Dominion Law Reports

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COMPRISING EVERY CASE REPORTED IN THE COURTS OF EVERY PROVINCE, AND ALSO ALL THE CASES DECIDED IN THE SUPREME COURT OF CANADA, EXCHEQUER COURT, THE RAILWAY COMMISSION, AND THE CANADIAN CASES APPEALED TO THE PRIVY COUNCIL

ANNOTATED

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VOL. 65

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REX v. NAT BELL LIQUORS LTD.

Imp.
P.C.

Judicial Committee of the Privy Council, Lord Buckmaster, Lord Atkinson, Lord Sumner, Lord Wrenbury, Lord Carson.
April 7, 1922.

CONSTITUTIONAL LAW (§IA—20)—SECTION 92 OF THE B.N.A. ACT—WORD "EXCLUSIVELY"—MEANING OF.

The word "exclusively" in sec. 92 of the B.N.A. Act means exclusively of any other legislature, and not exclusively of any other volition than that of the provincial legisature itself. The fact that the Alberta Liquor Act was passed in accordance with the wishes of the majority of the people on a vote taken for that purpose does not make it any the less a duty passed by the Legislature of Alberta and no other, or prevent it being a competent Act under this section.

STATUTES (§IIA—103)—ALBERTA LIQUOR ACT—REPEAL OF SECTION RELATING TO EXPORTATION—PASSING OF LIQUOR EXPORT ACT AT SAME TIME—CONSTRUCTION OF ACT AS REPEALED—VALIDITY OF ACT—INTERFERENCE WITH INTERPROVINCIAL AND FOREIGN TRADE—VALIDITY OF PROVISION AS TO FORFEITURE CLAUSE.

The repeal of sec. 27 of the Alberta Liquor Act of 1916, which left nothing in the Act itself which authorises a liquor exporting business to be carried on or the keeping of liquor for export to persons in other provinces or in foreign countries, must be read in conjunction with the Liquor Export Act, which became law on the same day and which under certain conditions legalised the export of liquor, and authorised liquor to be kept for the purpose of export trade, and the words "or by the Liquor Export Act," should be implied after the words "this Act," in sec. 23 of the Liquor Act, and the Liquor Act, so construed is not such an interference with interprovincial or foreign trade as to render the Act beyond the competence of the Provincial Legislature, and the Act being generally valid as to its character and object, its competence is not affected by the steps by which such competent legislation is to be enforced. The forfeiture provided in sec. 79 is covered by the word "penalty" in sec. 92 (15) of the B.N.A. Act, and is not *ultra vires* the Provincial Legislature.

[See Annotation on Interpretation of Statutes, 49 D.L.R. 50.]

CERTIORARI (§II—24)—ALBERTA LIQUOR ACT—CRIMINAL CODE OF CANADA—CONSTRUCTION—POWERS OF SUPERIOR COURT TO QUASH CONVICTION UNDER LIQUOR ACT.

Under secs. 62 and 63 of the Alberta Liquor Act, as amended by 1918 stats. ch. 4, sec. 55, and the Criminal Code of Canada, the depositions are not made part of the record, and are not available material on which the Superior Court on *certiorari* can enter on an examination of the proceedings below for the purpose of quashing a conviction, when once the jurisdiction of the magistrate has been established, and it is not competent to the Superior Court under the guise of examining whether such jurisdiction has been established, to consider whether or not some evidence was forthcoming before the magistrate of every fact which had to be sworn to in order to render a conviction a right exercise of his juris-

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Lord Sumner.

diction. What is meant by the word "reverse" in sec. 63 of the Liquor Act, is that the Court may if it thinks fit exercise the power of making some other conviction than that actually made below, and may direct the conviction which in its opinion the justices should have made.

[Review of authorities, *R.* v. *Borin* (1913), 15 D.L.R. 737; *R.* v. *Carter* (1916), 28 D.L.R. 606; *R.* v. *Emery* (1916), 33 D.L.R. 556; *R.* v. *Hoffman* (1917), 38 D.L.R. 289; *R.* v. *Covert* (1916), 34 D.L.R. 662, specially referred to; *R.* v. *Bolton* (1841), 1 Q.B. 66, 113 E.R. 1054; *Colonial Bank* v. *Willan* (1874), L.R. 5 P.C. 417, explained.]

STATUTES (§IIA—104)—SUPREME COURT ACT (R.S.C. 1906, CH. 139, SEC. 36, AS AMENDED BY 1920 STATS. CH. 32)—CONSTRUCTION—MEANING OF WORD "CRIMINAL."

The word "criminal" in sec. 36 of the Supreme Court Act, R.S.C. 1906, ch. 139, as amended by 1920 Can. stats. ch. 32, is not limited to the sense in which "criminal" legislation is exclusively reserved to the Dominion legislature by sec. 91 of the B.N.A. Act, but includes that power of enforcing other legislation by the imposition of penalties, including imprisonment, which sec. 92 authorises provincial legislatures to exercise. An appeal, therefore, does not lie to the Supreme Court of Canada from a judgment of the Supreme Court of Alberta (Appellate Division) in an action under the Alberta Liquor Act.

APPEAL by the Crown from the judgment of the Supreme Court of Alberta (Appellate Division) (1921), 56 D.L.R. 523, quashing an appeal under the Alberta Liquor Act, and appeal from the refusal of the Supreme Court of Canada 62 Can. S.C. R. 118, to entertain an appeal from the said judgment. Judgment of Supreme Court of Alberta reversed; judgment of Supreme Court of Canada affirmed.

The judgment of the Board was delivered by

LORD SUMNER:—On October 7, 1920, an information was laid at Edmonton, Alberta, against the respondents, Nat Bell Liquors, Limited, before a magistrate of that province, charging them with unlawfully keeping for sale a quantity of liquor contrary to the Liquor Act, that is to say for sale within the Province. The offence, which is created by the Alberta Liquor Act of 1916, ch. 4, sec. 23 is one triable by a Court of summary jurisdiction.

The respondents were convicted and were fined $200. The conviction, which is in the form provided by the Criminal Code (R.S.C. 1906 amended in 1920) ran, that Nat Bell Liquors, Limited, "is convicted . . . for that they, the said Nat Bell Liquors, Limited, on the 1st and 2nd days of October, 1920, at Edmonton, did unlawfully keep for sale a quantity of liquor." The quantity of liquor was the whole of the respondent's stock of whisky in the warehouse in question, though only one case of 12 bottles was actually sold. By a subsequent order, dated November 4, 1920, the magistrate declared the

whole of it, and the vessels in which it was contained, to be forfeited to the Crown. Nothing turns on the form of this order.

Thereupon, the now respondents moved, by way of *certiorari*, to quash both orders. In accordance with R. 4 of the Crown Practice Rules of the Supreme Court of Alberta, the magistrate returned the conviction and the order of forfeiture and with them the information and the evidence taken at the hearing in writing as required by statute. Hyndman, J. quashed the convictions, and on appeal his judgment was affirmed by the Supreme Court of Alberta (Harvey, C.J., dissenting (1921), 56 D.L.R. 523 at p. 543, 16 Alta. L.R. 149, 35 Can. Cr. Cas. 44).

The appellant then appealed to the Supreme Court of Canada (1921) 62 Can. S.C.R. 118, which dismissed the appeal formally, affirming without reasons given the Registrar's decision that any appeal was incompetent, the proceedings having been "on a criminal charge" within the meaning of the Supreme Court Act. Against this decision an appeal has been taken to their Lordships' Board, but it has become of minor importance, seeing that, by special leave subsequently granted by His Majesty in Council, an appeal has been lodged against the decision of the Supreme Court of Alberta, quashing the conviction and the order for forfeiture, and this is the principal matter now to be decided.

Both before Hyndman, J., and before the Supreme Court of Alberta the evidence was elaborately examined and weighed. The judgments both set out its general effect and frequently quote it *in extenso*, and it will be convenient, in order to explain what follows, to summarise them.

Nat Bell Liquors, Ltd. were incorporated by Dominion charter in 1917, and did a very large business in Edmonton as exporters of liquor. They held a licence from the Attorney-General of Alberta under the Liquor Export Act 1918, ch. 8, and its amendments and complied with the requirements of that Act. The officers of the company in control of the business were Nathan Bell and W. Sugarman. They had a warehouse, fully stocked, from which liquor was despatched for export in accordance with orders received, and their warehouseman, one Angel, was strictly commanded by his superiors to have nothing to do with any local sale or delivery, but to observe carefully all the provisions of the Liquor Act.

The police determined to test the business actually done by the respondents. They employed for this purpose, as a temporary detective-constable and *agent provocateur*, a man

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named Bolsing, who posed as a working carpenter and was provided by the police with a sum of marked money. He was a man who had been convicted some time before of stealing beer, and when cross-examined about it he unsuccessfully denied the conviction. He went to the respondent's warehouse, asked for and saw Angel, and after interviews on three successive days, succeeded in inducing him to sell him for $45, 12 bottles of whisky, which were given to him and taken away. Either Bell or Sugarman saw him on the premises before the final day, but he was not proved to have then known what he was about. When Bolsing paid the money to Angel, Bell and Sugarman were in another part of the room, though not within earshot, nor did they see the bottles given to him, but he swore that Angel then and there gave the money to them, saying "Here's $45 more." This they denied, as did a girl typist, who was also present. It was common ground that Angel did sell his employer's whisky and took the money, but the defendant's evidence was that he gave the money to a man named Morris Rosenberg, to keep for him. Bolsing also swore that he was allowed to select the case out of the entire stock, and to buy whichever whisky he liked. Hyndman, J., records the fact that it was not clear whether or not Angel was still in the respondent's employment at the time of the hearing. He was, at any rate, doing work for them at the warehouse after his misconduct had become known, and was not shewn to have ever been definitely discharged.

Of the numerous contentions raised by the respondents, those which logically come first, though not the most fully argued, relate to the validity of the provision as to forfeiture, and indeed of the whole Act, as it stood at the time of the conviction. It appears that the Liquor Act was passed in 1916 under the following circumstances. In the previous year, pursuant to sec. 6 of the Direct Legislation Act, ch. 3, 1913, 1st sess. an initiative petition was duly presented to the Legislative Assembly of Alberta, praying that a Bill, which was identical in all material respects with the Liquor Act, should be enacted. Thereupon, as the Act requires, the Bill was presented to the people of Alberta to be voted on, and, having been passed by a considerable majority, was passed by the Legislature without substantial alteration. The respondents contend that the Liquor Act is *ultra vires*, because, even if it related to matters named in sec. 92 of the B.N.A., 1867 regarding which a Provincial Legislature is "exclusively" empowered to make laws, still it was not "exclusively" made by the Legislature, but partly also by the people of Alberta. Indeed, the part played

in the matter by the Legislature was practically only formal. It was further argued that the Direct Legislation Act was itself *ultra vires* upon the ground that it altered the scheme of legislation laid down for Canada by the B.N.A. Act, a scheme which vests the provincial legislative power in a Legislature, consisting of His Majesty, as represented by the Lieutenant-Governor, and of two Houses, and introduced into it a further and dominant legislative power in the shape of a direct popular vote taken upon a Bill, which the statutory Legislature must pass, whether it really assents to it or not. On the first point it is clear that the word "exclusively" in sec. 92 of the B.N.A. Act means exclusively of any other Legislature, and not exclusively of any other volition than that of the Provincial Legislature itself. A law is made by the Provincial Legislature when it has been passed in accordance with the regular procedure of both Houses and has received the Royal Assent duly signified by the Lieutenant-Governor on behalf of His Majesty. Such was the case with the Act in question. It is impossible to say that it was not an Act of the Legislature and it is none the less a statute because it was the statutory duty of the Legislature to pass it. If the deference to the will of the people, which is involved in adopting without material alteration a measure, of which the people have approved, were held to prevent it from being a competent Act, it would seem to follow that the Legislature would only be truly competent to legislate either in defiance of the popular will or on subjects upon which the people are either wholly ignorant or wholly indifferent. If the distinction lies in the fact that the will of the people has been ascertained under an Act which enables a single project of law to be voted on in the form of a Bill, instead of under an Act which, by regulating general elections, enables numerous measures to be recommended simultaneously to the electors, it would appear that the Legislature is competent to vote as its members may be pledged to vote individually and in accordance with what is called an electoral "mandate," but is incompetent to vote in accordance with the people's wishes expressed in any other form. Unless the Direct Legislation Act can be shewn, as it has not been shewn on this occasion, to interfere in some way formally with the discharge of the functions of the Legislature and of its component parts, the Liquor Act, 1916, ch. 4, being in truth an Act duly passed by the Legislature of Alberta and no other, is one which must be enforced, unless its scope and provisions can themselves be shewn to be *ultra vires*. As for the Direct Legislation Act, its competency is not directly raised in the present appeal. What

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was done in this case was done under the Liquor Act, and if that Act is sustained there is no utility in going behind it to decide the validity of another Act, which merely conditioned the occasion on which the Liquor Act was duly passed.

The Liquor Act, as passed in 1916, contained clauses obviously designed to save it from offending against the provisions of the British North America Act. These clauses were numbered 27 and 72, and they provided as follows:—

"27. Nothing herein contained shall prevent any person from having liquor for export sale in his liquor warehouse provided such liquor warehouse and the business carried on therein complies with requirements in sub-section (1) hereof mentioned or from selling from such liquor warehouse to persons in other provinces or in foreign countries or to a vendor under this Act."

"72. While this Act is intended to prohibit and shall prohibit transactions in liquor which take place wholly within the Province of Alberta except as specially provided by this Act and restrict the consumption of liquor within the limits of the Province of Alberta, it shall not affect and is not intended to affect *bona fide* transactions in liquor between a person in the Province of Alberta and a person in another Province or in a foreign country, and the provisions of this Act shall be construed accordingly."

Since then the Liquor Act has been repeatedly amended. In 1917 among other amendments sec. 27 was repealed and sec. 72 in 1918. Accordingly the Act now reads, "No person shall within the Province of Alberta . . . keep for sale . . . any liquor except as authorised by this Act" (sec. 23), and there is nothing in this Act itself, which authorises a liquor exporting business to be carried on or the keeping of liquor for export to persons in other provinces or in foreign countries. The question now raised is whether the Act is now within the competence of the Provincial Legislature, containing as it does no disclaimer of any operation affecting such a business, but on the contrary expressly forbidding the keeping of liquor for sale in terms of such generality as would make the prohibition apply to such a business.

In their Lordships' opinion the real question is whether the Legislature has actually interfered with inter-provincial or with foreign trade. The presence or absence of an express disclaimer of any such interference may greatly assist where the language of the Provincial Legislature does not in itself determine the question and define its effect. If, however, it is otherwise clear that there is such an interference, or that there

is none, and the language actually used sufficiently decides that question, there is no such sovereign efficacy in such a clause as sec. 72 as to make its presence or absence in an enactment crucial. As to the other section repealed in 1918, it is of capital importance to note that on April 13, 1918, the day on which the amending statute, which effected this repeal, received the Royal Assent, that assent was also given to another statute of the Legislature of Alberta, the Liquor Export Act, 1918, ch. 8 which under conditions not at the moment material legalised the export of liquor, and authorised liquor to be kept in the province of Alberta for the purpose of such a trade. In their Lordships' opinion the Liquor Act as amended in 1918 must be taken to authorise by implication that which the Legislature, simultaneously and almost *uno flatu*, authorises in express terms by another statute directed to that very matter. It is an inconvenient mode of drafting, provocative of doubts and not without considerable peril to the Act in question, to use terms in the Liquor Act, which either import a recognition of another Act without any mention of it, or expressly annul while professing to ignore it. The dilemma is this. When the Legislature passed these two Acts, which became law on the same day, did it intend by a simple repeal expressed in the one to stultify all its work expressed in the other, which is what the literal reading of its language leads to, or did it intend to imply the words "or by the Liquor Export Act" after the words "this Act" in sec. 23 of the Liquor Act, and so effect a saving exception, which a literal construction of its language clearly negatives? On the principle *ut res magis valeat quam pereat*, their Lordships think that in this Act and in these circumstances the latter alternative is the one to be adopted, but they would be loth to apply this precedent in any other than an exactly similar case.

There are some other sections in the Liquor Act, certainly of a stringent character, which the respondents contended to be generally *ultra vires*. Some of these may be dismissed from consideration now as not imperilling the validity of the Act at large and not affecting the particular offence charged and the particular proceedings taken in this case. Such are sec. 78, which makes it an offence to publish any letter referring to any intoxicating liquor or giving the name of any person manufacturing intoxicating liquor; Section 79, which authorises a magistrate to arrest the occupant of any premises on which, under his search warrant, there has been found any liquor unlawfully kept; and sec. 80 under which the owner of any liquor may be summoned before a magistrate, whereupon, if

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it be found to be his liquor, he is to suffer forfeiture of it, unless he shews that he did not intend it to be sold or kept for sale in violation of the Act. Their Lordships do not think that if the Act is otherwise within the competence of the Legislature the inclusion of any of these provisions, remarkable as they are, makes it *ultra vires* as a whole. It is not an interference with sec. 121 of the B.N.A. Act, for the word "free," applied to admission into a province, does not further mean that when admitted the article in question can be used in any way its owner chooses, and although this Act, like many other Liquor Acts, has been made increasingly restrictive of individual freedom and enforced by legal measures of progressive severity, its competence depends on its general character and objects and not on the weight, with which the Legislature lays its hand on those who violate its statutes. These sections appear to be susceptible of being read and should be read as merely dealing with matters of a local nature in the Province and particularly with the steps, by which competent legislation is to be enforced there. One of these provisions, however, is separately challenged. It is that which affects the order forfeiting the respondents' stock of whisky. It is contended that the forfeiture provided in sec. 79 is *ultra vires*, because the powers of the Provincial Legislature are only those given in head 15 of sec. 92 of the B.N.A. Act, viz., "The Imposition of Punishment by Fine, Penalty or Imprisonment for enforcing any Law of the Province." It is true that this head does not name a forfeiture, but their Lordships think that it is covered by the word "penalty." The word is not defined in the Act. No doubt the commonest form of penalty is a money penalty, but as that is already dealt with in its most obvious form by the antecedent word "fine," their Lordships are not prepared to put so limited an interpretation on the word "penalty" as would rob the Provincial Legislature of the power, for example, of depriving an illegal vendor of poisons of his stock in trade and would leave it to him ready for further operations on his release from gaol.

The respondents then contended that, if they were within the Liquor Export Act by reason of the business which they carried on, and if they had complied with the provisions and formalities of that Act, they must *ipso facto* be outside the Liquor Act altogether, so that the presumption arising under that Act from the possession of liquor would not affect them and the lawfulness of their possession and of their purpose under the Liquor Export Act would, of itself, defeat any charge under the Liquor Act. The contention seems to their Lorhships

to be unfounded and not even easy to understand. Neither Act contains any provision excluding everything, which comes within the purview of the Liquor Export Act, from the operation of the Liquor Act. Presumably full effect must be given to the provisions of both. No doubt what the Liquor Export Act expressly legalises cannot be made an offence under the Liquor Act, for it cannot be supposed that, by similar and simultaneous enactments, the Legislature meant to contradict itself, but beyond this the matter cannot go. It is not necessary to examine the effect, which compliance with the Liquor Export Act would have on the presumption raised by the Liquor Act, or to ask whether it would conclusively rebut the presumption or only have the effect of shifting the burden of proof, for these are matters relating to the weighing of evidence and do not arise on *certiorari*.

Coming to the proceedings taken in this case, it is necessary at the outset to appreciate the general character and scheme of the Liquor Act and its relation to the Canadian Criminal Code. The expression "liquor," as used in the Liquor Act, includes "all fermented spirituous and malt liquors and all liquors which are intoxicating, and any liquor which contains more than 2½ per cent. of proof spirits shall be conclusively deemed to be intoxicating" (Section 2 (e)), and it is important to realise that every one, who is in possession of "liquor," is presumably a criminal, and is liable to be sent to gaol. (Section 54.)

Certain persons, such as chemists and clergymen in respect of liquor kept for dispensing and eucharistic purposes, and certain small quantities of liquor kept in a private house, are exempted from this criminality, and a distinction is made between possession for sale and possession in a private dwelling-house, but generally the provisions are as follows:—

"Section 23. (as amended by 1917, ch. 22, sec. 6.) No person shall within the Province of Alberta by himself, his clerk, servant or agent, expose or keep for sale or directly or indirectly, or upon any pretence or device, sell, barter or offer to any other person any liquor except as authorised by this Act."

"Section 24. No person within the Province of Alberta by himself, his clerk, servant or agent, shall have, keep or give liquor in any place wheresoever other than in the private dwelling-house in which he resides except as authorised by this Act."

"Section 24A. (See 1917, ch. 22, sec. 7.) No person within the Province of Alberta shall have or keep in his private

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dwelling-house a quantity of liquor exceeding one quart of spirituous liquor and two gallons of malt liquor."

"Section 54. If in the prosecution of any person charged with committing an offence against any of the provisions of this Act in the selling or keeping for sale or giving or having or purchasing or receiving of liquor, *prima facie* proof is given that such person had in his possession or charge or control any liquor in respect of or concerning which he is being prosecuted, such person shall be obliged to prove that he did not commit the offence with which he is so charged."

At the hearing of the summons the Attorney-General does not appear to have taken full advantage of the statutory presumption, contained in sec. 54, for, instead of simply proving that Nat Bell Liquors Ltd. had in their possession the liquors to which the charge referred, and leaving it to them to rebut the presumption of guilt thereon arising, he went into the case from the outset, as if the ordinary burden of proof rested on the prosecution. Probably this was the more convenient course under the circumstances of the case, but the result may be that, if the question whether there was evidence to convict can be raised at all, at the time at which it arose, was the conclusion of the case for the Crown, and that the statutory presumption should not be regarded as making good defects, if otherwise established, in a prosecution, in which the Crown had voluntarily undertaken the affirmative. At any rate, the effect of sec. 54 is made less of by the Judges than might perhaps have been expected, and, after the course which the case has taken, it would be unsatisfactory to dispose of the matter by simply saying that the Court did not accept the defendants' evidence on an issue upon which the burden of proof lay upon them. It will be convenient to state at the outset that none of the ordinary grounds for *certiorari*, such as informality disclosed on the fact of the proceedings, or want of qualification in the justices who acted, are to be found in the present case. The charge was one which was triable in the Court which dealt with it, and the magistrate who heard it was qualified to do so. There is no suggestion that he was biased or interested, or that any fraud was practised upon him. His conduct during the proceedings is unimpeached, and nothing occurred to oust his initial jurisdiction after the commencement of the inquiry. No conditions precedent to the exercise of his jurisdiction were unfulfilled, and the conviction, as it stood, was on its face correct, sufficient and complete.

In the superior Courts the proceedings in the Court below were kept throughout in the forefront of the case, sometimes in

the form of asking what evidence the Court was entitled to consider, sometimes in the form of considering its sufficiency and effect. The real question, though it might present itself as one of evidence, was one of the jurisdiction of the superior Court on *certiorari*. Hyndman, J., cited from *R.* v. *Covert* (1916), 34 D.L.R. 662, 28 Can. Cr. Cas. 25, 10 Alta. L.R. 349, a series of rules which, rightly or wrongly, purport to lay down the conditions, under which alone a Judge of fact can refuse to accept, that is to say, to believe evidence given before him, and, after elaborately examining the evidence, concludes by saying: "Looking at the whole case I am of opinion that the evidence of the defence meets, as squarely and satisfactorily as can reasonably be expected, the presumption raised against the defendants by the evidence for the Crown, and that it fulfills the requirements set forth in the judgment in *Rex* v. *Covert, supra,* and that consequently the Magistrate should have accepted such denials and explanations."

On appeal Stuart, J. (56 D.L.R. 523), while declining to discuss *Rex* v. *Covert,* says at pp. 556-558:—

"After reading the reasons the justice gave for convicting" (which were neither part of the formal conviction nor part of the depositions), "I cannot discover that he kept in mind, as he should have kept in mind, his duty to receive a spy's evidence with caution, or that he even remembered the untruths in the spy's evidence to which I have referred. . . . It was so easy for Bolsing to add the one circumstance to his story" (that was his statement about "$45 more") "which was necessary to make his work as a detective successful, that this quite evident failure on the part of the magistrate would be almost, if not quite, sufficient of itself in my opinion to justify the quashing of the conviction. . . . If the use of the word 'more' by Bolsing is adverted to, I must reply that that is too slight a cord upon which to hang anything, and in addition to the interest of the witness using the expression, and the obvious advantage of adding it, even the word itself is open to other interpretations. If I had been engaged with a jury on the trial of this case, I should undoubtedly have withdrawn it from their consideration on this latter ground at least."

Thereafter Beck, J., at pp. 565, 566, after laying down as a principle that the Court "has the right and the duty, in the exercise of its inherent plenary jurisdiction in supervising the proceedings of inferior tribunals, to examine the entire proceedings certified to it, and to deal finally with the case according to right and justice," proceeds to examine the statements

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of the witnesses, dwells on the fact that Bolsing was an accessory and was uncorroborated, and says at pp. 569, 570:—

"Had the charge been one not of keeping for sale but even for the lesser offence of selling, it seems clear to me that, had the case been before a Judge and a jury, the Judge ought to have withdrawn the case from the jury, or at the very least to have pointed out to the jury the danger of convicting upon such evidence, in view of the presumption of innocence, and the necessity for excluding all reasonable doubt; and in the event of a verdict of guilty to have given leave to appeal on the weight of evidence . . . in which event the verdict would have been undoubtedly set aside."

It appears to their Lordships that, whether consciously or not, these Judges were in fact rehearing the whole case by way of appeal on the evidence contained in the depositions, a thing which neither under the Liquor Act nor under the general law of *certiorari* was it competent to them to do. As, however, the majority in the Supreme Court proceeded on a view of *certiorari*, which purported to justify this mode of dealing with the evidence, their Lordships will consider the case in that light without disposing of it as a case of entertaining an appeal, where no appeal lay.

The reasons, expressed or implied, which in the view of the Judges warranted the Court in quashing this conviction appear to have been the following:—

(i) Without Bolsing there was no evidence of the commission of the offence by the accused company, and his evidence was no evidence, since he was an accessory before the fact and was uncorroborated;

(ii) It was not evidence on which a jury could safely convict, and ought therefore to be treated as no evidence at all;

(iii) Want of evidence or of sufficient evidence makes the conviction one pronounced without jurisdiction;

(iv) Such want of jurisdiction can be established by evidence *dehors* what is set out on or forms part of the record of the conviction;

(v) In any case, by the statute law of Alberta the depositions are part of the record, or can be examined on *certiorari* as if they were part of the record; and finally,

(vi) In Alberta, at any rate in connection with cases arising under the Liquor Act, the superior Court can do more than could be done on *certiorari* by the High Court of Justice in England, and can, as a matter of law, review the whole proceedings to see that justice has been done.

Their Lordships think that of these contentions the first and second may be shortly disposed of. They have not been referred to any decisive authority, which applies to *certiorari* the same considerations as apply to testing a jury's verdict, when challenged on a motion for a new trial or an an appeal; nor, apart from a few expressions, here and there, not very carefully considered, can any judicial dicta be found to support it. Whether the verdict was one which twelve reasonable men could have found, whether the evidence was such that twelve reasonable men could find on it otherwise than one way, whether the evidence was such that a jury could safely convict upon it, and whether it was such that a Court of Criminal Appeal should refuse to interfere with the conviction, are questions which, though fully argued, have no relations to the functions of a superior Court on *certiorari*. They all imply that there was evidence, but not much; they all ask whether that little evidence was enough; they are all applied to a body of men, who are not the absolute Judges of fact but only Judges, whose decision may, though rarely, be disturbed. On *certiorari*, as far as the presence or absence of evidence becomes material, the question can, at most, be whether any evidence at all was given on the essential point referred to. Its weight is entirely for the inferior Court:—

"If indeed there had been *any evidence* whatever, however slight, to establish this point," says Lord Kenyon in *Smith's* case (1800), 8 Term. Rep. 589, "and the magistrate, who convicted the defendant, had drawn his conclusion from that evidence, we would not have examined the propriety of his conclusion, for the magistrate is the sole judge of the weight of the evidence. And for this reason I think there is no foundation for the first objection . . . There was some evidence, from which he might draw the conclusion. . . ."

The majority in the Supreme Court of Alberta appear to have accepted this principle, but to have thought that it might be met by inquiring, whether the justices had misdirected themselves as to the law of evidence, under which term they sought to include a failure to give sufficient or any weight to features in the evidence, which appeared to them to be of preponderating importance. It may well be that error as to the law of evidence, like any other error of law, if it is apparent on the record, is ground for quashing the order made below, but none of the objections taken here shew that the magistrate acted under any misapprehension of the law. Their Lordships, beyond pointing out the fact, will not stay to consider that the charge was a charge of keeping the liquor for an unlawful purpose, to which

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Bolsing was not an accessory, and not one of selling it, to which he was. Assuming that Bolsing was an accessory, still he was a competent witness. If he impressed the justice as a witness of truth, no error in law was committed in believing him even without corroboration, but only an error of judgment. Corroboration, however, there was in fact on the point about the money so much adverted to, for, as Hyndman, J., points out (though he fails to see the significance of it), Angel, who on the case for the defence had disobeyed his orders in the most serious way and had disposed of his masters' whisky for his own profit, was still at the time of the hearing acting as their employee, a circumstance tending to shew that what he had done was not really a piece of flagrant disobedience and roguery but a thing within the scope of his duties, though unfortunately unsuccessful. The weight of this was for the magistrate, and was, if he so chose to regard it, some corroboration of Bolsing's tale.

Passing from considerations of the weight of the evidence, we come to the questions whether there was any evidence, and what materials are to be looked at, in order to answer that question, and further what effect a decision, that on some essential point evidence was completely lacking, would have on the jurisdiction respectively of the magistrates and the superior Court. In the different provinces of Canada there has, from time to time, been much diversity of view as to the powers and duties of the superior Court on *certiorari*. Though the principles laid down in *Reg.* v. *Bolton* (1841), 1 Q.B. 66, 113 E.R. 1054, 5 Jur. 1154, and the *Colonial Bank of Australasia* v. *Willan* (1874), L.R. 5 P.C. 417, 43 L.J. (P.C.) 39, 22 W.R. 516, have been accepted in Ontario, the attempt to distinguish them, as Stuart, J., and Beck, J., distinguished them in the present case, was made at any rate as long ago as 1883 *Reg.* v. *Wallace* (1883), 4 O.R. 127 per Cameron, J., dissentient. The Courts of Ontario have considered themselves free and even bound, under the legislation applicable, to examine the evidence returned by the inferior Court and to inquire whether the justices had before them any evidence of an offence, such as was within their jurisdiction, though they have uniformly purported to recognise that the weight and credibility of it, when given, were entirely for the justices. There has been considerable diversity in the language used. Sometimes the question has been whether there was "any sufficient evidence of the offence" (*R.* v. *Wallace*); sometimes whether there was "any evidence of an offence" (*R.* v. *Coulson* (1893), No. 1, 24 O.R. 246 and *Reg.* v. *Coulson* (1896), No. 2, 27 O.R. 59); sometimes whether there was "reasonable" evidence to support the conviction (*R.* v. *Borin* (1913), 15 D.L.R. 737, 29 O.L.R. 584); but the general view has been that, if there

is some evidence, there is jurisdiction to hear and determine, and thereafter the superior Court will not interfere (*R.* v. *Reinhardt* (1917), 27 Can. Cr. Cas. 445; *R.* v. *Cantin* (1917), 39 O.L.R. 20, 28 Can. Cr. Cas. 341; *R.* v. *Thompson* (1917), 28 Can. Cr. Cas. 271, 39 O.L.R. 108). The Courts of New Brunswick and Nova Scotia have decided that want of evidence is not a ground for quashing a conviction, and in *Hawes* v. *Hart* (1885), 18 N.S.R. 42, and *Reg.* v. *Walsh* (1897), 29 N.S.R. 521, the authorities are collected.

In Manitoba, Saskatchewan and Alberta a different view has asserted itself, though not without much difference of opinion. In *R.* v. *Pudwell* (1916), 26 Can. Cr. Cas. 47, Hyndman, J., adopted the regular view of *Willan's* case, and refused to quash a conviction, where the charge was within the jurisdiction and the proceedings were regular on the face of them. Later on in 1916, in the case of *R.* v. *Carter*, 28 D.L.R. 606, 26 Can. Cr. Cas. 51, 9 Alta. L.R. 481, Harvey, C.J., laid it down, after a full and careful examination of the authorities, that, if a conviction is valid on its face, absence of evidence to support a conviction is not a ground for quashing it, but in the main two decisions, *R.* v. *Emery* (1916), 33 D.L.R. 556, 27 Can. Cr. Cas. 116, 10 Alta. L.R. 139, in Alberta, and *R.* v. *Hoffman* (1917), 38 D.L.R. 289, 28 Can. Cr. Cas. 355, 28 Man. L.R. 7, in Manitoba, have caused the view to prevail in those provinces and in Saskatchewan, which was applied in the present appeal, and has also been followed in Quebec (*Lacasse* v. *Fortier* (1917), 30 Can. Cr. Cas. 87). The practical effect of those decisions is that, not only is the superior Court not precluded from examining the evidence given in the Court below or confined to ascertaining, as a point going to the jurisdiction of the magistrate, whether he had before him some evidence supporting his conviction, but it is free to range over the whole evidence and to subject it to criticism. This conclusion is arrived at by holding that legislation, which requires that depositions shall be taken in writing, and a rule, which requires them to be transmitted with the conviction on making a return to an order for *certiorari*, in effect make them part of the record for all purposes. This of course is a question of particular statutory practice and not of the general law. The decisions, however, go on to hold that, although in general the credibility and weight of the evidence is for the magistrate, the superior Court can, as a matter of law, consider whether he guided himself by a right view of the credibility of particular evidence, and it is plain that a practice to review the whole of the depositions, however the purpose of it is expressed, leads very easily to the conclusion that a conviction may be quashed, not so

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much because no witness has sworn to the particular facts required to make out a case for the prosecution, as because, on balancing it against the evidence given for the defendant, the great preponderance is thought to be on his side. This practice of examining the evidence, though of many years' standing before the present case, has been stated in the Manitoba and Alberta decisions as having objects which vary considerably. The Court would not quash, it has been said, if there was evidence to go to a jury (*R.* v. *Grannis* (1888), 5 Man. L.R. 153). There must be evidence, which the Court can see may reasonably support the conviction. Whatever the Court of Queen's Bench, upon an inspection of the proceedings, would deem sufficient to be left to the jury on a trial is, when set out on the face of a conviction, adequate to sustain it (*R.* v. *Davidson* (1892), 8 Man. L.R. 325). The Court can only quash, if there is a complete absence of any evidence whatever of the commision of the offence (*R.* v. *Herrell* (1898), 12 Man. L.R. 198). The Court examines the evidence to ascertain, not whether the tribunal reached the proper conclusion on the evidence, but whether there was any evidence upon which the tribunal could properly find as it did (*R.* v. *Emery*, 33 D.L.R. 556). In the present case Stuart, J., at p. 556, says of the position occupied by the magistrate:—

"He was not merely standing in the place of a jury. He was also a Judge, with the duty of applying in his own mind sound legal principles in the consideration and the weighing of the evidence. . . .

It is not acting at all on appeal on the facts to say that the magistrate misdirected himself in his duty as a judicial officer in failing to take into account the true character of the evidence of the prosecution on a crucial point. Particularly is this so when the magistrate knew that his decison against the accused was without appeal and would have tremendous consequences with respect to property, while a decision the other way would be subject to review at the instance of the prosecution by two appeals. . . . What I have said has no relation whatever to the questions discussed in *Rex* v. *Covert*, 34 D.L.R. 662, 28 Can. Cr. Cas. 25, 10 Alta. L.R. 349."

Beck, J., at pp. 559-561, states the matter with equal breadth, though in a somewhat different way:—

"This appellate division held in *Rex* v. *Emery*, 33 D.L.R. 556, 27 Can. Cr. Cas. 116, 10 Alta. L.R. 139, that the Court is entitled upon *certiorari*—at least in cases where *certiorari* is not taken away—to look at the evidence given before the convicting magistrate, to ascertain whether or not it is sufficient to sustain the conviction, and if it is not, to quash the conviction. . . This

view seems now to be that adopted in all the Provinces of Canada. . . I take occasion to endeavour to make clearer why the latter-day English decisions are of no authority upon this question, which, as I have said, seem at the present day to have become settled throughout Canada beyond reversal. . . .

The right and duty, therefore, of this Court to consider the evidence upon which a conviction is made, and if it is found to be sufficient, to quash the conviction, is then at least equal to the right and duty of the Court to set aside a verdict in a criminal case upon a case reserved, if it appears that the evidence is insufficient to support the conviction. The cases, therefore, in which upon a reserved case the Court has set aside a conviction for insufficiency of evidence, are therefore authorities applicable to cases arising on *certiorari* . . . But, as I shall endeavour to shew, the power of the Court to set aside a conviction on *certiorari* is much greater than its power upon a reserved case."

R. v. *Emery* was a case to which both Stuart, J., and Beck, J., had been parties, and, in a measure, the present case may be said to be an appeal against it. In argument, however, it has been pointed out that *R.* v. *Emery* was a case of summary trial of an indictable offence, whereas the present is a case of the determination by a Court of summary jurisdiction of an offence cognisable only by such a Court. In what their Lordships have to say of *R.* v. *Emery* they wish to keep open this distinction, if it be one, for consideration, if a case of an indictable offence should hereafter come before them, but, in so far as both cases are on all fours, *Emery's* case must be examined.

The proposition adopted may be stated thus: in exercising its inherent jurisdiction to supervise the proceedings of an inferior Court, the superior Court must inquire whether there was any evidence on which the tribunal below could have decided as it did decide, and this involves examining the evidence given to see if it was sufficient in this sense to sustain the conviction. If, on some part of the case, which was material to the charge and had to be legitimately established before the accused person could be convicted, no evidence was forthcoming at all, this would be error of law, which being duly brought to the notice of the superior Court would oblige it to quash the conviction. For this reliance is placed on the cases of *Smith*, 8 Term. Rep. 589; *R.* v. *Crisp* (1806), 7 East. 389, 103 E.R. 151; and *R.* v. *Chandler* (1811), 14 East 267, 104 E.R. 603; *Ex parte Vaughan* (1866), L.R. 2 Q.B. 114, 36 L.J. (M.C.) 17, 15 W.R. 198, and *Lovesy* v. *Stallard* (1874), 30 L.T. 792.

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It is evident that this exact point must be one of rare occurrence. It assumes complete jurisdiction, complete absence of any testimony on a definite and essential point, and complete presentation to the superior Court of this omission in the Court below. Only if the whole evidence given can be got before the superior Court can this difficulty be raised. Only when it appears that no witness whatever has said a thing that must be said by someone will it fall to be discussed. It will have two aspects: the first, whether the omission from the record of any statement that the necessary piece of evidence was given raises the presumption, that it must nevertheless have been given or the justices would not have convicted, or the presumption that, as it was not stated, it cannot have been given at all, or whether, at any rate, it shews that the record is in need of further and fuller statement; and the second, whether pronouncing a conviction, notwithstanding such an absence of necessary proof, is an error of law or a mistake in fact. More generally speaking, it becomes necessary to ask, what is the "record" and when can the superior Court go outside it, and, if want of evidence can be established, does that establish want of jurisdiction in the magistrate?

When justices were required to set out the evidence on the record of the conviction, as nearly as might be in the terms in which it was given, detection of a hiatus on the record would justify a mandamus to them, to complete the record by setting out the evidence on the point. In taking this course in *R.* v. *Warnford* (1825), 5 D. & R. 489, Abbott, C.J., says at p. 490:—

"The conviction must set out the language used by the witness, in order that it may be seen whether a right conclusion is drawn from it. The Court will not assume that the justice has done his duty, unless he tells us so by his own acts." On the other hand, if legislation has provided for a shorthand note of the whole of the evidence and for its attachment to the conviction as a part of it, when returned on *certiorari*, the record itself shews, when it reaches the superior Court, whether or no the evidence in question was given. It seems to have been by no means settled on authority that, even when the evidence eventually reaches the Court in a complete form, the Court should criticise the absence of the material evidence as error in law, and as ground for quashing the conviction. In *Ex p. Vaughan*, Shee, J., alone of the Judges who expressed opinions, dealt with the case of there being no evidence at all on which justices could adjudicate, but all he says is that then "they would be acting improperly." Lord Coleridge in *Lovesy* v. *Stallard*, says generally that "the existence of evidence is for the Court." On the other

hand, in *R.* v. *Justices of Galway*, [1906] 2 I.R. 446, Palles, C.B., points out that a conviction which sets out no evidence cannot be questioned as to the evidence given before the justices on material *dehors* the conviction. In *Reg.* v. *Justices of Cheshire* (1838), 8 Ad. & E. 398, 112 E.R. 889, it actually appeared on the affidavits filed on the question of the justices' jurisdiction, that, in making their order, they had acted on a view of the facts not testified to at all, but merely stated to them by one of their own body as being within his knowledge. The Court of Queen's Bench nevertheless, having decided that there was jurisdiction, declined to interfere. Though one member of the Court said that the justices had decided "absurdly," they refused to criticise the decision further. This," said Lord Denman, "we cannot look into."

It has been said that the matter may be regarded as a question of jurisdiction, and that a justice who convicts without evidence is acting without jurisdiction to do so. Accordingly, want of essential evidence, if ascertained somehow, is on the same footing as want of qualification in the magistrate, and goes to the question of his right to enter on the case at all. Want of evidence on which to convict is the same as want of jurisdiction to take evidence at all. This, clearly, is erroneous. A justice who convicts without evidence is doing something that he ought not to do, but he is doing it as a Judge, and if his jurisdiction to entertain the charge is not open to impeachment, his subsequent error, however grave, is a wrong exercise of a jurisdiction which he has, and not a usurpation of a jurisdiction which he has not. How a magistrate, who has acted within his jurisdiction up to the point at which the missing evidence should have been, but was not, given, can, thereafter, be said by a kind of relation back to have had no jurisdiction over the charge at all, it is hard to see. It cannot be said that his conviction is void, and may be disregarded as a nullity, or that the whole proceeding was *coram non judice*. To say that there is no jurisdiction to convict without evidence is the same thing as saying that there is jurisdiction if the decision is right, and none if it is wrong; or that jurisdiction at the outset of a case continues so long as the decision stands, but that, if it is set aside, the real conclusion is that there never was any jurisdiction at all. This appears from the very full and able discussion of all the authorities in *The King* (*Martin*) v. *Mahony*, [1910] 2 I.R. 695. On this point *Ex p. Hopwood* (1850), 15 Q.B. 121, 117 E.R. 404, 19 L.J. (M.C.) 197, may also be referred to. In that case *certiorari* having been taken away by statute, the Court could only interfere, if the justices had convicted

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without having any jurisdiction at all. It was alleged on affidavit that, on the particular summons in question, they had had no evidence before them, even of the service of the summons. The Court held that, even so, the fact did not take away jurisdiction. "As to the want of evidence on matter of fact," says Patteson, J., "that cannot possibly take away jurisdiction; no case can be cited where that has ever been said." To the same effect is *Re the Justices of Shropshire* (1866), 14 L.T. 598. Furthermore a conviction, regular on its face, is conclusive of all the facts stated in it, not excepting those necessary to give the justices jurisdiction, and it is from the facts stated in the conviction that the facts of the case are to be collected. Thus, in the well-known case of *Brittain* v. *Kinnaird* (1819), 1 Brod. & B. 432, the plaintiff had been convicted under the Bumboat Act, and the conviction stated his offence in terms of the Act simply, "for that he had unlawfully in his possession in a certain boat certain stores," very much as the conviction runs in this case. He said that his vessel was of 13 tons burthen and was not a boat, and sued the justice; but it was held that the conviction was conclusive evidence that a boat it was, and no distinction is drawn, which would limit the conclusive character of the conviction as an answer to civil proceedings in trespass taken against the magistrate.

In *Reg.* v. *Bolton* (1 Q.B., at pp. 72-74) Lord Denman, in a well-known passage says:—

"The case to be supposed is one . . . in which the Legislature has trusted the original, it may be (as here) the final, jurisdiction on the merits to the magistrates below; in which this Court has no jurisdiction as to the merits either originally or on appeal. All that we can then do . . . is to see that the case was one within their jurisdiction and that their proceedings on the face of them are regular and according to law. . . Where the charge laid before the magistrate, as stated in the information, does not amount in law to the offence, over which the statute gives him jurisdiction, . . . or, if the charge being really insufficient, he had misstated it in drawing up the proceedings, so that they would appear to be regular, it would be clearly competent to the defendant to shew to us by affidavits, what the real charge was and, that appearing to have been insufficient, we should quash the conviction. . . But as . . . we cannot get at the want of jurisdiction but by affidavits, of necessity we must receive them. It will be observed, however, that here we receive them, not to shew that the magistrate has come to a wrong conclusion, but that he never ought to have begun the inquiry. . . .

But where a charge has been well laid before a magistrate, on its face bringing itself within his jurisdiction, he is bound to commence the inquiry; in so doing he undoubtedly acts within his jurisdiction; but in the course of the inquiry evidence being offered for and against the charge, the proper or it may be the irresistible conclusion to be drawn may be that the offence has not been committed and so that the case in one sense was not within the jurisdiction. Now to receive affidavits for the purpose of shewing this, is clearly in effect to shew that the magistrate's decision was wrong, if he affirms the charge, and not to show that he acted without jurisdiction. . . . The question of jurisdiction does not depend on the truth or falsehood of the charge, but upon its nature; it is determinable on the commencement, not at the conclusion of the inquiry, and affidavits, to be receivable, must be directed to what appears at the former stage and not to the facts disclosed in the progress of the inquiry."

The law laid down in *Reg.* v. *Bolton* has never since been seriously disputed in England. In *Colonial Bank of Australasia* v. *Willan* the Judical Committee settled that the same rules are applicable to the Dominions, except in so far as they may be affected by competent legislation. The respondents must, therefore, distinguish these authorities, since, where they apply, it is not now possible to argue that they were not rightly decided, or else they must show special legislation applicable in Alberta. Willan's case is said to be distinguishable on two grounds, firstly, that it was not, nor was *Bolton's* case a criminal case; and, secondly, because Sir James Colvile's language shows the decision to have turned on the Committee's being satisfied from the evidence before it, that the material allegations had been proved by evidence given in the Court below. If so, both cases were merely decisions on the admissibility upon *certiorari* of fresh affidavit evidence to impugn or to confirm the regularity of the proceedings below, as returned to the superior Court.

There is no reason to suppose that, if there were any difference in the rules as to the examination of the evidence below on *certiorari* before a superior Court, it would be a difference in favour of examining it in criminal matters, when it would not be examined in civil matters, but, truly speaking, the whole theory of *certiorari* shows that no such difference exists. The object is to examine the proceedings in the inferior Court to see whether its order has been made within its jurisdiction. If that is the whole object, there can be no difference for this purpose between civil orders and criminal convictions, except in so far as differences in the form of the record of the inferior Court's determina-

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tion or in the statute law relating to the matter may give an opportunity for detecting error on the record in one case, which in another would not have been apparent to the superior Court, and, therefore would not have been available as a reason for quashing the proceedings. In this connection, reliance was placed on a passage in the opinion of Lord Cairns in the *Walsall* case (1878), 4 App. Cas. 30, 48 L.J. (M.C.) 65, 27 W.R. 189, The question for decision there was simply whether or not the Court of Appeal had jurisdiction to entertain an appeal from an order of the Court of Queen's Bench, discharging a rule *nisi* for a *certiorari* to quash an order of Quarter Sessions in a rating matter. Lord Cairns, speaking of certiorari generally, says at p. 39: "If there was, upon the face of the order of the Court of Quarter Sessions, anything which shewed that that order was erroneous, the Court of Queen's Bench might be asked to have the order brought into it and to look at the order and view it upon the face of it, and, if the Court found error upon the face of it, to put an end to its existence by quashing it;" and then, turning to the kind of order under discussion, and after stating how much in that matter, both of fact and of law, the Sessions were bound to set out on the face of their order, he says that the statements, which had led to its decision, making it not an unspeaking or unintelligible order, but a speaking one, . . . that order on *certiorari* could be criticised as one which told its own story, and for error could accordingly be quashed.

It is to be observed on this passage, that the key of the question is the amount of material stated or to be stated on the record returned and brought into the superior Court. If justices state more than they are bound to state, it may, so to speak, be used against them, and out of their own mouths they may be condemned, but there is no suggestion that, apart from questions of jurisdiction, a party may state further matters to the Court, either by new affidavits or by producing anything that is not on or part of the record. So strictly has this been acted on, that documents returned by the inferior Court along with its record, for example, the information, have been excluded by the superior Court from its consideration. That the superior Court should be bound by the record is inherent in the nature of the case. Its jurisdiction is to see that the inferior Court has not exceeded its own, and for that very reason it is bound not to interfere in what has been done within that jurisdiction, for in so doing it would itself, in turn, transgress the limits within which its own jurisdiction of supervision, not of review, is confined. That supervision goes to two points: one is the area of the inferior jurisdiction and the qualifica-

tions and conditions of its exercise; the other is the observance of the law in the course of its exercise.

The view taken in the Supreme Court of Alberta of the real grounds for the decision in the *Colonial Bank of Australasia* v. *Willan* proceeds on a complete misapprehension. At p. 446 of L.R. 5 P.C., Sir James Colvile says of the order, which had been wrongly quashed:—

"The order was one made by a competent Judge; shewing on the face of it that every requirement of the statute under which it was made had been complied with, . . . and containing an express adjudication upon a fact which, though essential to the order, the Judge was both competent and bound to decide, viz., that the sum claimed to be due to the petitioning creditors was then due to them from the mining company. Nor can it be said that there was no evidence to support this finding, since the affidavit filed in support of the petition distinctly swears to the debt.

"This being so, it seems to follow that the Supreme Court could only arrive at the opposite conclusion upon a retrial of the question of the petitioning creditors' debt, and that upon evidence which was not before the inferior Court."

Commenting on this passage Beck, J., in *R.* v. *Emery*, expresses the opinion that what the Judicial Committee condemned and all that it condemned was a retrial of the existence of the debt by the superior Court on fresh evidence, which had not been adduced below; and in *R.* v. *Hoffman* 38 D.L.R. 289, which adopted the reasoning and conclusions of *R.* v. *Emery* in the following year, it is said that all that was decided in *Willan's* case was the question of the admissibility of fresh evidence by affidavit in the superior Court, which had not been before the justices in the Court below. All this seems to have hung on Sir James Colvile's commencement of a new paragraph and a new step in the reasoning with the words "this being so." This was taken not as comprehending all that had preceded but as relating solely to the sentence (on p. 446) beginning "Nor can it be said that there was no evidence . . ." The report shews that no such point was taken by Mr. Benjamin for the respondents. His argument was that the proceedings were heard *ex parte*, for the company did not appear on the winding-up petition; but that the winding-up Judge had assumed the preliminary question, viz., whether or not there was a creditor before the Court, to have been conceded in consequence of the absence of controversy; that in the result he had established his jurisdiction by proceeding upon an assumed fact; and that the reality of that assumption having been

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inquired into in the superior Court on affidavit as to the fact, since questions going to the jurisdiction of the Court below must in case of need be inquired into, and it having been found that in fact no petitioning creditor existed, the order was rightly quashed (pp. 443 and 444). The passage above relied on is the answer to this argument, which is briefly dismissed at the end of the main conclusion by recalling that the Judge had uncontradicted affidavit evidence of the existence of the debt before him, and found and recited the existence of the debt, and in doing so was examining into the reality of an alleged fact, which it was within his competence to decide, although, had the alleged fact been found to be untrue, he would have been bound to dismiss the petition to wind up the company.

This misapprehension of the meaning of the Judicial Committee's opinion is probably due to the not infrequent confusion between facts essential to the existence of jurisdiction in the inferior Court, which it is within the competence of that Court to inquire into and to determine, and facts essential thereto, which are only within the competence of the superior Court. As Lord Esher points out in *The Queen* v. *Commissioners of Income Tax* (1888), 21 Q.B.D. 313 at p. 319, if a statute says that a tribunal shall have jurisdiction if certain facts exist, the tribunal has jurisdiction to inquire into the existence of these facts as well as into the questions to be heard, but while its decision is final, if jurisdiction is established, the decision that its jurisdiction is established is open to examination on *certiorari* by a superior Court. On the other hand, the fact on which the presence or absence of jurisdiction turns may itself be one which can only be determined as part of the general inquiry into the charge which is being heard. The following is a real instance of this. In an *Anonymous* case reported in (1830), 1.B. and Ad. 382, 109 E.R. 829, justices who had jurisdiction to hear a charge of common assault were precluded by statute from exercising it, if the evidence disclosed that the assault was accompanied by an attempt at felony. Although such an attempt was deposed to in the course of the evidence supporting the charge of assault, a rule to quash a conviction for a common assault was discharged upon the ground, that it was for the justices to decide whether they believed the part of the evidence which disclosed the attempt, and if they did not their jurisdiction to convict was not ousted by the statute. In the language of Coleridge, J., delivering the judgment of the Court in *Bunbury* v. *Fuller* (1853), 9 Exch. 111, 23 L.J. (Ex.) 29, the rule is thus stated at p. 140: "No Court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case,

upon which the limit to its jurisdiction depends; and, however its decision may be final on all particulars making up together that subject-matter, which, if true, is within its jurisdiction, and however necessary in many cases it may be for it to make a preliminary inquiry, whether some collateral matter be or be not within the limits, yet, upon this preliminary question its decision must always be open to inquiry in the superior Court."

In addition, however, to this mistaken attempt to place the decisions in *Bolton's and Willan's* cases on a too limited ground the majority of the Supreme Court of Alberta acted on a view of the English legislation of 1848, which without foundation is deemed to differentiate the law of *certiorari* in England and in Canada.

The Judges appear to have thought that the application of these cases depends on the effect in England of the Summary Jurisdiction Act of 1848, ch. 43; that the law applicable in Canada is the law, as it was in England before 1848, and not the law as it has stood ever since, and that under the earlier law the superior Court on *certiorari* was entitled to examine generally into the evidence on which the conviction was pronounced on the pretext of inquiring whether the conviction was within the jurisdiction of the justices. Their Lordships think that there has been a mistake on both points.

The *Queen* v. *Bolton*, undoubtedly, is a landmark in the history of *certiorari*, for it summarises in an impeccable form the principles of its application under the *régime* created by what are called Jervis's Acts (1848) chs. 42, 43, but it did not change, nor did those Acts change the general law. When the Summary Jurisdiction Act provided, as the sufficient record of all summary convictions, a common form, which did not include any statement of the evidence for the conviction, it did not stint the jurisdiction of the Queen's Bench or alter the actual law of *certiorari*. What it did was to disarm its exercise. The effect was not to make that which had been error, error no longer, but to remove nearly all opportunity for its detection. The face of the record "spoke" no longer: it was the inscrutable face of a Sphinx. Efforts have indeed been made to avoid this result by purporting to question the jurisdiction of the Court below, while really inquiring into its exercise, thus bringing before the superior Court, otherwise than on the record itself, matters which ought to be before it on the record or not at all, but these efforts have been made under some confusion of thought.

Long before Jervis's Acts statutes had been passed, which created an inferior Court, and declared its decisions to be "final" and "without appeal," and again and again the Court

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of King's Bench had held that language of this kind did not restrict or take away the right of the Court to bring the proceedings before itself by *certiorari*. There is no need to regard this as a conflict between the Court and Parliament; on the contrary, the latter, by continuing to use the same language in subsequent enactments, accepted this interpretation, which is now clearly established and is applicable to Canadian legislation, both Dominion and provincial, when regulating the rights of *certiorari* and of appeal in similar terms. The Summary Jurisdiction Act, 1848, was intended to produce and did produce its result by a simple change in procedure; not in the procedure of the Court of Queen's Bench or in the practice of *certiorari*, but in that of Courts of Summary Jurisdiction, and in this way effective means were found for putting a limit upon harassing and dilatory applications without unduly ousting the supervisory jurisdiction of the superior Court.

The matter has often been discussed, as if the true point was one relating to the admissibility of evidence, and the question has seemed to be whether or not affidavits and new testimony were admissible in the superior Court. This is really an accidental aspect of the subject. Where it is contended that there are grounds for holding that a decision has been given without jurisdiction, this can only be made apparent on new evidence brought *ad hoc* before the superior Court. How is it ever to appear within the four corners of the record that the members of the inferior Court were unqualified, or were biased, or were interested in the subject-matter? On the other hand, to show error in the conclusion of the Court below by adducing fresh evidence in the superior Court is not even to review the decision: it is to retry the case. If the superior Court confines itself to what appears on the face of the record, evidently the more there is set out on the record the more chance there is that error, if there was error, will appear and be detected. It by no means follows, however, that, because error has been detected injustice has been done, and so long as the choice for the superior Court lies only between quashing, if any error is found, and discharging the rule, if there be none, the real injustice may be done in the superior Court, and be simply due to the absence of any power to amend the proceedings or to substitute for the decision given the decision which ought to have been arrived at. The Summary Jurisdiction Act, by prescribing a brief form of conviction, generally applicable and not involving any recital of the evidence, found a practical solution for many of these difficulties by preventing errors from being found out. It did not justify what was previously error, it did not enlarge the infer-

ior jurisdiction or alter the law to be enforced either in the inferior or the superior Court; it simply cut down the contents of the record, and so did away with a host of discussions as to error apparent on its face. The superior Court acquired no new and more extensive right to admit fresh evidence by affidavit or to contradict the record of the conviction by matter *dehors* its contents. When it would previously have been confined to matter appearing on the face of the record, it continued to be so confined, but now that very little appeared on the face of the record, the grounds for quashing on *certiorari* came in practice to be grounds relating to competence and disqualification.

It follows that there is not one law of *certiorari* before 1848 and another after it, nor one law of *certiorari* for England and another for Canada. The real questions are—(1) has any statute, having force in Alberta, prescribed a form of conviction which omits all evidence from the record and leaves nothing but the statement that the accused was duly convicted to take its place; and (2) has any other such statute modified the practical effect of that provision, which, of course, must otherwise be the same for Canada as for England?

The Legislatures of Canada have not failed to profit by the experience of England in framing new or amending statutes directed to the removal of difficulties in the administration of the law, which arose out of common law rules and forms no longer adapted to the purposes of the day. Even before the British North America Act was passed in 1867, legislation had been enacted in Canada prescribing a general form of conviction for offences within the competence of a summary jurisdiction. That form was in substance the form prescribed in the English Act of 1848, the form now in force under the Criminal Code of Canada, and the form in which the conviction in the present case was expressed. Special Canadian legislation has long dealt with the subject of temperance and restricted or prohibited the sale of intoxicants, and Alberta, too, has for many years enacted strict measures of her own, the present Liquor Act being the last result of much amendment and reamendment of the earlier steps taken in that direction. All this has been done with the history of *certiorari* and of the effect of prescribing a general form for conviction present to the mind of the legislature concerned, and the enactments so passed must be read in the light of these general provisions. If so, no marked difference can be found between the systems under which in England and in Canada summary jurisdiction is applied to offences against liquor laws, and it follows *primâ facie* that Canadian legislation, affecting summary convictions and the powers of superior Courts to

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quash them upon *certiorari*, is to be construed, in accordance with the older English decisions, as limiting the jurisdiction by way of *certiorari* only where explicit language is used for that purpose, and, on the other hand, as contenting itself with an indirect limitation on the exercise of that jurisdiction, by substituting for the detailed record of a century and more ago the "unspeaking" form of a general conviction such as was prescribed in 1848. Of course, it is competent for the legislature to go further than this, and, where the language used shows such an intention, the presumption above stated is negatived. This may be done notably in two ways. The one is to take away *certiorari* explicitly and unmistakably, or to limit it in a manner not within the older decisions upon such words as "final" or "without appeal"; the other is, on the other hand, to restore it to its pristine rigour by restoring to the record a full statement of the evidence. In the present case it is argued that both methods have been employed in Alberta. The record, it is said, is made to contain the whole of the evidence and on *certiorari* the superior Court is directed to examine it. Three enactments are relied upon as differentiating the present case from the "latter-day English cases. They are (1) secs. 682, 683, 721, 793, 1017 and 1124 of the Canadian Criminal Code. The first two require that the evidence given before justices shall be taken down in the form of written depositions; sec. 793 binds the magistrate to transmit the depositions with other papers to the clerk of the peace to be placed among the records of the general sessions of the peace; sec. 1017 only refers to appeals and applications for new trials; sec. 1124 is to the like effect; it uses practically the same terms as sec. 62 of the Liquor Act, hereinafter quoted, and is re-enacted from 55 and 56 Vict. c. 29, sec. 889; (2) the provision in the Crown rules, which requires depositions to be returned with the conviction on *certiorari;* and (3) secs. 62 and 63 of the Liquor Act, which are relied on as specific legislation, directing what is to be done with those depositions in the superior Court on *certiorari* to bring up a conviction under the Liquor Act.

Their Lordships think it reasonably plain that no great reliance can be placed on any but the last of these provisions. To say that there would be no use in written depositions, if they were not to be available for use in a superior Court on *certiorari*, is to beg the question. Till the hearing is concluded, and the decision is pronounced, it cannot be known whether or not an appeal may be taken in appealable cases, but, if it is to be taken to good purpose, the depositions must have been put into permanent form while the evidence is being given. Even where

there is no appeal, the process of taking down what the witnesses say, as they say it, tends to care both on the part of the witnesses and of the Court, and makes it all the more possible to ensure that no conviction will be pronounced unless evidence has been given of each essential feature of the charge. Either of these considerations provides an abundant satisfaction for the sections, which require the evidence to be taken down, and it is unnecessary to speculate further as to their possible admissibility in the particular case of *certiorari*. Again, R. 4 of the Crown Practice Rules only requires that the evidence shall be returned with the conviction, and it refers to the depositions as separate papers or documents. Since the statute expressly provides that the record of the conviction may be sufficiently recorded in the statutory form, a mere general rule of practice is not to be read as altering that provision or as requiring that the record of it shall include a separate document sent along with it, that is to say, virtually, as declaring that the general form of conviction shall not be in itself a sufficient record, the statute notwithstanding.

Sections 62 and 63 of the Liquor Act are headed "Convictions and Subsequent Proceedings," and are as follows:—

"Section 62, (as amended by 1918, ch. 4, sec. 55). No conviction, order or warrant for enforcing the same or other process shall upon any application by way of *certiorari* or for a *habeas corpus* or upon any appeal be held insufficient or invalid for any irregularity, informality, or insufficiency therein, or by reason of any defect of form or substance therein, if the court or judge hearing the application or appeal is satisfied by a perusal of the depositions that there is evidence on which the justice might reasonably conclude that an offence against a provision of this Act has been committed."

"Section 63. The court or judge hearing any such application of appeal may upon being satisfied as aforesaid, confirm, reverse or modify the decision, which is the subject of the application or appeal, or may amend the conviction or other process or may make such other conviction or order in the matter as he thinks just . . . "

Here, no doubt, there is an express definition of the relation of depositions to *certiorari*, which includes any implied relation such as has been referred to above. The depositions are not made part of the record. They are used as independent materials, upon which the Judge must uphold a conviction, which upon its face he might otherwise be bound to quash for irregularity, informality or insufficiency, provided that he is satisfied within the terms of the section. It seems to have

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been thought in the Court below that, if the depositions could be looked at for one purpose on *certiorari*, they could be looked at for another, and that, as it is expressly provided that they are materials available for affirming an otherwise dubious conviction they must also, by necessary implication, be materials available for quashing a conviction, which on its face appears to be beyond doubt. This is not so. Plainly, the object of the section is to stop every chance of the accused's escaping after conviction, so far as it is possible to do so; but it contains no word in his favour. The only wonder is that it does not provide for *certiorari* to bring up and quash an order dismissing the information.

The next sec. 63 does, it is true, contain the word "reverse," but on examination it is clear that this is not a reversal that is to benefit the accused. The Court, upon being satisfied as aforesaid, that is, in the words of sec. 62, being:— "satisfied by a perusal of the depositions that there is evidence on which the justice might reasonably conclude that an offence against a provision of this Act has been committed, (sec. 63.) . . . may confirm, reverse or modify, . . . or may amend the conviction or make another conviction."

The condition of power to reverse, in the sense of a power to let the guilty person off, cannot be a conclusion from evidence that the Act has been violated, and it is to be noted that the word is "reverse" and not "quash." What evidently is meant is that, on drawing the above conclusion from the evidence, the Court may, if it thinks fit to exercise the power of making some other conviction, reverse for that purpose the conviction actually made below, which otherwise would stand in the way, and direct the conviction, which in its opinion the justices should have pronounced.

Their Lordships are of opinion that the provisions of the Canadian Criminal Code and of the Alberta Liquor Act have not the effect of undoing the consequences of the enactment of a general form of conviction; that the evidence, thus forming no part of the record, is not available material on which the superior Court can enter on an examination of the proceedings below for the purpose of quashing the conviction, the jurisdiction of the magistrate having been once established, and that it is not competent to the superior Court, under the guise of examining whether such jurisdiction was established, to consider whether or not some evidence was forthcoming before the magistrate of every fact, which had to be sworn to in order to render a conviction a right exercise of his jurisdiction.

The magistrate's order for the forfeiture of the entire stock of whisky in cases stands or falls by the same considerations as the conviction for keeping it unlawfully, though in itself it constituted by far the severest penalty. The Judges below were not unnaturally impressed by the fact, that one reason for selecting as the offence to be charged an unlawful keeping instead of an unlawful selling, was to get the opportunity, after establishing the offence, of applying for the forfeiture of the stock of whisky. This, however, makes no difference to the legal aspect of the matter. There was also some irregularity in the issue of the search warrant, which preceded the application for forfeiture, and in the information on which it was applied for, but this does not afford a ground for quashing the order, if otherwise it is not impeachable. It is urged that there was no evidence, which would justify the forfeiture, since proof of the unlawful sale of one case is no evidence of an unlawful keeping of the entire stock of cases, thousands in number. This, of course, is only another way of contending that there was no evidence of the commission of the principal offence. Even if the superior Court was entitled to investigate the nature and extent of the evidence, as to which the considerations already advanced need not be repeated, their Lordships are of opinion that this matter was one for the magistrate. If he believed the evidence as to the circumstances under which the whisky sold was inquired for, selected, sold and taken away, it cannot be said that his conclusion, that the whole stock and not the single case only was unlawfully kept, exceeded the provisions of the Liquor Act.

As leave was given for the appeal from the judgment of the Supreme Court of Alberta, upon which all the questions that arise can be completely disposed of, it became unnecessary, for the purpose of this case, to proceed with the appeal from the refusal of the Supreme Court of Canada to entertain the matter and their Lordships might well have declined to entertain it. They have, however, been asked to give a decision on this point also, in order that a question of law, which it is suggested is at least doubtful, may be set at rest. On this ground, and not as opening the door in future to any general admission of argument upon points, which do not necessarily arise, their Lordships are content to deal with it. The question is whether an appeal from the Supreme Court of Alberta in this case to the Supreme Court of Canada would have been a criminal cause or matter within the words of the Dominion statute (1920, ch. 32). This Act, which received the Royal Assent shortly before the commencement of the proceedings now in question, excepted by sec. 36, R.S.C. 1906, ch. 139, from the appellate jurisdiction of

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the Supreme Court of Canada, "proceedings for or upon a writ of *certiorari* arising out of a criminal charge." In substance and for present purposes this was the law as laid down in the Supreme Court Act, secs. 35, 36 and 39, and the alterations made in 1920 are not now material.

The question whether a prosecution under a typical Temperance Act is or is not a criminal charge has twice been before the Supreme Court in recent years, viz, *Re McNutt* (1912), 10 D.L.R. 834, 47 Can. S.C.R. 259, which was a case of *habeas corpus*, and *Mitchell* v. *Tracey* (1919), 46 D.L.R. 520, 58 Can. S.C.R. 640, which was a case of prohibition. In the first, six Judges took part in the hearing. Three of them held that the application for the writ arose "out of a criminal charge"; one held that it did not, and one seriously doubted whether it did; the remaining Judge expressed no opinion on the point. The case was, however, capable of being disposed of on other grounds. Duff, J., delivered an elaborate and striking judgment, to the effect that the application for the writ did not arise out of a criminal charge, and the principal judgment *contra* was that of Anglin, J. In the second case, out of five judges who took part, three followed the conclusion of Anglin, J., in the earlier case, Anglin, J., himself being one, and two expressed no opinion on the point at all. Under these circumstances it becomes desirable to examine the question more fully than would otherwise be required, in view of the fact that the present case has been substantially disposed of on the appeal from the Supreme Court of Alberta.

The issue is really this. Ought the word "criminal" in the section in question to be limited to the sense in which "criminal" legislation is exclusively reserved to the Dominion legislature by the British North America Act, sec. 91, or does it include that power of enforcing other legislation by the imposition of penalties, including imprisonment, which it has been held that sec. 92 authorizes provincial legislatures to exercise? It may also be asked (though this question is not precisely identical) under which category does this conviction fall of the two referred to by Bowen, L.J., in *Osborne* v. *Milman* (1887), 18 Q.B.D. 471, 56 L.J. (Q.B.) 263, 35 W.R. 397, when he contrasts the cases "where an act is prohibited, in the sense that it is rendered criminal," and "where the statute merely affixes certain consequences, more or less unpleasant, to the doing of the act."

Their Lordships are of opinion that the word "criminal" in the section and in the context in question is used in contradistinction to "civil," and "connotes a proceeding which is not

civil in its character." *Certiorari* and prohibition are matters of procedure, and all the procedural incidents of this charge are the same whether or not it was one falling exclusively within the legislative competence of the Dominion legislature, under sec. 91, head 27. When the Supreme Court was established by statute in 1875, and this exception out of its powers as to *habeas corpus* was enacted by secs. 23 and 51, there was then in existence a substantial body of undoubtedly criminal matters, which did not rest on any statute, and this must have been within the purview of these sections, the B.N.A. Act notwithstanding. After all, the Supreme Court Act is concerned not with the authority, which is the source of the "criminal" law under which the proceedings are taken, but with the proceedings themselves, and all the arguments in favour of limiting appeals in such cases apply with equal force, whether the provincial legislature is or not the competent legislative authority.

There Lordships will, therefore, humbly advise His Majesty that on the appeal from the judgment of the Supreme Court of Alberta, 56 D.L.R. 523, the appeal should be allowed; that the judgments of the Supreme Court, 62 Can. S.C.R. 118, and of Hyndman, J., should be set aside, and that the conviction and order for forfeiture should be restored, and the appeal from the Supreme Court of Canada should be dismissed. Their Lordships were given to understand that an arrangement has been made between the parties, which makes any direction as to costs unnecessary on the present occasion.

Judgment accordingly.

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Exchequer Court of Canada, Audette, J. April 19, 1922.

TRADEMARKS (§VI—30)—PRIOR USER—"PERSON AGGRIEVED"—SEC. 42 TRADE MARK ACT.

Held: That it is the use of a trademark, and not its invention, which creates the right to its registration. In cases of conflict as to prior user the test is: Which claimant was the first to use the mark on his goods to distinguish them from others, thus giving information to the trade that such goods are his.

2. That "use" of a trademark within the meaning of the Trade Mark Act must be of a public character, such use being demonstrated by the mark being related in some physical way to the goods themselves or to the wrapper or case containing the same.

3. Where a person had used a trademark in Canada since 1920, and elsewhere (under registration) for a much longer period, for the purpose of distinguishing his goods from those of rival traders, and another person had obtained registration of the said mark in 1921, the former is a "person aggrieved" under sec. 42 of the Trade Mark Act by such registration in Canada and may apply to have the same expunged.

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APPLICATION by petitioner to have the registration of the specific trademark consisting of the word "Whistle" expunged.

R. S. Smart, and *H. G. Fox*, for petitioner.

H. J. Scott, K.C., for objecting party.

AUDETTE, J.:—This is an application, by the petitioner, to expunge from the Canadian register of trademark the above specific trademark consisting of the word "Whistle," as "applied to the sale of soft drinks," and registered in Canada, on October 6, 1921, by the said objecting party, who resides at Windsor, Ontario.

The Court is given jurisdiction over such matters both under sec. 23 of the Exchequer Court Act R.S.C. 1906 ch. 140, and under sec. 42 of The Trade Mark and Design Act, R.S.C. 1906, ch. 71.

It appears from the evidence that the petitioner and his predecessors in title, the Orange Whistle Co., have been manufacturing and selling a soft drink called and labelled "Whistle" since 1916 in the United States of America and registered the same at that date, in the United States, as appears by ex. No. 3.

The petitioner's business was started in January, 1916, inventing the drink at the same time as they invented the name or trade mark. The petitioner organised a number of serving companies in several States: viz: New York, Ohio, Tennessee, Alabama, Texas, Missouri, etc., and built up a large business after having extensively advertised at great expense. In 1920, the petitioner's sales in the United States and Canada amounted to $9,000,000. In the same year, he spent advertising in Detroit, across Windsor, the objecting party's residence, between $6,000 to $7,000, besides what his agent Wagener spent himself.

He started developing his Canadian business by sending circulars in Canada, in 1917, receiving enquiries for samples. On February 5, 1920, N. Moore, the person in charge of the company in San Francisco—controlled by the petitioner—booked Messrs. Cross & Co. for shipping and did actually ship to them in March of the same year, and thereafter, as more particularly appears by exs. Nos. 9, 10, 11, 12, and 13.

Edwin Irvine, the proprietor of the firm Cross & Co. put up a plant, manufactured and bottled "Whistle" in Vancouver, Canada, since March, 1920,—buying the syrup from the petitioner who always kept control, the product being sold in Canada, under the name of "Whistle," with the orange and blue label with the word "Whistle" across it.

The petitioner's business in Canada last year amounted to $12,000, of which $10,000 represents the Vancouver business. He has two serving factories in Canada.

Albert Brown, of Montreal, manager of the Caledonia Spring business, heard of this "Whistle" on March 12, 1919 and saw it advertised in the "Bottler's Gazette," and wrote for sample in 1919, as per ex. No. 7, and as a result received sample ex. No. 8.

Witness Wagener began manufacturing "Whistle" at Detroit, U.S.A., in 1918, under arrangement with the petitioner. He met Horton, the objecting party, five or six years ago and then again at his plant, in Detroit, in August, 1921, when he informed him (Wagener) he was perfecting something to take place of "Whistle."

Horton paid Wagener another visit later on requesting a sample of "tin sign of Whistle" which Wagener gave him.

Part of Horton's examination on discovery was read at trial, I will refer to it hereafter.

At the conclusion of the petitioner's case in chief, counsel at Bar for the objecting party moved for judgment by way of non-suit, upon the ground among others, that the petitioner was not a person aggrieved under sec. 42 of the Trade Mark and Design Act; and that, therefore, the Court had no jurisdiction and that the Vancouver firm were receiving their goods from the San Francisco Co. and not from the suppliant. This motion was continued to the merits and evidence was then adduced on behalf of the objecting party.

It is conclusively established from Horton's examination on discovery that prior to June 1921, he did not have any printed label or matter upon which the word "Whistle" appeared. He never used a label with the word "Whistle" prior to 1921.

At p. 5 of the discovery evidence, Horton states he had his label printed last year under the following circumstances. The Jones Co., who printed the label, did not obtain the *design* for the label. Richardson, a travelling salesman for the Wright Lithographing Co. "obtained the design for me." (p.6). "He said he could get me one so he went over the river—I guess from Wagener over there who was bottling "Whistle" on the other side. Q. He got a copy of the label that Mr. Wagener was using? A. Yes sir. Q. And he gave it to your lithographers? A. No, he gave it to me. Q. Gave it to you? A. Yes. Q. And you gave it to the Jones Lithographing Co.? A. They both figured on it, yes. Q. And the Jones Lithographing Co. made your labels from it? A. I told him I didn't know where—I knew at that time there was one over there,

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but not before—no; let's see—I told him I didn't know at that time that this place had a patent on "Whistle" over there—that they had no right to have that "Whistle," and I took the label and made the insertion of the girl's head, or the boy's head, with the hand to his ear. Q. You took the label, and—A. We will admit that this is a copy of the label that they [illegible] on the other side. Q. I just want to get this: You took the label that you got from the Whistle Co. of Detroit and you asked your lithographer to copy it and to add a little boy's head to it? A. I told him to make me a label up with the orange and the "Whistle"—I wasn't sure whether it was going to be the same colour as that. I told him the shape of the label, that is, the same shape of my dry ginger ale label. Q. I show you a label here which I am advised is the one used by the petitioner, and ask you if you recognize that as being like the label which you obtained in Detroit?

(Exhibit No. 2) "A. The label I had didn't have this bottom "Minimum contents 6 fluid ounces" on it; and it wasn't exactly quite the same colour. Q. But apart from that, if you rubbed these few words out—? A. It wasn't exactly the same colour. It seemed to be more of a darker orange. Q. But the design was the same? A. The design was practically the same as that. Q. Looking at Exs. 1 and 2, you would say that your lithographers had made a good copy? A. No. I don't see that there's any copy to it. Q. No copy? A. No; if it was an orange it would be that colour. Q. But I mean apart from the colour, that the design is a good copy? A. We will admit that the label is—the lithographer took it to get an idea of what I wanted. Q. And he copied it exactly, didn't he? A. No, I can't say that he copied it exactly. There is a girl whistling to the boy, where the other is just a girl whistling. Q. But apart from the little boy's head, he copied it exactly? A. No, it is a different coloured label. Q. I am speaking of the design now. A. The design is the boy listening to the girl whistling, I should judge. Q. But the whole diamond-shaped label, with the arrangement— A. They are not diamond shaped labels. . . . . Q. These labels speak for themselves; if you will refresh your memory from them it will make the record clearer. Will you admit what is the same on each? A. One is a light orange colour; the other is dark. Q. But as far as the design, the letter-press, goes, it is the same? A. So far as the letter-press, yes. Q. Have you noticed that the labels run in slightly different shapes according to the ink used? A. Mine don't—not if they are done by good lithographers they don't."

Then in December Horton procured from Wagener a tin sign with the words "Thirsty? Whistle" and changed it for his use into "Thirsty? Drink Whistle." He contends he had this formula completed 4 years ago.

Now coming to the evidence at trial adduced after the petitioner's evidence disclosed when they started business, Horton testifies he invented that drink as far back as the fall of 1911, that he made and sold that drink from 1911, under the name of "Whistle"——but he adds he did not use any label until June 1921.

Arthur Bangle, a pool-room and soft drinks dealer at Windsor, who has been in the pool-room business for 3 years and 16 years in the grocery business, testified he was Horton's customer for about 10 years, and that about 9 years ago he bought from him a soft drink under the name of "Whistle" but that it was not a known drink at the time.

Archibald Lewis, employee in a cafeteria at Windsor, testified that from 1918 to 1920 he bought soft drinks from Horton, under the name of "Whistle," because he told him so.

John E. Hanlan, of Windsor, when at the base ball park, bought from Horton, between 1912 to 1915, soft drinks which the latter told him it was "Whistle."

Then in rebuttal, Albert E. Segner, of Windsor, who worked for Horton in 1912 or 1913 up to 1915 when he went in the army from 1915 to 1919 and worked again for a short time for Horton both in 1919 and 1920, testified he had knowledge of every drink bottled by Horton and that during the time he worked for Horton, he never heard of any drink called "Whistle." He was discharged by Horton in 1915. The liquor was in the mixing room and he says he knew what he was bottling.

Again, Charles Wickens, of Windsor, testified he worked for Horton during 1917, 1918, 1920 and a short time in 1921. He says he knew what he was bottling and that in the year 1917, 1918 and 1920 he never heard of a drink called "Whistle" but that he did hear of such a drink in July and August 1921.

The evidence respecting the time at which the sale of this soft drink, under the name of "Whistle," was made by Horton is unsatisfactory and conflicting and, in the view I take of the case, it has nothing to do with the question of law involved in the controversy and further I do not deem it necessary to pass upon the declaration accompanying the application for the trade mark. However, as the trial Judge, having had the advantage of seeing the witnesses, observing their demeanor,

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and the manner in which the testimony was given, and taking into consideration all the surrounding circumstances of the trial, the probabilities and improbabilities, I feel in duty bound to declare that I do not rely on that part of the evidence tending to shew that such soft drinks were sold by Horton, under the name "Whistle" as far back as 1911. No reliability should be placed upon such evidence.

Indeed, it is the use of a trade mark, and not its invention, that creates the right. Paul on Trade Marks, 153 sec. 92. Paul on Trade Marks, adds further, at p. 148, sec. 87: "The test in all cases of conflict as to priority of adoption is, which claimant was first to so use the mark as to fix in the market a conviction that goods so marked had their origin with him." See also *Candee, Swan & Co.* v. *Deere & Co.* (1870), 54 Ill. 439. The applicant for the registration of a trademark in Canada must be the proprietor of the mark, and the evidence in the present case discloses pretty well how the design was conceived and made up—that is long after the petitioner was using it in Canada. The colourable distinction in copying the mark obtained in Detroit clearly disclosed the intention of the applicant. *The Vulcan* (1914), 22 D.L.R. 214, 15 Can. Ex. 265; (1915), 24 D.L.R. 621, 51 Can. S.C.R. 411; *Partlo* v. *Todd* (1888), 17 Can. S.C.R. 196; *Standard Ideal Co.* v. *Standard Sanitary Mfg. Co.* (1910), 27 T.L.R. 63.

"No right can be absolute in a name as a name merely. It is only when that name is printed or stamped upon a particular label or jar and thus becomes identified with a particular style and quality of goods, that it becomes a trade-mark." 2 Brewster, Pen. 304. See also *M'Andrew* v. *Bassett* (1864), 4 DeG. J. & S. 380, 46 E.R. 965.

And again, Sebastian, 5th ed. p. 62, says: "The expression 'used as a trade-mark' was much considered in the case of *Richards* v. *Butcher* (2) (1891) 2 Ch. 522, 532 where Kay, J., said that 'user as a trade-mark' means, not what the person who uses has in his own mind about it, not what he has registered in a foreign country, but what the public would understand, when the trade mark or so called trade mark is impressed upon the goods, or upon some wrapper or case containing the goods, to be the trade mark. That is the trade mark proper; and 'user as a trade mark' means and must necessarily mean, the impressing of those words either upon the goods, or upon some wrapper or case containing the goods, in such a way that the public would necessarily understand those words to be, and alone to be, the trade mark of the person who uses them." See also Kerly, 4th ed. pp. 32, 34, 35, 227, 228.

It is not necessary that the applicant for registration should be the inventor of the word applied for. *Linotype Co's Trade Mark*, [1900] 2 Ch. 238.

The petitioner has shewn a prior *bonâ fide* appropriation of the word "Whistle" as a trademark, supplemented by a continuous use in the United States since 1916 and in Canada since March 1920, long before Horton either built up his design from the petitioner's design procured at Detroit and also long before June 1921, when Horton first used it.

I may casually add, in answer to the contention raised at Bar that the petitioner is not "a person aggrieved," as contemplated by sec. 42 of the Trade Mark Act that I cannot agree with that view taking that he is absolutely within the purview of the Act. The petitioner has been using his trademark in Canada since 1920 and in the United States since 1916, to distinguish his goods from those of other rival traders and if the Canadian registration remains against his prior user he will be deprived of the just use of his *bona fide* trademark in Canada. Under such circumstances, I take it, the petitioner is a person aggrieved and the Court should exercise in his favour the statutory discretion provided by sec. 42 of the Act. In support of that conclusion I would cite *Re Vulcan*, 24 D.L.R. 621; *Baker* v. *Rawson* (1890), 8 R.P.C. 89; *Autosales Gum & Chocolate Co.* (1913), 14 D.L.R. 917, 14 Can. Ex. 302; *Batt & Co's Trade Mark*, [1898] 2 Ch. D. 432, 15 R.P.C. 534, 67 L.J. (Ch.) 576; *Powell* v. *Birmingham Vinegar Brewery Co.*, [1894] A.C. 8, 63 L.J. (Ch.) 152; *Re Apollinaris Co's Trade Mark*, [1891] 2 Ch. D. 186, 61 L.J. (Ch.) 625.

Therefore, for the reasons above mentioned, I have come to the conclusion that the petitioner is the proprietor of the trade mark "Whistle," and that he has acquired the right to the same in Canada by first user thereof in Vancouver ever since March, 1920, while the objecting party used such a mark or design in Canada only sometime in June, 1921. It is not necessary, as suggested, that the use of the word "Whistle" in Canada, prior to 1921, should have been made at Windsor itself. Paul, on Trade Marks, at p. 149, sec. 88 says: "The mere fact, however, that an established trade mark is not at the time in use in a particular locality, gives no one the right to appropriate it. If a manufacturer or vendor could secure a claim to a trade mark on the ground alone that it was not in use, prior to the time when he adopted it, in the special locality in which he proposed to use it, the law for the protection of trade marks would be shorn of most of its strength, for, on the same prin-

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ciple, other persons would be at liberty to adopt it in any locality in which it happened at the time not to be in use."

"The world is wide," said Bowen, L.J. in a trade mark case *Harper & Co.* v. *Wright & Co.*, [1895] 2 Ch. 593 "and there are many names . . . . There is really no excuse for imitation, etc." The argument of undersigned coincidence in the present case is one not commending itself or deserving of respect in view of all the circumstances disclosed in the evidence. The petitioner has extensively advertised, has built up a large business under the name "Whistle" and he is entitled to protection.

It is unnecessary to give any opinion upon what as yet is a moot question as to whether—taking into consideration that Canada and the United States are adjoining and neighbouring countries—a Canadian citizen would have the right, with impunity, to appropriate an American registered trade mark extensively used in the United States for many years and register it as his own in Canada; and furthermore whether the American owner having for a long period neglected to register in Canada, did not lose, by such laches, his right to so register.

There will be judgment ordering the expunging from the entry in the Canadian trade mark register of the specific trade mark "Whistle," under No. 128, folio 29460, in accordance with the Trade Mark and Design Act. The whole with costs against the objecting party.

Judgment accordingly.

ANNOTATION ON TRADEMARK.

BY

RUSSELL S. SMART, B.A., M.E., OF THE OTTAWA BAR.

The question of who is a "person aggrieved" within the meaning of sec. 42 of the Trade Mark and Design Act, R.S.C. 1906, ch. 71, is discussed in the annotation at 57 D.L.R. 220.

The question of whether trademark rights can be acquired in any case where some mark has not been actually applied to the goods has not been specifically considered by any Canadian Court of record. Even in the British and United States reported cases it is difficult to find cases specifically dealing with the question because of its elemental character. The term "trademark" itself implies a mark and hence it must be in some way physically attached to the goods the original of which it is desired to identify.

ANNOTATION

The leading English case is that of *M'Andrew* v. *Bassett* (1864), 4 DeG. J. & S. 380, 46 E.R. 965, 33 L.J. (Ch.) 561, 12 W.R. 777, where Lord Westbury said at p. 384:—

"I am not in this case driven to the necessity of determining when for the first time property may be said to be established in a trademark. An element of the right to that property may be represented as being the fact of the article being in the market as a vendible article, with that stamp or trademark at the time when the defendants imitate it."

Browne on Trade-Marks, 2nd ed., p. 2 (n), defines a trade-mark as:

"An arbitrary symbol *affixed* by a manufacturer or merchant to a vendible commodity."

While Bouvier's Law Dictionary, 8th ed., entitled "Trade-Marks" defines it as:—

"A symbol, emblem or mark which a tradesman puts upon or attaches in some way to the goods he manufactures or has caused to be manufactured."

The definition in the American and English Encyclopedia, vol. 28, p. 346, is:—

"A trade-mark may be defined as a name, sign, symbol, or device which *is applied or attached to goods* offered for sale in the market so as to distinguish them from similar goods, etc"; and on p. 352 it is stated:—

"It is essential to the validity of a trade-mark as such that there shall be some actual physical connection between the goods and the mark, so that the mark goes with the goods into the market."

These, taken with the authorities referred to in the preceding judgment, make it clear that a trademark must in some way be affixed or attached to a vendible article.

The trademark in the present case was used on a soft drink made from a syrup supplied by a separate manufacturer who, in turn, bought certain secret ingredients from the petitioner who authorised the manufacturer and bottler to use the trade-mark on the drink made under his direction and with these secret ingredients.

In a number of United States cases it has been held that, under similar circumstances, the trademark was truthfully and properly used. In the case of the *Coco-Cola Co.* v. *Lewis G. Stevenson et al* (4 T.M.R. 113), it was said:—

"The claim that 'Genuine Coca and Cola Flavor' is truthfully descriptive of the flavor of defendant's product, is disposed of by *Coca-Cola Co.* v. *Koke Co. of America* (10 T.M.

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Rep. 441), (254 U.S. 143); *Davids Co.* v. *Davids*, 233 U.S. 461 (4 T.M. Rep. 175); *Coca-Cola Co.* v. *Nashville Syrup Co.*, 200 Fed. 157 (2 T.M. Rep. 318); and this would be true even in the absence of the stipulation in this case, that 'Coca-Cola' has a secondary or distinctive meaning."

Defendants make the point that, because the plaintiff itself does not bottle the beverages made from its syrup but permits others to do so under supervisory bottling contracts, takes this case out of the rule with reference to adoption and user, for the reason it is charged that plaintiff's trademark is only used upon the syrup. The Courts have held that the sufficiency of plaintiff's supervisory contracts over its bottlers justify the employment of plaintiff's trademark 'Coca-Cola' on the bottled product. *Coca-Cola Co.* v. *Deacon Brown Bottling Co.*, 200 Fed. 105 (3 T.M. Rep. 33); *Coca-Cola Co.* v. *J. H. Butler*, 229 Fed. 224 (6 T.M. Rep. 206). In the latter case equity enjoined a bottler from using the syrup and beverage made therefrom without supervision, against the plaintiff's wishes. The Court held the same in *Coca-Cola* v. *Bennett*, 238 Fed. 513 (7 T.M. Rep. 159).

DE WOLF v. DELMAGE.

Alberta Supreme Court, Appellate Division, Stuart, Beck, Hyndman and Clarke, JJ.A., and Walsh, J. March 30, 1922.

BROKERS (§IIB—14)—AGREEMENT WITH REAL ESTATE AGENT AS TO SALE OF PROPERTY—AGENT PRODUCING PURCHASER—MEMORANDUM OF PURCHASE CONTRACT EXECUTED BY PARTIES—DEPOSIT OF PART OF DOWN PAYMENT MADE TO AGENT—PURCHASER UNABLE TO MAKE BALANCE OF DOWN PAYMENT — RESCISSION OF CONTRACT — NO NOTICE TO AGENT—COMPENSATION OF AGENT.

Where an agreement in effect authorises a real estate agent to procure a purchaser and to accept a deposit and to retain from the deposit his commission for procuring a purchaser then ready and willing and apparently able to fulfil his obligations as purchaser to the extent at least of making the down payment, and the evidence shews that this is the position at the time the memorandum of contract to purchase is executed, the agreement further providing that if the sale is consummated the vendor shall be liable to pay a commission of 5%, and the purchaser makes a deposit of part of the down payment to the agent, but the sale afterwards falls through on account of the inability of the purchaser to pay the full cash payment, and the agent is not informed of the facts nor given an opportunity to assist the purchaser in raising the balance necessary, the agent is entitled to retain the deposit made to him but is not entitled to the full commission on the sale.

[*McIntyre* v. *Law* (1918), 40 D.L.R. 231, distinguished. See Annotation on Brokers, 4 D.L.R. 531.]

APPEAL from a County Court judgment in an action against a real estate agent for the sum of $250 deposited in their hands by a proposing purchaser. The trial Judge gave judgment for

the plaintiff, the vendor, and dismissed the agent's counterclaim for $100 in addition to the $250. Reversed.

S. B. Woods, K.C., for appellant.

R. D. Tighe, for respondent.

STUART, J.A.:—I agree with what is said in this case by my brother Beck. But I think there is another ground on which the appellant is entitled to succeed. The appellant had a substantial interest in the contract entered into between the plaintiff and Hunter. It was through the maintenance and fulfilment of that contract that he would earn the money which he expected to get. He had obtained a purchaser at any rate so satisfactory to the vendor, the plaintiff, that the plaintiff bound himself by a written memorandum to sell to him. Then after negotiations, of which the appellant was not informed, and carried on behind his back, the plaintiff and the purchaser presumed by agreement to rescind a contract in which they both knew that the appellant had an important interest. The plaintiff had engaged the appellant to secure a satisfactory purchaser and he stepped in and prevented the appellant from having the full chance to which he was entitled of getting that satisfactory purchaser or of doing all he could to make satisfactory the purchaser whom he had found. The vendor should have stood behind his agent, instead of stepping in front of him.

In these circumstances I think the vendor should have shewn more clearly than he did that the purchaser was unable to meet the down payment. The purchaser's apparent admission, made in the absence of the agent and obviously for his own purposes, that he was unable, was not in my opinion binding on the agent.

The action of the vendor did not go so far as in the case of *McIntyre* v. *Law* (1918), 40 D.L.R. 231, 13 A.L.R. 273, because there it was held that the vendor acted in bad faith. But nevertheless I think there was here an implied obligation in the vendor not to do what he in fact did, viz.: rescind the agreement by private arrangement with the purchaser without giving any notice to his agent or giving his agent a chance to get the sale carried through.

In these circumstances I think the agent was entitled to damages, and I would assess them at the amount of the deposit. On principle, perhaps, he should be entitled to the whole commission as damages, but on the facts he would have had to take more trouble and to spend more time in order to make the purchaser absolutely satisfactory and in that he might have failed. But he was entitled to a chance to try, and for the wrongful loss

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of this I would compensate him by allowing him to retain the $250.

BECK, J.A.:—This is an appeal from the judgment of His Honour Judge Dubue, by which, in an action against real estate agents for the sum of $250 deposited in their hands by a proposing purchaser, he gave judgment for the plaintiff, the vendor, and dismissed the agents' counter claim for $100 in addition to the $250.

There was a written agency contract. It authorised the agent "*to accept a deposit* to be applied on the purchase price and to execute a binding contract for sale on my behalf."

It also contained the following clauses: "In case the property is sold or disposed of within the time specified I agree to make the purchaser a good and sufficient transfer to the same; and it is further agreed that you shall have and *may retain* from the proceeds arising from such sale 5% commission on the above price. It is further agreed that should a *sale be consummated*, either directly or indirectly through your efforts after, as well as before the termination of this contract, then *I agree to pay* them commission on said sale."

The agents did in fact bring about an agreement between the plaintiff, as vendor, and one Hunter, as purchaser, and a memorandum of contract was signed by both parties on February 26, 1921. There were two quarter sections and a quantity of chattel property. For one quarter section the price was $4,000 payable $500 down, the assumption of a mortgage not to exceed $1,100 and to give a second mortgage to the vendor for $2,400 payable $500 April 1, 1922; $500 April 1, 1923; $700 April 1, 1924; $700 April 1, 1925, with 7% interest. For the other quarter section the price was $2,000, payable $500 down, the assumption of a mortgage of $788.50, and the balance of $711.50 on April 1, 1926, with 7% interest.

The price of the chattel property was $1,000 payable $500 cash and $500 January 1, 1922, secured by "lien note" bearing 8% interest.

The down payments it will be seen amount together to $1,500.

On or about March 10, 1921, Hunter, the purchaser, voluntarily paid the agents, on account of the cash down payments, the sum of $250; apparently because, owing to domestic affairs, he would necessarily have to ask for a considerable delay in completing the purchase.

On May 3, 1921, the plaintiff, the vendor, wrote the defendants, the agents, that "the deal with Mr. Hunter (the purchaser)

has fallen through owing to his not being able to raise the first payment. He has forfeited his deposit of $250 and I would ask you to pay it over to the mortgagees."

The fact appears to be that the purchaser, Hunter, was effectively bound by the memorandum of contract to purchase but it is left uncertain on the evidence whether or not the purchaser was in truth in a financial position to pay the remaining $1,250 to make up the down payment of $1,500, and it is of course still more uncertain whether he could have fulfilled his further obligations. The memorandum of contract of necessity contemplated the execution of more than one formal instrument and would (I should say it is fairly clear) cease to be binding on the vendor unless the down payment was made promptly. Both the vendor and purchaser being apparently *bonâ fide* under the belief that the effect of the contract was that of a mere option which the purchaser could abandon upon forfeiting the $250, it was agreed between them that the contract should be cancelled and the $250 forfeited. The agents, the defendants, complain that they were not consulted, urging that had they been consulted they could in all probability have enabled the purchaser to raise the balance of the down payment and in any case would have made it clear that the contract was a binding one, and not a mere option.

It is only necessary to examine the numerous cases upon commissions to real estate agents to see that each case as it arises must to a large extent depend upon some particular fact, circumstance or expression, or on conduct of the parties (See 9 Corpus Juris tit. "Brokers," pp. 505 *et seq.*, 20 L.R.A. (N.S.), Note pp. 1168 *et seq.* Walker on Real Estate Agency; Ogden Real Estate Agents).

I think this particular case is one of that class in which the agents are entitled to their commission upon the full purchase price (or an amount equivalent thereto by way of damages if the sale fell through by the vendor's fault) upon their producing a purchaser ready and willing and financially able to fulfil his obligations as a purchaser. Ordinarily when the vendor executes an agreement, especially a formal agreement, to sell to a purchaser produced by his agent, it is quite properly presumed that he has accepted the purchaser as one ready and willing and able to purchase; but in fairness and reason, this presumption must be taken to be a mere *primâ facie* presumption capable of, and subject to, being rebutted. In this case I think it is reasonably clear from the evidence that the vendor had no means of judging of the purchaser's ability or inability independently of the

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information received by him from the agents, until after the memorandum of contract was signed. Under these circumstances I think he had the right to refuse the purchaser if, acting reasonbly and *bonâ fide*, he did so on the ground of his inability to fulfil his obligations as purchaser. I think he acted reasonably and *bonâ fide* in terminating the contract. The fact that the purchaser had voluntarily paid $250 on account for the privilege of delay in completion, did not, in my opinion, affect the vendor's right in this respect. Had it not been for the purchaser's assent to the forfeiture of that sum the vendor could, I think, have retained only sufficient to have recompensed him for the costs, charges and expenses he had been put to, which doubtless would have been considerably less in amount.

Subject then to what I have to say later, *primâ facie* I think the agents were not entitled to their commission (unless perhaps upon the $250) and for this reason I would dismiss their counter claim for $100, the balance of the commission of $350, after deducting the $250 in their hands for the return of which the plaintiff, the vendor, sues.

Contrariwise, however, I am of opinion that the plaintiff cannot recover from the defendants, the agents, the $250 in their hands, and this, because of the distinguishing contrast made by the terms used in the agency agreement. In effect, that agreement authorised the agents to procure a purchaser and to *accept a deposit* and to *retain from the deposit* their commission for procuring a purchaser then ready and willing and apparently able to fulfill his obligations as purchaser to the extent at least of making the down payment, and the evidence shews that this was the position at the time the memorandum of contract was executed. The agreement further in effect provided that if a sale *is consummated* the vendor shall be liable to *pay* a commission of 5%. There is no inconsistency between these two provisions, indeed their combination seems to eventuate in a *juster* result than the Courts are often compelled to come to.

In this view the agents are entitled to retain the $250 deposit but are entitled to nothing further.

In the result, then, the appeal to the extent of $250 is allowed with costs; the judgment dismissing the counter claim with costs will stand, and judgment will be entered dismissing the plaintiff's action with costs.

HYNDMAN, J.A., concurs with BECK, J.A.

CLARKE, J.A., and WALSH, J., concur with STUART, J.A.

Appeal allowed.

ROYCROFT v. UGLUM AND STEPHANSON.

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Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon and McKay, JJ.A. March 27, 1922.

JUDGMENT (§IIA—60)—JOINT DEBTORS—PROMISSORY NOTE TAKEN FROM ONE—UNSATISFIED JUDGMENT ON NOTE—ACTION AGAINST OTHER ON ORIGINAL CONSIDERATION.

An unsatisfied judgment on a promissory note given by one joint contractor only, in conditional payment of a joint debt, is no answer to an action on the original consideration against the other.

[*Wegg-Prosser* v. *Evans*, [1895] 1 Q.B. 108, 64 L.J. (Q.B.) 1; *Dick* v. *Lambert* (1916), 29 D.L.R. 42, 9 S.L.R. 355, followed.]

APPEAL by defendants from the trial judgment in an action for the price of hardware supplied by the plaintiff to the defendants for the purpose of a contract for the erection of a building.

N. R. Craig, for appellant.

F. L. Bastedo, for respondent.

HAULTAIN, C.J.S., and LAMONT, J.A., concur with MCKAY, J.A.

TURGEON, J.A.:—The evidence in this case shews that the debt sued for ($348.15 plus interest) was for hardware supplied by the plaintiff to the defendants for the purposes of a contract for the erection of a building which the defendants were carrying out as co-contractors. Payment of this debt was delayed for some time on account of a dispute between the parties as to the goods supplied and the reasonableness of the prices charged. Finally, the defendant Stephanson gave the plaintiff his promissory note for $350, payable 30 days after date, to cover the debt. The amount of this note was less than the sum claimed by the plaintiff for principal and interest at the time it was given, but the plaintiff says he accepted it because it constituted an acknowledgment of the account. This note was not paid at maturity, and the plaintiffs brought action thereon against the defendant Stephanson and obtained judgment against him by default. Nothing has been recovered on this judgment. He afterwards brought this action for the original debt against both defendants.

It is argued on behalf of the defendant Uglum, in the first place, that he never was a party to the debt contracted for the supply of this hardware by the plaintiff, as he was not a co-contractor with Stephanson for the erection of the building in question, but merely a guarantor for the proper performance of the contract by Stephanson, who, he says, was the contractor; and he says that the plaintiff was aware of this and sold his goods to Stephanson alone. This contention, in my opinion,

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is not borne out by the facts, which point to a joint contract and a joint debt by the defendants to the plaintiff.

In the second place, it is argued on behalf of the defendant Uglum that the judgment recovered against his co-debtor on the promissory note is a bar to the plaintiff's action against him. This point is taken in the notice of appeal, but it was admitted by counsel on the hearing of the appeal that it cannot be sustained in view of the authorities if in fact the defendants are co-debtors. (*Wegg-Prosser* v. *Evans*, [1895] 1 Q.B. 108, 64 L.J. (Q.B.) 1; *Dick* v. *Lambert* (1916), 29 D.L.R. 42, 9 S.L.R. 355). In this latter case, which was decided by the Supreme Court of Saskatchewan *en banc*, the Court composed of four Judges was equally divided upon the point involved and the appeal from the decision of Newlands, J., was dismissed. In the result, the right of the plaintiff to recover personal judgment against one party upon promissory notes given by her alone, after having obtained judgment against another party—who was also liable to him upon the original contract, was sustained.

I would dismiss the appeal with costs.

McKAY, J.A.:—This is an action brought by plaintiff against defendants, as joint contractors, for goods sold and delivered to them at their request.

Before trial, the action was discontinued as against defendant Stephanson. The trial Judge gave judgment against defendant Uglum, and from this judgment defendant Uglum appeals.

It appears from the evidence that the plaintiff supplied the goods, the price of which he sues for, for a school building being erected by defendants, according to plaintiff's contention, for the public school board of the town of Shaunavon. The defendant Uglum contends that Stephanson was the contractor for said building, and he signed the contract only as guarantor to the school board that defendant Stephanson would carry out his contract. The contract was not produced at the trial. The trial Judge has found that defendant Uglum was a co-contractor with defendant Stephanson, and there is evidence to support this. And, as I cannot say the trial Judge was wrong in this finding, it must stand. He having seen and heard the witnesses give their evidence is in a better position to come to a correct conclusion on this question of fact than this Court. On this point the trial Judge says:—"It is also clear from the evidence that Uglum became personally responsible jointly with his co-contractor Stephanson for the amount of the plaintiff's account."

On this finding, the defendant Uglum is liable for the account sued for, unless the plaintiff has in some way released him therefrom. And he does contend that, because plaintiff took a note from Stephanson for the debt and sued thereon to judgment, plaintiff cannot now recover judgment against him, and cites *King* v. *Hoare* (1844), 13 M. & W. 494, 153 E.R. 206, 14 L.J. (Ex.) 29, and *Kendall* v. *Hamilton* (1879), 4 App. Cas. 504, 48 L.J. (C.P.) 705, 28 W.R. 97, in support of this contention.

I do not think these cases are applicable to the case at Bar, as they are cases where the second action was brought on the same cause of action as the previous one, and which cause of action had been merged in the judgment.

In the case at Bar the judgment on the note given by Stephanson was brought on a different cause of action, namely, on the note, from that on which this action is now brought. The plaintiff herein could not have sued defendant Uglum on the note given by Stephanson, because defendant Uglum was not a maker or endorser of the said note.

In 13 Hals., p. 336, at the end of para. 470, the author says: "Thus, an unsatisfied judgment on a bill or cheque, given by one joint contractor only, in conditional payment of a joint debt, is no answer to an action on the original consideration against the others." citing: *Drake* v. *Mitchell* (1803), 3 East 251; *Wegg-Prosser* v. *Evans*, [1895] 1 Q.B. 108.

The case at Bar comes within the foregoing statement of the law.

The only question that remains to be considered is, was the Stephanson note taken as absolute payment of the debt or only as conditional payment.

In Leake on Contracts, 6th ed., at p. 653, the author states: "Whether a bill or note is given and taken in satisfaction or as conditional payment is a question of fact as to the intention shewn by the parties; the presumption being that it is a conditional payment with a recourse to the original debt."

The authority cited supports the foregoing proposition.

All the evidence as to the giving and taking of the note is to the effect that it was given and taken as a conditional payment or collateral security, and the trial Judge has accepted this view of the evidence, and that it was not taken in payment or satisfaction of the debt.

In my opinion, therefore, the defendant Uglum is liable for the debt, the trial Judge was right in giving judgment against him, and the appeal should be dismissed with costs.

Appeal dismissed.

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HAUBRICH v. KEEFNER.

Saskatchewan Court of Appeal, Haultain, C.J.S., McKay, J.A., and Embury, J.K.B. (ad hoc). March 27, 1922.

SALE (§IIIC—74)—OF FARM TRACTOR—VERBAL AGREEMENT—FARM IMPLEMENT ACT NOT COMPLIED WITH—ACCEPTANCE OF TRACTOR—VOLUNTARY PAYMENT OF PURCHASE PRICE—REPUDIATION OF AGREEMENT—RECOVERY BACK OF PURCHASE PRICE.

Where a contract is made verbally for the sale and purchase of a farm tractor, and there is therefore no contract in writing as required by sec. 12 of the Farm Implement Act, ch. 128, R.S.S. 1920, but the purchaser with full knowledge of the facts, and knowing that he was under no legal obligation to pay the purchase money or take delivery of the tractor, voluntarily pays the money and takes delivery of the tractor, he cannot afterwards set up the legal invalidity of the agreement on the faith of which he has induced the vendor to alter his position, or recover back the money voluntarily paid.

[See Annotation on Sale of Goods, 58 D.L.R. 188.]

APPEAL by plaintiff from the trial judgment dismissing an action alleging false and fraudulent misrepresentation in the sale of a tractor, and claiming repayment of the purchase money on the ground that the contract did not comply with the Farm Implement Act and was therefore invalid. Affirmed.

L. McK. Robinson, for appellant.

G. H. Barr, K.C., for respondent.

The judgment of the Court was delivered by

HAULTAIN, C.J.S.:—On June 22, 1920, the respondent sold to the appellant a Fordson tractor for the sum of $1,035. Payment in full of the purchase price and delivery of the tractor were made on the day of the sale.

The tractor was a "large implement" within the meaning of the Farm Implement Act. The contract was made verbally, and there was no contract in writing as required by sec. 12 of the Farm Implement Act (R.S.S. 1920 ch. 128). That section reads as follows:—

"12. No contract for the sale of any large implement shall be valid and no action shall be taken in any court for the recovery of the whole or part of the purchase price of any such implement or of damages for any breach of any such contract unless the said contract is in writing, and in form A, and signed by the parties thereto."

After paying for and taking delivery of the tractor, the appellant kept it for several weeks and used it for ploughing 35 or 40 acres of land. While it was in his possession several small repairs and adjustments were made by the respondent at his request. It appears from the evidence that when the tractor was sold there was an old wheel on it which the respondent agreed to replace in case it was necessary. About July 12 the

appellant telephoned to the office of the respondent and informed one Dagg, an employee of the respondent, that the wheel had given out, and requested him to order a new wheel as agreed upon. Dagg telephoned the same day to Regina ordering the wheel, which was shipped the next day, the 13th, and received by the respondent on July 17, without any further communication with the appellant. On July 16, the appellant took the tractor from his farm to Vanguard, where the respondent's place of business was, and left it outside the respondent's garage on the street. The respondent was not present when the tractor was returned, but later in the day, upon finding it standing outside his premises, he sent one of his employees to Haubrich, to whom Haubrich stated that he had returned the tractor because it did not give satisfaction, and wanted his money back. This was the only notification ever given to the respondent of the return of the tractor and of a claim for return of the purchase money.

In his statement of claim the appellant alleged false and fraudulent misrepresentations inducing the contract, repudiation of that ground and return of the tractor. On this branch of the case the trial Judge found against the appellant upon evidence which, in my opinion, amply supported the finding.

The appellant also claimed repayment of the purchase money on the ground that "the said contract not having been in writing nor in Form A in the schedule to the Farm Implement Act was and is invalid in terms of the said Act."

The claim on this ground was also dismissed by the trial Judge (1921), 14 S.L.R. 182, and the present appeal is confined to that part of the judgment.

The contract here upon which the money was paid, although invalid under the statute and so far void that the law would not enforce it, was not prohibited by the statute. So far as I can see, it was a contract which the parties had a right to make and carry out if they so wished. There was no fraud, compulsion, or undue influence, and the plaintiff paid the purchase price with a full knowledge of all the material facts. He must be assumed to have known that he was under no legal obligation to pay the money or take delivery of the tractor, and if an action had been brought he could have defended himself under the statute. But he did not do this, but voluntarily paid with full knowledge of all the facts. Under these circumstances, he paid the purchase money voluntarily, and now seeks to recover his money back by setting up the legal invalidity of an agreement on the faith of which he has induced the defendant to alter his position.

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HAUBRICH v. KEEFNER.

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These facts do not, in my opinion, support an action for money had and received. "There is another general rule which may be thus stated, that where there is a voluntary payment of money it cannot be recovered back," per Fry, L.J., in *Kearley* v. *Thomson* (1890), 24 Q.B.D. 742, at p. 745, 59 L.J. (Q.B.) 288, 38 W.R. 614.

Money paid voluntarily without compulsion or undue influence and with a knowledge of all the facts cannot be recovered, although paid without any consideration. *Wilson* v. *Ray* (1839), 10 Ad. & El. 82, 113 E.R. 32, 8 L.J. (Q.B.) 224; *Brisbane* v. *Dacres* (1813), 5 Taunt. 143, 128 E.R. 641; *Bilbie* v. *Lumley* (1802), 2 East. 469, 102 E.R. 448; *Perry* v. *Newcastle Mutual Fire Insce. Co.* (1851), 8 U.C.Q.B. 363.

The same principle has been applied in England in cases arising out of contracts of infants which are declared by the statute (1874 ch. 62) to be absolutely void. There it has been held that when an infant has used or consumed goods for which he has paid money under a contract void under the statute, he cannot recover the money back. *Valentini* v. *Canali* (1889), 24 Q.B.D. 166, 59 L.J. (Q.B.) 74. See also *Holmes* v. *Blogg* (1817), 8 Taunt. 35, 508, 129 E.R. 294, 481; *Ex parte Taylor* (1856), 8 De G. M. & G. 254, 44 E.R. 388.

So in the case of gaming contracts, if a person who makes a wager and deposits a stake, he can before the event is determined repudiate the wager and recover the stake, *Varney* v. *Hickman* (1847), 5 C.B. 271, 136 E.R. 881; but he cannot recover the stake from the other party if it has been paid over before repudiation or revocation. *Burge* v. *Ashley*, [1900] 1 Q.B. 744, 69 L.J. (Q.B.) 538.

It may be noticed that in the cases of contracts of infants and gaming contracts, the statutes, as in the present instance, make the contract void without being forbidden, that is, void but not illegal.

The cases of *George White & Sons* v. *Jashansky* (1917), 34 D.L.R. 271, and *Frost* v. *La Compagnie des Jardin*, [1919] 2 W.W.R. 457, were cited to us on behalf of the appellant. Both of those cases, however, turned on the effect of a contract invalid under the Farm Implement Act, but in each case still executory, and therefore do not apply to the present case.

The facts of this case, in my opinion, absolutely rebut any presumption that the purchase money was received to the plaintiff's use or that the defendant promised to repay it, and I would therefore leave the parties in the position in which they have voluntarily placed themselves.

Appeal dismissed with costs. *Appeal dismissed.*

PRINCESS COPPER MINES Ltd. v. TRELLE.

Alberta Supreme Court, Walsh, J. March 10, 1922.

COMPANIES (§VF—262)—SALE OF SHARES AT DISCOUNT—VALIDITY—COMPANIES ACT, R.S.B.C. 1911, CH. 39—COMPANIES ACT, 1921 B.C., CH. 10, SEC. 139 (2)—ALL SHARES DEEMED TO BE FULLY PAID AND TO HAVE BEEN LAWFULLY ISSUED AS NON-ASSESSABLE—EFFECT—ULTRA VIRES TRANSACTION MADE VALID.

Section 139 (2) of the Companies Act, 1921 British Columbia, ch. 10, provides that "All shares of a company incorporated pursuant to sec. 131 of the Companies Act 1910, which have before the 17th day of April, 1920, been issued or agreed to be issued, as fully paid and non-assessable shall at all times be deemed to be fully paid and to have been lawfully issued as non-assessable." This sub-section puts an end to all question as to the right or duty of a company or any one else to extract payment of the difference between the par value of shares sold and their sale price, but also validates an *ultra vires* transaction by which the company issued such shares at a discount contrary to the Companies Act of British Columbia, R.S.B.C. 1911, ch. 39.

[*Alberta Rolling Mills* v. *Christie* (1919), 45 D.L.R. 545, 58 Can. S.C.R. 208; *The Ooregum* case, [1892] A.C. 125; *McCraken* v. *McIntyre* (1877), 1 Can. S.C.R. 479; *North West Electric Co.* v. *Walsh* (1898), 29 Can. S.C.R. 33; *Re Railway Time Tables Publishing Co.* (1889), 42 Ch. D. 98, referred to. See Annotation on Company Law in Canada, 63 D.L.R. 1.]

ACTION on a promissory note given in full value for shares of the plaintiff's capital stock subscribed for and issued to the defendant.

H. H. Parlee, K.C., for plaintiff.

G. V. Pelton, for defendant.

WALSH, J.:—The defendant is sued as the maker of a promissory note for $1,000 in favor of the plaintiff, given by him in full payment for 4,000 shares of the plaintiff's capital stock subscribed for by and issued to him.

He claims to have been induced to subscribe for these shares by certain false and fraudulent representations then made to him as to the richness in ore of the mining location owned by the plaintiff. I find against him on this defence.

He sets up as a further representation the plaintiff's promise to put him in charge of its operations on this property. That was not a representation. It was, if anything, a condition. He cannot escape liability on that ground for two reasons. The first one is that he was in fact given the promised employment but he abandoned it in a few weeks and made no effort in the succeeding months of that year's work to perform his contract. When he presented himself the following year the plaintiff refused to let him go on with his work, partly because of this and partly because of his incompetence and extravagance. The other reason is that this was a condition subsequent or a collateral agreement which could not avail him for the rescission

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of the principal agreement. *Alberta Rolling Mills* v. *Christie* (1919), 45 D.L.R. 545, 58 Can. S.C.R. 208.

It is pleaded as a defence that the shares for the purchase price of which this note was given were issued at a discount contrary to the Companies Act of British Columbia R.S.B.C. 1911, ch. 39 and that is a fact. The par value of the shares sold to him was $4,000, and the agreed price for them in this transaction was $1,000. The plaintiff is a British Columbia company and the note was made and payable and the entire deal consummated in that Province and so the rights and liabilities of the parties must be determined by the British Columbia law. No evidence as to what that law is was given before me. The Companies Act, as it was when the note was made and as it has since been amended, was put in and referred to by both counsel, and so I feel myself at liberty to treat these statutes as proved, under sec. 25 of the Alberta Evidence Act, ch. 3, of 1910, 2nd Sess.. I have not been referred to nor have I been able to find any British Columbia judgment under these statutes dealing with the questions raised by this defence.

This transaction took place in 1918. The sale of these shares at a discount was then expressly prohibited by sec. 98 of the Companies Act, being ch. 39, R.S.B.C. 1911.

It has been settled in England by the judgment of the House of Lords in the *Ooregum* case, [1892] A.C. 125, 61 L.J. (Ch.) 337, 41 W.R. 90, that the issue of shares at a discount is *ultra vires* of a joint stock company unless authorised by the legislature under whose authority it was created. This principle is taken for granted by the Supreme Court of Canada in *McCraken* v. *McIntyre* (1877), 1 Can. S.C.R. 479. See *North West Electric Co.* v. *Walsh* (1898), 29 Can. S.C.R. 33 at p. 47. It follows *a fortiori* that the sale of these shares at a discount in the face of the prohibitory section of the Act under which the plaintiff company was incorporated was *ultra vires* the plaintiff and, therefore, illegal and void.

It is contended, however, for the plaintiff, that the defendant's name was placed on the share register to his knowledge and with his assent and that he has never applied to have the register rectified by the removal of his name and that he is now under the authorities by reason of these facts not able to shield himself from liability under the original illegality of the transaction.

The facts are that the defendant applied for these shares and gave his note in payment in January, 1918. A certificate for 4,000 fully paid shares was issued on February 26, 1918, but I judge from the date on the stub in the book that it was

not sent to him until April of that year. The directors authorised this allotment by resolution and notice of it was sent at once to the Registrar of Companies. The defendant's name was placed in the register in respect of these shares and it is still there, no application for its removal having ever been made. Notices of meetings were sent to him but he attended none. The plaintiff's secretary says that the defendant sent him his proxy for the 1919 meeting. He was, however, then and still is the holder of other shares in this company and so this proxy may have referred to them. The defendant's evidence was taken under commission. He swears that he never received the certificate for the shares, for which this note was given. He says that it was offered to him but he refused to take it. I think that he must be mistaken about this for at the trial his counsel, Mr. Pelton, said that he (Pelton) had sent this certificate to some one in Vancouver some time after this action was started and it was commenced on December 19, 1919. Although I have a note of this statement of Mr. Pelton in my book, the reporter did not take it in his notes. To make sure of it I asked Mr. Pelton if my note was right and he tells me that it is. Although there is nothing to shew that the defendant ever saw his name on the share register or was ever told in so many words that it was there, I think upon the facts as I find them that he should and must have known that he was a member of the company in respect of these shares and that his name was on the register as such. Section 32 (2) of the above Act (R.S.B.C. 1911, ch. 39,) provides that every person who agrees to become a member and whose name is entered in its register of members shall be a member of the company.

In *Re Railway Time Tables Publishing Co.* (1889), 42 Ch. D. 98, the Court of Appeal refused to remove the applicant's name from the register in respect of shares bought by her at a discount because she had by her conduct assented to keep them. The judgment does not put her liability upon her original contract, which it characterizes as an unenforceable one, but on a new implied contract which arose from her assent and which it describes as an agreement to be a member with the liability imposed by the statute of paying in full for the shares.

In the *Ooregum* case, *supra*, the House of Lords unanimously sustained the judgment at the trial, holding not only that the issue of shares at a discount was *ultra vires* the company but that the holders of them were liable to pay in cash so much of their par value as remained unpaid upon the same. There are many other decisions to the same effect in winding-up

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cases which perhaps do not apply to this case because it is not a winding-up. A different conclusion was reached by the Court of Appeal in the earlier case of *Re Almada and Tirito Co.* (1888), 38 Ch. D. 415, 57 L.J. (Ch.) 706, 36 W.R. 593, but as pointed out in the *Railway Time-Tables* case by Cotton, L.J., who wrote the leading judgment in each case at pp. 113, 114 "there was wanting in that case the only material point here, namely the assent of the shareholder to his name being on the register. . . ."

The result of these authorities is, I think, that the transaction out of which this note grew was an *ultra vires* one, that the consideration for it was, therefore, illegal, that the new contract implied from the facts as I find them is one which did not validate the original transaction but gave rise instead to new liabilities differing most essentially from those imposed under it and so cannot be relied upon to fix the defendant with liability upon his note. Unless this illegality has been cured by the subsequent legislation, to which I will now refer, the plaintiff's action must fail.

Sub-section 2 of sec. 139 of the Companies Act, 1921, (Alta.) ch. 10, provides that "all shares of a company incorporated pursuant to section . . . . 131 of the Companies Act 1910 which have before the 17th day of April, 1920, been issued or agreed to be issued as fully paid and non-assessable shall at all times be deemed to be fully paid and to have been lawfully issued as non-assessable." This sub-section applies to this company and to these shares.

One obvious effect of it is that the principle of the *Railway Time-Tables* and the *Ooregum* cases no longer applies to these shares. They must be "at all times deemed to be fully paid and to have been lawfully issued as non-assessable," and that ends all question as to the right or duty of the company or any one else to exact payment of the difference between their par value and sale price. But does it do more? Does it validate the *ultra vires* transaction out of which this note grew? I think that it does.

This sub-section obviously does not apply to shares which were properly issued as fully paid and non-assessable for there was no need to thus legislate with respect to them. It can only affect shares which, though purporting to be fully paid and, therefore, non-assessable, were not so in fact. There was not, when these shares were sold, any authority to issue them as non-assessable unless they had been paid for in full. Section 132 of the Act (ch. 7, 1910) directed that where shares were issued subject to further assessments the word "assessable" or

if not so subject the word "non-assessable" as the case might be, should be printed or written in red ink on the face of the certificate. This, which was then the only provision in the Act for the issuing of shares as non-assessable, did not authorize their issue as non-assessable if they had not been paid for in full; it simply directed that the certificate should shew whether or not they had been fully paid for by the use of the appropriate one of these two adjectives. The expressions "fully paid" and "non-assessable" are in this connection synonymous terms. When and only when shares are fully paid for are they non-assessable; if they are non-assessable it is because and only because they have been fully paid for. When, therefore, the Legislature decreed that such shares should be deemed to be fully paid and to have been lawfully issued as non-assessable, it not only made them what they purported to be but were not but also validated the transactions which gave rise to their issue for it could not thereafter be held that they had been unlawfully issued, though that was in fact the case. I think, therefore, that the original illegality of this sale has been cured by this amendment so that it no longer affords the defendant a defence to this action.

Under the British Columbia Act no personal liability attaches to any holder of shares in such a company as this. Section 135 of the Act of 1910, ch. 7 provided that no shareholder or subscriber for shares in such a company should be liable for non-payment of calls made upon his shares. Section 2 of ch. 10 of the Statutes of 1916 defines "call" to include "assessment, instalment and any other sum paid or agreed to be paid or payable in respect of a share." This is relied upon as a further defence to this action. I am satisfied, however, that it was the intention of the parties that this note should operate as absolute payment for these shares and in consequence the defendant is no longer indebted for their price but only upon the note taken in payment of it. For this reason I think that this defence is not open to the defendant.

The plaintiff is entitled to judgment for the amount claimed with costs and the defendant's counterclaim for rescission of this contract and of another contract to buy certain other shares of the capital stock and re-payment to him of the money paid by him in respect of it must stand dismissed with costs as it is founded upon the same facts and contentions as those unsuccessfully raised as a defence to the action.

Judgment for plaintiff.

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REBER v. BEWLEY.

Alberta Supreme Court, Appellate Division, Stuart, Beck, Hyndman and Clarke, JJ.A. ,and Walsh, J. March 29, 1922.

CHATTEL MORTGAGE (§IIB—10)—DESCRIPTION OF PROPERTY—SUFFICIENCY —BILLS OF SALES ORDINANCE, ALTA. C.O. 1898, CH. 43—REQUIREMENTS.

The description of the animal as the issue of another animal is not a sufficient description within the requirements of the Bills of Sales Ordinance, Alta. C.O. 1898, ch. 43, when, although that description is true, such animal has at the date of the mortgage ceased to follow its dam for nurture.

APPEAL by defendant from a District Court judgment in an action for the recovery of two geldings or their value. Reversed.

Robert Hunter, for appellant.

J. F. Lymburn, for respondent.

STUART, J.A.:—I agree with my brother Beck. But I would like to add a word or two with regard to the so-called delivery of the horses in question by the defendant to the plaintiff; there is a grave question of the defendant's authority from Ward to do such a thing. Possibly as against Bewley the burden of proving such authority was not upon the plaintiff. But what evidence there is shews fairly clearly that Bewley did not have such authority but had been expressly told not to make such delivery. I do not think the circumstances were sufficient to create an estoppel even accepting the plaintiff's story. Even if the defendant did say something which could be interpreted as permission to the plaintiff to take possession of the two horses I see nothing to prevent him from recurring to the limited authority given him and from treating the two animals as not delivered and dealing for himself, at least in the absence of an estoppel.

Furthermore, the facts that the defendant actually paid $60 to the Harvester Company and actually worked the two horses during the winter are strongly confirmatory of his contention that he never delivered the horses into the plaintiff's possession.

It was, I may add, clearly admitted on the argument by respondent's counsel that the plaintiff could not rely on the mortgage itself but must rest upon the question of the delivery by the defendant.

BECK, J.A.:—This is an action in the District Court for the recovery of two geldings or $200 as their value. The District Court Judge gave judgment for the plaintiff. These animals are the defendants unless the plaintiff is entitled to them by virtue of a chattel mortgage dated December 20, 1918, from one Ward to the plaintiff. The description in this chattel mortgage of the goods mortgaged is as follows:—

"All and singular these goods, chattels, livestock, implements, farming implements, tools and appliances, furniture, household stuff, personal property and effects particularly described as follows: that is to say;

Two grey mares, each 8 years old, branded 3 Y on right hip, one spring calf, black, branded J.B. on left hip, one spring calf red branded J.B. on left hip, all of which said goods and chattels, livestock, implements, farming implements, tools and appliances, furniture, household stuff, personal property and effects are now owned by or in the possession of the mortgagor and are situate lying and being upon or about the n.w. 2-44-9 w4th. And also all and singular all the increase of any and all of the livestock above mentioned and described, whether born or unborn on the day of the date of these presents and as well after as before the time when such increase follows the mother for nurture so long as and until these presents or any renewal or renewals thereof are fully paid off and satisfied, which increase shall, if so demanded by the mortgagee, be branded the mortgagor at his own expense and charge as may be directed by the mortgagee, in default of which the mortgagee may do the same and add the cost and expense occasioned thereby to the principal money hereby secured."

The paragraph (two grey mares, etc.), was a part of the printed form which was used in drawing the mortgage. The two geldings in question were in fact issue of the two mares particularly described in the mortgage but were respectively two and three years old at the date of the mortgage.

On January 1, 1921 Ward executed a bill of sale of the two geldings to the defendant. I find the facts to be that the defendant gave value for the bill of sale and that although he knew that the two geldings were issue of the two mares mortgaged he did not know that the geldings were included in the mortgage; in other words that the defendant was a bona fide purchaser for value without notice. I find this to be so notwithstanding that the plaintiff, corroborated to some extent by the evidence of his two sons, says that in November 1920 the mares and the geldings and three other animals being on the range in the charge of the defendant for Ward, and the plaintiff enquiring for the animals covered by his mortgage, the defendant said that Ward had told him to hand over the seven head to the plaintiff. The defendant denies this and is confirmed very strongly by a letter from Ward, the covering envelope of which bears the post office date stamp of September 18, 1920, telling the defendant to hand over to the plaintiff the

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two mares and two colts and saying: "You use Rex and Rock & Baldy (Rex & Rock being the two geldings in question) till things is fixed." There are other circumstances also confirming the defendant's story. I think his evidence must be accepted. The sole question remaining then is: Were the two geldings sufficiently described in the chattel mortgage to enable the mortgagee to follow them into the hands of a *bona fide* purchaser for value without notice? I think clearly not.

The question of issue of mortgaged animals dropped during the currency of the mortgage both in the case where the issue is expressly mortgaged and where it is not will be found to be dealt with at considerable length in the following authorities. Barron & O'Brien on Chattel Mortgages 2nd ed. p. 153; *Nicholson* v. *Temple* (1880), 20 N.B.R. 248; affirmed by S.C. of Canada, Cassels' Digest 1875-1893 p. 114; *Roper* v. *Scott* (1907), 16 Man. L.R. 594; Corpus Juris, vol. 11 tit Chattel Mortgages pp. 502 *et seq;* Jones on Chattel Mortgages, 5th ed. at 149 *et seq;* 14 L.R.A. (N.S.) 431; 17 L.R.A. (N.S.) 203.

But, it seems to me, that none of the authorities touch the question which, on the facts of the present case, is this: Is it a sufficient description within the requirements of the Bills of Sales Ordinance to describe an animal as the issue of another animal, when, while that description is true, it has at the date of the mortgage ceased to follow its dam for nurture?

The Bills of Sales Ordinance (C.O. 1898 c. 43) requires that the mortgage "Shall contain such *sufficient* and *full* description thereof that the same may be *readily* and *easily* known and distinguished."

It seems to me that it is useless to review the cases decided under this and like provisions in other provincial enactments. They are to be found noted in Barron & O'Brien at pp. 207 (Alta), 286 (B.C.) 319 (N.B.) 359 (N.S.) 469 (Ont.) 575 (Sask.).

It seems to me to be sufficient to express the opinion, after considering all that has been said on one side or other of the question, that, although it is in no case necessary to give a perfectly sufficient description, nor the fullest description, nor such a description as will enable one with great ease and readiness to identify the goods, yet the character of the goods and the ease or difficulty of giving a particular description, rather than a general one, are circumstanses, which must be taken into account in deciding, having regard to the obvious purpose of the enactment, whether the description is or is not sufficiently particular. In the case before us it seems to me

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that the animals in question, having admittedly acquired an individuality equal to that of their dams, it cannot be taken to have been within the intention of the enactment; that so general a description as that these grown animals were the issue of other animals should be sufficient. The District Court Judge found in favor of the plaintiff on a different view of the facts.

For the reasons I have given I would allow the appeal with costs and dismiss the plaintiff's action with costs.

HYNDMAN and CLARKE, JJ.A. and WALSH, J. concurred with BECK, J.A.

Appeal allowed.

GIBSON v. PETRIE.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon and McKay, JJ.A. March 27, 1922.

HUSBAND AND WIFE (§IID—73)—WIFE'S SEPARATE PROPERTY—LOAN OF TO HUSBAND ON TERMS — USE OF BY HUSBAND IN HIS FARMING OPERATIONS—IMPLIED GIFT TO HUSBAND—RIGHT OF HUSBAND'S CREDITORS TO SEIZE — EVIDENCE — INTENTION OF PARTIES — ESTOPPEL.

Where an interpleader action to determine whether animals at the time of seizure by the sheriff were the property of the wife of an execution debtor the evidence of the wife and her husband clearly establishes that the original animals were bought with the wife's money and that the animals seized were either these original animals or their increase, or other animals purchased with the wife's money and there is no evidence that she ever intended to make a gift to her husband of any of them, the wife is not estopped from claiming the animals as her own although she allowed her husband to deal with them under a power of attorney from her, and consented to his giving a chattel mortgage of some of them to the bank, or that she allowed her husband to use them in his farming operations upon terms.

INTERPLEADER issue directed to determine whether at the time of the seizure by the sheriff of the cattle and sheep in question they were the property of the defendant as against the plaintiff.

T. D. Brown, K.C., for appellant.

Levi Thomson, K.C., for respondent.

HAULTAIN, C.J.S., concurs with LAMONT, J.A.

LAMONT, J.A.:—The plaintiff is an execution creditor of John Petrie, the husband of the defendant. Acting under the plaintiff's execution, the sheriff seized 21 head of cattle and 17 head of sheep. These animals the defendant claims are hers. The foundation of her claim is, that all these animals were purchased for her with her money or property, or are the increase of animals belonging to her.

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Lamont, J.A.

The evidence shews that in 1910 John Petrie and the defendant were married in Scotland. He had no money, but she had $2,000 left to her by her father, which with accumulations amounted to $2,500. Near the end of 1910 they came to Canada, and lived near Cupar, he working out on a farm. In 1913 he took up a homestead west of Swift Current. In view of their moving to the homestead, the defendant gave her husband a power of attorney to transact all business for her and on her behalf, and she furnished him with the money necessary to purchase three mares, six cows, a wagon, and a carload of equipment. These he purchased for her. He admitted that he had no money of his own. They remained on the homestead until 1919, when, through a succession of crop failures, John Petrie became discouraged and wanted to leave the place. The defendant desired to stay on. Finally an arrangement was arrived at, which was embodied in the following written document:

"Consul, Sask., Sept. 5th, 1919.

"This agreement made in duplicate this 5th day of September between John Petrie, farmer, and his wife Margaret Petrie both of Consul, Saskatchewan. John Petrie agrees to give Margaret Petrie one quarter of his share of the crop clear of what land he may rent, if she signs off her rights on the homestead. Margaret Petrie also agrees to rent John Petrie her equipment for to put in the 1920 crop.

(Signed) Margaret Petrie, John Petrie."

The homestead just paid the encumbrances thereon.

Prior to this time the original power of attorney became worn out, and on July 2, 1919, the defendant had given her husband a new power of attorney, which was put in evidence. In September or October, 1919, they returned to Cupar. At that time the defendant owned 12 work horses, in addition to other stock and machinery. In April, 1920, John Petrie rented section 5-22-16-W. 2nd on crop payments. During the summer or fall he sold $600 worth of the plaintiff's horses under her instructions. Part of this money he kept for his own use, giving his wife a quantity of oat sheaves for the amount he kept. Part of the money, a quantity of these oat sheaves and some of her machinery went for the purchase of certain cattle and sheep, part of the stock under seizure.

The trial Judge accepted the evidence of the defendant and her husband, and found that the animals seized were the property of the defendant. The plaintiff appeals.

I entirely agree with the conclusion of the trial Judge. The story told by the defendant and her husband does not bear any

of the earmarks of fraud or collusion, and it is corroborated by the documents filed, as well as by the evidence of independent witnesses. The defendant, in my opinion, has clearly established that the original animals were bought with her money, and that the animals seized are either these original animals or their increase, or other animals purchased with her money or property. There is no evidence that she ever intended to make a gift of any of them to her husband.

It was pointed out that she allowed her husband to deal with the animals as his own. He did deal with them, but he had a power of attorney from her to do so. The only act of his which was really inconsistent with her ownership was the giving of a chattel mortgage on some of them to the bank, but, as was pointed out by Richards, J.A., in *Simpson* v. *Dominion Bank* (1910), 19 Man. L.R. 246, her consent to the mortgage is no estoppel against anyone but the mortgagee.

It was also argued that her husband was carrying on the farming operations, and cases were cited to establish that, where such was the case, the crop grown even on the wife's land would be the property of the husband. These are cases dealing with the crop grown by the husband. None of them go so far as to hold that the fact that the husband was carrying on the farming operations—or the fact that her animals were cared for on the farm by her husband—in any way estops her from claiming animals which she has established to be her property. In this Province a married woman is entitled to acquire, hold and deal with real and personal property as if she were unmarried. The defendant having satisfactorily established the property in the animals seized to be in her, is entitled to judgment.

I would dismiss the appeal with costs.

TURGEON, J.A.:—This is an interpleader issue to determine whether certain horses and cattle seized under execution upon the farm occupied by the debtor as a lessee are his property, and, therefore, subject to the execution, or the property of his wife, who claims them as hers. Even if we assume, as counsel for the appellant contended we should assume, that the onus is upon the wife in this case, notwithstanding the form of the issue, to prove that the chattels are hers, I think that she has in fact discharged that onus and proved her right to the property. There does not seem to be any doubt at all about the evidence establishing the wife's ownership, which comes down in a form bearing all the earmarks of truth, from the time the parties were married in 1910 to the present, and is corroborated in certain

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important particulars by disinterested third parties. The chattels were, therefore, the property of the wife at the time the husband contracted the debt upon which the execution was founded, and also at the time of the seizure, and were not subject to the execution, except possibly on the ground of estoppel.

It only remains to be considered, therefore, whether the wife so conducted herself by allowing the husband to have the use of these chattels and the apparent possession of them that she is now estopped from setting up her right to the property against the creditor. The authorities cited on behalf of the appellant go no further than to lay down that rule that actual or apparent possession by the husband shifts to the wife the onus of shewing that the goods are hers (*Massey et al* v. *Dell* (1919), 45 D.L.R. 734, 12 S.L.R. 136), and this statement of the rule disposes of the assertion that, because she allowed the husband to use her implements and animals in his farming operations upon terms, as set out in the evidence, she is now precluded from so shewing. The execution debtor cannot set up any express estoppel towards himself, and there is, in my opinion, none to be inferred from the circumstances.

I would dismiss the appeal with costs.

McKAY, J.A., concurred in the result.

Appeal dismissed.

PACIFIC FRUIT AND PRODUCE CO. v. DINGLE AND STEWART.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron and Dennistoun, JJ.A. March 10, 1922.

COMPANIES (§VIIB—373)—FOREIGN—SALE BY CORRESPONDENCE—F.O.B. WASHINGTON—REFUSAL TO ACCEPT ON ARRIVAL AT WINNIPEG—SALE—LOSS—DAMAGES—RIGHT TO RECOVER—MANITOBA COMPANIES ACT R.S.M. 1913, CH. 35.

The plaintiff, a company incorporated under the laws of Oregon and doing business in the United States, sold to the defendants a car of peaches f.o.b. Yakima, Washington, on arrival of the car at Winnipeg the defendants rejected it and the company sold it at the best price obtainable. The plaintiff was not shown to have an agent or place of business in Manitoba, the transaction was a sale by correspondence through a broker and was an isolated act. The Court held that the plaintiff was not prohibited by the Manitoba Companies Act R.S.M. 1913, ch. 35, from maintaining an action for damages for the loss sustained by reason of the rejection of the goods by the defendant.

[*John Deere Plow Co.* v. *Agnew* (1913), 10 D.L.R. 576, 48 Can. S.C.R. 208; *Securities Development Co.* v. *Brethour* (1911), 3 O.W.N. 250, applied; *Bessemer Gas Engine Co.* v. *Mills* (1904), 8 O.L.R. 647, distinguished.]

APPEAL by plaintiffs from the judgment of Dysart, J., dismissing an appeal from an order of the Referee staying an action until the plaintiffs should obtain a license to carry on business in Manitoba under the Manitoba Companies Act. Reversed.

F. M. Burbidge, K.C., for appellants.

The judgment of the Court was delivered by

PERDUE, C.J.M.:—The plaintiffs are a corporation incorporated under the laws of the State of Oregon and doing business in the United States. The statement of claim alleges that in September, 1920, the plaintiffs sold to the defendants a car of peaches, f.o.b. Yakima, Washington, at $1.65 a box, that they delivered the car containing 1,232 boxes at Yakima, but on its arrival at Winnipeg defendants rejected it; whereupon plaintiffs caused the same to be sold at the best price obtainable, namely, $1,241.51, in Canadian funds. After paying customs duty, commission and exchange on Canadian money and applying the balance in reduction of their claim the plaintiffs claim the sum of $1,234.15.

The sale to the defendants was made by Nicholson-Rankin, Ltd., of Winnipeg, who acted as brokers in the matter. Amongst a number of defences set up by the defendants, they plead that the action cannot be maintained by reason of the fact that the plaintiffs are an extra-provincial corporation within the meaning of the Manitoba Companies Act, R.S.M., 1913, ch. 35, and has not been licensed as required by sec. 122 of the said Act.

A motion was made to the Referee in Chambers on behalf of the defendants for an order dismissing the action, on the ground that it could not be maintained by reason of the provisions of the above Act, the plaintiffs being an extra-provincial corporation and not having been licensed as required by the Act. The Referee made an order staying the action until the plaintiffs should obtain a license to carry on business in Manitoba. An appeal from this order was heard by Dysart, J., and dismissed. From this dismissal the present appeal is brought.

The affidavit of Mr. Rankin, vice-president of Nicholson-Rankin, Ltd., states that their company carries on business as brokers in Winnipeg, and as a small part of their business the company acts as brokers in transactions in fruit; that the company's business consists in bringing buyer and seller together and except in so far as the law creates the relationship of principal and agent in cases where brokers act, the company is no more the agent of the buyer than of the seller; that on the conclusion of the transaction the company sends a seller's note to the seller and a buyer's note to the buyer. This appears to have been the course followed in the present case.

Mr. Rankin stated that his company deals with sellers of fruit at many points in Canada and the United States and that at the time it was dealing with the plaintiffs it also dealt with

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Perdue, C.J.M.

other fruit sellers carrying on business in the neighbourhood of the plaintiffs. He stated that the transactions in question were put through in accordance with the general practice referred to.

The telegrams between Nicholson-Rankin, Ltd., and the plaintiffs and the seller's contract signed by the brokers show a sale of a car of peaches by the plaintiffs to the defendants at $1.65 a box, f.o.b. Yakima, Washington, $500 to be wired to plaintiffs by defendants as guarantee on prepaid freight.

Section 118 of the Companies Act, R.S.M. 1913, ch. 35, is as follows:—"118. No corporation coming within class V. or VI. shall carry on within Manitoba any of its business unless and until a license under this part so to do has been granted to it, and unless such license is in force, and no company, firm, broker, agent or other person shall, as the representative or agent of or acting in any other capacity for any such corporation, carry on any of its business in Manitoba unless and until such corporation has received such license and unless such license is in force; provided that taking orders for or buying or selling goods, wares and merchandise by travellers or by correspondence, if the corporation has no resident agent or representative and no office or place of business in Manitoba, shall not be deemed a carrying on of business within the meaning of this part; provided also that the onus of proving that a corporation has no resident agent or representative and no office or place of business in Manitoba shall, in any prosecution for an offence against this section, rest upon the accused."

The plaintiffs would fall within class VI. referred to in the above section.

Section 122 of the same Act imposes a penalty of $50 for every day a corporation carries on business in Manitoba contrary to the provisions of sec. 118, and declared that so long as it remains unlicensed it shall not be capable of maintaining any action, suit or proceeding in any Court of Manitoba in respect of any contract made in whole or in part within Manitoba.

The question involved in this case hinges upon the words in sec. 118, "shall carry on within Manitoba any of its business." Did the transaction in this case come within these words? The first proviso in sec. 118 seems to apply. The plaintiffs were not shewn to have an agent or place of business in Manitoba. The transaction was a sale of goods by correspondence through a broker and was an isolated act. Moreover, the contract was performed by the plaintiffs by delivering the goods f.o.b. at Yakima, Washington.

In *Bessemer Gas Engine Co.* v. *Mills* (1904), 8 O.L.R. 647, cited upon the argument, the sale was made by a person resident in Ontario who was authorised by the plaintiff, a foreign corporation, to sell its engines on commission at prices specified in a price list furnished by them. It was held by Street, J., that the person who made the sale was a resident agent of the corporation and that the Act, 63 Viet. ch. 24, sec. 6 (Ont.) containing a provision similar to ours, applied and was a bar to the action. The case is obviously distinguishable from the present one.

In *Securities Development Co. of New York* v. *Brethour* (1911), 3 O.W.N. 250, an action was brought by the plaintiffs, a company incorporated in the United States, on eight separate agreements, signed by defendant in form something like promissory notes, to pay $24 under each to one Hall or order and indorsed to plaintiffs. An agent of the plaintiffs had come to Ottawa where defendant resided and had sold to him certain lots of land in a townsite in New York State. Defendant signed an agreement to purchase, made a cash payment and signed the agreement sued on. The agent also took agreements from other customers in Ottawa. It was held by a Divisional Court (Meredith, C.J.C.P., Teetzel and Middleton, JJ.) that 63 Viet. ch. 24, (Ont.) did not apply as the dealings there in question were not a "carrying on business" within Ontario so as to come under the Act. This decision is referred to with approval in *Consolidated Investments Ltd.* v. *Caswell* (1915), 21 D.L.R. 525, 25 Man. L.R. 213.

In *John Deere Plow Co.* v. *Agnew* (1913), 10 D.L.R. 576, 48 Can S.C.R. 208, the plaintiffs, a company incorporated under the Dominion Companies Act, R.S.C. 1906, ch. 79, with its head office in Winnipeg and not licensed in British Columbia, entered into an agreement with the defendant who was domiciled in British Columbia giving him the exclusive right to sell its goods in that Province. In pursuance of this agreement defendant ordered goods to be shipped from Winnipeg to him, f.o.b Calgary, he assuming all risks and charges to Elko, B.C., where the goods were to be received and sold. He gave the company his promissory notes for the price of the goods, some of the notes being signed at Elko. It was held by the Supreme Court of Canada that the transactions in question did not constitute the carrying on of business by the company in British Columbia within the meaning of the B.C. Companies Act, 1910, ch. 7. The B.C. Act contained provisions requiring the licensing or registration of every extra-provincial company having gain for

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its purpose, and forbade the carrying on of its business in British Columbia by itself or its agent until licensed as required. Section 166 of the B.C. Act was practically identical with our sec. 122.

I think the appeal should be allowed and the order of the referee dated August 15, 1921, and the order of Dysart, J., dated October 31, 1921, be both set aside. The costs of these orders and of this appeal should be costs to the plaintiffs in any event of the cause.

Appeal allowed.

JAMIESON v. JAMIESON.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin and Mignault, JJ. December 15, 1921.

PARTNERSHIP (§VI—25)—FATHER AND SON IN PARTNERSHIP—DEATH OF FATHER—WILL AUTHORIZING SON TO RENEW PARTNERSHIP WITH ESTATE—WIDOW TO BE PAID SHARE OF PROFITS—NO PROFITS OWING TO CROP FAILURES—APPLICATION BY WIDOW FOR ADMINISTRATION AND DECLARATION—ACQUIESCENCE OF ALL PARTIES TO TAKING ACCOUNTS AND WINDING UP THE PARTNERSHIP—PARTNERSHIP ORDINANCE C.O. 1911, CH. 94.

A testator, at the time of his death was carrying on farming operations in partnership with his son the defendant. Under the will the testator appointed the son and two sons-in-law executors of his will, by which he devised and bequeathed all his property to his executors in trust (a) during the life time of the widow "to pay over to her my estate's share of the net profits derived from the operations of the Bandeath stock farm" (b) at her death to convey to the defendant the west half of the section on which the buildings were stated to be situated upon condition of his releasing his interest in the other half and also paying off half of the mortgage indebtedness and (c) then to sell the east half and his share of the chattel property and divide the proceeds among his children, the defendant being excluded. The Court held that the partnership as it then stood was by the Partnership Act dissolved by the death of the testator, and that the surviving partner had no right after that date to carry on the partnership business in the way he did. The administrator had a right under the Partnership Ordinance to elect to take interest in lieu of profits as to the deceased's share in the partnership and that such interest was payable from the death of the testator. That under the proceedings as constituted the widow could not avail herself of the Married Women's Relief Act, Alta. Stats. 1910, 2nd sess, ch. 18.

[*Jamieson v. Jamieson* (1921), 61 D.L.R. 80, reversed.]

APPEAL by plaintiff from the judgment of the Alberta Supreme Court, Appellate Division (1921), 61 D.L.R. 80, in an action by a widow for a declaration that a partnership business carried on by her husband as one of the partners had come to an end by the death of the testator, and asking *inter alia* that an administrator be appointed to the estate, that an account be taken of the profits of the continuation of the business by the

respondent and that the latter be charged with such profits, if any, made in the business since the testator's death.

J. A. Ritchie, K.C., for appellant.

Chrysler, K.C., for respondent.

DAVIES, C.J.:—I concur with ANGLIN, J.

IDINGTON, J.:—The late William Crawford Jamieson and his son, the respondent John Archibald Jamieson, had been for some time before the death of the former, on April 4, 1917, carrying on a general farm business in sect. 31, tp. 37, r. 15, west of the 4th meridian, in the Province of Alberta.

The memorandum of agreement, dated March 16, 1912, forming the said partnership, consisted of two paragraphs as follows:—

"That the partnership heretofore existing between the above partners is this day, the said William C. Jamieson taking over the interest of the said Albert A. Jamieson and all his assets in the said partnership except the lands; and the said William C. Jamieson and John A. Jamieson taking over the interest of the said Albert A. Jamieson in the said lands, being section 31, in township 37 and range 15, west of the fourth meridian.

2.—It is agreed between William C. Jamieson and John A. Jamieson that they shall continue in the partnership together under the terms of the existing partnership agreement between the three herein mentioned,—except that the said interest of the said William C. Jamieson in the chattels shall be two-thirds, instead of one-third as heretofore; and the interest in the land shall be each an undivided one half interest; and the firm shall be known as "William C. Jamieson & Son."

There had been a firm partnership between the father, the said J. A. Jamieson and another son which explains the reference in the above para. No. 2.

The father by his last will and testament, dated February 18, 1915, appointed said respondent, John A. Jamieson, and the two other partners executors of said will and trustees of the estate and by paragraph three thereof provided as follows:—

"3.—I give, devise and bequeath unto my said trustees and the survivors and survivor of them all my estate, real and personal, and wheresoever situate and being upon and subject to the following trusts: (A) During the lifetime of my wife Margaret to pay over to her my estate's share of net profits derived from the operation of Bandeath Stock Farm, being two thirds of the net profits of the said farm and to pay to her all net income of every nature, kind and description derivable from my estate. (B) At the death of my wife to convey unto my son,

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John A. Jamieson, the west half of section 31, township 37, range 15, west of the 4th meridian, being that half of the Bandeath Stock Farm upon which the buildings are situated; this devise is made upon the conditions that the said John A. Jamieson do release at that time his undivided half interest in the east half of said section and also upon the condition that the said John A. Jamieson do assume and pay half of the principle and interest owing at the time of my death or subsequent accruing on any mortgage encumbrance upon the said section. (C) Also, at the time of my wife's death to convert into money the east half of said section and to convert into money unless a division is agreed on by all parties interested my two thirds undivided interest (the other one third being owned by my said son, John A.) in the stock and other chattel property on the said farm, and all my personal effects and to pay and to divide the same equally amongst my children then living except John A. the said children now being Jessie McTavish, wife of John S. McTavish, Isabella Jane, Florence Margaret, Nellie, Charles, James and Albert, deducting, however, from the share of my two sons, James and Albert, each the sum of $500 advanced to them in my lifetime and divide the sum of the two deductions, being $1,000 equally between my daughters Isabella Jane and Florence Margaret and Nellie. (D.) To pay or deliver over unto any child or children of any of my children who should die before the time of distribution arrives the share of its or their parent per stirpes."

The partnership was admittedly one terminable at will or death of either party.

Section 41 of the Partnership Ordinance of Alberta C.O.N. W.T. 1911, ch. 94 provides that:—

"On the dissolution of a partnership every partner is entitled, as against the other partners in the firm, and all persons claiming through them in respect of their interest as partners, to have the property of the partnership applied in payment of . . . . what may be due to the partners respectively after deducting what may be due from them as partners to the firm; and for that purpose any partner or his representatives may on the termination of the partnership apply to the Court to wind up the business and affairs of the firm."

Clearly that right came into force and became effective on the death of the father but nothing was done by the respondent son, John A. Jamieson, or others named as executors as above set forth, to procure probate of said will or to establish any business relation of any kind with the widow, one of the appel-

lants, or anyone else concerned as legatees or devisees for carrying on the business. Yet the said respondent John A. Jamieson, without consulting any such interested parties continued carrying on the said farm sending no accounts to anyone until appellant Margaret Annie Jamieson, the widow of his father, instituted this action on the 14th of August, 1919.

In the course of the trial thereof the appellant the Trusts and Guarantee Co., by the direction of the Court obtained, after renunciation by the executors, probate of said will, and was added party plaintiff with said widow.

A good deal of confusion of thought might have been avoided by bringing about this creating of a duly constituted representative of the estate before launching this suit.

For clearly to my mind the question raised herein, save as to the peculiar right of the widow, to which I will presently advert, must be determined by measuring the respective rights of the Trust Company as administrator and the respondent as a surviving partner.

The trial Judge by his formal judgment expressly and properly, as I understand the law, declared as follows:—

"1. This Court doth declare that the partnership subsisting between the testator and the defendant, John Archibald Jamieson, was dissolved by the death of the testator.

2. And this Court doth order and adjudge that the said partnership be wound up and that for such purpose it is hereby referred to the Master in Chambers at Calgary to take the usual and necessary partnership accounts.

3. And this Court doth further order and adjudge that the Master in taking such accounts shall distinguish between the operations of the partnership up to the date of the testator's death and the operations subsequent thereto." (This judgment was affirmed by the Appellate Division ((1921), 61 D.L.R. 80.)

By subsequent order Mr. Chadwick, a barrister in Calgary, was substituted for the Master and discharged a somewhat difficult duty ably and well.

He took the accounts on the footing he was directed in way of distinguishing the operation of the partnership from subsequent operations.

In taking the accounts of the subsequent operations, the appellants properly declined to consider profits and losses, but declared their right of charging the respondent, John A. Jamieson, with interest on the amount of the testator's share in the partnership assets used in carrying on the business after the

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death of the testator and the dissolution thereby of the partnership.

The relevant law is clear and express in sections 44 and 45 of the Partnership Ordinance of Alberta, C.O.N.W.T. 1911, ch. 94, which read as follows:—

"44. Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with its capital or assets without any final settlement of accounts as between the firm and the outgoing partner or his estate, then, in the absence of any agreement to the contrary, the outgoing partner or his estate is entitled at the option of himself or his representatives to such share of the profits made since the dissolution as the Court may find to be attributable to the use of his share of the partnership assets or to interest on the amount of his share of the partnership assets.

45. Subject to any agreement between the partners, the amount due, from surviving or continuing partners to an outgoing partner or the representatives of a deceased partner in respect of the outgoing or deceased partner's share is a debt accruing at the date of the dissolution or death."

The Trust Company, the appellant, would have been grossly negligent in its discharge of duty if it had failed to make such a declaration when it was quite clear that respondent, John A. Jamieson, without the slightest foundation of right to do so, proceeded as he had done.

If he had any right to suppose he had been so authorised by his father's will, he should have got it probated first and then submitted his course of duty to the Court failing to reach any basis of action between himself and those others concerned.

The statutory enactment is a most righteous one intended to provide against just such lawless courses as he pursued and as a deterrent imposes the obligation of paying the profits or interest whichever may, in the judgment of those administering the estate of a deceased partner, elect.

The widow's election or non-election is not what is to be considered.

It is the interest of the estate which, for this purpose is represented by the party acting as duly constituted executor or administrator.

I respectively submit that the Judge hearing the appeal from the report of the referee who followed the law as disclosed by the statute above quoted, erred in overruling his finding of $1,592.78, as due in that respect.

That part of the judgment appealed from maintaining that ruling, I hold should be reversed and the referee's finding restored.

The next ground of appeal is against the ruling of the Court below that the lands of the partnership should not be sold at present.

During the argument I was inclined to think as the case was presented that possibly it was a mere temporary refusal with which we should not interfere but, enlightened by a perusal and consideration of the case and the many authorities cited in appellant's factum, I am clearly of the opinion that the appeal should be allowed on this point also.

The provision in sec. 41 of the Partnership Ordinance quoted above, expressly gives the power to the representative to apply to the Court, as the Trust Company appellant did and got a judgment founding proceedings for that purpose.

I do not think, under such circumstances, that either the trial Judge should have on the hearing of motion for further directions or the Court of Appeal should have unless to rectify mere error in the course of the trial or making of such a decree as I have above quoted from, change the clear effect of such a judgment.

But it is in effect said that the trustee is exceeding his rights and powers by insisting upon the sale of the lands because the testator had expressed in the clauses of his will above quoted another intention.

It is very difficult to understand how the testator came to make such a will without making provision for carrying it out. Clearly, in law, there is no power in the administrator of such a will to carry on the business of the firm, and the only chance the respondent, John A. Jamieson, ever had of doing so he renounced.

Had he taken probate of the will he might have been able to argue plausibly that the carrying on of the farm was part of the duty cast upon him as trustee, and if he had duly rendered accounts and done his best, though I do not think he should have succeeded in such contention in face of the enactments I have referred to above and the peculiar wording or want of wording, of the will, yet he would have had something more arguable than he has now.

Indeed, though his position in doing so would, in my opinion, be untenable, yet it would not have been so utterly hopeless as the present contention that he can hang on to the west half of the section and insist on the widow taking one third of the

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profits in that as fulfilment of the provisions or supposed provisions, of the will.

I most respectively submit and ask can anything be more absurd in face of the large indebtedness, the absolute necessity to resort to the sale of lands to liquidate it, and the rights given by the Alberta Statute 1910, 2nd. sess. ch. 18, to the widow who wishes to know exactly what she may get under the will and then elect to take her rights under said statute if more beneficial than to attempt to carry out part of such a will?

I am of the opinion that under such circumstances the Court cannot sell part of the lands and thus protect John A. Jamieson in his supposed rights disregarding the rights of the widow and all other parties.

The Judge who heard the motion, on further directions relied upon *Re Holland*, [1907] 2 Ch. 88, 76 L.J. (Ch.) 449.

I, with great respect, cannot see in the respective surrounding circumstances and devise or bequest there in question, and those herein involved and the nature of the devise or bequest in question here, the slightest resemblance.

The case of *Farquhar* v. *Hadden* (1871), L.R. 7 Ch. 1, 41 L.J. (Ch.) 260, referred to by the Judge deciding *Re Holland*, has much more resemblance to this case.

Indeed if the litigation herein continues, I imagine the resemblance will soon become identical.

The cases cited in argument in this latter case and of which one is again cited herein by appellants' factum, are much more in point on that aspect of the case.

I am, however, of opinion that the point taken therein of a condition precedent being created by the will before it became operative in the way applied below, supported by the cases of *Acherley* v. *Vernon* (1739), Willes, 153, 125 E.R. 1106; *Priestley* v. *Holgate* (1857), 3 K. & J. 286, 69 E.R. 1116, 26 L.J. (Ch.) 448; *Re Welstead* (1858), 25 Beav. 612, 53 E.R. 770, is an effective answer to respondent's contention.

I need not elaborate, for it seems to me self evident on the facts presented herein, none of the conditions have been or can be observed.

Hence the duty is obligatory on the Court to direct the sale of all the lands as declared in the case of *Wild* v. *Milne* (1859), 26 Beav. 504, 53 E.R. 993.

It is not necessary to follow alternative suggestions and authorities relevant thereto cited in a well prepared factum.

I think the appeal should be allowed with costs here and in the Court below, so far as relevant to the said several contentions.

I may be permitted to suggest that respondent, John A. Jamieson, can protect himself by being allowed to bid at the sale of the lands.

DUFF, J. (dissenting):—The point of substance to be considered on this appeal turns upon the claim by the appellant against the respondent for interest. The deceased, William Crawford Jamieson, the father of the respondent and the husband of Margaret Annie Jamieson, one of the appellants, died in April, 1917, and the claim for interest arises in this way. At the time of his death W. C. Jamieson was carrying on the business of a stock farm in partnership with his son, the respondent, on sec .31, tp. 37, west of the fourth meridian, each partner having an undivided one half interest in the land, William Jamieson's interest in the chattels being two thirds and that of the son one third. The partnership was a partnership at will. Prior to his death the father made a will by which he gave to his three trustees, who included his son, all his real and personal estate and among other things directed as follows:—

"During the lifetime of my wife Margaret to pay over to her my estate's share of net proceeds derived from the operation of the Bandeath Stock Farm, being two thirds of the net profits of the said farm and to pay to her all net income of every nature, kind and description derivable from my estate."

The will was not proved until December, 1919, when letters of administration with the will annexed were delivered to the Trust Company. During the interregum the business was carried on by the son, there being no profits for the years 1917-18 The action was brought by the widow in August, 1919, claiming an account and praying that the defendant should be charged with the profits made in the business since the testator's decease.

The claim for interest is based upon sec. 44 of the Partnership Ordinance of Alberta (C.O.N.W.T. 1911, ch. 94) which corresponds with sec. 42 of the English Partnership Act, 1890, ch. 39. In so far as revelant it is in the following words:—

"Where any member of a firm has died or ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with its capital or assets *without any final settlement of accounts as between the firm and the outgoing partner or his estate*, then, in the absence of any agreement to the contrary, the outgoing partner or his estate is entitled at

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the option of himself or his representatives to such share of the profits made since the dissolution as the Court may find to be attributable to the use of his share of the partnership assets, or to the interest at the rate of five per cent. per annum on the amount of his share of the partnership assets."

I am unable to agree that this section has any application to the circumstances of the present case. Impliedly, the will directs that the business of the stock farm shall be carried on. The testator's interest in the partnership passed to his executors and trustees of whom the respondent was one. But the intention of the testator was that the business of the stock farm should be carried on, and there was to be no interruption, no settlement at his death. The respondent was entitled to insist upon this and if the representatives of the estate declined to participate, he was still entitled to have the business proceed as directed. The co-executors might, actuated by misgivings as to the personal responsibility they would incur in carrying on the business, be loath to assume the burden of administration and difficulties so arising might be so great as to compel the son to proceed without the assistance of co-executors or co-trustees; still he was entitled to do so. There was, if my reading of the will is right, no discretion vested in the trustees upon this point. If the son was willing to proceed, then the course to be pursued by the estate, whoever the representatives of the estate might be, was marked out by the will.

Notice first then that sec. 44 operates where the surviving partner carries on without 'any final' settlement of accounts as between the firm and 'the outgoing partner or his estate.' The presuppositions are that there is an 'outgoing partner' and that it is a case in which it is the duty of the firm on the one hand to account and the right of the 'estate' to demand an account on the other. Here there was in this sense no 'outgoing partner.' There was no duty on part of the son to account, no right on part of the estate to demand a settlement of accounts. The section, therefore, by its very terms excludes this case.

But the judgment of the Appellate Division may be rested on broader grounds. The enactment (sec. 44) did not change the law as it stood at the time the Act was passed. The rule to which it gives statutory expression is fully explained and discussed at p. 673 of Lindley on Partnership, ed. 8. It is based upon the principle that where a wrongdoer has employed the property of another in trade his responsibility is to restore the property and to make the owner proper compensation for its detention. And it was considered to be just that where there were profits the wrongdoer should not be allowed to profit

by his own wrong and where there were no profits that the owner should not be deprived of compensation; and consequently the rule was that the owner should have the right to claim at his option either the profits actually made or interest at the current rate. It is not of course permissible in construing a statute passed with the object of codifying some branch of the law as was the Partnership Act to resort to previous decisions for the purpose of controlling the construction of the language of the code: but it is permissible to refer to the principle which is the foundation of a statutory rule and to the applications made of that principle for the purpose of illustrating it.

It is a misapprehension to suppose that the executor derives his authority from probate. "The probate is" in the language of a work of long established reputation and weight (Williams on Executors, at p. 207) "however merely operative as the authenticated evidence and not at all as the foundation of the executor's title; for he derives all his interest from the Will itself and the property of the deceased vests in him from the moment of the testator's death"; and this passage is supported by unimpeachable authority, *Smith* v. *Milles* (1786), 1 Term. Rep. 475, 99 E.R. 1205; *Comber's* case (1721), 1 P. Wms. 766, 24 E.R. 605. And upon these principles, it is settled law that the executor, before he proves the will, "may do almost all the acts which are incident to his office except only some of them which relate to suits." (Williams, Executors, 213). And such acts will stand good though the executor die without proving the will. *Brazier* v. *Hudson* (1836), 8 Sim. 67, 59 E.R. 27, 5 L.J. (Ch.) 296. Indeed, it is clear that the respondent could not have refused to prove the will if the interested parties had required him to do so. *Re Stevens*, [1898] 1 Ch. 162. It is true no doubt that upon the grant of administration to the Trust Company the powers of the executors ceased; but that (the grant operated to vest a title in the administrator only as from its date) is a circumstance as I conceive of no relevancy to the present question. Technically, the act of the respondent in dealing with the testator's interest in the partnership property would be the act of all the executors; and it must be assumed—there is no suggestion to the contrary that the respondent acted without the dissent of his co-executors.

The respondent, who in substance carried out the will, acted as the will required him to act both as partner and as executor, cannot, therefore, be regarded either technically or otherwise as a wrongdoer within the principle upon which the statutory rule is founded.

The appeal should be dismissed with costs.

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ANGLIN, J.:—Upon the material which the record contains—and there is nothing to warrant our surmising the existence of a state of facts other than it discloses—subject to the dominant rights of the creditors and apart from legal considerations, having regard to the provisions of the will of the late Wm. C. Jamieson, I would be inclined to regard the disposition made in this case in the Provincial Courts as doing substantial justice between the appellant Margaret Annie Jamieson and the respondent John Archibald Jamieson. But the Partnership Ordinance (sec. 44) appears to present an insuperable obstacle to maintaining the judgment of the Appellate Division. The business of the partnership formerly subsisting between the respondent and his deceased father was undoubtedly carried on after the death of the latter "without any final settlement of accounts as between the firm and the outgoing partner('s) . . . . estate." It could not have been otherwise, no legal representative of that estate having been appointed. Under these circumstances the statutory right of the representatives of the deceased partner to elect either to claim profits or to claim interest appears to be absolute.

Assuming that by sufficiently distinct and definite directions in the will of a deceased partner the carrying on of the business by the surviving partner so as to bind the estate of the former, without concurrence of his personal representatives and without any accounting having taken place, could be authorised and the surviving partner thereby relieved of any obligation to the estate other than that of accounting for such profits as he might make out of the business, with respect, I do not find in the will before us anything which would suffice to sanction that being done or to exclude the operation of the statute or justify the Court in declining to give effect to its explicit language. The widow, although she is a life beneficiary under the will and is also the assignee of nine of the twelve children of the testator including six of the seven, other than the respondent, who take under his will subject to her life interest (the children of the seventh, Isabella, who is dead, being minors), could not elect for profits so as to bind the personal representatives to forego the right of the estate to claim interest under the statute. On this branch of the case, therefore, the appeal must be allowed, and the report of the Master restored.

The west half of sec. 31, devised to the respondent after the widow's death, having formed part of the partnership assets, is liable to be sold to satisfy claims against the partnership. The other assets being apparently insufficient to meet the partnership debts, this land, notwithstanding the devise of it

by the deceased partner to the surviving partner, must be so dealt with. Of course all that is devised to the respondent is his deceased partner's interest and that, it is needless to say, can be ascertained only when claims of creditors of the partnership have been satisfied. Moreover the devise to the respondent is no more specific than is the bequest of the proceeds of the east half of the section and of the testator's interest in the stock to seven others of his children nominatim. No doubt it is desirable to carry out the provisions of the will as far as possible. But the specifically devised assets are bound to contribute ratably towards satisfaction of the debts of the partnership which bear alike on the testator's interest in all the partnership assets. Nothing in the will exempts the respondent and imposes the exclusive burden of the debts on the other beneficiaries *inter se*.

Unless some real prejudice to the creditors might ensue, however, the Master in carrying out the sale of the assets should, I think, offer the west half and the east half of sec. 31 as separate parcels so that the amount of the proceeds of each may be ascertained and the respective interests of the children *inter se* under the will may be protected.

The matter is not yet ripe for the exercise of the jurisdiction conferred by the Married Women's Relief Act.

The appellants are entitled to their costs here and in the Appellate Division.

MIGNAULT, J.:—The respondent was in partnership with his father, the late W. C. Jamieson, for the purpose of farming and stock raising. The father died in April, 1917, leaving a will whereby he directed his executors to pay to his wife, one of the appellants, his estate's share of net profits derived from the operations of the stock farm, and also all net income of every nature, kind and description derivable from his estate, the west half of the farm, on the death of his wife, to become the property of the respondent. The executors neglected to apply for probate and subsequently renounced thereto, and, during the pendency of this litigation, the Trusts and Guarantee Co., the other appellant, was appointed administrator with will annexed of the property of the deceased, and was added as a party plaintiff. After his father's death the respondent continued the business.

Mrs. Jamieson, the widow, brought this action in August, 1919, against the respondent, her son. She had previously acquired the shares in the estate of all her children, with the exception of those of the respondent and of one daughter, Isabella

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Jane Jamieson. All the children (some of them infants represented by the official guardian) were, during the suit, added as defendants.

Mrs. Jamieson's statement of claim alleged that the partnership had come to an end on the death of W. C. Jamieson, and asked, *inter alia*, that an administrator be appointed to the estate, that an account be taken of the profits of the continuation of the business by the respondent, and that the latter be charged with the profits, if any, made in the business since the testator's death.

After its appointment as administrator and its joinder as a party plaintiff, The Trusts and Guarantee Co., elected to charge the respondent with interest in lieu of any profits on the deceased's share in the partnership. The widow had made a similar election some time previously, but I think that, having in her action demanded profits on the deceased's share, she could not change her election and ask for interest. However the administrator, as representative of the deceased's estate, was not precluded from demanding interest in lieu of profits and its election stands.

The trial Judge, in an order dated November 27, 1919, declared that the partnership had come to an end on the death of W. C. Jamieson, and ordered that it be wound up, referring the matter to the Master in Chambers at Calgary to take the usual and necessary partnership accounts.

The Master found that the share of the deceased in the partnership amounted to $11,987.38 and allowed interest at 5% from April 4, 1917, to November 30, 1919, to wit : $1,592.78. The latter amount is the chief bone of contention between the parties, for it is common ground that the operations of 1917 and 1918 gave no profits, and the appellants will be gainers if they can demand interest in lieu of profits.

The parties having appealed from the Master's report, the trial Judge decided that the will allowed the respondent to continue the partnership, subject to paying over to the widow the share of profits attributable to the deceased's share in the partnership, and that interest could not be claimed on the deceased's share. In so far as it granted interest, the Master's report was set aside. This judgment was affirmed by the Appellate Division (1921), 61 D.L.R. 80.

Not without considerable reluctance, in view of the nature of the claim made against her son by Mrs. Jamieson I have come to the conclusion that the will did not sufficiently authorise a continuation of the business after the death of the testa-

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tor, and I think also, under sec. 44 of the Partnership Ordinance (Alberta), that the administrator of the testator's estate is entitled to claim interest in lieu of profits on the share of the deceased. I would not have agreed to allow the widow to change the election she had already made to take profits, but she does not represent the estate and the administrator does, so that the latter clearly has the right of election given by sec. 44 to the representative of the deceased partner's estate.

The Courts below made no order for the sale of the land and I would make none myself, the more so as the refusal to order the sale was not a final one, and it is still open to the parties to apply for it should circumstances, such as claims made by creditors, render it necessary. The majority of my colleagues think, however, that the land should be sold.

The widow also desired to avail herself of the Married Women's Relief Act. The Court below considered that the proceedings were not so constituted as to make it possible to deal with this question. In that I agree.

The appeal must be allowed to the extent of restoring the Master's allowance of interest in favour of the administrator of W. C. Jamieson's estate. The appellants are entitled to costs here and in the Appellate Division. *Appeal allowed.*

HELGASON v. HOWARD.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Fullerton and Dennistoun, JJ.A. March 10, 1922.

AUTOMOBILES (§IIIB—267)—MOTOR CAR STALLED ON HILL—MOTORCYCLE AND SIDE CAR STALLED IN ENDEAVORING TO PASS—DRIVER OF MOTOR CAR STARTING ENGINE, AND RELEASING BREAK—MOTOR CAR BACKING INTO MOTORCYCLE—DAMAGES—LIABILITY—RES IPSA LOQUITUR.

A defendant whose motor car stalls going up a hill, should know that when he releases his break in starting the engine again the car will run back unless he can get his clutch in quickly enough to check it, and where this happens and his car runs back into another car which he knows is stalled behind him, and causes injury to it and its occupants, he is guilty of negligence and liable in damages. In such a case the doctrine of *res ipsa loquitur* applies.

[See Annotation on Automobiles, 39 D.L.R. 4.]

APPEAL by plaintiffs from the trial judgment in an action for damages caused by a motor car backing into a motor cycle and side car. Reversed.

C. K. Guild, for appellants.

W. J. Donovan, for respondent.

The judgment of the Court was delivered by

FULLERTON, J.A.:—This action was brought to recover damages for negligence. The plaintiffs, husband and wife, were proceeding down a fairly steep hill leading to Rock Lake in

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Manitoba on a motor cycle with side car attached. About a third way down they met and passed the motor car of the defendant which was stalled on the hill. The position of the defendant's car forced the plaintiffs to keep so close to their own side of the road that one of the wheels of the cycle ran over the side and stalled the engine. This occurred just as the motor cycle had passed the rear wheels of the defendant's motor. Immediately the defendant's motor backed, struck the motor cycle and precipitated it and the plaintiff's over the embankment. At the trial both plaintiffs were called as witnesses. Their evidence was sufficient to make a *primâ facie case*. Under sec. 63 of the Motor Vehicle Act, R.S.M., 1913, ch. 131, the plaintiffs having shown damage sustained by a motor vehicle, the onus of proof that such loss or damage did not arise through his negligence was on the defendant. Moreover the evidence clearly established a case of *res ipsa loquitur*.

Beven, on Negligence, 3rd ed., vol. 1, p. 118, lays down the rule that "the mere occurrence of an injury is sufficient to raise a *primâ facie* case. (a) When the injurious agency is under the management of the defendant; (b) When the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care."

The plaintiffs' counsel did not, however, rest on the *primâ facie* case he had made but proceeded to read portions of the defendant's examination for discovery which give his explanation of the cause of the accident. Shortly, the discovery evidence shews that defendant was going up the hill when his engine died and he was stalled with his brake set when the plaintiff came in sight. His car was standing diagonally on the road with the left hand wheel from 3 to 4 feet from the left side of the road, and the front wheels much nearer the right side. He says he noticed the motor cycle come to a stop with its left hind wheel opposite his back fender. He then started his motor, released his brake and let in his clutch. His car ran back not more than 3 feet, struck the motor cycle and put it over the bank.

At the conclusion of the plaintiffs' case the defendant moved for a non-suit which was granted.

The trial Judge took the view that the facts did not establish a case of *res ipsa loquitur*, and also that the onus placed upon the defendant by The Motor Vehicle Act had been completely met by the defendant's discovery evidence.

With respect I think the trial Judge was in error on both points. Before the defendant attempted to start his car he knew the exact position of the motor cycle, and knew that if

by any chance his car should run back it would strike the motor cycle and in all probability put it over the bank.

He knew or should have known that the moment he released his brake the car would run back unless he could get his clutch in quickly enough to check it. It is not clear from his examination whether he was in low or high gear when he stalled, but in answer to the question "Couldn't the engine go up on low?" he replied: "My engine died." I would assume from this that he was taking the hill on low. If his engine stalled on low gear he should have anticipated difficulty in starting again from a stationary position. Moreover his car was fitted with an emergency brake which, if promptly applied, would have stopped the car instantly. Under all the circumstances, I am clearly of opinion that the defendant was guilty of negligence.

I would allow the appeal with costs and direct a verdict to be entered for the sum of $700, together with the costs of the trial.

Appeal allowed.

REX v. JANONSKY.

Supreme Court of Canada, Idington, J. in Chambers. January 20, 1922.

APPEAL (§XI—721)—LEAVE TO APPEAL UNDER CRIMINAL CODE AMENDMENT, 1920 STATS. CH. 43, SEC. 16—CONSTRUCTION AND APPLICATION OF AMENDMENT.

In order to enable the parties to appeal from a conviction under the amendment to the Criminal Code, 1920 stats. ch. 43, sec. 16, on the ground that it conflicts with a previous judgment, there must be a conflict of law, and not any of the accidental results of litigation from a different set of facts and circumstances, the object of the section being to make the administration of the criminal law as uniform as possible.

It is doubtful if the denial or granting of a separate trial to one jointly indicted, which rests on the exercise of sound discretion can ever become the subject of leave to appeal under the amendment.

APPLICATION by the Attorney General for Quebec, under the Criminal Code Amendment 1920 stats. ch. 43 sec. 16, from a judgment granting a new trial. Dismissed.

Lucien Cannon, K.C., for appellant.

Robert Laurier, for respondent.

IDINGTON, J.:—The Attorney-General for Quebec applies under sec. 1024A, amending, by sec. 16 of ch. 43, (Can.) 1920, the Criminal Code, for leave to appeal from the judgment of the Court of King's Bench, appeal side, whereby the above named George Janonsky has been granted a new trial, and the ground taken is that said judgment conflicts with the judgment of the Court of Appeal for British Columbia in the case of

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R. v. *Davis* (1914), 16 D.L.R. 149, 19 B.C.R. 50, 22 Can. Cr. Cas. 431, where a new trial was refused notwithstanding that the appellant had been tried, against his will, jointly with another accused party.

I am, after a perusal of the several notes of judgment herein and a comparison thereof with the several notes of judgment in the *Davis* case, unable to recognise any such conflict between the judgment herein and that in the *Davis* case as to furnish a basis upon which I could properly rest such an order as applied for.

The result to the respective prisoner in each case is quite different, and so were the relevant facts and circumstances which the respective Courts had to consider and pass upon quite different.

The Court in the *Davis* case was able to say in the light of the said facts and circumstances to be considered that there was no miscarriage of justice; but in this case the Court unanimously came to the conclusion that as the result of a joint trial there had been a miscarriage of justice.

In neither case were the reasons assigned such as to lead to the unanimous conclusion that a separate trial where several accused were jointly indicted could be claimed as of right.

I think that the conflict had in view in the amendment, clearly must be one of law and not any one of the accidental results of litigation from a different set of facts and circumstances. The object thereby sought is to render the administration of the criminal law as uniform as possible.

I agree fully in the desirability of our doing what we can to bring about such result.

To give leave to appeal herein would not promote such an object, but on the contrary, I fear, tend to confusion.

I doubt if the denial or granting of a separate trial to one jointly indicted which rests on the exercise of sound discretion can ever become the subject of leave to appeal under the amendment in question.

Having formed an opinion adverse to the application herein, I felt it advisable to consult such of my colleagues as available and may say that a sufficient number to constitute a majority of the Court agree in the result reached, though in no way responsible for the foregoing reasons which I assign for refusing the order allowing appeal. I am by no means to be taken as having formed or desired to express any opinion upon the merits of the decisions either in this case or that relied upon.

Petition disimissed.

TOWNSEND v. CANADIAN NORTHERN R. Co.
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Alberta Supreme Court, Appellate Division, Stuart, Beck, Hyndman and Clarke, JJ.A., and Walsh, J. March 31, 1922.

WATERS (§IIA—72)—WATERCOURSES—WHAT ARE—INTERFERENCE WITH BY RAILWAY — NEGLIGENCE — DAMAGES — BURDEN OF PROOF—LIABILITY.

The view adopted in Alberta is that it is sufficient to constitute a watercourse if the accumulation of water from rains and snow flows in a regular course through depressions in the land to an outlet; and such drainage course is for water from heavy or extraordinary rains as well as lighter ones, and when a railway company constructs its railway so as to impair the usefulness of such water course it is guilty of negligence and liable for the resulting damage. The burden of proving that the damages would have been sustained if the railway embankment had not been constructed is on the defendant railway.

[*Makowecki* v. *Yachimyc* (1917), 34 D.L.R. 130; *Farnell* v. *Parks* (1917), 38 D.L.R. 17, applied.]

APPEAL by plaintiffs from the trial judgment dismissing an action for damages caused by the flooding of certain lands. Reversed.

H. R. Milner, K.C., for appellants.

N. D. Maclean, K.C., for respondent.

The judgment of the Court was delivered by

CLARKE, J.A.:—These actions, commenced separately, appear to have been consolidated prior to trial.

Townsend is the owner of the south-east quarter of sect. 15, tp. 59, range 19, west of the 4th meridian, and Martin is the owner of the south-west quarter of the same section.

Each claims damage caused by the flooding of his lands in 1920 by water which they allege was obstructed and prevented from escaping through its natural course by the embankment of the defendant's railway, and each plaintiff asks for an order directing the defendant to adopt the necessary methods to prevent the flooding of the lands in future.

The appeal is from the judgment at the trial which dismissed the action—on the ground that the plaintiffs failed to prove their allegation of negligence by the defendant in the construction of the railway so as to cause the damage complained of and also that the plaintiff's injuries resulted from the special abnormal conditions that existed owing to the great floods of water all over the district.

The railway was constructed in 1915 along the north end of sect. 10, only the highway separating it from the plaintiff's lands.

Townsend farmed his quarter section since 1911 and Martin homesteaded his quarter in 1908 and resided thereon steadily since 1913.

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The evidence as to drainage conditions prior to the construction of the railway is shortly as follows:—

Martin says the water flows upon his quarter from the north west quarter of 15, coming through sections 22 and the north east quarter of 15, and that some water comes from 26 and 27 and from the west of 23, which is as far as he traced it; from his land it runs down south east and follows the same course every year; from his place it flows on to Townsend's quarter through the sloughs and hay land to a point on the highway, south of section 15 where a log culvert was put in, the same year as the railway grade was constructed (1915). This culvert is about opposite the centre of Townsend's quarter. The course then continues through Hiscock's land, north east quarter of 10, leaving it at the south east corner; then through the school section (11) and down to the river. In the course there are some springs; the average flow through Martin's place is about 4 and 5 feet wide, the water course is just from the heavy rain and the heavy snow, in places it spreads over the land and in places it has regular runs, creeks.

He also speaks of a little water course a little south east of his place crossing Townsend's place, on the same slough as the larger course previously mentioned. Martin did some ditching on his quarter in June, 1915, by plowing along the line of the natural course, which would have the effect of expediting the flow of water upon Townsend's land and probably increase the flow. Some beaver dams were cut through on his neighbour's lands above him; he thinks that was done in 1914. There is no evidence of any other artificial drainage. I do not think this artificial work materially contributed to the damages claimed by the plaintiffs.

Townsend does not speak of the water-course above his land but tells of the two natural watercourses across it, the one in which the log culvert is situated and a smaller one west of the present railway culvert; which he speaks of as being between the large natural course and the smaller one. He says the water ran pretty freely through Hiscock's place, natural runway, then it goes through the school section to Pine Creek and from there into the Saskatchewan River. He judged the area draining through his land to contain 1,200 to 1,500 acres.

Thomas Hiscock resided since 1909, off and on, on the north east quarter of 10, says the natural watercourse ran through the centre of his place, low lying land, it has a clear course through.

Alfred E. Farncombe, a surveyor and civil engineer with considerable experience in connection with drainage works, is the only witness on either side who made a survey of the drainage

area. He made his examination in October, 1921, just before the trial, and says that with regard to the watercourse he agrees with witnesses for the defendant as to the area lying north of the railway up to possibly the north boundaries of the south half of 15. There were different places where it could be seen water had run but there was nothing that could be said to be a decided watercourse, that is a very level tract in there, it has numerous pot holes, there is a slight fall there, probably 2 ft. to the mile, perhaps more. But north of there he endeavored to find the water-shed and found that the east road allowance of section 15 was practically the water-shed; he found a well-defined dry-creek bed on the north half of 15 running south that emptied into this basin on 15. The creek bed was somewhere in the vicinity of 6 feet bottom and it was a clearly well defined creek, dry. Following that course down he found that it developed somewhat, and the main channel went to the west into the south west quarter of 15, and there was another channel, a lesser one swung around slightly to the east and then came back and entered into about the same place, all flowing into these two quarter sections. There was more or less a runway, although it was obstructed by beaver dams through the south half of 15, and it was a fairly good runway, very spread out. South of the railway track and about 800 ft. down, the runway contracts and there is a beaver dam and a well defined cut through that beaver dam where the water has washed through, about 8 ft. wide. At the road allowance south of Townsend's place where the log culvert was put in the main channel is about 125 ft. wide, a sort of depression. From the runway north of the road allowance to the outlet on the beaver dam on sect. 10 he found a fall of 8 inches. There is a big pot hole on the road allowance. His level was taken from a point north of that. He estimated the drainage area to be in the vicinity of 2,000 acres. In his opinion an adequate culvert, in view of the little fall in the watercourse, should be 6 by 4 ft. The railway embankment is about 4 to 4½ ft. high.

For the defence, Ernest R. Roblin, a civil engineer, who took levels and made contours of the south half of 15, says that the hay slough is perceptibly lower, but the country is more or less of height, that is, it is not generally sloping but it has a series of small holes and several rises; that the difference between the north west and south east portion of the half section is very close to 2 ft., within 2 ft. of being level in the low points; that it is poor drainage; there is no perceptible fall that is sufficient to give good drainage. In view of the fact that there is a little

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higher ground at the track he did not consider it a natural drainage course. He refers to the area south of the railway as more or less of a pot holey country but does not appear to have made an investigation of it. He did not see the watercourse before the railway crossed it, but thought the drainage system crossed where the railway was afterwards constructed at two points, viz., where the railway culvert was put in and the log and culvert.

E. Kells Hall, the defendant's engineer of construction, states that the general direction of the drainage through the two quarter sections is south-easterly; that there is no defined watercourse at the point where the log culvert is, and while guarding himself from describing it as a natural watercourse he says "the natural contour of the country run in that direction, but as far as water coming down you can perfectly well see that there is not any more difference than a couple of feet; out in a country where so much water comes down it is liable to slop over on to you in any direction." He knew that the water naturally flowed from Townsend's place on to Hiscock's and from there on down to the Saskatchewan and that all the water in that part of the country flows into the Saskatchewan basin.

The result of this evidence is that the natural drainage of this considerable area is south easterly over the plaintiffs' lands and that its only outlet is across the lands where the railway is constructed and on to the Saskatchewan River.

In view of the differences of judicial opinion concerning the legal meaning of the term "watercourse" it is not surprising to find the witnesses differing on the subject.

If the drainage course in question is not a watercourse within the meaning of the law that is the end of the matter, for the defendant would be justified in entirely blocking it by a solid embankment or otherwise, but on the contrary if it be a watercourse then the owers of the higher lands have a legal right to have the accustomed flow maintained, notwithstanding that the construction of the railway is authorised by law. The Railway Act does not authorise anything to be done by the company that will naturally impair its usefulness, but on the contrary recognizes the obligations of the lower land owners not to interfere with the watercourse. The Railway Act in force at the time of the construction of the railway is contained in ch. 37, R.S.C. 1906, sec. 154, requires the company to restore as nearly as possible to its former state any watercourse which it diverts or alters, or to put the same in such a state as not materially to impair the usefulness thereof, and sec. 250 requires that the company shall in constructing the railway make and maintain suit-

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able ditches and drains along each side of and across and under the railway to connect with ditches, 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.

If, in order to constitute a watercourse, it is necessary, as has been held in some cases, that there be a perennial living stream, flowing within defined cut banks for its whole length, or one or other of such conditions, then the course now in question is not a watercourse, but if it is sufficient that the accumulation of water from rains and snow flows in a regular course though depressions in the lands to an outlet, then I think the drainage course in question is a watercourse within the meaning of the law. The latter view is the one adopted in this Province for conditions similar to those in question in this action. The subject is so fully discussed by this Court in *Makowecki* v. *Yachimyc* (1917), 34 D.L.R. 130, 10 Alta. L.R. 366, and *Farnell* v. *Parks* (1917), 38 D.L.R. 17, 13 Alta. L.R. 7, that I think it unnecessary to discuss it further than to say that such conditions as here exist seem to me to emphasise the correctness of the latter view. If the former view prevailed, the result would be that an owner of the lower lands could, without incurring any liability, completely shut off the natural flow of the upper waters to the only outlet it has and render the lands unfit for cultivation, which would be a manifest injustice.

The drainage course thus being treated as a watercourse, the next question is whether or not its usefulness has been impaired by the construction of the railway. The only opening through the embankment provided for the discharge of the water coming from the whole area north of the railway is a 24 inch corrugated iron culvert, which Farncombe says is insufficient. There is no evidence that the railway company made any examination of the drainage area or any estimation of the quantity of water to be taken care of before determining the size of the culvert. No witness says it is sufficient in case of extraordinary rains. Mr. Adams says it is quite sufficient under ordinary circumstances for any flood, rain fall, and from the construction of the railway in 1915 until the year 1920 there is no evidence of any complaint, but it seems to me that does not satisfy the obligation upon the company, which is not only to provide an outlet for waters caused by light or moderate rainfalls but to provide such an outlet "as not materially to impair the usefulness thereof" (viz., the watercourse); sec. 154, and "so that the then natural, artificial or existing drainage of the said lands shall not be

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obstructed or impeded by the railway." Sec. 250. I think the watercourse is for water from heavy or extraordinary rains as well as lighter ones and it would appear it is then most needed. I think the company has failed in its duty in this repect, and was guilty of negligence in constructing the railway in such a way as to impair the usefulness of the watercourse. Such was treated as negligence by Robinson, C.J., in *Vanhorn* v. *Grand Trunk Railway* (1859), 18 U.C.Q.B. 356, at p. 360.

The next question raises considerable difficulty, viz., whether notwithstanding the insufficient outlet through the railway embankment the plaintiffs' damages are attributable to the extraordinary rainfall in 1920 and would have been sustained if the embankment had not been constructed.

I would think the burden of proving this was on the defendant. *Mackenzie* v. *Tp. of West Flamborough* (1899), 26 A.R. (Ont.) 198. Roblin was asked his opinion as to whether or not there would have been flooding even if the railway embankment had not been there at all and replied: "It is possible to imagine a rainfall sufficient to flood any such flat country regardless of any such artificial dump or anything being there."

Hall was more emphatic and stated: "There is not a question of doubt in my mind that the land would have been flooded had the railway not been there at all." Martin says that for over two weeks in June, 1920, the water was within 6 inches of the top of the railway grade, and it was a month before it got back to normal. He also says that in 1914 there was a heavy rainfall, he thought a little more than in 1920, and he had no difficulty that year. Townsend also referred to the wet season of 1914, and stated that there would have been practically no flooding of his land in 1920 but for the railway embankment. Hiscock said 1914 was a very wet season and he did not notice any difficulty. He was not asked particularly about his crops in 1920 but stated he had not had the experience of having his hay flooded, he had a good crop there every year.

If the flooding was general as contended by the defendant, one would expect that Hiscock's crops below the railway would have been injured and that witnesses from outside this drainage area would have been produced to prove damage to other crops in the neighbourhood. It may be as stated by Hall that the plaintiffs' lands would have been flooded in any event for a time, but he does not say that the water would have remained for the length of time it did. I do not thing the evidence is sufficient to discharge the onus upon the defendant to shew that the plaintiffs' damages were not attributable to the defendant's

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negligence. I think it quite probable that owing to the heavy rain the grain crop would have suffered to some extent, but the hay crop admittedly is not easily damaged by water and the loss to it probably arose largely from its being drowned by the water lying upon it for so long a period.

I think under all the circumstances a fair allowance for the damages for the years 1920 and 1921, being up to the trial caused by the flooding of 1920, is $425 for Martin and $350 for Townsend.

Their right to recover by action is, I think, clear. It is not suggested that any provision was made for compensation in the original construction. See *Arthur* v. *Grand Trunk R. Co.* (1894), 22 A.R. (Ont.) 29.

I do not think it a proper case for an injunction or permanent damages. A better remedy is provided by the Railway Act, which permits an application to the Board of Railway Commissioners for the construction of the necessary drainage works across the railway, having regard to all proper interests.

I would, therefore, allow the appeal with costs, set aside the judgment below, and direct judgment in favour of the plaintiffs for the amounts above stated with costs. The defendant to have no set off of costs and Rule 27 as to costs not to apply.

Appeal allowed.

VIPOND v. GALBRAITH.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher and McPhillips, JJ.A. March 10, 1922.

FRAUD AND DECEIT (§ VIII—35)—DIRECTORS AND OFFICERS OF COMPANY—SALARIED DIRECTOR OBTAINING JUDGMENT BY COLLUSION—REGISTRATION OF WOODMAN'S LIEN—INTENT TO DEFRAUD CREDITORS—REMEDIES.

The incorporators of a company three in number of whom respondent Galbraith was one, arranged matters so that they would each receive salaries of $5,000 a year, Galbraith being the secretary-treasurer and all being directors. Galbraith established a lien under the Woodmen's Lien Act R.S.B.C. 1911, ch. 243, and became a judgment creditor of the company. The Court held that the judgment against the company was obtained by collusion with the company with intent to defeat and delay its creditors and to give a preference to one of them over the others, and that such judgment was null and void, and should be set aside, and the lien cancelled and that the appellant was entitled to any other necessary consequential relief.

APPEAL by plaintiff from a judgment of Murphy, J. and a lien registered under the Woodman's Lien for Wages Act R.S. B.C. 1911 ch. 243, on the ground that they were obtained by fraud and collusion and for the purpose of defeating and delaying creditors.

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VIPOND v. GALBRAITH.

McPhillips, J.A.

E. C. Mayers, for appellant.

Frank Higgins, K.C., and *Galbraith*, for respondent.

MACDONALD, C.J.A.:—I would allow the appeal.

MARTIN, J.A., would allow the appeal.

GALLIHER, J.A.:—Although there is room for argument as to how far the Act as amended, up to the present, can be carried, I cannot bring myself to the view that a woodman's lien attaches in the circumstances of this case.

It seems contrary to the very history and purposes of the Act—I would allow the appeal.

McPHILLIPS, J.A.:—The appeal in my opinion should succeed—without entering into all the details—it is evident that the real incorporators of the company, three in number of whom the respondent Galbraith was one, entered into a venture so arranging matters that they would each receive salaries of $5,000 a year—they then being all the directors of the company—the appellant Galbraith being the secretary-treasurer—and now the respondent Galbraith is a judgment creditor of the company following upon the establishment of a lien under the Woodman's Lien for Wages Act, R.S.B.C. 1911, ch. 243.

The judgment and lien is attacked in this action upon the following grounds—(a) that the facts and circumstances surrounding the case did not admit of their being a lien established—that the appellant Galbraith did not come within the purview of the Act being the secretary-treasurer of the company with a fixed salary and that even apart from that did not establish, even if he did come within the purview of the Act, that he did work entitling a lien being declared; (b) that there was fraud in claiming and enforcing the lien as against creditors and that it was a preference and the obtaining of the judgment against the company known to be insolvent, was the obtaining of a judgment with intent to defeat and delay the creditors.

In my opinion, the facts fully support the submissions of the appellant upon this appeal and that the judgment and lien must be set aside—the lien of course falls if the judgment falls, being merged therein.

There can be no question upon the facts that the whole transaction was fraudulent from its inception, and the respondent Galbraith was privy to the fraud—the company facilitating the establishment of the lien and the obtaining of the judgment (see *Ex parte Reader—Re Wrigley* (1875), L.R. 20 Eq. 765, 44 L.J. (Bcy.) 139, Sir James Bacon, C.J., "a more suspicious case cannot well be imagined"). Now the present case is one that in all its ramifications, commencing with the incorporation

of the company, establishes the palpable intention to exhaust all its assets to the delay and hindrance of creditors if any should come upon the scene. When they did they only found a totally emasculated undertaking, if the judgment and lien are to be held to be effectively obtained. In this connection, it is only necessary to refer to the illegal resolution whereby each of the three parties who really constituted the company were to receive a salary of $5,000 and this at the commencement of things, (*Re George Newman & Co.*, [1895] 1 Ch. 674, at pp. 685, 686). The governing law in the various Acts at present extant with respect to insolvents is the equal distribution of the property and effects of insolvents and acts which are done with the object of preventing an equal distribution are fraudulent within the meaning of the statute law. Can it be successfully said upon the facts of the present case that the acts done were not done with the object of preventing an equal distribution of the property and effects of the company? It would certainly be an act of temerity to so contend, in my opinion, unquestionably it is well portrayed in the present case that all that which is challenged was done with the object of preventing an equal distribution of the property and effects of the insolvent company, (see *Young* v. *Waud* (1852), 8 Exch. 221, 22 L.J. (Ex.) 27), and it is not essential that there should be actual moral fraud but that which has been done is a fraud within the meaning of the statute law (*Allen* v. *Bonnett* (1870), L.R. 5 Ch. 577; *Re Wood* (1872), L.R. 7 Ch. 302; *Ex parte King* (1875), 2 Ch. D. 256 at p. 263, 45 L.J. (Bcy.) 109; *Ex parte Payne* (1879), 11 Ch. D. 539; *Re Jukes*, [1902] 2 K. B. 58, 71 L.J. (K.B.) 710; *Young* v. *Flecher* (1865), 3 H. & C. 732, 34 L.J. (Ex.) 154, 13 W.R. 722; *Re Slobodinsky*, [1903] 2 K.B. 517, 72 L.J. (K.B.) 883, 52 W.R. 156). It cannot be successfully contended that there is a valid lien here because it is supported by a judgment—(the judgment of course is invalid also in my opinion, as previously expressed upon the ground of fraud and collusion), I would refer to what Eldon, L.C., said in *Colclough* v. *Bolger* (1816), 4 Dow. App. Cas. 54, at p. 64, 3 E.R. 54:—"The sales ought not to be held valid though they have the colour of the protection of a decree of a Court of Equity."

That judgment was a collusive one—and there is really no difference between consenting and facilitating judgment—the facts amply support. The following language of Sir Richard Couch, who delivered the judgment of their Lordships of the Privy Council in *Edison General Electric Co.* v. *West & Van-*

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couver Tramway Co., [1897] A.C. 193, at p. 198, is much in point in the present case:—

"It is plain from the evidence that there was an agreement between the tramway company and the bank the effect of which was that the bank should have a judgment, and that their judgment should have priority to the appellants' judgment, the object being, as Mr. Ward said, that the bank should be in a position to protect the company, if possible, so as to carry it on. The case comes within the provision in the section. It has been argued for the respondents that the confession must be fraudulently given. The section does not use that word; but the giving a judgment by confession by a person in insolvent circumstances voluntarily or by collusion with a creditor with intent to defeat or delay his creditors, or to give a preference to one of them over the others, is treated by the statute as a fraudulent act. Their Lordships approve of the decision of the Court of Appeal for Ontario in *Martin* v. *McAlpine*, 8 A.R. (Ont.) 675. Their Lordships are of opinion that the statute makes the bank's judgment null and void as against the creditors of the tramway company. They will, therefore, humbly advise Her Majesty to reverse the decree and order of the Supreme Court on the trial and on the appeal, and to declare the judgment of the bank against the tramway company to be null and void, and to order the executions issued thereon and the certificates thereof registered as a charge against the lands of the company to be set aside and cancelled, with costs of the suit, including costs of the appeal to the Supreme Court, but with liberty for the appellants to apply to the Supreme Court for any consequential relief for the purpose of enforcing their judgment. The respondents, the Bank of British Columbia, must pay the costs of this appeal."

There was here the apparent intent in placing the lien and obtaining judgment of defeating the appellant in this appeal of the rightful fruits of a judgment to be recovered following the then pending action of the appellant, (*Penny* v. *Fulljames* (1920), 50 D.L.R. 553, 30 Man. L.R. 386), and the fraudulent intent of the directors will through them, be attributed to the company, and further it was the respondent Galbraith's intention to get a benefit for himself.

I cannot accede to the contention made at this Bar that the attacked judgment is a judgment *in rem* and must conclude all the world and absolutely establishes the lien, in my opinion, the present case is not within the principle as stated in Smith's Leading Cases, (1915) 12th ed. vol. 2, at p. 779:—

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"The universal effect of a judgment *in rem* depends it is submitted on this principle, viz.: that it is a solemn declaration proceeding from an accredited quarter concerning the *status* of the thing adjudicated upon; *which very declaration operates accordingly upon the status of the thing adjudicated upon* and *ipso facto* renders it such as it is thereby declared to be."

The judgment *in rem* is always "as to the *status* of the *res*.—what *res* have we here? at most all that we have is a lien followed by a judgment, it is not complicated by—a situation of a sale of timber held to be the subject of a woodman's lien—and some innocent purchaser on the scene—as to what would happen in such a case, I express no opinion, (see *Minna Craig Steamship Co.* v. *Chartered Mercantile Bank of India, London and China*, [1897] 1 Q.B.D. 460, 66 L.J. (Q.B.) 339, 45 W.R. 338).

That the action is well founded and the judgment challenged and its validity disproved—is dealt with by Lord Brougham in *Earl of Bandon* v. *Becher* (1835), 3 Cl. & Fin. Reports 479, at p. 510, 6 E.R. 1517:—"Where you appear as an actor, object to a decree made in another Court, upon which decree your adversary relies; and you may, either as actor or defender, object to the validity of that decree, provided it was pronounced through fraud, contrivance or covin of any description, or not in a real suit or if pronounced in a real and substantial suit, between parties who were really not in contest with each other."

In the present case, the action is properly brought to set aside the challenged judgment, and the evidence well entitles it to be declared that the judgment of the respondent Galbraith against the company, is null and void as against the creditors of the company being obtained by collusion with the company with intent to defeat and delay its creditors and to give a preference to one of them over the others, thereby doing that which is treated by the statute law as a fraudulent act. The executions issued and any certificate of judgment or lien should also be set aside and cancelled and all necessary consequential relief. It follows, that in my opinion, the appeal should be allowed.

Appeal allowed.

KERRIGAN v. HARRISON.

Supreme Court of Canada, Idington, Duff, Anglin, Brodeur and Mignault, JJ. October 11, 1921.

HIGHWAYS (§VC—264)—SALE OF LAND—COVENANT TO KEEP ROAD IN REPAIR—ROAD CEASING TO EXIST BY REASON OF ENCROACHMENT OF WATERS OF GREAT LAKE—ENFORCEABILITY OF COVENANT.

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Where the nature of the contract and the value of the lots sold preclude the possibility that it could have been within the contemplation of the parties that the vendor should expend large sums of money to protect the base of a road which the vendor agreed to keep in repair, and such road ceases to exist by reason of the encroachment of the waters of one of the Great Lakes, the covenant to maintain and repair such road is unenforceable.

Idington, J.

APPEAL from the decision of the Appellate Division of the Supreme Court of Ontario (1920), 54 D.L.R. 258, 47 O.L.R. 548, reversing the judgment at the trial (1919), 46 O.L.R. 227 in favour of the plaintiff (appellant). Affirmed.

A deed from the respondent to one Graham, of land bordering on Lake Erie contained the following clause:—

"Provided and it is further agreed by and between the party of the first part, her heirs and assigns, and the party of the second part, his heirs and assigns that the party of the second part shall have a right of way to his said lands over a certain road shewn upon said plan as Harrison Place, running north-easterly and south-westerly as shewn upon the said plan and the party of the first part agrees to maintain the said road and bridges thereon in as good condition as the same are now, and the party of the second part, his heirs and assigns, agree with the party of the first part, her heirs and assigns, to close the gates across the said roadway whenever he or they may have occasion to use said gates."

Said Graham conveyed to appellant the property, consisting of two lots, described in said deed except half of one lot.

The lake took by erosion all the road called Harrison Place and respondent laid out a new road in its place. Appellant, however, claimed that she was obliged to maintain the former road as it existed when the deed was given to Graham and brought an action to compel her to do so. The trial Judge gave judgment in her favour directing the respondent to restore the road to its original condition or to furnish a road and bridges in all respects as suitable. The Appellate Division reversed his judgment holding that by the erosion the title to the road had reverted to the Crown and performance of the covenant would be illegal.

Lafleur, K.C., and *Braden*, for appellant.

H. J. Scott, K.C., and *McEvoy* for respondent.

IDINGTON, J.:—The covenant upon which the appellant sued herein, given by respondent in a deed by which she granted to one Graham two town lots of land of which he afterwards assigned the smaller one to appellant, does not seem to me to be clearly one that runs with the land. It was a covenant to

maintain a road and bridges thereon (by which access could be had to the land so granted) in as good condition as same were at the time of the grant.

The proviso containing said covenant began by stating that it was agreed by and between the grantor, her heirs and assigns, and the grantee, his heirs and assigns, that the grantee should have a right of way over a certain road shewn on a plan, and ended by a covenant of the grantee binding him, his heirs and assigns to close the gates across said roadway.

From this it clearly was a private right of way and was of some considerable length and seems to have served a number of places before reaching the point of approach to the land conveyed.

Even if the covenant would run with the land so conveyed, I doubt, if, having regard to the surrounding circumstances as well as the language used, it could be held to do so in a sense that any assignee, as appellant is, of a small part only of the land granted should enjoy the benefit of same.

The law is to be found in *Spencer's* case, 5 Co. 16, and the notes thereto in vol. 1 of Smith's Leading Cases (12th ed.) p. 62.

The grantor can hardly have contemplated keeping up such a road for a colony and forever.

Then the road at the point in question seems rather remote from the land in question and it may only be one of the many collateral things that have been held not to be of the nature of that which must be the foundation for a covenant running with the land.

The points of objection resting upon the right of appellant to sue were taken here for the first time. And in deference to the argument so presented as well as curiosity I have considered the cases cited and much in *Spencer's* case, 5 Co. 16, and notes there cited above, without coming to any other definite conclusion than that, if there had been any doubt in my mind as to part of the ground upon which the judgment appealed from is rested in the Court below, I should have desired a re-argument of this phase of the case. The suggestion I make, as to the appellant not being the assignee of the whole, is my own and if resorted to needs an argument devoted thereto.

I have considered very fully the grounds taken in the argument in the Court below, and have come to the conclusion that the reasons assigned by the Chief Justice of the Exchequer Division presiding in the second Appellate Division of the

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Supreme Court of Ontario are, in the main, correct but that it is not necessary to go quite so far as to hold that the mere periodical covering of an eroded part by a few inches of lake water, inevitably leads to a reversion of that part of the land in question to the Crown.

But assuredly herein, if the pretensions set up by the appellant are correct, much more than operating on a small part to counteract that which seems inevitable would have to be done by the respondent, or should have been done by her, to protect, by works such as witnesses speak of, the base of the road in question. That would involve what is contemplated by the reasons of the Chief Justice which would be applicable in the sense of interfering with navigation or the right of the Dominion to assert dominion over the space involved.

I do not think we need go further than the observance of the rule as to what could be held to have been possibly within the contemplation of the parties as I suggested during the argument herein.

I find justification therefor in the judgment of Lord Kenyon, C.J., in the case, cited by counsel for respondent, of *The Company of Proprietors of the Brecknock and Abergaveny Canal Navigation* v. *Pritchard et al* (1796), 6 Term. Rep. 750, where in a somewhat similar covenant to that in question herein was involved.

In disposing of it he said at p. 752:—"This sort of loss must have been in the contemplation of all the parties in this case; the bridge was to be built in such a manner as to resist any body of water."

Such was the nature of the contract there in question.

Such is not the nature of the contract here in question.

The pretension that such a contract as involved herein (merely in respect of and for the sale of two village lots worth together $1,200), necessarily involves the possibilities of expending a fortune for discharging the obligation, is, to my mind, quite unthinkable.

If any one has pretended to say that such was involved in fact I beg leave to doubt, his recollection and would feel inclined to doubt that the statement had ever reached the mind of respondent.

Let us apply our common sense to such pretensions and there is an end of such stories.

In my view, it never was within the contemplation of either of the parties that in the event of that happening, which has happened, the respondent was bound by such a covenant as

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this to restore the road in question. If such a case had been presented to either as within the possibilities contemplated we never would have been troubled with this covenant or this case.

I rely, of course, on the cases cited and other reasons based thereon in said judgment of the Chief Justice, to which I have not specifically referred.

The appeal should be dismissed with costs.

DUFF, J.:—The proviso in the grant from the defendent to Graham upon which the decision of this appeal turns is in these words:—(See statement)

The right of way reserved is, therefore, a right of way on a defined road and it is that defined road which the defendant covenanted to maintain. The Appellate Division was, I think, entirely right in holding that the covenant did not contemplate the case of the destruction of the substratum of the road by the inroads of the lake. The case is within the broad principle upon which the rule in *Taylor* v. *Caldwell* (1863), 3 B. & S. 826, 122 E.R. 309, rests, if not embraced within the terms of the rule itself. The parties clearly contracted on the footing that the site of the road should continue to exist. I say they clearly did so because, having regard to all the circumstances, one cannot suppose that reasonable persons, having clearly in view the contingency which happened, would on the one hand have exacted or on the other hand agreed to enter into an unqualified covenant to protect the site of the road from the invasion of the lake.

The appeal should be dismissed with costs.

ANGLIN, J.:—Two questions arise in this case—one as to the construction of the grant by the defendant to the plaintiff's assignor of a right of way over a certain road shewn . . . as Harrison Place and her covenant to maintain the said road and bridges thereon in as good a condition as the same are now, and the other as to the plaintiff's right to claim the benefit of this covenant. In the view I take of the first question it will be unnecessary to deal with the second.

The trial Judge, (Falconbridge, C.J.) held the plaintiff entitled to recover and ordered the defendant to furnish, construct and maintain over her lands a road and bridges as suitable, sufficient and convenient for the plaintiff as the road known as Harrison Place was at the date of the defendant's conveyance to the plaintiff's assignor. Damages were also awarded for breach of the covenant, (1919), 46 O.L.R. 227.

The Appellate Divisional Court reversed this judgment, holding that the erosion of the site of Harrison Place by encroachment of the waters of Lake Erie had relieved the defendant

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from all liability under her covenant, (1920), 54 D.L.R. 258, 47 O.L.R. 548. The fact of the erosion is common ground.

With very great respect, I fail to find anything in the agreement for the right of way or in the covenant to maintain it which would entitle the plaintiff or her assignor, were he suing, to such a substituted right of way as the judgment of the lamented Chief Justice of the King's Bench awarded. The grant is of a right of way over Harrison Place; the covenant is to maintain said road and bridges thereon.

Harrison Place having ceased to exist without any default of the defendant, I agree in the view of the Judges of the Appellate Divisional Court that her obligation under the covenant sued upon thereupon lapsed. I cannot usefully add anything to the reasons for this conclusion stated by the Chief Justice of the Exchequer Division.

The question is purely one of construction of the terms of the covenant, which must, of course, be read in the light of the circumstances under which it was made. But I do not find either in the language of agreement and covenant *per se* or in the circumstances under which they were entered into, as disclosed by the evidence, anything that warrant imposing upon the defendant an obligation—almost certainly impossible of performance—to protect the road in question against invasion by the waters of Lake Erie. That cannot reasonably be supposed to have been within the contemplation of the parties.

The case in my opinion falls within the principle of the line of authorities of which *Taylor* v. *Caldwell*, 3 B. & S. 826, 122 E.R. 309, is the best known and *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.*, [1916] 2 A.C. 397, 85 L.J. (K.B.) 1389, is a modern instance, rather than within that of *Paradine* v. *Jane* (1682), Aleyn 27, 82 E.R. 897, and *Atkinson* v. *Ritchie* (1809), 10 East 530, 103 E.R. 877, relied on by the late Chief Justice of the King's Bench. The law seems to be well stated in paras. 717 and 718 of vol. 13 of Corpus Juris, which the Chief Justice cited but thought not applicable. The case at Bar I think falls within the exception noted in para. 713 rather than under the general rule stated in the passage from para. 711 quoted by the Chief Justice. The language of Hannen, J. in *Baily* v. *De Crespigny* (1868), L.R. 4 Q.B. 180, at p. 185, 38 L.J. (Q.B.) 98, 17 W.R. 494, appears to be in point.

BRODEUR, J.:—The obligation incurred by the respondent under her contract with the appellant's auteurs was to maintain a certain road therein described. This road having been destroyed by the act of God, her obligation is at an end.

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The parties contracted on the basis of the continued existence of the road, its subsequent perishing excuses the performance (Corpus Juris, vol. 13, p. 642, sec. 717). There is an implied condition that the impossibility of performing the obligation puts an end to the obligation of keeping the road in repair. The word "maintain" could not cover the obligation of re-establishing the road if it were washed away by the action of the waves. It means to keep in repair the road in question. It could not be construed in the circumstances as an obligation of reconstructing works which by their high cost could never have been contemplated by the parties.

This contract should be read as containing an implied condition that the respondent should be excused if the breach became impossible from the perishing of the thing without default of the contractor. *Taylor* v. *Caldwell*, 3 B. & S. 826, 122 E.R. 309; *Appleby* v. *Myers* (1867), L.R. 2 C.P. 651, 36 L.J. (C.P.) 331.

No reasonable suggestion can be offered that the destruction of the road was due to the negligence or the fault of Harrison.

The appeal fails and should be dismissed with costs.

MIGNAULT, J.—I concur with my brother Anglin.

Appeal dismissed.

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Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin, Brodeur and Mignault, JJ. March 29, 1922.

CONTRACTS (§VC—402)—SALE OF LAND—SECRET PROFIT ON SALE—RESCISSION ON ACCOUNT OF FRAUD—PROPERTY SUB-DIVIDED AND SUBSTANTIAL INTEREST GIVEN TO GOVERNMENT—MORTGAGE FOR PURCHASE PRICE — FORECLOSURE — RIGHTS AND LIABILITIES OF PARTIES.

In an action for foreclosure of a mortgage given for the balance of the purchase price of land, purchased by a syndicate and afterwards turned over to a joint stock company which subsequently divided the lands into townsite blocks, the Court held that the collusion of the plaintiff with one of the members of the syndicate whereby such member was enabled to obtain a secret profit of $25 per acre was sufficient ground on which to grant rescission of the contract, and the fact that the vendor had parted with the land and the vendee had changed its character by sub-dividing it into town lots, and as a consequence had given the Government of British Columbia an interest in it did not preclude a judgment for conditional rescission. The burden of procuring cancellation of the plan of sub-division and reconveyance of the lots transferred to the provincial government should rest on the defendants, the plaintiff being required to deposit with the Registrar of the Supreme Court his consent as mortgagee to such cancellation and reconveyance duly verified.

[*Greenizen* v. *Twigg* (1921), 62 D.L.R. 572, reversed.]

APPEAL from a judgment of the British Columbia Court of Appeal, ordering foreclosure of a mortgage, and directing that

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certain moneys obtained fraudulently should be set off against the mortgage moneys. Reversed, rescission of the sale of the land for which the mortgage was given ordered for fraud.

Eugene Lafleur, K.C., and *G. Barclay*, for appellants.

DAVIES, C.J.:—At the close of the argument in this appeal I was of the opinion that the appeal should be dismissed and the judgment of the Appeal Court of British Columbia af firmed for the reasons stated by Macdonald, C.J.

After, however, reading carefully the evidence and the factums and after consultation with my colleagues, I came to the conclusion that rescission and reconveyance of the lands in question might possibly be had and, therefore, the appeal should be allowed and the judgment of the trial Judge restored with modifications. If rescission and reconveyance take place, then appellant should have costs in this Court and the Court of Appeal. But, in the event of rescission and reconveyance being found impossible, the judgment of the Court of Appeal should stand and the defendants should pay plaintiffs' costs of appeal to this Court.

My brother Anglin has stated fully the reasons for our judgment, in which reasons I concur.

IDINGTON, J. (dissenting):—This appeal arises out of a sale of lot 833 group 1 Cariboo District, B. C., containing 590 acres, by the respondent Greenizen, a barrister at law practising at Petrolea, Ontario, pursuant to an option given by him to a firm of surveyors doing business under the name of Gore & McGregor in Victoria, B. C.; and the mortgage and guarantee of payment thereof given to secure balance of the price and sued upon herein.

The negotiations were all carried on by correspondence until the completion of the transaction in Petrolea, when one Down, the secretary of said firm, was sent with definite instructions to complete the transaction on the basis of a price of $75 an acre payable in terms somewhat different from those respondent had specified.

That led to some further correspondence for the respondent realized that the extended term for payment needed security for the payment of the mortgage proposed to be given by appellant who was an entire stranger to him.

The result was a deed to appellant which is not produced and a mortgage back to respondent for three-fourths of the purchase money to be guaranteed by the members of the syndicate represented as the purchasers of shares in the venture.

In the correspondence, beginning in July, 1912, which led up to this deal in October or November following, there had

been many and varying suggestions made on the part of McGregor of the firm of Gore & McGregor, or the firm, to the respondent, or by him to either of them, which were not acted upon until that which formed the actual basis of what is now in question.

It was made quite clear at the outset that the respondent would not venture upon or join in the scheme of a town site subdivision, but was willing to sell at $50 an acre, plus $10 an acre, to McGregor as his commission.

That very common-place mode of dealing may have suggested the alternatives that ensued, but it was not acted upon. What seems to have been acted upon was an option claimed in the following terms:—

"Gore & McGregor
Land Surveyors and Civil Engineers
Victoria, B.C. Sept. 16, 1912.

I. Greenizen, Esq.,
Petrolea, Can.

Dear Sir:—Your letters of the 7th and 9th inst. received with many thanks, and in reply beg to state that I am now working on the proposition and unless I receive a wire to the contrary am taking a 30-day option on section 833 from to-day's date at the price of $60 per acre, less $10 commission to me, which I would be much obliged if you would confirm as soon as convenient.

Thanking you for past favours, I remain,
(Signed) J. Herrick McGregor, per E. J. Down."

That seems from the Gore & McGregor headline to have been written on the firm's office paper and to have been evoked by the immediately preceding correspondence which had taken place and seems to have been assented to, but the formation of a syndicate to carry it out was entirely in origin and creation the conception of the firm and Twigg.

That is followed by the following telegram announcing the formation of a syndicate and terms it demanded:—

"Victoria, B.C., Oct. 3rd, 1912.

Mr. I. Greenizen, Petrolea, Ont.

Syndicate formed ready to take your section at price arranged one quarter cash terms must be extended and certainty of station to be assured wire approval immediately and we will visit you and arrange details unless you are coming this way.

Gore & McGregor."

And in turn by the two following night lettergrams:—

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"Petrolea, Ont., Oct. 3rd, 1912.

Gore & McGregor, Chancery Chambers, Victoria, B.C.

Telegram of yesterday received. Sent you on 30th ult. letter from railway company and blue print shewing railway siding and proposed station site. I will either carry through arrangement with railway company for you or you can do so yourselves. Impossible for me to go west. I can meet you here at any time within ten days. Do not understand what you mean about extending terms.

I. Greenizen."

"Petrolea, Ont., Oct. 5th

Gore & McGregor, Chancery Chambers, Victoria.

Cannot accept new terms proposed unless I have deferred payments secured or thoroughly responsible party on agreement prefer to carry out agreement according to my terms first proposed. I. Greenizen."

There would seem to have been some difficulty in getting some of the members of the syndicate so formed to stay with it and possibly all the more so when required to sign the guarantee insisted upon by respondent.

The foregoing is all there is, however, as any basis for the charge of collusive fraud by the respondent and McGregor as pleaded by each of the appellants herein in the respective 12th and 13th paragraphs of each defence in question herein.

The said 12th paragraph is as follows:—

"12. The said J. H. McGregor, to the knowledge of the plaintiff, did not disclose to the other members of the partnership his relations with the plaintiff nor the fact that the plaintiff was willing to sell the said lot for $50 an acre."

The 13th paragraph is as follows:—

"13. The said J. H. McGregor, in fraudulent collusion with the plaintiff, verbally pretended to the other members of the said partnership that the plaintiff would not sell the said lot to the partnership for less than the sum of $75 an acre, amounting in all to the sum of $44,250, whereas, in truth and in fact, the said J. H. McGregor had verbally agreed with the plaintiff at the same time that if the said J. H. McGregor could induce the other members of the partnership to assent to the purchase of the said lot from the plaintiff at the price of $75 an acre, or $44,250 in all, then the said J. H. McGregor was to receive the sum of $25 an acre, or $14,750 being one-third of the said price, as his reward for his share in the fraud."

Though I have read the entire evidence in the case I have been unable to find any such evidence of fraud so pleaded as

to found in law a judgment of rescission of the contract, and hence cannot agree either with the trial Judge's judgment or the judgments of the Chief Justice and Galliher, J.A., in the Court of Appeal, (1921) 62 D.L.R. 572.

Assuming for argument's sake despite my said conclusion, just expressed, before dealing, as I will, at length with such and other aspects of the case, I may say I agree with the unanimous opinion of the Judges of the Court of Appeal that under the circumstances which have developed it is absolutely impossible in my view of the law, to grant rescission of the contract.

The land in question when agreed to be sold was part of the wilderness.

It was made a part of the terms of the contract that the respondent should sell to the Grand Trunk Pacific Railway Co. 50 acres, or more, thereof, and that was carried out. How can that be restored?

The remainder of the property was subdivided in such small lots as to entitle the Government of British Columbia under one of its statutes to receive a conveyance (which was carried out by appellant Twigg and his company) of one-fourth of said lots. How can that be restored?

The pretence that the plan can be cancelled and all incidental thereto obliterated seems to me an idle fancy.

It is not pretended that there is any statutory enactment enabling the Government to forego its rights to the land it has so acquired in the public interest and obliterate all means of access to the Grand Trunk Pacific Railway Co's station, for example, or in many other obvious ways interfere with many possible rights acquired by the public. Eight years or more have elapsed since that situation was created by appellant Twigg and his associates.

Again this land was conveyed by appellant Twigg to an incorporated company of which he was the promoter.

There has arisen as the result of dealings consequent thereunder a variety of situations which render it impossible for the Court properly to attempt to deal therewith for the mere purposes of rescission.

There are people who are entitled to be shareholders therein not yet before the Court. And from the appellant Twigg's evidence alone, there is a situation for which he seems largely responsible that in the absence of said company and others from this record would alone render it improper to grant the rescission he prays for.

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Some of the guarantors, like sensible men, have settled with respondent and are all the complications involved in all that to be re-litigated and the results to be tried out again? They cannot be resolved herein on this record. They are not parties to this record. Rescission has been refused in numerous cases of actual fraud for far less grounds than appear in the foregoing or indeed any one of the foregoing grounds that stand as a barrier.

I need not review the cases which are to be found in such text books as Fry on Specific Performance or Kerr on Fraud and Mistake.

I need say no more than that the appellants have not, nor has either one of them, been able to cite a case presenting anything like such features as this one, wherein rescission has been granted.

The rule that unless the parties can be restored to their original position has only been departed from in regard to incidental changes for which due compensation can be made as in the case of *Lindsay Petroleum Co.* v. *Hurd* (1874), L.R. 5 P.C. 221, cited by the appellant wherein the merely sinking of a well and use of some of the oil got thereby was to be compensated for.

That is typical of all the cases I think in which such relief is given. That, by the way, was a case of actual fraud, for one of the parties owning gave a conditional promise to sell all the land for $13,750, when in fact the price was $10,000. And this was done for the purpose of shewing it to any person liable to be caught thereby and it was shewn so effectively as to induce the purchasers to act thereon. The other owner in that case gave a letter of recommendation to be shewn such people and concealing the fact of his ownership of a part of that sold.

In the case of *Wilde* v. *Gibson* (1848), 1 H.L.C. 605, at pp. 632-3, 9 E.R. 897, Lord Campbell expressed the law relative to right of rescission, as follows:—

"In the Court below the distinction between a bill for carrying into execution an executory contract, and a bill to set aside a *conveyance that has been executed,* has not been very distinctly borne in mind.

With regard to the first: If there be, in any way whatever, misrepresentation or concealment, which is material to the purchaser, a court of equity will not compel him to complete the purchase; but where the *conveyance has been executed,* I apprehend, my Lords, that a court of equity will set aside the conveyance only on the ground of *actual fraud.* And there would be no safety for the transactions of mankind, if, upon

the discovery being made at any distance of time of a material fact not disclosed to the purchaser, of which the vendor had merely constructive notice, a conveyance which had been executed could be set aside."

This case in hand is more like unto the case of *Kelly* v. *Enderton* (1912), 5 D.L.R. 613, 22 Man. L.R. 277, affirmed in the Privy Council, 9 D.L.R. 472, [1913] A.C. 191.

The option feature there in question is also as set forth above, a prominent feature of this case.

The only difference in that regard is that there the sale was effected at the price named, whereas here the party or parties holding the option saw fit to raise the price but there is not a tittle of evidence to shew any collusion of the respondent with the optionee or optionees in that regard unless and until the closing of the transaction, with which I will presently deal.

There are many surmises possible as to how and why this came about, amongst which are the facts that the firm of Gore & McGregor, as such, at a stage testified to by Templeton, a junior member of the firm, later on than the giving of the option, that the firm could not agree to act on the option but left it to McGregor if he saw fit to carry on and act thereon.

He then seems to have turned to the appellant Twigg who seems to be chief promoter of this litigation and he never took the slightest precaution to ask and find out for himself whether or not a less price than he swears to was presented to him.

Indeed, I doubt if he ever presented such a question to McGregor, and he certainly did not to the respondent.

McGregor fell as a soldier in the late war having enlisted at the outset and got killed in 1915.

I should require much more evidence than appellant Twigg gives on this point of McGregor's representations of the actual facts, especially when the dead man whose honour is aspersed cannot give his version.

He speaks in very general terms and seems to rely more on the fact that no other terms were named than those presented by McGregor.

If McGregor was possessed of an option and saw fit to present the proposition as one of his own, as quite probably he did, upon which he rested the consideration as that which he was entertaining and offering, he was quite within his rights unless and until he said or in some way indicated that the consideration he was asking was the lowest price he had been offered or could acquire the property at.

We have nothing accurately sworn to on these lines. Nor have we anything to prove that either McGregor or his firm

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ever pretended to act otherwise than would be perfectly proper for a man possessed of an option as was held in *Kelly* v. *Enderton*, cited above.

If we turn for the present from Twigg to the evidence of others, we find that Head, Holland and Landry, all strangers to respondent, who each became a member of the syndicate and was examined as a witness, took no proper care to know anything of the property, the price or the value thereof, and cannot complain herein, at this late date, if regard is to be had to the law as laid down, for example, in the case of *Rolfe* v. *Gregory* (1865), 4 DeG. J. & S. 567 at p. 579, 46 E.R. 1042, by Lord Westbury in the passage quoted in appellants' factum, where he limits the right to complain by the express condition that it must be in ignorance of the fraud "without any fault of his own."

Two of these men are not complaining for they settled with respondent. Landry, however, is complaining and his evidence discloses that he never was approached by McGregor but only took a gambling chance as it were when his own brother, a member of the firm of Gore & McGregor, brought the matter under his notice.

In short Twigg, who is the man making all this trouble and was the man who ought to have known from the very beginning, or on several other occasions, what he now complains of. He began communications with respondent before the syndicate was completed.

Down, the secretary of Gore & McGregor, was sent to Petrolea to close the sale with respondent. Then, for the first time, respondent became aware of the basis in way of price under which the syndicate was being formed, and that McGregor was put down as having the right to claim one-third thereof.

Inasmuch as under the original option given, $10 an acre was to be allowed the Gore & McGregor firm, and the chief inducement to that firm was to gain money by the surveying to be done, there was nothing to surprise anyone in the new terms if their services and expenses were to be given without any further charges.

These items clearly would reach the sum of at least $12,000, and if they had to wait for years as they might have done, the margin does not seem so gross, especially when McGregor was taking half of the whole and running the risks implied therein, as to cause a Petrolea lawyer engaged in wild land speculations in British Columbia, to conclude from that price basis alone that a fraud was being perpetrated on anyone.

However he took the double precaution of directing his own

Petrolea bankers to inform the bankers in Victoria in sending them the title deeds and deed he gave, how the money realised by the draft for the cash payment of $11,062.50 was to be disposed of, as follows:—

"Accompanying these papers is my draft upon Mr. Twigg for $11,062.50. Upon payment of this draft, the execution by Mr. Twigg of the mortgage enclosed in proper form so that it can be registered, and the execution of the guarantee enclosed by the parties thereto, you will kindly deliver up to Mr. Twigg all the enclosed papers except the mortgage and the guarantee which are to be returned to me.

Out of the moneys received from my draft upon Mr. Twigg $1,475 is to be paid to Messrs. Gore & McGregor, of Victoria, $2,212.50 is to be paid to Mr. R. Irving, Slocan Star Mines, Bower Building, Vancouver, and the balance $7,375 is to be transmitted to me here free of exchange," and by directing Down to write on same day also the following letter:—

"I. Greenizen, Petrolea, Canada, Nov. 6th, 1912.

J. Taylor, Esq., Manager Royal Bank of Canada, Victoria, B.C.

Dear Mr. Taylor:—Referring to my conversation with you prior to my going East, I beg to inform you that Mr. Greenizen here with whom I have been doing business will be sending to your bank at Victoria papers and documents relating to the purchase of some lands in Cariboo District by a Victoria Syndicate for whom H. D. Twigg, Barrister, of Sayward Block, is acting.

Mr. Greenizen is sending instructions with the papers and draft regarding the proportionate amounts which Messrs. Gore & McGregor, Mr. R. Irving, of the Slocan Star Mines, Bower Building, Vancouver, and himself, are to receive. The amounts are as follows: Mr. Greenizen $7,375, R. Irving, $2,212.50, and Messrs. Gore & McGregor, $1,475.

The amount that Mr. Greenizen will receive back is therefore $7,375. The $1,475 due to my firm you can place to their credit, and you will kindly place Mr. Irving's share according to his own request which he will inform you.

Thanking you in anticipation of your attention to this, and hoping to see you soon in Victoria, I beg to remain,

Ernest J. Down."

And writing Twigg, the appellant, next day the following:

"Petrolia, Ont., Nov. 7th, 1912.

H. Despard Twigg, Esq., Victoria, B. C.

Re Lot 833, Group 1, Cariboo.

Dear Sir:—Out of the moneys payable to me under your

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mortgage to me bearing date November 1st, 1912, there is payable to Messrs. Gore & McGregor, of Victoria, Six thousand six hundred and thirty-seven and 50/100 dollars ($6,637.50). This amount you are hereby authorised to pay to them, together with the interest thereon as provided in my mortgage, as follows: One-half out of the moneys payable November 1st, 1913, and the balance out of the moneys payable November 1st, 1914. Provided that if the mortgage is paid in full before its due date, this full amount is to be paid to Messrs. Gore & McGregor at that time.

I. Greenizen."

And on same date he wrote a letter to Gore & McGregor in almost identical terms with the last to Twigg—to which I shall presently refer further for it came to Twigg's actual notice in May, 1914.

None of these letters were marked private.

It would be simply impossible for anyone of intelligence to misunderstand this distribution of the money price in question, after reading them, or any of them.

I would infer that those written the bankers were intended to be shewn Twigg along with the title deeds and other papers if he so desired and if he failed to do so that was fault on his part.

Unfortunately he was not asked as to them, or evidence adduced from the Victoria banker as to what transpired.

All I am concerned with, however, is as to the bearing of such letters, and the writing thereof, by respondent or by his directions, upon the charge of fraud made herein against the respondent.

I submit it is impossible to suppose that the man who made thus clear and open the fact of the division of the price of $75 an acre, could ever have supposed he was committing such a fraud as charged, or ever have imagined that there was anything to conceal.

The misfortune happened, however, that the letter to Twigg was entrusted to Down to deliver to him, and, for some reason or other, he failed to deliver it.

Though a witness he was not asked why.

The transaction was not closed for 3 months after the writing and transmission of these letters.

It turned out that of the alleged members of the buying syndicate two withdrew and others had to be substituted which took time.

Meantime the syndicate, asked, in absolute terms, respondent to arrange with the Grand Trunk Pacific Railway Co. the con-

veyance to it of what land it would acquire if fixing a station on said land; and it was ultimately agreed that despite the terms previously mentioned by the railway company the price per acre named in the arrangement with the syndicate was to apply to the entire arrangement with them, though for their benefit the 50 acres asked by the railway company to secure a station was to be conveyed to it.

A copy of the agreement by respondent with said company, dated December 11, 1912, was sent appellant Twigg by respondent on that date.

It appears from the correspondence about that time that the cash payment, though alleged by Twigg to be ready, was not paid into the bank and respondent's complaint of this led to an agreement between respondent and appellant Twigg, dated February 3, 1913, of which the essential parts are the following:—

"Whereas the said Twigg, representing himself and others, in or about the month of November last, purchased from the said Greenizen lot number eight hundred and thirty-three (833), group 1, in the District of Cariboo, British Columbia, save and except certain portions of said lot conveyed to the Grank Trunk Pacific Railway Co. for railway purposes.

And whereas there was an agreement by the said Greenizen to procure from the said railway company the execution of an agreement, a copy of which is hereto annexed.

And whereas the said agreement has been approved and accepted by the railway company and is awaiting the signatures of the proper officers of the said company.

And whereas the said Twigg has paid into the Royal Bank in the City of Vancouver, seven thousand three hundred and seventy-five dollars ($7,375.), the initial payment on account of the said land; and it was agreed that the said money should remain in said bank until the delivery of the agreement above referred to properly executed by the said company.

And whereas the said Greenizen has applied for the release of said money, and the said Twigg has consented thereto on the terms hereinafter set out.

Now therefore the said Greenizen agrees that if the said sum of $7,375, together with any accumulated interest thereon, if paid to him, that he will, in the event of the said railway company failing to execute said agreement, refund the said money, together with interest allowed by banks on savings deposits; and to secure the refund of said moneys the said Greenizen charges the said lands therewith and also charges therewith that

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certain mortgage made and executed by the said company upon the said lands to secure the payment of the purchase moneys."

That agreement was delivered to Twigg to induce him to release the cash payment of $11,062.50 that had been deposited by him on getting the deeds, but held up by the bank on his orders pending conclusion of matters with the railway company. And in the event of that falling through, it was intended, as the correspondence shews, that he, Greenizen, should refund what was paid him. Of course Greenizen properly interpreted that correspondence not as covering anything but what was paid him personally as his share but not to include what Gore & McGregor should get out of the deposit. He assumed that in light of the previous correspondence Twigg, and those he represented, fully understood the matter as he did.

How any lawyer could pretent that this express limitation of Greenizen's liability to refund in such events as contemplated, only the exact two-thirds of the entire deposit to be released on faith thereof, and yet not inquire why such limitation made, or get satisfaction relative to the balance and as to who was to repay him, Twigg, a trustee, such balance, passes my comprehension.

I cannot accept such pretences as he puts forward in way of explanation or excuse for so acting, and yet pretend that he had no notice of or reason to believe that Gore & McGregor had an interest in the other third of the sum he was releasing.

I fear his memory has failed him or to serve him over such a term of years.

It was his manifest duty to those he had induced to give him that money to have got proper explanations for their protection, or better still, security for its return.

The banker he was directing to release the money, could and no doubt would have explained to him if asked who was getting the balance.

I do not think an appellant in possession of such notice is entitled to come into Court and claim rescission of such an agreement as in question on the grounds put forth or any other relief as against respondent after thus being put upon enquiry and failing to pursue the inquiry.

It refutes every possible ground for him pretending fraud on the part of respondent Greenizen who certainly would never have tendered any such document to Twigg, the lawyer and trustee for others, if he, Greenizen, had in the slightest degree given any ground for suspecting his integrity in any aspect of the transaction in question.

And the story of what happened in May, 1914, is, when appellant Twigg's conduct in relation thereto is considered, even stronger, though after the transaction was fully executed.

It is this, that Greenizen was then pressing for payment of the mortgage given by Mr. Twigg, and now in question and amongst other members of the syndicate whom Twigg called upon McGregor for his contribution, and was met by the letter of Gore & McGregor, as follows:—

"Victoria, B. C., May 21st, 1914.

H. D. Twigg, Esq., Victoria, B. C.

Nechaco Estate

Dear Sir:—We enclose herewith our cheque for $600, on account of call on the above syndicate.

In accordance with an order on you for the payment of some $6,637.50 signed by Mr. Greenizen, dated Nov. 7, 1913, we wish to apportion $2,000 of the present call of $4,000 against same, which we are sure will be satisfactory to Mr. Greenizen.

The amount of the enclosed cheque you will, therefore, return to us when you have collected the other monies as this is an advance out of the $2,000 we are desirous of retaining, which as you know is the total amount due by our sydicate members.

Gore & McGregor, Ltd., per Ernest J. Down."

That order so referred to is as follows:—

"Petrolea, Ont., Nov. 7th, 1912.

Messrs. Gore & McGregor, Victoria, B. C.

Re Lot 833, Group 1, Cariboo.

Dear Sirs:—Out of the moneys payable to me under mortgage bearing date November 1, 1912, from H. Despard Twigg, I agree to pay you the sum of four thousand, four hundred and twenty-five dollars ($4,425), together with interest at 6½% as follows: one half of said sum on November 1, 1913, and the balance on November 1, 1914. Provided that if the mortgage is paid in full before its due date this full amount, together with interest down to that time, will be paid you in full. This agreement, of course, is conditional upon my receiving payment of the mortgage as it is only out of the moneys paid under the mortgage that you are to receive the above mentioned amount.

I Greenizen."

It is the counterpart of the letter written Twigg in fact in 1912, quoted above, and dated Nov. 7, 1912 (though in error referred to as of that date in 1913).

Twigg was thus presented with the exact facts expressed to him in letter of same date quoted above.

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He pretends that the letter given Down to hand him (and which he pretends was never delivered) aroused his suspicions when shewn to him 2 months before the trial but he does not seem to have been so excited by the perusal of substantially the same information thus communicated in May, 1914, for he acquiesced in its suggestions.

Let anyone compare the contents of these two letters, the one to him above quoted and that just now quoted to Gore & McGregor, and it will puzzle him so doing, to reconcile Twigg's attitude to the one seen in 1914 with that pretended in 1920, on seeing the other.

The vision he had in 1914 of large profits had 6½ years later faded and been replaced by the sight of a loss, but that hardly justifies his changing his attitude.

In truth I have no doubt Gore & McGregor, or the latter, satisfied him fully as to the nature of the transaction else he never would have formally acted upon the suggestions made in this letter.

In conclusion, all the foregoing circumstances with which I have dealt so fully, convince me not only that appellant Twigg has no right to rescission but also that he never had, as against respondent, any right to complain or be relieved of any part of his obligation under the mortgage sued upon.

Much of what I have written is also an answer to the appeal of Landry.

The pretence that there is evidence of deceit upon which an action might lie against respondent, seems quite unfounded so long as the law stands as laid down in *Peek* v. *Derry* (1887), 37 Ch. D. 541, 57 L.J. (Ch.) 347, 36 W.R. 899.

The same might be said, I think, of McGregor for aught that appears in the evidence, but the widow, as administratrix of his estate appeals, claiming the same thing as Twigg. How she, as such, can so claim to succeed in her appeal based thereon, I cannot see.

The respondent, however, has cross-appealed solely for the purpose of obtaining relief from any claim that may be made by the firm of Gore & McGregor, or the corporate company of that name, or possibly the administratrix of the McGregor estate.

The respondent by the judgment appealed from got thereby the balance of the mortgage when reduced to the basis of $50 an acre, being all he ever claimed, yet if the firm of Gore & McGregor have, in fact, a claim well-founded to the balance of the third of the price, by reason of the option given being

in fact theirs, notwithstanding what Templeton said in evidence as to their giving it to McGregor, the respondent is entitled to be protected.

The correspondence is in conflict with Templeton's evidence for it was carried on in the name of the firm, for the greater part, the exceptions thereto probably being a short way of doing it.

The undertaking letter above quoted seems to recognize the firm as the proper party. But, possibly, the whole has passed to the corporate firm.

Neither being before us on this record we can only give relief by way of restoring the mortgage to the original effect thereof, which is in law the logical result of my findings of fact.

That, however, is not, I gather from the correspondence that took place in 1916, exactly what the firm desired.

It would be better if the parties concerned in this aspect of the case should get together and limit the restoration to such sum beyond the $50 an acre basis as they agree upon.

I think the several appeals by Twigg, Landry and Mrs. McGregor should be dismissed with costs and the cross-appeal be allowed with costs on the terms and in the way I have indicated above.

DUFF, J.:—There are circumstances disclosed by the evidence which combine to create an intractible doubt in my mind whether if I had tried the action I should, upon the questions of fact involved have reached the conclusions upon which the judgments below proceeded. It is quite impossible to say, however, that there is not a substantial body of facts which can be arrayed in support of those conclusions; and such being the case and there being nothing to indicate any departure from principle in the inferences drawn or in the application of the law to the facts we could not, without disregard of the settled rules upon which this Court proceeds in such cases decline to govern ourselves by those conclusions.

In effect, it has been held by the Courts below that the appellant assisted a gentleman who was forming a syndicate to purchase certain lands from the appellants in misleading his co-adventurers as to the price he was paying for the lands. There can be no manner of doubt that the persons misled were entitled, had they discovered the breach of duty by their co-adventurer immediately after the conclusion of the sale, to demand a judicial nullification of the transaction including, of course, the return of the moneys paid. But the lands have

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since been dealt with and the question arises whether the restoration of the *status quo* is reasonably practicable. In the circumstances, I think the respondents should have an opportunity to procure the cancellation of the townsite plan, the transfer of the interest vested in the government and the transfer of the land from the townsite company; and if that be done I can see no reason for doubting that a rescission of the sale followed by a return of the property to the appellant (with such compensation if any as may be just in view of changes in the title or the physical condition of the property) is a remedy "practically just" within the meaning of that phrase as used by Lord Blackburn in *Erlanger's* case (1878), 3 App. Cas. 1218, and in *Lindsay Petroleum Co.* v. *Hurd, supra.*

In the former case at pp. 1278 and 1279 that Judge said:—

"It is, I think, clear on principles of general justice that as a condition to a rescission there must be a *restitutio in integrum.* The parties must be put in *statu quo* . . . . I think the practice has always been for a court of equity to give this relief whenever by the exercise of its powers it can do what is practically just though it cannot restore the parties precisely to the state they were before the contract."

And again in the second of the above mentioned cases it was laid down by the Judicial Committee at p. 240 who say that from the nature of the inquiry it must always be a question of more or less depending on . . . . the degree of change which has occurred whether the balance of justice or injustice is in favour of granting the remedy or withholding it.

In the *Lindsay Petroleum Co's* case, there being some doubt as to the power of the appellants to make restitution the order made by the Judicial Committee was a conditional one, that is to say rescission and repayment were to go into effect upon restitution being made; if restitution should prove feasible to the satisfaction of the Ontario Court of Chancery; in that case the defendants were to repay to the plaintiffs the moneys sued for but otherwise the plaintiff's bill was to be dismissed with costs.

This precedent points the way to practical justice in the appeal before us. If restitution is not practicable then the appeal should be dismissed with costs; for in that case the appellant is accountable for the moneys which actually or constructively passed through his hands over and above the sum of $50 an acre which must be taken to have been the value of the property. If restitution proves to be practicable the appeal should be allowed with costs.

ANGLIN, J.:—The principal issues in this case are questions of fact. Upon them we are confronted with concurrent findings by an experienced trial Judge and the majority of the Court of Appeal. It is the rule of this Court to reverse such findings only if they are demonstrably erroneous. The nature of the questions presented in this case rendered them eminently proper for determination by a tribunal having the advantage of seeing the parties and hearing them give their evidence. Interference with the findings is correspondingly difficult.

The principal questions raised by the cross-appeal are, first, whether the respondent, Greenizen, was cognizant of the secrecy of the $25 an acre profit to be made by McGregor, one of the syndicate to which he sold, so that his (Greenizen's) failure to ensure that the other purchasers should be apprised of it rendered him legally culpable as *particeps* in the fraud alleged to have been perpetrated on them by their co-adverturer; and, second, whether, upon all the facts in evidence knowledge of the alleged secret profit should be imputed to the appellant Twigg, followed by acquiescence by him in the terms of sale. A third question arises as to the appropriate remedy in the event of the plaintiff's complicity in the fraud being held to have been established: this forms the subject of the main appeal, by which the defendants seek the restoration of the judgment for rescission pronounced by the trial Judge.

Although the $25 an acre was nominally made payable to the firm of Gore and McGregor, there is abundant evidence to sustain the finding that McGregor personally was the beneficiary of it.

There is, no doubt, not a little in the record to support the respondent's contention that to a man of ordinary intelligence circumstances which came to Twigg's attention would have conveyed knowledge of the profit to be made by McGregor and that, although he (Greenizen) knew of McGregor's secret profit and had not expressly communicated that fact to the other purchasers, he had taken steps which he had reason to believe would have brought it to their knowledge.

But the trial Judge, with all these facts before him, found that "there was actual fraud"—that "he (Greenizen) had been guilty of what the Courts hold to be fraudulent concealment"—that "he did not inform them (McGregor's co-purchasers) of the fact that he was arranging to give McGregor his rake-off." The Judge also found that McGregor's relation to Greenizen was that of an agent—that Greenizen was the vendor to the syndicate and not McGregor; and he accepted Twigg's denial

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of any knowledge of McGregor's interest of the $25 an acre in the purchase price to be paid Greenizen. The majority of the appellate Judges affirmed these findings, the Chief Justice (with whom Galliher, J. concurred) saying at p. 573:—

"The price at which the land was sold was intentionally misstated by the plaintiff to be $75 an acre whereas the amount actually to be received by the plaintiff was $50 an acre . . . I agree . . . that the plaintiff's conduct in this respect was wrongful and would found an action . . . for damages for deceit."

And again: "The mortgagee, Greenizen, and one of the purchasers for whom this mortgage was taken, have been found guilty of fraud. They procured the sale and mortgage by fraud."

Without expressing any opinion as to what views I should have taken on these issues, if dealing with the evidence in a Court of first instance, I am not so clearly convinced that the conclusions reached are unjustified, that I would feel warranted in disturbing them here. The cross-appeal, therefore, fails and must be dismissed with costs.

There remains the question raised by the main appeal—to what remedy are the defendants entitled on their counterclaim? The trial Judge thought them entitled to rescission conditionally upon their being able to reconvey the lands as they stood before the sale to the syndicate (except the portion given to the Grand Trunk Pacific Railway Co.) and that in default of such re-conveyance their counterclaim should be dismissed. But he put upon the plaintiff the burden of procuring cancellation of the plan of subdivision of the lands and re-conveyance by the provincial government of the lots which were transferred to it (as prescribed by a provincial statute) upon such subdivision being registered and approved. The Judge treated the deposit with the Registrar of the Court of a deed of re-conveyance in the lands as subdivided and now held by Nechaco River Estates Ltd. and of all such consents as might be required from the defendants, or from persons claiming through or under them, to enable the plaintiff to procure cancellation of the subdivision plan as equivalent to an effective re-conveyance; and he directed that upon such documents being so lodged with the Registrar the defendants, Twigg and Landry, should have judgment for repayment by the plaintiff to them of all amounts paid by them respectively to him on account of purchase money with interest thereon and the costs of the counterclaim, leaving the plaintiff to procure cancellation of the plan of subdivision and re-conveyance from the provincial

government of the lots transferred to it. The plaintiff's action on his mortgage and collateral bond was dismissed with costs.

The Court of Appeal thought it clear that restitution of the land was impracticable and that rescission, therefore, could not be had. But the majority of the Court was of the opinion that the defendants were entitled to recover damages for deceit, which they assessed at $25 an acre, or $14,750. The third member of the Court, while of the opinion that fraud had not been established and that no ground existed for awarding damages for deceit, nevertheless thought the respondents entitled to a reduction of the principal sum upon the plaintiff's mortgage by the amount which McGregor was to be paid, viz. $25 an acre, or $14,750. The plaintiff, accordingly, was given judgment for the price of the lands sold to the syndicate at $75 an acre with interest thereon at 6½%, the rate fixed by his mortgage, less all moneys and the value of all considerations received by him on account of the sale, with interest thereon at the same rate, and $25 an acre allowed as damages and interest thereon likewise at 6½% computed from the date of the sale.

Assuming rescission to be impracticable, I should not be disposed to differ from the view taken by the Court of Appeal that, fraud being established, damages for deceit, though not claimed, should be allowed as an alternative remedy. Neither would I quarrel with the assessment of such damages at the $25 an acre secret profit which McGregor was to have received. The basis of this assessment may not be scientifically accurate, but it probably represents at least approximately the loss to the syndicate directly attributable to the fraud to which the plaintiff was found to have been a party.

I am, with great respect, however, of the opinion that the judgment for conditional rescission was right and that it should be restored with the modification that the burden of procuring cancellation of the plan of subdivision and re-conveyance of the lots transferred to the provincial government should rest on the defendants and not on the plaintiff, the plaintiff, however, being required to deposit with the Registrar of the Supreme Court of British Columbia his consent as mortgagee to such cancellation and re-conveyance duly verified. I see no reason for a departure in this respect from the form of the judgment given by the Privy Council in *Lindsay Petroleum Co.* v. *Hurd* (1874), L.R. 5 P.C. 221. The relief given by the Court of Appeal should be added as an alternative remedy.

Since the enactment of the British Columbia Land Act Amendment Act of 1921 (2nd sess.) ch. 24 it is by no means

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TWIGG v. GREENIZEN.

Anglin, J.

clear that the defendants cannot make adequate restitution of the property purchased by them from the plaintiff. The portion of the lands conveyed to the Grand Trunk Pacific R. Co. need not be considered. The arrangement for the conveyance of these lands to the railway company was made by the plaintiff himself and when he made the sale to the defendants it was understood to be subject to the carrying out of that arrangement. Pursuant thereto and with the concurrence of the plaintiff a transfer was subsequently made to the Grand Trunk Pacific R. Co. of the land which it had been agreed should be conveyed to it. Inability to reconvey this land to the plaintiff, therefore, does not stand in the way of the defendants making such restitution as would entitle them to rescission.

It may be that the plaintiff would be willing, or possibly would prefer, to have his land back in its present condition, i.e. subdivided, with certain portions of the land appropriated for streets and the prescribed number of lots vested in the government. If so, he should be allowed the option of taking it in that form. I would allow him 30 days within which to file an election with the Registrar of the Supreme Court of British Columbia to take back the land in its present condition should he so desire. If he makes such election or if he fails to deposit with the Registrar of the Supreme Court of British Columbia the consent directed in the next succeeding paragraph hereof, there should be judgment for rescission upon the defendants' depositing with the Registrar within 2 months a re-conveyance to the plaintiff from the Nechaco River Estates of the lands as they now stand vested in that company together with such consents or other documents as may in the opinion of the Registrar be sufficient to revest such lands in the plaintiff. Thereupon, the defendants, Twigg and Landry, should have judgment for repayment by the plaintiff to them respectively of all moneys received by him from each of them together with interest thereon, as was directed in the judgment of the trial Judge.

Should the plaintiff not so elect to take a re-conveyance of the lands as subdivided, he should file with the Registrar of the Supreme Court of British Columbia within 30 days his consent as mortgagee (duly verified) to the cancellation of the plan of subdivision and re-conveyance by the provincial government of the lots, transferred to it to the Nechaco Estates; and within 1 month thereafter, or within such further reasonable time as the Registrar may allow, the defendants should procure such cancellation and re-conveyance and should also deliver to the Registrar such assurances as he may deem sufficient for the re-

conveyance to and revesting in the plaintiff of the lands sold by him to the syndicate of which the appellants, Twigg and Landry, were members, except so much thereof as has been transferred to the Grand Trunk Pacific R. Co. Upon such assurances last mentioned being so deposited with the Registrar of the Supreme Court of British Columbia the defendants, Twigg and Landry, should have judgment against the plaintiff for the repayment to them respectively of all sums of moneys paid to him by them on account of the purchase of the lands together with interest thereon, as was directed in the judgment of the trial Judge.

Should the defendants for any reason, other than failure on the part of the plaintiff to furnish his consent for that purpose as mortgagee, be unable to procure cancellation of the subdivision plan and re-conveyance of the lots vested in the provincial government and to give such assurances as in the opinion of the Registrar of the Supreme Court of British Columbia will suffice to revest in the plaintiff the lands sold by him to the syndicate (except those transferred as aforesaid to the Grand Trunk Pacific R. Co.), judgment should be entered in the terms already directed by the Court of Appeal of British Columbia.

If rescission and re-conveyance should take place under the terms of the present judgment the defendants should have their costs of their appeal to this Court and in the Court of Appeal from the plaintiff: should such rescission and reconveyance prove to be impracticable without any default of the plaintiff, the appeal of the defendants should be dismissed with costs.

BRODEUR, J.:—This is an appeal concerning the rescission of a sale of land on the ground of fraud. The appellants claim there was collusion between the vendor and one of the purchasers McGregor, by which the latter was to receive a part of the purchase price. Of course, this distribution of the purchase price was concealed from the other purchasers who were induced by their associate McGregor to form part of the syndicate that was acquiring this land. Some efforts were made however by Greenizen to establish that the purchasers knew that McGregor was to receive a commission from the vendor Greenizen. A letter of November 7, 1912, and some other pieces of evidence on which he relies to maintain his contention do not, in my opinion, prove that this interest of McGregor in the purchase price was known to his co-purchasers when the deeds were signed. Besides, the concurrent findings of the Courts be-

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low satisfy me that the other purchasers were not aware that their associate McGregor was to have a share in the purchase price.

The principle of law and equity is that a partner shall take no profit for himself out of his partners. This principle is an exceedingly just one calculated to secure the observance of good faith between partners.

In this case, we have a vendor who agrees with one of the members of the syndicate purchasing his property to give him a share of the purchase price. It was his duty to inform the other members of the syndicate of the secret commission which he was to hand over to this co-purchaser; and if he failed to disclose that fact he was liable to see his sale set aside, as we have decided in the case of *Hitchcock* v. *Sykes* (1914), 23 D.L.R. 518, 49 Can. S.C.R. 403.

The trial Judge came to a right conclusion in rescinding the sale. The Court of Appeal found also that there was fraud but that the rescission could not be pronounced in view of the fact that the land had been subdivided into town lots and that the Province, under the provisions of sec. 63 of the Land Act, R.S. B.C. 1911, ch. 129 was entitled to one-fourth of these subdivided lots.

The objection was taken into consideration by the trial Judge and he ordered that the rescission should take place subject to the right of the vendor to a reconveyance of the lands in question. I cannot agree with this objection of the Court of Appeal.

The appeal should be allowed with costs of this Court and of the Court below. The cross-appeal should be dismissed with costs.

I concur with my brother Anglin as to the manner in which our decision should be carried out.

MIGNAULT, J.:—I concur with Anglin, J.

Appeal allowed and cross-appeal dismissed.

REX v. RICHARDSON AND MORASH.

Nova Scotia Supreme Court, Harris, C.J., Russell, Chisholm, Mellish, and Rogers, JJ. February 11, 1922.

BURGLARY—INDICTMENT—COUNT CHARGING BREAKING AND ENTERING DWELLING HOUSE BY NIGHT AND STEALING THEREIN—FAILURE TO PROVE BREAKING AT NIGHT—FAILURE TO AMEND INDICTMENT—CR. CODE SECS. 457, 458, 380.

A conviction for breaking and entering a dwelling house by night and stealing therein will be quashed on appeal if there is no evidence that the breaking and entering took place at night.

[See Annotation at end of this case on Indictments for Burglary and Theft.]

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REX v. RICHARDSON AND MORASH.

ROGERS, J.

CASE reserved by Russell, J., as to whether the case against the prisoners should have been withdrawn from the jury and a verdict of "not guilty" directed.

Accused were tried before Russell, J., with a petit jury at the October Term of the Court at Halifax upon an indictment charging that they did "Unlawfully break into and enter in the night time the dwelling house of one William Thompson and did commit an indictable offence therein, to wit: did unlawfully steal twenty five packages of cigarettes, cigars, tobacco, candies and other goods of the value of twenty five dollars or thereabouts the property of the said William Thompson."

At the conclusion of the case for the Crown counsel for the accused applied to the Court to instruct the jury to return a verdict of "not guilty" on the ground that the indictment did not establish the offence charged.

The learned judge over-ruled the objection and the jury returned a verdict of guilty.

The following questions were reserved for the consideration of the court:—

"1. Should I have given effect to the objection of the counsel for the accused and have withdrawn the case from the jury or directed a verdict of 'not guilty?'

"2. Could the jury properly return a verdict of 'Guilty' upon the indictment as framed and the evidence given in support of it?"

J. B. Kenny, K.C. for the prisoners.

A. Cluney, K.C. Crown Prosecutor, for the prosecution.

ROGERS, J.:—The accused have been found guilty by a jury upon an indictment charging the breaking and entering a dwelling house in the night time and committing therein the indictable offence of stealing property of the value of twenty five dollars. The draughtsman of the indictment has apparently undertaken to frame the charge by combining together parts of three sections of the Code,—sec. 457 (a) which provides for the offence of breaking and entering a dwelling house by night with intent to commit any indictable offence therein; sec. 458 which provides for the offence of breaking and entering a dwelling house by day and committing an indictable offence therein; and sec. 380, providing for the offence of stealing in any dwelling house property to the value of twenty five dollars or more. It is quite obvious that there should have been three separate counts, and if there had been the evidence might have supported a conviction on a count framed under section 458.

As the case stands it may well be questioned whether any offence at all has been charged, but if any it is as argued for

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the Crown that defined by section 457 (a), the punishment for which may be life imprisonment.

There is, however, no evidence that the breaking and entering took place by night, and on this simple ground, and answering the first question submitted by the reserved case. I think a verdict of "not guilty" should have been directed.

Had there been a demurrer to the indictment or a motion to quash it, the trial judge could have, under section 898, ordered an amendment, or upon the trial when it appeared that there was a variance between the evidence given and the charge, he could have, under section 889, upon motion so amended the charge (and without prejudice to the accused) as to make it conformable with the proof. The Court has power, I take it, under section 1018 to direct a new trial, but in view of the circumstances I would in this case decline so to direct.

The conviction should be quashed and the accused discharged.

HARRIS, C.J.: I agree.

RUSSELL, J.:— I agree.

CHISHOLM J.:— I agree.

MELLISH, J.:—I agree in the conclusions reached by my brother Rogers.

With some doubt I think the indictment sufficient. But I think there was no evidence to support it.

Consequently the first question should be answered in the affirmative and the second in the negative. The conviction should be quashed and the accused discharged.

I offer no opinion as to the propriety of an amendment in such a case to meet the evidence. The Crown, apparently, did not ask for it.

Conviction quashed and accused discharged.

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INDICTMENTS FOR BURGLARY AND THEFT

It is common and better practice to allege in one count both the burglary and the larceny. 1 Hale P.C. 560; *Speer's Case* 17 *Gratt*, (Va.) 572.

The reason for framing an indictment for burglary in a dual form where the theft is accomplished, is that the definition of burglary is breaking and entering with intent to commit an offence and the actual commission is such strong evidence of the intent that the law has adopted it and admits it to be equivalent to a charge of intent in the indictment. East's P.C. 520 (n). The charge of the intent is supported by proof of the completed larceny. *State* v. *McClung* (1891) 13 S.E. Rep. 654, (W. Va.), 14 Cr. Law. Mag. 84.

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The safer course in drawing an indictment for burglary and theft is to expressly charge the intent to steal along with the breaking and entering at night and to add that the accused did then and there steal in the dwelling house (specifying the property stolen).

The intent must be proved as laid. Where the prisoner was indicted for burglary and stealing goods, and it appeared that there was no goods stolen, but only an intent to steal, it was held by Holt, C.J., that this ought to have been so laid, and he directed an acquittal. *R.* v. *Vandercomb*, 2 East, P.C. 514.

It seems sufficient in all cases where a felony has been actually committed, to allege the commission without any intent: 1 Hale, P. C. 560; 2 East, P. C. 514; and in such case no evidence, except that of the committing of the offence, will be required to show the intention. It is a general rule, that a man who commits one sort of felony in attempting to commit another, cannot excuse himself on the ground that he did not intend the commission of that particular offence. 2 East, P. C. 514, 515; *Commonwealth* v. *Chilson*, 2 Cush. 15.

The intentions of the parties will be gathered from all the circumstances of the case. Three persons attacked a house. They broke a window in front and at the back. They put a crowbar and knife through a window, but the owner resisting them, they went away. Being indicted for burglary, with intent to commit a larceny, it was contended that there was no evidence of the intent; but Park, J., said, that it was for the jury to say whether the prisoner went with the intent alleged or not; that persons do not in general go to houses to commit trespasses in the middle of the night; that it was a matter of observation that they had the opportunity, but did not commit the larceny, and he left it to the jury to say whether, from all the circumstances, they could infer that or any other intent. Anon. 1 Lewin, C. C. 37.

If the prosecutor fail in his attempt to prove the breaking and entry of the dwelling-house, but the indictment charges the prisoner with a larceny committed there, he may be convicted of the larceny. *R.* v. *Withal*, 2 East P.C. 517; *R.* v. *Hungerford*, 2 East P.C. 518..

There may be cases in which, upon a joint larceny by several, the offence of one might be aggravated by burglary in him alone, because he might have broken the house in the night, in the absence and without the knowledge of the others, in order to come afterwards and effect the larceny, and the others might have joined in the larceny, without knowing of the previous breaking. *R.* v. *Butterworth*, Russ & Ry. 520.

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Although a prisoner may be convicted of the larceny only, yet if the larceny was committed on a previous day, and not on the day of the supposed burglary, he cannot be convicted of such larceny. This point having been reserved for the opinion of the judges, they said: "The indictment charges the prisoner with burglariously breaking and entering the house and stealing the goods, and most unquestionably that charge may be modified by showing that they stole the goods without breaking open the house; but the charge now proposed to be introduced goes to connect the prisoners with an antecedent felony, committed before *three* o'clock, at which time, it is clear, they had not entered the house. Having tried, without effect, to convict them of breaking and entering the house, and stealing the goods, you must admit that they neither broke nor stole the goods on the day mentioned in the indictment; but to introduce the proposed charge, it is said that they stole the goods on a former day, and that their being found in the house is evidence of it. But this is surely a distinct transaction, and it might as well be proposed to prove any felony which these prisoners committed in this house seven years ago, as the present."..*R.* v. *Vandercomb*, 2 Leach, 708.

If the entry be made with the intention of committing merely a tort not constituting an indictable offence, there is no burglary even if an indictable offence be in fact committed after the accused has entered the house. *R.* v. *Rodley* [1913] 3 K.B. 468; *R.* v. *Karasch* [1915] 2 K.B. 749. Under the English Larceny Act 1916, sec. 25 the breaking and entering must have been with intent to commit a "felony" in the house and not a mere misdemeanor. 1 Odgers' Common Law of England 2nd. ed. p. 394.

It is always a question for the jury whether the accused entered with the necessary intent. They may infer an intention to commit an indictable offence from the fact that the prisoner after entering did commit one. Cf. 1 Odgers' Com. Law 2nd ed. p. 394.

The fact that the entry was made in the night may be shown by circumstantial evidence like other facts. At whatever time in the morning the loss was discovered (of an article proved to have been in the house on the previous evening) the jury might well weigh the probability whether the article would have been taken from the house in the day time in connection with the other evidence *The State* v. *Bancroft* (1839) 10 N. Hamp. 105. Upon a single count alleging both burglary and larceny there may be a conviction of either but not of both. *State* v. *McClung* (1891) 13 S.E. Rep. 654 (W. Va.); 14 Cr. Law Mag. 84; 1 Hale P.C. 559; Wharton's Cr. Pldg. sec. 244. If there be a general

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verdict of guilty on a count charging both burglary and larceny it is deemed a conviction of burglary only, and the sentence is for burglary not for both or for larceny. 1 Hale P.C. 559; *Commonwealth* v. *Hope*, 22 Pick. (Mass.) 1; Speir's Case, 17 Gratt. (Va.) 570; *Breese* v. *State*, 12 Ohio St. 146; *Kite* v. *Commonwealth*, 11 Metcalf (Mass.) 581. It has been said that the larceny is merged in the conviction for burglary where both are charged in the one count. *Kite* v. *Commonwealth* supra.

The *count* of an indictment must contain a statement that the accused has committed some indictable offence therein "*specified.*" Cr. Code sec. 852. Such statement may be in popular language without technical averments or allegations of matter not essential to be proved, Cr. Code sec. 852 (2). It *may* be in the words of the enactment describing or declaring the offence or in any words sufficient to give the accused notice of the offence with which he is charged. Cr. Code sec. 852 (3). That is the nature of the crime need only be described in the words of the statute creating it. *R. v. Trainor*, 27 Can. Cr. Cas. 232, 10 Alta L.R. 164; *R.* v. *Goodfellow*, 10 Can. Cr. Cas. 424. 11 O.L.R. 359; *R.* v. *Stroulger*, 17 Q.B.D. 327; *Smith* v. *Moody* [1903] 1 K.B. 56, 72 L.J. K.B. 43.. The indictment must contain a certain description of the crime charged and a statement of the facts by which it is constituted, so as to identfy the accusation lest the grand jury should find a bill for one offence and the defendant be put upon his trial in chief for another, without any authority. 1 Chitty's Crim. Law 2nd. ed. 169; *R.* v. *Bainbridge* (1918) 42 O.L.R. 203, 30 Can. Cr. Cas. 214, 42 D.L.R. 493.

A count is not to be deemed objectionable or insufficient for the reason *only* that it does not name or describe with the precision any person, place or thing. Cr. Code sec. 855.

The court may, however, order particulars to be furnished by the prosecutor, if satisfied that it is necessary for a fair trial. Cr. Code. sec. 859.

Under the heading of "Burglary and Housebreaking" the offence of burglary is declared by the Criminal Code. Can. 1906. ch. 146 as follows:

Every one is guilty of an indictable offence and liable to imprisonment for life who,—

(*a*) breaks and enters a dwelling house by night with intent to commit any indictable offence therein; or,

(*b*) breaks out of any dwelling-house by night, either after committing an indictable offence therein, or after having entered such dwelling-house, either by day or by night, with intent to commit an indictable offence therein. Cr. Code sec. 457.

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Every one convicted of an offence under this section who when arrested, or when he committed such offence, had upon his person any offensive weapon, shall, in addition to the imprisonment above prescribed, be liable to be whipped. Cr. Code sec. 457 (2).

An indictment for burglary should state that the offence was committed in the night.

The original meaning and derivation of the term 'burglary' are somewhat obscure. It has been supposed to be a translation of the Old English term "burgh-brice". 2 Encycl. Laws of England p. 475.

The time at which the attack or breaking took place does not appear to have been originally an essential element of the offence, although nocturnal entry must have been regarded as a circumstance of aggravation. But by the seventeenth century the definition of burglary was restricted to cases of "breaking and entering in the night into the mansion-house of another with intent to commit felony whether the felonious intent is or is not executed." 3 Co. Inst. 63; 1 Hale P.C. 548; Hawkins, bk. 1, ch. 38 secs 1, 17; 2 Encycl. Laws of England, p. 476. The more modern definitions substitute the word 'dwelling-house' for 'mansion-house.' 2 Encycl. Laws of England p. 476.

Housebreaking under the present English law differs from burglary in two important particulars:—

(1) It can be committed at any hour of the day or night;

(2) It can be committed in any building, whether a dwelling house or not, so long as it is a solid structure, not merely a tent or movable caravan. 1 Odgers' Common Law of England (1920) 2nd. ed. 396.

The offence of housebreaking declared by Cr. Code secs. 458 and 459 is limited to (a) breaking and entering *by day* and committing indictably offence therein; (b) breaking out *by day* after committing indictable offence; (c) breaking and entering *by day* with intent. *Cf.* 7 and 8 Geo. IV Imp. ch. 29; 24 and 25 Imp. ch.96.

LANGLOIS v. LEMIRE; Re GARDNER.

Quebec Superior Court in Bankruptcy, Panneton, J. March 16, 1922.

BANKRUPTCY (§III—28)—AUTHORISED ASSIGNMENT—APPOINTMENT OF TRUSTEE—CONFIRMATION OF APPOINTMENT—REMOVAL OF.

When the proof shews that everything that has occurred from the date of an authorised assignment to the meeting of creditors has been done with the consent of the creditors and the authorised trustee has been confirmed in his appointment at such meeting, there is no ground for dismissing him.

[See Annotations, 53 D.L.R. 135, 59 D.L.R. 1.]

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LANGLOIS v. LEMIRE; RE GARDNER.

Panneton, J.

PETITION for removal of an authorised trustee.

PANNETON, J.:—The petitioner asks that the trustee, Joseph E. Lemire, be dismissed as such and replaced by Alexander Burnett, for the following reasons:—That from August 10, 1921, the date of the assignment, until the beginning of January, 1922, the said Lemire did nothing in his quality as trustee to liquidate the estate of the authorised assignor. That the trustee allowed the authorised assignor to continue to administer its affairs to the prejudice of the creditors; that no statement of the assignor's affairs was produced in Court notwithstanding the fact that the trustee was several times called upon to do so.

To this petition the said trustee pleads that he never neglected to do his duty as trustee or to act in the interest of the creditors, and that he acted in accordance with their wishes and with their co-operation.

That notwithstanding what took place at the creditors' meeting of January 11, the said Lemire was confirmed in his appointment as trustee; that he could not obtain a statement or prepare it himself because he was not in possession of the necessary books; but with a view to obtaining information, he procured leave, at the creditors' meeting of February 2, 1922, to examine F. A. Langlois, J. V. Rogers, and the petitioner and some other shareholders of the company and that if he did not produce a statement of the debtor's affairs as required by the Bankruptcy Act, it was due to the fact that the petitioner and other interested persons who were in charge of the affairs of the said assignor did not provide him with the books and the information necessary to prepare it.

There was a partial inscription in law to this contestation which defence in law is dismissed without costs.

The proof shews that everything that occurred from the date of the assignment to the meeting of creditors of January 11 was done with the consent of the creditors, and, the said Lemire having been appointed trustee at the said meeting, there is no ground for dismissing him.

The proof also shews that nothing occurred after said meeting to justify the conclusions of the petition.

The Court dismisses said petition with costs.

Petition dismissed.

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Re TURNER.

Saskatchewan King's Bench, MacDonald, J. April 11, 1922.

BANKRUPTCY (§IV—40)—CROP PAYMENT LEASE—ONE HALF CROP RESERVED AS RENT—ASSIGNMENT OF LESSEE UNDER BANKRUPTCY ACT—RIGHTS OF LANDLORD.

Where a tenant under a crop payment lease whereby the landlord is to receive as rent one half of the crop grown on the land, delivers part of such crop in the name of the lessor, as part of his share, and then delivers a further amount of the crop to the elevator to be shipped in his own name, and subsequently makes an authorised assignment under the Bankruptcy Act, the landlord is a secured creditor, his security being the balance of the proceeds of the half share of the crop in question.

[*Rex* v. *Curtis* (1920), 52 D.L.R. 427, applied.]

ACTION to determine the ownership of certain grain, grown under a crop payment lease, the lessee having made an authorised assignment under the Bankruptcy Act.

R. H. Milliken, for trustee.

W. A. Benyon, for landlord.

E. B. Jonah, for Sask. Co-operative Elevator Co.

MACDONALD, J.:—By lease dated May 8, 1917, one Percy Love leased to Watson Thornton Turner sect. 29, in tp. 34 and r. 10, west of the 3rd meridian, in the Province of Saskatchewan, for a term of 5 years from March 1, 1917, the rent reserved being the one half share or portion of the whole crop of the different kinds and qualities to be grown on the demised premises.

In the year 1921, such one half share of the crop amounted to 2,648 bushels and 50 pounds.

On or about Sept. 7, 1921, the lessee delivered in cars and shipped in the name of the lessor as part of the lessor's share of the crop 1101 bushels.

On October 14, 1921, the lessee made an authorised assignment under the Bankruptcy Act to the Traders Trust Co.

On or about October 27, 1921, the lessee, authorised assignor, delivered in a car, 1,528 bushels of the crop grown on said land, and caused the same to be shipped to the Saskatchewan Co-operative Elevator Co. in the name of the lessee.

The elevator company made an advance of $600 to the lessee against said shipment, sold the grain, and holds the net balance of the purchase price over and above the advance and proper charges pending a decision as to the party entitled thereto. Both the trustee and the lessor claim the said balance, and the question for determination is whether the landlord is entitled thereto in preference to the other creditors of the authorised assignor.

In my opinion, the lessor is a "secured creditor" in respect of the rent of said premises.

Section 2 of the Crop Payments Act, being ch. 126 R.S.S. 1920, reads as follows:—

"2. In all cases in which a *bonâ fide* lease has been made and a *bonâ fide* tenancy created between a landlord and tenant, providing for payment of the rent reserved, or any part thereof, or for payment in lieu of rent, by the tenant delivering to the landlord a share of the crop grown or to be grown on the demised premises, or the proceeds of such share, then, notwithstanding anything contained in the *Chattel Mortgage Act*, or in any other statute, or in the common law, the lessor, his personal representatives and assigns shall, without registration have a right to the said crops or the proceeds thereof to the extent of the share or interest reserved or agreed to be paid or delivered to him under the terms of such lease, in priority to the interest of the lessee in said crops or the proceeds thereof, and to the interest of any person claiming through or under the lessee, whether as execution creditor, purchaser, mortgagee, or otherwise."

Section 2 (gg) of the Bankruptcy Act, 1919, ch. 36, defines "secured creditor" as follows:—

"'Secured creditor' means a person holding a mortgage, hypothec, pledge, charge, lien or privilege on or against the property of the debtor, or any part thereof, as security, for a debt due or accruing due to him from the debtor."

Section 3 of the Crop Payments Act deals with cases of agreement of sale of land on the crop payment plan, and its provisions are *mutatis mutandis* the same as the provisions of sec. 2 above quoted. In *Rex* v. *Curtis* (1920), 52 D.L.R. 427, 13 S.L.R. 207, 33 Can. Cr. Cas. 106, a decision of the Court of Appeal of this Province, and therefore binding on me, it was held that the provisions of said sec. 3 did not alter the common law under which the wheat in question belonged absolutely to the purchaser, until delivered to the vendor or his assigns, but the judgment proceeds, at p. 428:—

"The manifest intention of the statute is to protect vendors against persons claiming as execution creditors, purchasers and mortgagees against the purchaser. As between the vendor and purchaser, it only gives 'a right to the said crops or to the proceeds thereof to the extent of the share or interest agreed to be delivered or paid over, in priority to the interest of the purchaser, his personal representatives or assigns in such crops or the proceeds thereof.' These words do not seem to me to give

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the vendor any greater or further rights as against the purchaser than he has under his original contract. They certainly do not alter the legal ownership of the crop. The crop still remains the property of the purchaser subject to his contractual obligation to deliver a part of it to the vendor."

As I understand the decision it means this: Under such a contract as the one in question, the crop until delivery (or division?) remains under the common law the property of the purchaser, *subject to his contractual obligation to deliver a part of it to the vendor;* and the Crop Payments Act does not alter this. But "the manifest intention" of the statute is to protect vendors against persons claiming through or under the purchaser, whether as execution creditor, purchaser, mortgagee or otherwise, and this it effectuates by making the crop in the hands of such persons claiming under the vendor subject to the purchaser's "contractual obligation to deliver a part of it to the vendor." Where at common law the vendor would have only a right *in personam* he has under the statute a right *ad rem.* The lessee in this case has, in my opinion, on or against the property of the debtor "a privilege" which is an advantage conferred over and above the ordinary law. (Per Brett, M.R., *Re Miller,* [1893] 1 Q.B. 327).

I am, therefore, of opinion that the lessor is a secured creditor, his security being the balance of the proceeds of the half share of the crop in question, and his claim should be dealt with accordingly by the trustee.

The elevator company may retain its costs out of the funds in its possession, but the trustee shall pay the amount of such costs, and the costs of the landlord, to the landlord. The trustee shall have its costs out of the estate.

Judgment accordingly.

Re ASSIGNMENT OF KWONG TAI CHONG Co.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher and Eberts, JJ.A. March 10, 1922.

BANKRUPTCY (§I—3)—BRITISH COLUMBIA COURT OF APPEAL—APPEAL COURT IN BANKRUPTCY—POWER AND DISCRETION OVER COSTS—BANKRUPTCY ACT, SECS. 63 (3), 68 (2) AND 54 (3).

By sec. 63 (3b) of the Bankruptcy Act the Court of Appeal of British Columbia is constituted an Appeal Court of Bankruptcy and under sec. 68 (2) of the same Act the Appeal Court has untrammeled power and discretion over costs.

APPLICATION to British Columbia Court of Appeal on question of costs following dismissal of an appeal to that Court in proceedings taken by the authorised trustee under an assignment

pursuant to the Bankruptcy Act to set aside a conveyance on the ground of fraud.

M. O'Dell for appellant.

W. C. Brown, K.C., and *C. O'Brian*, for respondent.

MACDONALD, C.J.A.:—These proceedings were taken by the authorised trustee, under an assignment pursuant to the Bankruptcy Act, ch. 36, 1919 (Can.), made by one Jang Bow Kee. They were commenced in the Bankruptcy Court to set aside a conveyance on the ground of fraud. They were dismissed, and on appeal to this Court the appeal was dismissed. The Registrar inserted in the judgment of this Court a clause directing the unsuccessful appellant to pay the costs of the respondents personally and this motion is made to vary the formal judgment by striking out the personal order against him.

The Bankruptcy Act, sec. 2 (l) defines "Court" or "the Court" to mean, unless the context otherwise requires or implies, the Court which is invested with original jurisdiction in bankruptcy under the Act, and such Court in this Province is the Supreme Court (sec. 63 (a)). By the same sec. 63, sub-sec. 3 (b), the Court of Appeal of British Columbia is constituted an Appeal Court of Bankruptcy. Then sec. 68 (2) declares that subject to the provisions of the Act and to General Rules the costs of and incidental to any proceedings in Court, shall be in the discretion of the Court. Rule 54 (3) of the General Rules provide that where an action is brought by or against an authorised trustee as representing the estate of the debtor, or where an authorised trustee is made a party to a cause or matter on his application or the application of any other party thereto, he shall not be personally liable for costs unless the Judge before whom the action, cause or matter is tried, for some special reason, otherwise directs. The General Rules, 68 to 71 inclusive, deal with appeals to the Appeal Court and provide for the giving by the appellant of security for the costs of the appeal, and R. 71 declares that subject to the foregoing rules appeals to the Appeal Court in any bankruptcy district or division, shall be regulated by the rules of such Court (the Court of Appeal of British Columbia) for the time being in force in relation to appeals in civil actions and matters. Such rules do not extend to or deal with the question of costs, that subject being dealt with by a section of the Court of Appeal Act. It is true that the section of the Act has been imported into the rules for convenience by the compiler of the rules, but it is not in fact a rule at all. The English Bankruptcy Act, ch. 59, 1914, gives an

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appeal to the Court of Appeal in Bankruptcy, but provides that subject to the bankruptcy rules the Court shall be governed by the provisions of O. 58 of the Rules of the Supreme Court, which give the Court discretionary power over costs. It is, therefore, as if O. 58 were incorporated in the Bankruptcy Act. Had the rules of the Court of Appeal of British Columbia been like the English rules, there would be no difficulty in this case. The Bankruptcy Act and rules make no provisions other than what I have adverted to with respect to the jurisdiction of the Appeal Court over costs. And yet it is apparent from the provisions requiring security for costs of an appeal to be given, that Parliament contemplated the Appeal Court in Bankruptcy having jurisdiction over the costs. The Appeal Court in Bankruptcy has only the jurisdiction given it by the Act, it is a Statutory Court. The Appeal Court of Bankruptcy, by sec. 63, sub-sec. 3, is vested with, and I think, confined to power and jurisdiction, except as varied by General Rules, to pronounce the order or decision which ought to have been pronounced by the Court appealed from. Subject to said rules it follows the procedure of the Court of Appeal of British Columbia, but the power to give costs is not a matter of procedure. In the common law Courts this power was statutory, commencing with the statute of Gloucester (1278), 6 Edw. I. In the Court of Chancery it seems to have been inherent in the Court, but whatever the powers of these Courts were as to costs inherent or otherwise, there are no words, I think, in the Bankruptcy Act which confer the jurisdiction of those Courts upon the Appeal Court of Bankruptcy, except that specifically mentioned, viz., to pronounce the judgment which the Court below ought to have pronounced, and, if I am not in error in my construction of the Act, jurisdiction over costs.

It remains, therefore, to consider whether upon the true construction of the several sections of the Bankruptcy Act to which I have been referred, either expressly or by necessary implication, the Appeal Court has been given power over costs. This, I think, depends upon the construction to be put upon the word "Court." It will be seen that "Court," *unless the context otherwise requires or implies,* is to be taken to mean the Court of original jurisdiction. Now the provisions for the giving of security for costs of an appeal, I think necessarily implies that the Appeal Court should have jurisdiction over costs, and, therefore, the true construction of said sec. 68 (2) is that Parliament there made use of the word "Court" in a broader sense than that defined in the interpretation clause; in

other words, "Court" has impliedly in this connection a wider meaning than in the definition. Such a construction will give effect to the manifest intention of Parliament and obviate the absurdity of holding that Parliament intended to make provision for the security for costs of a Court which otherwise would have no jurisdiction to award costs. I think, therefore, that sec. 68 (2) is applicable to the Appeal Court.

General Rule 54 (3), above mentioned, does not call for or admit of the construction which I have placed upon sec. 68 (2). I think that rule must receive the narrower construction. It refers to costs in an *action* and the trial thereof. It is the "Judge" who is directed to give the costs in the manner there stated and not the Court.

On this construction of sec. 68 (2) the Appeal Court has untrammeled discretion over costs, and in the exercise of that discretion in the present case I would not strike out of the formal judgment the clause making the trustee personally liable. It may be thought that this conclusion is at variance with the decision of the Court of Appeal in *Bond* v. *Conkey*, not yet reported. That was an appeal to the Court of Appeal of British Columbia, a Court constituted by authority of the Provincial Legislature, while the Appeal Court of Bankruptcy is a Court constituted by authority of the Dominion Parliament. A new jurisdiction is given to the former Court which it is to exercise in accordance with the Bankruptcy Act and Rules and the practice therein pointed out. In that case, the action was commenced before the receiving order was made. After the bankruptcy the plaintiff applied for security for costs of the action on the ground that the defendant had become a bankrupt. An order was made that the security be given within a time specified otherwise the action should stand dismissed. After the expiration of the time and after the action according to the order stood dismissed, the trustee in bankruptcy moved to be made a party and to be permitted to defend. That application was dismissed. An appeal was taken to the Court of Appeal of British Columbia, and was dismissed. Counsel for the trustee invoked said sec. 68 of the Bankruptcy Act and the General Rule 54 (3), and submitted that the costs of the appeal should not be made payable by the trustee personally. His application was dismissed on the ground that the Act and rule were inapplicable to the Court of Appeal, which they clearly were, the whole proceeding both in the Court below and in the Court of Appeal being entirely outside the Bankruptcy Act and Courts. It is clear that the decision in that case as to the costs

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was right and that the statutory provision governing the Court of Appeal of British Columbia was applicable and the appeal being dismissed that the costs should be ordered to follow the event.

We have, however, in this case an entirely different situation: we have proceedings commenced in bankruptcy under the Bankruptcy Act and carried from the Court of original jurisdiction in bankruptcy to the Appeal Court of Bankruptcy. In support of the construction which I have put upon sec. 68 (2) I refer to *Re Estate of Sir William Van Horne* (1919), 47 D.L.R. 529, 27 B.C.R. 269, where I ventured to read the words "net value" in accordance with the context rather than with the definition given in the Act. In the interpretation of the section of the Act there in question, the Succession Duty Act, ch. 217, R.S.B.C. 1911, there were no such words as we find in this Act "unless the context otherwise requires or implies," yet that decision was upheld in the Privy Council, *sub. nom. Royal Trust Co.* v. *The Minister of Finance for British Columbia*, 61 D.L.R. 194, [1921] 1 A.C. 87, where notwithstanding the definition, the meaning of the words "net value" were made to conform to the context in order to carry out what appeared to their Lordships to be the intention of the Legislature.

GALLIHER, J.A.:—I agree with the Chief Justice.

MARTIN and EBERTS, JJ.A., agree in allowing appellant costs.

Judgment accordingly.

Re BROWN TAXI Co. and DETROIT RADIATOR Co.

Quebec Superior Court in Bankruptcy, Delisle, The Registrar. March 23, 1922.

BANKRUPTCY (§I—7)—ASSIGNMENT—POWERS OF INSPECTORS—POWERS OF TRUSTEE.

The inspectors of an estate are appointed by the creditors to have a general supervision of all the operations made by the trustee and for the protection of the creditors at large. Such inspectors must act personally and cannot delegate their powers without the authorisation of the creditors and a trustee cannot do anything in the way of accepting tenders or selling stock or assets, without having the consent in writing of the inspectors.

[See Annotation on Bankruptcy, 53 D.L.R. 135, 56 D.L.R. 104, 59 D.L.R. 1.]

PETITION of Joseph Albert praying that the sale of the assets of the creditors to him be declared good and valid and that he be put in possesion thereof.

DELISLE, Registrar:—The debtor assigned in the hands of Morris Goodman, an authorised trustee, on January 11, 1922. The trustee had an advertisement published in newspapers offer-

ing to sell *en bloc* by tenders all the assets of the debtor to the highest tender and saying that the last day for the receiving of tender would be on January 16, 1922, at noon. On January 16 the petitioner, without handing any tender in writing to the trustee, asked him if his tender would be accepted. On the affirmative answer of the trustee he then handed to the trustee a cheque for $700; there was not at that first interview between the petitioner and the trustee any amount mentioned of the tender. However, in the afternoon, the petitioner went back to the trustee's office, and then and there it was apparently understood between them that at least an amount of $4,000 should be given to the trustee by the petitioner, if the tender was accepted and ratified by the inspectors. The trustee then declared that the inspectors would come together at a meeting which he was to call at once and would decide then whether the tender of $4,000 would be accepted.

On January 17, 1922, there was a meeting, the minutes of which are filed as Ex. C.1, of certain persons pretending to be inspectors or to replace the inspectors which had been appointed and chosen by the creditors. In fact at that meeting there was only one inspector, Mr. Hood. The other persons who pretended to act as inspectors or *aux lieu et* place of the inspectors had never been appointed by the creditors; the petitioner's tender was accepted and he was requested to deposit with the trustee a cheque for the sum of $3,300. The petitioner then gave his cheque, dated January 17, 1922, for the sum of $3,300. This cheque was handed to the trustee, but it bore no legal stamps nor was it accepted by the bank on which it was drawn.

At the hearing the petitioner deposited in the hands of the Registrar of the Court an accepted cheque of $4,000. The petitioner was then partly put into possession of the assets by the trustee.

It seems that the meeting of January 17, 1922, of pretended inspectors is informal, and cannot have any legal effects.

The inspectors of an estate are appointed by the creditors to have a general supervision of all the operations made by the trustee and for the protection of the creditors at large. Such inspectors must act personally and cannot delegate their powers without the authorisation of the creditors.

We must come to the conclusion that the pretended acceptation of the petitioner's tender by such a meeting as the one held on January 17, 1922, is null and void and could not give the trustee any power or authorisation to give the petitioner the possession of the assets.

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On January 20 a meeting of the true inspectors was held at which the trustee was instructed to return the deposit of $4,000 made by Mr. Albert, the petitioner, on account of the offer of purchase of the estate, and inform him that his offer was not accepted.

By his letter of January 20, 1922, the trustee returned the deposit of $4,000, viz., the two cheques that had been deposited into his hands.

It is well established doctrine that a trustee cannot do anything in the way of accepting tenders or selling stock or assets, etc., without having the consent in writing of the inspectors appointed by the creditors. Then, any thing that could have been said or done by the trustee as to the acceptation of refusal of the tender was of no avail, as long as the tender had not been accepted by the inspectors; here the inspectors who only had the right to advise the trustee, did at their meeting held on January 20, refuse to accept the tender.

Therefore I come to the conclusion that there was no sale and that the petitioner is not entitled to have the sale of assets as hereinabove stated declared good and valid, nor is he entitled to be put in possession of the assets.

Considering that the petitioner has failed to prove the allegations of his petition, said petition is dismissed with costs against the petitioner. *Petition dismissed.*

PRISTUPA v. UNION BANK OF CANADA, et al.

Saskatchewan King's Bench, Bigelow, J. March 28, 1922.

INTERPLEADER (§III—30) — LAND LEASED BY FATHER TO SON — SON PLANTING AND HARVESTING CROP—RIGHT OF CREDITORS OF FATHER TO SEIZE CROP—FRAUDULENT PREFERENCES ACT, R.S.S. 1920, CH. 204.

Where a son leases from his father, who is in financial difficulties, the father's farm, and puts in and harvests the crop, paying for the seed and binder twine and engaging the thresher, the crop grown on such leased land belongs to the son and cannot be seized for debts of the father.

[*Massey-Harris* v. *Moore* (1905), 6 Terr. L.R. 75; *Cotton v. Boyd* (1915), 24 D.L.R. 896, 8 S.L.R. 229, followed; *Leippi* v. *Frey* (1921), 61 D.L.R. 11, referred to.]

INTERPLEADER issue to determine the ownership of certain grain seized by the sheriff under executions issued by the defendants.

J. H. Hearn, for plaintiff.

E. S. Wilson, for the defendants, excepting the Metal Shingle & Siding Co.

BIGELOW, J.:—This is an interpleader issue in which the plaintiff affirms that grain grown on the north west quarter of 23, and the south east quarter of 26, both in tp. 38, range, 27,

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west of the 2nd meridian in 1921 and seized by the sheriff under executions issued by the defendants against one Egor Pristupa (the father of the claimant) is the property of the plaintiff.

On April 29, 1921, the plaintiff leased from the execution debtor the farm above described. The plaintiff was a school teacher and knew that his father was in financial difficulties, and I believe he took this way to help his father out. He took 2 weeks away from his regular occupation to put in the crop and came back and harvested it himself. The evidence is that the plaintiff paid for the seed, put in the crop, paid for the binder twine, and engaged the thresher who was paid by the sheriff. The defendants attack this lease under the Fraudulent Preferences Act, R.S.S. 1920, ch. 204, but I think the case comes within *Massey-Harris* v. *Moore* (1905), 6 Terr. L.R. 75, and *Cotton* v. *Boyd* (1915), 24 D.L.R. 896, 8 S.L.R. 229.

In the latter case, Newlands, J., in giving judgment of the Court *en banc*, said, at p. 231:—

"In *Kilbride* v. *Cameron*, 17 U.C.C.P. 373, it was held that crops grown upon land transferred in fraud of creditors, which were grown at the sole expense of the fraudulent vendee, belonged to him, and could not be seized as the goods of the vendor. The case was followed by me in *Massey-Harris* v. *Moore* 6 Terr. L.R. 75."

See also *Leippi* v. *Frey* (1921), 61 D.L.R. 11 (which was affirmed by the Court of Appeal December 15, 1921, without written reasons), in which I had occasion to go into the same question and where other cases were cited.

I am of the opinion that the grain in question is the property of the plaintiff and cannot be seized by the creditors of the lessor.

The costs of this interpleader will be paid by the defendants, including the Metal Shingle & Siding Co. as they are a party to the issue although they did not appear at the trial.

Judgment accordingly.

Re INVERNESS RAILWAY AND COLLIERIES Ltd.

Nova Scotia Supreme Court, Russell, J., Ritchie, E.J., Chisholm and Mellish, JJ. April 13, 1922.

BANKRUPTCY (§I—5)—COMPANY—INCORPORATED TO OPERATE A RAILWAY AND MINES OF RAILWAY INCORPORATED BY SPECIAL PROVINCIAL ACT — ASSIGNMENT OF COMPANY UNDER BANKRUPTCY ACT—VALIDITY—PRIOR ASSIGNMENT MADE TO BANK—VALIDITY OF AS TO BOOK DEBTS NOT PAID AT DATE OF SUBSEQUENT ASSIGNMENT IN BANKRUPTCY.

The Inverness Railway and Collieries Limited was incorporated under the provisions of the Nova Scotia Joint Stock Companies

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Act, R.S.N.S. 1900, ch. 128, for the purpose of carrying on a railway and mining undertaking. The purpose of the incorporators being to operate the railway and mines of the Inverness Railway and Coal Company which was incorporated by a special Act of the Legislature of Nova Scotia, the Inverness Railway and Collieries Limited, made an assignment under the provisions of the Bankruptcy Act to the Eastern Trust Co.

Held by Russell and Mellish, JJ., that the company was not in business as a railway company, and it was therefore competent for it to make the assignment. Chisholm, J., and Ritchie, E.J., held that the company fell within the definition of "railway company" within the definition of the term in sec. 2 (r) of the Nova Scotia Railways Act, R.S.N.S. 1900, ch. 99, and therefore it was not competent for it to make the assignment. As to whether an assignment made by the company to the Royal Bank of Canada was void as to book debts not paid at the date of the subsequent assignment in bankruptcy, Russell, J., held that such assignment was not void and that the equitable rights of the bank by virtue of the assignment had priority over the rights of the creditors as represented by the trustee in bankruptcy. Chisholm, J., Ritchie, E.J., and Mellish, J., held that such assignment was void under sec. 30 (1) of the Bankruptcy Act.

[See Annotations, 53 D.L.R. 135, 59 D.L.R. 1.]

CASE STATED to the Court on the application of the Eastern Trust Co. trustee in bankruptcy of the estate of the Inverness Railway and Collieries Ltd. Two questions were raised for the consideration of Chisholm, J. Judge in Bankruptcy and were referred by him to the full Court.

The questions so raised and referred, and the facts and circumstances are fully set out in the Judgments.

J. McG. Stewart, K.C., for the Royal Bank of Canada, creditor.

W. C. McDonald, for the trustee in bankruptcy.

RUSSELL, J.:—The facts in this case are so fully and clearly set out in the opinion of Mellish, J., that it is not necessary to re-state them in detail.

On the first question, which is, in effect whether the Inverness Railway and Collieries, Ltd., could make an assignment under the provisions of the Bankruptcy Act, (Can.) 1919, ch. 36, I incline to agree with the answer in the affirmative which is given in the opinion referred to. The only ground on which it is contended that the company could not make such an assignment is that it is a railway company and as such was not competent under the terms of the Act to make the assignment. I concur not without some doubts, in the opinion referred to that the company was not in business as a railway company and was, therefore, competent.

The second question referred to us for consideration is whether the assignment made by the company to the Royal Bank of Canada in December is void as to book debts not paid at the

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date of the subsequent assignment in bankruptcy. At the date of the assignment to the bank the statute, sec. 30 (1) referred only to an assignment to "any other person" and it is contended that the word "person" is by the Bankruptcy Act made inapplicable to an incorporated bank. This argument is founded on the definition in sec. 2 (aa.) which enacts that "person includes corporation and partnership," If we were confined to the Bankruptcy Act in our search for the meaning of the term we should have to say that the bank is not a person, because it is not a partnership and it is not a corporation as defined in the Act, the latter term expressly excluding incorporated banks. But the Bankruptcy Act, while it enacts that the term person "includes" a partnership and a corporation, meaning corporation as defined in the Act does not say it may not include other things as well. It certainly must include an individual *homo sapiens*, and I know of nothing in the Bankruptcy Act which excludes the definition of person given in the Revised Statutes of Canada as including any body corporate and politic. Section 33 of the Interpretation Act, R.S.C. 1906, ch. 1, to which reference has been made as if it were opposed to this extension of the meaning, was passed I take it merely to set at rest a question whether a definition or rule of interpretation contained in any Act applied to the construction of the very section in which the definition or rule of interpretation was contained. The clause seems to have come into the statute as an amendment to the Interpretation Act, passed in July, 1906. It is not to be found in the earlier two volume edition of Revised Statutes of Canada. There must have been a question raised whether when a definition was given for a word and the word happened to be used in the very same clause in which the definition occurred you could use the definition in the endeavour to ascertain the meaning of the word when construing the definition clause. That provision does not even in terms apply to the interpretation of sections other than the section containing the definition and hence can throw no light on the subject of our inquiry.

It will be observed that the words upon which the contention now under consideration is based have been deleted from sec. 30 (by 1921 (Can.) ch. 17, sec. 25) and Mr. Duncan in his book on the Law and Practice of Bankruptcy in Canada, says at p. 336 that "the deletion of the words 'to any other person' was no doubt intended to avoid the contention that section 30 was not intended to apply to banks, it being possible the word 'person' as defined in section 2 (aa) did not include banks."

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It might be plausibly contended that there was no need for the change if the word did not formerly include a bank, but the argument is only plausible,—not to my mind convincing. It is certain that the statute now applies to an assignment made to a bank and as I cannot conceive any reason for a different policy having been adopted when the Act of 1921 was passed from that indicated in the Act of 1922, I infer that the change was made to remove the doubt and not to give expression to a change of policy.

The further question arises as to the effect of sec. 30 (1) on the validity and operation of the company's assignment to the bank. On this part of the case I have, I need not say with much doubt and misgiving, come to a different conclusion from that of my brother. I cannot see the necessity for considering this section as anything more than a recognition of the existing provincial legislation on the subject to which it relates. An assignment of book debts existing or future gave the assignee an equitable interest in those debts the moment they came into existence. Now I think I am justified in saying that the general policy of bankrupt legislation is to transfer to the creditors of the bankrupt through their trustee, official assignee or by whatsoever title he may be designated, only the property to which the debtor was both legally and equitably entitled. The bank in this case is equitably entitled to the book debts of the company due at the date of the assignment in bankruptcy and remaining unpaid. There is no provincial legislation here which requires that a transfer of book debts should be filed or registered, as they are not included in the terms of our Bills of Sale Act, R.S.N.S. 1900, ch. 142, which deals only with chattels and these do not as therein defined include choses in action. To my mind it seems highly inequitable that an assignment of book debts for a present and valuable consideration should not have precedence over the claims of the general creditors as represented by the assignee in bankruptcy. If there had been a provincial statute providing for registration the bank would doubtless have complied with its terms and the assignment to the bank would in that case have been good as to all existing book debts. Why should its rights be less valid because there is no such legislation with which it could comply? It has complied with the provisions of whatever statute there is because there is no such statute. Let us imagine that in the Province of New Brunswick there is a statute providing for the registration of assignments of choses in action making the assignment void if not registered. In Nova Scotia there is no such statute. A debtor does business in both Provinces and has book debts

due him in both. He assigns those arising in Nova Scotia to one bank and those in New Brunswick to another. The assignment in the latter case is duly filed. Can it be possible that the mere accident of our having no law requiring the Nova Scotia assignment to be registered makes it a void transaction while the New Brunswick assignment is valid? I cannot think that such is the intention of the statute.

But it is suggested that unless the assignment of book debts is void in the absence of compliance with some provincial statute, that is to say void unless there is a provincial statute for registration, and unless that statute has been complied with, "no meaning or operation can be given to the proviso at the end of the section preserving the validity of debts growing due under specified contracts or book debts included in a transfer of a business made *bona fide* and for value etc.," I think there is ample room for the operation of this proviso consistently with our holding valid an assignment made under conditions such as exist in the present case. It can be applied in the case where there is a provincial registration law and that law has not been complied with. In such a case, but for this proviso the Bankruptcy Act would make such transactions as those referred to in the proviso void. Perhaps and probably the provincial Act might have the same effect. But the nature of the debts referred to is such that Parliament has seen fit for reasons that seemed to it good to hold the assignment of those obligations valid, notwithstanding anything in the Act or in the provincial statute applicable to the case.

The corresponding section of the English Bankrupt Act, does not in the interest of the general creditors confiscate the equitable rights of the creditor who has received an assignment of book debts for which value has been given. It merely obliges the assignee to comply with the terms of the Bills of Sale Act if he would preserve his rights. I see no reason why our Bankruptcy Act should go further than this in favour of the general creditors. The English Act contains the same proviso as ours in favour of the two special classes of debts referred to. That proviso can only operate in the case of the assignment not having been duly registered. The assignment of the debts referred to would not be void if the assignment were duly registered. The effect of the proviso is to validate the assignment as to such debts even where the instrument has not been registered. My suggestion is that the corresponding proviso in the Canadian Bankruptcy Act has exactly the same effect.

For the reasons given I am of opinion that our answer to the second question should be in the negative and that the

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equitable rights of the bank by virtue of the assignment have priority over the rights of the creditors as represented by the trustee in bankruptcy.

RITCHIE, E.J. agrees with Chisholm, J.

CHISHOLM, J.:—The two questions raised in this application are:—

1. Whether the assignment made by the Inverness Railway and Collieries, Ltd., to the Eastern Trust Co. was authorised under the provision of the Bankruptcy Act, and

2. Assuming such assignment to be valid, whether the general assignment of book debts to the Royal Bank of Canada is void as against the trustee in bankruptcy.

1. The Inverness Railway and Collieries, Ltd., was incorporated under the provisions of the Nova Scotia Joint Stock Companies Act R.S.N.S. 1900, ch. 128 on July 28, 1920, for the purpose of carrying on a railway and mining undertaking. The apparent purpose of the incorporators was to operate the railway and mines of the Inverness Railway and Coal Co., which was incorporated by a special Act of the Legislature of Nova Scotia.

The Nova Scotia Railways Act, R.S.N.S. 1900, ch. 99, sec. 2 (a) prescribes that: "The expression Special Act means any Act under which the company has authority to construct or operate a railway, or which is enacted with special reference to such railway and includes all such Acts";

And sec. 2 (b) that: "The expression 'company' means a railway company and includes any person having authority to construct or operate a railway."

By the Interpretation Act, R.S.N.S. 1900, ch. 1 sec. 23 (10) the expression 'person' includes any body corporate or politic, or party.

And the Nova Scotia Railways Act sec. 2 (r) further enacts that: "The expression 'railway company' or 'company' includes any person being the owner or lessee of, or a contractor working any railway constructed or carried on under the powers of any statute of the province."

Henderson, who purchased the entire undertaking of The Inverness Railway and Coal Co. would therefore while the owner, come within the definition of a railway company quoted above. Henderson on July 20, 1920, gave the Commissioner the notice required by the Nova Scotia Railways Act, sec. 269, and became entitled to a license as provided for in sec. 270 of the said Act. From about July 21, 1920, up to and until February 7, 1921, the Inverness Railway and Collieries, Ltd., operated

the railway, and on the last-mentioned date the trustees for the bond holders took possession of the undertaking.

On February 26, 1921, the Inverness Railway and Collieries, Ltd., made an assignment under the provisions of the Bankruptcy Act to the Eastern Trust Company.

The question arises at the outset whether the Inverness Railway and Collieries, Ltd., was a railway company within the definition of the term in sec. 2 (r) of the Nova Scotia Railway Act.

In the agreement of July 1920, between Henderson and the Inverness Railway and Collieries, Ltd., Henderson purports to convey to the company all his rights powers and privileges under the agreement of sale of June 16, 1920, and the order of the Supreme Court of July 19, 1920, approving of the said agreement, with power to use the name of Henderson whenever necessary to enforce the provisions of said agreement and order. Henderson thereby constituting the company his attorney for the said purpose. The said agreement of July, 1920, further provides that the vendor—for so Henderson describes himself—shall be indemnified and saved harmless with respect to his covenants and agreements in the Indenture of June 16, 1920, that Henderson will hold the railway etc. as trustee for the company and will permit the company to operate the railway as his agent and that all net earnings of the railway shall be the property of the company. The agreement further provides that the company will pay the vendor (Henderson) the sum of $200,000 which he agreed to pay under the Indenture of June 16 and that Henderson surrenders in favour of the company all rights, powers and privileges acquired by him under the said Indenture and said Order of the Supreme Court and will hereafter exercise such of them as nominally remain vested in him exclusively for the benefit of the company.

The definition given in the Railways Act, R.S.C. 1906, ch. 37 sec. 2, is as follows:—

"Sub-sec. 4 'Company' (a) means a railway company and includes every such company and any person having authority to construct or operate a railway."

Under the terms of this definition the term railway company is not exhaustively defined; and the definition does not much assist to determining what the term means in the Bankruptcy Act.

The Bankruptcy Act, ch. 36 of 1919, sec. 2, has the following definition:—

"Section 2 (k): 'Corporation' includes any company incorporated or authorised to carry on business by or under an Act

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of the Parliament of Canada or of any of the provinces of Canada, and any incorporated company wheresoever incorporated, which has an office in or carries on business in Canada, but does not include . . . railway companies."

Section 2 (aa.) (as amended by 1921, (Can.) ch. 17, sec. 5): 'Person' includes . . . a corporation, as restrictively defined by this section, a body corporate or politic. . ."

Section 2 (o) as amended by 1920, ch. 34, sec. 2: 'Debtor' includes . . . a corporation."

By sec. 9 of the Bankruptcy Act "any insolvent debtor" in the circumstances mentioned in the section may make an assignment.

The term "debtor" includes a corporation, that is a corporation as defined by the Act; and the term "person" includes a corporation as restrictively defined by paragraph (k) of sec. 2. Corporation as so restrictively defined excludes a railway company.

I think it can be fairly contended that the Inverness Railway and Collieries, Ltd., falls within the definitions of "railway company" given in the provincial Act. Though not technically the owner, it became, it seems to me, the beneficial owner of the railway undertaking. Henderson divested himself, so far as he could, of all his interest in the undertaking. And if it did not become the owner, its status may probably be covered by the terms "lessee" or "contractor." The word "contractor" is not restricted to one who builds a railway; and it is difficult to give the word any meaning which would exclude a company such as this one.

The purpose of the Bankruptcy Act is plainly to place railway companies beyond the scope of the Act; and corporate bodies which fall within the term "railway companies" under a definition of the term as given in a provincial statute are intended to be excluded from bankruptcy proceedings to as great an extent as similar corporations operating under a Dominion charter. Even if the company were outside of the definition given in the provincial and Dominion Acts, it might still be a railway company; and taking into consideration the purposes for which this company was incorporated, its contractual relations with Henderson, and the work which it carried on between July 21, 1920, and February 7,1921, I have come to the conclusion that the Inverness Railway and Collieries, Ltd., is a railway company within the meaning of the Bankruptcy Act and that it has no power to make an assignment under the provisions of the Bankruptcy Act.

My answer to the first question would therefore be in the negative.

2. If I am right in my answer to the first question, the second question becomes merely academic. But as my answer to the first may not be the answer of the majority of the Court, I deem it my duty to deal with the second.

Section 30 (1) of the Bankruptcy Act as amended by 1921, (Can.) ch. 17, sec. 25, reads:—

"30. (1.) Where a person engaged in any trade or business makes an assignment of his existing or future book debts or any class or part thereof, and is subsequently adjudicated bankrupt or makes an authorised assignment, the assignment of book debts shall be void against the trustee in the bankruptcy or under the authorised assignment, as regards any book debts which have not been paid at the date of the presentation of the petition in bankruptcy or of the making of the authorised assignment, unless there has been compliance with the provisions of any statute which now is or hereafter may be in force in the province wherein such person resides or is engaged in said trade or business as to registration, notice and publication of such assignments. Provided that nothing in this section shall have effect so as to render void any assignment of book debts due at the date of the assignment from specified debtors, or of debts growing due under specified contracts, or any assignment of book debts included in a transfer of a business made *bona fide* and for value, or in any authorised assignment."

With respect to assignment of book debts we have in this Province no statute requiring registration, notice or publication of such assignments; and the question arises as to whether this section avoids all general assignments of book debts, except in Provinces where there is statutory provision for registration, notice and publication of such assignments and there has been registration notice or publication of such assignments.

The other view is that there is no avoidance under the statute where there is no provincial law requiring registration notice and publication.

It is unfortunate that the parliamentary draftsman should have left sec. 30 (1) so obviously open to conflicting interpretation, when the use of a few additional or different words would have put the meaning beyond dispute.

With respect to the contention that the bank is not a person within the meaning of the Act, the general rule is that when a word is used more than once in a section, the same meaning must be given to it whenever it occurs. That would work a

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result with respect to sec. 30 (1) which I cannot believe to have been intended by Parliament. I should rather read the section as being intended to enact that where any person who is liable to be adjudicated bankrupt or is capable of making an assignment, under the provisions of the Act, makes an assignment to any person capable of taking an assignment of book debts, etc., the assignment shall be void, etc. The assignments which are within the section are struck down as void in the principal clause, and in direct and explicit terms; and in the subordinate clause those which comply with the provincial laws which are now or may hereafter be in force, are restored. If it were intended to restore those made where there are no such provincial laws, it is not unreasonable to expect that Parliament would say so in terms as direct and explicit as those used in the main clause.

While the question is not clear from doubt, I have arrived at the conclusion that the second question should be answered in the affirmative.

MELLISH, J.:—The Inverness Railway and Coal Co. is a body corporate, incorporated by special Act of the Legislature of Nova Scotia for the purpose of owning and operating a mining undertaking at Inverness and elsewhere in the County of Inverness and for the purpose of owning and operating a railway in said county and the said company had duly built a railway from Canso to Inverness and had operated the same in the carrying of freight and passengers and had operated mines at Inverness up to July 20, 1920.

The National Trust Co. Ltd. is a body corporate and the mortgagee of the entire railway and mining undertaking of Inverness Railway and Coal Co. and trustee for bondholders under a trust deed.

By agreement in writing which was dated June 16, 1920, said Inverness Railway and Coal Co. Ltd. and the National Trust Co. Ltd. agreed to sell the entire undertaking of the said Inverness Railway and Coal Co. to Henderson upon the terms therein expressed, and in pursuance of said agreement said Henderson entered into possession of the properties therein described on July 20, 1920.

The Inverness Railway and Collieries Ltd. is a body corporate, incorporated under the provisions of the Nova Scotia Joint Stock Companies Act, R.S.N.S. 1900, ch. 128, July 28, 1920, for the purpose of carrying on a mining and railway undertaking. In accordance with the provisions of the Railway Act, R.S.N.S. 1900, ch. 99, and amendments thereto, said Henderson

notified the Commissioner of Mines on July 20, 1920, that he had purchased the said properties, but no notification was ever given to the said Commissioner of Mines by or on behalf of the Inverness Railway and Collieries Ltd. of that company's intention to run or operate a railway. On July —, 1920, said Henderson and Inverness Railway and Collieries Ltd. entered into the agreement under which the said Inverness Railway and Collieries Ltd. as agents of said Henderson operated the said railway from on or about July 21, 1920, up to and until February 7, 1921, when the said Inverness Railway and Coal Co. and the National Trust Co. re-entered into possession of the properties on default having been made by said Henderson under his agreement.

The Royal Bank of Canada on December 27, 1920, received an assignment of book debts from Inverness Railway and Collieries Ltd., which is not, I understand, of the character which is expressly excepted from the operation of sec. 30 of the Bankruptcy Act.

For the purposes of this application only, it is admitted the Royal Bank of Canada gave present cash value on taking such assignment of book debts.

On February 26, 1921, the Inverness Railway and Collieries Ltd. made an assignment under the provisions of the Bankruptcy Act to the Eastern Trust Co., trustee in bankruptcy.

Two questions raised for the consideration of the Judge in Bankruptcy have been submitted to us:—(*a*) Whether the assignment made by the Inverness Railway and Collieries Ltd. to the Eastern Trust Co. was authorised under the provisions of the Bankruptcy Act; (*b*) Assuming such assignment be valid, whether the general assignment of book debts to the Royal Bank is void as against the trustee in bankruptcy.

The Bankruptcy Act 1919, ch. 36, as amended by the Acts of 1920, ch. 34, and 1921, ch. 17, has the following provisions:—

"2. In this Act unless the context otherwise requires or implies the expression. . . . . .

(k) 'Corporation' includes . . . any incorporated company . . . which has an office in or which carries on business within Canada, *but does not include* building societies having a capital stock nor incorporated banks, savings banks, insurance companies, trust companies, loan companies or railway companies. . . . . .

(*o*) 'Debtor' includes any person . . . who . . . (*d*) was a corporation . . . which carried on business in Canada; and where the debtor is a corporation *as defined by*

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this section the Winding Up Act . . . shall not . . . apply to it. . . . . .

(aa) 'Person' includes corporation and partnership. . . .

30 (1) Where a person engaged in any trade or business makes an assignment to any other person of his existing or future book debts or any class or part thereof, and is subsequently adjudicated bankrupt or makes an authorised assignment, the assignment of book debts shall be void against the trustee in the bankruptcy or under the authorised assignment as regards any book debts which have not been paid at the date of the petition in bankruptcy or of the authorised assignment, *unless there has been compliance with the provisions of any statute which now is or at any time hereafter may be in force in the province wherein such person resides or is engaged in said trade or business as to registration, notice and publication of such assignments.* Provided that nothing in this section shall have effect so as to render void any assignment of book debts due at the date of the assignment from specified debtors or of debts growing due under specified contracts or any assignment of book debts included in a transfer of a business made *bona fide* and for value or in any authorised assignment. (2) For the purposes of this section 'assignment' includes assignment by way of security and other charges on book debts."

Is an assignment of book debts to an incorporated bank within this section?

It is contended on behalf of the bank that it is not a 'person' within the meaning of this section; and that although the word 'person' includes by sub-sec. 2 (*aa*) above quoted a 'corporation' the latter word must there be held to be used in the restricted sense as defined in sec. 2 (*k*).

Undoubtedly sec. 2 is a part of the Act, but a perusal of the section itself I think indicates that the word 'corporation' as therein used is not always intended to be read in such a restricted sense. Where such restricted sense is clearly intended in this section the words 'corporation as defined by this section' (see sub-sec. 2 (*o*)) are used. I am therefore of opinion that the word 'corporation' is used in sub-sec. 2 (*aa*) in its ordinary and unrestricted sense, which indeed is the usual and proper way of using definitive language, and that consequently the word 'person' in sec. 30, line 2, includes an incorporated bank.

Our attention has been called to sec. 33 of the Interpretation Act, ch. 1, R.S.C. 1906, which provides that "Definitions or rules of interpretation contained in any Act shall unless the contrary intention appears apply to the construction of the

sections of the Act which contain those definitions or rules of interpretation, as well as to the other provisions of the Act." But section 34 of the same Act, which section is headed 'Definitions,' also provides:—

"In every Act unless the context otherwise requires . . . (20) 'Person' includes any body corporate and politic . . ."

I do not think that the context requires us to restrict this meaning either in sub-sec. 2 (*aa*) or in sec. 30. Certainly not in the latter. Indeed I cannot see any reason for putting by implication banks, insurance companies, trust companies, loan companies and railways in a better position than other creditors. The legislative intention on the contrary is, I think, *prima facie* against any such preference.

But it is further to be considered whether sec. 30 has any operation in this Province when no such statute as that contemplated by the section is in force. The proper construction to be put upon the section is not, I think, easy to determine. The bank contends it has no application in a Province where there is no statutory provisions such as that therein referred to.

I have come to the conclusion that the intention of this section is to make void traders' assignments of book debts as against the trustee in bankruptcy in respect of book debts unpaid at the date of the petition or assignment in bankruptcy except as to assignments of the classes of book debts named in the proviso to the section and as to assignments of which publicity has been given by registration or otherwise in compliance with 'any' existing or future provincial statute. In other words, the assignment, if not within the proviso, shall be void unless there be a local statute as to publicity and compliance with '*any*' such statute. The word 'unless' is often used as meaning 'except when.'

I am unable to give any other consistent interpretation to the section. If it were not intended to apply to Provinces where no such statutory provisions exist I think we should reasonably expect different language to be used.

I think the section has the primary object of avoiding certain assignments of traders in favour of their creditors in bankruptcy and not merely to define the effect of non-compliance with provincial legislation.

The section of the English Bankruptcy Act from which this section was apparently derived has evidently this primary object in view. 1914 ch. 59, sec. 43.

This section, of course, was passed by a Parliament with plenary powers which had no need to make provincial distinction or make any concessions to provincial legislative powers.

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If the section under consideration is to be held not to apply to Provinces where no such legislation exists, I can give no consistent meaning to the proviso therein contained. Why should not local statutes in respect of book debts such as those mentioned in the proviso be complied with? And if non-compliance with local statutory provisions in respect thereto made them void as against creditors by the terms of the statutes themselves (see for example ch. 5, (B.C.) 1916) why should the subject of the assignment not go into the hands of the trustee in bankruptcy?

Was the Inverness Railway and Collieries, Ltd., entitled to make an assignment under the Bankruptcy Act? This road was constructed and operated under special legislation of the Province. It was subject to the provisions of the local Railway Act, ch. 99, R.S.N.S. 1900. And that Act, including secs. 269, 270 and 271, I think contemplates that it should not be otherwise held or operated except by license as therein provided unless under special legislation. A company incorporated by letters patent might perhaps not be subject to the provisions of the Railway Act. But it is, I think, the intention of that Act that a railway like the one in question when subject to the provisions of the Act should so remain.

The proper conclusion,, as it seems to me, is that the Inverness Railways and Collieries, Ltd., was not in business as a 'railway company' within the meaning of the Bankruptcy Act. It did not have, and could not have, the usual powers of a railway company as to acquiring lands etc., without special legislation. It was doing what any person could do as agent for Henderson in the operation of the railway with a view apparently of going into business after the Legislature met, as a railway company having the powers and responsibilities of such a company in respect to the particular road in question; and it was not even doing that when it made the assignment in bankruptcy. Indeed there may be some question as to whether the term 'debtor' as defined in sec. 2 (o) of the Bankruptcy Act does not include every sort of 'corporation' in view of the restrictions applied to that word when used in that sub-section in connection with winding-up proceedings. On this, however, I offer no opinion.

Both the questions submitted should, I think, be answered in the affirmative.

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Saskatchewan Court of Appeal, Haultain, C.J.S., Turgeon, J.A., and Brown, C.J.K.B. September 26, 1921.

INTERNAL REVENUE (§I—10)—INLAND REVENUE ACT (CAN.)—POSSESSION OF MASH SUITABLE FOR MAKING SPIRITS—ONUS OF PROOF AS TO LICENCE FROM OR NOTICE TO REVENUE DEPARTMENT.

On a charge under the Inland Revenue Act (Can.) of unlawful possession of mash suitable for the manufacture of spirits, the onus is upon the accused to shew the possession was lawful because of his having the required license or having given the required notice under the Act.

The following case was stated for the opinion of the Court of Appeal by McKay, J.:—

"On the 4th of June, 1921, at Yorkton, the accused was tried by me with a jury, upon the following charge:

"For that he the said Frank Varga at or near Section 34-24-5, W. 2nd, in the Province of Saskatchewan, on or about the 26th day of April, 1921, without having a license under The Inland Revenue Act, being Chapter 51 of the Revised Statutes of Canada 1906 and amendments thereto, and without having given notice as required by the said Act, did have in his possession a quantity of wash suitable for the manufacture of spirits.

"The said Frank Varga further stands charged as aforesaid for that at the same time and place without having a license as aforesaid and without having given notice as aforesaid did have upon his premises a quantity of wash suitable for the manufacture of spirits.

"The evidence for the Crown showed that the accused had in his possession and upon his premises as charged a quantity of wash suitable for the manufacture of spirits, but no evidence was produced to shew that he had no license or had not given notice as required by the said Inland Revenue Act.

"No evidence was called for the accused. Counsel for the accused contended that the Crown should show that accused had no license and had not given the required notice.

"In view of secs. 33, 54 (2), 127 and 154 of The Inland Revenue Act and what is stated on pp. 1956 and 1957 of the 7th Eng. and 1st Can. ed. of Russell on Crimes [Note (*a*)], I ruled that the onus was on the accused to shew he had the required license or had given the required notice.

(*a*) ONUS OF PROVING EXCEPTION UNDER REVENUE STATUTE — INLAND REVENUE ACT (CAN.).

In *R.* v. *Hanson* (referred to Paley on Convictions, ed. by Dowling, p. 45 n (1)), the rule laid down in *R. v. Turner*, 3 M. & S. 206 was affirmed. That rule was that the prosecutor, in

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"The jury found the accused guilty on the said charge and I bound him over to appear for sentence at the next sittings of the Court of King's Bench at Yorkton, and on the application of counsel for the accused I decided to submit a case for the opinion of the Court of Appeal.

"The question submitted for the opinion of the Court is: Was I right in ruling that the onus was upon the accused to shew that he had the required license or had given the required notice?"

W. M. Graham, for the Crown.

W. R. Parsons, for the accused.

At the close of the argument the Court answered the question submitted in the affirmative and affirmed the conviction without giving written reasons.

Conviction affirmed.

HIGGINS v. ELLIOTT.

Nova Scotia Supreme Court, Harris, C.J., Russell, J., Ritchie, E.J., Mellish and Rogers, JJ. April 13, 1922.

SALE (§IV—91)—SALE OF BUSINESS BY DEFENDANT—RE-SALE TO DEFENDANT BY PURCHASER—BULK SALES ACT, 1913 (N.S.), CH. 5—NON-COMPLIANCE WITH PROVISIONS OF ACT—VALIDITY OF TRANSACTION.

The defendant carried on a general store business which in 1912 or 1913 he sold out to one Ernest E. Peers. The defendant leased his premises to Peers and in 1920 Peers owed defendant $1,100 rent and a large sum for the balance of the sale of the stock which was represented by a note. In August, 1920, Peers sold his stock of goods then inventoried at cost prices at $3,756.97 to the defendant

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general, is not called upon to prove negatively all that is stated in the information as matter of disqualification. In *R.* v. *Hanson*, the conviction was for selling ale without an excise license. The information negatived the defendant's having a license, but there was no evidence to support this negative averment. The conviction was sustained on the evidence of sale, and the absence of proof by the defendant that he had a license. Abbott, C.J., said there might be cases which may be fit to be considered as exceptions to the general rule but this was not one of them. The party thus called upon to answer for an offence against the excise laws, sustains not the slightest inconvenience from the general rule, for he can immediately produce his license; whereas if the case is taken the other way, the informer is put to considerable inconvenience. So in *R.* v. *Smith*, 3 Burr. 1475, which was a conviction for trading as a hawker and pedler without a license, and the trading was admitted, the onus of proving a license was upon the accused.

[Russell on Crimes, 7th Eng. and 1st Can. ed. pp. 1956, 1957. *Cf. R.* v. *Willis*, 1 Hawk., ch. 89, sec. 17; *Apothecaries Co.* v. *Bentley*, Ry. & M. 159; 1 C. & P. 538; *R.* v. *Harris*, 10 Cox C.C. 541.]

at 75 cents on the dollar and the amount of the sale, after deducting a small sum for work in connection with the sale amounted to $2,792.97. There was no settlement of the amount due the defendant by Peers at the time, but it was to be calculated and off-set against the $2,792.97. Later the defendant paid Peers $400 in cash and there were some notes indorsed by defendant for Peers which apparently were accommodation and retired by Peers. The defendant claimed that there was probably $70 or $80 still due to Peers on a settlement of the accounts.

The Court held, reversing the judgment of the trial Judge, that the sale by Peers to defendant was for "cash or on credit" within the meaning of the Bulk Sales Act, ch. 5, N.S. Stats. 1913, sec. 3, and void for non-compliance with that Act.

APPEAL from the judgment of Chisholm, J., dismissing with costs plaintiff's action to set aside a sale or transfer of a stock of goods, wares or merchandise made by one Ernest E. Peers to defendant as fraudulent and void as against creditors and as being a sale in bulk within the meaning of the Bulk Sales Act, sec. 6 (N.S.), 1913, ch. 5. Reversed.

S. Jenks, K.C., and *F. L. Milner*, K.C., for appellant.

J. L. Ralston, K.C., and *J. A. Hanway*, K.C., for respondent.

HARRIS, C.J. (after setting out the facts as stated in the headnote):—The plaintiff, in December, 1920, recovered a judgment against Peers for $251.91 which is unsatisfied, and on January 11, 1921, issued a writ against the defendant claiming a declaration that the sale by Peers to defendant was void:—(a) Under the Statute of Elizabeth, (b) Under the Assignments Act, R.S.N.S. 1900, ch. 145, or (c) Under the Bulk Sales Act, ch. 5, 1913 (N.S.), as against the creditors of Peers, and that the goods sold to defendant are assets for the payment of the debts of Peers.

The case was tried before Chisholm, J., at Amherst, who gave judgment in December, 1921, dismissing the action, and there is an appeal to this Court.

The transaction was not attacked in this Court under the Statute of Elizabeth or the Assignments Act, but it was contended that it was void under the Bulk Sales Act ch. 5 of the Acts of 1913.

The trial Judge had decided that the sale was not one for cash or credit within sec. 4 of the Bulk Sales Act.

One question argued at considerable length was as to whether or not sec. 3 of the Act applied to sales other than those "for cash or on credit" to which only secs. 2 and 4 apply.

While secs. 2 and 4 specifically refer only to sales of goods "for cash or on credit" sec. 3 it is contended has a wider application. I quote it in full:

"3. Any agreement for the purchase or sale of any stock of goods, wares or merchandise in bulk shall be in writing and

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shall contain an inventory of the property so sold or to be so sold, and such agreement shall be filed within ten days after the execution thereof in the registry office of the registration district where the vendor resides, or if he is a non-resident, then in the registry office of the district where such property is situate, and no part of the purchase price for such goods, wares and merchandise shall be paid or any promissory note or notes or any security for said purchase price delivered within thirty days after the execution of such agreement."

Notwithstanding the general words used in the first part of this section it is, I think, clear from the words of the last part of the section that it is sales "for cash or on credit" only that are being dealt with and any other construction would lead to the anomalies pointed out by the trial Judge.

The question is whether the sale here is one for "cash or on credit" within the meaning of the Act and I have reached the conclusion that it is. It is obviously within the mischief aimed at by the Act and it is not a barter or exchange of goods which counsel argued did not come within the meaning of the Act. If the transaction is examined it resolves itself into a sale for cash worked out by off-setting the cash payable for the goods in part against the debt due from Peers to the purchaser.

In *Spargo's* case (1873), L.R. 8 Ch. 407, at p. 414, 42 L.J. (Ch.) 488, 21 W.R. 306, Mellish, L.J., said:—

"Nothing is clearer than that if parties account with each other, and sums are stated to be due on one side, and sums to an equal amount due on the other side on that account, and those accounts are settled by both parties, it is exactly the same thing as if the sums due on both sides had been paid. Indeed, it is a general rule of law, that in every case where a transaction resolves itself into paying money by A. to B., and then handing it back again by B. to A., if the parties meet together and agree to set one demand against the other, they need not go through the form and ceremony of handing the money backwards and forwards."

And see also comments on this case by Lord Macnaghten in *Larocque* v. *Beauchemin*, [1897] A.C. 358 at p. 365, 66 L.J. (P.C.) 59, 45 W.R. 639; and *Livingstone* v. *Whiting* (1850), 15 Q.B. 723, 117 E.R. 632, 19 L.J. (Q.B.) 528, 15 Jur. 147.

Some cash was paid by the defendant to Peers after the sale on account of it and the defendant admits that there is still due to Peers $70 or $80 on the purchase.

The Act makes bulk sales—and it is admitted this is one—absolutely void as against the creditors of the vendor in cases where the provisions of secs. 2 and 3 have not been complied

with, unless the proceeds of the sale are sufficient to pay the creditors of the vendor in full and are in fact actually applied in or towards payment of all the vendors' creditors *pro rata* without giving any preference or priority to one over another except such as is provided for by law or previous contract. The money was not so applied. The plaintiff is entitled to a decree that the sale was void under the Act.

The only remaining question is as to whether the remedy can be worked out in this action or whether the plaintiff is to be left to work out his remedy by execution or if necessary by further proceedings. The most of the goods or at least one-half of them had been sold before the trial and they have now probably all been disposed of by defendant.

The statement of claim does not specifically set out that the plaintiff is suing on behalf of himself and all the other creditors of Peers, but the relief claimed is that the sale is void as against the creditors of Peers and that the goods sold to the defendant are assets for payment of the debts of Peers.

The action is, I think, to be treated as an action on behalf of all the creditors.

In *Macdonald et al* v. *McCall* (1885), 12 A.R. (Ont.) 593, Osler, J.A. in considering a similar question said at pp. 635-6:

"From the conclusion thus arrived at as to the creditors' right to obtain execution of property of this nature it follows upon the authority of the *Reese River Mining Co.* v. *Atwell*, L.R. 7 Eq. 347, and *Longeway* v. *Mitchell*, 17 Gr. 190, that the plaintiffs having proved their status as creditors are at least entitled to a decree declaring the impeached conveyance to be void as against creditors. But should not the Court now go further? In those cases the court of equity was exercising its own peculiar jurisdiction to set aside an instrument on the ground of fraud, and could not give the plaintiff judgment and execution. To arm himself with that he was compelled to resort to a court of law, though a legal execution might be useless, and it might be necessary for him if he wanted equitable execution again to resort to the Court of Chancery by means of a fresh suit in that court.

Under the jurisdiction at first conferred on the old courts by the Administration of Justice Act, and now, in consequence of the creation by the Judicature Act of a new tribunal, having the combined jurisdiction of the old, this state of things no longer exists, and the court gives in one and the same action, so far as it can conveniently be done, the complete and appropriate relief to which the party is entitled. . . . . On principle and on the authority of such cases as *Anglo-Italian*

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Bank v. *Davies*, 9 Ch. D. 277; *Smith* v. *Cowell*, 6 Q.B.D. 75; *Salt* v. *Cooper*, 16 Ch. D. 544; *Slade* v. *Hulme*, 18 Ch. D. 653. I can see no reason why all this should not be done in the same action."

See this case on appeal (1886), 13 Can. S.C.R. 247.

What Osler, J. said in *Macdonald and McCall* was quoted with approval and followed in *Urquhart* v. *Aird* (1905), 6 O.W.R. 155.

The form of the decree can be settled when the order is moved for.

Perhaps I should add that I agree with what the trial Judge has said, that the transaction seems to have been an absolutely honest one and the defendant entered into it without knowing of the existence of the Bulk Sales Act. There seem to be very few persons who were creditors at the time of the transaction and apparently they are known and the amount of their respective claims can easily be ascertained. The property has probably all been sold and the amount the defendant is to account for can be ascertained and probably the parties can now agree without the necessity for a reference, or the attendant cost to adjust their rights and the rights of all parties interested, and I trust this will be done. In any event the defendant must pay the costs of the trial and appeal.

RUSSELL, J.:—This is a case the result of which depends upon the construction of the so called "Bulk Sales Act" passed in 1913, ch. 51. The Act consists of 8 sections, the sixth of which defines a bulk sale in such terms as undoubtedly apply to the transaction in question. The second section makes it the duty of every person who bargains for, buys or purchases any stock of goods, wares or merchandise in bulk for cash or on credit, before closing the purchase of the same, and before paying to the vendor any part of the purchase-price or giving any promissory note or notes or any security for the purchase-price, to demand and receive a statutory declaration of the vendor or his duly authorised agent stating the names and addresses of all the creditors of the vendor and the amounts due, owing, payable or accruing due.

My impression is that the terms for cash or on credit were intended to cover every conceivable case of a bulk sale, because the next following section, which provides for a written memorial of the agreement which is required to be filed, omits the qualifying words, for cash or on credit, and enacts in clear terms that any agreement for the purchase or sale of any stock of goods, wares or merchandise in bulk shall be in writing and shall contain an inventory of the property so sold or to be sold and

such agreement shall be filed within ten days after the execution thereof in the registry office of the registration district in which the vendor resides (with provision added for the case of a non-resident) and no part of the purchase-price shall be paid or any promissory note or notes or any security for the purchase-price delivered, within 30 days after the execution of the agreement.

I cannot entertain any doubt that the third section refers to the same transaction as the second and enacts an added requirement to that contained in sec. 2 of the Act. The fourth section enacts that whenever any person purchases any stock in bulk for cash or on credit and pays any part of the price or executes or delivers to the vendor or his order or to any person for his use any promissory note or other document on account of the price without first having demanded and obtained the statutory declaration provided for in sec. 2 "or if such agreement is not filed as provided in sec. 3, then such sale shall be deemed fraudulent and shall be absolutely void as against the creditors of the vendor unless the proceeds of such sale are sufficient to pay the creditors of the vendor in full and are in fact actually applied towards their payment *pro rata.*"

The sections that I have summarised are those with which we are chiefly concerned in the solution of this case. It is unfortunate that we are unable to depend upon precedents derived from the decisions in other Provinces as the terms of the Act as adopted in the different Provinces so greatly vary. For example: the statute of Saskatchewan under which occurred the case of *Peart Bros.* v. *MacDonald*, cited by the trial Judge in his decision (1917), 33 D.L.R. 19, 10 S.L.R. 6, makes it clearly a condition of the sale being void that the purchaser shall pay part of the purchase-price or deliver a note, etc. No part of the price had been paid and therefore the Court *in banco* reversed the decision of Newlands, J., and held that the sale did not come within the class of sales contemplated by the Act. The statute of this Province is materially different as to the very point on which the Saskatchewan decision turned. To bring the sale within the terms of the Act all that is necessary is that it should be a bulk sale for cash or on credit and as to such a sale the provision follows that before closing the purchase and before paying, etc., or giving, etc., it shall be the duty of the purchaser and vendor to comply with certain conditions, failure to comply with which renders the transaction void against creditors of the vendor. In Saskatchewan it could be held that the transaction did not come within the terms of the statute at all. Here—subject to the question to be considered later whether in order

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to come within the statute it must be for cash or on credit and whether if so it was a sale for cash—the transaction was within the statute and the only question to be determined is whether or not there had been such a non-compliance with the statutory requirements as to render the sale void.

The defendant was a merchant doing business in Pugwash who, in August, 1913, sold his stock in trade to one Peers for $2,000 and leased his building to him at a rental of $200 a year. The purchaser carried on business for a number of years and became indebted to the defendant in the sum of $3,000. At length, in August, 1920, the defendant Elliott purchased the stock in the shop for $2,792.97 which was assumed to be about 75% of the invoice price. No question is made as to the honesty or fairness of the transaction. The question is simply whether it comes within the terms of the Bulk Sales Act. I do not see how the question can be answered otherwise than in the affirmative. There may be a fair question raised as to whether it was a sale for cash or on credit. I think it was a sale for cash. To constitute such a sale it is not necessary that any actual money should pass from the hand of the purchaser to that of the vendor. The transaction is the same as if the purchaser had handed his cheque to the vendor and the latter had passed it back to the purchaser in cancellation *pro tanto* of the debt. As Lord Macnaghten said in *Larocque* v. *Beauchemin*, [1897] A.C. 358, at p. 367, quoting James, L.J., in an earlier case: "anything which amounts to what would be in law sufficient evidence to support a plea of payment would be a payment in cash within the meaning of this provision," there under consideration. The passages that immediately follow seem to me clearly applicable to this transaction and to warrant us in deciding that the sale was a sale for cash.

But whatever doubts there may be as to the application of sec. 2, there can be none whatever if I am right in holding that sec. 3 is applicable to this transaction. The agreement between the parties was not reduced to writing nor filed according to the requirements of the section. The enactment is clear and distinct that if the agreement is not filed as provided in sec. 3 the sale shall be deemed to be fraudulent and shall be absolutely void as against creditors of the vendor unless the proceeds of the sale are sufficient to pay the creditors in full and are in fact actually applied in or towards the payment of all the vendor's creditors in the manner provided by the section.

The proceeds of the sale were not sufficient to pay the defendant in full, not to speak of other creditors, one of whom

was the plaintiff who obtained judgment against the vendor on December 18, 1920, for $251.91, no part of which has been paid. The defendant tells us frankly that he never knew that such a thing as the Bulk Sales Act existed, and I have not a particle of doubt that he tells the truth. The trial Judge has expressed his belief that the transaction was entirely honest and I find no difficulty in concurring in that belief and regretting that a statute so vitally affecting the transactions of the business community should be so little known as it is. It is suggested that if the provisions of secs. 2 and 3 of the Act are held to apply to the defendant's purchase it may not be too late even now for him to comply with their requirements. I fear that this suggestion cannot be worked out. Section 2 requires the statutory declaration to be made before closing the purchase. The purchase was closed at the latest the moment there was a delivery to satisfy the Statute of Frauds. The provision that the written agreement is to be filed within 10 days after execution surely cannot be complied with by one not reduced to writing until more than a twelvemonth from its date although no time is expressly stated within which it is to be put in writing.

The defendant may, however, escape the consequences of his innocent failure to comply with the law if one or other of the contentions made by his counsel and not dealt with at the trial can be supported.

It is contended that the goods were all disposed of and plaintiff cannot now claim them from the defendant. The answer is, in part, that the goods have not all been disposed of. As to the goods disposed of it may be for the parties at a later stage to discover the meaning of the term "absolutely void as against the creditors of the vendor." It would not be advisable, perhaps it would not be just, to determine such a point without hearing the parties interested as to the doubt expressed by Strong, J., in *Clarkson* v. *McMaster* (1895), 25 Can. S.C.R. 96. It seems difficult to comprehend how any title can be made to property, so long as there is an unpaid creditor, by virtue of a transaction which the statute declares to be absolutely void against creditors. On the other hand, it would be an obvious injustice that a purchaser for value of the goods without notice of the invalid nature of the transaction should be compelled to surrender the property. The statute of Elizabeth enacted that transfers of property under the conditions therein defined should be utterly void, but it was not long before it was discovered that they were only voidable. We are not called upon in this case to say whether the property can be followed in the hands of the innocent purchaser or not.

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The defendant further contends that plaintiff cannot succeed without an execution. Whatever may have been the decisions of this Court in former days, I think there can be nothing in the contention since the decision in *Reese River Silver Mining Co.* v. *Atwell* (1869), L.R. 7 Eq. 347, 19 W.R. 601. The comments on this case of Strong, J., in *McCall* v. *McDonald* (1886), at 13 Can. S.C.R. p. 255, and on two earlier cases in which it had been held that the creditor attacking a deed as void must first have a judgment at law, besides being interesting and instructive, seem to dispose conclusively of the contention now set up.

The remaining contention of the defendant is that the vendor of the property should have been made a party to the action. The plaintiff claims no relief against the vendor, and the vendor has no interest in the relief claimed against the purchaser or in respect of the goods transferred. The vendor has parted absolutely with his interest in the property and has received from the purchaser a release *pro tanto* of his debt due the latter. I see no reason why it was necessary that he should be joined.

In my opinion the appeal must be allowed with costs and a declaration as claimed that the transfer was void under the Bulk Sales Act, that the goods so far as they are in the hands of the purchaser are assets for the payment of the judgment recovered by Peers and that the purchaser is trustee of the proceeds of the sale so far as may be necessary for the satisfaction of the said judgment.

RITCHIE, E.J., concurs with ROGERS, J.

MELLISH, J.:—I think that the sale in question was a sale for cash or on credit within the meaning of the Bulk Sales Act. The goods were bought for a money price agreed on and I do not think it was any the less a sale for money because the money which the vendor owed the vendee was to be utilized for the purpose of payment. The parties were not making a barter or exchange of goods, nor was the transaction an assignment in trust. The price was presently payable subject to an adjustment of accounts which might shew a balance one way or the other, and so might turn out to be in part a credit sale, but in so far as one account was met by the other at the time of the sale it was a cash sale. (See Benjamin on Sales, 6th ed., p. 877).

The appeal should be allowed with costs and judgment be given with costs in favour of the plaintiff, declaring that the transfer was void under the Bulk Sales Act, and for such further and other relief as may be appropriate to the circum-

stances and which can be discussed when the order is moved for.

ROGERS, J.:—A sale by a general trader to the defendant, his principal creditor, of substantially all of his stock in trade is attached by the plaintiff, a creditor, as being void under the Bulk Sales Act (1913, ch. 5). The debtor, one Peers, had purchased the business as a going concern from the defendant Elliott some years previously, and at the time of the transaction in question was the latter's debtor for a portion of the purchase and rent of the shop owned by Elliott in which the business had been conducted. Peers, who thought his goods would amount at cost prices to a sum between $5,000 and $6,000 was willing to sell out at seventy-five cts. on the dollar, and after some negotiation Elliott agreed to become the purchaser on that basis. Stock was taken by a third party and as the gross amount reached the sum of $3,800 only, the sum payable after deducting the agreed discount and expenses amounted to $2,792. The indebtedness of Peers to Elliott including the rent is spoken of in round figures as amounting to about $3,000. The trial Judge found the agreed price to be reasonable and fair, but there are no findings as to the precise terms of the contract regarding payment. Peers says he got a slip from Elliott shewing the amount arrived at and that he did not receive any money on account. He adds, however, and he repeats it several times, that he has not as yet had any settlement with Elliott. Apparently there were other dealings between them and on a settlement there would be a balance to be paid to Peers. The evidence of Elliott on the point will best be appreciated by quoting it *verbatim*.

"Q. It is correct, is it, that you never paid Mr. Peers any part of the purchase price? A. I never did. Q. Do you intend to pay him? A. I intend to pay him if there is anything due him; I always pay my debts. I try to. Q. On what terms were these goods purchased, Mr. Elliott, for cash or credit? A. They were purchased for when my bill was paid—Mr. Peers at the time I was buying claimed he had between $5,000 and $6,000 worth of stock; I told him I did not think he has half or over half, that was roughly and I bought them and they were to go to pay my debts and there were some of the goods in the store when I bought that I had sold to him. Q. And your debt was about $3,000? A. Yes, that is rent and debt. Q. For which you held his promissory note? A. Yes, and there was a small shop account opposite. Q. Then there would not be anything due him? A. We did not know whether there was anything due him; I think to-day there is probably $70 or $80

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more would be due him if things were settled up but not more than that; I would not even say that; there might be a trifle owing him."

The transaction, if it is to stand, results in Elliott's acquisition of the goods, his setting off of his debts against the price, and an unascertained balance amounting possibly to $70 or $80, or perhaps "only a trifle" in favour of Peers is to be struck when the postponed settlement is arrived at. There is no contradiction as to the terms which are easily gathered from the evidence already referred to.

The question for determination, purely one of interpretation, is whether such a transaction is hit by the Bulk Sales Act? The Act is entitled:—"An Act to Regulate the Purchase, Sale and Transfer of Stocks of Goods in Bulk" and by sec. 6 a sale in bulk is a sale or transfer of goods (or part thereof) out of the usual course of business or when substantially the entire stock or an interest in the business is sold or conveyed or attempted to be sold or conveyed. There can hardly be a doubt that the passing over by a debtor to a favoured creditor of his whole stock of merchandize is such a transaction as one would expect to be dealt with in an Act purporting to deal comprehensively with "the purchase sale and transfer of stocks of goods in bulk." (See the remark of Lindley, M.R. in *Fielding* v. *Morley Corporation*, [1899] 1 Ch. 3). The legislation is remedial and its purpose is to improve the position of general creditors as against those who would seek special advantages and it must without straining the language used be reasonably construed so as "to suppress the mischief and advance the remedy." It is ancillary to the many modern statutory enactments tending to compel a trading debtor to respect the equal claims of all creditors to share ratably in his assets. The condition of solvency or insolvency has no relationship to this added safeguard for the payment of just debts without priority or preference. It is made clear that a trader who is about to sell out his business must consult his creditors and be quite sure that he intends to shew equal justice to all and the purchaser has a duty thrown upon him of declining to purchase in the absence of evidence disclosing that the debtor is respecting the primary obligation of paying his debts out of his goods, the possession of which is assumed to be the basis of credit. An Act of this nature with its scope so well defined by both title and contents should if at all possible be interpreted with sufficient liberality to save it from becoming meaningless and useless, and to defeat attempts to do something in an indirect or circuitous manner which the Act is intended to regulate if not

prohibit. If a favoured creditor can obtain payment of his claim by the simple device of purchasing his debtor's stock in bulk and off-setting his debt, the Act will be practically destroyed and the method suggested by the transaction in this case (the *bona fides* of which is not questioned) will soon become a popular one, particularly among that large class of transient traders whose commercial dealings are so frequently "out of the usual course of business."

Speaking for myself alone, I have no real difficulty in coming to the conclusion that the sale was a "sale in bulk" within the clear meaning of the statute and that it should be avoided. I do not find it necessary in order so to conclude that the Act should be read so as to embrace as is suggested by Russell, J. "every conceivable case of a bulk sale"; although there are compelling reasons, some of which have already been suggested, in addition to those put forward by the Judge, for the support of that proposition. For the moment, however, I will accept the view of the respondent's counsel and assume that the very broad description of the sales affected by the Act suggested by the reading of the first lines of sec. 3 must be governed by what he would argue are restrictive words: "for cash or on credit" following the words "in bulk" as in both secs. 2 and 4. The Act then if not complied with avoids any sale of goods in bulk for cash or on credit. But the transaction in question, it is contended, while a sale in bulk is not a sale for cash or sale on credit. What is the real significance of these so-called modifying words, and are they in fact restrictive, or should they be so read in this Act? It is just at this point that there is likely to be some confusion. A sale of goods in common parlance as well as in law is always a sale for cash payable either presently or after a period of credit agreed upon. A transfer of one stock of goods for another stock the price of neither being ascertained in currency is not a sale but a barter. Every sale is a transfer of goods for a price expressed in money and in the absence of agreement is a cash sale—a sale for immediate payment as opposed to a credit sale—a sale for postponed payment. Both are sales and both must for the purpose of completion be expressed as to price in money or currency; and observe the definition in the Sale of Goods Act—"A contract of sale of goods is a contract whereby the seller transfers, or agrees to transfer, the property in goods to the buyer for a money consideration, called the price." The acceptance for the price in lieu of currency of a contra account in a like amount in settlement is payment of the agreed cash or money price by virtue of an arrangement (set-off) which does not make the sale any

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the less a sale for cash. In the case at bar it is doubtful even yet—it is in fact clear on the evidence quoted that there has not even yet been a settlement which could be proved under a defence of payment in answer to a claim for the price. The offsetting is allowed by law as a matter of practical convenience to avoid exchange of goods or of tokens or, to use a more modern expression "the swapping of cheques." It was suggested in argument that the goods were to go in payment of the debt and even that there was not to be an adjustment, but the evidence of Elliott already quoted hardly lends colour to such an idea. "I bought them," he says further, "and they were to go to pay my debts"; and again he says he was "not influenced at all by the fact that Peers owed him $3,000 and he was getting paid"; because he believed Peers had plenty to pay all his bills. The Act was in force when the contract was being made and by virtue of its provisions an agreement to set off the old debt could not be made; that part of the agreement, if in fact it was a part of it, was paying a part of the price under sec. 3 just as if it was paid to a like amount in actual currency; the payment, whether in cash or in notes, or the giving of security must by force of the statute await the fulfilment by both parties of the requirements of sec. 2 and the filing under sec. 3 of the agreement, necessarily in writing, and the delay for 30 days until the creditors, all of them could be consulted,—not an onerous requirement in view of the obvious and useful purpose to be served. Unless the words of the statute under consideration are to be interpreted narrowly and unreasonably and the evidence of the transaction itself be misread, there can, in my opinion, be only one conclusion, namely, that there has been a violation on the defendant's part of duties which he must be assumed to know under both secs. 2 and 3 and it must follow that the penalty provided by sec. 4, the avoidance of the transaction, must be exacted.

Nor am I at all convinced that the view of Russell, J. to the effect that every sale in bulk is subject to the provisions of the Act is not fully justified. The title, the interpretative sec. 6, the exception only of judicial and trustees' sales by the last section, the omission of the supposedly restrictive words is the only section (3) which goes to publicity, the enactment itself of that section and the reference to it in secs. 4 and 5, provisions not found in the Act in some other jurisdictions, all seem to point in that direction; and bearing in mind that the remedial substance of the Act if I may so speak is to be found in sec. 3, namely (1) the publicity by filing and the (2) prohibition of the payment of the price—(not in cash necessarily but by

any thing answering a plea of payment) or (3) the delivery of a note or any security—an extension of the meaning a step beyond the idea involved in the narrower view of the meaning of the words "sale for cash or on credit"—and (4) that the payment, delivery or giving of security are by the section peremptorily forbidden as a matter of law for a period of 30 days, quite regardless of the stipulations of the parties (unless by precontract within the saving clauses—the last line of sec. 4 and the 12th of sec. 5) one finds it difficult not to reach a conclusion so consonant with the wide purpose of the legislation and so helpful in advancing the intended remedies, I agree that it is now too late for the defendant to comply with the Act. Not only has the statutory period elapsed, but the rights of the parties are to be determined as of the date of the service of the writ. The term "absolutely void as against" is I think now well settled as meaning no more than voidable only, and that if the transaction is avoided as a result of the proceedings the judgment must be effective as of the date defendant was fixed with knowledge of the proceedings. He dealt with the goods thereafter at his peril and if he allowed them to reach the hands of *bona fide* purchasers he has the money in his pocket and it belongs not to the plaintiff alone, but to the general body of creditors subject, of course, to the prior lien for the costs of the proceedings necessary to make these assets available for a just distribution. Any creditor can clearly maintain the proceedings. A seizure under execution immediately following the transfer would have been a more summary and effective method but an action at the instance of any creditor is maintainable. There may be some doubt as to the exact remedy which can be afforded, but that matter can be discussed when the final order is applied for.

I also agree that the vendor is not a necessary party to the proceedings.

I have deliberately refrained from discussing a case decided under a statute of somewhat similar import passed in another province. The two Acts are essentially different; the inclusion in our Act of sec. 3 and the consequent reference to it in sec. 4 must necessarily render any such decision, well decided as it may be on its own language, quite useless as an aid to the construction of our own Act.

The appeal should be allowed and with the usual result as to costs.

Appeal allowed.

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K.B.

HARRIS v. LANDRIAULT & RECORDER'S COURT (Mise en cause)

Quebec King's Bench, Greenshields, J. March 17, 1921.

SUMMARY CONVICTIONS (§II—20)—JURISDICTION OF RECORDER OF MONTREAL — PERSONA DESIGNATA — RECORDER'S COURT CONSTITUTED UNDER QUEBEC CIVIL LAW WITHOUT JURISDICTION UNDER CRIMINAL CODE—CR. CODE SECS. 771, 773.

The Recorder's Court of the City of Montreal constituted a court of record under the Montreal Charter has no jurisdiction to try an offence under the Criminal Code, but the Recorder as *persona designata* has the special trial jurisdiction of a Magistrate under Part XVI. of the Code by virtue of Code secs. 771 and 773. Where the conviction and commitment on summary trial returned in *habeas corpus* proceedings shew that the conviction was made by the "Recorder's Court," the prisoner will be discharged and the conviction quashed.

MOTION for discharge on *habeas corpus*.

Cohen and *Bernstein*, for petitioner.

Nathan Gordon, for the Recorder's Court, *mise en cause*.

GREENSHIELDS, J.:—The petitioner obtained the issue of a writ of *habeas corpus*, ordering the respondent to shew cause of her detention in the common gaol of the district of Montreal, of which respondent is the keeper. The respondent produced the body of the petitioner with the return that she was detained in virtue of three convictions followed by sentences. The convictions and the commitments are fully set forth in his return.

The principal ground of attack made upon the convictions and sentences is that they were rendered and pronounced by the Recorder's Court; that that Court was without any jurisdiction whatever to hear and determine the charge against the petitioner. If it be the fact that the Recorder's Court had no jurisdiction *ratione materiae*, the conviction is bad and the petitioner is entitled to the relief sought.

It is admitted that the information upon which the warrant for the apprehension of the petitioner issued, was laid under arts. 225 and 228 of the Crim. Code. Art. 225 defines what a bawdy house is, and 228 created the offence. It is in like manner admitted that the petitioner was prosecuted under Part XVI. of the Criminal Code. In the margin of the printed information and complaint, the articles of the Criminal Code, 225, 228 and 773 are indicated.

Three convictions intervened against the petitioner upon similar informations, but covering different dates. They are the same, and the consideration of one will cover the three, the only difference being that in one case the petitioner pleaded guilty.

The first information and complaint was signed and sworn to on the 8th day of June, 1920. Upon that information and

complaint a warrant issued from the Recorder's Court of the City of Montreal. It was signed by the Recorder of the City of Montreal, and by the clerk of the Recorder's Court. It is dated the 8th day of June, 1920. Under this warrant the petitioner was arrested and brought before the Recorder's Court, and there gave bail before one Bernard, who signs the bail bond in his quality of Justice of the Peace of the city and district of Montreal, on the 16th day of June, 1920, at ten o'clock in the morning, and at such other dates as the case might be adjourned until her final discharge according to law, to answer to the information and complaint against her.

The petitioner did appear, and pleaded not guilty. The hearing of the matter was adjourned from time to time until the 25th day of October, 1920, when conviction intervened, and sentence was rendered. In part the verdict and sentence read as follows:—

(Translation):—In the Recorder's Court of the City of Montreal:

Be it known: that on the 25th day of October, in the year of Our Lord, 1920, Flore Harris, of the said City, was this day by the Recorder's Court, of the City of Montreal, convicted of a criminal offence.

Then follows a statement of the offence, and then follows the sentence. In part it reads:

And the said Court condemns the said Flore Harris by reason of her criminal act to be imprisoned in the common gaol of the district of Montreal in the said City, with hard labour, during the space of six months.

A commitment followed, and in part it reads as follows:

(Translation):—In the Recorder's Court of the City of Montreal.

To all the constables and other peace officers, and to each of them in the said district of Montreal, and to the keeper of the common gaol of the district of Montreal.

Then follows the statement of the conviction of the petitioner, and is added:

(Translation):—For these reasons these presents are to enjoin you the said constables or peace officers, and each of you, to arrest the said Flore Harris, and to conduct her in safety to the common gaol of the said city, and there deliver her to the keeper of the said common gaol with the present commitment; and the said Court enjoins you, the said keeper of the common gaol, to receive the said Flore Harris under your care in the said common gaol, and there to detain her at hard labor during the space

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of six months, to count from the day of her arrival as prisoner at the said prison, and to do so these presents are your authority.

The petitioner was arrested; was conducted to the common gaol, and is there detained. The commitment is signed, "G. H. Semple, Recorder of Montreal," and is countersigned by one Lalonde, Clerk of the Recorder's Court.

Under a delegated power from the Legislature of the Province of Quebec, 3 Edw. VII., ch. 62, sec. 48, the City of Montreal proceeded by art. 476 of its Charter to constitute what is called "The Recorder's Court." It reads as follows:

There shall be two Recorders for the City of Montreal, and there shall be a Court of record to be called for the Recorder's Court of the City of Montreal, over which either or both of the Recorders together shall preside.

By art. 477 it is enacted that the Lieutenant-Governor in Council shall name the Recorders. There is then created or constituted a Court of record, the sittings of which shall be presided over and held by officers known as "Recorders." The jurisdiction of the Recorder and of the Recorder's Court is set forth and defined in art. 483 and 484 (with sub-pars.), 485, 486 and 487. In brief, the Recorder's Court has jurisdiction to hear and try—

(a) Summarily, any action brought in virtue of any by-law or resolution of the council for the recovery of any sum of money due to the city for any assessment, license, tax, water rate, etc.; (b) Any action for the recovery of wages or salary arising from the lease of hire of work, or for the recovery of damages, etc., where the amount is not more than $50; (c) Any action for the enforcement of a by-law; (d) Any action for the recovery of taxes, assessments, license fees, etc.; (e) To hear and try summarily all offences mentioned in art. 3580 and 3592, inclusive, of the R.S. [1909].

No reference is made and no jurisdiction is given or purported to be given to the Recorder's Court to hear and determine any offence under the Criminal Code of Canada. So far as the Criminal Code is concerned, the Recorder's Court as a Court of record is unknown. The Recorder is, under the Criminal Code, Part XVI., designated and empowered to act.

Part XVI. of the Criminal Code deals with Summary trials. By art. 773 certain offences are named and designated and provision is made that they may be tried, summarily, by a "Magistrate." For the trial of some offences jurisdiction to try summarily is conferred upon the Magistrate by the "consent" of the

person accused. In other cases the Magistrate has absolute jurisdiction without consent. The offence for which the petitioner was tried is one of the cases in which the Magistrate has jurisdiction without consent. See art. 774.

In art. 771 is found a statement of what "Magistrate" means and includes, and in the Province of Quebec it includes, among others, any Recorder. The Recorder is, therefore, a *persona designata*, having the jurisdiction of a "Magistrate" within the meaning of Part XVI. of the Criminal Code. It is needless to say that summary trials of indictable offences by a Magistrate, and speedy trials of indictable offences by a Court of Sessions, is a marked departure from the common law. It is a special statutory jurisdiction. That jurisdiction cannot be extended beyond the terms of the statute, and unless a Court or a person comes within the four corners of the statute, that court or that person is absolutely without jurisdiction. The Magistrate exercising jurisdiction under part XVI. of the Criminal Code, does not hold a Court of record. He does not act as the presiding officer of the Court, but exercises a statutory jurisdiction conferred upon the individual. Under art. 785, if the person accused does not give his consent, where consent is necessary, to be tried summarily before a Magistrate, then the Magistrate proceeds to hold a preliminary enquiry, as provided in Parts XIII. and XIV., and if a *prima facie* case is made out, he is committed to stand his trial before the Court of original criminal jurisdiction.

It is manifest from this, that the Magistrate is not a Court, as a Court cannot hold a preliminary enquiry, much less commit an accused to stand his trial before the Assizes.

The only reference in Part XVI. to a "Court" is found in art. 787:

Every Court held by a Magistrate for the purpose of this Part, shall be an open public Court.

That section is manifestly inserted to bring in in conformity with the general rule, that all trials had under the terms of the Criminal Code shall be public and the public shall be admitted, unless excluded by the exercise of the discretionary power of the presiding Magistrate.

By art. 793 of the Code, it would seem manifest that the Magistrate does not hold a Court of record. That section provides:

The magistrate adjudicating under the provisions of this Part shall transmit the conviction, or a duplicate of the certificate of dismissal, with the written charge, the depositions of wit-

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HARRIS v. LANDRIAULT AND RECORDER'S COURT.

Greenshields, J.

nesses for the prosecution and for the defence, and the statement of the accused, to the clerk of the peace, or other proper officer for the district, city, county or place wherein the offence was committed, there to be kept by the proper officer among the records of the General or Quarter Sessions of the Peace, or any Court discharging the functions of a Court of General or Quarter Sessions of the Peace.

The Magistrate does not preserve a record of the trials, but another designated Court does.

I have obtained much assistance from the able arguments of the learned counsel for the parties. I have been referred to high authority in the way of pronouncements by our Courts and Judges thereof, more or less *ad rem*. They are not, however, the assistance that I would perhaps have desired.

In the case of *Mercurio* v. *Recorder's Court* (1919), 54 D.L.R. 641, 33 Can. Cr. Cas. 336, 29 Que. K.B. 37, Carroll, J., then a member of this Court, quashed a conviction where the accused had been found guilty by the Recorder's Court of the City of Quebec of the offence mentioned in art. 228 of the Cr. Code. In the course of a well reasoned judgment, he said in part:

(Translation):—The Charter of the City of Quebec authorizes the *Recorder* to deal with offences such as are charged against the petitioner, and to hear and determine such charge. This jurisdiction is given to the Recorder as *persona delegata*. It is not given to the Recorder's Court, and there is a reason to justify this distinction.

The Recorder's Court of the City of Quebec may be held by the Mayor, or by the Mayor with a member of the Council, or by two members of the Council. These persons may not have sufficient legal knowledge, and in the matter with which we are dealing the Legislature wished to give jurisdiction to the Recorder only.

The learned Judge refers with approval to the case of *D'Allaire* v. *The City of Quebec* (1907), 32 Que. S.C. 118, a judgment by the late Sir François Langelier. The learned Judge further added:

(Translation):—The Parliament of Canada has legislated in criminal matters for the whole Dominion and it is to that legislation that we must have recourse to punish infractions therein mentioned.

The learned Judge maintained the writ of *habeas corpus*, and granted liberty to the petitioner.

There is no doubt whatever that the Parliament of Canada has exclusive legislative authority in criminal matters, and when

the Parliament of Canada has created an offence and specified a punishment, that legislation must prevail to the exclusion of any provincial legislation. In like manner the Parliament of Canada has exclusive legislative authority to enact the whole corpus or body of rules of procedure to punish offences by it created. It has, as said Mr. Justice Carroll, in the *Mercurio* case, delegated to the Recorder, personally, the power, authority and jurisdiction to act under Part XVI. of the Criminal Code. It nowhere has given that power and jurisdiction to the Recorder's Court, constituted a Court of record by provincial legislation.

It was with regret that Mr. Justice Carroll was forced to maintain the writ of *habeas corpus*. He said:

La conséquence est regrettable pour ce cas particulier, mais il est impossible de permettre la généralisation d'abus de procédure comme celui qui a été commis dans cette cause-ci.

I may be permitted to adopt as mine his words. It is with regret that I am forced to do as he did, maintain the writ of *habeas corpus* and order the liberation of the petitioner.

Mr. Recorder Geoffrion and Mr. Recorder Semple, as recorders have full jurisdiction to hear and determine the offence with which the petitioner is charged. Had either of these officers acted as a recorder, he would have been a "magistrate" within the meaning of Part XVI. of the Code, and I would be the last to disturb a conviction and sentence by him found and pronounced; but where, as in the present case, there is, in my opinion, absolute lack of jurisdiction, I have but one course to follow, viz., grant the prayer of the petitioner.

Discharge ordered.

The formal judgment was as follows:—

JUDGMENT:—"Considering that the petitioner was arrested tried and convicted of the offence created by and mentioned in section 228 of the Criminal Code of Canada;

"Considering that the trial of the petitioner was had before the Recorder's Court of the City of Montreal, and was by that Court convicted and sentenced to imprisonment during a term of period of six months, and was by the said Recorder's Court committed to the common gaol of the district of Montreal, where she now is detained;

"Considering that the said Recorder's Court was without jurisdiction (*ratione materiae*) to hear and determine the said offence;

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"Considering the trial, conviction, sentence and commitment of petitioner is wholly illegal; doth maintain the said writ of *habeas corpus;* doth quash the conviction and sentence pronounced against the petitioner, and doth order that she be discharged from further custody and detention in the common gaol of the district of Montreal."

HAWORTH v. WEBB.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon and McKay, JJ.A. March 27, 1922.

ANIMALS (§IA—7)—OPEN WELLS ACT, R.S.S. 1920, CH. 169, SEC. 4—GRAIN ACCESSIBLE TO STOCK—DEATH OF HORSE FROM EATING—HORSE UNLAWFULLY AT LARGE—LIABILITY OF OWNER OF GRAIN.

Section 4 of the Open Wells Act, R.S.S. 1920, ch. 169, provides that "No person shall have or store on his premises or on any premises occupied by him any kind of threshed grain accessible to stock of any other person which may come or stray upon such premises." Under this provision the owner of a horse may recover its value from one who has upon his premises threshed grain accessible to stock where the horse dies by reason of eating the grain, even although the horse at the time is unlawfully at large.

APPEAL by defendant from the trial judgment in an action for the value of a horse which died through eating a quantity of threshed wheat on defendant's farm. Affirmed.

H. M. Allan, for appellant.

P. H. Gordon, for respondent.

HAULTAIN, C.J.S., concurs with MCKAY, J.A.

LAMONT, J.A.:—In this action the plaintiff seeks to recover the value of a horse which died through eating a quantity of threshed grain on the defendant's farm. The defendant had about 8 bushels of wheat in the bottom of one of his granaries. There was a door-way in the granary 7 ft. high. There was no door covering this opening, but it was boarded up with boards sliding up and down in grooves, formed by making cleats on each side of the doorway one inch apart. These boards extended to a height of 5 ft. above the floor of the granary, leaving a space of 2 feet at the top of the door-way open. The floor of the granary was about a foot above the ground. On January 17, 1921, the plaintiff's horse, which was running at large contrary to the provisions of a by-law in that behalf, along with a number of other horses was about the defendant's granary, when, by reason of some pressure applied from the outside to the boards in the grooves, one of the inside cleats gave way and the boards went down, admitting the horses into the granary, where they ate wheat with the result that the defendant's horse

died therefrom. To recover the value of the horse and the amount he spent in fees to the veterinary surgeon who attended it, the plaintiff brought this action. The trial Judge found that the cleats holding the boards covering the opening had not been securely nailed, and he awarded the plaintiff $250, the value of the horse, and $63.75, the veterinary's fees. The defendant now appeals to this Court.

The Act respecting Open Wells and other Things Dangerous to Stock (R.S.S. 1920, ch. 169) provides as follows:—

"4. No person shall have or store on his premises or on any premises occupied by him any kind of threshed grain accessible to stock of any other person which may come or stray upon such premises."

The evidence in my opinion establishes that the grain in the defendant's granary was accessible to stock. One inside cleat was not strong enough to withstand the pressure that was put upon it and it broke in two, about 12 or 14 in. from the top of the cleat. The break, according to the evidence of an independent witness, "was not a straight break across but it split diagonally down." The length of this split was 4 in., showing that the wood in the cleat was not straight grained. The cleat was 5 ft. 10 in. long, and the boards reached to a height of 5 ft. It broke, therefore, near the upper side of the top-most board. The reasonable conclusion, in my opinion, is, that one of the horses got its head into the 2 ft. opening between the top-most board and the top of the doorway, and having smelled the wheat pressed inwards in an effort to reach it, with the result that the cleat broke and permitted the horse to get at the grain. Getting its head through the opening above the boards and pressing inwards to get at the grain, are acts which it is in the nature of a horse to do, and which should be expected. I agree, therefore, that the defendant failed to keep his wheat inaccessible to stock.

On behalf of the defendant it was contended that, even if he had been guilty of a violation of sec. 4, above quoted, the plaintiff was not entitled to succeed, for the reason that at the time his horse ate the wheat it was unlawfully running at large. The question therefore is: Can the owner of a horse unlawfully running at large recover its value from one who has upon his premises threshed grain accessible to stock where the horse dies by reason of eating the grain?

At common law every man was bound at his peril to keep his cattle within his close, and if he failed to do so and his animals got on the land of another without that other's permission or

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default such animal was a trespasser, and the owner of the land owed no duty to the trespassing animal beyond this: that he must not unlawfully injure it, nor allure it to his land with malicious intent that it might be injured, nor must he make the premises more dangerous for it than they otherwise would be. *Latham* v. *Johnson*, [1913] 1 K.B. 398, 82 L.J. (K.B.) 258.

At common law, therefore, the answer to the above question would be in the negative.

Has the common law in this respect been altered by legislation? Two statutes require consideration: The Stray Animals Act ch. 124, R.S.S. 1920, and the Open Wells Act. Section 3 of the Stray Animals Act provides that it shall be lawful to allow animals to run at large in Saskatchewan, except in cities, towns and villages. But the Act then goes on to provide that a municipality may by by-law restrain animals from running at large. Where, under this Act, a municipality has passed a by-law restraining animals from running at large, an owner whose animals are at large contrary to the by-law has the same rights and is subject to the same obligations with respect to them as if the common law still prevailed, unless there is some other statutory provision altering or modifying the rights and obligations which would have prevailed at common law. See Armour C.J. in *Patterson* v. *Fanning* (1901), 2 O.L.R. 462.

The Open Wells Act, in my opinion, has altered the rights and obligations of an owner at common law. Section 4 of the Act is quoted above. Section 3 prohibits an owner or occupier from having upon his premises an open well which is dangerous and accessible to stock. These sections have received consideration in several cases in our own Courts.

In *Kruse* v. *Romanowski* (1910), 3 S.L.R. 274, the plaintiff's horse, which was running at large, strayed on to the defendant's unfenced land and ate a quantity of poisoned grain, which was in a pail in the defendant's wagon. In an action against the defendant for the value of the horse, the Court *en banc* held that the plaintiff could not recover. The ground upon which the judgment was based was, that the plaintiff's horse at common law was a trespasser and had no right to be upon the defendant's land, and there was no statute in force permitting it to run at large. At that time section 4 of the Act respecting Open Wells and other Things Dangerous to Stock was in force, but the Court seemed to think that it had no application to the case before it. A few years later, *Baldry* v. *Fenton* (1914), 20 D.L.R. 677, 7 S.L.R. 203, came before the Court. In that case the plaintiff's horse was running at large

contrary to a by-law in that behalf. The defendant had on his premises an open well accessible and dangerous to stock. The plaintiff knew the well was open and dangerous, and he knew that if his animals were allowed to run at large they would, in all probability, stray into the field where the well was situated. Knowing these things, he turned his horses at large; with the result that one of them fell into the well and was killed. The Court *en banc* held that the plaintiff could not recover. The ground of the decision was, that the plaintiff in turning his horses at large with the knowledge of the danger that he had, and the probability of his horses getting into it, must be held to have assumed the risk of his horses falling into the well. Under these circumstances, the turning of his horses at large made him the author of his own wrong to the same extent as if he had driven them to the neighbourhood of the well. In this case, however, the Court appears to have taken a different view of the Open Wells Act from that which prevailed in *Kruse* v. *Romanowski, supra,* for the opinion was expressed that that Act imposed upon an owner or occupier of land a duty towards trespassing animals as well as animals lawfully at large, not to keep upon his premises an open and dangerous well accessible to stock, and that the common law to that extent had been altered by the Act.

In *Watson* v. *Guillaume* (1918), 42 D.L.R. 380, 11 S.L.R. 348, the plaintiff's horses while lawfully at large strayed upon the defendant's unfenced land, where they ate a quantity of threshed grain that was assessible to stock, with the result that one died and two others were injured. It was held by this Court that the plaintiff was entitled to recover. Haultain, C.J.S., in his judgment with which Newlands, J.A. concurred, after referring to the Open Wells Act and the Stray Animals Act, at p. 383, said:—

"I am of opinion, therefore, that the common law rule with regard to animals has been modified by the legislation above referred to, and, in any event, the facts of this case bring it within the reason of the decisions in *Goodwyn* v. *Cheveley,* 4 H. & N. 631, and *Tillett* v. *Ward,* 10 Q.R.D. 17, cited above."

In the case at Bar the plaintiff's horse was unlawfully at large. When it strayed upon the defendant's land and ate the grain that killed it, it was a trespasser toward whom the defendant at common law owed no duty to keep his grain inaccessible. The Open Wells Act, however, does, in my opinion, impose that duty upon an owner or occupier of land in favor of an animal which is a trespasser as well as one lawfully at

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large, and if he fails to perform that duty he is liable for any loss which occurs by reason of such failure.

If the owner of the injured animal is the author of his own wrong, whether by turning his animals into the danger zone or turning them at large under circumstances which justifies the Court in concluding that when he did so he knew they would likely get into danger and that he assumed the risk thereof, the result, of course, would be different. But generally speaking the object of the Open Wells Act is to compel an owner or occupier of land who has an open well or threshed grain accessible to stock upon his premises to protect the same against animals coming or straying thereon irrespective of whether the animals are lawfully or unlawfully at large. When the plaintiff in this case allowed his animals to run at large, he had no knowledge whatever that there was threshed grain in the defendant's granary accessible to stock.

Under these circumstances the defendant, in my opinion, is liable, because he failed to perform the duty which the Act cast upon him, and the loss sustained by the plaintiff was the direct result of such failure. The appeal should, therefore, be dismissed with costs.

TURGEON, J.A., concurs with McKAY, J.A.

McKAY, J.A.:—This is an action to recover the value of a horse the property of plaintiff, which plaintiff alleges died as the result of eating threshed grain, namely, wheat, which defendant had on his premises, accessible to stock; and also for the amount of a veterinary surgeon's account incurred by plaintiff in endeavouring to save the life of the said horse.

The trial Judge gave judgment for the plaintiff, and from this judgment the defendant appeals.

Section 4 of the Open Wells Act (R.S.S. 1920, ch. 169) provides:—

"4. No person shall have or store on his premises or on any premises occupied by him any kind of threshed grain accessible to stock of any person which may come or stray upon such premises."

The evidence shews that the plaintiff's horse was unlawfully running at large, and it strayed on to the defendant's land, whereon the defendant had a granary with about 8 bushels of threshed wheat in it. The doorway of the granary was about 3 ft. 8 in. wide, and 7 ft. high; and was closed to 5 ft. 1½ in. from the bottom with 6 boards placed in groves formed by cleats nailed on to the door jambs. This would leave an open-

ing at the top of 1 foot 10½ in. wide, extending the full width of the doorway, 3 ft. 8 in.

I do not think it will serve any useful purpose to go further into the evidence, as the trial Judge has found from the evidence that the inside cleat that broke did not have more than four nails in it to hold it in place, and that the wheat in the granary was not safely protected against stock. In other words, it was accessible to stock, and there is ample evidence to support this finding.

The trial Judge has also found that the plaintiff's horse died as the result of eating the wheat in said granary of defendant.

The next question to consider is: Is the defendant liable notwithstanding that the horse was unlawfully running at large. (Contrary to by-laws passed under the Stray Animals Act, ch. 124, R.S.S. 1920).

It is contended on the part of the defendant that, as the plaintiff committed a deliberate breach of the law in allowing his horse to run at large, he should not be entitled to recover; citing *Singleton* v. *Williamson* (1861), 7 H.& N. 410, 158 E.R. 533; *Etter* v. *Saskatoon* (1917), 39 D.L.R. 1, 10 S.L.R. 415, and other cases.

I do not think these cases should be followed in this case, as, to my mind, the prohibition created by sec. 4 of the Open Wells Act applies equally to horses unlawfully running at large as to those lawfully running at large. The evidence of Mr. Coleman, the veterinary surgeon, in the case at the Bar shews that, "Anywhere from a pint of wheat up would cause a horses's death if eaten." The Legislature no doubt realised the great danger it is to stock to leave grain accessible to them, hence the provision in sec. 4. And the language is clearly wide enough to apply to stock running at large lawfully or unlawfully. Horses may unlawfully be at large without the knowledge or intention of the owner; for instance, by breaking out of an enclosure, or gates being left open by a stranger, and if such horses died from the result of eating wheat left in the open on his premises by a person, such person, in my opinion, would be clearly liable. In my opinion it was the intention to protect all horses from eating so deadly a grain as wheat is to a horse; hence the provision.

In *Baldry* v. *Fenton*, 20 D.L.R. 677, 7 S.L.R. 203, the plaintiff brought his action against the defendant for the value of his horse which fell into an open well on the farm of the defendant and was killed, while unlawfully running at large. Section 2 of R.S.S. 1909, ch. 124, then in force, was as follows:

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"(2) No person shall have on his premises or on any premises occupied by him any open well or other excavation in the nature thereof of a sufficient area and depth to be dangerous to stock and accessible to stock of any other person which may come or stray upon such premises."

My brother Lamont, who delivered the judgment of the Court, is in part reported as follows (p. 678):

"Apart, therefore, from the Open Wells Act, the defendant was not guilty of any breach of duty to the plaintiff. Does that Act impose upon the defendant any duty in respect of trespassing animals which, prior to the passing of the Act, he was not obliged to observe. I am of opinion that it does. By the section above quoted, the defendant was expressly prohibited from having on his farm an open well dangerous to stock and accessible to the stock of any other person which might come or stray on his farm. But the stock coming or straying upon the defendant's land were at common law trespassers, and it was not contended that the common law had been altered in the municipality of Enfield so as to make it lawful for cattle to stray or run at large there at the passing of the Open Wells Act. Straying animals were, therefore, trespassers when they entered upon an owner's land. But it was for the protection of animals coming or straying upon the land of an owner or occupier that the statute prohibited such owner or occupier from keeping an open well. I am, therefore, of opinion that the statute does create on the part of an owner or occupier of land a duty towards straying or trespassing animals not to keep an open well. That duty the defendant did not observe, and is, therefore, liable if the death of the horse resulted from his negligence in this respect."

In that case the defendant was held not to be liable because the plaintiff knew of the existence of the open well. In this case the evidence shews that the plaintiff did not know of the condition of the granary, or that there was grain in it.

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

Appeal dismissed.

BROWN v. BULMER.

Saskatchewan Court of Appeal, Haultain, C.J.S., McKay, J.A., and Mackenzie, J. (ad hoc). March 6, 1922.

FRAUDULENT CONVEYANCES (§VI—30)—PURCHASE OF LAND UNDER AGREEMENTS FOR SALE—DEFAULT IN MAKING PAYMENTS—JUDGMENT AND EXECUTION—CONVEYANCE OF OTHER PROPERTY TO DEFEAT JUDGMENT CREDITOR—CONVEYANCES BETWEEN HUSBAND AND WIFE—

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—FRAUD—ONUS OF PROOF—UNCORROBORATED EVIDENCE OF PARTIES —SUFFICIENCY OF.

In an action to set aside transfers of real property as fraudulent against creditors, the onus is generally on the plaintiff to prove fraud, but where the transfers are between near relatives, and there are suspicious circumstances in connection with the transfers of the properties, the onus is shifted to the transferee of establishing the *bona fides* of the transaction, and for this purpose the uncorroborated evidence of the parties to the transactions is in general not sufficient.

APPEAL by defendants from the judgment at the trial of an action by an execution creditor to set aside as fraudulent transfers of certain properties made by the defendant Mrs. Bulmer and her co-defendants. Affirmed.

John Milden, for appellants.

C. E. Gregory, K.C., for respondent.

The judgment of the Court was delivered by

McKAY, J.A.:—This is an action by the respondent, an execution creditor of appellant Clara B. Bulmer, (hereinafter referred to as Mrs. Bulmer) to set aside as fraudulent transfers of certain properties made by Mrs. Bulmer to her co-defendants.

The respondent, by agreement of sale dated November 28, 1912, agreed to sell to Mrs. Bulmer lots 7 and 8 in block 158 in the City of Saskatoon, according to plan of record in the Land Titles Office for the Saskatoon Land Registration District as plan Q2, for the price of $38,000 (stated as $40,000 in the agreement), of which price the sum of $12,000 (stated to be $14,000 in the agreement) was paid upon the execution of the agreement, and the balance was payable in instalments with interest at 8% per annum.

Mrs. Bulmer made default in her payments, and the respondent brought action against her in March, 1919, and obtained judgment against her for $17,504.96 and costs, on which nothing has been paid. Writs of execution were issued on said judgment and they are still wholly unsatisfied.

Mrs. Bulmer in her evidence admits that since the date of the said agreement to purchase said lots from respondent she was never in a position to pay her debts.

There are three different properties involved, and three different transfers attacked.

1. The home property, being lot 13 in block 172 A in the City of Saskatchewan, according to plan Q 3, registered in the name of Mrs. Bulmer and transferred by her to appellant W. H. Bulmer (hereinafter referred to as Mr. Bulmer) without consideration on November 6, 1918, or 6th or 8th January, 1919.

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2. The Bell property, being lot 9 and the most north westerly eight feet throughout of lot 10 in block 158 in the City of Saskatoon, according to plan Q 2, registered in the name of Mrs. Bulmer and by her transferred to appellant Mary Jane Bulmer without consideration on August 19, 1918.

3. The Ayres mortgage, being mortgage from Priscillia M. Ayres to Mrs. Bulmer, dated July 12, 1918, and registered in the Land Titles Office for the Saskatoon Registration District on July 30, 1918, as instrument No. B.O. 4022, for $8,000, and being on lots 1 and 2 in block 159 and lots 13, 14 and 15 in block 158, according to plan Q 2 of record in said Land Titles Office, and transferred by Mr. Bulmer to defendant Henry Smith Bulmer on July 12, 1918.

Mr. and Mrs. Bulmer, by their statement of defence, contend that these properties, although registered in the name of Mrs. Bulmer, were the properties of Mr. Bulmer, he having paid for them, and Mrs. Bulmer was only bare trustee for Mr. Bulmer who was the beneficial owner thereof. Appellant Mary Jane Bulmer makes the same contention for the Bell property, and that it was transferred to her to secure a debt due to her by Mr. Bulmer.

Mr. Bulmer is the husband of Mrs. Bulmer. Mary Jane Bulmer is the mother of Mrs. Bulmer. Henry Smith Bulmer is the father of Mr. Bulmer.

The trial Judge held that the said transfers were made to defeat the respondent's claim, and, amongst other things, directed that as to the home property there should be a reference to the Local Registrar to ascertain the value thereof; and as to the Bell property, he declared the transfer to Mary Jane Bulmer void as against the respondent and other creditors of Mrs. Bulmer, and, it having been sold to George E. Pendleton on agreement of sale, he appointed the National Trust Co. receiver to collect all monies due or to become due from George E. Pendleton.

He also ordered that defendant Henry Smith Bulmer deposit with the local registrar of the Court of King's Bench at Saskatoon a transfer of the said Ayres mortgage in favour of Mrs. Bulmer, and appointed the National Trust Co. receiver to collect all monies due or to become due from Priscilla M. Ayres under said mortgage. From this judgment the appellants appeal.

There is no evidence of the value of the said lots 7 and 8 at the time the transfers attacked were made, but the evidence shews that, at that time, Mrs. Bulmer was unable to pay her debts in full, and she transferred said properties without any

consideration. So the sole question is, did said properties belong to her or to her husband, Mr. Bulmer, or, in other words, did she hold said properties as bare trustee for Mr. Bulmer, or was she the beneficial owner as well as having the legal title thereto?

It may be noted here, that, according to Mr. and Mrs. Bulmer's evidence, all the money she put into these two lots 7 & 8 was about $6,000, being part of the cash payment, and she appears to have given this money to Mr. Bulmer, who made all the payments to respondent with his own cheques. That is, beyond part of the first payment, he made all the other payments on these lots, as he did on the other properties in question.

Before dealing with each of the said properties separately, I may say that all the business in connection with the three properties attacked, and the lots purchased by Mrs. Bulmer from the respondent, was transacted by Mr. Bulmer and he was thoroughly familiar with her financial situation. In the early part of his judgment the trial Judge, referring to the three properties and the transactions in relation thereto, says:—

"With reference to all these transactions it may at the outset be said in a general way that the payments were made and the business transacted largely if not altogether by the husband, but it must also be said that there was no agreements written or otherwise to the effect that the wife was taking or was to hold the property in trust for the husband or that she should at any definite time or at any time thereafter convey the same to the husband, nor does it appear that there was any such understanding or intent."

The onus is generally on the plaintiff in actions of this kind to prove fraud, but where the transfers are between near relatives, as in this case, and there are suspicious circumstances in connection with the transfers of the property, Courts have held that the onus is shifted to the tranferee.

"In transactions between relatives having the effect of defeating the claims of creditors, if the circumstances are suspicious, the onus is shifted to the purchaser of establishing judicially the *bona fides* of the transaction. *Langley* v. *Beardsley*, 18 O. L.R. 67 at 72, and *Harris* v. *Rankin*, 4 Man. L.R. 115. The evidence to that effect must be clear and satisfactory evidence. For this purpose the uncorroborated evidence of the parties to the transaction is in general not sufficient; *Merchants Bank* v. *Clarke*, 18 Gr. 594; *Osborne* v. *Carey*, 5 Man. L.R. 237; *Ripstein* v. *British Canadian Loan Co.* 7 Man. L.R. 119; *Ady* v. *Harris*, 9 Man. L.R. 127; *Goggin* v. *Kidd*, 10 Man. L.R. 448."

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Mathers C.J. K.B. in *Kilgour* v. *Zaslavsky* (1914), 19 D.L.R. 420, at pp. 422, 423, 25 Man. L.R. 14.

See also *Koop* v. *Smith* (1915), 25 D.L.R. 355, 51 Can. S.C.R. 554.

Some of the suspicious circumstances in the case at Bar are: (1) It is admitted that the transfer of the home property was made to avoid respondent's execution being registered against it. (2) The transfer of the home property was made on 6th or 8th January, 1919, possibly November 6, 1918, and at the time it was made Mr. Bulmer then knew that respondent was going to sue Mrs. Bulmer. (3) The transfers of the Bell property and the Ayres mortgage were made within a period of 6 months prior to the transfer of the home property, and respondent had been threatening to sue before these transfers were made.

Under these circumstances, it seems to me the above referred to principle should be applied in the case at Bar when considering whether or not Mrs. Bulmer was a bare trustee of the said properties for Mr. Bulmer.

1. The home property. This is the home of Mr. and Mrs. Bulmer wherein they have been living since 1907 or 1908. The title to this property was in Mrs. Bulmer's name, at any rate since 1908, when she gave a mortgage thereon for $3,500, which amount was used in payment of the dwelling house erected on the lot.

The evidence is not clear as to who originally paid for this property, but as it was put in Mrs. Bulmer's name, the presumption is it was a gift to her, even if her husband Mr. Bulmer originally paid for it. *Scheuerman* v. *Scheuerman* (1916), 28 D.L.R. 223, 52 Can. S.C.R. 625. This property was transferred by Mrs. Bulmer to Mr. Bulmer without any consideration either on November 6, 1918, or January 6 or 8, 1919, and Mr. Bulmer became the registered owner thereof on January 8, 1919. The exact date of this transfer is not important in so far as it relates to the home property, but it is important when we come to consider the other properties.

The evidence as to the date of this transfer and why it was transferred, is as follows. In his examination for discovery Mr. Bulmer says that Mrs. Bulmer transferred it to him on "January 8, 1919." This is the date of the certificate of title. At the trial when being questioned by the counsel why he had this property transferred to him, he said: "Because it was exempt." . . . . "When I transferred it I knew Mr. Brown was going to proceed with his action, and I transferred

it for the simple reason I wanted to avoid execution being against it."

And in cross-examination the evidence is as follows:—

"Q. Now Doctor, I understand that you admit that the home place on the 6th November was transferred to you to avoid the Brown execution? A. Yes. Q. And there was no other reason why it should be transferred from Mrs. Bulmer to you? A. No. It was the home property. There is no other reason."

Counsel for the appellants contends that what Mr. Bulmer meant by this evidence as to intention in having this property transferred to him was that as he believed this property was exempt from respondent's execution and that, therefore' respondent would have no claim on it, he had it transferred to prevent said execution from appearing on the title to it, and not with the intention of defeating respondent's claim. But even with this explanation it was admittedly transferred to avoid the respondent's execution.

However, there is some evidence that this property belonged to Mrs. Bulmer, and the trial Judge has found that it is her property, otherwise he would not have held that she transferred it to Mr. Bulmer to defeat the respondent's claim and have given the judgment he did concerning it, because, if she held it as bare trustee for Mr. Bulmer, she would have the right to transfer it to him without the interference of the Court. The trial Judge apparently did not believe Mrs. Bulmer when she said it was never given to her. It is also to be noted that Mr. Bulmer in his evidence did not claim this property as his. He says it was because he believed it was exempt that he had it transferred to him, and for no other reason.

In *Koop* v. *Smith*, *supra*, at p. 357, Idington J. says: "These cases of alleged fraudulent assignment must generally depend largely upon the view of the facts taken by the trial Judge."

And, in my opinion, it can be very well said of the case at Bar, as was said by Anglin J. in *Koop* v. *Smith* at p. 359 "Whether this transaction was *bonâ fide* was eminently a question for the trial Judge."

The trial Judge then having found that this property belongs to Mrs. Bulmer, this finding should not be disturbed by this Court, and I may say I agree with this finding.

Appellants' counsel also contends that, even if this property were Mrs. Bulmer's, as it was exempt from seizure under execution to the extent of $3,000, and the mortgage against it by virtue of The Exemptions Act 1919, now ch. 51 of R.S.S. 1920, and no evidence was produced at the trial to shew the value thereof, and consequently no evidence to shew respondent was

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prejudiced by said transfer to Mr. Bulmer, it cannot be held that the said transfer was made to defeat the respondent's claim.

While the said home property is exempt as above stated under said Exemptions Act, it is not exempt from respondent's execution by virtue of the Land Titles Act. By sec. 149 (2) of the then Land Titles Act, ch. 18 of 1917, 2nd sess., Statutes of Saskatchewan, the respondent's writ of execution against lands would form a lien and charge against said home property. Said sub-section reads as follows:—

"(2) Such writ shall from and only from the receipt of a certified copy thereof of the registrar for the land registration district in which the land affected thereby is situated bind and form a lien and charge on all the lands of which the debtor may be or become registered owner situate within the judicial district the sheriff of which transmits such copy, including lands declared by *The Exemptions Act* to be free from seizure by virtue of writs of execution, but subject, nevertheless, to such equities, charges or incumbrances as exist against the execution debtor in such land at the time of such receipt: Provided that nothing herein contained shall be taken to authorise the sheriff to sell any lands declared by *The Exemptions Act*, to be free from seizure by virtue of writs of execution."

In *Advance Rumely Thresher Co.* v. *Bolley* (1920), 55 D.L.R. 308, 13 S.L.R. 447, this Court held that a transfer of his homestead by a man to his wife, if made to defeat creditors, will be declared void by the Court so far as to enable an execution subsequently obtained by one of the creditors to form thereon the lien or charge given by virtue of an execution under sec. 149 (2) of the Land Titles Act 1917.

The said property, then, being the property of Mrs. Bulmer and registered in her name, was not exempt from the respondent's writ forming a lien and charge thereon by virtue of said sec. 149 (2), and when same was transferred by her, even with the intention as contended by the appellants' counsel, it was transferred to defeat the respondent's claim and had that effect. The transfer, therefore, of this property to the appellant Mr. Bulmer is void as against the creditors of the said Mrs. Bulmer.

2. The Bell property. The evidence is to the effect that Mr. Bulmer purchased this property on the instalment plan shortly before Mrs. Bulmer purchased lots 7 and 8 from respondent.

In April, 1914, when Mr. Bulmer paid in full for this property, he had the transfer therefore made to Mrs. Bulmer, but did not register it until August 14, 1918. Mrs. Bulmer trans-

ferred this property to Mary Jane Bulmer on August 19, 1918, without consideration. The evidence of Mr. Bulmer is to the effect that this property was transferred to said Mary Jane Bulmer as security for a debt due by him to her. In his examination for discovery Mr. Bulmer, when being questioned why this transfer to Mrs. Bulmer was not registered sooner, after saying it was held by him from April 21, 1914, to August 14, 1918, states that, "It was held as collateral to what I had loaned Mrs. Bulmer to pay on the property." This evidence is, in effect, an admission that this property was purchased for Mrs. Bulmer. In addition to this, there is the presumption that this property was given to her as a gift, from the fact that Mr. Bulmer had it transferred and registered in her name. This property adjoins lots 7 and 8 purchased by Mrs. Bulmer from the respondent, and apparently it was the intention she should have the two properties.

If the correct date of the transfer of the home property be November 6, 1918, then Mr. Bulmer, on his own evidence, knew within 3 months—and if January 8, 1919, be the correct date, then within 6 months after the transfer of the Bell property that respondent was about to sue Mrs. Bulmer. But he must have known, or at any rate expected, that respondent would sue Mrs. Bulmer at any time when he advised Mrs. Bulmer to transfer this property to Mary Jane Bulmer, because he knew respondent had been writing threatening letters before the transfer of this property and that Mrs. Bulmer's payments were long past due and nothing paid thereon for a long time, as the rents which may have been collected by the National Trust Co. went towards payments of taxes to his knowledge, and that Mrs. Bulmer had no money wherewith to pay respondent.

The only evidence against the presumption that this Bell property was a gift to Mrs. Bulmer, is the tax sale redemption receipt dated October 31, 1917, and that of Mr. Bulmer who said at the trial that he did not give it to her. Notwithstanding this, the trial Judge found that the transfer of this Bell property to Mary Jane Bulmer was made to defeat the respondent's claim, and to make this finding he must necessarily have also found that this property belonged to Mrs. Bulmer. There is ample evidence on which he could make these findings, and in view of what was said in *Kilgour* v. *Zaslavasky*, and *Koop* v. *Smith*, above referred to, I do not think this Court should disturb these findings.

As Mrs. Bulmer was the owner of the property and there is no evidence to shew that she knew of the payments for the

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taxes or repairs, and the payments were purely voluntary on the part of Mr. Bulmer without any request from Mrs. Bulmer, it must, in my opinion, be assumed that he intended these payments as gifts to Mrs. Bulmer.

(See *Re Montgomery Lumber* v. *Montgomery* (1911), 20 Man. L.R. 444. 3. Ayres Mortgage. The debt to secure which this mortgage was given was part of the purchase money due from Priscilla M. Ayres to Mr. Bulmer on lots 13, 14 and 15 in block 158, plan Q2 in the City of Saskatoon, which he and Helgerson had agreed to purchase from one Davis and which they sold to Miss Ayres under an agreement of sale dated February 22, 1913. Helgerson assigned all his interest in the lots and agreement of sale to Mr. Bulmer.

The first mortgage given by Miss Ayres to Mrs. Bulmer is dated August 22, 1914, for $9,000, upon lots 1 and 2, block 159, plan Q2 in the City of Saskatoon. Mr. Bulmer says this mortgage "represented the balance of the cash payment," and was put in Mrs. Bulmer's name at the request of Miss Ayres, who thought Mrs. Bulmer would be more lenient with her than Mr. Bulmer.

On November 17, 1914, Mr. Bulmer became registered owner of these lots 13, 14 and 15, and transferred them to Mrs. Bulmer on March 1, 1915, and she became registered owner thereof on the 4th March, 1915. By transfer dated July 29, 1918, Mrs. Bulmer transferred lots 13, 14 and 15 to Miss Ayres, and Miss Ayres became the registered owner thereof on July 30, 1918. Miss Ayres gave the mortgage in question to Mrs. Bulmer, dated July 12, 1918, for $8,000, and Mr. Bulmer swears that this last mortgage also represented the balance of the cash payment. (See pp. 6 and 13 of evidence.) About this time he claims he made a reduction in his claim against Miss Ayres of about $20,000.

Counsel for appellants laid great stress on the evidence of Mr. Bulmer wherein he said that he did not consult Mrs. Bulmer in making this big reduction in his claim, as tending to shew that she had no interest therein. I do not think this material for three reasons. First, she may not have been interested in the whole amount Miss Ayres owed. it is not contended she was, but only in the $8,000 mortgage. Secondly, Mr. Bulmer appears to have transacted all Mrs. Bulmer's business without consulting her. She left all her affairs entirely in his hands to do as he saw fit. Thirdly, Mr. Bulmer may at that time have come to the conclusion that $8,000 was all that could be collected from Miss Ayres.

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From the evidence in connection with this mortgage, apparenly his intention was to give Mrs. Bulmer the $9,000 represented by the first mortgage, and balance of which he says was represented by the mortgage in question for $8,000.

Counsel for appellants argued that this last mortgage did not represent the original $9,000 but that it was a new mortgage for a new sum, namely, the amount to which the whole claim was reduced. But the evidence is against this argument. However, even if this argument is correct, I do not think it makes any difference, as the mortgage was still in Mrs. Bulmer's name, and there is no evidence that she received the $9,000 secured by the first mortgage.

The trial Judge in his judgment stated: "I do not hesitate in the light of the evidence to hold that this mortgage was transferred to Henry S. Bulmer to evade the plaintiff's claim." and ordered that defendant Henry S. Bulmer re-transfer it to Mrs. Bulmer. I agree with this.

The result is, that in my opinion the appeal should be dismissed with costs.

Appeal dismissed.

WRIGHT v. GILFOY.

Alberta Supreme Court, Walsh, J. April 19, 1922.

MORTGAGE (§VIIC—156)—REDEMPTION—TIME—DISCRETION OF MASTER—RIGHTS OF SUBSEQUENT ENCUMBRANCERS.

There is no set time for redemption in Alberta, everything being left to the discretion of the Master, who fixes such time in each case as according to the circumstances appears to him to be the proper period. When there are subseqeunt encumbrancers he should allow a reasonable time in which they may familiarise themselves with the conditions, and make any arrangements they may think proper to avert a sale if they so desire, although as against the mortgagor he might be justified in ordering an immediate sale.

APPEAL by plaintiffs in a mortgage action from that portion of an order *nisi* made by the Master at Calgary which gives the defendants 3 months in which to redeem the property, on the ground that this is an unreasonable and inequitable period of redemption under the circumstances and in so far as it was fixed as a matter of discretion it was a discretion improperly exercised.

M. M. Porter, for plaintiff.

C. J. Ford, K.C., for defendant.

WALSH, J.:—The plaintiff's claim is now approximately $20,000. There is a second mortgage for $16,250 and interest and subsequent executions aggregating roughly, without inter-

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est or costs, $12,500. According to the only evidence of value submitted to the Master the land alone has a fair value of $2,400 and the value of the improvements on the basis of cost less depreciation is $32,600 though the cost of duplicating them today would be about $46,000. The appraisers' report is that while the property now has a fair value under existing conditions of $24,000 to $25,000 the sum of $20,000 is, in his opinion, its maximum value, scaling that down to $14,000 with a possibility that no offer could be secured for it at any price.

The Master imposed upon the defendants liability for a monthly rental of $100 over this period of redemption and reserved to the plaintiffs the right to apply if this rental is not paid. Mr. Porter complains that the carrying charges of this loan for interest and taxes are $202 per month and says because of this that the rental is quite inadequate.

Idington v. *Trusts & Guarantee Co.* (1917), 34 D.L.R. 86, 11 Alta. L.R. 337, cited by Mr. Porter is not in point. That was a case of enlarging the time for redemption after the expiration of the time limited therefor by the order *nisi* and different considerations obviously apply to such an application.

Our practice in such a matter differs from that in force in other jurisdictions, notably England and Ontario. There, a definite period of redemption is set with power in the Court to order a sale without giving the usual or any time to redeem. With us there is no set time for redemption. Everything is left to the discretion of the Master who fixes such a time in each case as according to the circumstances of it appears to him to be the proper period. This, I think, is the better system. There is such a variety of circumstances under which mortgaged property is in this country made the subject of legal proceedings that it is impossible to frame a rule that will meet them all and of course every case must be decided on its own facts. It may be helpful, however, to see how the power vested in the Court in England and Ontario to cut down or cut out entirely the period of redemption is used. I have been able to find but few authorities and they are very old.

In *Newman* v. *Selfe* (1864), 33 Beav. 522, 55 E.R. 471, 33 L.J. (Ch.) 527, 12 W.R. 564, it was held that it was not obligatory to give a mortgagor any time to obtain the money but that if all other encumbrancers require a sale and the mortgage is in arrears for years and the interest is still unpaid the Court has the power to direct a sale at once.

In *Coxon* v. *Lever* (1864), 12 W.R. 237, *Bennett* v. *Harfoot* (1871), 19 W.R. 428, and *Wolverhampton &c.* v. *George* (1883),

24 Ch. D. 707, orders for immediate foreclosure were made without giving a day for redemption.

In *Rigney* v. *Fuller* (1853), 4 Gr. 198, the Court refused to make an order for immediate sale the only ground for the application being that the property was not of sufficient value to pay the plaintiffs claim.

In *Swift* v. *Minter* (1879), 27 Gr. 217, Blake, V. C., made an order for immediate sale, there being present in that case in addition to the fact, that the land was not worth enough to satisfy the mortgage claim the further circumstances that the mortgagor's had been guilty of waste, that the premises were being allowed to get into disrepair and that a better price could be obtained for it then than 6 months later.

In this case, if I had to consider the question from the point of view only of the mortgagor and his wife and it is they who oppose this appeal, I would not hesitate to hold that the plaintiffs were entitled to an order for the immediate sale of the property. With the total encumbrances against it more than twice the maximum value put on it by a competent and reliable appraiser, in the face of the very strong probability amounting almost to a certainty that it cannot be sold for an amount sufficient to pay even the plaintiffs in full, with the carrying charges of the plaintiffs' mortgage more than double the amount fixed by the Master as a fair rental for the property, with not the slightest prospect of its value being enhanced in the immediate future but rather the contrary and with no suggestion that the mortgagor by virtue of this delay will be able to pay or even reduce the amount of this mortgage debt, I think it but an idle and unprofitable consideration to extend to him this or any period of grace apart entirely from the injustice done the plaintiff in thus adding to the loss which he will in all probability suffer under his security.

The subsequent encumbrancers, however, must be taken into consideration. Our practice with respect to them is to my mind very unsatisfactory. They are not parties to the action at all. The only requirement is that they "shall be served with notice of the judgment or order directed or made in the action" (R. 46). Subsequent encumbrancers quite often have a substantial interest in the property which is the subject of the mortgage action and so are sometimes concerned to see that the mortgage account of the plaintiff is properly taken. For this

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reason I think it would be fairer to bring them in before the account is taken and in this way give them a right to be heard on all matters in which they are interested including the time allowed for redemption. Our practice does not allow that to be done and so of course the Master cannot do it. I think, therefore, that he is quite right when there are subsequent encumbrancers in allowing a reasonable time for redemption quite regardless of the fact that as against the mortgagor he might be justified in ordering an immediate sale. Until they are served with notice of the order, they know nothing of it and they are certainly entitled to a reasonable time in which to familiarize themselves with the conditions and make any arrangements which they may think proper to avert a sale if they so desire.

Although, if I had been making this order, I rather think that I would not have allowed so long a period of redemption as the Master did (for the chances of any of the subsequent encumbrancers electing to redeem seem to me to be so remote) I cannot say that he erred in allowing it, and so I must dismiss the appeal but without costs.

The Master has power to vary his order. I think that he might very well exercise it in this case by materially shortening the time for redemption or in fact directing an immediate sale if upon notice of such an application to all of the subsequent encumbrancers none of them oppose it or if they do oppose it they fail to satisfy him that there is a reasonable prospect either of the plaintiffs' mortgage being redeemed by them or of better results following if the period of redemption stands as at present. In my opinion, it is their interests and theirs alone which, under the circumstances of this case have to be taken into account in this connection, and if they consent or rather if they do not object and for good reasons to such a variation I think it should be made.

Judgment accordingly.

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Supreme Court of Canada, Idington, Duff, Anglin, Mignault, JJ., and Cassels, J. (ad hoc). February 7, 1922.

TAXES (§IIIF—149)—NON-PAYMENT—FORFEITURE OF LAND—CONFIRMATION — NOTICES — IMPOSSIBILITY OF COMPLYING WITH ACT—SUSPENSION OF PROCEEDINGS—JURISDICTION OF DISTRICT COURT JUDGE.

The notice required to be given by sec. 314 of the Rural Municipalities Act, 1911-12 Alta. stats., ch. 3, is a condition precedent to the jurisdiction of the District Judge to confirm the tax enforcement return, and where the statutory method of giving the notice becomes illegal by the outbreak of war and is prohibited, the District Judge is without jurisdiction to confirm the return.

[*Rur. Mun. of Streamstown* v. *Reventlow-Criminil* (1920), 52 D.L.R. 266, affirmed.]

APPEAL by defendant from the judgment of the Alberta Supreme Court, Appellate Division in an action to set aside a sale of land for non-payment of taxes. Affirmed.

Eugene Lafleur, K.C., *S. B. Woods*, K.C., for appellants.

C. F. Newell, K.C., for respondents.

IDINGTON, J.:—The respondent sued to recover lands in the appellant's municipality and claimed by it to have been duly forfeited to it under the provisions of the Rural Municipality Act of Alberta, ch. 3, 1911-12, and afterwards duly sold under said Act and its amendments.

The respondent by her pleadings as amended, charges that the assessments of the said lands were illegally and fraudulently made by assessing her lands and those of other non-residents at a higher rate per acre than the lands of residents within the municipality and fraudulently endeavoured to collect from the plaintiff (now respondent) such an amount as would make the taxes unequal and hence the said assessment as against her was void.

The appellant's counsel in his factum herein relies upon the opinion of Ives, J., who alone of the several Judges below having to deal with the matter pronounces an opinion favourable to the appellant, but does not, I respectfully submit, give any reasons explaining the numerous peculiarities in this assessment roll now in question. Indeed, I suspect that the plan now before us based on the assessment roll and which I have found so helpful may not have been presented to the Courts below.

It presents no new evidence but points the way to read the assessment roll in an intelligent way and, as I understood, if memory serves me, from something stated in argument, was agreed upon as a method of averting the expense of printing the assessment roll part of the case to be presented to us.

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Ives, J., relies upon the case of *Town of Macleod* v. *Campbell* (1918), 44 D.L.R. 210, 57 Can. S.C.R. 517, and indeed cites a passage from my own judgment therein, to which I still adhere, as good law, but fails to observe what as it seems to me now, I, fortunately, set forth on p. 212 of the report, expressly stating that the alternative of fraud might be relied upon as a defence which vitiates everything but was not, as I there point out, the case made by the defendant therein.

The appellant relies upon said decision which in my view of the law is no answer to the charge of fraud which I submit has not been attempted seriously to be met by the factum of the appellant.

And the assessor on examination for discovery after having been examined as to a very large number of assessments, testifies, illustrative of his work, as follows:—"118. Q. I notice here in looking over the assessment that the outside residents are assessed about $1 an acre higher than the residents? A. Sometimes, not in all cases sometimes that happens; there were certain people who reside there who were assessed as high as others, one or two. 119. Q.—But as a usual thing the outsider is assessed, in most cases we have gone over, they are a little higher, from a dollar to a dollar and a half an acre? A. Somewhere about that.

The Court:—I don't know why you put that in—may use it for the purposes of argument; the facts are all in there."

Seemingly he here admits the remarkable discrepancy except in a very few instances, and offers no explanation thereof. Is it not fair to infer he had none to offer? Having had time to consider before being called as a witness on behalf of appellant after a discussion between the counsel and the trial Judge as to the result and need for further evidence, appellant called him as its only witness.

When he is so called upon to give evidence in support of the appellant's claims herein he testifies as follows:—Q.—You heard the evidence put in from your examination for discovery in connection with the assessment of land in community and the lands that are the subject matter of this action? A. Yes.

Q.—Will you explain to His Lordship how these lands came to be assessed higher than some other lands in the immediate locality? A.—As Mr. Ford has stated it says in the Act, I went personally over all the lands in question, in fact, over all the lands in the municipality. I assessed this land under sec. 252—I think it is—at their actual cash value without any regard to the expenditure of capital or labor thereon. The lands

in question are lands which belonged originally to the Canadian Pacific Railway Co.

Q.—The lands belonged to outsiders? A.—Yes, those that Mr. Ford was referring to this morning; the people whose names appear in the assessment roll as being assessed for those lands came in to the municipality, took it when there was some sort of land movement on, a sort of boom, and they purchased a considerable quantity of C.P.R. Lands.

Q—Those non-residents? A.—Yes, really they are speculators, to use a common term, they made a selection of the best of those lands, and that is the reason you see the lands are assessed at what I believed and still believe their actual cash value; they selected the best land; you will see by the assessment roll there is a considerable number of quarters which are still unsold and they are not as good as some of the others.

Q.—My friend referred to some lands belonging to outsiders which were assessed at a little higher amount than those belonging to people in the municipality; can you show me any cases where residents were assessed at the same figure? A.—The amounts are not large they are $1 or $1.50 an acre different. In the case of the N.E. of 18-52-2 that is the meaning of this, this is assessed at $2,000. All section 25-52-2 belongs to a man named Boyce, who is a resident; his name does not appear at the time in the book as a resident but he was resident and is a resident; that is assessed at $2,080.

Q.—This particular quarter? A.—Yes, south east of 5-52-3 you will find assessed the same; all section 4-52-3, that is homestead land.

Q.—South east quarter of 5 is non-resident? A.—Yes, I think if he took the case of the south east 32-52-3, there is a man non-resident, living in Montana, that is assessed the same as the rest of the section, and the south east 34-52-3 you will find is assessed lower than the rest of the section. He lives in Vermilion.

Q.—Mr. Ford. What about the other parts of the section? A.—It is assessed lower than the other parts of the section.

Q.—The Court. Are the other parts owned by residents? A. Yes.

Q.—Mr. Ford. Turn your book up on that; I think you are wrong there. A.—Yes, that is correct; this man T. J. Barridge, it is assessed at $1,760 or $11 an acre; this south east 34, there three quarters are assessed at $1,840; the north west of 34 is owned by James Common of Vermilion, and is assessed at $1,840; the south west of 34 is owned by M. Brown, of Mar-

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wayne, who is resident, and assessed at $1,840; the north east of 34 is owned by W. Snowball, of Girouard, and is assessed at $1,840, the same as the man who is residing there. The north west of 53-2 which is C.P.R. land is assessed to the C.P.R.; that is only assessed at $1,920; the north east of 26-53-2 is practically assessed the same; the Hudson's Bay Co., practically the same; that is a homestead quarter, and 12-5, there is W. T. Barnes, a non-resident, living in Edmonton, he is assessed the same as the other residents of the section. Q. Mr. Newell. Just across the line in I it is assessed at $3 an acre more? A.—This is raw land, south east of 12—in the same section is a non-resident, living in Edmonton, and it is assessed the same; take the case of the man on section 10-53-3, on the south east 10, the man lives at Silver Plains, Manitoba, assessed the same as the rest of the section.

Q.—And the man south of him assessed $2 an acre more; he is an outsider.

Q.—The Court. How many townships are there? A.—Nearly eleven, on account of the river being our north boundary.

Q.—There are variations? A.—Oh, yes, the southern boundary is 14, 15, 16, dollars per acre, goes down to 8 or 9 at the northern exterior.

Q.—Why that? A.—The distance from the town and facilities for getting to town.

Q.—Is there any difference in the quality of the land? A.—Considerable.

Q.—Level country? A.—The whole municipality is rolling.

Q.—What is the nearest town? A.—The nearest town is Kitscoty on the Canadian Northern. There are quite a lot more all over the book in the same way. Here is the north west of 20—there are two cases here, the south east of 20-52-2 that man lives in Vancouver; he is assessed the same as the rest of the section.

Q.—Mr. Newell. The land in section 19, which is an outsider, is $4 an acre higher. A.—The north west of 20 man is an outsider, he is the same as the rest.

Q.—The Court. I would gather that you did not often discriminate between quarters in the same section but you did between sections? A.—That may be his idea but there is no land comes even in a section; some lands are stony, some are sandy, some have a considerable amount of brush on them, others haven't, and so on. I may add during the whole period I have assessed those lands I have not had eight appeals against my assessment in the whole period.

The Court. How long have you been assessor? A.—Ever

since the municipality was established in 1912 and I was secretary-treasurer prior to that of the old local improvement district and I have been in this district for 15 years. I know the district perfectly, every quarter section of it."

Such is the entire excuse and the only feasible explanation is that speculators were non-resident and selected the best land; or as to some part of the district the further north you go the land is of less value.

The value of that excuse can be tested by applying the assessment of the Hudson's Bay Co.'s land and in a relative degree by observing the fact that the C.P.R. Co. (from which the alleged speculators might have bought) got the odd sections by statutory agreement and not by way of selection.

I have taken the assessment of Hudson's Bay Co.'s lands as a test of the value of said excuse.

That company was not a speculator but allotted by statutory agreement certain numbered sections or parts thereof throughout the North West Territories.

And there seems to be in regard to that company's assessment the remarkable, I had almost said miraculous, coincidence of discrimination against it as well as others compared with the resident landowner.

And I find no other possible explanation for such discrimination than the studied design on the part of the assessor to favour residents as against non-residents.

There is in the plan I have referred to as the digest of the argument to be drawn from the assessment roll a further particularity that this discrimination was noticeably less when the non-resident happened to be a resident of Alberta, although outside appellant's district, or in Saskatchewan as distinguished from those in Winnipeg or in Ontario, for example, or in Montana or other parts of the United States.

The case made permits of a comparison of the assessments of the respondent's lands and that of other non-resident's lands with the Hudson's Bay Co's lands, and the clear analogy between them all when compared and contrasted with the assessment of resident lands leads me irresistably to the conclusion that the charge is well founded, and that the man responsible was, if his story of a yearly inspection is true, in a position to have refuted it in a much more satisfactory way than he has attempted by the above quoted evidence.

It would no doubt have been more satisfactory if some one acquainted with the relevant facts to be got by an inspection of the district in question had gone over some of the grounds in question and testified to the actual facts of a comparison so made between the lands in question and some of the resident

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lands in the neighbourhood, or if the assessor had been more thoroughly cross-examined as to those comparatively very few parcels of land he points out as justification of his integrity in making the assessments herein in question.

But is it reasonable to ask a party like respondent to undergo such expense of inspection?

As to that explanation wherein he gives instances of a dozen or more, which, if listened to in the hurry of examination may have sounded all right but in comparing what he says with the roll I find the alleged explanation most unsatisfactory.

This is not the commonplace question of a mere irregularity and accidental result of carelessness in discharging the assessor's duties. If that had been the case, of course, there would not be sufficient to maintain the charge of systematic discrimination against the class to which the respondent belonged and hence support for the charge of fraud.

The excuse given as to non-resident speculators having acquired the best lands removes the case out of the ordinary one of careless assessment and when shewn to be wholly unfounded when applied to the Hudson's Bay Co.'s lands assessed on the evidently increased basis of other non-residents demonstrates that there was an entirely different cause for the remarkable results found spread over so large a section of country.

There were in all about 95 quarter sections assessed to the Hudson's Bay Co. and, so far as I can see, the excuse given touches but one quarter in same section as the Hudson's Bay Co. was partly concerned in. That he points out to being N.E. 1/4, 26-53-2 which adjoins the Hudson's Bay Co's quarter, which, according to the plan, seems to be covered in part by a lake. And others he points to are not adjacent to its sections or points thereof or if so the discrimination is apparent.

In most of the said dozen or so pointed out by the witness I find some very patent explanation for his apparent departure from his usual discrimination, or reason to suspect same, as in the case of Boyce, whose address is set down as Peterboro, Ont. and in some others the fact that the surname of the non-resident is the same as others in same section or as in the case of a man whose address is Vermilion just across the boundary of the appellant's district.

The assessments of odd numbered sections originally of the C.P.R. lands alloted to it by a statutory agreement and acquired by non-resident speculators, of whom respondent seems to have been one, as compared with the even numbered sections acquired by homesteaders or other residents is also most instructive, but we have not had the same elaborated tabulated

assistance carried out in this regard as might have been presented if, as my reading of the assessment roll leads me to believe was possible.

How does it happen that these odd numbered sections assigned the C.P.R. Co. should be almost invariably, when in the hands of non-residents, more valuable than even numbered sections in the hands of residents or nearby owners?

Indeed the surprising thing, studying the roll as I have done, is how many pages of it shew an undulating roll of valuation from top to bottom of the page shewing the residents had much less valuable lands than the non-residents. I cannot think that the configuration of ground actually corresponds so exactly in comparison with these assessments as made to favour the resident as against the non-resident.

The average homesteader is not stupid as to entitle appellant to rely upon such stupidity as a means for accounting for the discrimination. Some other cause I fear operated to create the apparent distinction and discrimination in values.

I agree with Beck, J., (1920), 52 D.L.R. 266, in the Court below in holding the charge of fraud proven. And I may point out that the trial Judge, 15 Alta. L.R. 204, remarked during the course of the trial to the assessor "I would gather that you did not often discriminate between quarters in the same section but you did between sections?" In answer thereto the assessor said:— "A.—That may be his idea but there is no land comes even in a section; some lands are stony, some are sandy, some have a considerable amount of brush on them, others haven't, and so on. I may add during the whole period I have assessed lands I have not had 8 appeals against my assessment in the whole period."

The fact that only 8 appeals occurred during his several years of office does not count for much when we have regard to the expense of an appeal on the part of the non-residents at a great distance from the properties owned—and how few of them, if any, could easily inspect the assessment roll. The moderation of the discrimination as pointed out in the plan referred to seems to account for much in this regard. Yet he repeats this more than once in his examination and cross-examination as if a complete answer to what he is charged with.

In holding the assessment fraudulent I do not, in fact, think he realized that his conduct was of that character but rather that it was quite fair to tax the speculator to the utmost he or she might bear in patient silence.

Mistaken economic theories and worse still the mistaken application of sound economic theories mislead very many. Never-

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theless, the result is in some cases legally speaking fraudulent.

There was the less excuse for such view seeing that the land as such, without regard to the improvements, was fixed by statute as the basis of assessment; and that the Legislature had enabled the municipal councils to discriminate to the extent of 25% between the rate of taxation to be imposed on the land enclosed and improved and that held unimproved.

The discrimination based on statute was in law perfectly right and in many respects justifiable.

I imagine that the assessor was unable to distinguish between that legitimate discrimination and what he conceives he might venture on his own responsibility without law to justify it. In short he seems to have imagined he was doing a like righteous thing by discriminating in his assessing.

Be all that as it may be the trial Judge, at p. 206 when he came to deliver his judgment spoke as follows:—

"The plaintiff attempted to discover irregularities in the assessment confirmation and forfeiture proceedings but I think with no success. At the opening of the trial the plaintiff's counsel obtained leave to amend by making an allegation of fraud in the method of assessment. This was alleged to be shewn by the fact that the assessment roll for 1914 showed that the lands of non-residents (including the plaintiff's) were assessed regularly at a considerably higher figure than those of resident tax payers. I am bound to say that the evidence is such as to point very strongly to that conclusion, but I do not propose to rest my decision on that point."

This from the trial Judge who possibly had not any more than the Court of Appeal the advantage we have of studying the plan presented shewing in somewhat concrete form the strong argument presented thereby of a most perplexing question, shews how the evidence impressed him.

I am unable to agree, however, with the reasons of the trial Judge or the majority of the Court of Appeal which adopted his broader grounds and held that the war had so precluded the possibility of respondent receiving notice that, therefore, the alleged notice was of no avail.

The Legislature has power to enact any mode of notice or want of notice it pleases relative to the assessment of lands to be taxed. It was long the law, for example, in Ontario that lands might be assessed either as resident or non-resident lands, and owing to the difficulty of learning who was the owner many non-residents lost their lands through coming to be sold for taxes unknown to them.

In pursuance of such legislation there were many cases where the non-resident whose address was unknown had to either keep an eye on the roll or run the risk of his lands being sold for arrears of taxes and as a result of such legislation or his own disregard to such legislation lost his lands.

True, in such cases, 3 or 4 years must run in arrear before the tax sale ensued and thus, as matter of justice, he could only blame his own carelessness when so losing his lands.

The measure of legislative power in that regard, however, is all I am just now concerned with.

It was the business of the non-resident owner to know the law and keep an eye on its operation so far as regarded his own interest.

Hence, I am of the opinion that the owner who gets that service of notice which the statute requires whether to be mailed to him, delivered at his residence or on the premises, or sent in such other mode as the statute provides has no legal right to complain of the failure to receive such notice, if indeed any provided by law.

He may have been on the other side of the Globe where mail would not reach him, or in prison, where such an address had not been given, and thus, under either such circumstance, a possible object of pity, if losing his land by virtue of a sale thereof, without his knowledge or possibility of knowledge.

But so long as the provisions of the statute provided for taxing his land and, on default of payment, selling it, had been duly observed, there could be no legal excuse for non-payment of the tax, or claim to recover his lands if sold for non-payment thereof if all proceedings taken in conformity with the relevant express statutory provisions, no matter how harsh and unreasonable they may have been.

In the present case, until we come to the forfeiture proceedings, I see nothing for the respondent to complain of save the charge of fraud which I hold, after much study thereof and the circumstances relevant thereto, well founded. Indeed, she would appear to have suffered in a more marked degree than the Hudson's Bay Co., used above as a test case. Was it because she was helpless and in a small way a speculator buying C.P.R. lands?

The proceedings for forfeiture are provided by secs. 309 to 319 of the Rural Municipality Act, ch. 3, 1911-12 (Alta.) as amended at the time when such were taken by those concerned therein.

The first part of sec. 313 provides as follows:—

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"313:—On the application of the treasurer of the municipality or some solicitor authorized by the council to the Judge of the District Court within whose judicial district the municipality is wholly or partly situated such judge may appoint a time and place for the holding of a court of confirmation of the said return notice of which shall be published in every issue of *The Alberta Gazette* for two months and once each week for at least eight weeks in such newspaper published in the vicinity of the lands entered on the said return as shall be named by the judge."

The return is not in evidence but a notice of the motion to be made for its confirmation by the Judge empowered to hear the application is produced and shewn to have been published in the said "Alberta Gazette." A reference thereto indicates that notice was published first on September 15, 1915, and continued in subsequent issues thereof until and including the issue of October 30, 1915.

The first question raised in regard thereto is the true interpretation of sec. 313.

Does it require 2 months of actual publication? If so then evidently there was not 2 months of publication by a publication beginning on September 15, and ending on October 30 for an application to be made on November 9.

The particularities of the section are such that I have so far been unable to form any decided opinion; and the statute having been since amended, perhaps I had better not, seeing the grounds taken must strongly by respondent are the fraudulent assessment and what I am about to deal with.

Section 314 of the Rural Municipality Act as it was first enacted in 1911-12 reads as follows:—

"314.—A notice of the time and place fixed for confirmation of such return shall be sent by registered mail by the treasurer of the municipality at least sixty days prior to the time so fixed to each person who appears by the records of the land registration district within which the lands lie or by the said return to have any interest in the lands mentioned in the said return in respect of which confirmation is desired and whose post office address is shewn by said record or return; and the entry against such lands in the said return of the date of mailing such notice together with the signature or initials of the treasurer shall without proof of the appointment or signature or initials of the treasurer be *primâ facie* evidence that the required notice was duly mailed on the date so entered."

I infer from much in the case that the secretary-treasurer when he took the proceedings in 1914 to enforce the payment

of the taxes in question overlooked the amendments made to this section by sec. 36 of ch. 7 of the Alberta Statutes in 1913, which reads as follows:—

"Such application shall be in the following form:—

In the matter of the court of confirmation of the tax enforcement return of the rural municipality of . . . .

Take note that His Honor Judge . . . Judge of the District Court of the District of . . . has appointed . . . the . . . day of . . . 19 . . . for the holding of the court of confirmation to confirm the tax enforcement return of the rural municipality of . . .

and further take notice that you appear to have an interest in (*here insert full description of the land mentioned in the said tax enforcement return*).

Dated the . . . day of . . . 19

Secretary-Treasurer of the Rural Municipality of . . . "

and was again amended by sec. 24 of ch. 9 of the statutes of 1914, substituting the word "notice" for the word "application" in the first line of said amendment.

Another notice than this was published in the "Alberta Gazette" pursuant to sec. 313, and from many indistinct and indefinite references in the course of the trial I have got the impression that the same notice was that which was later used in the attempt of the secretary-treasurer to carry out the requirements of sec. 314.

I find also in the appellant's factum the following:—

"The notices in question were sent in accordance with sec. 314 of the Rural Municipal Act, being ch. 3 of the Statutes of Alberta 1911-1912; ' . . . to each person who appears by the records of the Land Registration District within which the lands lie or by the said return to have any interest in the lands mentioned in the said return in respect of which confirmation is desired and whose post office address is shown by said records or return . . . ' "

The writer clearly had no reference to the above amendments in view. And as the final disposition of this appeal was, after argument, directed to stand over in order that the purchasers of the lands in question might be added parties by consent which was obtained, correspondence was had relative thereto by the Registrar to avert expense of another argument.

Incidentally thereto, he was directed to call attention of appellant's counsel to the seeming defect which I have referred to above in the publication of the notice.

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In reply thereto, counsel puts it beyond doubt that the same notice was used under both secs. 313 and 314. Clearly that appearing in the "Gazette" was not conformable to that required by the above amendment.

Apart from all that, however, I have fully considered the question of whether the *onus probandi* rested upon the appellant or respondents, and have come to the conclusion that by reason of the proof of such a notice as required being a subject matter which lies peculiarly within the knowledge of the appellant the onus rested upon it at the trial.

See Taylor on Evidence ed. 11, para. 376, and cases noted there.

I may also point out that the rule laid down in Taylor para. 364 of his work, in my view puts the *onus probandi* on the present appellant.

The pleadings herein are of that character that plaintiff alleged the want of notice in many parts of the Act and defendant not only denied generally all such allegations but distinctly alleges the giving of such notice as required.

There was no ruling of the trial Judge on the question. Each counsel for the parties concerned stated briefly his contention and without insisting upon a ruling the counsel for defendant (now appellant) accepted the suggestion of the trial Judge that all the evidence either desired better be given and appellant proceeded to call the secretary-treasurer of the appellant and he only testified on this point to the mailing of all notices and saying he had the certificates of registration but did not seem to pretend he had the copies of notices he so mailed or produce same.

The only evidence on this point besides that is as follows:—

"MR. TIGHE:—To whom did you send notice required by the Act owing to the forfeiture proceedings? A.—By registered mail to Oldfield, Kirby & Gardiner, and Alice Lilliam Reventlow-Criminil, Fiume, Austria-Hungary. Q.—Did you send all the notices required by the Act. A. Yes."

I am unable to hold that such proof by any means discharged the onus resting on the appellant and much less so when I find its counsel immediately followed this by his remarking that the onus rested on his opponent and getting the negative reply then given.

I cannot hold that a witness is entitled to swear to both law and fact in that way and thereby discharge the onus resting on the appellant. Much less so when as printed the singular instead of the plural is used.

The notice required by the amendment above referred to was an imperative requirement of the proceedings to forfeiture and is not overcome by sec. 260 of the assessment part of the Rural Municipality Act.

For these reasons alone relative to want of notice, I am prepared to hold that the appellant must fail.

Amongst many other cases I have consulted I may refer to *Crysler* v. *McKay* (1877), 2 A.R. (Ont.), 569, and same case under name of *McKay* v. *Crysler* (1879), 3 Can. S.C.R. 436; *Jones* v. *Bank of U.C.* (1867), 13 Gr. 74; *Hall* v. *Farquharson* (1887), 15 A.R. (Ont.) 457; *Hall* v. *Hill* (1863), 22 U.C.Q.B. 578, and the same case in (1865), 2 U.C.E. & A.R. 569, as being instructive on the questions raised herein though I confess by no means decisive, yet well illustrating the principles to be observed in tax sales.

In conclusion I am of opinion that the appeal herein should be dismissed with costs throughout.

I may add that we required as already stated the parties claiming as purchaser or under same should be added parties defendant and they having consented to be so added without costs or any further argument should be added by the judgment to be given herein.

The appellant should also be directed to repay to each of such added parties respectively the sum paid by him or his predecessor in title by way of purchase money at the tax sale in question with interest thereon from the date of the purchase now in question.

DUFF, J.:—I concur in the view of Harvey, C.J. expressed in his judgment in *Town of Castor* v. *Fenton* (1917), 33 D.L.R. 719, 11 Alta. L.R. 320, and approved by Beck, J. in the Court below (52 D.L.R. 266) at p. 274, that so long as the lands in question have not been dealt with under sec. 320, that is to say, so long as the title remains in the municipality, there is a right of redemption vested in the taxpayer.

The only question, therefore, is whether the power of sale under sec. 360 was duly exercised. No title has passed to and no right to a transfer of the title has become vested in the purchasers because of the absence of the Minister's approval. In substance, the sale is open to grave objections—that measure of good faith, of regard for the interest of the debtor which the law requires of a seller in such circumstances was not, I am convinced, taken in this case. *B. C. Land and Investment Agency* v. *Ishitaka* (1911), 45 Can. S.C.R. 302 at pp. 316, 317; and the transaction being still inchoate, that is to say the pur-

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chasers not having acquired any vested interest in the lands, they are not entitled to insist upon the completion of it as against the respondent.

ANGLIN, J.:—I concur with MIGNAULT, J.

MIGNAULT, J.:—This is an action by the respondent on a caveat which he caused to be registered in the Land Titles Office for the North Alberta Land Registration District, and on which the appellant had notified her to take proceedings. The facts which gave rise to the respondent's caveat and to this action may be briefly stated.

In the year 1914, the respondent, a subject of the Empire of Austria-Hungary residing at Fiume in that Empire, was the registered owner of 3 parcels of land in the Rural Municipality of Streamstown, Alberta. Prior to the European war, taxes on these parcels of land had been paid by the respondent's agent, Messrs. Oldfield, Kirby and Gardiner of Winnipeg, but the war between His Majesty and Austria-Hungary having supervened and communication between the respondent and her former agents being impossible, the latter, with the money in their possession, were unable to pay in full the 1914 taxes on these parcels of land and could not obtain the necessary funds from the respondent. Eventually, after having offered a payment on account, they applied what money they had to pay the taxes on one of these parcels, and the other two only are now in question.

Under the statute governing the recovery of municipal taxes in rural municipalities in Alberta (Statutes of 1911-12, ch. 3 known as the Rural Municipality Act as amended in 1913 and 1914), the treasurer of each municipality prepares a separate statement known as "the tax enforcement return," containing the names and addresses of persons indebted for taxes during the previous year, with a description of each parcel of land for which such persons are assessed and a statement of the amounts due (Sec. 309). After this return has been audited by the auditor of the municipality, application is made to a Judge of the District Court for an appointment of a time and place for the holding of a Court of confirmation of the return, notice of which must be inserted in every issue of the "Alberta Gazette" for 2 months and once each week for at least 8 weeks in a newspaper published in the vicinity of the lands (sec. 313).

A notice of the time and place fixed for confirmation of the return must also be sent by registered mail by the treasurer of the municipality at least 60 days prior to the time fixed

for the holding of the Court of confirmation, to each person who appears by the records of the land registration district to have any interest in the lands mentioned in the return and whose post office address is shewn by said records or return. Section 314 which requires this notification contains a form of notice which it states shall be used.

At the time and place appointed, the Judge hears the application and any objecting parties, and, if he finds taxes to be in arrears confirms the return as to lands on which such taxes are in arrears, and the effect of such adjudication, when registered, is to vest in the municipality the said lands free from any encumbrance, subject, however, to redemption by the owners within 1 year from the adjudication by paying the amounts due with the expenses (sec. 316).

A copy of the adjudication must be sent to the parties to whom, under sec. 314, notice is required to be given, and before the expiration of 11 months from the date of the adjudication, the treasurer publishes in the "Alberta Gazette" and in a local newspaper a notice stating that the land named therein has been forfeited for non-payment of taxes and mentioning the time at which the period of redemption will expire, and this notice is sent to the interested parties not more than 60 days nor less than 30 days before the expiration of the redemption period (sec. 316).

If after 1 year from the adjudication the taxes, expenses and redemption fee and any penalties imposed have not been paid, the Registrar on application of the treasurer, issues a certificate of title under the provisions of the Land Titles Act in favour of the municipality, free from all liens, mortgages and encumbrances (sec. 318).

Only one other section of this statute need be noted, sec. 320, which empowers the council of the municipality to sell or lease, with the approval of the Minister of Municipal Affairs, any land which has become the property of the municipality under forfeiture for non-payment of taxes.

I have said that Messers. Oldfield & Co. had not sufficient funds to pay the taxes levied on two of the three of the parcels of land belonging to the respondent. The treasurer of the appellant municipality, the only witness examined at the trial, stated that he had sent to the respondent as well as to Messrs. Oldfield & Co. all the notices required by the statute. As far as the respondent was concerned,the treasurer said that these notices were mailed to her by registered letter addressed to Fiume, Austria-Hungary, which appears to have been the

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address shewn in the records of the land registration district. These notices evidently could not be sent to the respondent on account of the war then pending. Similar notices were also sent to Messrs. Oldfield, Kirby, and Gardiner, Winnipeg.

Some correspondence took place between the treasurer, Mr. Rawle, and Messrs. Oldfield, Kirby and Gardiner and the latter's request to accept a payment on account and to grant time to pay the balance were refused. It is clear that the appellant, through its treasurer, relied on its strict rights under the provisions I have cited, although Mr. Rawle well knew or must have known, that his notification of the tax enforcement proceedings could not, by any possibility, reach the respondent.

The tax enforcement return was confirmed by the District Judge on November 9, 1915, no appearance having been entered on behalf of the respondent, and, the year for redemption having expired, the lands were forfeited to the appellant which, on November 29, 1916, obtained a certificate of title from the land registry office. The appellant afterwards applied to the Minister of Municipal Affairs for permission to sell these lands, and the Minister stipulated that the sale should be by public auction after due advertisement. Just before the sale a New York attorney advised the treasurer that a sister of the respondent desired to pay the taxes and so redeem the land but the answer was that it was too late. Similarly, Messrs. Oldfield, Kirby and Gardiner wrote in December, 1916, to the treasurer, seeking to redeem the lands, but were told that they were being sold by public auction, without the date of the sale being mentioned. This auction took place on December 30, 1916, and the respondent's land was knocked down to some 3 purchasers for about a fourth of its assessed value. The appellant's treasurer certainly might have given notice to Messrs. Oldfield and Co. of the date of the projected sale and thus would have enabled them to protect the respondent, but he seems to have been very careful not to do so. It was after this attempted sale that the respondent, through her attorneys, offered to pay the taxes and registered her caveat. As I have stated, this action was brought by her after notice given by the appellant, under sec. 89 of the Land Titles Act, ch. 24, 1906 requiring her to take proceedings on her caveat.

In this action, the respondent attacked the appellant's taxation as being based on a discriminatory and fraudulent assessment and also alleged that the required formalities for the forfeiture of the lands were not carried out. The appellant

took issue with the respondent on all these grounds. At the hearing, we were met with the difficulty that probably the most interested parties, the purchasers at the auction sale, had not been made parties to the action, nor had they intervened, although it appears by statements made before the trial Judge, as well as by the remarks of Beck, J. in the Appellate Division, 52 D.L.R. 266, that Mr. Ewing, K.C. was retained by one of the purchasers, and watched the proceedings on his behalf in both Courts. Beck, J. says Mr. Ewing stated that, so far as his client was concerned he was satisfied that the case should proceed with or without his client being made a party.

On the other hand, before this Court, Mr. Lafleur, K.C., who represented the appellant, said that his client was willing to accept the money due for taxes and expenses, provided it was relieved from liability towards the purchasers.

The Court however thought that the purchasers should be heard and gave the parties the opportunity to adopt the necessary proceedings to bring them into the case. Subsequently, a declaration was filed with the Registrar to the effect that the persons interested in the purchase agreed to be bound by the judgment of this Court as if they had originally been made parties to the action, but without liability for costs. It seems, therefore, that the case can be disposed of without any further proceedings by or on behalf of the purchasers, who, it may be added, could have intervened if they had thought proper.

The inequalities in the assessment of lands in this municipality, admitted by Mr. Rawle, go far to shew a design to place the burden of taxation chiefly on outsiders or speculators, as they were called, in relief of the actual settlers, for it is difficult to explain away the fact that contiguous sections were assessed at a high or low figure according as they belonged to outsiders or to farmers who themselves cultivated their land. But it appears unnecessary to deal with this point, for under the circumstances of this case, I do not think that the forfeiture of the respondent's lands can be sustained.

The proceedings for the confirmation of a tax enforcement return are undoubtedly judicial proceedings, and they lead up to the forfeiture of the lands of the person adjudged to be in arrears unless these arrears be paid. The statute (sec. 314) requires that a notice of the time and place fixed for the confirmation of the tax enforcement return be sent by registered mail by the treasurer of the municipality at least 60 days prior to the time so fixed to each person who appears by

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the record of the land registration district or by the return to have any interest in the lands and whose post office address is shewn by the said records or return. This notification, in my opinion, is a condition precedent to the jurisdiction of the District Judge to confirm the tax enforcement return, for it is clear that no judgment can be rendered against a person who has not had effective service or notice in the manner required by law of the demand made against him (*Turcotte* v. *Dansereau* (1897), 27 Can. S.C.R. 583). If, therefore, the condition for the existence of the jurisdiction in the District Judge could not be performed, if no notice could be sent to the interested party on account of the war, the District Judge was without jurisdiction when he confirmed the return. (See Maxwell, Interpretation of Statutes, 6th ed., p. 676). The mere mailing and registering of the notice, under the circumstances, would not suffice, for the notice so mailed and registered could not, on account of the war, be sent to the respondent, and what the statute requires is the sending of the notice by registered mail, not its mere mailing. This notice, therefore, was not sent to the respondent and the District Judge was without jurisdiction. It follows that the adjudication confirming the return is a nullity. (On the general question of the necessity of proof that a notice relied on had actually reached the person to whom it was addressed, I may refer to the decision of this Court in *Paulson* v. *The King* (1915), 27 D.L.R. 145, 52 Can. S.C.R. 317, affirmed by the Judicial Committee, 54 D.L.R. 331, [1921] 1 A.C. 271.)

But it is said that notice of the proceedings before the District Judge was sent to the respondent's agents in Winnipeg. The answer is that this agency, involving intercourse with an alien enemy which the respondent undoubtedly was during the war, came to an end from the moment that a state of war existed between His Majesty and the empire of Austria-Hungary. In *Ertel Bieber & Co.* v. *Rio Tinto Co.*, [1918] A.C. 260, Lord Dunedin said (pp. 267-8):—

"The proposition of law on which the judgment of the Courts is based is that a state of war between this kingdom and another country abrogates and puts an end to all executory contracts which for their further performance require, as it is often phrased, commercial intercourse between the one contracting party, subject of the King, and the other contracting party, an alien enemy, or any one voluntarily residing in the enemy country. I use the expression 'often phrased commercial intercourse' because I think the word 'intercourse' is sufficient without the epithet 'commercial.'"

And in the same case at p. 276 Lord Atkinson said:—

"The illegality of these communications does not in the slightest degree depend on the triviality of the business details communicated. The danger to the State involved in them lies probably to the greater extent in this, that, if permitted, they would afford easy opportunities for the communication of information most useful to the hostile belligerant State, and therefore injurious to the State of which the person making the communication was a subject."

The question of the status before the Courts whether as plaintiffs or as defendants, of enemy aliens was much discussed at Bar. It was elaborately considered by Lord Reading in his judgment in the cases of *Porter* v. *Freudenberg, Kreglinger* v. *Samuel*, and *Re Merten's Patents*, reported together in, [1915] 1 K.B. 857, 84 L.J. (K.B.) 1001, 32 R.P.C. 109. But I am satisfied to rest my judgment on the statute governing the confirmation of the tax enforcement return, the condition of which, essential to the jurisdiction of the District Judge, could not be performed owing to the war, with the result that the Judge was without jurisdiction to confirm this return and thereby cause the forfeiture of the respondent's lands. For this reason, I would not disturb the two judgments, which amply secure the right of the appellant to obtain payment of any taxes due by the respondent.

One objection of the appellant I may mention. After having notified the respondent to take proceedings on her caveat, the appellant claimed, when she did bring this action, that she could not do so, being at the time an enemy alien. I do not think that is open to the appellant to take this objection after its notification, and I agree with the two Courts that the objection should not be entertained.

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

CASSELS, J. (ad hoc):—I concur with MIGNAULT, J.

Appeal dismissed.

REX v. ADAMS.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, Hyndman and Clarke, JJ. December 17, 1921.

REVISION OF SENTENCE—POWERS OF COURT OF APPEAL—CR. CODE 1055A; 1921 (CAN.) CH. 25, SEC. 22.

On a motion to the Court of Appeal for revision of sentence, that Court has to consider what would have been a fair and just sentence in the exercise of the judicial discretion of the trial Judge.

MOTION on behalf of the convict to diminish the sentence imposed at trial.

Alex. Stuart, K.C., for the convict.

E. B. Cogswell, K.C., for the Crown.

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App. Div.

REX v. ADAMS.

Stuart, J.

The judgment of the Court was delivered by

STUART, J.:—This is an application on behalf of a convict under section 1055A. of the Criminal Code passed in the last session of Parliament [1921, (Can.) ch. 25, sec. 22]. This section reads as follows:

1055A. (1). When an offender has been convicted of an indictable offence other than one punishable with death, a judge of the court of appeal for the province in which the conviction was had may direct that application may be made to that court for a revision of the sentence passed.

(2) Upon any application so made the court of appeal shall consider the fitness of the sentence passed and may upon such evidence, if any, as it thinks fit to require or receive—

(a) refuse to alter that sentence; or (b) diminish or increase the punishment imposed thereby but always so that the diminution or increase be within the limits of the punishment prescribed by law for the punishment of the offence of which the offender has been convicted; or (c) otherwise, within such limits, modify the punishment imposed by the sentence.

(3) . . . ''

This is the first application under this section which has come before this Court or, so far as we are aware, before any provincial Court of Appeal. It is, therefore, desirable that, at least in a tentative way and as far as may be necessary to deal with the actual case before us, something should be said as to the principles upon which the court will act in hearing such applications. Up to the present it has never been possible for a Court of Appeal to interfere with a sentence legally imposed by the trial judge in a criminal case. The above statute has, however, now conferred such power upon the Court. It is obviously an adoption of the English Statute which, in the year 1907, (Imp.) ch. 23, conferred similar powers upon the English Court of Criminal Appeal.

The English Act gives a convicted person a right, with leave, to appeal sec. 3, sub.-sec. (c), ''against the sentence passed on his conviction unless the sentence is one fixed by law.'' It enacts also that [sec.(4) sub sec. 3], ''on an appeal against sentence the Court of Criminal Appeal shall, if they think that a different sentence should have been passed, quash the sentence passed at the trial and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as they think ought to have been passed . .''

There is also provision in the English Act for the reception of further evidence by the Court of Appeal. But there is one

very significant proviso which does not appear in our Act and which reads thus: "Provided that in no case shall any sentence be increased by reason of or in consideration of any evidence that was not given at the trial." We have no such express restriction imposed on us but probably the spirit of that proviso would prevail.

Aside from the provision just quoted, I cannot see any substantial difference between the English statute and ours insofar as the revision of sentences is concerned. It will be very helpful, therefore, to bear in mind the course adopted by the English Court of Criminal Appeal. In Purcell's Digest of Vols. 1 to 11 of Cohen's Criminal Appeal Reports, there will be found at pp. 97 et seq. a discussion of the principles of revision adopted by that Court. I think it best to quote it in full. It is as follows:—

"What was anticipated from the action of the Court of Criminal Appeal in the revision of sentences is set forth in the judgment delivered by Darling J. (Walton, Pickford JJ.) in *Woodman* (2 Cr. App. R. 67): "It is one of the advantages of this tribunal that it tends to a standardization of sentences. Of course, no invariable tariff can be fixed, for it is impossible to classify guilt so nicely as to indicate it even approximately by the names given to various crimes. But with time it is to be expected that the revision of sentences by this Court will tend to harmonise the views of those who have to pass them, and so to ensure that varying punishments are not awarded for the same amount of guiltiness.

"As to the difficulty in certain cases of standardisation, Channell J. (Jelf, Coleridge JJ.), in *Gorman* (2 Cr. App. R. 188), said: 'As to the suggestion of standardising sentences, it is quite impossible to lay down any standard as to what is a proper punishment for the offence of wounding with intent to do grievous bodily harm—as little as in cases of manslaughter, the most difficult of all. The question depends on the circumstances attending each particular case.'

"The Court has on several occasions stated the general principle on which it interferes with sentences. It will not interfere 'unless it was apparent that the Judge at the trial had proceeded upon wrong principles or given undue weight to some of the facts'; *Sidlow* (1 Cr. App. R. 29); *Ross* (3 Cr. App. R. 198); *Stanley* (5 Cr. App. R. 16). 'It is undesirable to alter the sentence unless the Judge at the trial has clearly gone wrong'; *Williams* (2 Cr. App. R. 158); *Slutter* (5 Cr. App. R. 64). 'If the principle on which the Court of trial passes sentence is right, the Court will not enquire whether the sentence is one which they themselvves would have thought

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well to pass.' *Maurice* (1 Cr. App. R. 176). 'It is not the policy of this Court to interfere if its members are of opinion that they would have given a less sentence, but only if the sentence appealed from is manifestly wrong.' *Wolff* (10 Cr. App. R. 110). 'Whilst we much dislike interfering with sentences there are some cases in which we feel bound to do so, and this is one of them. We think the sentences are so clearly excessive that we must reduce them.' *Wilde* and *Jukes* (11 Cr. App. R. 34). In that case appellants pleaded guilty to two indictments for shopbreaking. Wilde, a first offender, was sentenced to two years' imprisonment with hard labour, which the Court reduced to six months; and Jukes, an old offender, was sentenced to three years' penal servitude, to commence on the expiration of a sentence of seven years' penal servitude passed on the previous day, and his sentence was reduced to one of three years' penal servitude, to run concurrently with his sentence of seven years' penal servitude.

"The distinction between pleas of guilty and verdicts was considered in *Nuttall* (1 Cr. App. R. 100). 'Where there is a trial, the Judge who presides at it and has the advantage of personal observation has a better opportunity of determining the sentence. This Court will then be reluctant to interfere with sentences which do not seem to it to be wrong in principle, though they may appear heavy to individual Judges'; and later: 'But the Court desires as far as possible to standardise sentences where it has the facts before it and can judge them as well as the Court below.'

"What these propositions mean can be ascertained from the decisions of the Court in particular cases. The application of the punishment of penal servitude, whether on offenders who have not previously been convicted or on those who have a criminal record, affords an easy elucidation of the principles of revision."

Then there follows in Purcell's Digest a number of specific instances of revision and reduction of sentences. Without citing any of them specifically it may be observed that apparently the Court often interferes and reduces the sentence where it is the first conviction on indictment even though there may have been other summary convictions. They apparently lean against severe sentences for first offences. One or two cases, however, may be referred to as having some analogy to the case before us now. In *Rex* v. *Keats* (1913), 9 Cr. App. Rep. 214, a sentence of seven years for incest was reduced to three years owing to an overcrowded home and squalid conditions.

In *Rex* v. *Maria Jones* (1913), 9 Cr. App. R. 251, the accused was seventy-two years old and had passed some thirty-two years of her life in prison. A sentence of three years' penal servitude for stealing a pair of boots hanging outside a shop was considered far too severe and was reduced to six months' hard labour.

In *R.* v. *Fitzgerald* (1910), 6 Cr. App. R. 99, twelve months for housebreaking in Middlesex was reduced to six months. It may be well to quote what the presiding judge, Pickford, J., said in this case. It is as follows:—

"In this case appellant is appealing against a sentence of twelve months' imprisonment with hard labour passed upon him at the Middlesex Sessions. It is his first offence and the sentence is a severe one; and we have been told by Mr. Lawless, for the Crown, and also by the learned chairman, who presided there, that housebreaking is a very serious offence in the locality and that a great many such crimes are committed there. No doubt that was the reason why so heavy a sentence was given and perhaps another consideration may have been that the appellant who is a young person is said to be medically unfit for detention in a Borstal institution. We have taken all these matters into consideration, but on the whole we think the term of twelve months is too severe. The sentence will, therefore, be reduced to six months' imprisonment with hard labour to run from the date of the conviction."

It is, indeed, plain from the reports that, notwithstanding some of the expressions used in the extract above quoted from Purcell's Digest the Court of Criminal Appeal does constantly interfere with sentences and reduce them on various grounds. There is only one case of an increase. The Court evidently takes very seriously the task of revising sentences in an endeavour to secure some degree of uniformity and fairness although it is recognised that each case must have its own circumstances of excuse or aggravation and that these circumstances are to be chiefly considered. With us the attempt at more uniformity will be confined to the Province and the Courts of Appeal in the nine Provinces may vary in the course which they adopt. Moreover the precedents in the English Court of Criminal Appeal, it must be remembered, are from a jurisdiction where the conditions of society are to some extent different and the decision in many cases seems to have been affected by consideration of the character of the various penal institutions to which, according to the sentence, the convict would be sent. Our penal institutions do not exactly corres-

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pond. And it may be, although we do not know for certain, that our parole system has been more extensively applied than any possible corresponding system in England.

I do not think, therefore, that any attempt to follow the English decisions with preciseness is advisable and we shall probably have to work out a course of action of our own based upon our own local conditions.

To come now to the facts of the particular case presented to us, the accused was convicted of incest with his daughter, a young girl then about 14 years of age. The accused is somewhere over 60 years of age. The case was first brought to the attention of the police by the appearance of pregnancy in the girl. It appears that she suggested that her father was the cause of this. But it also appears that she was in fact pregnant by a young man named Cook and she gave to her sister an explanation as to why she put it on her father. She said that she heard that in such cases a girl might be forced to marry the man and she did not want to do so and she thought nothing could be done to her father. Cook had disappeared.

There is no doubt that the act of incest intended by the Crown to be charged was thought by the prosecution to have led to the pregnancy. The father was arrested on account of the daughter's allegations and while under arrest he made a statement in writing to the police. The admission of this statement was objected to by counsel for the accused, but it seems to have been quite voluntary and the reserved case asked for and granted upon that point was abandoned. Then this application for a revision of the sentence was made.

The statement made by the accused, which furnished the necessary corroboration of the evidence of the daughter, is not really fit for print.

The trial Judge, in presenting the reserved case now abandoned, speaks of the suggestion that the present application would be made and he says, "In view of this I might add that while the accused was not before me as a witness, both at his election for trial at Fort Saskatchewan jail, where I had difficulty in making matters clear to him, and on his trial he gave me the impression of being 60 years and upwards of age, and while not suffering from any organic disability of mind he was dull of understanding either from inherently deficient mentality or natural decay." We have also been furnished upon request with a report from the Acting Surgeon of the Saskatchewan Penitentiary, which, although the request was for a full report,

is extremely meagre and perfunctory. As to his mental condition he says, "age has slowed down his power of concentration; otherwise would say mental faculties fair."

The fact that the accused made voluntarily and without apparent shame such statements to the police as he did make, confirms the view that he was weak-minded. Indeed I should for myself infer from the statement a condition of great weakness of mind although the Judge and the surgeon do not put it so strongly. One would infer from the language he used that lack of sexual control throughout his life had resulted as usual in serious mental deficiency.

In the statement he speaks of his daughter coming to his bed and of what at times there occurred. It is clearly not a case of deliberate incest between persons possessed of full mental and physical powers. The parties concerned were evidently in a low condition of life and the surroundings of the home not of the best.

In these circumstances I think it was very severe to impose a sentence of five years in the penitentiary. On the other hand, in the cases which must now occasionally come before us under the statute I think care must be taken not to infringe upon a field of action which properly belongs to the prerogative of the Crown as exercised on the advice of the Minister of Justice. It may often be that upon application to him he may think it right to exercise mercy. But all we have to consider, at least in this case, is what would have been a fair and just sentence in the exercise of the judicial discretion placed by law in the hands of the Judge at the trial. The question whether and to what extent facts arising subsequent to the trial should be considered by us in these applications I would like to reserve for future consideration. Practically nothing new has occurred in this case. The crime, speaking generally, no doubt is a grave one, and in this case it was committed by a parent upon his own child of tender years for whose character he was responsible. Nevertheless, upon the evidence it is still left in some doubt whether it was the parent or Cook who first violated the child's chastity, and we cannot with safety, I think, act upon the assumption that it was the former. Then he was an old weak-minded man and there was much ground for suspecting that it was the child's passion, as she was developing into maturity, which led the old man into his error.

The accused has been in custody now since June last and therefore, upon the whole, my opinion is that the sentence should

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be reduced so as to make it determine at the end of the present year. A similar case is not likely to occur very frequently, if at all.

Sentence reduced.

THE "FREIYA" v. THE "R.S."

Exchequer Court of Canada, Audette, J. January 7, 1922.

SALVAGE (§I—1)—ACTION FOR SALVAGE—LOCAL CUSTOM OF VOLUNTARY ASSISTANCE—ESTABLISHMENT—APPLICATION—SALVOR NOT KNOWING OF CUSTOM—CANADA SHIPPING ACT, R.S.C. 1906, CH. 113, SEC. 759.

Every usage must have acquired such notoriety in the business or amongst the class of persons affected by it that any person in that business or amongst that class, who enters into a contract affected by the usage must be presumed to have intended that the usage should form part of the contract, and no one who is ignorant of an alleged usage can be bound by it if it appears to be unreasonable, and he can only be assumed to have acquiesced in a reasonable usage. Held, reversing the judgment of the Local Judge of the B.C. Admiralty District, that the custom on the Pacific of British Columbia that all vessels engaged in the fishing industry afford to each other in the common interest, and for their joint benefit, voluntary and gratuitous assistance to crews and vessels in distress in any of the various accidents which are incidental to vessels of various descriptions engaged in that industry, was not sufficiently established to deprive the owner of a boat engaged in buying and marketing fish, who was ignorant of any such custom, from recovering salvage under sec. 759 of the Canada Shipping Act (R.S.C. 1906, ch. 113).

APPEAL from the judgment of the Local Judge in Admiralty of the British Columbia Admiralty District (1921), 59 D.L.R. 330, 21 Can. Ex. 87; in an action for the salvage of a fishing boat. Reversed.

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

D. A. McDonald, K.C., *E. A. Bennett*, for appellants.

E. C. Mayers, for respondent.

AUDETTE, J.:—This is an appeal from the judgment of the Local Judge of the British Columbia Admiralty District, pronounced on April 26, 1921 dismissing the plaintiffs' action.

On the afternoon of July 28, 1920, while Mr. Matthews, the manager of the Anglo-British Columbia Packing Co., was travelling on board the "Fir Leaf," on his way to the cannery at Glendale Cove, he "sighted the gas boat R.S., sunk and submerged, with just simply a part of the pilot-house showing and the mast, with a big seine, floating around which prevented them from getting alongside of her. There was a very bad west wind blowing at the time and the sea was very choppy." He then decided to go to the cannery to get some gear and salve the boat, and on his way kept looking on the beach for

the crew who had necessarily left this submerged craft. The "Fir Leaf" found part of the crew, took three of them on board, leaving two on the beach to watch the "R.S.," which they did until it got dark. Three of them had already started for the cannery in a small skiff and she picked them upon her way.

The "R.S." at the time was, as shewn by ex. 2, under charter for a period of 35 days to the Glendale Cannery for fishing purposes.

When the "Fir Leaf" arrived at the Glendale Cove, and while proceeding to load the necessary gear, including the taking of a scow and winch, they related all about the mishap and condition of the "R.S.," and Mr. Matthews sent the night boss for Matthew Wilson, the skipper of the "Freiya", which was lying at the cannery wharf, having been engaged there for three or four days in loading fish purchased from the cannery. Wilson came to the wharf at Mr. Matthews' request, and becoming acquainted with all the circumstances of the mishap of the "R.S." asked Mr. Matthews (who was much concerned about losing his seine, says witness Ford) if he wanted his services and Mr. Matthews answered "yes," and said he thought two boats were better than one and Wilson pulled off on board the "Freiya" at about 9.30 p.m., whilst the "Fir Leaf" followed about half an hour afterwards, both in search of the sunk and submerged "R.S."

At the time they left the cannery it was blowing heavy from the west and it *fined away* at about 2 o'clock in the morning.

After steaming full speed all night, from 9.30 o'clock on the evening of the 28th, the "Freiya" between 5.30 and 6 o'clock a.m. of the 29th found the "R.S." She was all under, submerged, only just about one foot of her pilot house and the mast out, with the seine net all the way around her, impossible to get alongside of her with their boat on account of this 300 fathoms of seine around her. The "R.S." was lying under water at an angle of about 45 degrees to the port side, with nobody on board.

The "Freiya" lowered a small boat and the captain, accompanied by one of his crew, made a line fast on her and proceeded to tow and after towing for some little time, the seine strung out straight behind the "R.S." That was the state of things when the "Fir Leaf" came to them between 6.30 to 6.45 or 7 o'clock on the morning of the 29th.

Witness Matthews testified that, at 6 o'clock in the morning Capt. Jackson came to him and said he thought the "R.S."

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"had gone," was lost; but on his advice they went to look for her in Hoeya Sound and when coming out, rounding Boulder Point, they sighted the "Freiya" at a distance of 2½ to 3 miles.

They proceeded towards them and after circling around they succeeded in picking up the seine and hauling it on board the scow. They then moved the scow alongside of the "R.S." and stretched the derrick wire to the step of the mast, but it parted. Then both with the scow and their boat they placed the "R.S." in what they called crutches, and the "Fir Leaf," after that tried her power, but she had to stop it as she was thereby driving the "R.S." under water.

From that time on the "Freiya" towed the whole gathering, that is the "R.S.", the scow and the "Fir Leaf" to Glendale Cove, arriving there at about 1 o'clock, p.m. For such services the "Freiya" claimed the sum of $6,000.

To this claim the defendant sets up, *inter alia*, a denial of any salvage services and in the alternative says that "it is the custom amongst *those engaged in the cannery and fishing business* of the Coast, and in the inlets of British Columbia for the various *fishing boats, cannery tenders*, etc., and their masters and crews to render reciprocal services to each other in times of need without thereby creating or intending to create any obligation on the part of the party to whom such services are rendered either by way of salvage or as a contractual liability." And in further alternative, the defendant paid into Court and tendered to the plaintiffs for their services the sum of $250, reserving the question of costs and submitting that such tender was sufficient.

The evidence spread upon the record by the defendant upon this alleged custom is composed of the testimony of one John MacMillan, a perfectly disinterested witness, and that of witnesses Walker and Matthews, two managers of the Anglo-British Columbia Packing Co. in question and which held the "R. S." under charter, at the time of the accident.

Witness MacMillan limits that custom to cannery tenders and cannery boats, and adds that it does not mean the salvors would not be entitled to claim, but that it is not the custom to claim. He further says that the custom does not apply to outside people who have nothing to do with the cannery people, strangers, owners of separate boats, and who have nothing to do with fishing business. And by "outside people" he says he understands people who are not interested with the canneries, that

is those who are not chartered—whose boats are not chartered to the canneries and which are not owned by the canneries, but are independent of the cannery people. The custom is confined to cannery owners and those engaged in *fishing* business—it is restricted to the *fishing* business.

Witness Walker states it has been the custom of all canneries, and any one interested in the fishing business, and "*interested*" means *engaged* in the fishing business, to abide by this custom. There is no difference between vessels owned *by the cannery companies or chartered by them*, or in their employ by *fishermen attached* to them. Adding: that is: fishing vessels which are attached to one cannery during the season will give mutual assistance to all other vessels gratuitously. In the course of his examination by counsel for the plaintiffs, he is asked:—

"Q. Suppose he was not a neighbor, but travelling up the Coasts buying *fish*, and he drops into a cannery which suits him best, would you consider him bound by that custom? A. *Well no.* I would'nt consider any one bound, it is just— I am simply *giving the feeling of cannery*—of the fishing people as a rule. Q. But you don't know of any instance where a man such as I have described, who wasn't under any contract with the cannery. A. We have been blessed with fish buyers *in the last year or so*, but that hasn't come under my ruling. Q. Yes—but would you say they were within this custom or not? A. I wouldn't say at all. I couldn't say."

Yet, when this witness ceases to be examined on behalf of the plaintiffs and falls into the able hands of counsel for the defence, he answers the following leading question, in direct contradiction of what precedes, viz.:—"Q. So that the man who did travel in that way from cannery to cannery buying fish is—in substance, would be within the area of the custom that you have mentioned? A. Yes, he would."

In the result this witness swears black and white. He has, however, laid the premises for the answer he first gave and not for the second answer.

Passing now to the evidence, upon this subject of custom, of witness Matthews, another manager of the same company interested as having the "R.S." under charter, again answering briefly another leading question—which always has a tendency to impair the value of the answer given by the witness, viz:—

"Q. You agree, do you, that the custom as far as you have known of it during your 12 years' experience includes all those who are in any way connected with the industry, the fishing industry of the province. A. I do, yes."

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And that is all the evidence adduced in support of such alleged custom.

The place and function of "custom" are elementary matters in the law and need not be discussed at any length here. But it will serve the interests of clarity in arriving at the grounds of my judgment, to state the distinction between "custom" proper and "local usage." Coke, C.J., in *Rowles* v. *Mason* (1612), 2 Brownl. 192 at p. 198, quaintly says:—

"Prescription and custom are brothers and ought to have the same age, and reason ought to be the father and congruence the mother, and use the nurse, and time out of memory to fortify them both." That observation is of course confined to "customs" proper. However, there is no pretention in the case before the Court that the usage or understanding in question here amounts to a custom that has existed from time immemorial, or that it has been built into the common law by judicial decision. At best it is only a local usage, but taking it at that, while the alleged usage need not have existed from time immemorial, yet it must be *notorious, certain,* and above all things *reasonable,* and it must not offend against the intention of any legislative enactment. See per Jessel, M.R. in *Nelson* v. *Dahl* (1879), 12 Ch. D. 568 at p. 575, and per Farwell, L.J. in *Devonald* v. *Rosser & Sons,* [1906] 2 K.B. 728 at 743, 75 L.J. (K.B.) 688.

In *Dashwood* v. *Magniac,* [1891] 3 Ch. D. 306 at pp. 370, 371, 60 L.J. (Ch.) 809, Kay, L.J. speaks of custom and usage as follows:—"A great deal has been said in argument for the Defendants about 'custom;' but, in my opinion, the word has been strangely misused. A custom which controls the law of waste must be a custom to do that which would be waste but for the custom. Waste in law is destruction of a part of the inheritance by a limited owner, such as a tenant for life or years. The custom which would exonerate him from the consequences must be a custom for a limited owner to do the act in question without being subject to any legal liability. *Littleton,* in sect. 169, states that 'a custome, used upon a certaine reasonable cause, depriveth the common law,' and in sect. 170, 'and note that no custome is to be allowed, but such custome as hath been used by title of prescription, that is to say, from time out of minde.' Coke's Commentary confirms this statement of the law, quoting *Consuetudo praescripta et ligitima vincit legem: Co. Litt.* (Page 113 a.).

But this must not be confounded with such customs or rather usages as are imported into commercial contracts, or into

contracts between landlord and tenant, as in *Wigglesworth* v. *Dallison* Doug. 201. In that case an immemorial or prescriptive custom was pleaded; but other authorities have recognized that evidence of immemorial usage in such cases is not required; (see *per* Mr. Justice *Blackburn* in *Crouch* v. *Credit Foncier of England* Law Rep. 8 Q.B. 386, and *Tucker* v. *Linger* 21 Ch. D. 18; 8 App. Cas. 508. But such usage, however extensive, would not prevail against positive law, whether by statute or decision; *per* Chief Justice *Cockburn*, in *Goodwin* v. *Robarts* Law Rep. 10 Ex. 337."

Every usage must have acquired, such notoriety in the business or amongst the class of persons affected by it that any person in that business, or amongst that class, who enters into a contract affected by the usage, must be assumed to have intended that the usage should form part of the contract. See *Reg.* v. *Stoke-upon-Trent* (1843), 5 Q.B. 303, 114 E.R. 1263; and *Re Goetz, Jonas & Co., ex parte the Trustee*, [1898] 1 Q.B. 787, 67 L.J. (Q.B.) 577, 46 W.R. 469; *Holderness* v. *Collinson* (1827), 7 B. & C. 212 at 216, 108 E.R. 702.

No one who is ignorant of an alleged usage can be bound by it if it appears to be unreasonable, and he can only be assumed to have acquiesced in a reasonable usage. *Neilson* v. *James* (1882), 9 Q.B.D. 546 at p. 552, 51 L.J. (Q.B.) 369; *Scott* v. *Irving* (1830), 1 B. & Ad. 605 at 612, 108 E.R. 912.

In the case before the Court, the party against whom the alleged custom is asserted cannot be bound by any assumption or inference that he acquiesced in it when entering upon the salvage service. On the contrary, Captain Carson, the owner of the "Freiya," swears positively that he had never heard of any custom of waiving salvage.

No usage can prevail if it be directly opposed to statute law. To give effect to usage which involves a defiance of positive law would be to subvert fundamental principle. *Goodwin* v. *Robarts* (1875), L.R. 10 Ex. 337. *Neilson* v. *James, ubi supra* at p. 551.

Having said so much and approaching the consideration of the question in the light of these elementary principles I am led to find that the custom in question or usage applied only to cannery people and the people engaged in fishing, and not to persons, who did not fish but only limited their business and avocation to buying fish. Are we to include all merchants buying and selling fish, in or outside cities, into this custom because they own vessels engaged in buying fish for them, and which they afterwards sell to wholesalers? Could they thereby

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become bound by this alleged understanding among the cannery and fishing people—people actually engaged in fishing? Stating the case is answering it. Our city fruit dealers are not fruit growers. Our city fish merchants are not people engaged in fishing.

The plaintiffs, under the evidence submitted do not come within the ambit of this alleged custom. The defendant has failed to prove the custom could apply to a person engaged exclusively in buying fish, and who was not engaged in actual catching or canning fish. This custom cannot be imposed upon outsiders who are not engaged in either the business of fishing or cannery.

A general understanding, or custom, such as alleged cannot be extended beyond what the evidence *clearly* shows to be the limits of its sphere, and beyond what cogent evidence shows to have been the originating principle giving rise to the same. It may be that a custom or usage of the sort might have arisen among cannery and fishing people—distinguished as a class by themselves—as a policy of measure of *local* co-operation between members of the class. But what might be valid and binding as between them, could not operate to the detriment of positive rights enjoyed by the people outside of the class.

Section 759 of the Canada Shipping Act (R.S.C., 1906, ch. 113) reads as follows:—

"759. When, within the limits of Canada, any vessel is *wrecked*, abandoned, stranded or in *distress*, and services are rendered by any person in assisting such vessel or in saving any wreck, there shall be payable to the salvor by the *owner* of such vessel or wreck, as the case may be, a reasonable amount of salvage including expenses properly incurred." (See also sec. 827 thereof).

In the view I have taken of the case, upon the evidence submitted, it becomes unnecessary to decide whether or not a custom such as alleged, being in clear derogation of the statute, could claim any validity and could be enforced in a Court of law. See *Girdlestone* v. *O'Reilly* (1862), 21 U.C.Q.B. 409; *Darling* v. *B. T. Hitchcock* (1866), 25 U.C.Q.B. 463; *Cossman* v. *West* (1887), 13 App. Cas. 160, 57 L.J. (P.C.) 17; *Neilson* v. *James* (*ubi supra*); *Daun* v. *City of London Brewery Co.* (1869), L.R. 8 Eq. 155, 38 L.J. (Ch.) 454.

There were a number of minor but interesting questions raised at Bar, but it would carry us too far afield to enter into the consideration of the same especially since the view I have taken of this appeal makes it unnecessary to do so. I will, however,

casually cite on this question as to what is necessary to allege in the pleadings the Rule of Court 64, which limits such allegation to facts only.

Request was made at Bar that in the event of the appeal being allowed, the Court should assess and the judgment should also include the amount the plaintiffs would be entitled to recover, thus saving costs and expenses to all parties.

Acceding to such request, I will point out that the "R.S.," on July 28 and 29, 1920, came within the ambit of sec. 759 of the Canada Shipping Act. She was in such state that no one could remain on board, she being sunk and submerged. As to being abandoned, it is well to bear in mind some of the crew were left on shore to keep an eye on her, but that could not be done during night. Captain Jackson, the captain of the "Fir Leaf" on the morning of the 29th had almost given up hope of finding her.

However that may be, the "R.S." on those two days was in great danger of becoming a total loss. Had she drifted near the shore, it is self-evident the seine would have caught on the beach or on the rocks near the beach and would have been pulled down and become a total loss. Both the seine and the craft were rescued and saved.

Whether the "Freiya" undertook to look for the "R.S." of her own free will or at the bidding of others makes no difference. (Williams & Bruce, Admiralty Practice, 3rd ed., p. 128). She actually steamed out in search of the "R.S." when she heard of the mishap. She was free to do so or not. She was out at night when it was blowing hard with choppy sea. She was out all night using her searchlight, and she finally sighted and found this submerged craft and was in the act of towing her quietly when the "Fir Leaf" arrived and indeed extended great help. The "Freiya" did not rescue her alone although she might have done so according to the evidence—*She was materially assisted by the "Fir Leaf" and her scow.* But the "Fir Leaf" on the previous day had not attempted to salve her alone in plain day time.

Taking all the circumstances of the case into consideration I have come to the conclusion that the sum of $250 tendered for such services is insufficient, and that the plaintiffs are entitled to recover for all she has done, the sum of $500.

Therefore, there will be judgment allowing the appeal and condemning the defendant in the sum of $500. The whole with costs in both courts against the defendant.

Appeal allowed.

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ALEXANDER HAMILTON INSTITUTE v. CHAMBERS.

Saskatchewan Court of Appeal, Haultain, C.J.S., Turgeon, and McKay, JJ.A. November 14, 1921.

EVIDENCE (§IIF—214)—FOREIGN CORPORATION—FAILURE TO ESTABLISH STATUS IN ACTION—DISMISSAL BY TRIAL JUDGE—NO STATUS TO CARRY ON BUSINESS IN PROVINCE—APPEAL—JUDGMENT INTERLOCUTORY OR FINAL.

Foreign plaintiffs suing under a trade name in a Saskatchewan Court must establish their status, and where at the close of their case there is nothing before the trial Judge to shew him whether they are a corporation, a partnership or an unincorporated organisation of individuals, he is justified in dismissing the action on the ground that they are an unincorporated company not registered under the Saskatchewan Companies Act (R.S.S. 1920, ch. 76) and incapable for that reason of carrying on business in the province or of enforcing the contract sued on.

Such judgment is a final judgment and an appeal must be to the Court of Appeal and not to a Judge of the King's Bench in Chambers.

[*Shubrook* v. *Tufnell* (1882), 9 Q.B.D. 621, followed.]

APPEAL by plaintiffs from the trial judgment dismissing their action and also an appeal from a judgment of a judge of the King's Bench in chambers that the original judgment was a final judgment and that an appeal therefrom must be to the Court of Appeal. Both judgments affirmed.

P. H. Gordon, for appellant.

F. W. Turnbull, for respondent.

The judgment of the Court was delivered by

TURGEON, J.A.:—In this case the appellants brought action under the name of "The Alexander Hamilton Institute, New York, U.S.A.," without setting out in the statement of claim the particulars of their status, and the evidence adduced by them at the trial throws no light upon such status. At the close of their case there was nothing at all before the trial Judge to shew him whether the appellants were a corporation, a partnership, or an unincorporated organization of individuals. In his statement of defence the respondent raised the question of the appellants' status in different manners, alleging, among other things, that the appellants are an unincorporated company, not registered under the Companies' Act, R.S.S. 1920, ch. 76, and incapable for that reason of carrying on business in this Province and of enforcing the contract sued upon. Upon the completion of the appellants' case, the respondent moved to have the same dismissed on account of this failure of the appellants to prove their status. This motion was allowed by the trial Judge, and, in my opinion, he was right in allowing it. We were informed by counsel for the appellants, upon the

argument, that the appellants are a corporation incorporated under the laws of the State of New York. This being the case, I think the objection was well taken for several reasons. In the first place, the general rule is that while foreign corporations may sue in the Courts of this Province, they must prove that they are incorporated in the foreign country. (*The National Bank of St. Charles* v. *De Bernales* (1825), 1 Car. & P. 569). In the second place, the Saskatchewan Companies' Act contains certain provisions, in secs. 25, 26 and 27, which require such companies to register in this Province and to take out a license before beginning to carry on business, and certain penalties are provided for those who carry on business without complying with these provisions.

In the well-known companies' cases reported under the title of *Great West Saddlery Co.* v. *The King*, 58 D.L.R. 1, [1921] 2 A.C. 91, 90 L.J. (P.C.) 102, the effect of these provisions of the Saskatchewan Companies' Act was considered by the Judicial Committee of the Privy Council, and it was held by that body that their effect at p. 27, (58 D.L.R.):—

"Is to make it impossible for the company to enter into or to enforce its ordinary business engagements and contracts until registration is effected."

For this reason these provisions were held to be *ultra vires* of the Provincial Legislature in so far as they purport to apply to companies incorporated under the authority of the Parliament of Canada, but they are valid and effective against a company not so incorporated. Had the whole case been presented in proper manner to the District Court Judge, it might have been open to the appellants to argue that they were entitled to the protection of sub-sec. 3 of sec. 25 of the said Act, which safeguards here certain contracts made by unregistered companies. It was impossible for the trial Judge to go into these different matters, however, by reason of the failure of the appellants to disclose their status, and under the circumstances he was right in dismissing their action. The appellants at first treated the judgment dismissing their action as an interlocutory judgment, and appealed therefrom to a Judge of the King's Bench in Chambers. MacDonald, J., who heard the application, decided that the judgment was a final judgment and that the appeal, therefore, did not lie to a Judge in Chambers. The appellants, besides entering an appeal from the original judgment, as from a final judgment, to this Court, have appealed as well against the order of MacDonald, J., and ask to have it declared that he was wrong and that the judgment appealed from is inter-

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locutory. Upon this point I have reached the conclusion that MacDonald, J., was right, and that the judgment is a final and not an interlocutory judgment.

The decisions upon the question seem to have given expression to two opposite views. One view is that an order is final only where it is made upon an application or proceeding which must, in any event, whether it succeed or fail, finally determine the rights of the parties. This is the principle laid down in *Salaman* v. *Warner*, [1891] 1 Q.B. 734, 60 L.J. (Q.B.) 624. The other view, and the one which I think should prevail, is, that an order is final when it does, if allowed to stand, finally dispose of the rights of the parties, regardless of what might have happened if it had been made the other way. This is the rule laid down in *Shubrook* v. *Tufnell* (1882), 9 Q.B.D. 621, and adopted in *Bozson* v. *Altrincham Urban Council*, [1903] 1 K.B. 547, 72 L.J. (K.B.) 271, where the Court of Appeal considered the decision in *Salaman* v. *Warner*, and expressly dissented from it. The judgment of the Judicial Committee of the Privy Council in the *case of Goverdhandas Vishindas Ratanchand* v. *Ramchand Manjimal et al*, (1920), L.R. 47 Ind. App. 124,, uses this language: "The effect of those and other judgments is that an order is final if it finally disposes of those rights of the parties."

The judgments mentioned in this reference are *Bozson* v. *Altrincham Urban Council*, *supra*, and *Salaman* v. *Warner*, *supra*. Their Lordships state that the decision in the *Salaman* case was followed in the *Bozson* case, but this is evidently an error in the report as the *Bozson* decision expressly overruled the *Salaman* decision and followed instead the earlier decision in *Shubrook* v. *Tufnell*, *supra*, and their Lordships adopt the rule laid down in that case and in the *Bozson* case. The reference to *Salaman* v. *Warner* was probably meant to be to *Shubrook* v. *Tufnell*. And I do not think that any decision of this Court will be found upon scrutiny to establish a different rule. In *Newkirk* v. *Stees* (1910), 3 S.L.R. 208, the facts were that the defendant gave notice of appeal from the judgment given against him at the trial, but made default in filing the appeal book within the time limited by rule of Court. He applied to a Judge in Chambers for an order extending the time for filing, and his application was refused. He then appealed to the Court en banc against this decision of the Judge in Chambers, when it was held that the order appealed against was interlocutory only. The judgment of the Court cites with approval the rule laid down in *Salaman* v. *Warner*, but then proceeds as follows at p. 210:—

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"Again, this order does not dispose of this case. An application has still to be made to dismiss the appeal before the case can be finally disposed of, and for that reason also this order is not a final order."

The order under review in the *Newkirk* case was, therefore, not a final order under the rule laid down in *Goverdhandas Vishindas Ratanchand* v. *Ramchand Manjimal et al., supra,* and which, I think, should be followed here, and the adoption of the rule in *Salaman* v. *Warner* was not necessary to the determination of the case. The order, upon its face, was not a final order whichever test was applied to it.

In *Canadian Lumber Yards* v. *Dunham* (1920), 53 D.L.R. 474, 13 S.L.R. 350, Newlands, J.A., quotes the rule in *Salaman* v. *Warner* and that in *Bozson* v. *Altrincham Urban Council,* and says at p. 475: "Under either of these tests the order in question is a final order, and therefore the appeal is to this Court."

Lamont, J.A., in dealing with the objection which was taken that the order was not a final order, says at pp. 477, 478: "In view of the fact that the parties obtained from the Judge an order striking out the defence without any notice of motion or formal application being made therefor, and particularly when they obtained it for the purposes of getting the questions involved before the Court in appeal, I will not give effect at this stage to any technical objection as to the right of appeal. What constitutes a final order has now been authoritatively settled by the Privy Council in *Goverdhandas Vishindas Ratanchand* v. *Ramchand Manjimal et al.*"

In the case at Bar the order appealed from is an order dismissing the appellants' action. Under the rule which I think should be followed, this is a final order and the appeal should have been to this Court and not to a Judge of the King's Bench in Chambers.

I would dismiss the appeal with costs.

Appeal dismissed.

REX v. FLEMING.

Vancouver County Court, British Columbia, Cayley, Co. Ct. J. October 13, 1921.

INTOXICATING LIQUOR (§III A—55)—ILLEGAL SALE BY UNLICENSED VENDOR —SPECIAL ENACTMENT FOR ILLEGAL SALE OF BEER AND NEAR BEER —INTERPRETATION—B.C. GOVERNMENT LIQUOR ACT 1921, CH. 30.

The prohibition of sec. 46 of the Government Liquor Act, 1921 B.C., ch. 30, against the sale by any other than a government vendor, of "any liquor known or described as beer or near-beer or by any name whatever commoniy used to describe malt or

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brewed liquor" includes the sale of ordinary beer, and where the evidence discloses a sale of beer only upon a charge brought for illegally selling intoxicating liquor the conviction should be under sec. 46 with the appropriate penalty under sec. 63 of the Act, and not a conviction in the terms of sec. 26 for selling intoxicating liquor with the more onerous penalty applicable thereto. Whatever is included within the special section, 46, must be considered as taking the subjects dealt with in sec. 46 out of the provisions of sec. 26.

APPEAL from a conviction by the Police Magistrate of Vancouver on a charge of unlawfully selling liquor contrary to the provisions of the Government Liquor Act. Accused found guilty. Penalty imposed changed.

W. M. McKay, for the Crown.

G. W. Zimmerman, for the accused.

CAYLEY, C.C.J.:—The accusation is brought against one James Fleming that he did sell, unlawfully, intoxicating liquor, on July 6, 1921, at the city of Vancouver. Counsel on both sides consent that the depositions given in the Police Court shall be placed before me as the sole evidence in this case. There being no opportunity for me to examine the witnesses or observe their demeanour, I am governed by the decision of *Rex* v. *McCranor*, 47 D.L.R. 237, 31 Can. Cr. Cas. 130, that when a judgment has been arrived at by the Court below and no evidence, or no witnesses produced, except the depositions taken in the Court below, the Court appealed to should take the position of all Appellate Courts; that where the finding of the Court below can be found reasonable on the evidence, the Appellate Court will not reverse that finding. I find that the evidence produced before the Police Magistrate was sufficient for him to find as he did, and as he found the accused guilty, I see no reason why I should not adhere to that conclusion on the evidence produced before me, it being the same evidence as was produced before the magistrate. The accused is therefore found guilty.

It is now argued by counsel that the penalty imposed by the lower Court, namely, six months, was not according to the provisions of the Government Liquor Act, ch. 30, of the British Columbia Statutes, 1921, in that the evidence shewed that the intoxicating liquor disposed of was beer.

The evidence of course discloses that the intoxicating liquor disposed of was beer, and I have therefore to ascertain from the wording of the Act as to whether beer is included in the provisions of sec. 26 of the Government Liquor Act. If beer were included in sec. 26 of the Government Liquor Act there would be no reason for dealing with it separately as it is dealt with in

sec. 46 of the same Act. Sec. 46 of the same Act reads as follows:

"No person other than a Government vendor shall sell or deal in any liquid known or described as beer or near-beer or by any name whatever commonly used to describe malt or brewed liquor."

Evidently sec. 46 specializes in regard to the sale of beer whether it is near-beer, common beer or any other name used to describe malt or brewed liquor. That I take to mean what is ordinarily accepted by common people as beer. Cascade beer is sold and advertised as beer. I take it to mean that sec. 46 covers the sale of such beer as Cascade beer. Where a general section provides certain penalties for offences thereof, specifying in general terms the offence for which the penalty is prescribed, and that section is followed by a special section dealing with a special offence for which a separate penalty is prescribed, the rules of construction are that the separate section shall exclude from the terms of the general section all that is contained within the terms of the special section. The general section here is sec. 26, which speaks of intoxicating liquor. The special section is sec. 46, which deals with the sale of beer. Whatever is included within the special sec. 46 must be considered as taking the subjects dealt with in sec. 46 out of the provisions of sec. 26. The penalties attached to the infringement of sec. 26 do not therefore prescribe the penalties that should be enforced for the infringement of sec. 46. It may be that the terms of the Act are somewhat inconsistent. I think they are inconsistent. The rules of construction of statutes, however, govern the Courts in interpreting mutually conflicting sections. I must, therefore, consider that the evidence having disclosed no offence other than that of dealing in beer, that the penalty prescribed must be in connection with the provisions of sec. 46 and not of sec. 26. It would be improper for a prosecuting attorney to prosecute one man under the provisions of sec. 26 and another man under the provisions of sec. 46 for precisely the same offence. The Courts would allow no such discretion to any prosecuting attorney to describe beer as "liquid" for the mere purpose of bringing it under the provisions of sec. 26. This would be to allow the prosecuting attorney to select in advance what the penalty should be. The penalty for selling beer comes under sec. 63 of the Government Liquor Act. For the first offence a man found guilty is subject to a penalty of not less than $50 or more than $100 and in default of immediate pay-

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ment to imprisonment for not less than 30 days or more than two months.

I find the man guilty as the magistrate found him, but qualify the finding of the magistrate by finding that the intoxicating liquor of which he disposed was beer and, therefore, subject to the penalty only of sec. 63 of the Government Liquor Act. The accused is therefore sentenced to a $50 fine and in default two months.

Conviction modified.

EAGLES HALL ASSOCIATION v. BERTIN.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon and McKay, JJ.A. January 30, 1922.

LANDLORD AND TENANT (§IID—32)—LEASE OF PREMISES FOR TWENTY YEARS—REGISTRATION OF CAVEAT BY TENANT—WITHDRAWAL OF CAVEAT TO ENABLE OWNER TO OBTAIN MORTGAGE ON PROPERTY—CAVEAT FILED SUBSEQUENTLY TO FILING OF MORTGAGE—DEFAULT OF OWNER—MORTGAGEE OBTAINING POSSESSION OF PROPERTY—TERMINATION OF LEASE—DAMAGES UNDER COVENANT FOR QUIET ENJOYMENT.

A registered owner of land who gives a lease in the form required by the Saskatchewan Land Titles Act, for leases for terms of more than three years, impliedly covenants for quiet enjoyment for the term of the lease, and is liable in damages if, through his own default, he loses his interest in the property, to the damage of the tenant, before the expiration of the term.

By withdrawing a caveat against the property in order to enable the owner to obtain a mortgage on it as a first encumbrance, and filing a new caveat subsequent to the mortgage, a tenant does not waive his right to insist on a covenant in the lease for quiet enjoyment during the term of the lease, or his right to damages for breach of such covenant.

APPEAL from a judgment in favour of the plaintiff in an action for damages for breach of an implied covenant for quiet enjoyment in a lease granted by the defendant to the plaintiffs for a period of 20 years from November 27, 1912.

C. E. Gregory, K.C., and *J.O. Begg*, for appellant.

D. Buckles, for respondent.

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

LAMONT, J.A. (dissenting):—The consideration expressed in the lease is $8,000, but the evidence, in my opinion, is not sufficient to justify the conclusion that the plaintiffs really paid anything at all for it. The defendant says he made them a gift of the lease, and I think our judgment must go upon the assumption that he did. The plaintiffs entered into possession and placed a caveat against the demised premises, to protect their lease. In the following year the defendant being desirous of raising some money on the security of the demised prem-

ises requested the plaintiffs to withdraw the registration of their caveat, so as to enable the proposed mortgage to be registered as a first charge against the premises. To this the plaintiffs agreed, and the mortgage was so registered. The defendant having made default in his payments under the mortgage, the mortgagees foreclosed, and obtained possession of the demised premises about July 1, 1920. Shortly afterwards they notified the plaintiffs that they must either pay a rental of $400 a year or vacate the premises. The plaintiffs moved out, and brought this action for damages. The trial Judge held in their favour, and awarded them damages in the sum of $3,500. The defendants now appeal to this Court.

Two questions arise on this appeal: (1) Did the lease raise an implied covenant on the part of the defendant for the quiet enjoyment of the premises by the plaintiffs? And (2) if so, did the plaintiffs by withdrawing their caveat and permitting the mortgage to be registered as a first encumbrance against the leased premises, forfeit their rights under the implied covenant?

1. As no person other than the defendants had any estate or interest in the demised premises at the time the lease was granted, there is to be implied from the leasing of the premises a covenant on the part of the defendants that the plaintiffs shall have quiet enjoyment thereof for the full term of the lease, namely, 20 years. *Markham* v. *Paget*, [1908] 1 Ch. 697, 77 L.J. (Ch.) 451; Woodfall's Law of Landlord & Tenant, 20th ed. p. 838; Foa's Law of Landlord & Tenant, 3rd ed. p. 130.

2. The plaintiffs having an implied covenant from the defendant for the quiet enjoyment of the premises for 20 years, agreed with him that he might place a mortgage upon the premises and that such mortgage should be an encumbrance thereon in priority to the lease. Did the surrender of the priority of the lease as against the premises themselves carry with it a surrender of the rights which the plaintiffs had under the implied covenant? If it did not, the plaintiffs are still entitled to enforce those rights, for it is not suggested that they were lost in any other way. In my opinion, it did not, and that for two reasons: First, because there was no agreement on the part of the plaintiffs to give up their rights under the implied covenant, and a surrender of them is not necessarily implied in a surrender of the priority of their lease as a first encumbrance, and, secondly it was the duty of the defendant to pay the mortgage money and interest, and had he done so this litigation would not have arisen.

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In *Anderson* v. *Stevenson* (1887), 15 O.R. 563, the lessees had agreed in writing to postpone their lease to the mortgage. The lease contained an express covenant for quiet enjoyment. The mortgage became in default, and the land was sold under it. The lessees brought an action for damages for breach of the covenant for quiet enjoyment. It was held that they were entitled to recover. In giving the judgment of the majority of the Court, Rose, J., at pp. 571, 572, said:—

"Must it not in all fairness be held that by agreement between the parties to the lease the covenant for quiet enjoyment should, after the date of the agreement, be taken to speak with reference and apply to the altered condition of affairs; and must not the Court now hold that it would be inequitable to allow the lessor or those representing her to set up the consent of the lessees to the postponement of the mortgage as a consent that the lessor—mortgagor—might neglect or refuse to pay the mortgage moneys or interest and so cause the eviction of the lessees.

It seems to me that unless the agreement can be construed into one not only to allow the mortgage to take priority over the lease but also as a consent to the lessor—mortgagor—making default in payment of principal and interest, the covenant is literally broken, for the lessees have been literally evicted by reason of an act of the lessor and by a person claiming under her."

Although in that case the covenant was an express covenant, the reasoning in my opinion applies equally here. I do not think that in either case it could reasonably be held that a consent to waive priority of the lease in favour of the mortgage can be construed also as a consent that the mortgagor may make default in paying the mortgage money and interest. As pointed out in the judgment above, unless such consent is held to have been given, the plaintiffs are still entitled to their rights under the covenant.

In my opinion, the trial Judge was right in holding that they were entitled to recover.

The amount of damages awarded, however, is, in my opinion, excessive. The plaintiffs are entitled to recover the value of the unexpired portion of their term, some 11 years and 9 months. What this value is the evidence does not clearly shew. There was evidence given that, at the time of the trial, the premises would let for $400 a year. There was also evidence that a few years before they brought but little over the expenses of looking after the rooms. Any amount awarded must be to some

extent speculative. There is, however, no doubt that the premises have a substantial rental value. I would assess the damages at $2,000.

The appeal, in my opinion, should be allowed, and the judgment below varied by reducing the damages to $2,000.

TURGEON, J.A. concurs with McKAY, J.A.

McKAY, J.A.:—The appellant being registered owner of certain land in the City of Swift Current on which there was a building, by lease dated November 27, 1912, for the expressed consideration of $8,000 leased to the respondent the third floor, or upper storey, of the said building, to be held by the said respondent as tenant for the space of 20 years from December 1, 1912.

On March 12, 1913, the respondent caused a caveat to be registered against the said land in the proper Land Titles Office in that behalf under the said lease.

After the granting of said lease to the respondent, the appellant mortgaged the said land to the Colonial Investment Co. of Toronto, and the respondent withdrew its said caveat at the request of the appellant, so as to give the said mortgage priority to said caveat, and another caveat was registered subsequent to the said mortgage. The said mortgage was foreclosed by the said Colonial Investment Co. and it obtained possession of said property about July 1, 1920.

The respondent was in possession of the leased premises from December 1, 1912 to the end of February, 1921.

Mr. Healy, who became owner of the property in question, required the respondents to pay rent at the rate of $400 per year from July 1, 1920, for the said third floor which they had leased from the appellant.

The respondent brought this action, claiming damages from appellant for the breach of an implied covenant for quiet enjoyment. The trial Judge gave judgment for the respondent, and the appellant appeals therefrom on several grounds, which I now proceed to consider.

1. The appellant contends that he was induced to sign the lease in question by the fraud of the respondent. The trial Judge has found against him on this point, and there is ample evidence to support this finding and it should not be disturbed.
2. The appellant also contends that he did not receive any consideration for the lease, but that he gave it as a gift to the respondents. In my opinion, it is immaterial whether the lease was given in consideration of $8,000 or as a gift. The evidence shews that certain trustees of the Eagle Lodge, a fraternal

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society, had agreed to purchase a certain lot from the appellant for $3,000, upon which they paid $1,000. The appellant appears to have reacquired the whole interest in this lot and gave the lease in question to the respondent. The evidence is not sufficiently clear to shew that the respondent acquired the interest of the trustees in the lot in question and then exchanged the lot for the lease. But, in any event, the appellant admits he gave a 20 year lease to the respondent as a gift, the lease to begin to run from December 1, 1912, and the respondent went into possession and occupation under this lease. Consequently, the lease is binding upon the appellant. 3. The appellant further contends that there is no implied covenant for quiet enjoyment under the lease. In my opinion, there is.

In *Hart* v. *Windsor* (1844), 12 M. & W. 68 at p. 85, 152 E.R. 1114, 13 L.J. (Ex.) 129, Baron Parke, in delivering the reserved judgment of the Court of Exchequer, said:—

"It is clear that from the word 'demise', in a lease under seal, the law implies a covenant, in a lease not under seal, a contract, for title to the estate merely, that is, for quiet enjoyment against the lessor and all that come in under him by title . . . . .; and the word 'let', or any equivalent words (Shepp, Touch, 272) which constitute a lease, have, no doubt, the same effect, but no more."

In *Bandy* v. *Cartwright* (1853), 8 Exch. 913, 22 L.J. (Ex.) 285, under a letting in writing in which the word "demise" does not appear to have been used, the Court held that there was an implied agreement for quiet enjoyment during the term.

In *Hall* v. *City of London Brewery* (1862), 2 B. & S. 737, 121 E.R. 1245, 31 L.J. (Q.B.) 257, referred to in *Markham* v. *Paget*, [1908] 1 Ch. 697, 77 L.J. (Ch.) 451 at p. 713, the agreement was not made under seal, and the operative words were "the said company do hereby agree to let." The Court of Queen's Bench held that under these words there was an implied promise of quiet enjoyment during the term.

In *Mostyn* v. *West Mostyn Coal & Iron Co.* (1876), 1 C.P.D. 145, 45 L.J. (C.P.) 401, where the word "let" was used in the lease, the Court held that there was an implied convenant for quiet enjoyment. Brett, J., at p. 152, in his judgment said:—

"The case of *Hart* v. *Windsor*, is an authority that the word 'let' has the same effect in this respect"—that is, as to implying a covenant—"as the word 'demise', and that any other equivalent word would have the same effect."

In *Markham* v. *Paget*, [1908] 1 Ch. 697, 77 L.J. (Ch.) 451, Swifen Eady, J., after reviewing a number of authorities, held that an agreement of yearly tenancy by which the landlord "agrees to let" certain premises contains an implied covenant for quiet enjoyment.

Turning to the case at Bar, we find that the lease is in Form J. in the schedule of the Land Titles Act, ch. 41 of R.S.S. 1909, being the Act then in force at the time of the making of the lease, and the word used in the operative part of the lease is the word "lease."

Section 81 of the said Act reads:

"When any land for which a certificate of title has been granted is intended to be *leased* or *demised* . . . . for a term of more than three years the owner shall execute a lease in Form J. in the schedule to this Act. . . ."

The word "lease" therefore, as used in the lease at Bar, must be taken to have the same meaning as "demise," as that is the word to be used when it is intended to demise the land.

Furthermore, in the lease in question (ex. P. 2.) the leased premises are referred to twice in the covenants as the "demised premises."

I do not think that secs. 62, 63 and 167 of said ch. 41, or the corresponding sections, 65, 93 and 94 of ch. 67, R.S.S. 1920, dealing with implied covenants, negative the said implied covenant for quiet enjoyment, as contented by appellant's counsel. It is to be noted that there are no implied covenants expressly provided for on the part of the lessor in the foregoing sections, and the law with regard to the implied covenant on the part of the lessor, as shown by above cited authorities, is not changed by the Land Titles Act.

In my opinion, then, there is an implied covenant for quiet enjoyment under the lease in question.

4. Appellant further contends that, even if there was such implied covenant, the respondent waived its right to the same by removing its caveat and allowing the mortgage to be registered against the property.

The evidence clearly shows that the withdrawing of the caveat was done at the request of and to enable the appellant to get a loan on the property in question with other property, and not in any way with the intention of the respondent giving up its lease. According to the evidence, the respondent filed another caveat after the mortgage was registered. The effect, to my mind, of withdrawing the caveat was simply to give the mortgage priority over the lease, but this did not

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in any way release the appellant from his covenant for quiet enjoyment. He was still under obligation to respondent to keep the mortgage in good standing, and so prevent the mortgagee from interfering with the quiet enjoyment of the leased premises by the respondent.

It was so held under an express covenant for quiet enjoyment in *Anderson* v. *Stevenson*, 15 O.R. 563, where, after the lease was given and registered, the lessees at the request of and for the accommodation of the lessors entered into an agreement with the mortgage company to postpone their lease to the mortgage.

5. Appellant's counsel further contends that the covenant (if any) for quiet enjoyment ended with the title or interest of the appellant in the property, when the mortgage was foreclosed, and cites as authority for this 18 Hals. para. 1027, which is as follows:—

"The implied covenant for quiet enjoyment does not insure the possession of the lessee during the whole term. It is operative only during the continuance of the estate of the lessor in virtue whereof he was able to give possession to the lessee; and, if this ceases during the currency of the term, the liability on the covenant, save for disturbance already suffered, also ceases," and, *Adams* v. *Gibney* (1830), 6 Bingham 656, 130 E.R. 1434. In addition to *Adams* v. *Gibney*, Halsbury cites the following cases as authority for the above paragraph:—

Swan v. *Stransham* and *Searles* (1566), 3 Dyer, 257b, 73 E.R. 570; *Penfold* v. *Abbott* (1862), 32 L.J. (Q.B.) 67, 11 W.R. 169, 9 Jur. (N.S.) 517; *Schwartz* v. *Locket* (1889), 61 L.T. 719, 38 W.R. 142; *Baynes* v. *Lloyd*, [1895] 1 Q.B. 820, 64 L.J. (Q.B.) 787, 44 W.R. 328.

Woodfall, Landlord & Tenant, 19th ed. at p. 809, also makes the statement that:—

"The implied covenant for quiet enjoyment ceases with the estate of the lessor, and does not necessarily continue during the whole term expressed to be granted . . . ." and closes with the words, " . . . . the inflexible rule appears to be that when the landlord's interest ends, his *implied* contract for quiet enjoyment ends with it."

Bell on Landlord & Tenant, and Clarke on Landlord & Tenant also make like statements, this is, that the implied covenant for quiet enjoyment ceases with the lessor's estate.

I have carefully read all the above cases, and they are all cases in which the estate or interest of the lessor expired with-

out any fault on his part. They were cases where the lessor was either a tenant for life or a tenant for a period of years, and he either died or his estate or interest expired before the term ended which he had given to his lessee, and the remainderman or reversioner not claiming title from or under the lessor interfered with the lessee. It is quite true that the language used by the Judges in these cases, (except in the *Schwartz* and *Granger* cases), is very wide, perhaps as wide as the propositions above stated in Halsbury, Woodfall, Bell, and Clarke. For instance, in the *Baynes* case, Russell, C.J., at p. 826, says:—

"I have come to the conclusion, after careful consideration of the authorities, that such implied covenant or covenant in law determines with the interest of the lessor, or, in other words, enures only during the continuance of that interest."

But in view of what Sheppard's, Touchstone, Cockburn C.J. and Lord Coleridge, C.J. state to be the law, as hereinafter referred to, I think this unqualified language is to be restricted to the nature of the cases these Judges were considering at the time, and that the unqualified propositions above referred to, used by Halsbury, Woodfall, Bell, and Clarke, are also to be restricted to cases of a like nature as these quoted, and that they do not apply to such cases as the case at Bar, where the loss or termination of the estate or interest of the lessor was caused by his own default, and the person interfering obtains title to the leased property from or under the lessor.

In *Baynes* v. *Lloyd*, *supra*, at p. 789, Kay, L.J., quoting from Sheppard's Touchstone at p. 165, says he states the law of implied covenant as follows:—

"If one make a lease for years of land by the words 'demise' or 'grant' and there is not contained in the lease any express covenant for the quiet enjoying of the land, in this case the law doth supply a covenant for the quiet enjoying of it against the lessor and all that come under him by titles during the term."

And in *Hall* v. *City of London Brewery*, 2 B. & S. 737, at p. 741, 121 E.R. 1245, Cockburn, C.J. said:—

"It is inconsistent with common sense that, when a man is let into possession for a year, a promise by the lessor for quiet enjoyment against himself and *all that claim by title under him* should not be implied."

And Baron Parke in *Hart* v. *Windsor*, *supra*, uses practically the same language.

If the above words "all that come in under him by title," or "all that claim by title under him" include a person get-

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ting title to the leased premises under a prior mortgage given by the lessor, then, according to Sheppard's Touchstone, Cockburn and Baron Parke, the implied covenant for quiet enjoyment would be operative when the lessee is disturbed during his term by such person. And in my opinion such person is included in above words.

In *Carpenter* v. *Parker* (1857), 3 C.B. (N.S.) 206, 140 E.R. 718, 27 L.J. (C.P.) 78, 6 W.R. 98, the defendant gave a lease to plaintiff with an express covenant against eviction or disturbance by himself "or any person claiming under him." There was a prior mortgage on the premises executed by trustees authorised to do so by the defendant, and the lessee was disturbed by the surviving mortgagee. It was held that the mortgagee was a person claiming under the defendant. See also Redman's Landlord & Tenant, 7th. ed. p. 260.

I am strengthened in the view I take by the judgment of Lord Coleridge, C.J. in *Schwartz* v. *Locket* (1889), 61 L.T. 719. Locket held by lease, and let to Schwartz from year to year. No express covenant for quiet enjoyment. Locket's lease having expired, Schwartz was evicted by the superior landlord in the middle of one of the years. It was held Schwartz had no right of action against Locket for such eviction. Lord Coleridge said at p. 720:—

"A demise from year to year does not imply a covenant against an eviction by a superior landlord. This principle is laid down over and over again. There are five or six cases given to that effect in Woodfall on Landlord and Tenant."

It is to be noted that all this case decides is that a demise from year to year does not imply a covenant against eviction by one having paramount title, after the lessor's term has ended, and it is not, in my opinion, an authority for the statement made by the above referred to text-writers that, the implied covenant ends with the lessor's estate or interest.

It is also important to note the interpretation which Lord Coleridge puts upon the cases relied on by Woodfall for this above referred to statement. He, in effect, says that the principle laid down in these cases is that the implied covenant for quiet enjoyment does not apply when the eviction is by a superior landlord, and not that the covenant ends with the lessor's title.

In my opinion, then, the covenant for quiet enjoyment in the case at Bar did not cease with the termination of the appellant's interest or estate in the landed property, as his interest

or estate in said property terminated through his own default in not keeping the mortgage paid up.

And the respondent's right to quiet enjoyment having been interfered with by Mr. Healy, who obtained title through or under the appellant, the latter is liable to the respondent for the damages which it suffered.

The damages that respondent is entitled to are the value of the unexpired term of the lease, with such other actual damage as respondent has sustained.

Williams v. *Burrell* (1845), 1 C.B. 402, 135 E.R. 596, 14 L.J. (C.P.) 98.

The respondent occupied the premises till the end of February, 1921; the unexpired term was therefore 11 years and 9 months. There is no direct evidence of what the unexpired term was worth. There is evidence, however, to the effect that for the 8 years to end of November, 1920, respondent was in occupation of the premises, it made an average profit of $358.41 5/8 per annum. Early years of this period were exceptionally good, and it is not likely there would be as good years as these early years during the unexpired period. From 1913 to 1919 the profits decreased annually, until they were as low as $80.45 in 1919. Then in 1920 they began to increase again, for this year of 1920, they were $52.14, plus the rent respondent had to pay to Mr. Healy of $133.30, altogether amounting to $185.44.

Mr. Healy was charging respondent rent at the rate of $400 per annum from July 1, 1920, and witness Webber says it was worth that. Another witness, Mr. Haight, says a fair annual rental would be "$30 to $50 per month, according to conditions; $400 or $500 per year, something like that." Then later he says, $400 per year would be a fair rental. The respondent had to heat the premises, but there is no evidence of what it would cost to do this.

In view of the evidence, I would think a fair and reasonable value for the unexpired term would be $250 per annum, the present value of which would be $1,960, with interest at 7% per annum.

I would, therefore, allow the respondent for its damages $1,960 and the $133.30 it paid to Mr. Healy for rent; altogether $2,093.30. Although respondent may have paid for rent more than $133.30, there is no evidence that it did.

If either party be dissatisfied with this amount, the dissatisfied party may within 30 days from the date of this judgment apply to the Local Registrar at Swift Current to assess the

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damages. Both parties to have the privilege of submitting evidence to the Local Registrar. The costs of such reference to be paid by the party failing to increase or decrease the above allowance of $2,093, as the case may be.

The appellant will have his costs of this appeal.

Judgment accordingly.

PLANT v. URQUHART.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin and McPhillips, JJ.A. January 10, 1922.

SUMMARY CONVICTION (§ VI—60)—FORMAL CONVICTION CONFORMING WITH ADJUDICATION—SUBSEQUENT CONVICTION SIGNED BY MISTAKE AND TRANSMITTED TO APPELLATE COURT OMITTING THE FORFEITURE ORDER CONTAINED IN THE FIRST—APPEAL FROM CONVICTION—EFFECT OF ORDER DISMISSING ON ERRONEOUS RECORD—QUESTION OF ESTOPPEL—SUBSEQUENT CIVIL ACTION ON BASIS OF NO EFFECTIVE FORFEITURE DISMISSED—B.C. PROHIBITION ACT 1916, CH. 49—SUMMARY CONVICTIONS ACT, 1915, B.C., CH. 59.

The formal conviction imposing a fine and ordering confiscation of liquor seized under the B.C. Prohibition Act 1916, ch. 49, may be set up in answer to a civil action for return of the liquor, although such formal conviction was not transmitted as it should have been to the County Court having appellate jurisdiction in respect thereof and although by mistake another conviction was afterwards made out, signed and transmitted, which did not include the confiscation order.

Where an appeal was taken against the conviction both as to the keeping for sale and the forfeiture and counsel for the appellant finding the forfeiture omitted in the transmitted conviction failed to call the attention of the County Court to the discrepancy or to urge that the appeal should be allowed, and the appeal was dismissed, the accused cannot afterwards insist that the transmitted conviction is the only authentic record.

Per McPhillips, J.A.:—The transmitted conviction was a nullity. The defendants justifying under the actual adjudication of forfeiture and the formal conviction first drawn were not estopped by the proceedings in the County Court.

APPEAL by the plaintiff from the judgment of Murphy, J., (1921), 61 D.L.R. 211, 29 B.C.R. 488, dismissing an action for the recovery of intoxicating liquor seized under the B.C. Prohibition Act 1916, ch. 49, and amendments. The defence set up was a conviction for keeping liquor for sale and a confiscation order made by the magistrate, the validity of the latter and the record of same being called in question. The appeal was dismissed, the Chief Justice dissenting.

Chas. Wilson, K.C., for appellant.

A. Macneil, for respondent.

MACDONALD, C.J.A. (dissenting): — The plaintiff was convicted of keeping liquor for sale contrary to the B.C. Prohibition Act, was fined and the liquor was confiscated to His Majesty.

On the same day the formal conviction was drawn up and duly signed by the convicting magistrate and left with one of the Police Court clerks. It appears to be the custom of the Magistrate, who was very busy at this time, when disposing of a charge, to make a note upon the information of his adjudication. This he had done, noting that the prisoner had been fined $300 and the liquor confiscated. With a large number of other information disposed of that day, the magistrate, as was the custom, sent the one in question to one of the clerks of the Police Court, whose duty it was to draw up the formal conviction. By some mistake, not explained, the clerk drew up a formal conviction in this case, and with a large number of others sent it to the magistrate to be signed. It was so signed, and afterwards the clerk of the Police Court deposited the same in the County Court, pursuant to sec. 83 of the Summary Convictions Act. The real conviction, the one previously signed, remained with the papers in the Police Court. This second conviction, or what purported to be a conviction, was signed the day following the magistrate's signature to the real conviction. It differs from the real conviction in this, that while it purports to impose the fine, it says nothing about the confiscation of the liquor.

The accused appealed to the County Court and on search of the records of the County Court before the appeal came on, his counsel discovered the document, and finding no other conviction deposited there, he offered no evidence and the appeal was dismissed.

The liquor in question is of the value of about $40,000, and it was against the confiscation of the liquor that the substantial appeal was taken.

Upon the dismissal of the appeal, the solicitor of the accused demanded a return of the liquor which had been seized prior to the conviction, and upon refusal brought this action for the recovery of it.

The defence is the conviction confiscating the liquor.

Assuming for the purposes of this case that it was open to the magistrate to change his mind, even after he had signed the true conviction, the fact is that he did not do so, he signed the second document without even knowing that it purported to be a conviction. The conviction never was sent by him to the County Court, pursuant to said sec. 83, but the false document was sent and became a record in the County Court. Sec. 83 declares that "It shall be sent to the County Court and there

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to be kept among the records of the Court." That was the conviction that was before the County Court Judge when he dismissed the appeal.

The defendants represent His Majesty in this appeal, and I think the document sent to the County Court obviously for the purposes of the appeal estops the defendants from setting up the true conviction. The appeal should, therefore, be allowed, and an order made as prayed for the delivery of the liquor to the plaintiff.

MARTIN, J.A., would dismiss the appeal.

McPHILLIPS, J.A.:—This appeal cannot in any way trespass upon any of the questions of law determined by their Lordships of the Privy Council in *Canadian Pacific Wine Co.* v. *Tuley* 60 D.L.R. 520, [1921] 2 A.C. 417, 36 Can. Cr. Cas. 130, that is —it has been finally determined that the "Summary Convictions Act" (1915 B.C., ch. 59) and the "British Columbia Prohibition Act" (6 Geo. V., 1916 B.C., c. 49) are *intra vires* of the Legislature of the Province of British Columbia.

Further, where as in the present case, there was a valid conviction, there was the power to declare the liquor forfeited to His Majesty, that was also the situation in *Canadian Pacific Wine Co.* v. *Tuley, supra,* and the conviction and forfeiture were sustained. In that case no appeal was taken (here an appeal was taken and dismissed) to the County Court, a procedure which was open and which I dealt with in my reasons for judgment to be found in *Canadian Pacific Wine Co.* v. *Tuley* (1921), 60 D.L.R. 315, 29 B.C.R. 472 at 477, 36 Can. Cr. Cas. 104. In my opinion the appeal having been taken to the County Court with an appeal lying to this Court therefrom (see *Rex* v. *Evans* (1916), 23 B.C.R. 128), this action is incompetent as the appeal to the County Court was in its nature an appeal both upon the facts and the law. (See sections 75 to 83 inclusive of c. 59, 5 Geo. V., 1915 B.C.).

The notice of appeal to the County Court was in the words and figures following:—

Dominion of Canada)
Province of British Columbia)
City of Vancouver)

Take notice that Morris Plant, named as E Lipsitch (alias Morris Plant), who was on the 22nd day of July, 1920, at the City of Vancouver, in the County of Vancouver, convicted before C. J. South, Deputy Police Magistrate and one of His Majesty's Justices of the Peace in and for the said City, for that he, the said Morris Plant, named in the said conviction as

E. Lipsitch (alias Morris Plant) of the said City of Vancouver on the 9th day of July, A.D. 1920, at the said City of Vancouver, in the County of Vancouver, did unlawfully, at his residence, 1648 Robson Street, keep for sale a large quantity of liquor, contrary to the provisions of the British Columbia Prohibition Act, contrary to the form of the Statute in such case made and provided, and who was adjudged by the said Deputy Police Magistrate and Justice of the Peace for his said offence to forfeit and pay the sum of $300.00, to be paid and applied according to law, and if the said sum is not paid forthwith that he be imprisoned in the common gaol of the County of Vancouver at Oakalla, County of Westminster, in the said Province, for the term of three months, unless the said sum and the costs and charges of the commitment and of the conveying of him to the said common gaol be sooner paid, and in respect of whose liquor an order of confiscation or forfeiture was made, thinks himself aggrieved by such conviction and intends to appeal and hereby appeals from the said conviction to the County Court of Vancouver holden at Vancouver at the sittings thereof to be held at Vancouver, B.C., on the 13th day of September, 1920. Dated at Vancouver, B.C., this 27th day of July, 1920.

"Morris Plant"

To Walter Owen, Informant,

And to C. J. South, Deputy Police Magistrate and one of His Majesty's Justices of the Peace in and for the City of Voncouver,

And to the Honourable, the Attorney-General for the Province of British Columbia.

Vancouver, Oct. 14, 1920.

(Registry appeal book, pp. 96-97.)

It would appear that when the appeal came on before the County Court, counsel for the appellant became aware then, if not before, that the conviction returned by the magistrate was not in the form of the conviction as made at the time of the adjudication, *i.e.*, it had not therein the forfeiture provision; it would seem that through some error or inadvertence upon the part of the magistrate, the conviction returned to comply with section 83 of the "Summary Convictions Act" was not in form in compliance with the adjudication made and later the conviction in proper form was transmitted to the County Court.

It was stated at this Bar by counsel for the appellant, that counsel for the appellant in the County Court observing that the conviction upon file in the County Court did not cover the

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forfeiture of the liquor, contented himself with not calling the attention of the learned Judge thereto and did not urge that by reason thereof the appeal should be allowed.

The conviction was in fact drawn up and signed in proper form and was in the terms as understood by the appellant and recited in the notice of appeal. The conviction as transmitted to the County Court was signed, it would seem, two days after the conviction in proper form had been signed. The writing (conviction as transmitted) in erroneous form was a nullity; it was not the conviction, the true adjudication of the magistrate. The most that could be said would be that some argument in the appeal in the County Court might have founded upon it; and that for the purpose of the appeal it would have to be deemed to be the conviction made—an argument, however, not made or ventured to be made—an argument which, to me, would be idle argument.

The erroneous writing so transmitted could be well defined in the language of the Divisional Court of Ontario, in *McLeod* v. *Noble* (1897), 28 O.R. 528, at p. 548, as "a thing of naught." (Also see *De Geneve* v. *Hannam* (1830), 1 Russ. & M. 494, 39 E.R. 190, Vice-Chancellor Shadwell, "a mere nullity," and see *The Leonor* (1916) 3 British and Colonial Prize Cases 91 (Prize Court of British Columbia), Martin, J., at pp. 101, 103, 104, 108; and *In re Sproule* (1886), 12 Can. S.C.R. 140).

Nothing being said in the County Court upon the appeal to that Court as to the spurious conviction there filed, the attempt now is, by means of this action, to succeed upon the ground that the effect of the filing of the erroneous conviction precludes reference to the conviction in any other form; that is that a false conviction must be read as the true conviction. No authority is cited for this astonishing proposition, and it is not to be wondered at, as authority for fundamental error is a rarity.

It is a matter for remark that counsel upon the appeal to the County Court did not discharge his full duty, I regret to say, in not calling the attention of the learned Judge to the form of the conviction upon file, erroneous in form. I observed upon this during the argument of the appeal at this Bar, but was surprised to find that counsel supporting this appeal was of the opinion that the counsel upon the appeal to the County Court was not called upon to direct the attention of the learned Judge to the matter although the learned Judge in that Court in dismissing the appeal proceeded upon a conviction declaring forfeiture of the liquor, it is now submitted in this Court that the conviction containing the declaration of forfeiture cannot be

looked at. I expressed my disapproval of the course adopted by counsel in the County Court and also of counsel supporting that course at this Bar, and referred them to what was said by the Lord Chancellor (Lord Birkenhead) in *Glebe Sugar Refinery Co.* v. *Trustees of the Port and Harbours of Greenock*, [1921] 2 A.C. 66, 90 L.J. (P.C.) 162, (1921), Weekly Notes 85, at p. 86, and owing to its very instructive nature, I make the full quotation:—

"Lord Birkenhead, L.C., said that a point of considerable importance had arisen upon which he thought it right to make some observations. It was not, of course, in cases of complication, possible for their Lordships to be aware of all the authorities, statutory or otherwise, which might be relevant to the issues requiring decision in the particular case. Their Lordships were therefore very much in the hands of counsel and those who instructed counsel in these matters, and the House expected, and indeed insisted, that authorities which bore one way or the other upon the matters under debate should be brought to the attention of their Lordships by those who were aware of those authorities. That observation was irrespective of whether or not the particular authority assisted the party which was aware of it. It was an obligation of confidence between their Lordships and all those who assisted in the debates in this House in the capacity of counsel. It had been shown that Mr. Sandeman, Sir John Simon, and Mr. Macmillan were unaware of the existence of the section, which appeared to their Lordships to be highly relevant to, and indeed decisive upon, the matters under discussion here. Indeed, the circumstances in which leading counsel were very often briefed at the last moment rendered such an absence of knowledge extremely intelligible. But he himself found it very difficult to believe that some of those instructing learned counsel were not well aware of the existence, and the possible importance and relevance, of the section in question. It was the duty of such persons, if they were so aware, to have directed the attention of the leading counsel to the section and to its possible relevance, in order that they in turn might have brought it to the attention of their Lordships. A similar matter arose in the House some years ago, and it was pointed out by the then presiding judge that the withholding from their Lordships of any authority which might throw light upon the matters under debate was really to obtain a decision from their Lordships in the absence of the material and information which a properly informed decision required; it was, in effect, to convert this House into a debating assembly upon legal matters, and to obtain a decision founded

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upon imperfect knowledge. The extreme impropriety of such a course could not be made too plain. The learned counsel who had addressed their Lordships were acquitted of personal responsibility in this matter, but he very much hoped that the observations he had thought it necessary to make would prevent a recurrence of that with which he had dealt. It was possible that the views which their Lordships had formed upon this point would be reflected in the order which their Lordships might think proper to make."

It is clear that the language of the Lord Chancellor is comprehensive of what occurred here. The learned Judge in the County Court should have been advised of the form of the conviction as transmitted to that Court and it is impossible to admit of it being urged here now that the conviction as transmitted was in a form which, if made known to that Court, would have resulted in the appeal being allowed and the further submission to this Court that in that erroneous form only can the conviction be looked at in this Court, and that this appeal should succeed and that it be decided that no forfeiture of the liquor is sustainable. It would be a travesty upon the law if this would of necessity have to be the determination of this Court.

It was strongly pressed that there is estoppel here. I cannot see that there is any form of estoppel. It is true we have Co. Litt. 352 (a):—

"Estoppel is when one is concluded and forbidden in law to speak against his own act or deed, yea, though it be to say the truth." (Termes de la Ley, tit. Estoppel, cited in *Ashpitel* v. *Bryan* (1863), 3 B. & S. 474, 489, 122 E.R. 179; *Simm* v. *Anglo-American Telegraph Co.* (1879), 5 Q.B.D. 188, C.A. per Bramwell, L.J., at p. 202).

But it has been held:

"Estoppel is only a rule of evidence; you cannot found an action upon estoppel."

Low v. *Bouverie*, [1891] 3 Ch. 82, C.A. per Bowen, L.J., at p. 105; and see Lindley, L.J., at p. 101; *Re Ottos Kopje Diamond Mines Ltd.*, [1893] 1 Ch. 618 C.A. per Bowen, L.J., at p. 628; and see *Dickson* v. *Reuter's Telegram Co.* (1877) 3 C.P.D. 1; *Harriman* v. *Harriman*, [1909] P. 123, C.A., per Farwell, L.J., at p. 144.

The true conviction has been given in evidence in the action and there is nothing that creates estoppel—of record by deed or matter *in pais;* the false record transmitted to the County Court can be of no embarrassment in the Supreme Court or in this Court.

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Then it was pressed at this Bar that the situation was one of *res judicata*, by reason of what happened in the County Court. I must say that I cannot follow this argument. With deference, the *res judicata*, if it exists at all, is in favour of the respondents, as upon the record in the County Court the appeal from the conviction and forfeiture stood dismissed and from that point of view it might well have been urged upon the part of the respondents to this appeal that the action was frivolous and vexatious and should have been stayed. *Stephenson* v. *Garnett*, [1898] 1 Q.B. 677 (C.A.).

It is clear to me that the action is not maintainable, the conviction which includes the forfeiture is unassailable; there was an appeal to the County Court, an appeal upon the facts and upon the law; and that appeal stood dismissed, and although there was a further appeal therefrom to this Court, no appeal was taken.

The mere statement of the history of the proceedings had and taken establishes that this action offends against all the recognised precedents determinative of litigious proceedings; there is here an attempt to reagitate questions that have been finally determined; the appellants, in my opinion, are concluded by the existent and upheld conviction and forfeiture.

I therefore am satisfied that the learned trial Judge arrived at the right conclusion in dismissing the action, and for the foregoing reasons I would dismiss the appeal.

Appeal dismissed.

FICKE v. SPENCE AND OLSON.

Saskatchewan King's Bench, Bigelow, J. March 18, 1922.

LAND TITLES (§VIII—80) — PERSONAL REPRESENTATIVE REGISTERED AS OWNER OF LAND IN PERSONAL CAPACITY—PARTY LOANING MONEY ON STRENGTH OF ABSTRACT OF TITLE—DAMAGE—NEGLIGENCE OF REGISTRAR—LIABILITY.

While the Land Titles Act (Sask.) generally provides that no entry shall be made upon a certificate of title of any notice of trust, an exception is made in the case of land held by a personal representative, sec. 145 of the Act (R.S.S. 1920, ch. 67) providing that "when land is transmitted the duplicate certificate of title issued to the deceased owner shall be delivered up to be cancelled . . . and the Registrar shall grant to the executor or administrator *as such* a new certificate." Where through the negligence of the Registrar the certificate shews such personal representative to be the registered owner of the lands, not a personal representative but in his personal capacity and a mortgagee who is entitled to rely on the abstract of title sustains damage on account of such negligence, the Registrar is liable for such damage or so much thereof as cannot be satisfied by a judgment against such personal representative.

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FICKE v. SPENCE AND OLSON.

Bigelow, J.

ACTION for damages arising out of the wrongful issuing of a certificate of title by the Registrar.

L. MacTaggart, for plaintiff.

A. L. McLean, for defendant, the registrar.

No one for defendant Olson.

BIGELOW, J.:—This case arises out of the *Western Trust Company* v. *Olson*, (1918), 11 S.L.R. 418. Certain land was registered in the name of John Olson, personal representative of Andrew Benjamin Handel, deceased. John Olson, not as personal representative of Andrew Benjamin Handel, deceased, but in his personal capacity, mortgaged the said land on February 13, 1913, to the plaintiff for $2,200. In the action above-mentioned I hold that the mortgage was wrongly registered, with the result that the Western Trust Co. obtained priority over plaintiff's mortgage to the amount of their claim. The land was sold, the claim of the Western Trust Co. paid, the balance was paid into the Court and paid out to the plaintiff Ficke, and the plaintiff sustained a loss alleged to be $1,171.17, and interest at 8% from December 1, 1919, and brings this action against the Registrar and Olson.

At the time Olson obtained the land from plaintiff, he represented to plaintiff that he was the owner of the land. Nothing was said about him being owner as a personal representative. The mortgage was prepared by the solicitor and placed in the registry office for registration on February 14, 1913. At that time the solicitors for Ficke applied for and obtained from the Registrar a registration abstract and certificate of title to the said lands, which abstract and certificate showed that the land was registered in the name of John Olson, and subject to the following incumbrances, namely, a mortgage to The Saskatchewan Land & Investment Co. for $1,300 registered December 6, 1909. The plaintiff relied on the said abstract and certificate, and on the fact that the registrar had accepted his mortgage for registration, and believed that his mortgage formed a first charge on the land in question, and advanced $2,200 to the said Olson, paying off the mortgage to the Saskatchewan Land & Investment Co., in order that the plaintiff's mortgage might be a first charge. At the time of the registration of the plaintiff's mortgage and obtaining the said abstract and certificate, John Olson was not the registered owner of the said land in his personal capacity, but was registered as owner as personal representative of Andrew Benjamin Handel. Is the Registrar liable under these circumstances?

The defendant raises the same defence here which Ficke did in the previous action, brought by the Western Trust Co., namely that the Land Titles Act generally provides that no entry shall be made upon a certificate of any notice of trust. As I pointed out in my judgment in that case, it seems to me that an exception has been made in the case of land held by a personal representative. Section 145 of the present Land Titles Act, R.S.S. 1920, ch. 67, provides—"When land is transmitted the duplicate certificate of the title issued to the deceased owner shall be delivered up to be cancelled, or be proved to have been lost or destroyed, and the registrar shall grant to the executor or administrator *as such* a new certificate."

Then the defendant contends that the plaintiff was negligent in not making a personal search of the title, or in not obtaining a certified copy of the title. I cannot agree with this contention. Provision is made by the Act for obtaining an abstract and certificate from the Registrar for which a fee is paid. I think people have a right to rely on the correctness of such documents, and to conduct their business thereon. The incorrectness of an abstract which caused damage was the basis of a decision of Newlands, J., in finding a Registrar liable, in the case of *Canada Life Assurance Co.* v. *Registrar, Assiniboia Land Registration District* (1912), 3 D.L.R. 810, 5 S.L.R. 208. At pp. 810-11, he said:—

"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 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."

The principles referred to in *Attorney-General* v. *Odell*, [1906] 2 Ch. 47, 54 W.R. 566, 75 L.J. (Ch.) 425, and *Gibbs* v. *Messer*, [1891] A.C. 248, 60 L.J. (P.C.) 20, cited by the defendant, do not seem to me to apply here. These were cases of forged instruments. I quite agree with the defendant's contention that the Registrar should not be liable for loss occasioned

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by registration of a forged instrument. I do not think the same principles apply here.

Then it is contended that Mr. Emerson, a member of the firm of solicitors who were acting for the plaintiff in putting through this mortgage, had some knowledge that Olson owned this land in a representative capacity, and that his knowledge would be the knowledge of the plaintiff. I cannot make a finding as to whether Mr. Emerson did or did not have such knowledge, as I have only before me the admission of facts and the pleadings and the evidence taken at the first trial; the exhibits have not been handed to me. In the view I take of the matter, I do not deem it necessary to delay this judgment until I send for the exhibits. I conclude from the evidence before me that if Mr. Emerson had any such knowledge it was obtained in another matter in the office some time previously, and not in connection with this matter at all, and that there was nothing to bring it to his mind in connection with this matter. I do not think that any knowledge Emerson may have had in this way can be fastened on the plaintiff. See *Worsley* v. *Earl of Scarborough* (1746), 3 Atk. 392, 26 E.R. 1025. Lord Hardwicke, L.C., says, at p. 392:—

"It is settled that notice to an agent or counsel *who was employed in the thing by another person or in another business and at another time* is *no notice* to his client who employs him afterwards, and it would be very mischievous if it was so, for the man of most practice and greatest eminence would be the most dangerous to employ."

I am of the opinion that the plaintiff has sustained loss or damage through an omission or mistake of the Registrar, jointly with the fraud of Olson in representing himself to be the registered owner. There will be a reference to the local Registrar to ascertain these damages, which will include the loss on the mortgage as well as the legal costs of defending the action brought by the Western Trust Co. against him. I think plaintiff was justified in defending that action.

Under sec. 163 of the Land Titles Act, judgment will first be entered against Olson for the damages so found by the local Registrar and the costs to be taxed, including the costs of the trial before Brown, C.J. When plaintiff can prove that such judgment is not and cannot be satisfied in whole or in part out of the goods or lands of Olson, and that the amount of such judgment in whole or any part thereof remains unsatisfied, plaintiff may apply to me or some other Judge of the King's Bench for judgment against the Registrar.

Judgment accordingly.

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Saskatchewan King's Bench, Bigelow, J. April 15, 1922.

HUSBAND AND WIFE (§IIIA—144)—ALIENATION OF WIFE'S AFFECTIONS—DAMAGES—NO PROOF OF ADULTERY—RIGHT OF ACTION.

A husband may recover damages for the alienation of his wife's affections although there is no proof of adultery, and notwithstanding that the wife continues to live with her husband.

[*Bannister* v. *Thompson* (1913), 15 D.L.R. 733, followed.]

ACTION for damages for alienation of the affections of the plaintiff's wife.

W. M. Rose and *E. A. Gee*, for plaintiff.

N. R. Craig, for defendant.

BIGELOW, J.:—This is a peculiar case, and one for which I am afraid I can find no exact precedent. The action is brought on two grounds: (1) alleging that the defendant enticed and procured the plaintiff's wife to depart and remain absent from the house and society of the plaintiff; (2) alleging that the defendant alienated from the plaintiff the affections of his wife and deprived him of her love, services and society, and of the society of his children, thus destroying the peace and happiness of his household.

There is no evidence on which I can find that the defendant enticed the plaintiff's wife away from the plaintiff's home. There is evidence on which I can find that the wife transferred her affections from the plaintiff to the defendant, and that the defendant was largely responsible for this; and although the plaintiff's wife did not leave him and go to the defendant, it soon after led to a separation agreement and the wrecking of the plaintiff's home. The question of law is, whether defendant is liable for damages under these circumstances.

I would refer first to the facts. The plaintiff was married to his wife, Janet Simpson, in June, 1911. They lived in the United States until April, 1916, when they came to a farm about 12 miles from Eastend, in this Province. Defendant is a bachelor, and lived about half a mile away, and was the nearest neighbour of the plaintiff. Plaintiff and his wife had two children, and lived happily together until 1920, when plaintiff began to be suspicious of defendant's attentions to his wife. The plaintiff's wife gave evidence on behalf of the defendant and stated that she and the plaintiff always had trouble because the plaintiff wanted sexual intercourse too frequently, and she wants me to believe that that was the reason she finally ceased to love him and decided to leave him. I do not believe this. They had lived together from June, 1911, until the fall of 1920, and it seems to me, if this had been the real reason for the loss of the

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wife's love and affection, it would have developed sooner and not at a time when plaintiff discovered that his wife was very intimate with the defendant. I believe the evidence of the plaintiff that they lived happily together until 1920. In August, 1920, the plaintiff began to be suspicious of the defendant's attentions to his wife. Plaintiff was frequently away from home overnight in connection with his work; and, although there is much contradictory evidence as to small matters arousing suspicion, there is no doubt about the fact that defendant frequently visited plaintiff's wife at her home when plaintiff was away, both in the day-time and in the evenings. I believe the plaintiff's story, for the most part, as to the small details that aroused his suspicion. His wife denied almost everything that the plaintiff referred to. I do not believe the evidence of the wife. Some of the reasons which lead me to this conclusion are as follows:

(1) She swore she never called the defendant "Tom"; and yet, when defendant was giving full details of an incident when she met the defendant after dark by appointment with her horse and buggy, the defendant stated in his evidence that she said to him, "Get in, Tom." Also Mrs. Gordon tells about a time when plaintiff's wife was at her house for two or three hours, and plaintiff's wife continually talked about "Tom," meaning the defendant. (2) The wife contradicts the defendant as well as the plaintiff about a conversation between plaintiff and defendant. Plaintiff had heard that defendant had said to one Ellis and to one Phillips that he would like to have sexual intercourse with the plaintiff's wife. Plaintiff and his wife went to see the defendant about this, when, according to the evidence of both plaintiff and defendant, defendant admitted he had said this. The wife denies this. (3) She denies in part Mrs. Sam Gordon's story. Mrs. Sam Gordon is a disinterested witness, and there is no reason for not believing her story. Mrs. Gordon relates several occasions when she knew that plaintiff was away from home and she saw defendant go to the plaintiff's house, twice in the evening and once in the morning, where he stayed four hours. Besides that she would go driving with defendant, and when plaintiff was away would go out into the fields to meet defendant.

Where plaintiff's wife makes such a wholesale denial of everything, it is impossible to believe her as against the plaintiff where plaintiff is corroborated by independent evidence such as Mrs. Gordon's.

In September, 1920, plaintiff thought his wife was treating him coolly. He accused her of loving someone else, and told

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her of a dream he had that someone had come between them and stolen her affections, and that it was going to break up the home. The wife said this was quite true, but when plaintiff asked who it was, the wife said "You will never know." It was then that the wife said she was going to leave the plaintiff, but as she had no money to go she said she would wait until after threshing. Soon after this the wife met the defendant by appointment after sundown near the south-west corner of defendant's place. The wife had her buggy and horse and defendant got in. Plaintiff had been away from home, and coming home and not finding his wife there, went in search of her, and found his wife with defendant in the buggy. They all went to the plaintiff's house. Plaintiff was very indignant at finding them together and more so because defendant gave a false explanation of the meeting. Then it was that the wife stated that the defendant was the man who had come between her husband and her and had stolen her affections and had broken up the home. The plaintiff and his wife and family left Eastend early in November, 1920, and went to California to visit the wife's sister. Plaintiff thought that by getting her out of the country, away from defendant, her love and affection for him might return, but the damage had all been done. Plaintiff and his wife did not live happily in California. Defendant was frequently referred to in their conversation, and the wife refused to allow plaintiff his marital rights; with the result that a separation agreement was entered into on December 9th of 1920. The plaintiff and his wife had lived apart since that date, although the wife did not go to the defendant.

I am convinced that, although there was no enticing away, the actions of the defendant resulted in the total alienation of the affection of the wife and the wrecking of the plaintiff's home. Is the plaintiff entitled to damages under these circumstances?

Mr. Craig contends that *Marson* v. *Coulter* (1910), 3 S.L.R. 485, is an authority directly in point for the defendant. That was a decision of Wetmore, C.J. At p. 492 he said:—

"So far as I have been able to discover under any authorities brought under my notice, in order to maintain this action there must be an enticing *away*. It is not sufficient that the party charged should use wiles by which he has been able to seduce the wife, and so alienate her affections, but it must be something of a character akin to enticing away a servant from the employ of a master. In the case of a servant the enticing must be of a character *per quod servitum amisit*, and in the case of a wife it must be of such a character *per quod consortium amisit*. It must be an enticing away by which the plaintiff is deprived of

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the society of and cohabitation with his wife. Now, that did not take place here. He took her for drives and he took her to entertainments, and they were out together late in the evenings, and he was found in a compromising position with her, and all that. Still, the plaintiff was not deprived of her society or of cohabitation with her. They resided together, except when, for instance, he might be temporarily away or she might be temporarily away. It is true she refused to allow him his marital rights, but nothing can result from that unless the enticing away was brought home, and anyway I think that was due to the adulterous relations between her and the defendant."

But I do not consider that case an authority directly in point, as the principal point of that case was that the Supreme Court of Saskatchewan had no jurisdiction to entertain an action for criminal conversation. The Chief Justice decided for the plaintiff on the ground that defendant was liable because he harboured the plaintiff's wife. He found there was no enticing away. Having found for the plaintiff on another ground, the quotation above seems to me to a large exent to be *obiter dictum*.

Defendant also relies on the judgment of Osler, J.A. in *Lellis* v. *Lambert* (1897), 24 A.R. (Ont.) 653, where, at p. 664, he says:—

"The loss of a wife's affections not brought about by some act on the defendant's part which necessarily caused or involved the loss of her *consortium*, never gave a cause of action to the husband. His wife might permit an admirer to pay her attentions, frequent her society, visit her home, spend his money upon her, and by such means alienate her affections from him, resulting even in her refusal to live with him, and, so far as she could bring it about, in the breaking up of his home, and yet, there being no adultery and no 'procuring and enticing,' or harboring and secreting' of the wife, no action lay at the suit of the husband against the man."

But, as was pointed out by Middleton J. in *Bannister* v. *Thompson*, (1913), 15 D.L.R. 733, 29 O.L.R. 562, this statement is purely *obiter*, as the question under discussion in that case was the right of a wife to maintain an action for the alienation of the husband's affections, adultery being charged.

In *Bannister* v. *Thompson* (*supra*), Middleton, J. decided that notwithstanding the fact that a wife still remains in her husband's house, though occupying separate apartments, and that adultery has not been proved, an action will lie in damages for the "enticing away and alienation of her affections."

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That case went to the Appellate Division of the Supreme Court of Ontario, the Court consisting of Meredith, C.J.O., Maclaren, Magee and Hodgins, JJ.A., where the Court sustained the decision of the trial Judge and held that an action for enticing away and alienating the affections of plaintiff's wife is maintainable without proof of adultery, and notwithstanding that the wife continues to live with her husband.

In vol. 21, "Cyc.," p. 1617, it is laid down:—

"Against one who entices away or alienates the affections of the wife, the husband may maintain an action for damages. . . . It is not necessary to a recovery that the wife be actually debauched or seduced or that there be a physical separation of the spouses."

The only English case cited as authority for that particular proposition is *Macfadzon* v. *Olivant* (1805), 6 East, 378, 102 E.R. 1335. That case is not authority for such a proposition, as there the defendant seduced the plaintiff's wife. I have not examined the American cases cited by the author of "Cyc," as I am satisfied to follow the decision of the Appellate Division of the Supreme Court of Ontario, but if one were interested in a further study of the subject, the American cases might be of some assistance.

Bannister v. *Thompson* was approved of in *Van Dorn* v. *Felger* (1918), 42 D.L.R. 760, 14 Alta. L.R. 110, a decision of the Appellate Division of the Supreme Court of Alberta. Stuart, J., who delivered the judgment of the Court, said, at p. 766:—

"Short of adultery there may, however, be—(1) illegal alienation of affection, (2) illegal enticing away, (3) illegal harbouring."

If the remarks of Wetmore, C.J. quoted above in *Marson* v. *Coulter*, were the *ratio decidendi* of the case, I should hesitate before deciding not to follow so eminent a jurist. I think the facts of *Bannister* v. *Thompson*, (*supra*), are more like the case at bar, and I follow that decision of the Appellate Division of the Supreme Court of Ontario, approved as it is by the Appellate Division of the Supreme Court of Alberta, and hold that the husband has an action for alienation of the affections of his wife without proof of adultery and notwithstanding that the wife still continues to live with her husband. "There must be *damnum cum injuria per quod consortium amisit* is as much the gist of the action as the other; for though it should be laid that the plaintiff lost the comfort and assistance of his wife, yet if the fact that is laid by which he lost it be a lawful act, no action can be maintained. By

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injuria is meant a tortious act, it need not be wilful and malicious, for though it be accidental, if it be tortious, an action will lie." Willes, L.C.J. in *Winsmore* v. *Greenbank* (1745), Wills 578, at p. 581, 125 E.R. 1330.

I think the plaintiff is entitled to recover, and I fix the damages at $1,000, for which amount and costs the plaintiff will have judgment.

Judgment for plaintiff.

REX v. REGINA WINE AND SPIRIT, LTD.
REX v. PRAIRIE DRUG Co.

Saskatchewan Court of Appeal, Haultain, C.J.S., McKay and Turgeon, JJ.A. January 16, 1922.

CONSTITUTIONAL LAW (§ IA—20)—INTOXICATING LIQUORS—REGULATION OF EXPORT COMPANIES—PROVINCIAL LAW REQUIRING RETURN TO BE MADE TO PROVINCIAL AUTHORITIES—PENALTY FOR FAILURE TO MAKE RETURN—SASK. TEMPERANCE ACT, R.S.S. 1920, CH. 194, AND 1920 SASK., CH. 70.

A liquor export company whether incorporated under a provincial or Dominion law may be compelled by a provincial law to make a return, under penalty, of the liquors held in store for its export business, and of liquors ordered by the company for future delivery to it within the province. Sec. 11 (2) of the Saskatchewan Temperance Act, R.S.S. 1920, ch. 194, added by 1920 Sask., ch. 70, sec. 8, is within the legislative power of the provincial legislature and sec. 59 (1) of that Act has the effect of providing a penalty for failure to make returns, apart from the statutory presumption declared by sec. 11 (4) as enacted 1920 Sask., ch. 70, whereby such failure shall constitute *prima facie* proof of unlawful keeping or offering for sale.

CASES referred to the Court of Appeal from the Court of King's Bench, Embury, J. (1921), 60 D.L.R. 461, 14 S.L.R. 320, 36 Can. Cr. Cas. 230, on the dismissal on each case of the Crown's appeal in that Court from a magistrate's order dismissing the charge against the accused. The questions were answered in favour of the Crown.

T. D. Brown, K.C., Directors of Prosecutions, for the Crown, appellants.

J. F. Frame, K.C., for the defendants in both cases, respondents.

CASE OF THE REGINA WINE AND SPIRIT, Limited.

HAULTAIN, C.J.S.: — The respondent is a company incorporated under the Saskatchewan Companies Act, and at all times material to the present case was carrying on business in Saskatchewan as a "liquor exporter" within the meaning of sec. 11 of the Saskatchewan Temperance Act and amendments thereto.

Section 11, as amended [1920 Sask., ch 70, sec. 8] is in the following terms:—

"11. Nothing herein contained shall prevent any brewer, distiller, compounder or other person duly licensed by the Government of Canada for the manufacture or compounding of liquors, from keeping or having in any building wherein such manufacture or compounding is carried on, or used by such brewer, distiller, compounder or other person, any liquors for sale to any person in another province or in a foreign country for use and consumption outside of Saskatchewan or from selling therefrom to such person."

"(2) Every such brewer, distiller, compounder or other person and every liquor exporter shall, forthwith upon the coming into force of this Act, make a return shewing in separate detail:

"(a) an inventory of the kinds and quantities of all liquors in his possession at the date of the coming into force of this Act;

"(b) the exact place or places where such liquor is stored; and

"(c) a statement of the kinds and quantities of all liquors ordered by him for delivery but not received by him at the date of the coming into force of this Act, together with the date of the order or orders and the name and address of each person from whom any of the liquor has been ordered.

"The return shall be certified over the signature of such person as correct and shall be forthwith sent to the commission by registered mail.

"(3) Every such brewer, distiller, compounder or other person and every liquor exporter shall also, on every Monday, make to the commission a return shewing in separate detail all sales of liquor made during the preceding week together with the name and address of every purchaser, the method of shipment, the place from which the same is shipped and such other information in respect thereof as the commission may require. The returns mentioned in this and the preceding sub-section shall be in such form as the commission may from time to time require, and forms for making such return shall be obtained from the commission.

"(4) Evidence of the falsity of any return mentioned in the preceding sub-sections, or of failure to make any such returns, shall in any proceedings against any such brewer, distiller, compounder or other person or against any liquor exporter be *prima facie* proof that the person accused has unlawfully kept and unlawfully offered for sale or sold, bartered or exchanged liquor."

Section 59 of the Act in question is in the following terms:

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"59. Any person violating any of the provisions of this Act for the violation of which no penalty is herein specifically provided shall be guilty of an offence and liable to a penalty of $200 and in default of immediate payment to imprisonment for three months."

The Saskatchewan Temperance Act came into force on the 15th December, 1920.

The respondent did not make the return above provided for forthwith after the coming into force of the Act. Proceedings were therefore taken before the Police Magistrate for the City of Regina, and the respondent was charged before him for having failed to send in the return required by the Statute. The charge was dismissed by the magistrate, and an appeal was then taken from such dismissal to the Court of King's Bench. The appeal was heard and dismissed by Mr. Justice Embury, who, at the request of the appellant, reserved the following questions for the opinion of this Court:

"1. Was I right in holding that failure to comply with sub-section 2 of section 11 of the Saskatchewan Temperance Act as amended is not an offence under the provisions of the said Act.

"2. Was I right in holding that if failure to comply with the said sub-section is an offence under the said Act then that sub-section is *ultra vires* of the legislature?

"3. Was I right in dismissing the appeal?"

As to the first question:

If the enactments in question are within the powers of the Legislature, I am of opinion that failure to comply with the provisions of s.s. 2 of sec. 11 is an offence within the terms of sec. 59. There is a positive duty imposed upon the persons mentioned in the sub-section by the Legislature. It is admitted that the provisions of the sub-section have been violated by the failure of the respondent to make the prescribed return. No penalty is specifically provided for such a violation of the Act, and consequently sec. 59 applies.

The case of *Reg.* v. *Elborne* (1892), 21 O.R. 504, 19 A.R. (Ont.) 439, is a strong authority for this opinion. The Ontario Statute, R.S.O. 1887, c. 194, s. 52, provided that it should be the duty of every chemist or druggist to record in a book every sale or other disposal of liquor by him, etc., etc., "*and in default of such sale or disposal being so placed on record*" that every such sale should *prima facie* be held to be in contravention of the provision of section 49 of the Act. A specific penalty was imposed by the Act for contravention of sec. 49. Sec. 85 of the

Act was very similar in terms to sec. 59 of the Act now under consideration. Elborne was convicted by a police magistrate "for that he being a druggist unlawfully did sell liquor without recording the same as required by the Liquor License Act." The Divisional Court (C.P.) quashed the conviction on the ground that non-entry in the book as required by the Act did not constitute an absolute contravention of the Act, but merely threw on the defendant the onus of rebutting the statutory presumption. On appeal, the Court of Appeal reversed this decision, holding that the conviction might properly be upheld under sec. 85 for the offence of not recording sales in a book, that being an offence for which no penalty was specifically provided for in the Act.

The next question to be considered is, whether the provisions of sub-sec. (2) of sec. 11 are within the power of the Provincial Legislature. It was argued on behalf of the respondent that to impose such duties on liquor exporters, who are presumably only engaged in international or inter-provincial trade, under penalty for non-performance, is an invasion of the exclusive jurisdiction of Parliament in respect of the regulation of trade and commerce.

This contention, in my opinion, is completely met by the decisions in *Att'y-Gen'l for Ontario* v. *Att'y-Gen'l for the Dominion*, [1896] A.C. 348, 65 L.J. (P.C.) 26; *Att'y-Gen'l for Manitoba* v. *Manitoba License Holders' Association*, [1902] A.C. 73, 71 L.J. (P.C.) 28; and *Canadian Pacific Wine Co. Ltd.* v. *Tuley*, 60 D.L.R. 520, 36 Can. Cr. Cas. 130, [1921] 2 A.C. 417.

In the last mentioned case it was held within the power of the Legislature of British Columbia to enact The British Columbia Prohibition Act (Statutes of 1916, c. 49, and amendments). After a summing up of the main provisions of the Statute, among them sec. 19, which is very similar in terms to the one now under consideration, the Privy Council decided as above stated, with no further comment except:

"That in their opinion the case is governed by the principles enumerated when their decision was given in favour of the Province of Manitoba on the interpretation of secs. 91 and 92 of the B.N.A. Act, 1867, in *Att'y-Gen'l for Manitoba* v. *Manitoba License Holders' Association, supra.*"

The case of *Att'y-Gen'l for Australia* v. *The Colonial Sugar Refining Co. Ltd.*, and others, [1914] A.C. 237, 83 L.J. (P.C.) 154, which was cited to us by counsel for the respondent, does not conflict with the foregoing. In that case the Common-

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wealth Parliament had passed the Royal Commissions Act which gave to Royal Commissions issued under letters patent power to make an enquiry, and for that purpose to summon persons to give evidence and to produce documents, and also imposed penalties for a failure to obey a summons. It was held that

"The power to impose new duties upon the subjects of or on the people residing in any individual State was, before the federation, vested in the Legislature of that State, and the Acts in the form in which they were passed by the Commonwealth Parliament could not be brought within the powers which are, by the Constitution Act, exclusively vested in that Parliament."

The legislative power of the Commonwealth Parliament to make laws for the peace, order and good government of the Commonwealth is restricted to the matters mentioned in the Constitution Act. Any powers which are not thus specifically granted to the Commonwealth belong to the State.

In the present case, in view of the decision of the Privy Council in the above cited cases, there can be no doubt that the sub-section under consideration is within the powers of the Provincial Legislature. It does not interfere directly or indirectly with any of the business operations of liquor exporters, either within or outside of the Province. The obligation to make the prescribed returns cannot possibly be said to prevent, prohibit, restrict, or even incidentally to affect in the slightest degree the importation, exportation, sale, transportation or use of liquor for the purposes of international or inter-provincial trade.

I would, therefore, answer all the questions submitted to us in the negative.

McKAY, J.A. concurred.

CASE OF PRAIRIE DRUG COMPANY, Limited.

HAULTAIN, C.J.S.:—I would answer the questions submitted in this case in the negative for the reasons given in the case of *Rex* v. *The Regina Wine and Spirit, Limited, supra.*

The fact that this company is incorporated by the Dominion Parliament does not, in my opinion, distinguish this case from *The King* v. *Regina Wine and Spirit, Limited.* The Provincial law in question is one of general application, such as laws imposing taxes for provincial purposes, or requiring licenses for certain purposes, or prescribing certain forms of contract, which are clearly within the power of a Provincial Legislature to enact. *Great West Saddlery Co.* v. *The King*, 58 D.L.R. 1, [1921] 2 A.C. 91.

Applying the test established by the Privy Council in that case, the sub-section in question does not impose on the respondent company conditions which, if not complied with, would prevent or restrict the exercise of the powers of the company within the Province.

McKAY, J.A. concurred.

BOTH CASES.

TURGEON, J.A.:—Two points are involved in the consideration of the above appeals. In the first place we have to determine whether sub-section 2 of sec. 11 of the Saskatchewan Temperance Act is *intra vires* of the Provincial Legislature and applicable to the respondents, who are liquor exporters. This sub-section (quoting s.s. 1 with it to make its meaning clear) reads as follows:—

"11. Nothing herein contained shall prevent any brewer, distiller, compounder, or other person duly licensed by the Government of Canada for the manufacture or compounding of liquors, from keeping or having in any building wherein such manufacture or compounding is carried on, or used by such brewer, distiller, compounder or other person, any liquors for sale to any person in another province or in a foreign country for use and consumption outside of Saskatchewan or from selling therefrom to such persons.

2. Every such brewer, distiller, compounder or other person and every liquor exporter shall, forthwith upon the coming into force of this Act, make a return shewing in separate detail:

(a) an inventory of the kinds and quantities of all liquors in his possession at the date of the coming into force of this Act;

(b) the exact place or places where such liquor is stored; and

(c) a statement of the kinds and quantities of all liquors ordered by him for delivery but not received by him at the date of the coming into force of this Act, together with the date of the order or orders and the name and address of each person from whom any of the liquor has been ordered.

The return shall be certified over the signature of such person as correct and shall forthwith be sent to the commission by registered mail."

The second question to be determined is whether a liquor exporter who fails, as the respondents failed, to comply with the aforesaid sub-section is liable to the penalties provided by sec. 59 of the Act, which says:—

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"Any person violating any of the provisions of this Act for the violation of which no penalty is herein specifically provided shall be guilty of an offence and liable to a penalty of $200.00, and in default of immediate payment to imprisonment for three months."

It is contended that the aforesaid provisions of the Act are *ultra vires*, because they encroach upon the exclusive jurisdiction conferred upon the Parliament of Canada by clause 2 of sec. 91 of the British North America Act, under the title of "The Regulation of Trade and Commerce." The authority of the decision in *Heffernan* v. *Hudson's Bay Company* (1917), 39 D.L.R. 124, 29 Can. Cr. Cas. 38, 10 S.L.R. 322, is relied upon, among others, in support of this contention.

In my opinion this objection to the enactment is not well taken. It is needless, I think, in view of the numerous cases which have been decided on this and analogous matters, to cite authority here at great length for the few propositions which appear to me to dispose of this branch of the case. The purpose of the Saskatchewan Temperance Act, taken as a whole, is undoubtedly to prevent trafficking in liquor within the Province except for certain purposes and subject to certain restrictions, and this object is well within the competence of the Legislature.

Examining in particular the sub-section which is under review in this case, our duty is to ascertain what it is, not in title or by declaration but in "pith and substance." Is it a regulation properly and reasonably incidental to the main purpose of the Act, or is it really an attempt to go further than the Act, in the main, purports to go and than the Legislature has power to go, by preventing or hindering the exportation of liquor from Saskatchewan to other Provinces or to foreign countries? In the first case it is *intra vires*, in the second case it is not, even although, in the second case, it may have the effect of facilitating the enforcement of the local law. The Legislature cannot do indirectly what the decision in *Heffernan* v. *Hudson's Bay Co.* declared that it cannot do directly. To put the case broadly, it cannot, under the pretence of legislating to promote temperance in Saskatchewan, pass laws which, in reality, are meant to promote temperance in another country or another Province, by preventing or hampering trade in liquor between Saskatchewan and such other country or Province. Applying this test to the sub-section in question, I can find nothing in it which is objectionable.

In my opinion it is a provision the intention of which was to furnish to the Liquor Commission, the body charged with the

enforcement of the Saskatchewan Temperance Act, information which it was important, as well as reasonable, that it should possess regarding stocks of liquor held by traders in Saskatchewan, or ordered by them upon the date that the Act came into effect and the duties of the Commission began. And it is information the obtaining of which cannot be said to prevent or interfere in any degree with export trade.

In the course of their judgment in the recent case of *Can. Pac. Wine Co.* v. *Tuley*, [1921] 2 A.C. 417, 60 D.L.R. 520, 36 Can. Cr. Cas. 130, the Judicial Committee of the Privy Council declared certain provisions of the British Columbia Prohibition Act, similar in effect to the provisions of the aforesaid sub-section of the Saskatchewan Act, to be within the legislative power of the Province.

In holding, as I do, that this sub-section is *intra vires* of the Legislature, I express no opinion regarding section 12 of the Act or the remaining sub-sections of sec. 11. Whatever may be said of these other portions of the enactment, the sub-sec. with which we are now dealing is, in my opinion, severable from them, and is not affected by the consideration that some of them may possibly be invalid. I mention this because it was urged upon us by counsel for the respondents that these sections 11 and 12 form one system set up for the supervision and control of the export liquor business, and that their various provisions must stand or fall together. Some enactments are of such a character that their different parts cannot be disconnected and dealt with separately when their constitutionality is being examined, but in my opinion this enactment is not one of that sort; it is rather one of the class to which the general rule is applicable, that an Act may be *ultra vires* in part only.

I disagree as well with the contention that, in any event, the sub-section is inapplicable to the respondents The Prairie Drug Company, by reason of the fact that this company is incorporated under the Dominion Companies' Act. I think it is within the power of the Legislature to call upon all exporters to furnish the required information, and that such power is not defeated in a given case by the mere fact that the exporter in question happens to be a company created by Dominion authority.

We next have to consider whether the penal provisions of sec. 59 apply to liquor exporters who fail to make the return provided for by the sub-section. It was argued before us that s.s. 4 of sec. 11 provides the only legal consequence which was intended

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to fall upon those who failed to make the required return. Sub-section 4 is as follows:—

"(4) Evidence of the falsity of any return mentioned in the preceding sub-sections, or failure to make any such return, shall in any proceeding against any such brewer, distiller, compounder or other person or against any liquor exporter be *prima facie* proof that the person accused has unlawfully kept and unlawfully offered for sale or sold, bartered or exchanged liquor."

In my opinion this argument is not well founded. While it is true that an onerous rule of evidence confronts a person in default under this sub-section in case a specific charge of unlawful sale or unlawful keeping is laid against him, this incident appears to me to be something quite distinct from the punishment for the wrongful omission of which the defaulter has become guilty, and which is a substantial offence in itself regardless of whether a specific charge for another and different offence is ever laid against him or not. The Act states positively that every liquor exporter shall make the return. Failure to comply with this requirement is a disobedience of the Statute punishable in itself, and in my opinion the intention of the Legislature was that it should be punishable under sec. 59. I do not think the Legislature intended that this disobedience should be punishable only in a casual and round-about way by having a charge for another offence laid against the party in default, and that it should not be punishable at all in the absence of circumstances arising to justify the laying of such other charge. (See *Reg.* v. *Elborne*, 19 A.R. (Ont.) 439).

The question submitted to us by the learned Judge of King's Bench who heard the appeal taken by the appellant from the decision of the magistrate before whom the informations were laid, are in the following form:

"1. Was I right in holding that failure to comply with sub-section 2 of section 11 of the Saskatchewan Temperance Act as amended is not an offence under the provisions of the said Act?

2. Was I right in holding that if failure to comply with the said sub-section is an offence under the said Act then that sub-section is *ultra vires* of the Legislature?

3. Was I right in dismissing the appeal?"

In my opinion each of these questions should be answered in the negative.

Answers to reverse decision below.

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Alberta Supreme Court, Walsh, J. April 21, 1922.

TROVER (§IB—10)—CONVERSION—WHAT CONSTITUTES—LEASE OF LAND ON CROP PAYMENTS—WRONGFUL SALE OF GRAIN BY LESSOR—PORTION OF GRAIN MORTGAGED—RIGHTS OF MORTGAGEE.

The defendant leased to one Rogers and his brother a certain quarter section of land, the lessees agreeing to pay therefor to the lessor . . . "the full one-half share or portion of the whole crop of the different kinds and qualities which shall be grown upon the demised premises" during the term, such share to be delivered on the day of the threshing; the lease further providing "that the lessees will immediately after the threshing deliver all the crop in the elevator or on cars . . . in the name of the lessor and lessees "and that the grain tickets and receipts covering the delivery of the said crop shall be held intact and not drawn upon until complete settlement has been made between the lessor and the lessees." When the grain was cut and in stook one of the lessees mortgaged to the bank "one-fourth share or interest in all grain then cut and in stook." As the grain was threshed it was hauled to the elevator, and storage tickets were issued in the names of the lessor and lessees. The entire crop was then sold by the lessor, who wrongfully had his agent endorse the lessee's names to the storage receipts, and who received the full price for the grain, and gave his own cheque to the lessees for the balance due to them, after all adjustments under the lease had been made and including a payment on property which lessees were buying from defendant.

The Court held that each of the lessees had an exclusive right to and dominion over his own share of the grain which was not subject to the ownership or control of the other and which he could mortgage or sell even before the grain was divided, and that the mortgage to the plaintiff vested in it his property and made the plaintiff co-owner with the other lessee, so that on the day the defendant sold the grain the plaintiff and the other lessee were the owners in common of it, subject to the defendant's interest, and the defendant had as against the plaintiff no right to sell it, and by the sale the defendant made himself liable to the plaintiff in damages for its conversion or to account for its share of the proceeds.

[*Banque d'Hochelaga* v. *Hayden and Gillespie* (1922), 63 D.L.R. 514, distinguished.]

ACTION for damages for wrongful conversion of grain.

L. M. Johnstone, K.C., and *W. S. Gray*, for plaintiff.

A. E. Dunlop, K.C., for defendant.

WALSH, J.:—On September 2, 1920 Gilbert H. Rogers mortgaged to the plaintiff "one-fourth share or interest in all grain then cut and in stook" on a certain named quarter section. Rogers and his brother were at that time lessees of this land under a lease from the defendant to them "yielding and paying therefor unto the said lessor . . . the full one-half share or portion of the whole crop of the different kinds and qualities which shall be grown upon the demised premises" during the term, "Such share to be delivered on the day of the threshing, said threshing shall be done on or before the

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15th day of November A. D. 1920." The lease provides "that the lessees will immediately after the threshing deliver all the crop in the elevator or on cars at Coaldale in the Province of Alberta in the name of the lessor and lessees," and that "the grain tickets and receipts covering the delivery of the said crop shall be held intact and not drawn upon until complete settlement has been made between the lessor and the lessees." These are the only provisions of the lease material to this issue.

All of the grain grown on this land in 1920 was cut and in stook before this mortgage was given. Threshing started on September 9, and was finished on the 12th, the grain being hauled by the lessees from the separator to the elevator of the Ellison Milling & Elevator Co. at Coaldale, as it was threshed. The storage receipts for it were issued in the joint names of the lessor and lessees. The defendant sold all of the grain to this elevator company at an exceedingly satisfactory price immediately after the last of it was delivered. He says that he spoke to the mortgagor, Gilbert H. Rogers, about this sale before it was made and as soon as he ascertained the price that could be had for it and they decided to sell. The mortgagor's evidence does not quite bear this out. He says that he had a talk with the defendant during the threshing, in the course of which he said that if the grain was his he would sell at once and that is all that happened between them. The plaintiff knew nothing of this sale and there does not appear to have been any talk on the subject between the defendant and the other lessee. The sale of the entire crop was, however, admittedly made by the defendant alone, neither of the lessees taking any part in it, though perfectly satisfied with the price realised. Immediately after the sale, one Graham, the defendant's office manager and accountant, went under his instructions to the office of the elevator company to get payment for the grain. He endorsed each of the storage receipts "P. Lund & Rogers Bros. by Wm. Graham," this being necessary, apparently, before the purchaser would make payment for the grain. He had ample authority to thus endorse the defendant's name but had absolutely none to endorse that of the lessees, Rogers Bros. Upon this being done the elevator company issued its cheque for $8,376.35 in full for this grain, payable to the defendant alone, and gave it to Graham. He took it to the defendant's office and on the same day the lessees met him there and they made a settlement of their accounts, as a result of which the defendant kept the

elevator company's cheque for the value of the grain and issued his own cheque for $1,618.57 to the lessees in full of the balance coming to them. There was deducted from their share of the grain in the making of this settlement, after all adjustments under the lease had been made, all other sums which they owed the defendant, including a sum, the amount of which I do not know, for payments accruing but not yet due from them in respect of their purchase from the defendant of some land in British Columbia. They demurred to this at first but finally gave in and took the cheque in settlement, which they cashed and used for purposes of their own. In the result, therefore, the defendant got his own full share of the grain and got out of the lessees' share everything that they owed him, including money not due for more than a month, while the plaintiff got not a dollar of its claim out of the interest in this grain mortgaged to it by one of the lessees. In these circumstances, and on these facts as to which there is, except as above noted, practically no dispute, the plaintiff seeks to hold the defendant liable for the amount of its claim under the mortgage, and damages on the ground that his sale of this grain amounted to a wrongful conversion of its property.

Although the statement of defence alleges upon several grounds the invalidity of the plaintiff's mortgage, no objection whatever was raised to it on the trial and Mr. Dunlop very frankly and very fairly conceded in his argument that it was not open to attack. The defendant was entirely ignorant of the existence of this mortgage until long after the sale of the grain by him and the division of the proceeds between himself and his tenants. He acted in perfect good faith throughout and his actions met finally with the full approval of the only people whom he then knew to be interested in the grain, namely his tenants.

Under this lease I think that the property in the entire crop was at all times in the lessees, subject to the title, if any, of the plaintiff under its mortgage and subject at most to the defendant's right to receive the share of it to which he was entitled on the day of the threshing.

Haydon v. Crawford (1834), 3 U.C.Q.B. (O.S.) 583; *Campbell* v. *McKinnon* (1903), 14 Man. L.R. 421; *Robinson* v. *Lott* (1909), 2 S.L.R. 276. It was held in the first mentioned case that no legal property in any wheat raised on the farm could vest in the lessor under the lease there in question until the tenant had threshed and divided it and delivered to him his portion and that if the tenant should fail to deliver over the

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lessor's share the latter would have his remedy as upon other covenants but the tenant might before division legally alienate the whole. Beck, J. in delivering the judgment of the Appellate Division of this Court in *Elves* v. *Pratt* (1916), 32 D.L.R. 670, 11 Alta. L.R. 134 at pp. 136, 137, speaking of this decision and of the fact that it had been followed in the two other cases above noted, questions without deciding "whether it should be followed in a Court administering a complete system of jurisprudence embracing what was formerly law and equity for it seems to be the more reasonable conclusion that where a landlord is to be entitled to a portion of the produce of his own land as compensation for its use by a tenant, he by virtue of the contract in that respect acquired an interest in the entire crop in its undivided state which may be sold or encumbered by the landlord and in respect of which in the event of a threatened removal by the tenant he might obtain an injunction on the ground of his actual interests and not merely on the ground of the removal or diminution of the property subject to distress." That suggestion puts the rights and the title of the defendant in this grain under this particular lease upon as high ground as they are capable of, so that whilst as long as the crop remained undivided the legal property in it was in the lessees, the defendant had an interest in it which he could sell or encumber and which he could protect by injunction in the event of its threatened dissipation.

This grain never was divided between the parties to this lease. It went into the elevator as an undivided whole, the provision of the lease for the delivery of the defendant's share on the day of the threshing having been apparently waived by mutual consent. That provision seems to be inconsistent with the clause immediately following, which provides for all of the crop being delivered in the names of the lessor and the lessees and for the grain tickets being held intact until complete settlement had been made between them. The intention of it may have been to fix the date on which the rent would fall due, the Saskatchewan Court of Appeal having held in *Foster* v. *Moss* (1911), 4 S.L.R. 421, under a clause worded in this exact language, that the rent fell due on the day the crop was threshed. I fancy, not only from the working of the lease, but from the conduct of the parties, that the intention was to deliver the wheat to the elevator without any previous division of it, figure up in bushels the quantity that each of the parties was entitled to and divide the grain tickets between them accordingly. Be that as it may, the grain was on the day

on which the defendant sold it, the property of the lessees subject, as I have said, to such interest as the plaintiff and defendant, respectively, had in it under the mortgage and the lease.

The American authorities seem to favour the view which I have taken of the property in the grain under such a lease as this. See Underhill on Landlord & Tenant, p. 311 *et seq.* and 24 Cyc. p. 1469 *et seq.* I have been unable to find any English authority on the question, probably because the system of renting on shares is not in vogue there, though largely practised on this continent.

It must follow, I think, from what I have said, that to the extent to which any property in this grain passed to the plaintiff under its mortgage from one of the lessees, the sale made by the defendant was unauthorised and, therefore, wrongful, particularly when it was consummated by the endorsement of the lessees' names on the grain tickets without their authority, and payment of the full purchase money to him without any sanction.

The plaintiff, of course, took only such property in this grain as its mortgager had. What property was that? He and his brother were the joint owners of it and entitled to share equally in it subject to the defendant's interest. Each of them had an exclusive right to and dominion over his own share which was not subject to the ownership or control of the other, and which he could mortgage or sell even before the grain was divided. His mortgage to the plaintiff vested in it his property and made the plaintiff co-owner with the other lessee. This, I think, is a correct summary of the law in this respect, as taken from the text of the chapter on joint ownership in Williams on Personal Property 17th ed. and the authorities there cited, as well as by analogy to the law relating to the joint ownership of real estate. See Redman on Landlord & Tenant, 6th ed. p. 54 *et seq.*, and Barron & O'Brien, 2nd ed. p. 77. The situation, therefore, was on the day that the defendant sold this grain, that the plaintiff and the other tenant Ray Ward Rogers, were the owners in common of it, subject to the defendant's interest as above defined and the defendant had, as against the plaintiff, no right to sell it.

The Appellate Division had a somewhat similar case to deal with in *Banque d'Hochelaga* v. *Hayden* (1922), 63 D.L.R. 514, though the facts of that case differ materially from those that I am concerned with. One of the questions there was whether the plaintiff's mortgage was upon a specific share of

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ascertained goods or upon what, if anything, should remain of the tenant's share after payment of all the owner's claims against him and the holding was that it covered a specific share of the grain. That, I think, is so here. Although provision is made by the lease for the sharing between the parties in varying proportions of the expenses incidental to the operations to be carried on under it, there is nothing which gives either party the right to retain out of the share of the other party some expenditure which he should have made but did not make, though that may have been the object of the provision for holding the grain tickets intact until complete settlement had been made between the parties. The lessor's full one-half share was to be paid to him "without any deduction, defalcation or abatement whatsoever" and it was his right to get it. It follows that the lessees had the right to the other full one-half share. The property was then ascertained and the mortgagor's share in it was specific.

I think that by the sale of this grain the defendant made himself liable to the plaintiff either in damages for its conversion or to account for its share of the proceeds.

If I am wrong in the view that I have taken as to the property in this grain and the right view is that the defendant and his tenants were the owners of it in common and that he as one of such owners had the right to sell it, he was bound to account for their share of the proceeds to the other owners, one of whom at the time of the sale was the plaintiff. And so, whether his sale was wrongful or rightful, I think he is bound to make compensation to the plaintiff, either in damages or on an accounting.

There was a parol understanding between the lessees and their father that he should be equally interested with them in this grain. He has never asserted and does not now assert any claim under this understanding. The money received by the lessees from the defendant seems to have been dealt with by them without reference to it. The only effect of it, if recognised, would be to reduce the mortgagor's share from a one-fourth to a one-sixth interest in the grain, and as even that interest would be quite sufficient to cover the plaintiff's claim. I am not concerning myself over it.

The measure of the plaintiff's damages is the amount of its mortgage and interest, in all $990. The value of its property in the grain on the basis of the sale price was $2,094.09, if its mortgagor's interest was one-fourth or $1,396.06, if by a recognition of the father's interest it was reduced to a one-sixth

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share and so its recovery is well within the amount that came to the defendant's hands for it. The claim for the costs of entering judgment in its action against its mortgagor that was current when the mortgage was given and of issuing execution is too remote.

The plaintiff will have a judgment against the defendant for $990 and costs under col. 2. Rule 27 not to apply.

Judgment for plaintiff.

KOWALENKO v. LEWIS AND LEPINE.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon, JJ.A. November 28, 1921.

JUSTICES (§II—5)—NEGLECT OF STATUTORY DUTY—FAILURE TO RETURN CONVICTION AND PAPERS FOR PURPOSES OF APPEAL—RESULTANT DISMISSAL OF APPEAL — CIVIL ACTION BY APPELLANT FOR DAMAGES—CR. CODE SECS. 757, 773 (A), 797.

An action lies against a Justice for neglect to return the conviction made by him for the purposes of an appeal therefrom, if the appeal is dismissed because of the conviction and depositions not being before the Court. The right of action was sustained in favour of the accused against two Justices exercising the powers of a "Magistrate" under Part XVI. of the Cr. Code (sec. 773 (a) on the summary trial of accused for receiving stolen goods under $10 in value, the conviction for which offence was appealable under Cr. Code sec. 797 in like manner as from a summary conviction.

JUSTICES (§II—6)—CIVIL LIABILITY — JUSTICES PROTECTION ACT, 1848 IMP.—CR. CODE SECS. 757, 1143-1151.

Even if the Justices Protection Act, 1848 Imp., ch. 44. be in force in Saskatchewan, it affords no answer to a claim against a Justice for damages resulting from neglect of the Justice's statutory duty to transmit a conviction to be filed for the purposes of a possible appeal.

JUSTICES (§II—6)—PROTECTION FROM VEXATIOUS ACTIONS—THINGS PURPORTING TO BE DONE IN THE PERFORMANCE OF DUTY—FAILURE TO TRANSMIT CONVICTION FOR APPEAL—CR. CODE SEC. 1148.

Sec. 1148 of the Criminal Code which continues the existing protection enjoyed by Justices from vexatious actions for things "purporting to be done in the performance of their duty" does not cover the neglect of Justices to transmit their convictions as required by the Criminal Code. (Per Lamont, J.)

APPEAL (§VIB—287)—FROM JUSTICES—RECEIVING STOLEN PROPERTY UNDER $10—POWER TO ADJOURN APPEAL TO OBTAIN RECORD OF CONVICTION, DEPOSITIONS, ETC., NOT TRANSMITTED—DISCRETION—MANDAMUS—CR. CODE SECS. 751, 797.

The District Court Judge before whom the appeal from a summary trial conviction on a charge of receiving (value under $10) comes on to be heard under Cr. Code secs. 751 and 797, has power to adjourn the hearing so that the conviction and depositions which the trial Justices had omitted to transmit, may be brought into Court; but if, in his discretion, the District Court Judge does not adjourn the hearing but dismisses the appeal, mandamus would not lie to review that discretion.

APPEAL (§VID—2893)—FROM SUMMARY CONVICTION AND IN CERTAIN CASES OF SUMMARY TRIAL UNDER PART XVI. CR. CODE—POWER OF ADJOURNMENT—ENDORSING ORDER OF ADJOURNMENT ON THE CONVICTION OR ORDER APPEALED FROM—STATUTE DIRECTORY AS TO ENDORSEMENT AND NOT JURISDICTIONAL—CR. CODE SEC. 751 (3).

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The provision in Cr. Code sec. 751 (3) that the Court to which a summary conviction appeal is taken under secs. 749 and 750 shall have power if necessary to adjourn the hearing of the appeal "by order endorsed" on the conviction or order appealed from, does not prevent an adjournment being made in a case in which the conviction or order appealed from is not before the Court by reason of the Justice's neglect to transmit it.

[*R.* v. *Read*, 17 Ont. R. 185, approved; dictum of Hannington, J., in *Ex parte Cowan, R.* v. *Delegarde*, 9 Can. Cr. Cas. 454, 36 N.B.R. 503, disapproved.]

APPEAL by defendants (Justices of the Peace) from the judgment of a district court awarding damages against them in an action by the person convicted in which he complained that his appeal to a District Court Judge from a summary trial conviction for receiving stolen goods of less value than $10 (Cr. Code secs. 773, 797) had been dismissed because of the justices' default in making return of the conviction, the deposit on appeal and other material under Cr. Code. sec. 757, whereby he had suffered damages. On the appeal coming on to be heard on May 25, 1921, the Court of Appeal made an interim order that the case should stand over so that the plaintiff might supplement his proofs by bringing in evidence that he had laid the foundation for the appeal taken to the District Court Judge by serving due notice of appeal under the Criminal Code, sec. 750, *Kowalenko* v. *Lewis* (1921), 59 D.L.R. 333, 35 Can. Cr. Cas. 224.

L. McKay Robinson, for appellants, defendants.

F. H. Bence, for repondent, plaintiff.

TURGEON, J.A.:—The facts of this case are set out in the interim judgment of the Court reported in (1921), 59 D.L.R. 333, 35 Can. Cr. Cas. 224. The respondent having since complied with the terms of that judgment, the merits of his action against the appellants can now be examined.

The appellants contend, among other things, that no malice was proven against them and that they are entitled to the benefit of The Justices' Protection Act 1848, (11 & 12 Vict. ch. 44) which, they claim, is in force in Saskatchewan. I am inclined to agree with the dictum of Wetmore J. in *Simpson* v. *Mann*, 6 Terr. L.R. 445, where that judge referred to that Act as being in force in the North-West Territories, but it is not necessary, in my opinion, to make any express finding upon the point, because I do not think the protection extended to justices by the enactment applies to cases of the class we are dealing with here. The Justices' Protection Act deals with two classes of actions against a justice of the peace: (1) actions brought "for any act done by him in the execution of his duty as such justice

with respect to any matter within his jurisdiction as such justice," and (2), actions brought "for any act done by him *in a matter of which by law he has not jurisdiction.*" In the first case the party bringing the action must allege and prove malice on the part of the justice; in the second case no allegation or proof of malice is necessary. It will be seen, therefore, that this Act can apply only to cases where the preliminary question as to the justice's jurisdiction in regard to a particular act of his can be put and answered. The question is: "Did he have jurisdiction to do the act complained of?" If so, you must show malice, if not, you are not obliged to show malice." It is clear that no such question can be put here, and that consequently this case is not covered by the Act.

The appellants in this case at bar are justices of the peace who, at the time in question, had in their possession as a result of a conviction made by them certain documents, which they were required by sec. 757 of the Criminal Code to transmit to the District Court; such transmission to be made, in the words of the section, "before the time when an appeal from such conviction or order might be heard." The finding of the trial judge, supported by the evidence, is that they neglected to make the necessary transmission, although they knew of the appeal. They were, therefore, guilty of negligence of which the respondent has the right to complain, regardless of the question of malice. It remains only to be seen, therefore, whether this negligence was the cause of the injury which the respondent suffered when his appeal was dismissed without being heard on its merits. If so, they are liable to him in damages.

I am aware that the foregoing interpretation of the Justices' Protection Act is not in accordance with the view expressed in footnote (h) to p. 646 of the 19th volume of Halsbury's Laws of England, which was referred to upon the argument. But the editor of the foot-note cites no authority for his opinion, which, if sound, would exonerate the justices in this case in the absence of malice on their part, and I cannot convince myself that he has interpreted the Statute correctly. I think moreover that the view which I express here is supported by the reasoning of the decision in *The Royal Aquarim* v. *Parkinson* 61 L.J. Q.B. 409; in *Harrison* v. *Brega*, 20 U.C.Q.B. 324, and in the cases cited in Craies Statute Law, 2nd. ed. p. 233. [note (a)].

(A) CIVIL ACTION AGAINST A JUSTICE FOR HIS NEGLECT OF A MINISTERIAL DUTY.

In deciding whether an action will lie for the breach of a duty imposed by statute it is necessary to consider whether the duty is merely a ministerial one or is of a discretionary or *quasi-judical* nature. It

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KOWALENKO v. LEWIS AND LEPINE.

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It appears from the record that when the appeal in the case of *Rex* v. *Kowalenko* came on for hearing at Venda, in the Judicial District of Humboldt, on June 24th, 1919, counsel for the prosecutor moved to have the appeal dismissed on the ground that the justices (the appellants in this case) had not transmitted the convictions, etc., to the Court; whereupon the District Court Judge ordered the appeal dismissed without costs.

The question as to whether the Judge had any discretion to do otherwise than he did had been the subject of some discussion. In my opinion the circumstances of the case did not necessarily call for an immediate dismissal of the appeal on the grounds alleged. It is true that an appeal from a summary conviction under the Criminal Code cannot be finally disposed of unless the existence of the conviction appealed from is proved, and that the best proof of such a conviction is the formal document signed and sealed by the magistrates. The establishment of these principles, however, does not, in my opinion, do away with the general rules of evidence or the ordinary powers of Courts to adjourn hearings, to grant time for the production of necessary evidence, and, in short, to make use of all the facilities of which Courts habitually avail themselves in the pursuit of their duties in order that substantial justice may be done between the parties. The contention that because the formal order of conviction is not found among the records of the Court when the case is called the appeal must necessarily be dismissed forthwith, can only be supported on one or the other of two theories. The first of these theories is that this state of the record is con-

is clear that an action will lie for the neglect of a duty of the former kind, but the question often arises as to which class a duty belongs. On the other hand, if the duty is judicial or even *quasi-judicial*, it is clear that no action will lie for the breach of it unless the breach is shown to be wilful and malicious. Craies' Statute Law, 2nd ed., p. 233.

The statute 11-12 Vict. Imp. ch. 44 was an Act to protect justices from vexatious actions for acts done by them in their duty as Justices in respect of any matter within their jurisdiction as justices. The protection is in respect of acts done by the justices and can have no application to defamatory words uttered. *Royal Aquarium v. Parkinson*, [1892] 1 Q.B. 431, 455, 61 L.J. Q.B., 409; *Umphelby* v. *McLean*, 1 B. & Ald. 41, under a similar prior statute applied, per Lopes, L.J.

In *Harrison* v. *Brega* (1861), 20 U.C. Q.B., 324 a registrar of deeds was held liable for an omission to include a registered mortgage in a certified "registrar's abstract." In answer to the contention that the defendant should have been served with a notice of action under a statute (C.S.U.C., ch. 126, sec. 20) requiring such in the case of a justice or officer sued for an act *committed* by him in pursuance of a statute or under the authority of a statute, the Upper Canada Court of Queen's Bench *en banc* held that the statute as to notice of action did not extent to cases of mere neglect. (*Davis* v. *Curling*, 8 Q.B. 286, distinguished).

clusive proof that the conviction does not exist. But it does exist; the accused may be in jail by virtue of it or may have paid his fine, as the case may be. The other theory is that the performance of this duty by the justices,—that is, by third parties,— within the time limited by section 757 of the Code, is a condition precedent to the accused's right to appeal. Although there is some authority for this latter proposition, I can find none that is binding upon me and I refuse to adopt it. It is unreasonable in its terms, I do not see how it can be deduced from anything that is contained in the Criminal Code, and there is authority for rejecting it with which I agree. (See *Harwood* v. *Williamson*, (1908), 13 Can. Cr. Cas. 195, 1 S.L.R. 58; *Re Kwong Wo*, 2 B.C.R. 336; *In re Ryer and Plows*, 46 U.C.Q.B. 206).

Again it has been said that no other alternative than to dismiss the appeal was open to the District Court Judge because in order to go any further with the case an adjournment would have been necessary, and that no adjournment could have been ordered on account of the provisions of s.s. 3 of sec. 751 of the Code. This sub-section is as follows:—

"(3). The Court to which such appeal is made shall have power, if necessary, from time to time, *by order endorsed on the conviction or order*, to adjourn the hearing of the appeal from one sitting to another, or others, of the said Court."

As the conviction was not before the Court it may be said that it could not be endorsed, and that consequently no adjournment could be ordered. This view is expressed in the judgment of Hannington, J., in the Supreme Court of New Brunswick in *Ex p. Cowan* (1904), 9 Can. Cr. Cas. 454, but the contrary view is adopted in the unanimous judgment of the Common Pleas Division of the High Court of Justice of Ontario delivered by Rose, J., in *Reg.* v. *Read*, 17 O.R. 185, where authority, with which I agree, is referred to for the proposition that this provision is directory only, and that (in the case there under consideration) an order delivered orally by the Judge and entered in the clerk's book constituted a valid adjournment, notwithstanding the omission to endorse the same upon the conviction. [Note (b).]

(B) ADJOURNMENT OF APPEAL FROM SUMMARY CONVICTION.

In *Reg.* v. *Read* (1889), 17 Ont. R. 185, it was held by the Common Pleas Division of the Ontario High Court of Justice that the provision in sec. 77 of the statute R.S.C. 1886, ch. 178, as to endorsing the order of adjournment on the conviction was not imperative but directory merely, and therefore the omission to make the endorsement did not affect the validity of the order to quash. Hon. John E. Rose, J., delivering the judgment of the Court, cites with approval the statement in Maxwell on Statutes, 2nd ed., p. 452, as follows: "When a public duty

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Since, then, the District Court Judge was not under the necessity of dismissing the respondent's appeal in the case of *Rex* v. *Kowalenko* on account of the neglect of the appellants as the convicting magistrates in that case to transmit the conviction to the Court, but might have taken steps as above outlined to provide for the appeal being heard notwithstanding this neglect, the further question now arises as to whether the respondent can place the responsibility for his injury upon the appellants so as to make them liable to him for the damages awarded to him in the judgment which is the subject of this appeal. The gist of the respondent's cause of action is that he was deprived of his right to have his appeal heard. Might he have taken steps to compel the District Court Judge to hear his appeal, for instance by way of mandamus?—and, if so, is he debarred from claiming damages against the appellants by reason of his failure to take such steps?

I do not accede to the proposition that the respondent would lose his remedy against the appellants on account of his failure to have recourse to another proceeding by which he might have succeeded in having his appeal heard, provided such proceeding were open to him; but I do not find it necessary to decide this. In my opinion no further proceeding was open to him. The Criminal Code does not provide an appeal to this Court from the decision of a District Court Judge in matters of this kind. An application for a writ of mandamus is the only thing that suggests itself as being open to the respondent, but in my opinion such an application could not succeed in the circumstances of this case. It does not appear that any offer was made by the respondent, and improperly refused by the Judge, to adduce other evidence of the conviction having been made. The respondent could not reasonably have been expected to have armed himself with such evidence, as he was clearly entitled to assume that the appellants had performed their duty under the Code by transmitting their conviction. Such being the case, the District Court Judge had power to adjourn the hearing, but in the exercise of his discretion he declined to do so. Mandamus will not lie against the Judge because we may disapprove of the manner in which he has exercised his discretion, but only where he refuses improperly to hear the appeal on its merits.

is imposed, and the statute requires that it shall be performed in a certain manner or within a certain time or under specified conditions, such prescriptions may well be regarded as intended to be directory only, when injustice or inconvenience to others who have no control over those exercising the duty would result if such requirements were essential and imperative." *Reg.* v. *Read*, 17 Ont. R. 185, at 186.

Instances illustrating the distinction which exists between cases where mandamus does and where it does not lie will be found in the following decisions:—

Reg. v. *The Justices of Middlesex*, 46 L.J.M.C. 225; *Rex* v. *Gregg* (1913), 13 D.L.R. 770, 6 Alta. L.R. 234, 22 Can. Cr. Cas. 51, and *In re Ryer and Plows, supra.*

The appellants' breach of duty was therefore the cause of the respondent's loss of the right of appeal, and they are liable to him for the injury he has sustained. *Ward* v. *Freeman*, Ir. C.L.R. 460).

I would dismiss the appeal with costs.

LAMONT, J.A.:—On April 1st, 1919, the plaintiff was convicted by the defendants as justices of the peace sitting together for unlawfully receiving stolen goods of the value of $10, knowing them to have been stolen. From this conviction the plaintiff appealed. He filed a proper notice of appeal in the proper office within ten days after the conviction was made. He served a copy thereof upon the defendants and upon the respondents, but not within the ten days. He also deposited with the defendants as convicting justices an amount sufficient to cover the fine and costs imposed and the costs of appeal. The appeal came on for hearing at Vonda on June 24th, 1919. The plaintiff was there with his witnesses. The notice of appeal filed was in Court. Service of a copy thereof on the proper parties was admitted. The Judge was satisfied that the appellant had made with the defendants the deposit required by the statute, but he dismissed the appeal. His note of the proceedings is as follows:—

"The King) Bence for Appell.
v.)
Kowalenko.) Crerar for Respdt.

The Justices have not transmitted the depositions and exhibits the conviction or order or the deposit made with them covering the fine and costs and costs of appeal to the clerk of court. Mr. Crerar moves to dismiss the appeal. Appeal dismissed without costs."

The plaintiff then brought this action, claiming damages for being prevented by the defendants' negligence from proving his innocence, damages to his reputation, and moneys paid out by him for counsel and witness fees and the deposit made to the defendants. . The defendants admitted that they did not transmit the conviction, etc., to the Court. The trial Judge, who was the Judge who dismissed the plaintiff's appeal, found in the plaintiff's favour and awarded him $234 as damages. From that judgment the defendants have appealed to this Court.

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For the defendants it argued, (1) that the conditions necessary to give the Court jurisdiction to hear the plaintiff's appeal from the summary conviction had not been performed, and (2) That the plaintiff's remedy was by way of *mandamus* to compel the Judge to re-open the case and hear the appeal on its merits, it having been dismissed on a preliminary point.

Section 797 of the Criminal Code gave the plaintiff a right of appeal subject to the provisions relating to appeals from summary convictions. These provisions are found in sec. 750, subsec. (b) and (c) of the Code as they stood prior to the amendment of 1919. Sub-section (b) reads as follows:—

(b) The appellant shall give notice of his intention to appeal by filing, in the office of the clerk of the court appealed to, a notice in writing setting forth with reasonable certainty the conviction or order appealed against, and the court appealed to, within ten days after the conviction or order complained of, and by serving the respondent and the justice who tried the case each with a copy of such notice.

S.S. (c) required the appellant to enter into a recognizance with two sufficient sureties before a County Judge, clerk of the peace, or justice of the peace, or to deposit with the justice making the conviction an amount sufficient to cover the sum adjudged to be paid and the costs of appeal, as the case may be.

Then sec. 751 in part reads:—

751. The Court to which such appeal is made shall thereupon hear and determine the matter of appeal .. .. ..

and sec. 757 provides:—

757. Every justice before whom any person is summarily tried, shall transmit the conviction or order to the Court to which the appeal is by this part given, ... before the time when an appeal from this conviction or order may be heard .. .. ..

As the right of appeal is purely statutory and is dependant upon the performance by the appellant of the conditions precedent set out in the statute, these conditions must be strictly complied with, at any rate as far as the conduct of the appellant is concerned. Unless there are special conditions required by any particular statute under which a conviction is made, the conditions the performance of which is necessary to give the Court jurisdiction are those specified in section 750 above quoted. The appellant must file a proper notice of appeal in the office of the clerk of the court appealed to within ten days after the conviction or order is made; he must serve the respondent and the justice who tried the case each with a copy

of such notice, and he must—unless he is remaining in custody—enter into the recognizance or make the deposit called for under sub-sec. (c). If these conditions have been complied with the Court appealed to has jurisdiction to hear the appeal, and it is the duty of the Court thereupon to hear and determine it upon its merits. (Secs. 751 and 754).

I am well aware that there are cases in which it has been held that the Court did not have jurisdiction to hear the appeal unless the convicting justice had transmitted the conviction, recognisance, deposit, etc., as the case might be, to the Court prior to the hearing of the appeal. With deference I am of opinion that these decisions are so at variance with the language of the statute that they should not be followed.

Where the statute gives a convicted person a right of appeal upon the performance of certain conditions, the right of appeal is complete, and the jurisdiction of the Court to hear it is complete, the moment it appears that these conditions have been performed. The Court cannot make its jurisdiction dependant upon the performance of some other duty, the obligation to perform which has been imposed by the statute not upon the appellant, but upon the justice. *Reg.* v. *Pawlett* (1873) L.R. 8 Q.B. 491, 29 L.T. 390.

Although sec. 757 imposes upon the justice the duty of transmitting the conviction or order to the Court before the time for hearing the appeal , failure on his part to so transmit it cannot affect the jurisdiction of the Court to hear the appeal, for the statute has not made the right of appeal conditional upon the performance by the justice of this duty.

In *Harwood* v. *Williamson* (No. 1) (1908), 1 S.L.R. 58, 13 Can. Cr. Cas. 195, 14 Can. Cr. Cas. 76, Wetmore, C.J., said:—

"I am also of opinion that section 757 is merely directory; that it is not a preliminary or conditional precedent to the appeal."

In that case the Chief Justice suggested that, if the conviction had not been transmitted to the Court, it might be proper for the Judge to adjourn the hearing of the appeal and direct the services of a subpoena *duces tecum* on the justice. This would seem to me to be a reasonable course, although, if the parties were agreed as to the contents of the conviction, I cannot see any objection to proceeding with the hearing and adjourn simply for the production of the conviction. This course would seem to be in line with the view expressed by Osler, J., in *In re Ryder et al,* 46 U.C.Q.B. 206, where that Judge said:—

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"There is nothing that I am aware of which makes it necessary that the formal conviction should have been returned and filed before the appeal is entered, or even before the hearing has commenced. It must, no doubt, as the authorities I have referred to shew, be proved at some time during the hearing, but at what time is a matter of practice, and in the discretion of the Court."

In this case the plaintiff duly filed his notice of appeal. Service of a copy thereof upon the defendants and the respondent was admitted at the hearing of the appeal. The only objection raised to the service was that it had not been made within ten days from the making of the conviction. It was made in each case more than a month before the hearing. I agree with the interpretation placed upon the sub-section by Newlands, J., in *Rex* v. *McDermott* (1914), 19 D.L.R. 321, 23 Can. Cr. Cas. 252, where he held that the limitation of ten days for filing the notice of appeal did not apply to the service of the notice. [Note (c).]

As to the deposit, it was not in Court, but I cannot find any statutory provision requiring the justice to forward it. If it were there it would certainly facilitate the proof, but in its absence the appellant may establish, by oral testimony, the amount fixed by the justice as sufficient to cover the costs of appeal, the amount of the fine and costs and the fact that he paid these sums to the justice.

In my opinion, therefore, all the conditions precedent, the performance of which were necessary to give the Court jurisdiction, has been duly performed. It was the duty of the Judge then to hear and determine the appeal. He dismissed it. In the judgment appealed from the Judge says, "The appeal was so dismissed because the conviction (etc.) and the moneys were not in Court." Was this a dismissal on the ground that he had no jurisdiction to entertain the appeal, or was it a dismissal on the merits induced by an erroneous view of the law? If the former, a *mandamus* would lie to compel him to hear the appeal on its merits. If the latter, *mandamus* would not lie. *Rex v. Trottier* (1913), 14 D.L.R. 355, 6 Alta. L.R. 451, 22 Can. Cr. Cas. 102. *Re McLeod* v. *Amiro* (1912), 8 D.L.R. 726, 27 O.L.R. 232, 25 Can. Cr. Cas. 230.

(c) The amendment to Cr. Code sec. 750 (b) by Canada Statutes, 1919, ch. 46, sec. 12, by which a time limit is expressly placed upon the service of the notice of appeal did not come into force until Oct. 1, 1919. [9-10 Geo. V., ch. 46, sec. 16.] The conviction in the *Kowalenko* case, *supra*, was dated April 1, 1919. The Code amendment of 1920 further provides that service of notice of appeal may be proved by the affidavit of the officer or person serving the same. 10 and 11 Geo. V., Can., ch. 43, sec. 12.

In my opinion sufficient is not shewn to enable us to determine the questions. In view of the number of cases in which District Court Judges in this Province have held that no jurisdiction existed to entertain an appeal from a summary conviction where the conviction had not been transmitted to the Court, it would seem not unreasonable to conclude that such would be the view of the Judge in dismissing the appeal in question. On the other hand, the fact that the appeal was dismissed would rather point to the conclusion that he entertained the appeal and dismissed it because he believed that the law was that the appeal could not succeed in the absence of the conviction, which would be a dismissal on the merits. I do not think we are called upon to speculate as to which of these views the learned Judge acted upon. The material not being sufficient to enable us to say that a *mandamus* would lie, the second contention on behalf of the defendants must fail.

That the plaintiff's action is maintainable would appear to be the view of the author of Paley on Convictions, 8th ed., where, at p. 324 he says:—

"If the magistrate after receiving due notice of the appeal, neglects to return the conviction whereby the party is prevented from prosecuting his appeal he is liable in an action on the case for the special damage."

Then it was argued that the defendants were entitled to the protection afforded by the Justices Protection Act (Imperial).

It is to my mind doubtful if that Act is now in force in this country, at any rate as far as duties imposed upon the justices by the Criminal Code are concerned.

The Parliament of Canada has expressly legislated in respect of the protection of justices of the peace. Criminal Code secs. 1143 to 1148. Section 1148 reads:—

"Nothing herein shall prevent the effect of any Act in force in any province of Canada, for the protection of justices or other officers from vexatious actions for things done purporting to be done in the performance of their duty."

If, therefore, the Imperial Act was introduced into this Province as part of the law thereof, the protection which it affords to justices is limited to that embraced in sec. 1148. That section continues any existing protection enjoyed by the justices from "vexatious actions for things done purporting to be done in the performance of their duty." In my opinion it cannot be said that mere neglect to transmit the conviction to the Court ap-

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pealed to was something "purporting to be done" by the justices "in the performance of their duty." The Imperial Act, therefore, if it is in force in the Province, has no application in this case.

The appeal should, in my opinion, be dismissed with costs.

HAULTAIN, C.J.S.:—I concur with the result arrived at by brethren Lamont and Turgeon and the reason given therefor.

Appeal dismissed.

NATIONAL MANUFACTURING Co. v. STEPA.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, Hyndman and Clarke, JJ.A. March 4, 1922.

EVIDENCE (§VIF—540)—PROMISSORY NOTE—COTEMPORANEOUS AGREEMENT—SALE OF GOODS—ORAL EVIDENCE TO PROVE ENTIRE CONTRACT.

Oral evidence is admissible to shew that a writing was not intended to contain all the terms of an alleged contract, but that there were in fact oral terms of the contract besides the written terms, the oral and written terms making one entire contract of which consequently the written terms are only a part.

[*Magrath v. Collins* (1917), 37 D.L.R. 611, 12 Alta. L.R. 259, applied. See Annotation on Contracts, 2 D.L.R. 636.]

APPEAL from His Honour Judge Dubuc, who dismissed an action on a promissory note. Affirmed.

K. C. Mackenzie, for appellant.

John Cormack, K.C., for respondent.

The judgment of the Court was delivered by

BECK J.A.:—The action is brought upon a promissory note made by the defendant to the plaintiff company for $165 and interest. The substantial defence was that the note was given for a set of scales and a cream separator which under an agreement made cotemporaneously with the giving of the note the defendant had the right to reject and return, a right which the defendant promptly exercised by returning the articles.

The Judge found the defence proved in fact. There is no doubt he was right in so finding. The question to which the argument was mainly directed was whether, inasmuch as the agreement was cotemporaneous oral agreement, evidence of it was admissible. No doubt the cases say that as a general rule evidence of a cotemporaneous oral agreement, inconsistent with the express, and possibly with the implied, terms of a promissory note intended to be effective according to its terms, cannot be given in evidence, but the rule goes no further and must be applied with discrimination and with strictness of limitation, and there are well recognised exceptions.

For instance, evidence is admissible to shew that the date is not the true date; that the note was not delivered; that it

was made subject to a condition or that the consideration has failed; that the maker signed for accommodation, etc.

But these instances by no means exhaust the instances in which evidence of an oral agreement cotemporaneous with the note can be given. The case of *Eaton* v. *Crooks* (1910), 3 Alta. L.R. 1, referred to in *Frith* v. *Alliance Investment Co.* (1912), 5 D.L.R. 491, 4 Alta. L.R. 238; (1913), 10 D.L.R. 765, 6 Alta. L.R. 197; *Brocklebank* v. *Barter* (1914), 22 D.L.R. 209, 8 Alta. L.R. 262; *Bible* v. *Croasdale* (1919), 24 D.L.R. 763, 9 Alta. L.R. 133; *Magrath* v. *Collins* (1917), 37 D.L.R. 611, 12 Alta. L.R. 259; *Long* v. *Smith* (1911), 23 O.L.R. 121, lays down the principles upon which, it is clear, the evidence given in the present case was admissible, namely: that oral evidence is admissible to shew that a writing was not intended to contain all the terms of an alleged contract; but that there were, in fact, oral terms of the contract besides the written terms, the oral and written terms making together one entire contract of which, consequently, the written terms were only a part.

Here the agent for the plaintiff induced the defendant not only to buy the scales and the separator and to sign the note but to sign a long printed document which bears as endorsement the description "sales contract," with "statement of financial standing . . . for the purpose of obtaining an agency and credit," with a list of eight items of "suggestions" as to how the agent should conduct himself. The sales contract, while making the signatory a purchaser, clearly indicates that, substantially, he is an agent for the sale of the goods, the ownership and right of possession being retained by the plaintiff company. So that the promissory note sued on is evidently but a part of a contract, the so called "sales contract" is another; the oral terms constitute another, the three items making together the complete true contract.

Taking the two writings together I think it is quite clear that there is nothing inconsistent with them in the oral terms, the substantial effect of which is that the defendant might pay the note by returning the goods, or in other words resign his agency and return the goods; and that is what virtually he did.

In addition to *Eaton* v. *Crooks*, of the authorities there cited and discussed, reference may usefully be made to *McQuarrie* v. *Brand* (1896), 28 O.R. 69; *Bank of South Australia* v. *Williams* (1893), 19 Victoria L.R. 514; Russell on Bills of Exchange, 2nd ed., pp. 37 *et seq.*

I would therefore dismiss the appeal with costs.

Appeal dismissed.

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HOOPER v CITY OF NORTH VANCOUVER.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, McPhillips and Eberts, JJ.A. March 10, 1922.

MUNICIPAL CORPORATIONS (§IIC—70)—FREE TRANSPORTATION TO RESIDENTS ON MUNICIPAL FERRY—INTEREST OF RATEPAYER SEEKING TO ENJOIN—THREATENED LOSS OF REVENUE—ADDITIONAL TAXES ON RESIDENTS.

Where a municipal corporation, acting under a by-law and the general powers conferred by its city charter, confers on the residents of the corporation free transportation on its municipal ferries, a ratepayer as such has no right of action to enjoin the corporation from operating such ferry by reason of the fact that if loss is occasioned by the operation of such ferry such loss will fall on the ratepayers of the city.

[*Robertson* v. *City of Montreal* (1915), 26 D.L.R. 228, followed.]

APPEAL by the defendant from orders of Murphy, J, granting injunctions restraining the defendants from issuing free transportation passes on its ferries plying between Vancouver and North Vancouver. Reversed.

The judgment appealed from is as follows:—

As to the first objection that plaintiff cannot succeed in obtaining an interlocutory injunction because he has not shewn irreparable injury I am of opinion the objection should be overruled. "Irreparable injury" in injunction applications means an injury that cannot be adequately remedied by damages. Kerr, 5th ed., p. 19, and authorities there cited. The case at Bar is I think of this character. I am also of opinion that the material shews sufficiently that injury is threatened or intended to the plaintiff to justify his obtaining an interlocutory injunction. He is a ratepayer of defendant corporation. The corporation is operating the ferry in question. If such operation results in a deficit, plaintiff will be called upon to make same good in proportion to his liability as a ratepayer.

The third objection that the plaintiff has no interest to maintain this action inasmuch as he has shewn no special injury to himself is one on which I have with considerable difficulty reached a conclusion adverse to its validity. *Robertson* v. *Montreal*, 26 D.L.R. 228, is cited in support. In that case however, if I understand it aright, the plaintiff though a ratepayer had no interest *qua* ratepayer different from the interest of any resident of the city. No financial burden could devolve upon the ratepayers because of the granting of the franchise in question. Here the contrary is quite within the realms of possibility. On the other hand, there is the case of *MacIlreith* v. *Hart*, 39 Can. S.C.R. 657, which decides that where the acts impeached may materially affect to their detriment the in-

terests of the ratepayers an action such as this will lie. Further it is to be noted that Duff, J. in *Robertson* v. *Montreal, supra*, expressly reserves his opinion as to whether if the ground of attack be that the act complained of is *ultra vires* a ratepayer can or cannot bring an action impeaching same. *Ultra vires* is the ground relied upon in these proceedings.

As to the main question I am of opinion that the resolution in question is *ultra vires* because it goes beyond the authority given by by-law No. 392 to the council. Sec. 13 of the by-law states:

"The Council may by resolution from time to time grant free transportation and authorise the issue of passes to whom they may deem it advisable in the interests of the city to do so."

What the council has here done, in my opinion, in reality is not to exercise the power conferred by this section but to grant a discount on the regular fares to the persons mentioned in the resolution. This is the clear result of the resolution. It is urged that the greater includes the less and that the council having power to grant passes must necessarily have the power to give discounts on fares. But it is I think unquestioned law that a municipal council passing a resolution by virtue of an authority conferred by by-law must find within the language of the by-law clear empowering language for the terms of such resolution. To my mind, power to grant passes cannot be held to necessarily imply power to grant discounts on fares. If it was intended to grant such power express words doing so should have been used. This view I think is all the more cogent in the case at Bar because I agree that the empowering section of the Municipal Act of 1914, ch. 52, for this by-law is sub-sec. 26 of sec. 54 and not sec. 343. Said sub-sec. 26 requires approval by the Lieutenant-Governor in Council as a condition precedent to any by-law passed thereunder becoming operative. Obviously very different considerations would arise when any particular by-law was being considered for the approval by the Lieutenant-Governor in Council where the by-law authorised the granting of passes from where it proposed to empower a municipal council to grant discounts on rates. The ferry in question it was stated in argument serves not merely the residents of the defendant municipality but the residents of several other municipalities. The council of defendant municipality might not unreasonably be expected to exercise its powers with an eye solely to the benefit of the residents of the defendant municipality without regard to any unfavourable reaction on the interests of other municipalities forced to use the ferry. The Lieutenant-Governor in Council however being

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the executive for the whole Province would, it would seem, be called upon to view the conferring of powers such as are in question here from the standpoint of all persons likely to use the ferry.

If therefore the Lieutenant-Governor in Council is said to have granted such discriminating powers as are contended for, by defendant municipality that, in my opinion, must be shewn to have been done by explicit language set forth in the by-law. As stated I do not find this requisite in the by-law before me. The injunction is granted.

E. C. Mayers, and *A. C. Sutton*, for appellant.

E. P. Davis, K.C., and *W. E. Burns*, for respondent.

MACDONALD, C.J.A.:—In my opinion, the plaintiff had no right to bring this action, it should have been brought, if at all, in the name of the Attorney-General. The plaintiff has suffered no special damage, the most that has been contended for him is that, as a ratepayer of the City of North Vancouver, his interests will be injured by the acts complained of. Armour, C.J.O., in *Hope* v. *Hamilton Park Commissioners* (1901), 1 O.L.R. 477, succinctly states the law as follows at p. 479:—

"The rule is that no person may institute proceedings with respect to wrongful acts, which, if of a private nature are not wrongs to himself, and if of a public nature do not specially affect himself, and this rule applies equally to *ultra vires* transactions."

The subject is dealt with very fully in *Robertson* v. *City of Montreal* (1915), 26 D.L.R. 228, 52 Can. S.C.R. 30, where there was much difference of opinion. Murphy, J. in the Court below distinguishes that case from the case at Bar by saying, that the plaintiff there "had no interest *qua* ratepayer different from the interest of any resident of the city," while he thought in the case at Bar, the plaintiff *qua* ratepayer had an interest different from that of a mere inhabitant of the city. In other words, because the ratepayers of the City of North Vancouver may suffer an injury as such, they have a special interest apart from the inhabitants of the public generally which entitles the plaintiff as one of them to bring this action. With respect, I am unable to agree with this view of the law; the injury must be peculiar to the plaintiff to entitle him to bring the action, or must affect him in a manner different from that of others generally. I do not think any distinction can be drawn between the ratepayers of the municipality and the public generally sufficient to found this action in the plaintiff. The Judge, no doubt, had in mind the class of cases referred to by the Chief Justice of the Supreme Court in *Robertson* v.

City of Montreal, supra, and which he illustrates by the case of *Crampton* v. *Zabriskie* (1879), 101 U.S.R. 601, and in our own Courts is exemplified by *Dundee Harbour Trustees* v. *Nicol*, [1915] A.C. 550, 84 L.J. (P.C.) 74, where it was held that the person there rated could bring the action. The Harbour Commissioners were a quasi-private corporation with a limited membership, having funds specially applicable for the purpose for which the corporation was brought into being and were, therefore, trustees of the funds and the property of the corporation. The defendants, on the other hand, are a municipal corporation acting on behalf of the general inhabitants of the city as well as on behalf of those who are ratepayers. They have a ferry license and are operating a public ferry with funds not specially allocated to that purpose. The injury, if any, done in this case, is one which affects all ratepayers at least equally with the plaintiff, he suffers no peculiar damage and the action, therefore, assuming that it lies at all, should have been brought in the name of the Attorney General.

I would allow the appeal.

MARTIN, J.A. would allow the appeal.

GALLIHER, J.A.:—I would dismiss the appeal, agreeing in the conclusions reached by the trial Judge.

MCPHILLIPS, J.A.:—With great respect to the Judge who granted the injunction, (Murphy, J.) I cannot persuade myself that it is a proper case in which an injunction should have been granted—I cannot see that it all comes within the accepted scope of being upon a review of the facts just or convenient. In truth the injunction is highly inconvenient to the city corporation and I cannot see that the plaintiff has established even a *primâ facie* case of special damage or injury sustained by himself, (see *Elmhirst* v. *Spencer* (1849), 2 Mac. & Gn., 45, at p. 50, 42 E.R. 18.) At most, and I do not really consider that it is so—there might be damage or injury to the public, but upon that phase of the matter—the action would not be properly constituted, the Attorney-General not being joined—this Court passed upon that point in *Oak Bay* v. *Gardiner* (1913), 17 D.L.R. 802, 19 B.C.R. 391, (Also see *Hope* v. *Hamilton Park Com'ns.* (1901), 1 O.L.R. 477 and *Evan* v. *Corporation of Avon* (1860), 29 Beav. 144, 54 E.R. 581, 30 L. J. (Ch.) 165, 9 W.R. 84). Then, as to the necessity that there be special injury sustained by the plaintiff himself to give status to bring the action we have the case of *Robertson* v. *City of Montreal*, 26 D.L.R. 228—and I would in particular refer to the judgment of the Chief Justice (Fitzpatrick, C.J.,) at pp. 229, 230—here we have a ferry, the case in the Supreme Court

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had reference to autobusses—the analogy is complete enough and I would refer to the judgment of Duff, J. at pp. 236-7, 238-9, and Brodeur, J. at p. 243—it occurs to me that the *Robertson* case is conclusive and as there held in the absence of evidence of special injury sustained by the plaintiff he had no status entitling him to bring the action, (also see *MacIlreith* v. *Hart* (1908), 39 Can. S.C.R. 657, Davies, J., at pp. 661, 662).

In view of the opinion at which I have arrived, it really is unnecessary to trench upon or deal with the merits—but in passing I would refer to the case of the *Att. Gen.* v. *Cambridge Consumers Gas Co.* (1868), L.R. 4 Ch. 71, 38 L.J. (Ch.) 94, 17 W.R. 145, which was a well constituted one, that is the Attorney-General was joined—and the matter for consideration was the disturbance of the pavement of a town by an unincorporated gas company without lawful authority, for the purpose of laying down gas pipes, and it was held not to be a nuisance so serious and important that a Court of Equity would interfere by injunction preventing the doing of the work—There, as here, after all, there would be the interference with operations that are of public advantage—I would particularly refer to what Sir W. Page Wood, L.J., said at pp. 83, 84. Then the present case is by no means one of irreparable injury, (see *Fletcher* v. *Bealey* (1885), 28 Ch. D. 688, 54 L.J. (Ch.) 424, 33 W.R. 745).

The counsel for the respondent strenuously argued that the questioned resolution was *ultra vires* as going beyond the authority given by the by-law No. 392, sec. 13—and it was so decided by the Judge, I cannot agree with this. It is clear to me that all that has been done is well within the purview of the by-law approved by the Lieutenant-Governor in Council, the authority extended—was to "grant free transportation and authorised the issues of passes to whom they (the council) may deem it advisable in the interests of the city to do so." I fail to see that that which has been done in any way transcends the authority given the city council. It was pressed that the passes were not only to ratepayers but to residents of North Vancouver not residents necessarily of the City of North Vancouver—that if there was a profit it might well be said that it would enure to the advantage of the ratepayers of the city but if a loss it would be a loss falling upon the ratepayers of the city only—whilst this may be true yet the ferry after all is in its nature a public utility and to carry the public generally is a matter of public advantage and it assuredly will add to the revenue to have the public patronage and the decision must be that of the city council the authorised authority—is it reason-

able that there should be interference at the suit of one or more of the ratepayers? That would mean chaos and possible destruction of the ferry service—so essential to the advancement of the city—in that a very large proportion of the inhabitants of the City of North Vancouver and the surrounding districts, as of necessity, require this ferry service to go to and from their work in the City of Vancouver lying across Burrard Inlet which is the stretch of water the ferries traverse. The counsel for the respondent also greatly relied upon *Dundee* v. *Nicol*, [1915] A.C. 550—and that portion of the judgment of Duff, J. in the *Robertson* case, at p. 237—where that Judge said:—

"What I have said has, of course no necessary bearing upon any right a ratepayer might be supposed to have to impeach proceedings of the council to impose a tax or rate exigible from such ratepayer."

Could it be said that anything might reasonably ensue which would create the incidence of taxation? Duff, J. refers to something which might be said to favour an action such as the present one but I fail to see its imminence, the ferry service is being carried on—if at a loss it means taxation, if at a profit the possible lessening of taxation—but there is no threatened taxation consequent upon the course being pursued—and in any case as I view it, an *intra vires* step duly and properly authorised supported by the authority of an approved by-law passed within the ambit of statutory authority conferred upon the municipality—it would seem to me that the contention put forward by the counsel for the respondent does not fall within the ratio of *Dundee Trustees* v. *Nicol*,—nor within the quoted language of Duff, J. It would seem to me that the present case well falls within the language used by Duff, J. earlier on that same page 237, namely:—

"The governing body of a municipal corporation exercising law-making powers affecting the rights of all His Majesty's subjects, presents a very different hypothesis from a corporation administering private property only. For excess of powers in the first case (which is a wrong against the corporation or against the public as a whole) the appropriate remedy seems to be by way of some proceeding at the instance either of the corporation itself or of an authority representing the public."

Upon the whole I am of the opinion that the injunction was wrongly granted. In any case the action is not properly constituted to admit of the cause of action set up being adjudicated upon, there being no case of special damage or injury sustained

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by the respondent, and it is not a case of interference with any proprietary rights.

EBERTS, J.A. would dismiss the appeal.

Appeal allowed.

MILLER-MORSE HARDWARE Co. v. DOMINION FIRE INSURANCE Co.

Supreme Court of Canada, Idington, Duff, Anglin, Mignault and Bernier, JJ. February 7, 1922.

INSURANCE (§IIIE—75) — POLICIES COVERING STOCK-IN-TRADE AND FIXTURES—FRAUD OF INSURED IN FURNISHING PARTICULARS OF LOSS—RIGHTS OF ASSIGNEE OF POLICY—SASKATCHEWAN INSURANCE ACT, R.S.S. 1920, CH. 84, SEC. 82, CONDITIONS 19, 20, AND 21. Condition 21 of the statutory conditions of sec. 82 of the Saskatchewan Insurance Act, R.S.S. 1920, ch. 84, which provides that "any fraud or false statement in any statutory declaration in relation to any of the above particulars shall vitiate the claim of the person making the declaration" will vitiate a policy although the "person making the declaration" has assigned the policy after a fire has taken place and loss occurred, and acts in signing the fraudulent proofs of loss only as agent for the assignee.

[*Miller-Morse Hardware Co.* v. *Dominion Fire Insurance Co.* (1921), 61 D.L.R. 114, affirmed.]

APPEAL and cross appeal from the judgment of the Saskatchewan Court of Appeal (1921), 61 D.L.R. 114, reversing the judgment of Embury, J. (1920), 56 D.L.R. 738, in an action to recover the amounts due on certain policies of fire insurance. Affirmed.

P. M. Anderson, K.C., for respondent.

IDINGTON, J.:—I am of the opinion that the respective appeals in each of these cases should be dismissed with costs here and in the Courts below.

I agree so fully with the reasons assigned by the Court of Appeal (1921), 61 D.L.R. 114, in the judgment of Turgeon, J., that I see no useful purpose to be served by repetition of same here.

I may, however, be permitted to submit that the argument of counsel for the respondent here and set forth in his factum, as to the value of the goods destroyed, impresses me not only with the gross overstatement of the value of the goods destroyed, but also that his estimate is much nearer to the correct estimate of the basis of the loss sustained than the proof of loss statement sworn to by the insured or evidence bearing thereon.

Indeed a perusal of all the evidence given by Stockhammer and his wife, the insured, causes me to doubt if the actual facts have ever been reached. The evidence of the former is of a most unsatisfactory kind, and it was upon him that the re-

spondents had to rely in making up and presenting their claim. Unfortunately his wife, who was the insured, seems to have been so confiding and truthful that she seemed to sign and swear to whatever he desired and told her was right.

In that sense she may not have desired to commit perjury and the proper test is possibly the alternative of a false statement given in sec. 21 of the statutory conditions, which reads as follows:—

"21.—Any fraud or false statement in any statutory declaration in relation to any of the above particulars shall vitiate the claim of the person making the declaration."

I realise that reckless swearing without due regard to whether what is sworn to is true or false is clear evidence of fraud. But I think it is well to point out the alternative nature of the section in question. I am prompted to do so by the stress laid by counsel for appellant upon the charges of fraud and perjury as if all that could be in question might in such case be met by the argument he presents.

In order to meet the case made out by the findings of the trial Judge, counsel for appellant properly presents the argument that the mistakes relied upon are all side by side with the like sort of mistakes of fact made in a way to the detriment of the claim of the assured; and hence cannot be held fraud. He certainly presents some peculiarities of error tending to shew that a better statement might have been prepared, if all had been known to those preparing the proof of loss statement.

And if there had been nothing further in the case than the minor findings of the trial Judge and the Court bound, to proceed alone upon the grounds of fraud, then the charge so found might have to be confined to the alternative of false statement.

I only refer to this in deference to the argument presented here, and for the reason that the statutory conditions which in Saskatchewan and other provinces need to be observed, and especially so as they displace the rules laid down in many judicial decisions.

Of course during the argument I felt and still feel that each of these errors he points out tended to destroy the reliability of the statement in the proof of loss affidavit.

Perhaps the sooner the basis of truth presented in all such dealings as in question herein is rigidly insisted upon the sooner we will have a higher regard therefor manifested in the daily business of life.

It would seem advisable for the insurers and insured working under such a statute as that now in question to observe strictly

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its express language. I am prepared to hold upon that basis alone the appellant fails as well upon the ground taken by the Court of Appeal.

It is not necessary to pass upon any of the other grounds of defence as to the insurance upon goods, but a casual perusal of the evidence suggests some would be difficult to overcome.

As to the cross-appeal, the policy on the building was a separate one, otherwise the point would be well taken relative to the false statement. In the case of *Harris* v. *Waterloo Mutual Fire Ins. Co.* (1886), 10 O.R. 718, there was only one policy for both goods and buildings.

As to cancellation, the statutory condition does not seem to permit of summary cancellation.

As to the quantity of gasoline kept on the premises and the question raised thereupon by the cross-appeal, the evidence is not as clear as it might have been. I incline to think it fairly arguable but in deference to the opinion of the majority of the Court do not entertain so strong an opinion as to entitle me to dissent.

I, therefore, agree with the dismissal of the said cross-appeal.

DUFF, J.:—I concur in dismissing the appeal and cross-appeal with costs.

ANGLIN, J.:—I concur in the dismissal of both the appeal and of the cross-appeal.

MIGNAULT, J.:—Both Courts were of opinion that there were gross mis-statements in the proofs of loss of the stock in trade sworn to by the insured, Mary Stockhammer, and filed by the appellant as part of its case. The difference of opinion was as to the effect of statutory condition 21 of the policies which read as follows:—

"21.—Any fraud or false statement in any statutory declaration in relation to any of the above particulars shall vitiate the claim of the person making the declaration."

The trial Judge construed strictly the words "person making the declaration" and, as the appellant was not the person who had signed the proofs of loss, held that the mis-statements of Mary Stockhammer did not vitiate its claim. The Court of Appeal, on the contrary, was of opinion that in signing the proofs of loss Mary Stockhammer had acted as the agent of the appellant, which had adopted these proofs and made them a part of its case, and it was, therefore, held that the condition applied.

The insurances in question were taken out late in December, 1916, with the view of securing the claim of the appellant, a creditor of Mary Stockhammer, a married woman, who carried

on trade under the name of Khedive Trading Co., the insurance moneys being however made payable to the insured. The fire took place on January 1, 1917, and on the 9th of that month Mary Stockhammer assigned the policies to the appellant. The respondent repudiated liability and in the beginning of March Mary Stockhammer signed a declaration purporting to furnish proofs of loss and this declaration was sent to the respondents by the firm of solicitors which now represents the appellant.

Under all the circumstances it is difficult to escape the conclusion that Mary Stockhammer, in furnishing proofs of loss under policies which she had previously assigned to the appellant, acted on behalf of the latter and as its agent. What is certain is that the appellant itself has made these proofs of loss a part of its case and relies on them to obtain judgment against the respondents. I would apply the maxim *qui facit per alium facit per se*.

The appellant objects that no proof of loss at all were necessary inasmuch as the respondents repudiated liability. The appellant however did furnish these proofs and having done so it brings itself under the conditions of the policies as to fraud and mis-statements.

I have come to the conclusion, in view of the special circumstances of this case, that the appellant's claim for the loss of Mary Stockhammer's stock of merchandise is vitiated by the false statements contained in the proofs of loss. This however does not affect the appellant's right of recovery of the insurance of the building, which right was recognised by the Court of Appeal. Consequently both the appeal of the appellant and the cross-appeal of the respondents in connection with the insurance of the building should be dismissed with costs.

BERNIER, J.:—I would dismiss the three appeals of the appellant for the following reasons:—

1. A review of the oral and documentary evidence has convinced me that false and fraudulent representations were made in the insured's application in order to obtain policies on her stock, and store fixtures.

These representations consist of (a) The excess valuation made of goods in the store of the insured at the time of, and in, her application, and (b) The insured, in answer to questions, stated that her merchandise contained no goods, bought at so much per cent on the dollar.

These representations have been planned and desired as much by the insured herself as by her husband, who had power of

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attorney regarding the business, and especially in obtaining the policies in question.

The valuation of the goods has been exaggerated to such an extent that I have come to the conclusion that it was fraudulently made.

Merchandise, valued $8,200, had been bought from Mr. Farnum. In answer to the question to ascertain whether this stock, or a part of it, had been bought for so much per cent on the dollar, the reply was in the negative. The evidence shews that the merchandise had been bought at 85 cents on the dollar, and that $6,970 had been paid instead of $8,200.

Mr. Thompson, general agent of the defendant, the Dominion Fire Ins. Co., and B. H. Guy, the agent of the other two defendants, had declared in their evidence that their companies do not insure goods bought at so much per cent on the dollar, and they would not have accepted this insurance, had they known of this

These representations are, therefore, material according to the statute of the Province; the answers were consenting guarantees of the contracts and accordingly affected them.

In my opinion, the answers not only affected the extent of the risk but the nature of it as well. In fact the witnesses call these "prohibited risks," and give their reason for doing so. Furthermore, from their evidence it can be seen, that if their companies had assumed the risk, the premiums would have been greater.

In a letter of December 9, 1916, written by the insured's husband, to the appellant, it is said that merchandise bought from Mr. Farnum was valued at $12,800. But the appellants were accused by the insured of making out the insurance for her. This letter, in my opinion, tends to throw light on the fraud planned between the insured and her husband in order to obtain a larger amount of insurance than that specified in the policies.

2. The statutory declaration requisite in order to establish the amount of fire loss contains false statements, of such seriousness that it is equally impossible to determine whether it was done by mistake or not.

The Court of first instance and the Court of Appeal are unanimous on this point, and notwithstanding the argument which the appellant's counsel delivered in his factum and supplementary memorandum, I must oppose him.

I cite as an example, the following fact, putting aside arguments on more important points concerning the value of the

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merchandise destroyed by fire. The insured's proof of loss contains the following:—

"[The property] was totally destroyed and damaged and was entirely consumed and no part thereof salvaged."

But how can this answer conform with that of Mr. Brewster, valuator of the two companies, who said that after the fire, there was $1,000 worth of goods not destroyed. The appellant gives as a reason for the mis-statements in her application, that the answers were written by Mr. Fladager, who was the insurance company's agent. I cannot be of this opinion in view of the following clause in the application:—

"And it is further agreed that if the agent of the company fills up or signs this application, he will in that case be the agent of the applicant, and not the agent of the company."

This clause achieves its purpose and is in no way affected by the provincial statute.

3. Regarding the question of law on which there was a difference of opinion between the Court of first instance and the Court of Appeal. I agree with the Court of Appeal, and concur with the arguments of Turgeon, J., who delivered judgment for Court of Appeal. I am of the opinion that the three appeals of appellants should be dismissed, that the judgment of the Court of Appeal should be sustained in its entirety in dismissing the three appeals with costs, and the cross-appeal of the Dominion Fire Insurance Co. also with costs.

Appeal and cross appeal dismissed.

LITTLE v. ATT'Y-GEN'L FOR BRITISH COLUMBIA.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, McPhillips and Eberts, JJ.A. March 10, 1922.

CONSTITUTIONAL LAW (§IIA—233)—B.C. GOVERNMENT LIQUOR ACT, 1921 STATS., CH. 30—PROVINCIAL GOVERNMENT TAX ON LIQUOR IMPORTED —VALIDITY.

The tax imposed by sec. 55 of the B.C. Government Liquor Act (B.C. Stats. 1921, ch. 30), which says in effect that any person in the Province becoming possessed of imported liquor must report the fact and pay to the Government such a tax on such liquor as will in the opinion of the Board of Liquor Control put the Province in the position it would have been in if the holder of such liquor had purchased it from the Government stores, is a direct tax and within the power of the Provincial Legislature.

[*Little* v. *Att'y-Gen'l for British Columbia* (1921), 60 D.L.R. 335, affirmed.]

APPEAL by the plaintiff from judgment of Clement, J., in an action for a declaration that plaintiff is not liable for the tax imposed by sec. 55 of the B.C. Government Liquor Act (B.C.

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Stats 1921, ch. 30) on liquor imported from another Province. Affirmed.

E. P. Davis, K.C., for appellant.

E. C. Mayers, for respondent.

MACDONALD, C.J.A.:—I am of the opinion that the trial Judge, 60 D.L.R. 335, has come to the right conclusion. The tax in question is a direct tax—*Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575, 56 L.J. (P.C.) 87; *Workmen's Compensation Board* v. *C.P.R. Co.* 48 D.L.R. 218, [1920] A.C. 184, 88 L.J. (P.C.) 169. It is, therefore, *primâ facie* at least within 55 (2) of sec. 92 of the British North America Act, 1867, giving exclusive powers of legislation in respect thereto to the Provincial Legislatures. I do not think there is any force in the contention that the tax is, in effect, a custom's duty, or even that it is an attempt on the part of the Province to prevent the importation of liquor into the Province by imposing a prohibitory tax in furtherance of the scheme of the Liquor Act, 1921 (B.C.), ch. 30, to vest in the Province a monopoly of the liquor traffic. While it is a maxim of our law that that which cannot be legally done directly cannot be legally done indirectly, yet it is not true that the Provincial legislature cannot do that which is within its legislative powers, because the effect of what it does may indirectly affect those subjects over which the Parliament of Canada has been given jurisdiction.

If there were no such Act on the statute book as the Liquor Act and the Province had put a heavy tax on liquor within the Province held for private or domestic consumption, it could hardly have been contended that such a tax would have been illegal though the effect of it would have been to reduce the quantity of liquor imported into the Province and thus to lessen the revenue of the Dominion from customs duties. But because the tax is part of the scheme of the Liquor Act, or at all events, is authorised by a section of that Act, it is contended that it must be otherwise. As was said by Duff, J., in *Gold Seal Ltd.* v. *Dominion Express Co.* (1921), 62 D.L.R. 62, 62 Can. S.C.R. 424, the distinction between legislation in relation to a particular subject and legislation which merely affected that subject must be kept clearly in mind when construing legislation of the Dominion, or of one of the Provinces. A high tax on any commodity the subject of import into British Columbia will have the effect of lessening the volume of importation and thus will affect the Dominion's revenue from custom's duties, but if the tax is within the power of the Province to impose, that fact does not make the imposition of the tax illegal.

But, if it be inferred from the context of the Liquor Act that sec. 55, the section which imposes the tax complained of, was not passed in the interests of the revenue, but as a means of controlling the liquor traffic in the Province, yet its imposition, in my opinion, would still be within the power of the Province.

If for the purposes of the Act, liquor once within the Province may be controlled by prohibition of its sale in the Province under the powers assigned to Provincial Legislatures to legislate upon matters of a local or private nature in the Province, I can see no reason why the power should not be held to extend to the imposition of a tax on liquor with the view of effectuating or assisting in that control.

I would, therefore, dismiss the appeal.

MARTIN, J.A., would allow appeal.

GALLIHER, J.A. :—I agree with the Chief of Justice.

McPHILLIPS, J.A.:—This appeal, in my opinion, fails. The trial Judge, Clement, J., has set forth his reasons for judgment in a very clear and succinct manner. The counsel for the appellant, Mr. Davis, in his very able argument at its Bar first submitted that the challenged sec. (55) of the Government Liquor Act, (ch. 30, (B.C.) 1921), is *ultra vires* as offending against sec. 121 of the B.N.A. Act 1867, which reads as follows:—

"All Articles of the Growth, Produce or Manufacture of any of the Provinces shall from and after the Union be admitted free into each of the other Provinces."

And the counsel for the appellant greatly relied upon *Att'y-Gen'l for Ontario* v. *Att'y-Gen'l for the Dominion*, [1896] A.C. 348, 65 L.J. (P.C.) 26, and contended that, in its effect, *Gold Seal Ltd.* v. *Dominion Express Co.* (1921), 62 D.L.R. 62, was not an authority in his way. I must admit that, during the argument, this contention weighed with me very considerably upon this line of reasoning that, although there was no attempt to at the boundary of the Province impose a customs duty which would be palpably beyond the powers of the Province, what was being done was the imposition of what, in effect, was a customs duty in an indirect way—whilst there was no interference with the entry of the liquor into the Province, the taxation levied was equivalent to the imposition of a customs duty. However, after careful consideration of this point, fortified as we'l by the reasons for judgment of Duff, J. (p.76), Anglin, J. (p. 83) and Mignault, J. (p. 88) in the *Gold Seal* case 62 D.L.R. 62, I am satisfied that sec. 121 (B.N.A. Act) is only referable to the levying of custom duties or other similar charges and would not

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extend to any inhibition of taxation as set forth in sec. 55 (ch. 30, (B.C.) 1921). That is, it is the imposition of a direct tax upon property within the Province and cannot be said to be a customs duty or import tax upon property brought into the Province. Once the liquor, i.e., the property subject to taxation is within the Province, it cannot be said that any magic attaches to it or that it is immune from Provincial taxation, because, as in the first case, it was liquor imported from one of the other Provinces of the Dominion. The liquor being within the Province—property in the Province—it follows that it must be subject to the incidence of taxation, and the taxation imposed is a direct tax. Lord Hobhouse in delivering the judgment of their Lordships of the Privy Council in *Bank of Toronto* v. *Lambe*, 12 App. Cas. 575 at p. 585, said:—

"Their Lordships . . . . hold that as regards direct taxation within the province to raise revenue for provincial purposes, that subject falls wholly within the jurisdiction of the provincial legislatures."

In *C.P.R.* v. *Workmen's Compensation Board* (48 D.L.R. 218), [1920] A.C. 184, it stated at p. 221: "In *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575, it was decided by the Judicial Committee that a Province could impose direct taxes in aid of its general revenue on a number of banks and insurance companies carrying on business within the province, and none the less that some of them were, like the respondents, incorporated by Dominion Statute. The tax in that case was not a general one, and it was imposed, not on profits nor on particular transactions, but on paid-up capital and places of business. The tax was held to be valid, notwithstanding that the burden might fall in part on persons or property outside the Province."

The method adopted or scale fixed for the imposition of the taxation gave me some anxious thought for a time in that it might be said to trench upon the Regulation of Trade and Commerce (sec. 91, No. 2 B.N.A. Act) in that plainly in the scale fixed for the taxation imposed (sec. 55 (1)) this language appears:—

"Shall pay to the Board for the use of His Majesty in right of the Province a tax to be fixed by the Board either by a general order or by a special order in any particular case at such rates as will, in the opinion of the Board, impose in each case a tax equal to the amount of profit which would have accrued to the Government in respect of the liquor so taxed if it had been purchased from a Government Liquor Store, increased by

the addition to that amount of an amount equal to ten per centum thereof."

This indicated procedure for the determination of the amount of the tax involves the imposition upon the owner of liquor imported and not bought from a Government liquor store of a double profit plus 10%, as, undoubtedly, in buying outside the Province the trade profit is part of the purchase price, but, in the end, can this be said to be other than a scale? It is conceivable, of course, that the effect may well be to discourage purchases of liquor from without the Province and bring about purchases only from the Government liquor stores, but, if the imposition is a direct tax upon property, can it be said that it trenches upon the Regulation of Trade and Commerce. That it may effect business conditions and reduce, if not eliminate, purchases of liquor from without the Province, cannot be said to trench upon the exclusive authority of the Parliament of Canada to legislate upon "the regulation of trade and commerce." *Parsons* case, (1881) 7 App. Cas. 96, 51 L.J. (P.C.) 11, shews that there may be cases where the statute law relates to property and civil rights in the Province and not amount to a regulation of trade and commence, and, in my opinion, the challenged legislation in the present case cannot be said to be in its nature a regulation of trade and commerce—and that the legislation is competent and *intra vires* of the Legislative Assembly of British Columbia—as being within the meaning of the exclusive powers conferred upon the Provincial Legislature, namely, under sec. 92, sub-secs. (2), (13), (16), namely (a) direct taxation within the Province in order to raise a revenue for provincial purposes—(b) property or civil rights in the province, and (c) generally, all matters of a merely local or private nature in the Province (also see *Virgo's* case, [1896] A.C. 88; *Manitoba Liquor Act* case, [1902] A.C. 73; *Att'y Gen'l for Ontario* v. *Att'y Gen'l for Dominion*, [1896] A.C. 348; *Montreal* v. *Montreal Street Railway*, 1 D.L.R. 681, [1912] A.C. 333; *John Deere Plow Co.* v. *Wharton* 18 D.L.R. 353, [1915] A.C. 330; *Tennant* v. *Union Bank*, [1894] A.C. 31, 63 L.J. (P.C.) 25; *Quong Wing* v. *R.* (1914), 18 D.L.R. 121, (49 Can. S.C.R. 440,) at pp. 124-5 per Fitzpatrick, C.J.; *Canada Southern Ry.* v. *Jackson* (1890), 17 Can. S.C.R. 316; *Smylie* v. *Reg.* (1900), 27 A.R. (Ont.) 172; *Montreal* v. *Beauvais* (1909), 42 Can. S.C.R. 211; *Smith* v. *London* (1909), 20 O.L.R. 133; *Beardmore* v. *Toronto* (1910), 21 O.L.R. 505).

It follows that, in my opinion, the appeal should be dismissed.

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EBERTS, J.A.:—This is an appeal from the judgment of Clement, J. in a case in which the plaintiff claimed for a declaration that he was under no obligation to comply with the demand of the Liquor Board made by virtue of Resolution No. 79 of the Board, passed under the provisions of sec. 55 of the Government Liquor Act, ch. 30, (B.C.) 1921, for payment of $11 in respect of a case of whisky purchased in the Province of Alberta, and imported by plaintiff into British Columbia.

The above action was dismissed. Mr. Davis contended that (1) sec. 55 of the Liquor Control Act and Regulation 79 passed thereunder, were *ultra vires;* (2) that the said Act was contrary to the provisions of sec. 121 of the B.N.A. Act; (3) that the legislation was a matter of trade and commerce.

The incidence of this tax is equal in all cases of liquor held for consumption within the Province, whether bought from a Government vendor or purchased outside the Province, that is to say, if purchased from a Government vendor, a certain addition is made to the cost price paid by the Government as representing profit upon the transaction. If purchased outside the Province, a similar addition is made to the cost price and imposed upon the purchaser of such liquor, so that whether bought from the Government vendor within or an independent vendor without the Province, the cost is the same to the person holding such liquor for consumption, within the Province, in the latter case the addition is made up by means of this tax in question by virtue of sec. 92, (2) B.N.A. Act, and levied directly upon the person so holding such liquor. The impost of 10% being merely, in my opinion, a measure enacted by way of additional security for effectuating the policy of the Act, whereby complete supervision and control of liquor to be consumed within the Province may be exercised.

I would dismiss the appeal.

Appeal dismissed.

WADIN v. BOYD.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon and McKay, JJ.A. March 6, 1922.

VENDOR AND PURCHASER (§IE—27)—AGREEMENT FOR SALE OF LAND—CANCELLATION—INADEQUACY OF CONSIDERATION—EVIDENCE OF FRAUD—CONSIDERATION OF CIRCUMSTANCES UNDER WHICH AGREEMENT ENTERED INTO.

Where the alleged consideration for the cancellation of an agreemen for the sale of land is so inadequate as to amount in itself to evidence of fraud, it is ground for cancelling the transaction, and in considering this question it is proper for the Judge to take into consideration the manner and circumstances in which the agreement was drawn and to consider the evidence as a whole.

[*Wadin* v. *Boyd* (1921), 60 D.L.R. 551, affirmed.]

APPEAL by defendant from the trial judgment (60 D.L.R. 551) in an action on an agreement for the sale of a farm. Affirmed.

C. E. Gregory, K.C., for appellant.

P. M. Anderson, K.C., for respondent.

The judgment of the Court was delivered by

McKAY, J.A.:—The respondent brings this action in an agreement for sale, dated March 27, 1920, of certain land and chattels sold by respondent to the appellant for the sum of $7,000, on which a cash payment of $1,500 was made, and the balance, less a mortgage of $1,200, assumed by appellant, was to be paid on time by crop payments.

The appellant alleges that this agreement was cancelled by agreement dated March 22, 1921. The respondent denies this, and contends that he was induced to sign the last mentioned agreement through the fraud of the appellant, and asks for its cancellation. The trial Judge (60 D.L.R. 551) found in favour of and gave judgment for the respondent. From this judgment, the appellant appeals.

The evidence as to how the alleged cancellation agreement came to be signed by the respondent is very contradictory. The appellant and Mr. Bright, who drew the agreement, asserting it was signed in pursuance of an agreement to settle arrived at between respondent and appellant, and respondent contending it was not signed as a settlement of their differences, but only as a start or preliminary to a settlement, and that the settlement was to be made on the following Monday. It appears that appellant was in default at this time, not having delivered to respondent his one-half share of the crop for 1920. The respondent is a foreigner and cannot read English.

In the course of his reasons for judgment the trial Judge makes the following findings among others: (60 D.L.R. at p. 552)

"The plaintiff received in cash and wheat $1,650 for chattels and crop worth $3,725; a balance due him $2,075, and it is alleged that the plaintiff agreed to cancel the original agreement in consideration of the $200 worth of improvements."

I cannot believe that the plaintiff intended entering into any such agreement. The plaintiff is illiterate and cannot read or write English. The cancellation agreement was prepared by one Bright, a bank maneger, who was supposed to be acting for both parties. He drew up the original agreement for sale. Many of the clauses in the form containing covenants by the purchaser were struck out. It would seem to me that Bright

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acted only in the interest of the purchaser when the original agreement was drawn, and I can quite understand him so acting when the alleged cancellation agreement was drawn. Bright's evidence was that the plaintiff understood the cancellation of the agreement when he signed it. I cannot believe that and think that Bright must be mistaken. I believe the evidence of the plaintiff, that he insisted on getting his half share of the crop that had been grown by the defendant before he would settle, and that he signed the cancellation agreement in the belief that he was signing a preliminary document and was told that if he would sign that document the settlement could be made the following Monday. Kerr on Fraud, 4th ed. p. 184, states:—

'But inadequacy of consideration if it be of so gross a nature as to the amount in itself to evidence of fraud is a ground for cancelling a transaction.'

The consideration alleged here is so inadequately gross that I think it is evidence of fraud. I would therefore cancel the agreement of March 22, 1921."

Counsel for appellant urged that the trial Judge was wrong in above findings, and that he should not have been influenced by the deletion of the clauses favourable to the respondent in the original agreement, as the respondent had not asserted any claim that said agreement was not drawn up as he wanted it.

In my opinion, the trial Judge was correct in taking into consideration the manner in which said agreement was drawn by Mr. Bright. It was not necessary for respondent to take formal or any objection to it in order to give the trial Judge the right to consider it. It is a circumstance which he had a right to consider in considering the evidence as a whole.

Appellant's counsel also urged that the respondent had acted on the alleged cancellation agreement. (1) by seeding the land in question in 1921, and (2) by registering the withdrawal of the caveat.

(1) As to seeding the land. The evidence shews that respondent did not do this under the alleged cancellation agreement. Before the said agreement was signed, and before any alleged verbal settlement was arrived at, the appellant had decided to abandon, and did abandon the land, and had moved the chattels away therefrom. And after this action was commenced (according to appellant's own evidence, about May 17, 1921) the respondent inquired of appellant if he intended to put in a crop on the said land, and his reply was that he did not intend to do so; thereupon the respondent seeded some of the

land. In my opinion, the respondent did not seed the said land as a result of the alleged cancellation agreement, but to prevent it from lying idle and deteriorating.

(2) There is no evidence that the withdrawal of the caveat was ever registered. There is ample evidence to support the findings of the trial Judge, and as he saw and heard the witnesses give their evidence, and believed the evidence of the respondent, this Court should not disturb his findings unless satisfied he is wrong. I have carefully read the evidence, and I cannot satisfy myself he was wrong. I would therefore dismiss the appeal with costs.

Appeal dismissed.

CITY OF HALIFAX v. LYALL & SONS CONSTRUCTION CO.

Nova Scotia Supreme Court, Harris, C.J., Russell, J., Ritchie, E.J., and Mellish and Rogers, JJ. April 28, 1922.

CONSTITUTIONAL LAW (§IA—20)—COMPANIES FEDERAL CHARTER—OBJECT TO CONSTRUCT BUILDINGS IN ANY PART OF CANADA—CITY CHARTER IMPOSING LICENSE FEE—VALIDITY.

Section 540 (1) of the city charter of the City of Halifax which is as follows: "Every person, firm or company, not a resident in the Province, who enters into any contract for the construction or alteration of any building in the city shall before beginning any work under such contract, pay to the city a license fee equal in amount to one-half of one per cent. of the total sum payable under such contract provided however that the provisions of this section shall not apply to any such person, firm or company which at the time of entering into any such contract is assessed for purposes of taxation by the city in the sum of five thousand dollars or upwards" is *ultra vires* and cannot be enforced against a company incorporated under an Act of the Parliament of Canada with power to do business in any part of Canada and one of whose objects is the construction of buildings, although it has no place of business in Nova Scotia except a temporary office in connection with work to be done in the City of Halifax.

[*John Deere Plow Co.* v. *Wharton*, 18 D.L.R. 353, [1915] A.C. 330; *Great West Saddlery Co.* v. *The King*, 58 D.L.R. 1, [1921] 2 A.C. 91, 90 L.J. (P.C.) 102, applied. See Annotation on Companies, 18 D.L.R. 364.]

CASE stated for the opinion of the Supreme Court of Nova Scotia as to the liability of the defendant company to pay a license fee to the City of Halifax under sec. 540 of the City Charter. Section held ultra vires.

J. McG. Stewart, K.C., and *Marshall Rogers*, for defendant.

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

HARRIS, C.J.:—A case has been stated for the opinion of the Court as to the liability of the defendant company to pay a license fee to the City of Halifax under sec. 540 of the City Charter. That section reads as follows:—

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"540. (1) Every person, firm or company not a resident in the province, who enters into any contract for the construction or alteration of any building in the city shall, before beginning any work under such contract, pay to the city a license fee equal in amount to one-half of one per cent of the total sum payable under such contract, provided, however, that the provisions of this section shall not apply to any such person, firm or company which at the time of entering into any such contract is assessed for purposes of taxation by the city in the sum of $5,000 or upwards.

(2) Every person, firm or company who contravenes or fails to comply with the provisions of this section, and the agent, foreman or other person in charge of the work on any such contract in behalf of any such person, firm or company, shall be liable to a penalty not exceeding double the amount of said license fee so payable, and in default of payment, to imprisonment for a period not exceeding 30 days, and in addition thereto, the amount of such license fee may be recovered by action in the name of the city, and in any such action against any person, firm or company out of the Province service of the writ of summons or other process upon any such agent or foreman shall be good and sufficient service upon such person, firm or company."

The defendant company is a body corporate, incorporate under an Act of the Parliament of Canada with power to do business in any part of Canada, and one of its objects is the construction of buildings. Its head office is at Montreal in the Province of Quebec and it has no place of business in Nova Scotia other than a temporary office in connection with the work to be done under the contract hereafter referred to.

The company made a contract with the Bank of Montreal for the construction of a building in the City of Halifax for the sum of $265,000 and the City of Halifax claims a license fee of one half of one per cent equal to $1,325 under the section of the City Charter referred to.

The point raised by the defendant company is that the section of the City Charter in question—a statute of the Provincial Legislature—is *ultra vires* as against defendant company and counsel rely on the two cases of *John Deere Plow Co.* v. *Wharton*, 18 D.L.R. 353, [1915] A.C. 330 and *Great West Saddlery Co.* v. *The King*, 58 D.L.R. 1, [1921] 2 A.C. 91, 90 L.J. (P.C.) 102.

In the former case Viscount Haldane, L.C., thus refers to the legislation in question there at pp. 354-5: he said:—

"It has been held by the Court below that certain provisions of the B. C. Companies Act have been validly enacted by the provincial legislature. These provisions prohibit companies which have not been incorporated under the law of the province from taking proceedings in the Courts of the province in respect of contracts made within the province in the course of their business, unless licensed under the Provincial Companies Act. They also impose penalties on a company and its agents if, not having obtained a license, it or they carry on the company's business in the province. The appellant was refused a license by the registrar. It was said that there was already a company registered in the province under the same name, and sec. 16 of the provincial statutes prohibits the grant of a license in such a case. The question which has to be determined is whether the legislation of the province which imposed these prohibitions was valid under the B.N.A. Act."

After referring to secs. 91 and 92 of the B.N.A. Act and discussing the relevant subsections, the Lord Chancellor proceeded at pp. 360-1:—

"It is enough for present purpose to say that the province cannot legislate so as to deprive a Dominion company of its status and powers. This does not mean that these powers can be exercised in contravention of the laws of the province restricting the rights of the public in the province generally. What it does mean is that the status and powers of a Dominion company as such cannot be destroyed by provincial legislation. This conclusion appears to their Lordships to be in full harmony with what was laid down by the Board in *Citizens Insurance Co.* v. *Parsons*, 7 A.C. 96; *Colonial Building Association* v. *Att'y-Gen'l for Quebec*, 9 A.C. 157; and *Bank of Toronto* v. *Lambe*, 12 A.C. 575.

It follows from these premises that these provisions of the Companies Act of British Columbia which are relied on in the present case as compelling the appellant company to obtain a provincial license of the kind about which the controversy has arisen, or to be registered in the province as a condition of exercising its powers or of suing in the Courts, are inoperative for these purposes. The question is not one of enactment of laws affecting the general public in the province and relating to civil rights, or taxation, or the administration of justice. It is in reality whether the province can interfere with the status and corporate capacity of a Dominion company in so far as that status and capacity carries with its powers conferred by the Parliament of Canada to carry on business in every part

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of the Dominion. Their Lordships are of opinion that this question must be answered in the negative."

And again, at p. 363, he said:—

"It might have been competent to that legislature to *pass laws applying to companies without distinction, and requiring those that were not incorporated within the province* to register for certain limited purposes, such as the furnishing of information. It might also have been competent to enact that any company which had not an office and assets within the province should, under a statute of general application regulating procedure, give security for costs. But their Lordships think that the provisions in question must be taken to be of quite a different character, and to have been directed to interfering with the status of Dominion companies, and to preventing them from exercising the powers conferred on them by the Parliament of Canada, dealing with a matter which was not entrusted under sec. 92 to the Provincial Legislature."

The provisions of the local statute in question in that case were the same in effect as the section of the City Charter in question except that in the *John Deere Plow* case the statute prevented the company unless registered from maintaining proceedings in the provincial Courts in respect to any contract made within the Province and except also that there was a statute of the Province prohibiting the grant of a license where there was another company of the same name upon the register. It is, however, to be noted that in their Lordships' judgment, neither of these provisions are mentioned as affecting the decision and it is quite evident that the judgment of their Lordships would have been the same if these provisions had not existed.

It is to be noted that in the case at Bar the legislation does not apply to all companies without distinction. It is aimed directly at extra-provincial companies and persons and firms not resident in the Province and, in that respect, it seems to be within the very words last quoted from their Lordships' decision.

In the *Great West Saddlery Co.*, case there were four different companies all incorporated under Dominion legislation and which were alleged to have infringed the statutes of the provincial Legislatures of Ontario, Saskatchewan and Manitoba by carrying on business in those provinces without being registered or licensed according to provincial requirements. The provisions of the Saskatchewan Act were substantially the same as the provisions of the section of the City Charter in

this case. Viscount Haldane, delivering judgment, in referring to the Saskatchewan legislation, said at p. 27:—

"If the Act had merely required a Dominion company, within a reasonable time after commencing to carry on business in Saskatchewan, to register its name and other particulars in the provincial register and to pay *fees not exceeding those payable by provincial companies*, and had imposed upon it a daily penalty for not complying with this obligation, it could (their Lordships think) be supported as legitimate machinery for obtaining information and levying a tax. But the effect of imposing upon such a company a penalty for carrying on business while unregistered is to make it impossible for the company to enter into or to enforce its ordinary business engagements and contracts until registration is effected, and so to destroy for the time being the status and powers conferred upon it by the Dominion."

And, again, at p. 27:—

"Section 25 of the Saskatchewan Act, which requires a Dominion company to obtain a license, stands on the same footing as the enactments in Ontario and Manitoba which have been held void as *ultra vires;* and in this case also the restrictions on the holding of land are not severable from the licensing provisions and are invalid on that ground."

I am of opinion that these cases are conclusive against the plaintiff's contention in this case and that the defendant is not liable to pay the license fee or tax sought to be imposed under sec. 540 of the Halifax City Charter, and there should be judgment for the defendant with costs.

RUSSELL, J.:—I think that the substantial question to be decided in this case is simply whether the enactment that has been attacked is a law to impose a direct tax upon the defendant company, and I cannot regard it as having any other object. I do not think that the decisions in the *John Deere Plow Co.* v. *Wharton*, 18 D.L.R. 353, or in *Great West Saddlery Co.* v. *The King*, 58 D.L.R. 1, were ever intended to overrule the earlier case of *Toronto Bank* v. *Lambe* decided by the same tribunal in 1887 and reported in 12 App. Cas. 575. On the contrary, the case last mentioned is expressly referred to by Lord Haldane in the *John Deere Plow Co.* case with approval as authority for the proposition that a Dominion company cannot escape the payment of taxes even though these may assume the form of requiring, as the method of raising a revenue a license to trade. The words which follow seem to suggest that such a license provision to be *intra vires* must be one which affects a

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Dominion company in common with other companies. But I cannot assume that it was intended to oblige the provincial authorities to make their tax by way of license extend to companies incorporated by the Provincial Legislature if, as to them, they could devise more effective modes of taxation.

In the later case of *Great West Saddlery Co.* v. *The King*, the conditions precedent to doing business by a Dominion company within the province were considered objectionable because in the words of Lord Haldane "these conditions do not appear to their Lordships to be merely a means for the attainment of some exclusively provincial object, such as direct taxation for provincial purposes." (58 D.L.R. 1 at pp. 7, 8.) The statutes referred to in the two Privy Council cases were held to be *ultra vires* because if held *intra vires* they would have the effect of destroying or impairing the status of Dominion companies. I do not think that the status of a company, any more than that of an individual is impaired by imposing a tax or by exacting penalties for non-payment or enacting provisions to secure payment. I think that the law with reference to the question involved still continues to be as stated by the Chief Justice of Canada in 15 D.L.R. 332, at p. 336 that, "the decisions of *Bank of Toronto* v. *Lambe* are undoubtedly authority for the exercise of the licensing power where the license is a *bona fide* exercise of the taxing power of the province."

I am of opinion that the statute in question is in this case a *bona fide* exercise of the taxing power of the Province. That power cannot be denied to the Province because of its liability to be abused (see 12 App. Cas. 575 at p. 586) nor because its abuse might have the effect of destroying the powers of the Dominion Legislature. This latter is an American idea which there is no necessity for applying in the interpretation of our constitutional Act because there is always the power of disallowance which does not exist in the constitutional system of the United States.

RITCHIE, E. J. :—The question involved comes before the Court under a stated case which is as follows:—

"1. The plaintiff is a body corporate under an enactment of the Legislature of Nova Scotia known as the 'Halifax City Charter.' 2. The defendant is a body corporate incorporated under an enactment of the Parliament of Canada and having as one of its objects the construction of buildings. 3. On or about the day of the defendant entered into a contract with the Bank of Montreal for the construction of a building for the bank in the city of Halifax for

the sum of $265,000 and the defendant has since been and is at the date hereof engaged in the work of constructing such building under the said contract."

4. Section 540 (1) (2) of the Halifax City Charter is as follows:—

(Section 540 (1) (2) cited in judgment of Harris, C.J.)

5. Under the foregoing enactment the plaintiff city by its assessor has sought to impose upon the defendant a license fee tax of $1,325 being the rate of one-half of one per cent on the amount of the foregoing contract.

6. The head office of the defendant company is at Montreal in the province of Quebec; it has no place of residence or business in the Province of Nova Scotia other than a temporary office on the site of the said building under construction and used solely for the purpose of the said contract, and it is not assessed by the plaintiff city for the purpose of taxation in respect to any property or in any way, except the said tax in respect to the said contract.

7. The question for the Court is whether or not defendant is liable to pay the license fee or tax sought to be imposed under sec. 540 of the Halifax City Charter."

The defendant company is not resident within the Province and it is not assessed for $5,000 or at all, and it is not sought to enforce the penalty. The point taken and clearly and concisely argued by Mr. Rogers, the junior counsel for the defendant company, is that defendant company is not liable because sec. 540 of the City Charter interferes with the capacity and status of the defendant company and is, therefore, *ultra vires* of the Legislature of Nova Scotia, the defendant company being incorporated and holding its charter under a statute passed by the Parliament of Canada. The Parliament of Canada has exclusive jurisdiction to legislate in respect of 'The regulation of Trade and Commerce.' It is equally clear that this legislative jurisdiction of the Parliament of Canada enables it to prescribe the extent and limits of the powers of companies the objects of which extend to the whole of Canada. The object in obtaining a Dominion rather than a provincial charter is to enable a company to do business throughout Canada irrespective of provincial boundaries. When such a charter has been obtained the company exists as a Dominion company.

There is no jurisdiction in a Provincial Legislature to interfere with the capacity and status of a Dominion company which has authority to carry on business throughout Canada. The foregoing propositions require neither argument nor

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elaboration because they are covered by the authority of cases decided in His Majesty's Privy Council. The following cases were cited by Mr. Rogers for the defendant company and in my opinion they fully support his contention.

John Deere Plow Co. v. *Wharton,* 18 D.L.R. 353; *Great West Saddlery Co.* v. *The King* 58 D.L.R. 1.

The remaining question is as to whether or not sec. 540 of the Halifax City Charter does interfere with the capacity and status of the defendant company. I have no hesitation whatever in answering this question in the affirmative.

The defendant company has under its charter the capacity and status to carry on business in every part of Canada. In pursuance of its powers derived from the Parliament of Canada the company enters into a contract with the Bank of Montreal for the construction of a building. The position of the city is that under and by virtue of provincial legislation the defendant company must before beginning the work under its contract pay $1,325 and if not paid, a severe penalty may be enforced. Only one way of escape is provided and that is that at the time of entering into the contract the company must be assessed for $5,000. There is no personal property tax, so this means that the company to avoid the payment of the tax must acquire real estate within the city of Halifax. It is the "capacity and status" of the defendant company which the Provincial Legislature has no jurisdiction to interfere with.

What do these two words mean? "Capacity" is defined in Bouvier's Law Dictionary to mean: "Ability, power, qualification, or competency of persons, natural or artificial, for the performance of civil acts, depending on their state or condition as defined or fixed by law; as the capacity to devise, to bequeath, to convey lands; or to take and hold lands; to make a contract and the like."

"Status" is defined by Brett, L.J. in (1878), 4 P.D. 1 at p. 11 as follows:—"The status of an individual, used as a legal term, means the legal position of the individual in or with regard to the rest of the community."

Accepting the definitions of the words "capacity" and "status" which I have quoted, I am of the opinion that the provincial legislation in question interferes with the capacity and status of the defendant company and is, therefore, *ultra vires.*

I answer the question submitted for the opinion of the Court in the negative.

The defendant company is entitled to its costs.

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MELLISH, J.:—The apparent object of the section of the City Charter in question is to prevent non-residents of the Province from contracting to construct or alter any building in the City of Halifax unless they pay to the city under the name of a "license fee" a percentage of the amount payable under such contract.

There is a proviso that the section shall not apply to persons assessed for taxation in the city in the sum of $5,000 or upwards.

By purchasing property in the City of Halifax the section can, therefore, be made inoperative without adding anything to the civic revenue—a circumstance which in itself sheds some light on its real purpose—which is, I think, not merely incidentally but primarily to restrain competition in the building trade. The power to so legislate is, in my opinion, not conferred on the local Legislature by the B.N.A. Act of 1867.

The section is, therefore, I think *ultra vires*.

ROGERS, J.:—The city, in my opinion, cannot enforce as against the defendant company, a federally incorporated company authorised to do business throughout Canada, the payment of the license fee attempted to be enforced under sec. 540 of the City Charter. In view of the very clear and explicit language used by the Lordships of the Judicial Committee in the case cited to us upon the argument, the section of the Charter referred to if *intra vires* at all must be read as excluding from its operation Dominion incorporated companies. The language of the section and especially when coupled with the penal clause is prohibitive and, in effect, interferes with the status of a federal company entitled to carry on business throughout the Dominion.

CAMPBELL v. MUNRO.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, Hyndman and Clarke, JJ.A. February 18, 1922.

PLEADING (§IID—185)—ALTERNATIVE CLAIMS—PLAINTIFF'S ELECTION.

A plaintiff may claim alternative remedies and is not put to his election until his right to relief is established either after default of defence when he may move for judgment, or after the evidence is concluded on a trial.

[*C.P.R.* v. *Meadows* (1908), 1 Alta. L.R. 349, applied.]

APPEAL from an order of a District Court Judge. Reversed.

G. A. Costigan, for appellant.

A. McL. Sinclair, K.C., and *A. C. MacWilliams*, for respondent.

Alta.

App. Div.

CAMPBELL v. MUNRO.

Hyndman, J.A.

The judgment of the Court was delivered by

HYNDMAN, J.A.:—This is an appeal from an order of MacNeill, D.C.J.

On August 3, 1920, the plaintiff sold and delivered to the defendant certain furniture for the price of $1,200. The defendant paid plaintiff on account of the said price the sum of $700, and the plaintiff agreed to accept in lieu of the balance of $500, two lots described at Lots 4 and 5, Block C, of Lot 4 in the town of Port Simpson, British Columbia (Map 401).

Plaintiff alleges that prior to the said agreement defendant represented that there were no taxes, rates or assessments outstanding against the property, but that same were paid in full, whereas in fact the lots had been sold at tax sale and had reverted to the Crown.

It is further alleged that defendant represented that the lots were worth at least $500 but the fact is that at the time of the said representation the said lots were practically of no value, nor are they of any value at the present time. That such representations were made fraudulently for the purpose of inducing plaintiff to accept the lots in lieu of said balance of $500 with full knowledge of their untruth, or recklessly without knowing and not caring whether either of said representations were true or false.

The plaintiff then alleges he suffered damages to at least $500 as a direct result of the material misrepresentations and that he stands ready and willing to redeliver the certificate of title of the lots to the defendant and claims:

"(a) An order restraining the defendant, her servants or agents, from in any way dealing with, selling, removing or disposing of the furniture herein, the subject matter of this action, pending the trial hereof, and (b) Rescission of the agreement for the sale and purchase of the said furniture and delivery thereof to the plaintiff, or (c) Rescission of that part of the agreement whereby the plaintiff agreed to accept the said lots in lieu of the balance of $500 of the purchase price, (cc) Judgment against the defendant for $500 and interest at 5% from August 3, 1920, as and for the said balance of the said purchase price, or (d) Judgment against the defendant for $500 damages with interest at 5% from August 3, 1920, and (e) Costs of this action."

The defendant sets up the usual denials and also pleads:—"(9) The defendant, without admitting the allegations of the plaintiff, is willing to deliver to the plaintiff all the furniture received by her from the plaintiff in exchange for the sum of $700 and the Certificate of title to said lots."

Issue was joined and the plaintiff then applied before the District Court Judge for directions.

When the motion came on to be heard counsel for defendant argued that final judgment should be given on the ground that the plaintiff having submitted to rescission the statement of defence is really a confession for the plaintiff's claim for rescission.

The Judge gave effect to this contention and ordered judgment with costs to be entered for the plaintiff for rescission of the contract.

This would involve the return of the furniture to the plaintiff in exchange for the $700 paid and a reconveyance of the lots.

To this disposition of the case the plaintiff objects, and submits that it is the plaintiff's right and not the defendant's, to elect which remedy he will adopt where there are alternative remedies under his claim. This, of course, is apart from evidence of an election prior to the action which does not arise here.

The simple question for determination being whether or not the plaintiff has the right to say which of several alternative remedies he will choose or whether the defendant has the exclusive right to do so.

It is undoubted law that in the case of a fraudulent misrepresentation that plaintiff may either sue for rescission of the transaction or for damages to compensate him for the actual loss he may have suffered. *Palmer* v. *Johnson* (1884), 13 Q.B.D. 351 at p. 354, 53 L.J. (Q.B.) 348, 33 W.R. 36; *Foster* v. *Stiffler* (1910), 19 Man. L.R. 533.

These are co-existing remedial rights arising out of the fact of the case.

I had thought that there was no doubt about the right to rely upon and claim several different rights "alternatively although they may be inconsistent." (See Rules of Court 89, also Ann. P. 1922, p. 324). This has consistently been the practice in this Court and the present case is the first I have known wherein the right has been questioned.

Prior to the Judicature Act in certain instances a party might prosecute his claim both in the Common Law Court and in Chancery, where either Court would grant a remedy, though one inconsistent with the other, but the plaintiff had to make his election before trial but only after defence or answer as to which remedy he would adopt. See McCaul's Remedies of Vendors and Purchasers, 2nd ed. 190, and authorities there cited.

In *Rice* v. *Reed*, [1900] 1 Q.B. 54, 69 L.J. (Q.B.) 33, Lord Justice A. L. Smith said, at p. 65:—

"The Courts have held that by suing for money had and re-

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ceived instead of in tort the plaintiff has conclusively elected to waive the tort. With those cases I certainly agree. In the present case the plaintiff sued Soltau in trover, and in the alternative for money had and received. If nothing more had occurred no Court could say that the plaintiff, by suing in the alternative for tort and for money had and received had waived the tort and elected to affirm the transaction. It is clear that no authority goes so far as that." (And at p. 66), "But there is another class of cases in which an act is of an ambiguous character and may or may not be done with the intention of adopting and affirming the wrongful act. In such cases the question whether the tort has been waived becomes rather a matter of fact than of law."

It seems to me that this authority is directly applicable. There is also the further point that in an action of this nature it may not even be within the power of the plaintiff to arbitrarily choose any particular remedy, but the Court in order to do the greatest justice between the parties may itself settle the question of the remedy. In *C.P.R.* v. *Meadows* (1908), 1 Alta. L.R. 344, Beck, J., at pp. 347, 348, said:—

"I think the Court ought in every case to consider the interests of all parties who may be affected by its judgment, and, if it can do so without injustice to the plaintiff, it has power and ought to exercise it to refuse a form of relief to which the plaintiff is *prima facie* entitled, and give him another form or relief to which he is also entitled, if by so doing the interests of the other parties will thereby by better conserved." And this was affirmed by the Court *en banc*. 1 Alta. L.R. 349.

My opinion, therefore, is that the plaintiff may claim alternative remedies and is not put to his election until his right to relief is established either after default of defence when he may move for judgment, or after the evidence is concluded on a trial.

I would, therefore, allow the appeal with costs and set aside the order appealed from with costs.

Appeal allowed.

SIGVALDASON v. HITSMAN.

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Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon and McKay, JJ.A. March 27, 1922.

CONTRACTS (§ID—60)—VENDOR AND PURCHASER—CONDITIONAL DEPOSIT WITH OFFER—REFUSAL TO ACCEPT OFFER—TENDER OF ANOTHER AGREEMENT WHICH IS REFUSED—NO CONTRACT WHICH CAN BE ENFORCED—RIGHT TO RETURN OF DEPOSIT.

Where a prospective purchaser submits at the request of the owner a conditional deposit with his offer, to be applied on the purchase-price of the property if the deal goes through, but the owner refuses to approve of the offer made and in his turn submits an agreement which the purchasers refuse to accept and the deal falls through, the parties making the deposit are entitled to have it returned to them.

[*Casson* v. *Roberts* (1862), 31 Beav. 613, 54 E.R. 1277, discussed.]

APPEAL by plaintiff from the trial judgment in an action to recover a deposit made with an offer to purchase certain land, the owner having refused to approve of the offer made, and the deal having been broken off. Reversed.

A. E. Vrooman, for appellants.

E. J. Brooksmith, for respondent.

HAULTAIN, C.J.S., concurs with LAMONT, J.A.

LAMONT, J.A.:—I agree with the conclusion reached by my brother Turgeon.

In my view of the case, the $500 deposit was not made in respect of any contract to which the parties agreed. The defendant and John Sigvaldason had been negotiating, and Sigvaldason had obtained the defendant's price and terms. It was arranged that John Sigvaldason should communicate with his brother, who was to be one of the purchasers, to see if he was agreeable to purchase. If he was, the purchasers were to wire the defendant to that effect. They were also to prepare the agreement of sale and send it forward with a deposit of $500, but the agreement was not to be binding until approved of by one Syme, who was appearing for the defendant. Frank Sigvaldason was willing to purchase on certain terms, and an agreement was drawn up in accordance with the terms to which he agreed and forwarded to the defendant, and $500 was deposited in the bank to the defendant's credit. Syme refused to approve of the agreement, and the plaintiffs would not agree to execute the agreement approved of by Syme, with the result that the deal was broken off. In my opinion the deposit was made in respect of the contract which the plaintiffs had drawn up, and no other. When the defendant refused to accept the terms set out in that agreement, he had no right to the deposit. The whole transaction amounted simply to an offer to purchase on the terms set out in the agreement drawn by the plaintiffs, with a deposit of

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$500 thereon. The offer not being accepted, the deposit must be returned.

TURGEON, J.A.:—This action arises out of certain negotiations which took place between the two plaintiffs and the defendant regarding the proposed sale to the plaintiffs of lands in Saskatchewan. No valid contract for the sale was ever entered into between the parties and the negotiations were finally abandoned. At one stage of the proceedings the plaintiffs paid to the defendant the sum of $500, as a deposit to be applied upon the purchase money when the agreement for sale was completed. They now seek to recover this amount, no agreement ever having been made.

If *Casson* v. *Roberts* (1862), 31 Beav. 613, 54 E.R. 1277, was rightly decided, the plaintiffs are entitled to a return of their deposit from the very fact that no enforceable contract for the sale of the land was ever entered into. The principle enunciated in the decision in question, which was delivered by Romilly, M.R., can be gathered from the words of the headnote:—

"Where there is no contract, or no contract which can be enforced, the purchaser is entitled to a return of his deposit. Thus, where one contracted by parol for the purchase of lands and paid a deposit, and afterwards declined to complete, it was held that his right to a return of the deposit constituted a sufficient debt to support a creditors' suit against the representative of the vendor."

This decision was approved in *Hinton* v. *Sparkes* (1868), L.R. 3 C.P. 161, at p. 165, 37 L.J. (C.P.) 81, where Bovill, C.J., quotes Romilly, M.R., as saying:—"There is, however, no authority which holds that the deposit must be considered as forfeited in the absence of any agreement whatever, or one which could neither be enforced at law or in equity." And he adds: "In that opinion I entirely concur."

This decision in *Casson* v. *Roberts* was questioned in *Thomas* v. *Brown* (1876), 1 Q.B.D. 714, 45 L.J. (Q.B.) 811, 24 W.R. 821, where Quain, J., says in reference to it (45 L.J. (Q.B.) at p. 816):—"With regard to *Casson* v. *Roberts*, I do not think that it has much bearing on this question of common law; but the reasoning in it does not appear to me to be satisfactory, and I do not agree with the decision."

But a perusal of the judgments delivered in *Thomas* v. *Brown* shews that this case was really decided against the intending purchaser, who sought to recover his deposit, upon the ground that if there was not a contract in writing sufficient to satisfy the Statute of Frauds, (the vendor's name having been omitted from the memorandum), the purchaser was nevertheless estopped from

denying the validity of the contract by reason of the subsequent steps taken by him in relation to the transaction. To all intents and purposes the decision was given on the basis of a binding contract from which the purchaser had withdrawn by his own default. This brings the decision in *Brown* v. *Thomas* within the same class of cases as *Howe* v. *Smith* (1884), 27 Ch. D. 89, 53 L.J. (Ch.) 1055, relied upon by the respondent on this appeal, but which cannot be followed here, because, in this latter case and in the other cases cited in support of the judgment at Bar, the controversy involved a binding contract in writing upon which a deposit had been paid. I may point out also that in *Thomas* v. *Brown*, Mellor, J., in refusing to apply the principle enunciated in *Casson* v. *Roberts*, said that he did so upon the ground that the circumstances of the two cases were different and that the principle in question did not govern the case before him. I cannot find, therefore, that the decision in *Casson* v. *Roberts* has ever been overruled, and, in my humble opinion, the rule which it lays down is sound and should be applied to the case at Bar.

Moreover I think the facts which we have to deal with here set up a stronger case in favour of the plaintiffs than that established for the purchaser in *Casson* v. *Roberts*. In the *Casson* case, Casson orally agreed with John Lloyd to purchase certain lands from him at a fixed price. He made two payments to Lloyd in pursuance of this oral agreement amounting to £438, which Lloyd accepted, acknowledging receipt of them as part payment of the deposit (£680) which Casson had agreed to pay as part of the purchase money. After Lloyd's death, Casson notified his executrix that he did not intend to complete the purchase and brought action to recover the £438. He succeeded for the reasons set out above. In the case at Bar the evidence, as I read it, shews that no definite agreement, even oral, was ever arrived at. The understanding was that the plaintiffs could buy the lands at a certain price provided security satisfactory to the defendant and an agreement to be approved of by a certain notary public were furnished by the plaintiffs. The plaintiffs did submit an agreement, embodying the security and the other terms which they proposed, and along with the documents they sent the $500, as the defendant had intimated that he would not consider their offer (because it was in reality their offer) at all unless it was accompanied by the $500, the evident intention being that this advance was to satisfy him of their good faith and of their ability to effect the purchase. The proposition submitted by the plaintiffs was not approved by the defendant or by the notary public, and an alternative proposal prepared by

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them was not accepted by the plaintiffs. Under these circumstances this payment of $500 was merely a conditional payment, and the condition having failed I do not see how the defendant can claim the right to retain the money advanced.

In the alternative, the defendant seeks to retain this $500 on the ground that it was paid to him by the plaintiffs to secure an option for the purchase of land "before seeding time." In my opinion there is nothing to justify any such claim.

I would allow the appeal with costs. The judgment in the Court below should be set aside, and judgment entered for the plaintiffs for the amount of their claim, with costs.

MCKAY, J.A., concurs with LAMONT, J.A.

Appeal allowed.

McDOUGALL v. ALLEN.

Nova Scotia Supreme Court, Harris, C.J., Russell, J., Ritchie, E.J., McIlish and Rogers, JJ. April 13, 1922.

CONTRACTS (§IE—105)—AGREEMENT FOR THE SALE AND PURCHASE OF LAND—MEMORANDUM IN WRITING—OPTION—ORAL EVIDENCE TO VARY — SPECIFIC PERFORMANCE — INTERVENING RIGHTS OF THIRD PARTIES NOT BEFORE COURT—RECOVERY BACK OF DEPOSIT.

The parties to an agreement for the sale and purchase of land signed the following document "Received from . . . one hundred dollars on property on Pugwash River known as the McPherson lot of one hundred and thirty acres. Purchasing price of property six hundred dollars, the balance of five hundred dollars to be paid not later than November 30th, 1919, and warrant and defend deed. Interest at 6 per cent." The Court held that this document was an agreement for the sale of land and not a mere option or receipt for money, and being in writing and complete on its face that oral evidence varying it was not admissible. The Court could not decree specific performance because the rights of a third party not before the Court had intervened, but the plaintiff was entitled to the return of the $100.

APPEAL from the judgment of Chisholm, J., in favour of defendant in an action for the specific performance of an agreement to sell land, damages for non-fulfilment of said agreement and in the alternative the return of money paid on account of the purchase-price with interest.

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

J. L. Ralston, K.C., and *J. A. Hanway*, K.C., for respondent.

HARRIS, C.J.:—The plaintiff sues for specific performance of a written agreement for the purchase of a wood lot or in the alternative for the return of $100 paid on account of the purchase money.

The agreement relied upon reads as follows:—

"$100.00 Pugwash, N.S.
February 18th, 1919.

Received from Alex. E. McDougall one hundred dollars on property on Pugwash River known as the McPherson lot of one hundred and thirty acres. Purchasing price of property six hundred dollars, the balance of five hundred dollars to be paid not later than November 30th, 1919, and warrant and defend deed. Interest at 6 per cent. (Sgd.) G.N.A.
A.E.M.D."

The defences set up were:—1. A denial of the making of the agreement. 2. That if defendant entered into the agreement the plaintiff was not ready and willing to perform it on November 30, 1919. 3. Time was of the essence of the contract and plaintiff did not pay the balance of the purchase-money on November 30, and defendant sold and conveyed property to Mrs. John McPherson. 4. The Statute of Frauds not complied with. 5. Denial as to damages. 6. Statement of claim does not disclose good cause of action.

The reply sets up a subsequent verbal agreement to extend time for carrying out agreement and an offer to pay balance after November 30.

I have referred to the pleadings because on the trial, evidence was received tending to shew that the agreement was only intended as an option, and then it was argued that being only an option, time was of the essence and there was a forfeiture of the $100, and the agreement was at an end.

It will be observed that there was no pleading that it was an option, and the evidence tendered on this point contradicted the written agreement and was, I think, clearly inadmissible. The agreement was signed by both parties and it was not merely a receipt for money but a complete contract within the Statute of Frauds. See *McKenzie* v. *Walsh* (1920), 57 D.L.R. 24, 61 Can. S.C.R. 312; *Peterson* v. *Bitzer* (1921), 63 D.L.R. 182, 62 Can. S.C.R. 384.

There is evidence of a subsequent verbal agreement to extend the time for payment in respect to which I would accept the plaintiff's version, so that if the evidence as to the agreement being intended as an option was held to be admissible, the time was extended and defendant could not on either hypothesis put an end to the contract without giving plaintiff a notice of his intention and an opportunity to complete the contract by payment, and no such notice or opportunity was given. It was also the duty of the vendor to prepare and tender a conveyance of the property to the purchaser and that was not done. It was

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argued that this duty was cast upon the vendee as it is in England, and English authorities were cited on the question, but that is not the law in Nova Scotia.

In *Wrayton* v. *Naylor* (1894), 26 N.S.R. 472, at p. 476, Meagher, J., said:—

"Under our system, as in Ontario and New Brunswick, the vendor prepares the conveyances and bears the expense unless the terms of sale provide otherwise. *Parker* v. *Watts*, 25 U.C.Q.B. 115, and *Goddard* v. *Sweeney*, 4 Allen N.B. 300."

There was evidence that defendant, before the action was commenced, entered into an agreement with a third party to sell the property and that this third party paid a deposit on account and took, and still holds, possession of the property. This third party is not joined in the action, and there is nothing to shew that she was not a *bona fide* purchaser for value.

The evidence shews that when defendant refused to carry out the agreement the plaintiff demanded the return of the $100 paid on account and thereby elected to treat the contract as rescinded.

I have reached the conclusion that the action for specific performance cannot be maintained, but plaintiff can recover the amount paid. *Wrayton* v. *Naylor* (1895), 24 Can. S.C.R. 295.

I think the appeal should be allowed with costs and judgment entered for the plaintiff for $100 with interest from the date of the demand at 5% and costs.

RUSSELL, J.:—I am of opinion that the writing in this case in the form of a receipt was a sufficient memorandum of a contract. The fact that there was a balance of $500 "to be paid," and that interest was chargeable thereon, which is the plain meaning of the writing, shews that it was more than an option. The words "to be paid" in a document under seal have been held to be a good enough promise to constitute a promissory note if the other requirements of such an instrument have been complied with. There cannot be specific performance of the contract if a subsequent agreement was entered into, deposit paid and possession given at least without the subsequent party being joined in the action. It is not necessary to consider whether an oral agreement to extend the time could be enforced. Time of payment is one of the terms of the written contract and a change of the terms may have to be in writing to be enforceable. But time was not, in my opinion, of the essence of the contract. The plaintiff is satisfied if he gets back his deposit and this, I think, he is entitled to.

I agree that the appeal should be allowed and judgment for the plaintiff with the statutory interest.

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RITCHIE, E.J.:—The authority of the case of *McKenzie* v. *Walsh*, 57 D.L.R. 24, 61 Can. S.C.R. 312, requires me to hold that the document which the Court is called on to construe in this case is an agreement for the sale of land and not an option or mere receipt for money. The agreement being in writing and complete on its face, it follows that oral evidence varying it was not admissible. The defendant refuses to convey the land and claims to hold the $100 which the plaintiff paid to him in respect of the purchase. Specific performance is claimed, and in the alternative a return of the $100. As pointed out, in the opinion of my brother Russell, this is not a case in which the Court would decree specific performance as the rights of a third party not before the Court have intervened, but the defendant cannot repudiate his agreement and retain the $100. For that amount the plaintiff should have judgment with interest and costs in the action and of this appeal.

MELLISH and ROGERS, JJ., agree with HARRIS, C.J.

Appeal allowed.

LEONARD v. WHARTON.

Supreme Court of Canada, Davies, C.J., Idington, Anglin, Brodeur and Mignault, JJ. March 4, 1921.

LIBEL AND SLANDER (§IIIC—105)—JUSTIFICATION—SERIES OF ALLEGED LIBELS — GENERAL VERDICT BY JURY — SOME OF ALLEGATIONS JUSTIFIED—NECESSITY OF PROVING JUSTIFICATION OF ALL ALLEGATIONS.

A plea of justification must justify everything alleged to be libelous, and if there are a series of alleged libelous allegations, the jury may find a general verdict, which will be sustained, even although the Court on appeal may be of opinion that some of the allegations are justified.

LIBEL AND SLANDER (§IIIA—95)—INNUENDO—RIGHT OF PLAINTIFF TO GIVE EVIDENCE OF SURROUNDING CIRCUMSTANCES—NON-SUIT.

Where an innuendo is pleaded the plaintiff cannot be non-suited until all his evidence has been put in, because the innuendo involves a consideration of all the surrounding circumstances, and the trial Judge cannot rule as to whether or not the allegation in the light of the surrounding circumstances is capable of a libelous meaning until such surrounding circumstances have been considered.

[See *Australian Newspaper Co.* v. *Bennett*, [1894] A.C. 284.]

APPEAL from the judgment of the Ontario Divisional Court (1919), 17 O.W.N. 127, in an action for libel. Reversed.

J. P. MacGregor, for appellants.

A. C. McMaster, for respondents.

DAVIES, C.J.:—I concur with ANGLIN, J.

IDINGTON, J.:—The appellant Leonard and respondent Wharton were formerly associated in the same business enterprise.

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The manner of their parting and consequent rivalry in the like sort of business, which ensued said parting, seem to have so aroused respondent Wharton that he overstepped the bounds of reason and wrote circular letters, of which one is presented in appellant's statement of claim and is alleged by them to be libelous.

That letter was set forth in full in said statement of claim, followed by three innuendoes of which each clearly was referable to its respective part of the letter.

The last clause of the said letter was as follows:—

"We were informed this morning by the general manager of the Dominion of Canada Guarantee and Accident Insurance Co. (who bond our attorneys) that the attorneys whose names appear in the above named list are not bonded by his company, contrary to the statement made in their circular, dated August 28th, 1916."

The last of the said innuendoes which, I take it, was that relative thereto, is as follows:—

"(e) that the plaintiffs Leonard and Parmiter and Leonard-Parmiter, Limited, were falsely misrepresenting to those with whom they strove to sell the Canadian Guide to Bonded Lawyers list that the said list was bonded by the Dominion of Canada Guarantee & Accident Insurance Co. when the truth was that the lawyers so listed in Canadian Guide to Bonded Lawyers were not, in fact, so bonded and would not be so bonded."

The respondents pleaded justification alleging the truth of said publication.

The issues to be tried were thus reduced to two in number, and, so far as conceivable in a libel suit, these are, in a sense, separate issues and hence a comparatively simple matter save as to arriving at a proper measure of damages.

The legal issue to be tried I submit, so far as the general issue raised by a comprehensive plea of justification pleaded herein, which justifies the whole publication as true in fact, can only be treated as one.

Whether or not under secs. 3 and 5 of the Libel Act, R.S.O. 1914, ch. 71, there may be more than one distinctive plea of justification raised, does not seem to me a point necessary to decide in this case.

The confusion created sometimes by a superfluity of words leads me to hope that pleading such distinctive bits of justification is not possible.

The respondents have by their pleading undertaken to justify the whole publication.

The case as presented in the trial Judge's charge to the jury

so stated it, and more than once expressly told the jury that they must decide as to the truth or falsity of what was alleged.

I might have been better pleased with the charge if he expressly stated that the question of the truth of each allegation must be considered by them, and if their findings of facts alleged reduced or narrowed the basis of plaintiffs' claim for damages, then they should, if so finding, bear that in mind in assessing same and only give damages for and in respect of that which had not been to their satisfaction demonstrated to be true.

However, no objection of that kind was taken to the charge (though many others were, and were dealt with), and cannot be raised now, and, I most respectfully submit, should not have been raised below for two reasons:

In the first place, I have no doubt that the jury so understood the charge, and that if they in fact believed the plea of justification was made out as to the last part of the publication, the allegation of its being libelous was eliminated in assessing damages, and we have no right to presume otherwise.

In the next place, there was ample evidence in the case to support the possible view presented by the trial Judge in line with the last four words of the relevant innuendo above quoted.

He, after having dealt elaborately with the main part of the case, proceeded to this inquiry and spoke thus:—

"Very little more needs to be said. You have this statement, and it is hardly necessary to trouble you with it, but it is right probably that I should read it. 'We were informed this morning by the general mgr. of the Dominion of Canada Guarantee and Accident Insurance Co. (who bond our attorneys) that the attorneys whose names appear in the above named list are not bonded by this company, contrary to the statement made in their circular dated August 28th, 1916.' You will ask yourselves, is that a fair version of the circular that was sent out on the 28th by the plaintiffs? The plaintiffs sent out a statement in which they said they proposed to issue a certain kind of guide, and that they hoped it would be out by September 1. It was not out by September 1, and it was not out when the defendant went to Mr. Withers. Was it fair to say, or was it true to say what is contained in that paragraph? Of course, if you juggle with words, it is quite open to argue that he said that their lawyers were all bonded—'Our lawyers are all bonded.' That did not necessarily mean when he was speaking of a future thing that they were bonded at that time. Would you, if you were writing a letter, want to be tied down in that way? Did the defendant, in saying that these men were not

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bonded, understand it in that way? You have to keep this in mind, that he is a specialist in this kind of thing. He knew far better than you know or I would know, or any lawyer would know, that bonding was impossible until the list was made out. He knew the list was not made out, and then he sends out this circular saying these people are not bonded. Well, I do not need to dwell on it. Was it done honestly? Was it honest afterwards to write in a circular, because it throws a light on the whole matter, that only 20% of these lawyers were bonded? Is there any proof of that, as a matter of fact? Was it or was it not an honest attempt to protect their own interests, or was it an attempt to scuttle these plaintiffs, drive them out of business? Ask yourselves at the same time, what business was it of Wharton's anyhow, whether these people were bonded or not....."

This does not seem to have been objected to though some facts bearing on it were, I think, called attention to, and dealt with.

I think that when we have regard to the subject matter in question in this last part of the publication, and the whole surrounding facts bearing thereon and illuminating its obvious purpose and meaning, that it was not only capable of being read as dishonestly intending to confuse and mislead those to whom it was addressed and improperly to insinuate that those dealing with appellants never would be bonded, but they and those concerned defrauded.

No man has a right to so try to mislead others and thereby dissuade them from dealing with a man or company and especially such of those toward whom, for good or bad reason, he has an antipathy.

For these reasons I think the jury's verdict and the consequent judgment thereon should not have been disturbed and hence the appeal should be allowed with costs herein and below, and said judgment restored.

In this view it is not necessary for me to deal with other matters dragged into this appeal.

ANGLIN, J.:—At a second trial of this action, two distinct libels were submitted to the consideration of the jury. Other claims made in the action were either abandoned or rejected by the trial Judge on the ground that the matter complained of was not actionable and as to them no appeal had been taken.

The two claims on which the jury passed were (a) that the plaintiff Leonard had been charged by the defendants with having failed, in breach of trust, to pay over to the defendant company moneys belonging to it, and (b) that Leonard-Parmiter, Ltd., had been accused of falsely representing that a list of

lawyers to be issued by it was or would be bonded. The jury by its verdict gave $3,000 damages to the plaintiff Leonard, and $1,000 to Leonard-Parmiter, Ltd. The trial Judge entered judgment for the plaintiff Leonard for $3,000, but dismissed the action as against the plaintiff company because it had made an assignment for the benefit of its creditors. On an appeal, and cross-appeal (1919), 17 O.W.N. 127, the latter portion of this judgment was set aside, but it was held that a plea of justification of the alleged libel as to the bonding of lawyers had been conclusively established. In the result a new trial was ordered on the ground that "the respondents claim and have recovered general damages for two libels.....The jury were instructed that they might assess general damages to the respondent company and Leonard in respect of these charges ..... The jury might, for all we know, have allowed all the damages in respect of the concluding paragraph of the letter," which contained the allegation of misrepresentation as to bonding.

Although the intention of the Appellate Divisional Court finally to dispose of the alleged libel in regard to the bonding and to restrict the new trial to the charge of having failed in breach of trust to account for moneys of the defendant company was, in my opinion, quite apparent in the statement of the reasons for its judgment, the order issued by the defendants was for a new trial generally. When the case came on again in the trial Court they nevertheless took the position that the new trial should be restricted to the issue in regard to the imputation of theft or breach of trust by the plaintiff Leonard. The trial Judge, however, adjourned the case to permit of an application to the Appellate Divisional Court to make clear its intention as to the scope of the new trial ordered by it. That Court thereupon directed that a clause should be inserted in its formal order expressly restricting the trial to the alleged libel charging theft or breach of trust. Having obtained an extension of the time for appealing, the plaintiffs now appeal from the judgment embodied in the order as amended (1919), 17 O.W.N. 127. Incidentally, they also appeal from an order to the Appellate Divisional Court (1920), 18 O.W.N. 125, dismissing an appeal from a judgment of Middleton, J., in Chambers, setting aside an order of the Master in Chambers providing for amendments to the statement of claim.

The trial Judge declined to direct the jury to specify separately whatever damages they should give in respect of each of the alleged libels. While it seems highly probable that the damages awarded to the plaintiff Leonard were all in respect of the

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charge of abuse of trust (which the statement of claim alleges was a libel on him) and that those given Leonard-Parmiter, Ltd., were for the allegation that its attorneys were (or would be) unbonded (the statement of claim in like manner averring that this charge affected the company), it is just possible that a portion of the damages on each item was given each plaintiff or perhaps that the jury dealt with the libel as a whole and apportioned the gross damages caused by it between the plaintiffs according to the degree of injury each had in its opinion suffered. It may well be, therefore, that, if the view of the Appellate Divisional Court that justification was established in regard to the charge that the lawyers in the plaintiff company's list were not bonded should be sustained, its order for a new trial could not be successfully attacked.

But, with great respect, I am of the opinion that justification was not so clearly made out that the dismissal of the plaintiffs' claim on this branch of the case can be supported. Having regard to the circular letter of August 28, 1916, written by the plaintiffs Leonard and Parmiter, announcing the forthcoming "Canadian Guide to Bonded Lawyers," to appear about September 1, which contained the statement that "all lawyers are bonded by the Dominion Guarantee and Accident Insurance Co," and to the facts, deposed to by the manager of the insurance company named, that arrangements had been made by the plaintiffs with him before August 28 for the bonding of lawyers to be listed in the proposed "Guide," so far as the names submitted, should be satisfactory to the company, and that a bond bearing date September 1, 1916, was actually issued by that company to Leonard-Parmiter, Ltd., about September 22, purporting to cover attorneys, solicitors and barristers whose names appear in heavy-faced type in the Canadian Guide to Bonded Lawyers, the statement in the defendants' circular of September 5:—"We were informed this morning by the general manager of the Dominion of Canada Guarantee and Accident Insurance Co. (who bond our attorneys) that the attorneys whose names appear in the above named list are not bonded by his company, contrary to the statement made in their circular dated August 28th, 1916," was, I think, susceptible of the meaning that no arrangement whatever had been made by the plaintiffs for the bonding of lawyers to be listed in their "Guide" with the Dominion of Canada Guarantee and Accident Insurance Co., and that such lawyers were not and would not be so bonded, and was likely to prove prejudicial to the plaintiffs. It was calculated to convey the impression that they fraudulently designed to obtain subscriptions to their "Guide" by misrepre-

sentation. While, if the words are taken in their narrowest sense, the allegation that the lawyers in the plaintiff company's list "are not bonded by the Canada Guarantee and Accident Insurance Co." may have been literally true, in the broader sense above indicated, which I think was open to the jury to ascribe to them and which, in my opinion, was likely to be that given to them by the vast majority of the persons into whose hands the document containing them was meant to pass, if they were not clearly untrue, the justification for publishing them was a question for the jury and the plaintiffs were entitled to have submitted to its verdict the libel now under consideration as well as that in regard to the failure of the plaintiff, Leonard, to account for moneys entrusted to him.

That being so, it matters little that we cannot be absolutely certain how much of the whole $4,500, awarded as damages, is referable to each of the libels charged. It is not altogether unlikely that a charge involving personal dishonesty or untrustworthiness on the part of Leonard would, to some extent, reflect upon and injure the Leonard-Parmiter Co. of which he was the head—not wholly improbable that the charge that the company's project involved obtaining subscribers by misrepresentation on an important matter would injuriously affect the reputation of its chief officer. But however that may be, the jury having determined upon a case properly submitted to them that as damages for two libelous statements contained in the same document the plaintiff Leonard is entitled to $3,000 and the plaintiff company to $1,000, its verdict, in my opinion, should not have been disturbed.

I concur in the view taken by the Judges of the Appellate Divisional Court, 17 O.W.N. 127, that the assignment of the plaintiff company for the benefit of its creditors did not vest in its assignee its cause of action for damages for libel and, therefore, presents no obstacle to recovery of judgment thereupon by it.

I would, for these reasons, allow this appeal and direct judgment for the plaintiff Leonard, for $3,000, and for Leonard-Parmiter, Ltd., for $1,000.

It thus becomes unnecessary to pass upon the appeal in regard to amendment of the statement of claim. That is matter of a class with which it is not usual for this Court to deal.

The appellants are entitled to their costs in this Court, and in the Appellate Division and to the general costs of the action. But the disposition of costs made by the orders of Middleton, J., of January 29, 1920, 17 O.W.N. 430, of Latchford, J., of Febru-

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ary 13, 1920, and of the Divisional Court of April 12, 1920, 18 O.W.N. 125, should not be disturbed.

BRODEUR, J.:—I am of opinion that this appeal should be allowed with costs, and that judgment be entered in favour of Leonard for $3,000, and in favour of the appellant company for $1,000.

MIGNAULT, J.:—I concur with ANGLIN, J.

Appeal allowed.

SCOTT AND SHEPPARD v. MILLER.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon, JJ.A. March 27, 1922.

HOMESTEAD (§IVA—30)—SALE OF BUSINESS AS GOING CONCERN—LEASE OF HOMESTEAD NECESSARY—AGREEMENT FOR LEASE SIGNED BY HUSBAND — WIFE REFUSING TO SIGN — AGREEMENT INCOMPLETE—BREACH OF CONTRACT—DAMAGES.

Where an agreement for the sale of a business as a going concern contains a clause by which the vendor agrees to lease the premises used by him in connection with the business, such premises being also to the knowledge of the purchasers the homestead of the vendor and his wife within the meaning of the Homestead Act, R.S.S. 1920, ch. 69, such agreement must be considered conditional on the husband securing the consent of the wife to the lease of the homestead, and where she refuses to join in the lease of the homestead, there is no binding contract, and the vendor is not liable in damages for breach of the agreement which has been signed by him alone.

APPEAL by defendants from the trial judgment (1921), 61 D.L.R. 377, in an action for damages for breach of contract to sell the defendant's business and lease of the premises where business was carried on. Reversed.

H. M. Allan, for appellant.

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

HAULTAIN, C.J.S., concurs with LAMONT, J.A.

LAMONT, J.A.:—This is an action for damages for breach of contract. By an agreement in writing—except as the certain terms left blank in the writing but supplied by oral testimony,—the defendant Miller, as vendor, agreed to sell to the plaintiffs, as purchasers, his business in Biggar as a going concern. The recital in the writing is as follows:—

"Whereas the vendor has agreed to sell and the purchasers have agreed to buy the goodwill, stock-in-trade and fixtures of the business carried on by the vendor at Biggar aforesaid, as a going concern for the sum of $ "

The agreement then went on to state what constituted the stock-in-trade, and that the price for the same was to be 100 cts. on the dollar, except for the damaged or shop-worn goods, and

certain articles of ladies' wear, which were to be taken at a price to be agreed upon, and if the parties could not agree as to the price, it was to be fixed by a third person to be appointed by them.

The verbal arrangement between the parties was, that possession was to be taken one hour before closing on June 1; a cash payment of $10,000 to be made on June 3, and notes given for the balance of the purchase price, payable $10,000 a year with interest. The written agreement left blank the amounts of the notes and the times of payment. The plaintiffs were to have the right of continuing the business in the name of the vendor if they so desired. The agreement also contained a clause by which the vendor agreed to grant in favour of the purchasers a lease for 10 years of the whole premises used by the vendor in connection with the said business. The rent was to be $75 a month. This agreement was executed on the night of May 2, 1918, and the plaintiff paid $100 deposit. That night, after the agreement had been signed and the parties had separated, the defendant shewed the agreement to his wife, who protested against it. She knew that, as she and her husband had their home in the store building, it could not be disposed of without her consent, and this consent she refused to give. Her chief objection seems to have been that the cash payment was too small and the time for paying the balance too long. She also thought that the rent of the building should be increased. She admitted that she may have suggested to her husband that the cash payment should be $20,000, but could not definitely say. At any rate, the defendant next morning told the plaintiffs that "he was sorry, but that Mrs. Miller and he had talked it over and they must have $20,000 cash and the payments to run two or three years for the balance." To this the plaintiffs refused to agree, and they have brought this action to recover damages for breach of contract.

The defendant sets up a number of defences, including the following:—(1) That the agreement was entered into conditionally upon Mrs. Miller's consenting thereto, and (2) that the premises agreed to be leased were to the knowledge of the plaintiffs the homestead of the defendant within the meaning of the Homestead Act, R.S.S. 1920, ch. 69, and, by that Act, no valid lease or transfer of the same could be made without the signature of the defendant's wife, and, therefore, the agreement to give a lease was void. The trial Judge held, as to the first of these defences, that there was no evidence of any such condition. As to the second, he says:—

"The defendant agreed to lease the lands, and if he cannot

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fulfil his agreement he is liable to the plaintiffs. It is quite true that plaintiffs could not enforce the agreement to lease or sell the land, as it was defendant's homestead, and his wife did not join in the agreement. But the plaintiffs are not seeking specific performance in this action. They are seeking for damages against defendant for failing to do what he agreed to do."

And then after a reference to the case of *Halldorson* v. *Holizki* (1919), 47 D.L.R. 613, 12 S.L.R. 498, he goes on to say:—

"So in the case at bar, in my opinion, the defendant is liable in damages to plaintiffs for breach of his agreement to sell and lease, notwithstanding that his wife did not join in the agreement."

And he awarded the plaintiffs $2,250 damages. From that decision, the defendant appeals to this Court.

To be entitled to damages the plaintiffs must establish that they had a valid agreement. A contract for the sale of a business as a going concern and a lease of the premises in which such business is conducted, with right to use the vendor's name, is, in my opinion, an entire and indivisible contract. That the plaintiffs so considered it is established by the evidence of the plaintiff Scott, who, in his examination for discovery, testified as follows:—

"Q.....Would you have purchased his business if he hadn't given you the lease of the premises? A. We never considered whether we would or not. Q. Was that the deal—that the lease, and the goodwill, and the use of his name and the agreement not to carry on, and the stock-in-trade were all part of the one deal—they were all to go together? A. Yes, sir."

The contract being indivisible, to support an action for damages it must be valid in all its parts, and it must not have been entered into conditionally upon the consent of Mrs. Miller to execute a lease. The plaintiffs knew that the defendant was a married man, and also knew that he resided with his wife upon the premises agreed to be leased. Such residence constituted the premises the defendant's homestead within the meaning of the Homestead Act. Section 3 of that Act provides:—

"3.—(1) Every transfer, agreement of sale, lease or other instrument intended to convey or transfer any interest in a homestead to any person other than the wife of the owner, shall be signed by the owner and his wife, if he has a wife, and she shall appear before a district court judge, local registrar of the Court of King's Bench, registrar of land titles or their respective deputies, or any justice of the peace, or before any solicitor other than the solicitor who prepared the document, his partner or clerk, and, upon being examined separate and apart from her

husband, she shall acknowledge that she understands her rights in the homestead and signs the said instrument of her own free will and consent and without compulsion on the part of her husband."

Under this section, in my opinion, no lease or transfer of a homestead is valid until it has been signed by the homesteader's wife (if he has one) and she has appeared before one of the officials mentioned and has acknowledged that she signs away her homestead rights of her own free will. The plaintiffs are presumed to know the law, and, as they were well aware that the defendant and his wife resided upon the premises to be leased, they must be held to have known that her signature to the lease would be necessary to make it valid. Knowing that, it seems to me necessarily to follow that in entering into the contract both the plaintiffs and the defendant must have intended it to be conditional upon the consent of Mrs. Miller to execute the lease, for, as the plaintiff Scott said, they had not considered purchasing the business apart from the lease. The granting of the lease went to the root of the whole transaction. It is true that there is no direct evidence that any of the parties expressly said that the signing of the agreement should be conditional upon Mrs. Miller's willingness to execute the lease; but they all knew that the agreement could not be carried out unless she consented to the lease being given.

Where a contract is entered into under these circumstances, it seems to me that the circumstances themselves furnish sufficient evidence that the performance of the contract was intended to be conditional upon the willingness of the wife to perform the part which, under the statute, she was obliged to perform to enable the agreement to be carried out. She being unwilling, the agreement, in my opinion, never became a valid and binding contract, and will not support an action for damages.

On the second of the above grounds it seems to me, as at present advised, that the defendant is likewise entitled to succeed.

In 13 Corp. Jur. 330, the author says:—

"A promise to do that which is legally impossible for the promisor to do will not constitute a consideration."

And in 39 Cyc. 1217, I find the following:—

"An executory contract to convey a homestead signed by the husband alone is within a statute providing that every sale or alienation of the homestead by the husband shall be null and void, and by the weight of authority such contract can neither be enforced in equity nor made the basis of an action for damages for non-performance."

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In *Wilson* v. *Carnley*, [1908] 1 K.B. 729, 77 L.J. (K.B.) 594, the question was whether a woman could maintain an action for breach of promise to marry when she knew at the time the promise was made that the defendant was a married man. The Court of Appeal held that no action was maintainable, the contract being void on the ground of public policy.

Our Homestead Act was passed for the purpose of preventing a husband from disposing of the homestead without the consent of his wife, given without compulsion and of her own free will. Although the Act gives the wife an interest in the homestead independent of her husband, it must not be forgotten that they are still man and wife, with, in most respects, interests which are identical. The prosperity of the husband, generally speaking, means the prosperity of the wife, while any loss sustained by him are losses which she must share. If, therefore, the husband enters into an agreement to sell the homestead, and if it be held that his wife's refusal to consent to the sale results in the husband being mulcted in heavy damages for breach of his contract, which damages will be so much loss to their joint estate, it seems to me that the freedom of will and the absence of compulsion which the statute requires on part of the wife would be very greatly interfered with. In many of such cases I fear the wife would be found making a declaration that she was signing the conveyance of her own free will, when, in fact, she was doing so very reluctantly, and under the compulsion which threatened loss, by way of heavy damages, for her husband's breach of contract, would exert upon her. To put this species of compulsion upon a wife seems to me to be entirely inconsistent with the spirit of the Act. In view, however, of the conclusion at which I have arrived on the first ground above mentioned, it is not necessary in this case that I express a concluded opinion as to whether in any case an agreement by a husband to dispose of the homestead, along with other property, can be made the basis of an action for damages in the absence of the wife's consent thereto, or whether the purchaser's remedy is not confined to specific performance of the agreement as far as the vendor can give it, with compensation for the homestead, as in *Halldorson* v. *Holizki*, *supra*. Being unnecessary in this case, the point may well remain open until a case arises in which its determination becomes necessary.

The appeal, in my opinion, should be allowed with costs, the judgment below set aside, and judgment entered for the defendant with costs.

TURGEON, J.A. (dissenting):—This is an appeal from the judgment delivered in the above case by McKay, J., on August

18, 1921. In his judgment the trial Judge deals at length and specifically with the various questions of law and of fact involved in the case and discussed upon the hearing of the appeal, and his judgment is to be found reported in (1921), 61 D.L.R. 377. Judgment was given by him in favour of the respondents in the sum of $2,250 with costs.

I am in agreement with the views expressed by the trial Judge upon the questions dealt with and in the amount of damages awarded by him, and I feel that I can add nothing material to what is to be found in his judgment. I would dismiss the appeal with costs.

Appeal allowed.

Re WHITFORD ELECTION.

Alberta Supreme Court, Walsh, J. December 2, 1921.

ELECTIONS (§III—80)—NOMINATION PAPERS NOT CONTAINING RESIDENCES AND OCCUPATIONS OF NOMINATING VOTERS—VALIDITY—REFUSAL OF RETURNING OFFICER TO RETAIN CERTAIN PAPERS FILED—VALIDITY OF NOMINATION—WITHDRAWAL OF CANDIDATE—NECESSITY OF AFFIDAVIT UNDER SEC. 143.

It is not necessary under sec. 137 of the Alberta Election Act, 1909 (Alta.), ch. 3, that the residences and occupations of the nominating voters should be set out in the nomination paper, and the omission does not invalidate the nomination paper.

When a nomination paper in proper form and regularly signed is delivered to the returning officer accompanied by everything else necessary to make the nomination perfectly valid it is filed within the meaning of the Act, and the subsequent refusal of the returning officer to retain the custody of the paper does not amount to a withdrawal of the nomination, the only way the nomination can then be withdrawn is by a declaration in writing signed by the candidate himself, under sec. 143 of the Act.

PETITION to set aside the election of a candidate elected at the general election held in the Province of Alberta. Petition granted, election set aside.

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

H. C. Macdonald, K.C., for respondent.

WALSH, J.:—At the general election held in this Province in July last, the returning officer for the electoral district of Whitford certified that as only the name of the respondent was duly proposed, he had declared him duly elected as the representative for that district in the Legislative Assembly of Alberta. The petitioner, who was then and still is a duly qualified elector of this constituency, protests this return and asks to have the respondent's election and this return declared void. He alleges that one Mike Chornohus was duly nominated as a candidate at said election, and because of this he says that the returning officer should have held a poll of the electors to determine which

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of these two candidates was their choice instead of making the return which he did.

At the appointed time and place for making nominations, the petitioner Boutillier appeared before the returning officer. He handed to him a written nomination of Chornohus, signed by ten duly qualified and well-known electors of long residence in the district, accompanied by the written consent of this candidate to this nomination and the written appointment of himself (Boutillier) as the agent of the candidate, together with $100 in money. The returning officer, after examining the nomination paper, told him that it was irregular, because it did not give the residence and occupation of each of the nominating electors. Boutillier, who knew their places of residence and occupations, said that he would write them in but the returning officer would not allow him to do so. He was accompanied by two of the men who had signed the paper, and he then proposed to have each of them fill in his own residence and occupation. One of them, whose signature happened to be near the top, did so. The name of the other man who was present was the very last one on the paper, but when Boutillier asked him to write in his address and occupation, the returning officer refused to permit it, saying that these descriptions must be filled up in their order without any skip in their sequence. This ruling made it impossible for this man to supply the needed information respecting himself, as there were several signatures intervening between his and that of the first man. Boutillier then got from the returning officer a sheet of paper on which he wrote out a new nomination paper and had it signed by four electors. He detached the candidate's consent from the first set of papers and attached it to this new nomination paper and handed them, with his own appointment as agent, to the returning officer who, after examining them carefully and comparing them with others, took from Boutillier the statutory deposit of $100 and gave him a written receipt for it and another written receipt for the nomination paper. When Boutillier got these receipts he asked the returning officer if everything was in order, to which he replied, "Yes, as far as I know," and so Boutillier went away quite satisfied that he had at last got his candidate really nominated. He was rudely awakened, however, two days later, when the returning officer calmly informed him that he had returned Shandro as elected by acclamation, having discovered that the second nomination paper of Chornohus was defective because his name in it was written Chornohuz, Boutillier having made the mistake of ending his name with the letter "Z" instead of with an "S." And so by the incorrect use of a letter the respondent has been,

since July last, by the grace of this punctilious and over-zealous officer, the representative of the electors of Whitford in the Legislature of this Province.

My opinion is that the objection taken to the first nomination paper was quite untenable. The only objection taken to it, either by the returning officer or by the respondent on the trial of this petition, was the absence from it of the residences and occupations of the nominating voters. I do not think that this omission invalidated the paper.

Section 137 of the Alberta Election Act, 1909 (Alta.), ch. 3, provides that "any four or more voters may nominate a candidate by signing before any person authorised to administer oaths within the Province, or before the returning officer, and causing to be filed with the returning officer a nomination paper (form 33)." There are of course other requirements, such as the consent of the candidate and the election deposit which I do not need to deal with here, as they were all complied with. Under the above quoted section of the Act two things, and two things only, are necessary to the nomination of a candidate, namely, the signing of the nomination paper by at least four voters in the prescribed form and manner and causing it to be filed with the returning officer. When that is done, and the other requirements of the Act are performed, the candidate is nominated.

Now there is not a word in this section even remotely suggestive of the need to give the places of residence and the occupations of the voters. Their signatures are all that it calls for. Neither does this section say, except inferentially, that the paper must be in form 33, for all that it calls for is "a nomination paper (form 33)." Even if this is intended to compel the use of form 33, given in the schedule to the Act, I see nothing in the form which makes the nomination paper invalid, because it does not give the residences and occupations of the voters who signed it. There is nothing in the body of the paper as it is set out in this form which calls for this information. It begins, "We the undersigned voters of the Electoral District." It leaves no place for the insertion in it of these particulars. The only thing there is in it which calls for this information are the following words, printed below the date line (signature, with residence and occupation).

Now, of course, a nomination paper to comply literally with this form should shew the place of residence and the occupation of each of the voters who signed it. It by no means follows though that the omission of them is fatal to the validity of the paper. The essential thing is that those who sign it should be voters. That is what both the section and the form emphasise.

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It undoubtedly might be of help in identifying the particular voters who signed the paper to have their places of residence and occupation given, but I can conceive of no reason why, if the signers are duly qualified voters, their failure to state where they live or what they do should nullify their otherwise regular effort to nominate the man of their choice. The words, "with residence and occupation" appearing where and as they do, are in my opinion simply directory and the failure to comply with their direction does not invalidate the nomination paper. If this constituted a patent and substantial defect in the omission of a specific statutory requirement, it would have been the duty of the returning officer to reject the nomination. *Two Mountains Dominion Election* (1912), 7 D.L.R. 126, 47 Can. S.C.R. 185. It did not amount to that, however, and so it did not invalidate the paper, and the returning officer had no right to reject it.

The other duty imposed upon those who fathered the nomination was to cause it to be filed with the returning officer. This I think Boutillier did so far as it was possible for him to do so when he handed it in to that officer. The paper, in proper form and regularly signed was delivered to the returning officer accompanied by everything else needed to make the nomination perfectly valid. So everything that Boutillier could do to cause it to be filed was done. It was filed so far as he was concerned when he parted with its possession by turning it over to the returning officer. I think "filed with" means "delivered to." Stroud says, "a document is filed when delivered to the proper officer to be filed." One meaning given to the word "file" by Wharton, is "to deposit at an office."

I think, therefore, that Chornohus was actually nominated under this original paper. At any rate, I think the returning officer was wrong in rejecting it, and he was wrong in refusing to allow Boutillier to write in the missing descriptions. He should have put Chornohus in nomination and therefore erred in returning Shandro as elected by acclamation.

Mr. Macdonald argues, however, that that nomination was withdrawn by Boutillier, so that it thereafter ceased to be available to him. I do not think that Boutillier withdrew this nomination paper. It was returned to him when the returning officer improperly rejected it. Notwithstanding its rejection, Chornohus remained properly nominated under it, though the returning officer refused to retain the custody of the papers evidencing the nomination. The fact that Boutillier, in an effort to satisfy the whims of this meticulous officer, framed and filed a new nomination paper, which he accompanied with the same consents and the same money which he had used with his first

paper did not, in my opinion, under the circumstances amount to a withdrawal of the original nomination, or prejudice the rights which he had acquired under it. If my opinion is right that Chornohus was nominated when his papers were filed and his deposit paid, then there was only one way by which, under the Act, he could withdraw, and that was by a declaration in writing, signed by the candidate himself, under sec. 143.

Holding as I do the opinion that Chornohus was properly nominated under the first nomination paper, I do not think it is necessary to consider the questions raised as to the regularity of his second nomination.

A question was raised on the hearing as to the qualification of Chornohus. He is of alien birth. He came to this country with his father when he was a lad of twelve. Six years later his father became a British subject in Canada by naturalisation. Automatically this naturalised Chornohus, who was still under age. The proof, however, that he is the son of the man thus naturalised came only from himself. It is objected that this is no evidence of that fact. The proof of the father's naturalisation is in a certified copy of a certificate of naturalisation, but the man named in it is Iwan Czornohus, another mis-spelling of the name by the improper use of the letter "Z," this time in place of an "h." I think the question of this man's citizenship is not in issue here. The returning officer would have had no right to enquire into that. If, being nominated, he had been elected, his right to sit could of course have been attacked upon this ground, but I do not think it incumbent upon the petitioner in such an issue as this to prove the qualification of the candidate. If I had been of a different opinion, I would have given Mr. Ewing a chance to prove, by the father, that this candidate is his son and that he (the father) is the man named in this certificate.

This over-zealous returning officer seems to have thought it to be his duty, and apparently his only duty, to block the nomination of this particular candidate. So far as I am concerned, this attempt to present this seat to the respondent must fail. With that failure must end, for the present at least, the respondent's right to represent this constituency. I regret that he saw fit to assert it and to insist upon it. His disclaimer of it would have shewn him to be possessed of a higher sense of honour and a keener appreciation of what is right than can be attributed to him in his struggle to retain what is morally not his, no matter how strong his legal claim to it may be. Surely his occupancy of this office, which he owes not to the people whose representative he is supposed to be, but to a returning

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officer astute to discover and keen to take advantage of any technicality that might deprive them of their right to choose their own representative, could bring no satisfaction to him if he was a right-minded man.

The petition is allowed and the respondent's election and the return thereof are set aside, with costs.

Petition granted.

Re H. D. McKENZIE Co. Ltd.

Nova Scotia Supreme Court, Harris, C.J., Russell, J., Ritchie, E.J., and Mellish, J. April 13, 1922.

BANKRUPTCY (§I—3) — POWERS OF JUDGE IN BANKRUPTCY — EX PARTE ORDER FOR APPLICATION OF WINDING-UP ACT, CH. 144, R.S.C. 1906— APPLICATION TO RESCIND PREVIOUS ORDER—BANKRUPTCY ACT, CH. 36 (CAN.) 1919, SEC. 74.

A Judge in Bankruptcy has power on an *ex parte* application to make an order that the provisions of the Winding-up Act shall apply to the insolvent company and that the applicants be at liberty to petition to Court for a winding-up order under that Act, and such Judge has also jurisdiction under sec. 74 of the Bankruptcy Act to rescind such *ex parte* order upon proof that it should not have been made.

[See Annotations on Bankruptcy, 53 D.L.R. 135, 56 D.L.R. 104, 59 D.L.R. 1.]

APPEAL from the judgment and order of Chisholm, J., Judge in Bankruptcy, rescinding the *ex parte* order made by him on February 6, 1922, whereby the provisions of the Winding-Up Act were declared applicable to the H. D. McKenzie Co., Ltd., and leave was given to proceed in respect of said company under said Act. On February 7 a petition was presented for the winding-up of the company under the Bankruptcy Act and an order was granted by Rogers, J., appointing the Royal Trust Co. as provisional liquidator.

The further facts are fully stated in the judgment of the Court as delivered by Harris, C.J.

J. L. Ralston, K.C., for M. E. C. Henderson, and *A. W. Jones* for the provisional liquidator, appellants.

J. McG. Stewart, K.C., for the petitioning creditor, respondent.

The judgment of the Court was delivered by

HARRIS, C.J.:—On February 6, 1922, Myron E. C. Henderson, the president of the H. D. McKenzie Co., Ltd., made an *ex parte* application to the Judge in Bankruptcy and obtained an order that the provisions of the Winding-Up Act, ch. 144, R.S.C. 1906, should apply to the H. D. McKenzie Co., Ltd., and that the applicant and George E. Faulkner should be at liberty to petition the Supreme Court of Nova Scotia for a winding-up order under the provisions of that Act. This *ex parte* order

was obtained on the affidavit of Henderson that the H. D. McKenzie Co., Ltd., "has valuable contracts for the supply of coal to various persons, firms and corporations." This affidavit also set out that it was in the interest of creditors and shareholders of the company that it should be wound up under the provisions of the Winding-Up Act rather than under the Bankruptcy Act, because it was doubtful whether under the Bankruptcy Act the trustee could be empowered to carry on the business and preserve these contracts, whereas under the Winding-Up Act a liquidator could be given power to carry on the business.

On February 27, 1922, a motion was made to the same Judge in Bankruptcy on notice for an order rescinding and setting aside the *ex parte* order made by the Judge in Bankruptcy. This application was made on behalf of Donald V. White, a creditor of the company, to the extent of upwards of $93,767.26, and the British and Foreign Agencies, Ltd., creditors for a sum exceeding $15,000.

The other claims against the company are about $50,000, and it is hopelessly insolvent.

On the hearing of this application, H. B. Stairs, the manager of the Royal Trust Co., provisional liquidators of the company, was examined and established beyond question that the valuable contracts for the supply of coal sworn to by Henderson, and upon which he obtained the *ex parte* order, could not be carried out at a profit, and that it was not in the interest of the estate to continue the business, and as a matter of fact the contracts had been abandoned.

The Judge in Bankruptcy, in the reasons for his judgment, said: "If the real situation had been made to appear to me when the first application was made to me, I should have refused it," and he set aside the *ex parte* order which he had previously made.

There is an appeal from his order rescinding the previous order. It is contended that the Judge in Bankruptcy could not set aside his *ex parte* order on an application, but the same should have been appealed from.

The practice in this Province has been well settled for many years of applying to the Judge who has made an *ex parte* order to rescind or vary it on the ground that it was improvidently granted. (See authorities cited by Meagher, J., in *Hamilton* v. *The Stewiacke Co. and Dickie* (1897), 30 N.S.R. 92 at pp. 102, 103. That is a practice based on convenience and one which I think should be upheld.

In the case of *Re a Debtor, ex parte Goldstein*, [1917] 1 K.B.

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558, Shearman, J., said at pp. 564, 565: "The whole practice of our Courts of justice is permeated by the principle that if an order affecting any person is made *ex parte*, and he is aggrieved thereby he does not appeal from the order, but comes before the Court with a summons or motion to set it aside."

I have no doubt whatever that the Judge had power on this ground to make the order appealed from, but it is also clear I think, that he had the power under sec. 74 of the Bankruptcy Act, ch. 36, of 1919, which provides that:—"Every Court having jurisdiction in bankruptcy under this Act may review, rescind or vary any order made by it under its bankruptcy jurisdiction."

This is an exact copy of sec. 108 of the English Bankruptcy Act, 1914 (Imp.), ch. 59.

The Supreme Court of Nova Scotia, by the Bankruptcy Act, constituted a Court of Bankruptcy and invested with such jurisdiction at law and in equity as will enable it to exercise original auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorised by this Act (sec. 63 (1)).

Chisholm, J., was duly assigned as the Judge for the purpose of the Act, and under sec. 64 has all the powers and jurisdiction in bankruptcy and otherwise conferred by the Act.

The sole question under sec. 74 is whether the *ex parte* order referred to was made by him under his bankruptcy jurisdiction.

The affidavit of Myron E. C. Henderson, upon which the *ex parte* order was made, is headed: "In the Supreme Court in Bankruptcy: In the matter of ch. 36 of the Acts of 1919, the Bankruptcy Act and Acts in amendment thereof."

The order is headed in the same way. The jurisdiction being exercised by the Judge when the *ex parte* order was made was under sec. 2 (c) of the Bankruptcy Act, and the question he was considering was whether or not he should, as the Judge in Bankruptcy, give leave to extend or apply the provisions of the Winding-Up Act to the bankrupt company. I am quite unable to understand how it can be successfully contended that the order was not made by him under his bankruptcy jurisdiction.

In the case of *Re Suffield & Watts; ex parte Brown* (1888), 20 Q.B.D. 693, 36 W.R. 584, cited by counsel for the appellant, the Bankruptcy Court made the order which it was sought to vary or rescind by virtue of the Solicitors Act, 1860, ch. 127, and as Lord Esher, M.R., points out at p. 696, "it could only be made under that Act."

That is not the case here, but on the other hand, the order

is made under the Bankruptcy Act in a bankruptcy proceeding authorised only by that Act.

The appeal should, I think, be dismissed with costs.

Appeal dismissed.

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Alberta Supreme Court, Appellate Division, Stuart, Beck, Hyndman and Clarke, JJ.A., and Walsh, J. March 31, 1922.

INFANTS (§ID—220)—RIGHT OF FATHER TO EARNINGS OF—EMANCIPATION OF INFANT—HIRING AGREEMENT WITH FATHER—RIGHT TO RECOVER UNDER.

A father is not legally entitled to the earnings of his child after the child has reached the age of 16 years, and an infant of 17 years of age, who has left his home and become emancipated from the father's custody and control, but who afterwards returns and enters into a hiring agreement with his father, may recover wages due under such agreement.

[*R. v. Chillesford* (1825), 4 B. & C. 94, 107 E.R. 994, applied.]

APPEAL from the judgment of Morrison, D.C.J., who affirmed the decision of J.A. Housiaux, J.P., awarding the plaintiff the sum of $243.75 and costs, for wages under the Master & Servants Ordinance. Affirmed.

M. J. Brennen, for appellant.

E. C. Locke, for respondent.

HYNDMAN, J.A.:—The plaintiff is the son of the defendant and was, at the date of the trial, 17 years of age. He left home about a year before the alleged hiring with his father, and worked for one Johnston, at the rate of $75 per month. One reason of his leaving home was because of certain religious differences between him and his father. According to the remarks of the trial Judge, he was at the time an able-bodied young man, apparently as competent a worker as though of age.

The evidence surrounding the circumstances of his return to his father's house, and the hiring agreement, was conflicting, but the trial Judge very emphatically accepted the son's version and found, as a fact, there was such a contract, and I cannot see upon what ground his finding should be disturbed.

There remains to consider, therefore, two points, namely (1) Does an action lie under the circumstances, the plaintiff being the minor son of his father; and (2) Does an appeal lie in such a case from the judgment of the District Court Judge?

As to the first question, I do not think it can be said that the plaintiff was still under the control and in the custody of his father in the usual sense, but had reached that stage in his life when he became quite competent to look after and support himself; and the fact that he remained away for a year earning his

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own living, with the tacit consent, at least, of the father, shewed that the latter did not consider it necessary to care for or look after him. In other words, he became emancipated from the control of his father, and the District Court Judge so found.

In Eversley on Domestic Relations (3rd ed.), at pp. 552, 553, it is said:—"It is a doubtful point whether or not the father is entitled to the earnings of his child. He certainly cannot claim them legally after the child has reached the age of sixteen ....."

Blackstone, 1 Com. 453, says:—"He (the father) may indeed have the benefit of his children's labour while they live with him and are maintained by him; but this is no more than he is entitled to from his apprentices or servants." This proposition must be limited to children who are living with, and being reared and nurtured by the parent, and not to those who are emancipated and are supporting themselves; and must mean that if a child work for its parent, it cannot afterwards recover on an implied contract to pay wages. But if a child enters, as he can do, into a valid contract of service with his parent for the payment of wages, the parent will not be entitled to retain such wages, but the child will be able to maintain an action for them against his parent. If the father emancipates the child from his control, every right to his earning would at once cease to exist."

The author cites as authority the case of *R.* v. *The Inhabitants of Chillesford* (1825), 4 B. & C. 94, 107 E.R. 994. Abbott, C.J., at pp. 99, 100, in that case said:—

"I am of opinion that in each of these cases the pauper gained a settlement by hiring and service. It has been conceded that if the pauper had been previously emancipated, he might have gained a settlement afterwards by hiring and service with his father. But emancipation does not confer any capacity to contract, and the objection is that the son had not the power to contract with the father, although he might with a stranger. The contract of an infant made for his own benefit, according to general principles of law, is not void, but voidable only at the election of the infant.....and if an infant, therefore, may with the permission of his father enter into a contract with a third person, why may he not with his own father? and here the father by taking him as his servant, gives his consent to the contract."

Bayley, Littledale and Holroyd, JJ., also expressed themselves to the same effect.

The facts of the case before us, as found by the trial Judge (and I think properly so), are such as make the authorities cited directly applicable. Consequently, there would appear to be no alternative but to affirm the decision in the respondent's favour.

While it is not necessary, in view of what I have said, to deal with the question of the right to appeal, it is nevertheless advisable to do so as a guide to future proceedings under the Master & Servants Ordinance.

An Act respecting Police Magistrates and Justices of the Peace, 1906 (Alta.), ch. 13, sec. 8, as amended by 1918, ch. 4, sec. 25, enacts:—

"Except as otherwise specially provided, the provisions of *The Criminal Code* of Canada, as amended from time to time, respecting summary convictions and proceedings relating thereto, shall apply in respect to all convictions or orders made or to be made by justices of the peace and police magistrates under any law or regulation in force in the province or under municipal by-laws."

Therefore, Part XV of the Criminal Code relating to summary convictions is made applicable and becomes in fact a part of the Master & Servant Ordinance, Section 752, sub-sec. 1, of the Code enacts:—

"When an appeal against any summary conviction or order has been lodged in due form, and in compliance with the requirements of this Part, the court appealed to shall try, and shall be the *absolute Judge, as well of the facts as of the law,* in respect to such conviction or order."

In *R. v. Beamish* (1901), 5 Can. Cr. Cas. 388, it was held by Walkem, J., at p. 390, that:—"Notwithstanding the ungrammatical structure of this section, it is clear that the Legislature intended that absolute effect should be given to the appellate Judge's decision, both on questions of law and fact, in respect to the magistrate's conviction or decision, or, in other words, that the decision of the appellate Judge should be regarded as final and conclusive."

In *R.* v. *Mischowsky* (1909), 15 Can. Cr. Cas. 364, which was a summary conviction for an offence under the Criminal Code, the Court *en banc* refused to entertain a reference by the Dist. Ct. Judge on the ground that because of sec. 749 there was no authority to warrant the reference and no jurisdiction in the Court to entertain it.

The right of appeal is statutory only and does not exist at Common Law. (*Superior* v. *City of Montreal* (1900), 3 Can. Cr. Cas. 379.) Without the amendment to the Master & Servant Ordinance granting the right of appeal to the Dist.Ct. Judge, which is given by the incorporation of Part XV of the Code, the decision of the magistrate would be final.

It is argued, however, that an appeal to this Court lies by reason of sec. 48 of the District Court Act, 1907, ch. 4, which

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provides for an appeal to this Court "in any 'cause' or 'matter,' from any decision made by a Judge of a District Court under any of the powers conferred upon him by any rules of Court or any statute unless provision is made to the contrary . . . . ."

It seems to me, however, that the wording of sec. 749 can admit of no other sensible interpretation than that of the District Court being the final appellate tribunal in proceedings under that part of the Code mentioned. If that is the meaning which should be placed upon the legislation in question, it must be regarded as a provision contrary to the general right of appeal conferred by said sec. 48 of the District Court Act.

The objects of passing the Master & Servant's Ordinance must have been to afford labourers and servants a speedy and inexpensive method of recovering wages (not exceeding 2 months). The ordinance, as originally enacted, gave no right of appeal, and I think it fair to assume that when subsequently that right was granted by virtue of Part XV of the Code, that it was intended such appeal should be limited as in ordinary "matters" under the Code. If several appeals should be allowed, the primary object of the legislation would be, in many respects, defeated.

It would, I think, not be amiss to state that cases of this nature are undesirable and rare. The presumption is in favour of the father, and magistrates should be careful to see that the evidence in support of the plaintiff's claim is very clear and satisfactory.

I would, therefore, dismiss the appeal with costs.

CLARKE, J.A., concurs with HYNDMAN, J.A.

STUART, J.A.:—For the reasons given by my brother Hyndman with regard to the merits of this appeal, I think it should be dismissed with costs.

The circumstances are obviously peculiar, and it by no means follows that a boy 17 years old could always have a right to bring an action for wages against his father.

It is not necessary to express an opinion upon the question of the existence of a right of appeal, and I prefer to postpone the consideration of that point until it is absolutely necessary to do so.

BECK, J.A., and WALSH, J., concur in the result.

Appeal dismissed.

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Re ALLAN GRAIN GOWERS' CO-OPERATIVE ASS'N; Ex p. ROBINSON, LITTLE & CO.

Saskatchewan King's Bench, MacDonald, J. March 10, 1922.

BANKRUPTCY (§I—5)—PETITION—JUDGMENT DEBT FOR GOODS SOLD ON CREDIT—ASSOCIATION PROHIBITED FROM BUYING ON CREDIT—DISMISSAL OF PETITION.

On a petition that an association be adjudged bankrupt and that a receiving order be made in respect of its estate, where the petitioner alleges that the association is indebted to the petitioner by virtue of a judgment recovered by the petitioner against the association and the association opposes the petition on the ground that it is not indebted to the petitioner, and the petitioner shews that it did recover a judgment against the association, the Court has power to enquire into the consideration for the judgment debt, and if the association was prohibited by statute from entering into the contract on which the judgment was recovered the petition will be dismissed.

[*Gnaedinger* v. *Turtleford Grain Growers Co-operative Ass'n*, 63 D.L.R. 498, applied.]

PETITION that association be adjudged bankrupt and that a receiving order be made in respect of its estate. Petition dismissed.

H. Ward, for petitioner.

L. McK. Robinson, for alleged debtor.

MACDONALD, J.:—This is a petition by Robinson, Little & Co., Ltd., that the Allan Grain Growers' Co-operative Association, Limited, be adjudged bankrupt, and that a receiving order be made in respect of its estate. The petition sets forth that the said association is indebted to the petitioner in the sum of $1,651.69, under and by virtue of a certain judgment recovered by the petitioner against the association in the Court of King's Bench for Saskatchewan on September 8, 1921. The association opposes the petition on the ground, among others, that it is not indebted to the petitioner. The petitioner shows that it did recover a judgment as alleged; but even though the petitioner has such judgment against the association, I still have power to enquire into the consideration for the judgment debt, and should do so where, as here, the point is raised that there is no debt in law or equity. See authorities collected in Williams on Bankruptcy, pp. 144 *et seq.*

The association was incorporated under the Agricultural Co-operative Associations Act, which now appears as ch. 119, R.S.S. 1920. Sub-secs. (4), (5), and (6) of sec. 5 of the said Act read as follows:—

"(4) The association shall, except as hereafter provided, pay for all goods purchased upon delivery:

Provided that any association may purchase upon credit from any other agricultural co-operative association or any company,

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association or society incorporated by any special Act of the Legislature of Saskatchewan having objects wholly or in part similar to the agricultural co-operative associations.

(5) No association shall sell its goods, wares or merchandise to its shareholders, patrons or customers except for cash. No credit shall be given.

(6) The directors shall not have power to pledge the credit of the association except as aforesaid or for the purchase price or rental of business premises, salaries and incidental expenses, or for moneys borrowed to pay for goods purchased or expenses incurred in connection therewith or the shipment thereof.

The judgment in question was recovered against the association as acceptor of certain bills of exchange. These bills of exchange, it is shewn by the evidence, were drawn by the petitioner for the purchase-price of certain goods sold on credit and delivered by the petitioner to the association. For the association it is argued that it was *ultra vires* of the association to purchase goods on credit from the petitioner, and that, therefore, there is no debt due from the association to the petitioner. There is no suggestion that the petitioner is an agricultural co-operative association or a company, association or society incorporated by any special Act of the Legislature of Saskatchewan, having objects wholly or in part similar to the agricultural co-operative associations.

The decision in *Gnaedinger & Sons, Ltd.*, v. *Turtleford Grain Growers Co-operative Assoc.*, just handed down by the Court of Appeal, 63 D.L.R. 498, upholds the contention of the association, and the petition must be dismissed. I think, however, I am justified in not awarding costs, and I do award none.

Petition dismissed.

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Saskatchewan King's Bench, Bigelow, J. April 1, 1922.

CHATTEL MORTGAGE (§IIC—16)—CHATTEL MORTGAGE ACT, R.S.S. 1920, CH. 200, SECS. 20 AND 9 (A)—VALIDITY OF MORTGAGE OF UNCUT CROP—VALIDITY WHERE DATE OF EXECUTION OF AFFIDAVIT OF WITNESS LEFT BLANK.

A chattel mortgage which is not given for the purchase-price of seed grain, or for meat, groceries, flour, clothing or binder twine, is invalid under the Chattel Mortgage Act, R.S.S. 1920, ch. 200, sec. 20, if given for a crop which is not cut at the time such mortgage is given. Such chattel mortgage is also invalid under sec. 9 of the same Act where the date of execution of the affidavit of the witness is left blank.

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BANKS (§VIII—160)—LINE OF CREDIT—WRITTEN PROMISE TO PAY—BANK ACT, 1913 (CAN.), CH. 9, SECS. 88 AND 90—SPECIFIC ADVANCES ON SPECIFIC GOODS—SECURITY FOR INDEBTEDNESS—GOODS NOT IN EXISTENCE AT TIME OF ENTERING INTO AGREEMENT.

The written promise required by sec. 90 (b) of the Bank Act 1913 (Can.), ch. 9, refers to a specific loan then being negotiated for, and to specific goods proposed to be given in security for such loan and such goods must be in existence at the time the agreement is entered into.

[*Clarkson* v. *Dominion Bank* (1919), 46 D.L.R. 281, followed.]

INTERPLEADER issue to determine the ownership and rights of the parties in connection with certain grain seized by the sheriff. The facts and circumstances are fully set out in the judgment reported.

J. H. Hearn, for plaintiff.

J. G. Banks, for defendant.

BIGELOW, J.:—This is an interpleader issue in which the plaintiff affirms and the defendant denies that the grain seized by the sheriff of the Judicial District of Humboldt under a writ of *fieri facias* issued in the actions in which the above named plaintiff was plaintiff, and Mike Posnikoff and Fred Popoff were defendants, and the above named plaintiff was plaintiff and Mike Posnikoff was defendant, the above named defendant had no property or interest in the said grain and was not entitled to claim the same as against the above named plaintiff.

The grain was grown in 1921 on a section of land owned by Posnikoff, but Popoff was farming a quarter section of it. Although their grain was mixed the evidence shews that 2000 bushels of the oats for which the defendant received the cash belonged to Popoff.

On October 31, 1921, the sheriff seized about 6,000 bushels of oats; 3,701 bushels were then in the elevator at Wadena, and the balance on the farm. At the time of the seizure storage tickets under the Canada Grain Act 1912, (Can.) ch. 27, had been issued by the elevator company in the name of the defendant and delivered to the defendant, with the result that the proceeds of the grain in the elevator $851.23 were sent to the defendant. The defendant paid this amount to the sheriff to abide the result of this action. The sheriff received $1,300 in all from the sale of the grain, the balance other than the $851.23 coming from the crop seized on the farm.

The defendant claims all of the crop:—

(1) Under a chattel mortgage dated September 12, 1921, made by Mike Posnikoff for $1520.40 direct indebtedness due by him and for $460 his liability as endorser on a note of Pop-

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off. The chattel mortgage conveyed all of the oats now in sheaf covering 200 acres of land on sec. 22 etc. (2) On account of security alleged to have been obtained under the Bank Act. (3) In the alternative the defendant claims the grain covered by the storage tickets, 3,701 bushels.

As to the chattel mortgage; The evidence is that only part of the grain was cut at that time; what part there is nothing to shew. The mortgage would not be valid as to the part that was not cut.

R.S.S. 1920, ch. 200, sec. 20 provides:—

"20. (1) No mortgage, bill of sale, lien, charge incumbrance, conveyance, transfer or assignment made, executed or created and which is intended to operate and have effect as a security shall in so far as the same assumes to bind, comprise, apply to or effect any growing crop or crop to be grown in future in whole or in part be valid except the same be made, executed or created as a security for the purchase price and interest thereon of seed grain or for meat, groceries, flour, clothing or binder twine."

This mortgage was not given for seed grain, and would therefore not be valid as to the crop that was growing, and as there is nothing to shew what part of the crop was cut at that time, I cannot say that the mortgage was valid as to any of it.

Again I am of the opinion that the chattel mortgage is invalid on account of sec. 9 of the Chattel Mortgage Act *supra* which reads in part:—

"Every mortgage or conveyance intended to operate as a mortgage of goods and chattels which is not accompanied by an immediate delivery and an actual and continued change of possession of the things mortgaged shall within 30 days from the execution thereof be registered as hereinafter provided together with:—(a) An affidavit of a witness thereto of the due execution thereof, giving the date of the execution."

The affidavit of the witness in the chattel mortgage in question says:—"The same was executed at the Town of Kamsack in the said Province on the day of September A.D. 1921."

The date of the execution is left blank, and I think the mortgage is invalid for this reason.

As to the claim under the Bank Act. This involves a construction of secs. 88 and 90. The Bank Act, 1913, (Can.) ch. 9 sec. 88, sub-sec. 2, reads as follows:—

"The bank may lend money to a farmer upon the security of his threshed grain grown upon the farm.

(6) The security may be taken in the form set forth in schedule C to this Act, or to the like effect."

Section 90 reads:—

"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 the 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."

Both of the parties in their argument referred to an amendment of sec. 88 passed in 1915, being ch. 1, but I cannot see that that amendment has anything to do with the case. It refers to the bank lending money for the purchase of seed grain. There is no suggestion in this case that the money was advanced for the purchase of seed grain.

The defendant loaned Posnikoff $723.50 on March 20, 1920, when Posnikoff signed the following note and agreement to give security:—

"$723.50 Due Aug. 18th, 1920

Kamsack, Sask., Mch. 24, 1920.

On August 15th, 1920, after date I promise to pay to the Bank of Montreal or order at the Bank of Montreal here, the sum of $723.50 with interest at the rate of cent. per annum as well after as before maturity. Value received.

Sec. 22 Twp. 34, Rge. 13

(Sgd.) M. Posnikoff.

The undersigned promise and agree to give the above named bank security for the above note and any renewal thereof under sec. 88 of the Bank Act covering all the threshed grain grown upon the farm situate 22 34 12 W2 and all the live stock situate 22 34 13 W2 which are now or may be from time to time owned by the undersigned, or by way of warehouse receipts or bills of lading for the same or part thereof; and the manager of the said bank or the acting manager for the time being is hereby appointed the attorney of the undersigned, to give from time to time to the bank the security above mentioned and to sign the same on behalf of the undersigned.

The borrower to sign here also (Sgd.) M. Posnikoff."

On May 11, 1920, the defendant loaned Posnikoff $715.25

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when a similar document was signed, payable August 15, 1920. This indebtedness was renewed from time to time until August 18, 1921, when a new note and agreement was signed by Posnikoff for $1520.40 payable on demand.

On August 31, 1921, the defendant loaned Posnikoff $25 and on October 24, 1921, $75.02 and a similar note and agreement was made at that time of the advance.

The defendant loaned Popoff $417.30 on January 28, 1920, when Popoff and Posnikoff signed a similar document, payable August 1, 1920, except that the farm is described as the North West of 22-34-13 West of 2nd. Popoff's note was renewed from time to time until October 27, 1921, when a similar note was signed for $463.02 payable on demand.

On October 24, 1921, Posnikoff signed the following agreement:—

"In consideration of an advance of Two thousand and eighty three dollars and two cents made by the Bank of Montreal to the undersigned, for which the said bank holds the following bills or notes; (1) as per schedule "A" hereto;

(the products of agriculture
(the live stock or dead stock or the products thereof
(the grain

mentioned below are/is hereby assigned to the said bank as security for the payment of the said bills or notes, or renewals thereof or substitution therefor and interest thereon.

This security is given under the provisions of sec. 88 of the Bank Act, and is subject to the provisions of the said Act.

The said

(products of agriculture
(livestock or dead stock, or the products thereof,
(grain,

are/is now owned by the undersigned and are/is now in the possession of myself and are/is free from any mortgage, lien or charge thereon (except previous assignments to the bank) and are in (2) store in bins or granaries situated on Section (22) Twenty-Two, Township (34) Thirty-four in Range (13) Thirteen W2nd. and are the following (3) Ten thousand five hundred and thirty one bushels of oats, and one hundred and thirty bushels of wheat.

Dated at Kamsack, the 24th day of Oct., 1921.

Sell 9000 oats. (Sgd.) M. Posnikoff."

Schedule A in that document enumerates the notes from the first and concludes with the notes for $1520.40, $25 and $75.02. The document also sets out the note of Popoff from the first and concludes with the $463.02 note.

There was also put in evidence a similar document as the last signed by Popoff per the manager of the defendant at Kamsack and referring to his indebtedness as $463.02 and the land as the south-west quarter of 22-34-13 west of 2nd.

It is under these documents that the bank claims all of the grain seized, claiming that when the advances were made there was an agreement to give the security.

It will be observed that the advances were made in the spring of 1920, and the security was not given until October 27, 1921. The money was certainly not advanced for seed grain. When asked the purpose of the advance, the bank manager said that Posnikoff and Popoff were moving from Kamsack to a farm near Wadena, and they got this money to move and develop the farm. Only a small crop was raised in 1921, and it was contended in the argument that the 1922 crop must have been contemplated as the grain on which Posnikoff and Popoff promised to give security. No such agreement was proved, and, it seems to me that it would be forcing the constructions of the clauses in the Bank Act above referred to to say that even if there was any such agreement it would be good.

I repeat what I said in the case of *Hawker* v. *The Royal Bank of Canada* (a Kindersley case not reported) (see 59 D.L.R. 674) that I would strictly construe such an act which validates a secret and unregistered security on personal property not in possession of the bank and in direct opposition to all provincial laws requiring registration of such a security.

In *Clarkson* v. *Dominion Bank*, (1919), 46 D.L.R. 281, 58 Can. S.C.R. 448, held:—

"The written promise required by secs. 90 (b) of the Bank Act (1906, R.S.C., c 29) refers to a specific loan then being negotiated for and to specific goods proposed to be given in security for such loan."

It appears from several of the judgments in that case that the goods must be in existence at the time of the agreement,

See Davies, C.J. at pp. 282, 283: "To my mind the object, intent and purpose of the section was plain and is sufficiently well expressed, though perhaps not so clearly as to remove all doubt. Primarily the section required that the taking of the security should be contemporaneous with the negotiation or contracting of the debt or loan. If, however, for any reason that could not be done, and scores of reasons arise to one's mind of conditions in which it could not, then the alternative of a written promise is substituted for the execution of the

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security. But the written promise to give security had reference, and reference only, not to a future debt or loan to be subsequently made, but to the then debt or loan being negotiated and to the goods and personal property then existing which it was proposed to give security upon, and with reference to which negotiations were taking place." See also Brodeur J. at p. 305. So I would hold this security invalid on the two grounds; (1) The question of fact that there was no proof that the 1921 crop was intended as the security, and (2) If there was such an agreement made in 1920 as to the 1921 crop it would be bad as covering property not then in existence.

The security would be good as to the $25 advance August 31, 1921, and the $75.02 advance, October 24, 1921.

The defendant also claims the grain covered by the storage tickets, 3,701 bushels, for which defendant realised $851.23. These tickets had been issued by the elevator company and delivered to the defendant before the sheriff seized. These tickets represented the grain, and when they were delivered to the defendant it was just the same as if the grain had been delivered. Posnikoff and Popoff were indebted to the bank at the time, even if the security the bank held was not good, and delivered these tickets, and the grain they represented to the defendant as payment on their indebtedness. The property passed to the defendant before seizure was made. See *Annable* v. *Younglove*, [1917] 3 W.W.R. 453.

Such a transaction might have been attacked as an unjust preference to a creditor if the circumstances warranted it, but no such contention is made here. I hold that the defendant is entitled to the grain represented by the tickets, in value $851.25.

According to the affidavit filed the tickets were received "pursuant to the security." This does not affect the validity of the payment, as Posnikoff and Popoff were indebted to the bank, but I think that is a reason why the part of the security that is good, viz; that given for the $25 and the $75.02 advances, should be taken out of these tickets. So the defendant will have the grain represented by these tickets, namely $851.23 and that is all. The rest of the grain I hold belongs to the plaintiff as against the defendant.

As to the costs; Each party has succeeded as to part. Although the value of the grain the defendant gets is more than that of the plaintiff's, most of the trial was taken up with issue on which the defendant fails. I think justice will be done by not allowing costs to either party.

Judgment accordingly.

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C.A.

ALEXANDER v. VANCOUVER HARBOUR COMMISSIONERS.

British Columbia Court of Appeal, Martin, Galliher, McPhillips, and Eberts, JJ.A. March 7, 1922.

COURTS (§IIA—150) — APPEAL FROM AWARD UNDER RAILWAY ACT OF CANADA—JURISDICTION OF JUDGE OF SUPREME COURT OF BRITISH COLUMBIA TO HEAR—SUPREME COURT ACT, R.S.B.C. 1911, CH. 58, SEC. 5—RAILWAY ACT OF CANADA, 1919 CAN. STATS., CH. 68.

A Judge of the Supreme Court of British Columbia sitting in Court, is sitting as a Superior Court, and has jurisdiction to hear an appeal taken under sec. 232 of the Railway Act of Canada (1919 Stats., ch. 68) from an award made under that Act.

[*James Bay R. Co.* v. *Armstrong* (1907), 38 Can. S.C.R. 511, [1909] A.C. 624; *Birely* v. *Toronto Hamilton and Buffalo R. Co.* (1898), 25 A.R. (Ont.) 88, applied.]

APPEAL by plaintiff from a judgment of Macdonald, J. in which he held that an appeal taken under sec. 232 of the Railway Act, (1919 (Can.) ch. 68) to the Supreme Court of British Columbia could not be heard by a single Judge of the Court, but must be heard by all the Judges of the Supreme Court. Reversed.

E. C. Mayers, for appellant.

C. H. Tupper, K.C., for respondent.

MARTIN, J. A. would allow the appeal.

GALLIHER, J. A. :—I agree in the judgment to be handed down by my brother McPhillips.

MCPHILLIPS, J. A. :—This is an appeal from the decision of Macdonald, J. that an appeal taken under sec. 232 of the Railway Act, ch. 68, 1919 (Can.) to the Supreme Court of British Columbia cannot be heard by a single Judge of the Court but must be heard before all the Judges of the Supreme Court. The appeal would seem, upon the facts of the present case, to be as of necessity to the Supreme Court as the appeal is not from an award of a Judge of the Supreme Court. The counsel for the appellant contends, and as I think rightly, that the appeal should have been heard by Macdonald, J. as he had jurisdiction to hear it. In my opinion, and with great respect to the Judge, he erred in holding that he was without jurisdiction to hear the appeal. If we turn to sec. 5 of the Supreme Court Act (ch. 58, R.S.B.C. 1911) it will be seen that the latter part of the section dealing with the Judges of the Supreme Court, their powers and privileges—reads as follows:—

"The Court may be held before the Chief Justice or before any one or more of the Judges of the Court for the time being."

It would appear that we have analogous statute law to that governing the Supreme Court of Ontario and an appeal from

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an award under the earlier Railway Act (R.S.C. 1906, ch. 37 sec. 209) was held to be possible of being taken either to a Judge in Court or to a Divisional Court. (See *Re Potter & Central Counties Ry.* (1894), 16 P.R. (Ont.) 16; *Re Montreal & Ottawa R. Co. and Ogilvie* (1898), 18 P.R. (Ont.) 120; *James Bay R. Co.* v. *Armstrong* (1907), 38 Can. S.C.R. 511; [1909] A.C. 624).

Birely v. *Toronto, Hamilton & Buffalo R. Co.* (1898), 25 A.R. (Ont.) 88, was an appeal under the Dominion Railway Act of 1888 and it was to a single Judge, namely, to Armour, C.J. The *James Bay Railway* case, *supra*, was from a decision upon an appeal from an award under the Railway Act (Canada) (ch. 37, sec. 209, and sec. 168, ch. 58 of 1903) and the decision of Meredith, C.J. was treated as a judgment of the High Court of Ontario. Equally would the decision of Macdonald, J. have been if he had heard the appeal—a judgment of the Supreme Court of British Columbia. It would certainly be highly inconvenient if an appeal from an award is not capable of being upheld before a single Judge of the Supreme Court of British Columbia sitting in Court. I find no provisions in the Supreme Court Act nor in the Rules of the Supreme Court which, in any way, restrict the powers of a single Judge when sitting in Court, i.e., he may exercise all the powers of the Court. The Supreme Court of British Columbia does not now sit as a Full Court, and as I view it one or more of the Judges sitting in Court constitute His Majesty's Supreme Court of British Columbia. Further rules formulated under the Railway Act, (ch. 37, R.S.C., 1906) (see B.C. Gazette (1918) vol. 58, p. 3647) exist providing for the hearing of appeals from awards by a single Judge sitting in Court. These rules are not abrogated by the repeal of that Act and the enactment of the Railway Act of 1919, which is stated to be an Act to consolidate and amend the Railway Act. The appeal is to a Superior Court (sec. 232 (1) Railway Act ch. 68, 1919). Now there can be no serious question of doubt as to how a Superior Court is constituted. Of course if the statute otherwise provides, the statute will control, but, when we have the statute providing that "the Court may be held before the Chief Justice or before any one or more of the Judges of the Court for the time being" and there are no provisions of the Act nor any Rules of Court otherwise providing (see sec. 5, ch. 58 Supreme Court Act, R.S.B.C. 1911), it is impossible to say contrary to the terms of the statute that a single Judge of the Supreme Court sitting in Court is not "His Majesty's Supreme Court of British Colum-

bia," when we arrive at that conclusion, it is manifest that any one of the Judges of the Supreme Court sitting in Court has jurisdiction to hear an appeal from an award under the Railway Act (ch. 68, 1919, Canada). If authorities are necessary to be referred to upon the point, with the greatest respect to all contrary opinion, I would refer to the Annual Practice, 1921, at pp. 1905, 1906, where the words "the Court or a Judge" are dealt with:—

" 'The Court'. The words 'the Court' mean the Court sitting in banc—that is, a Judge or Judges in open Court; they do not include a Judge at Chambers (*Baker* v. *Oakes*, 2 Q.B.D. 171; *Re Davison* (1899), 2 Q.B. 103; cf. further, *Clover* v. *Adams*, 6 Q.B.D. 622; and J.A. 1873, s. 39, Part V. *infra*, and (n)). In *Cooke* v. *The Newcastle, &c., Co.*, 10 Q.B.D. 332, 'Court' was held to mean a Divisional Court. The word 'Court' includes the Judges thereof, see *Dallow* v. *Garrold*, 14 Q.B.D. 543, and cf. J.A. 1873, ss. 29, 30, 39."

Therefore, when all the statute law bearing upon the point and the still standing rules are borne in mind, it cannot be a matter of doubt that a Judge of the Supreme Court of British Columbia sitting in Court is sitting in "a Superior Court." (sec. 232, (1) Railway Act, 1919, (Can.), i.e., his Majesty's Supreme Court of British Columbia, (also see sec. 9, ch. 58, Supreme Court Act, R.S.B.C. 1911) and, when you have the Superior Court thus properly constituted, the jurisdiction of the Court to hear the appeal from the award made under the Railway Act of Canada is conferred by the Railway Act of Canada and it is in pursuance of that Act the appeal is heard and an adjudication had.

I would allow the appeal.

EBERTS, J. A. would allow the appeal.

Appeal allowed.

KEATLEY v. CHURCHMAN and REA.

Alberta Supreme Court, Appellate Division, Stuart, Beck, Hyndman and Clarke, JJ.A., and Simmons, J. (ad hoc). April 28, 1922.

VENDOR AND PURCHASER (§IE—27)—CONTRACT TO PURCHASE LAND—VENDOR INDUCED TO ACCEPT WORTHLESS SECURITIES AND GIVE TRANSFER —CONFIDENCE OF VENDOR IN THIRD PARTY ON WHOSE JUDGMENT HE RELIES — THIRD PARTY BRIBED BY PURCHASER — FRAUD— RESCISSION.

The owner of real property entered into an agreement for the sale thereof, relying on the judgment and business acumen of a third party in whom he had implicit confidence. Such third party,

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as a result of bribery on the part of the purchaser, induced the vendor to accept as security for the land sold a number of notes and other securities which were absolutely worthless, and in return for which he was induced to give a transfer of the land. The Court ordered rescission of the contracts on the ground of fraud.

[*Keatley* v. *Churchman* (1921), 62 D.L.R. 139, affirmed.]

APPEAL by plaintiff from the judgment of Walsh, J. (1921), 62 D.L.R. 139, dismissing an action for specific performance of an agreement for the sale and purchase of land. Affirmed.

The facts of the case are fully stated in the following judgment and in the judgment of Walsh, J., 62. D.L.R. 139.

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

H. C. Macdonald, for respondent.

The judgment of the Court was delivered by

CLARKE, J. A. :—There can, I think, be no doubt that the agreement of November 28, 1918, between the plaintiff and Rea was executed under such circumstances as to render it voidable at the instance of Rea by reason of the payment by the plaintiff to Taylor of a commission for using his influence with Rea to obtain his consent to the agreement. To the plaintiff's knowledge, Taylor was acting as agent for Rea in the transaction and there was a confidential relationship existing between them. Rea was relying in some degree, at least, upon the judgment of Taylor for his protection. No intimation of the payment of the commission was given to Rea. *Hitchcock* v. *Sykes* (1914), 23 D.L.R. 518, 49 Can. S.C.R. 403. *Barry* v. *Stoney Point Canning Co.* (1917), 36 D.L.R. 326, 55 Can. S.C.R. 51.

As I view it, the taint of fraud affects the whole agreement completed on November 28 including those terms originally contained in the agreement of November 15, which became incorporated into the final agreement of the 28th. Rea says in his evidence, referring to the plaintiff's visit to him on the 28th. "He came to me and he told me he couldn't give me this Jackson mortgage" (meaning agreement) "but he wanted to give so many shares of the stock certificate in place of it."

The whole negotiation then became open as to all the securities offered as well on the 15th as on the 28th of November and the plaintiff being unable to fulfil the earlier agreement, it dropped, and the new agreement was then entered into.

It is contended on behalf of the appellant that Rea, with knowledge of the alleged fraud of the plaintiff, affirmed the transaction.

One of the representations alleged by Rea to have been fraudulently made on November 15, and so found by the trial Judge was that the Debels chattel mortgage on the mill was a

first mortgage whereas it was in fact a second mortgage—the falsity of this representation was, admittedly, discovered by Rea in January, 1919.

Afterwards he collected money on some of the securities taken by him and accepted renewals in his own name of the Saskatoon Commission Co. and McAlpine notes.

This conduct may very well be held to be an affirmance, sufficient to disentitle him to rescission by reason of the above misrepresentation, and it is contended that having once affirmed, he cannot, on discovery of other acts of fraud, repudiate-relying upon the general statement of the law in *Campbell* v. *Fleming* (1834), 1 Ad. & E. 40, 110 E.R. 1122, that after affirmance the right to repudiate the contract is not afterwards revived by the discovery of another incident in the same fraud. The payment of the commission to Taylor had not been discovered by Rea at the times of the acts of affirmance above mentioned nor indeed until after the commencement of this action—he was told of it by two persons in the latter part of 1919 and in December of that year spoke to Taylor about it and he denied it. I judge he first learned it as a fact in the examination for discovery in the action. I do not think *Campbell* v. *Fleming* covers this case but rather that it falls within the decisions in *Re London and Provincial Electric Lighting Co.; Ex parte Hale* (1886) 55 L.T. Reports 670 and *Boulter* v. *Stocks* (1913), 10 D.L.R. 316, 47 Can. S.C.R. 440, discussed in *Barron* v. *Kelly* (1918), 41 D.L.R. 590, 56 Can. S.C.R. 455.

The misrepresentation as to the chattel mortgage was quite separate and of an entirely different character from the fraud respecting the payment of commission and in my opinion the waiver of the former should not preclude Rea from repudiating the whole transaction on afterwards discovering the latter.

Another contention of the appellant is that the respondent's right of rescission is conditional upon a complete *restitutio in integrum* and that by reason of his neglect to renew the chattel mortgages and of his retention of the money ($2,500) paid as part of the November agreement, he is not now entitled to rescind and, in any event, that the repayment of the said sum should be made a condition of giving him relief.

As to the chattel mortgages, the time for renewal expired in 1920, long after the filing of the defence and counterclaim in which the November, 1918, transactions were repudiated and which sets out that the defendant Rea is and always has been ready and willing to deliver the securities back to the plaintiff and that he brings them into Court with the defence. It ap-

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pears from the evidence that no written assignment of the chattel mortgages was ever given to Rea. Section 20 of the Bills of Sale Ordinance 1898, C.O.N.W.T. ch. 43, requires that where an assignee makes the affidavit required on a renewal the assignment to him shall be filed. It is obvious that under the circumstances Rea could not have renewed the mortgages. If considered important, the plaintiff could and should have attended to this himself. And moreover, the plaintiff does not suffer from the want of renewal as he produced evidence to shew that arrangements had been made with the present owner of the mortgaged property to pay the mortgage off.

The question of the repayment of the $2,500 is more substantial. The respondent has not offered in his pleadings or otherwise to repay this money but claims to retain it on account of the payments in arrear under the original agreement of sale of March 30, 1918. The general rule is that as a condition of rescission there must be *restitutio in integrum* but the trend of the later cases seems to be toward a reasonable and equitable application of the rule and to hold that it requires the party seeking rescission to do merely what equitably he ought to do. In one of the cases in 13 Corpus Juris under note 68, p. 622 the law is thus stated:—

"It is true as a general proposition of law, that one who is induced by fraud to enter into a contract with another, must within a reasonable time after discovering the fraud notify the other party of its rescission and restore to him whatever consideration he has received under it. But he is not bound to restore to the other party what he has received under it where the other party is indebted to him in a larger amount."

In *Erlanger* v. *New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218, Lord Blackburn is quoted as saying at pp. 1278, 1279:—

"I think the practice has always been for a Court of Equity to give this relief whenever, by the exercise of its powers, it can do what is practically just though it cannot restore the parties precisely to the state they were in before the contract.

In *Hulton* v. *Hulton*, [1917] 1 K.B. 813, 86 L.J. (K.B.) 633, relief was given by way of rescission without repayment of money paid.

Applying the above principles to the present case, I think justice is best done by allowing the respondent to credit the $2,500 upon the arrears payable by the plaintiff under the original March agreement. It seems to me an idle thing to require Rea to pay $2,500 to the plaintiff and then receive back from

him under the agreement the same and a much larger amount. The plaintiff has had the use of the land for three seasons without payment of any principal or interest other than this $2,500, while the arrears of purchase money and interest have been accumulating. I think it would be unjust to the respondent, under the circumstances now, to compel him to pay his money to his debtor. I am not overlooking the plaintiff's statement that $2,000 of the $2,500 payment and his wife's statement that the whole $2,500 was procured by him from the sale of the wife's property, upon the understanding, as stated by the wife, that "we had clear title to the farm." It appears that all of the property transferred to Rea under the November agreement stood in the name of the plaintiff's wife and it is probable that the purchase of the farm was for her benefit, although in the husband's name. However that may be, the plaintiff requires an assistance from the Court to enable him to discharge his obligation to his wife. All he has to do is to pay what he owes her.

It is singular that although the action is for specific performance of the original agreement of March, 1918, as well as the November agreement, the judgment dismisses the action without any reference to the claim on the former agreement, but as there is no dispute concerning it, the defendant Rea being willing to carry it out on his part the parties appear to have treated the adjudication upon the November agreement as a disposition of the action.

The judgment below contains no direction for delivery out of Court to the plaintiff of the securities in question, which under the judgment he is entitled to. The Saskatoon Commission Co. and the McAlpine notes should be endorsed by Rea so as to transfer title to them before being handed over to the plaintiff and may be so endorsed, "without recourse." I observe that Rae has endorsed the Saskatoon Co. note without this limitation. He should have the opportunity of amending it.

If desired by either party, the judgment may contain a direction that the judgment below be amended as above indicated.

Subject thereto I would affirm the judgment and dismiss the appeal with costs.

Appeal dismissed.

N.B.

S.C.

CURLEY v. ROBERTSON.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., McKeown, C.J.K.B.D., and Grimmer, J. November 18, 1921.

COURTS (§IA—1)—ATTORNEY OF SUPREME COURT OF N.B.—PRIVILEGE OF BEING SUED IN COURT IN WHICH HE IS ENROLLED—CITY COURT OF ST. JOHN—JURISDICTION.

The City Court of St. John, N.B., has no jurisdiction in a case brought against an attorney of the Supreme Court, who has a privilege to be sued in the Court in which he is enrolled. This privilege which has been taken away by statutory enactments so far as County Courts and Justices' Civil Courts are concerned, has not been interfered with as regards the City Court of St. John.

APPLICATION by defendant for review from City of St. John City Court, referred by McKeown, C.J., K.B.D., to full Court.

H. W. Robertson, per se, supports application.

D. Mullin, K.C., contra.

The judgment of the Court was delivered by

HAZEN, C. J. :—This matter came before the Chief Justice of the King's Bench Division on review from the City Court of St. John, and was by him referred to this Court. It involves a claim of privilege by an attorney of the Supreme Court to be sued in the Court in which he is enrolled, thereby ousting the jurisdiction of the City Court of St. John in the case brought against him therein.

From the memorandum made by the Chief Justice accompanying the return, it is clear that he is of opinion that the privilege exists. He states that in recent years cases involving this question have been before the City Court to his knowledge, that there were two occasions some years ago which he recollects, and regarding which he took occasion to have a conversation with Sheriff Wilson, who acted as counsel for the two several attorneys who were sued in those cases. Judgments were entered for the plaintiffs by the magistrate, and on review before my predecessor in the office of Chief Justice, Sir Ezekiel McLeod, he set aside the verdicts in both cases on the ground of privilege claimed by the defendants. The Chief Justice of the Court of King's Bench also refers to the statutes in reference to the matter, and states that notwithstanding these statutes and the decision of the late McLeod, C.J. setting aside these judgments, the magistrate adheres to his opinion, and he accordingly concluded that the only thing for him to do in order to have the questions definitely settled was to refer the matter to the Court of Appeal, in view of the fact that the magistrate continues to sign judgments ignoring the privilege claimed, and the decisions of the late McLeod, C.J..

In the case of *Desbrisay* v. *Baldwin* (1847), 5 N.B.R. 379, that the privilege of attorneys of this Court to sue and be sued in their own Court existed was virtually recognized as stated by Barker, J. in *Simonds* v. *Hallett* (1897), 34 N.B.R. 216, and in the course of his judgment in that case that jurist said, at page 221:—

"Although many modifications of the law have taken place since that case was decided in 1847, I am not prepared to say . . . that no such privilege exists at the present day."

In the year 1870 an Act of the Legislature 33 Vict. c. 1 was passed which abolished the privilege of attorneys in the City Court of St. John and elsewhere, including Justices' Courts. The Consolidated Statutes of 1877, c. 120, Schedule A repealed this Act which had so taken away the privilege of attorneys in the City Court of St. John, and thereby left the matter in the same position as it was previous to the passing of the Act of 1870 above alluded to, for at common law when a statute or rule of the common law is repealed and afterwards the repealing Act is repealed by a later statute the earlier law is thereby revived. See Am. & Eng. Ency. of Law, vol. 26, p. 760, and cases therein referred to.

While the Consolidated Statutes repealed the Act of 1870, ch. 60 of the same consolidation expressly gives to Justices' Civil Courts jurisdiction in actions against attorneys of the Supreme Court, while by ch. 53 of the same consolidation relating to the City Court of St. John no such jurisdiction is given. Chapter 59, relating to Parish Courts, on the other hand, contains a provision similar to that contained in ch. 60, and provides that actions cognizable in a Parish Court may be brought by, and against all persons, including attorneys of the Supreme Court. The consolidation of the County Court Act for the same year also provides that no privilege shall be allowed to any person to exempt them from the jurisdiction of the several County Courts. It will be seen, therefore, that by express terms in this consolidation of 1877 the privilege is taken away so far as County Courts, Justices' Civil Courts, and Parish Courts are concerned, but there is no enactment that I can find interfering with the privilege in the City Court of St. John.

The Chief Justice of the Court of King's Bench regards the allusion made by Sir Frederick Barker in *Simonds* v. *Hallett*, which I have quoted, as important in view of the fact that he himself was one of those consolidating the statutes of 1877, and, therefore, initiated the repeal of the Act of 1870 which abolish-

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ed the privilege and drew the Justices' Act and the City Court Act and the County Court Act in the form in which they are found in that consolidation. It is true that in the City Court Act there is a provision to the effect that the same right of review and procedure thereon shall be had and allowed in all suits in the said Court, as is provided by the chapter relating to Justices' Civil Courts. I do not think, however, that this can be in any way construed as reading into the Act a provision such as has been placed in the other Acts mentioned, expressly abolishing an attorney's privilege.

I have come to the conclusion that the Chief Justice of the Court of King's Bench's should be advised that in the opinion of this Court the motion for review from the City Court should prevail, and the verdict entered for the plaintiff therein be set aside. I have come to this conclusion reluctantly, for I feel, as stated by Barker J., that the privilege never had much to recommend it and had its origin under conditions which have largely disappeared, and I can see no more reason for its existing in the City Court than in the other Courts in which it has been abolished by express enactment. It is not for me to make suggestions to the Legislature, but I cannot refrain from saying that, in my opinion, the passing of an Act at the next Session dealing with the matter in the same way that it has been dealt with in the other Courts would meet with public approval and be in the interests of justice.

MORRISON v. THOMAS.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon and McKay, JJ.A. January 6, 1922.

FIXTURES (§II—7) — WHAT ARE — RULES FOR DETERMINING — CIRCUMSTANCES—DEGREE OF ANNEXATION—OBJECT OF ANNEXATION.

In determining whether a building has become a part of the soil or is a chattel, regard must be had to the circumstances of each case, the degree of annexation and the object of the annexation. The Court held that a barn built on skids, and so that it could be easily moved, the only annexation to the soil being some posts to help support the roof and to which the stall partitions were fastened, erected for a temporary purpose by one who had no interest in the land, with the permission of the then occupant, was a chattel and the property of the person who had erected it.

TRESPASS (§IA—5)—WHAT CONSTITUTES—OWNER OF CHATTEL ENTERING ON LAND TO REMOVE IT—OWNER OF LAND REFUSING PERMISSION—INJURY TO LAND IN REMOVING—DAMAGES.

A person who has placed a chattel on land with the permission of the then occupant commits a trespass in entering on such land and removing such chattel without the permission and against the will of a subsequent purchaser of such land, but where he has not done any injury to the land in removing such chattel, the owner is entitled to only nominal damages.

APPEAL by defendant from the trial judgment in an action for trespass, and for damages to land by leaving noxious weeds thereon. Reversed.

N. R. Craig, for appellant.

A. G. Mackinnon, for respondent.

The judgment of the Court was delivered by

McKAY, J.A.:—In 1917, F. A. Anderson, the then registered owner of the N/W ¼ of sect. 22 in tp. 19 in r. 27, west of the 2nd meridian, arranged with Roy Sherrill that he Sherrill should break up the said quarter section in 1917 or 1918, and raise the first crop on it in payment for the breaking.

Mr. Sherrill broke up 50 acres on said quarter in 1917 and cropped it in 1918.

In the spring of 1918 the appellant was farming a half section across the road from the said quarter section, and arranged with Sherrill to help him break the said quarter and build on the said quarter a barn, to keep his horses in while he was farming the half section across the road, and breaking said quarter. Pursuant to this arrangement, in the spring of 1918, the appellant built on said quarter a barn, all of wood, 28 x 28 feet. The foundation of the barn was 2 x 4 inch sills placed on the ground, to which was spiked 2 x 10 planks, extending above the sill and fastened to the studding. This plank was put there to strengthen the sections of the barn when being moved, and to take the place of skids. To the studding was spiked 14 foot ship-lap for the walls of the barn. The barn was built in sections, and in the middle, where the ship-lap met, there was double studding, so that the ends of the ship-lap were spiked to separate studding. The corners were nailed in such a way that the studding for each side would come apart in sections. To support the roof there were two long joists resting on some of the studding at each end, and on 4 posts hereinafter described. The roof consisted of 1 x 12 inch boards lying flat on above two joists, with straw over them. To help support these two long joists, 4 upright posts were used, two posts for each joist at appropriate spaces, and the bottoms of these four posts were let into the ground about 6 inches. These posts were 2 x 6 inches. There is nothing to indicate that these upright posts were in any way nailed to the roof or the joists. The partitions in the barn were fastened to these 4 posts.

During 1918 but after the erection of said barn, Sherrill received word from Anderson that the latter did not want any

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more of the said quarter broken; hence the appellant did not break any of said quarter, but used the said barn for his horses while farming the half section he rented across the road. The barn was built by appellant with the intention of moving it, and was built with a view to its being easily moved from said quarter. The respondent before he bought the said quarter knew that appellant built this barn in the spring of 1918 for stabling his horses while he was farming the half section across the road.

The respondent agreed to buy the said quarter from Anderson under an agreement for sale dated December 18, 1918. The appellant used the said barn in 1919 while farming the said half section across the road, and removed the barn in November 1920.

The respondent brought this action against the appellant for trespassing upon said quarter, and for damage to his said quarter by leaving seeds of wild mustard and other noxious weeds thereon, and for the value of the said barn.

The trial Judge held that the said barn was a fixture and formed part of the real estate, and gave judgment for respondent for $476 for the value of the barn, and general damages for trespass $1. From this judgment appellant appeals, contending that the said barn was a chattel and belonged to him.

It is to be noted that the only annexation of the barn to the land is by the 4 posts let into the ground about 6 inches, and to which posts the partitions dividing the stalls are fastened, but the evidence does not say how fastened.

It is also to be noted that the appellant had no interest in the land on which the barn was erected, but he put it there with the permission of Sherrill, who was then in possession of said quarter, to use it while farming another piece of land and while breaking the said quarter in 1918, in the event of his doing so.

In *Hellawell* v. *Eastwood* (1851), 6 Exch. 295, 20 L.J., (Ex.) 154, Parke, B., delivering the judgment of the Court and dealing with the question whether a certain machine when fixed was part of the freehold, said at p. 312: "This is a question of fact, depending on the circumstances of each case, and principally on two considerations, first, the mode of annexation to the soil or fabric of the house, and the extent to which it is united to them, whether it can easily be removed, integre salve et commode, or not, without injury to itself or the fabric of the building. Secondly, on the object and purpose of the annexation, whether it was for the permanent and substantial im-

provement of the dwelling, in the language of the Civil Law, perpetui usus causa, or . . . . merely for a temporary purpose, (see the *Year Book*, 20 Hen. 7. c. 13), or the more complete enjoyment and use of it *as a chattel*."

In this case the Court held the machines, though slightly attached to the soil, were chattels.

In *Holland* v. *Hodgson* (1872), L.R. 7 C.P. 328, at p. 334, 41 L.J., (C.P.) 146, 20 W.R. 990, Blackburn, J., delivering the judgment of the Court, stated:—

"There is no doubt that the general maxim of the law is that what is annexed to the land becomes part of the land, but it is very difficult, if not impossible to say with precision what constitutes an annexation sufficient for this purpose. It is a question which must depend on the circumstances of each case, and mainly on two circumstances as indicating the intention, viz.: the degree of annexation and the object of annexation."

In *Stack* v. *Eaton* (1902), 4 O.L.R. 335, Meredith, C.J., states as follows at pp. 338, 339:—

"I take it to be settled law:—

. . . . . .

(2) That articles affixed to the land even slightly are to be considered part of the land unless the circumstances are such as to shew that they were intended to continue chattels.

(3) That the circumstances necessary to be shewn to alter the *primâ facie* character of the articles are circumstances which shew the degree of annexation and object of such annexation, which are patent to all to see.

(4) That the intention of the person affixing the article to the soil is material only so far as it can be presumed from the degree and object of the annexation.

. . . . . .

These propositions are the result of the decisions in *Bain* v. *Brand* (1876), 1 App. Cas. 762, 772; *Holland* v. *Hodgson* (1872), L.R. 7 C.P. 328, and *Hobson* v. *Gorringe*, [1897] 1 Ch. 182, and are in accordance with the view of the Supreme Court of Canada in *Haggert* v. *Town of Brampton* (1897), 28 Can. S.C.R. 174, which was decided in the same month as *Hobson* v. *Gorringe*, though a few days before the judgment in that case was delivered."

In the *Bain* case above referred to, it was a lessee who erected the fixtures which were in dispute between the heir and the executor of the lessee, and in the other cases referred to and the *Stack* case it was the owner of the land that placed the fixtures on the land. In view of what is said in these and other

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cases similar to the paragraph above quoted from the *Hellawell* case as to the object and purpose of the annexation of the chattel to the land, I think it is important to bear this in mind. In the case at Bar, the appellant who built the barn had no interest in the land.

According to the foregoing authorities, the barn, although only slightly annexed to the land, would become part of the land unless the circumstances are such as to shew that it was intended to continue a chattel. And the circumstances to shew this, according to the above clause (3), are, the circumstances which shew the degree of annexation and object of such annexation which are patent to all to see.

The degree of annexation was very slight, and the barn could easily be moved without injury to itself, according to the evidence, or to the land, according to the evidence and also as admitted by the respondent.

"In passing upon the object of the annexation, the purposes to which the premises are applied may be regarded." *Haggert* v. *Town of Brampton* (1897), 28 Can. S.C.R. 174 at p. 182.

In the case at Bar the barn was put on the said quarter for a temporary purpose, and not to enhance the value of the land on which it was erected; and the 4 posts were let into the ground in order to make them steadier in supporting the roof and for attaching the partitions to them. The degree of annexation and object of annexation would, in my opinion, be patent to all to see.

In *Reynolds* v. *Ashby & Son*, [1904] A.C. 466, 73 L.J. (K.B.) 946, 53 W.R. 129, Lord Lindley, in his judgment, used the following language, at pp. 473, 474:—

"I do not profess to be able to reconcile all the cases on fixtures, still less all that has been said about them. In dealing with them attention must be paid not only to the nature of the thing and to the mode of attachment, but to the circumstances under which it was attached, the purpose to be served, and last, but not least, to the position of the rival claimants to the things in dispute."

The last consideration mentioned in this case, in my opinion, is very important in dealing with the case at Bar.

This question of parties is also referred to in *Doran* v. *Willard* (1873), S.C.N.B. 1 Pugsley 358, as follows:—

"What might be only a chattel if erected by a tenant for years, might become a part of the soil if erected by the owner of the land, or one claiming as such."

And in *Russell* v. *Nesbitt* (1896), 3 Terr. L.R. 437, Wetmore,

J. uses this language in delivering his judgment as to whether a certain house was part of the land or not:—

"And in considering the question, the character of the person placing it, whether owner of the land or tenant or a stranger forms an important element."

In *Liscombe Falls Gold Mining Co.* v. *Bishop* (1905), 35 Can. S.C.R. 539, at p. 541, Davies, J., delivering the judgment of the Court, said:—

"The authorities all seem to show that it is not solely the fact of the chattels being annexed to the soil which determines whether or not they have become part of the soil but that the object and purpose and intention of their annexation must be looked to."

In this case, although some of the machinery of a Five Stamp Gold Mining Mill placed upon wild Crown lands in Nova Scotia was slightly annexed to the land, it was held it was a chattel, following *Hellawell* v. *Eastwood*, *supra*, where it was held certain machinery was not part of the freehold, and in delivering judgment, Parke, B. said at pp. 312, 313:—

"They were attached slightly so as to be capable of removal without the least injury to the fabric of the building or to themselves; and the object and purpose of the annexation was not to improve the inheritance but merely to render the machine steadier and more capable of convenient use as chattels."

Bearing in mind, then, the slight annexation and the object of annexation and the character of the person in relation to the land, who put the barn on the said quarter, and "the purpose to which it was applied" or used, and the construction of the barn, and the knowledge the respondent had of all this before he bought the land, with deference to the trial Judge, in my opinion in the light of the authorities the barn was not part of the real estate but a chattel.

This brings us to the next question: Did the appellant commit a trespass in going upon respondent's land and removing the barn. I think he did. It is true Sherrill gave him permission to build the barn on the said quarter, but after respondent agreed to purchase the said quarter and obtained possession of it from Anderson, he objected to appellant coming on the land if he claimed the barn. And furthermore, when appellant was moving the barn, respondent objected to his doing so, and ordered him to get off his land, which appellant refused to do.

In *Patrick* v. *Colerick* (1838), 3 M. & W. 483, (an action for trespass), 150 E.R. p. 1235, Parke, B., giving the judgment of the Court, said at p. 486:—

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"The mere fact of the defendant's goods being on the plaintiff's land is no justification of the entry, unless it be shown that they came there by the plaintiff's act."

In the case at Bar appellant himself placed the barn on the said quarter, and, in my opinion, he committed a trespass when he went on the respondent's land against the will of the respondent.

Counsel for appellant contended that as the respondent in his evidence at the trial admitted that no injury was done to the land by reason of appellant coming on said land to remove and removing said barn, and that he would have had no objection to his coming on the land if the barn were his, the appellant's, under these circumstances there would be no trespass, if the Court holds the barn is the property of the appellant. I cannot agree with this contention. The appellant committed a trespass, and I do not think the effect of the respondent's evidence is such as to waive or disentitle him to his claim for trespass. But I think it shows he would be entitled to only nominal damages, and the trial Judge was right in allowing $1.

The result is that the judgment should be reduced to $1, with costs of the trial, and the appellant will have his costs of the appeal.

Appeal allowed.

LeROY PLOW CO. v. J. CLARK & SON.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., White and Grimmer, JJ. November 18, 1921.

CONTRACTS (§IVC—350)—FOR SALE OF GOODS—CONSTRUCTION—TIME FOR DELIVERY—WAIVER OF CONDITION AS TO—DAMAGES FOR DELAY.

A contract for the sale and delivery of certain plows on or about April 1, 1917, immediately following the order for the plows contained the following "order for extras to be mailed later," and at the head of the order form were the following words: "The following goods and any subsequent orders requested on terms and conditions as herein named and printed on reverse side thereof." The Court held that the terms and conditions printed on the reverse side were part of the contract, and that the fact that the purchaser's attention was not specially called to them and that the plaintiff did not refer to the matter in his evidence was no reason for concluding that they should not be so construed. Held also that the order for "parts" formed part of the same contract with the order for plows, and could not be construed as a separate transaction. Held also that the purchaser by correspondence had waived the condition with regard to time for delivery as set out in the contract, and in the absence of a notice that unless the goods were shipped by a certain date he would refuse to accept them and would hold the plaintiff responsible, could not recover damages for delay in delivery.

APPEAL by plaintiff from a County Court Judgment in an

action for the price of certain plow parts, the appeal being as to the counterclaim of the defendant, that it sustained damages by the failure of the plaintiff to deliver certain plows at the time agreed on in the contract. Reversed.

J. J. F. Winslow, for plaintiff, supports appeal from the York County Court.

The judgment of the Court was delivered by

HAZEN, C.J.:—The plaintiff claimed against the defendant for the price of certain plow parts, the amount claimed being $366.25. On the trial, judgment for $366.25 was awarded to the plaintiff. There is no dispute concerning this, but the contentious matter in the suit arises out of the counterclaim of the defendant, who pleaded that it sustained damage by breach of a contract in writing dated December 7, 1916, for the sale and delivery by the plaintiff of 40 plows of a particular pattern, at $38 each, f.o.b. cars LeRoy, New York on or about April 1, 1917, it being alleged that the defendant required the plows for sale to customers in New Brunswick at a profit, and that plaintiff did not deliver any of the plows and the defendant suffered damage thereby. The damage as claimed was $10 a plow, or a total of $400.

The plaintiff in reply denied the statement pleaded in the counterclaim, and pleaded that no definite date was agreed upon for delivery and that there were certain conditions set out in the contract, to the effect that the plaintiff might withhold shipments whenever accounts owing by the defendant to the plaintiff were past due, and that no damage should accrue to the plaintiff on account of inability to fill the order at the time required or within a reasonable time thereafter, when caused by fire, strikes or any unforeseen or unavoidable cause. He further pleaded that at the time of the alleged breach, accounts owing by the defendant to the plaintiff were past due and that the plaintiff was unable to fill the order through unforeseen and unavoidable causes, the causes alleged being that the stock that he had on hand proved unsuitable and that he was unable to secure stock to complete the plows on account of the state of war then existing. It was further pleaded that the defendant extended the time of delivery by letters written to the plaintiff, and that such time of delivery was extended to the spring of 1918.

The evidence for the plaintiff was all taken on commission and the trial Judge of the York County Court, before whom the case was tried without a jury, gave judgment for the plaintiff on the plaintiff's claim for the amount mentioned

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above, and to the defendant on its counterclaim for $392. The contract which was placed in evidence was in the form of an order signed by both parties instructing the plaintiff to ship to the defendant at Fredericton.

"40 No. 38-60 Cambridge 2 way sulkey plows with bent coulters, at a price of $38 net cash, no discount, 60 days;" and immediately following the order for plows was the following "order for extras to be mailed later, discount 40% from list, 10% cash, 30 days." This was on the order at the time it was signed by both parties.

On the form upon which this contract was drawn certain clauses in writing were struck out by pencil lines being drawn through them, but at the head of the order form there were the following words:—

"The following goods and any subsequent orders requested on terms and conditions as herein named and printed on reverse side thereof."

And upon the reverse side, among others, were the conditions before referred to, providing that the company might withhold shipments whenever accounts or notes were past due or in their judgment credit was unsafe, and that no damage should accrue from inability to fill the order at the time required or within reasonable time thereafter when caused by fire, strikes or any other unforeseen or unavoidable cause.

The Judge was of opinion that these conditions formed no part of the contract when it was executed. He came to this conclusion because Mr. Clark who signed the contract for the defendant, stated in his evidence that these conditions formed no part of the contract in the case, and that his attention was not called to them at the time of its execution, and states that it appears to him that if it had been the intention at the time the contract was executed to incorporate the conditions on the reverse side of the paper that Mr. Larkins, the company's representative, who entered into the contract, would have so stated, but that nowhere in his evidence can he find a single reference to it.

It is well to bear in mind that there is no allegation of fraud on the part of the plaintiff. That being the case and the contract on its face and above the signature of the contracting parties distinctly stating that the goods and any subsequent order requested were on the same terms and conditions as printed on the reverse side of the document, I fail to agree with the reasoning of the Judge, and I do not think that the fact that the defendant's attention was not specially called

to them, and that the plaintiff did not refer to the matter in his evidence is a reason for concluding that they are not to be read as part of the contract. It appears that the form was accepted without objection by the defendant, and that being the case the general rule is that he is bound by its contents, whether or not he reads the document or informs himself of its contents before signing. While there are exceptions to this general rule, I cannot come to the conclusion that the conditions, as the Judge of the County Court did, were so unreasonable and irrelevant to the provisions of the contract that they ought not to be considered in the decision of the case. The decision on this point is not I think material to the decision of the case, but I feel that the conclusion arrived at by the trial Judge in this respect ought not to pass unnoticed.

The substantial point in the consideration of the case is as to whether or not the plaintiff failed to deliver the plows according to the terms of the contract, and that the defendant sustained damage thereby.

Before, however, considering this, reference should be made to the conclusion arrived at by the Judge of the County Court that the order for parts forms no part of the contract and was an entirely separate transaction, as to my mind this conclusion cannot be sustained. I pointed out how the order for parts was contained in the same document as the order for sulkey plows, and it seems to me no good reason can be advanced in support of the contention that the contracts were separate and distinct. They are entered into on the same form on the same day, and by the same parties, and the conclusion I must come to is that the contract was for the delivery of the sulkey plows, and also for extras a list of which would be mailed later, the price being fixed in both cases and the amount of discount stated. While the original contract says that the goods were to be shipped on or about December 1, 1916, it is admitted that this was a clerical error and should read April 1, 1917.

As to whether or not the plaintiff failed to deliver the plows according to the terms of the contract, there can be no doubt as the contract required delivery on or about April 1, 1917, and the question as to whether or not the defendant waived the time for delivery can only be determined by a consideration of the correspondence that passed between the parties.

On December 14, 1916 the plaintiff wrote the defendant thanking him for courtesies extended and stating that their order would have the best of attention, and reminding them of

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the necessity of making out their order for extras so as to have an opportunity of having these in readiness to go forward for the carload shipment.

On December 28 the defendant wrote asking them to tag one of the plows "St. Stephen" and to leave off the plow bodies and beams.

On January 4, plaintiff wrote that they had supplied all the materials for the 40 plows complete, and would prefer that defendant would take them as ordered and allow them to send the extra parts as part of the plow.

On April 14, defendants wrote that they were not yet in receipt of invoice of the car of plows, which was to have been shipped April 1.

On April 21 plaintiff wrote acknowledging receipt of this letter and assuring defendants that they were making every effort possible to obtain material to supply him with the carload of plows, that they had now received everything except the steel for the beams which they believed to be en route. This was 3 weeks later than April 1 on or about which day, according to the contract, the plows were to have been shipped. The defendants wired on April 30 to ship one-fourth of the repair order immediately if the car was yet unshipped.

On May 11 defendant again wrote stating they were greatly troubled because of the non-arrival of the goods, stating "The car was to be shipped us 1st of April and you wrote us on January 4th last that you had supplied all the materials for the 40 plows complete, and "complete" was underscored. Now we trust you will appreciate our position and if the car is still not ready to be shipped please ship us a few of the repairs, but we expect you will shortly now have the cars on the way."

Further stating that while they had had delays in shipment this year that the plaintiffs were the only people that had not delivered them the goods in time for use, and they added—"Of course we want the goods just the same because it is important that we have the repairs, and we can use the plows now for summer trade."

On the following day, May 12, plaintiffs wrote that they were very sorry that owing to the fact they had been held up on steel, they were unable to ship the car, and stating that if it was the defendant's wish they would cancel the order, but on the other hand if they wished them shipped at the low price at which they purchased them, they would make good on their part of the contract as soon as they were able to do so.

Again on May 29 in reply to defendant's letter of May 11,

plaintiffs wrote stating how very sorry they were that it had been impossible up to the present time to make shipment of carload of sulkey plows, and assuring them that they would forward the order just as soon as they could, and that in the long run it would not be of any material loss to the defendant in making this necessary delay of shipment.

On August 2, defendants wrote:—

"With reference to the car of plows and repairs which have been ordered for so long and which you have been promising from time to time, please advise if you are sending this car forward at once."

And plaintiffs replied under date of August 8 that they strongly believed they would be able to ship the carload of plows within the next 30 or 60 days, and on August 10, the day on which the letter was received by them, defendants wrote calling attention to the fact that plaintiffs on January 4 had written them that they had supplied all the material for the 40 plows, and that this coincided with their statement of April 21 that they were making every effort possible to obtain material. They said:—

"We trust that you can appreciate that the repairs are greatly needed, also that the plows should be shipped in accordance with the contract, and if you have sold the material that you provided at a higher price that is not our fault."

To this, on August 24, plaintiffs replied stating that when they said they were supplied with all material for the 40 plows complete the statement was made with the belief that steel beams and wheels that they had in stock would be proper material to use in the construction of the Cambridge sulkey plow. They found, however, that in this they were mistaken, and were obliged to order from the mill special beams and wheels with which to equip the plows. They stated they could not make a definite promise when they would be able to fill the order, but would simply say that if defendants still wished them shipped they would do the very best they could, and they hoped at the time of writing that within 30 days they would be able to give some definite information. They add:—

"In your reply please advise if you want these forwarded or if you wish same cancelled."

In reply, the defendant wrote on August 30 stating it was too bad they had not got the plows out, being too late now for the trade this year, and asking them to see that the repairs were forwarded immediately by a fast freight.

There seems to be no further correspondence until November

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27, when defendants wrote stating they had specific damages against the plaintiff for breach of contract for $487.10 and asking them to settle at once, stating that, in addition, they have been much damaged in business reputation by not furnishing the goods as agreed.

On December 3, the plaintiff wrote acknowledging receipt of this last mentioned letter, stating that they would not pay a single cent for their inability to fill orders on time, but stating that they would fill the order for the sulkey plows as soon as all the material was received, and that they would stand by this proposition if the defendants were still inclined to receive the goods when they could ship them. They further refer to the fact that they had shipped all the repairs that were due on the order on November 23, and on December 29 the defendants replied that they did not now want the plows as the season had passed for selling them.

Having regard to all this correspondence. I think it is perfectly clear that the defendants at no time insisted upon a literal carrying out of the terms of the contract, which provide for the shipment of the plows on or about April 1, 1917. On the contrary even as late as August 30 no word is contained in their letter of their intention to repudiate their contract because of the non-delivery of the plows by the date before mentioned, and it was not until November 27 that they made any claim for damages for breach of contract, and this claim was made without their having repudiated the contract or stated to defendants a date within which the goods should be delivered or otherwise they would hold them liable in damages. Had the defendant given to the plaintiff reasonable notice that unless the goods were shipped by a certain date the defendant would refuse to accept the same and would hold the plaintiffs responsible, the defendant might then have maintained its counterclaim, but not having done anything of the sort, having by its correspondence up to the last of August, 1917, shewn that it was willing to accept the plows even if shipped then, it seems to me that it waived the provision with regard to shipment and without giving such notice as I have suggested cannot successfully maintain its counterclaim against the plaintiff. The question of waiver is a question of fact to be drawn from the evidence and circumstances of each case in which it is set up as a defence, and having regard to all the evidence and the circumstances of this case I cannot help coming to the conclusion that the defendant waived the condition with regard

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to the delivery of the goods at the time mentioned in the contract.

I am, therefore, of opinion that the verdict entered for the defendant on the counterclaim for $392 should be set aside and the appeal allowed with costs.

Appeal allowed.

COPP v. WILLIAMS.

Nova Scotia Supreme Court, Harris, C.J., Russell, J., Ritchie, E.J., Mellish and Rogers, JJ. April 28, 1922.

ASSIGNMENTS FOR CREDITORS (§VIIA—55)—PREFERENCES BY INSOLVENT—PRESSURE BY CREDITOR.

A mere demand is sufficient pressure by a creditor to take away from a conveyance, transfer or mortgage the character of an unjust preference, and in order to succeed in an action to set aside a conveyance as void on this ground, under the Assignments Act there must be proof of a concurrence of intent on the one side to give and on the other to accept a preference over other creditors.

[*Molsons Bank* v. *Halter* (1890), 18 Can. S.C.R. 88; *Benallack* v. *Bank of B.N.A.* (1905), 36 Can. S.C.R. 120, followed.]

APPEAL from the judgment of Chisholm, J. in favour of defendant in an action to set aside a deed as void under the Assignments Act, or, in the alternative under the Statute Elizabeth. Affirmed.

F. L. Milner, K.C., for appellant.

J. L. Ralston, K.C., and *J. A. Hanway, K.C.*, for respondent.

HARRIS, C. J. :—The principle seems to be well established that: "a mere demand is sufficient pressure by a creditor to take away from a conveyance, transfer or mortgage the character of an unjust preference." *Molsons Bank* v. *Halter*, (1890), 18 Can. S.C.R. 88 at p. 95, per Strong, J. *Stephen* v. *McArthur*, (1891), 19 Can. S.C.R. 446 at p. 454.

It seems to be equally well settled that in order for the plaintiff to succeed in this case there must be, as stated by Ritchie, C.J., in *Gibbons* v. *McDonald* (1892), 20 Can. S.C.R. 587 at p. 589; "a concurrence of intent on the one side to give and on the other to accept, a preference over other creditors."

See *Benallack* v. *Bank of British North America* (1905), 36 Can. S.C.R. 120, at p. 129.

On the first question the trial Judge has believed and accepted the evidence of the defendant that there was pressure in this case within the meaning of the rule. While it would undoubtedly have been more satisfactory had the grantor given evidence, I am not prepared to assent to the proposition that there must be evidence from the grantor or otherwise the finding must be set aside.

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I am not prepared to say that the finding of the trial Judge as to pressure is clearly wrong and, therefore, I cannot, as I understand the rule, set it aside.

On the other question, as to whether there was an intent on the part of the defendant to obtain a preference over other creditors the defendant has testified that when he took the deed he did not know that his son was indebted to the plaintiff or to any other person. While the trial Judge has not expressly found that the defendant did not know and had no reason to believe there were other creditors it is I think a fair inference that he adopted that view because he quotes the defendant's evidence on the point (without expressing any disapproval of it) along with other evidence which he accepts.

On these grounds I think the appeal must be dismissed with the costs.

RUSSELL, J. :—Of the three cases cited by the trial Judge as authority for his decision, I should rule out the first, the *Molsons Bank* case, because the circumstances of that case disclosed a sufficient motive, altogether apart from any desire to give a preference,—to induce the debtor to do what resulted in a preference being given. The other two cases are so strongly in point as to "pressure" that I can see no other course open than that of affirming the decision. I can discover no evidence that makes against the finding of the trial Judge that the preferred creditor in this case was not aware of the preference. He professes not even to have known that there were other creditors. There are facts that arouse suspicion but none that would warrant a reversal of the finding. As to the question of pressure it would I fear be necessary to overrule the Supreme Court of Canada before we could reverse the judgment of the trial Judge.

RITCHIE, E. J. :—I quote from the judgment under appeal:

"At the close of the evidence the plaintiff's counsel asked for and obtained leave to amend his statement of claim as follows:—

'In the alternative the plaintiff says that at the time of the execution of the said conveyance the said Nicholas Williams was an insolvent person within the meaning of the Assignments Act, and the defendant was a creditor of the said Nicholas Williams within the said Act, and that the said conveyance was made to the said defendant as such creditor with intent to give the defendant as such creditor an unjust preference over other creditors of the said Nicholas Williams or over one or more of such creditors, and over the plaintiff as such creditor, and he

further says that the said conveyance did injure, delay, prejudice or postpone him, the plaintiff, as and being one of such creditors.'

The claim set up in the above plea was the only one relied on by the learned counsel, and the substantial defence relied upon was that the conveyance sought to be impeached was made as the result of pressure."

The only question necessary to be considered is as to whether the conveyance in question was a voluntary one or made under pressure. So far as the law applicable to the case is concerned, it has been settled by the Supreme Court of Canada. In the *Molsons Bank* v. *Halter*, 18 Can. S.C.R. 88 at p. 95, the late Sir Henry Strong said: "It is held that a mere demand is sufficient pressure by a creditor to take away from a conveyance transfer or mortgage the character of an unjust preference." The same Judge in *Stephens* v. *McArthur*, 19 Can. S.C.R. 446 at p. 453 said:—

"Then as to what acts are sufficient to constitute pressure the decided cases are equally explicit. The cases on this head are also all collected in the book last referred to (Tudor's L. C. on Mercantile Law, p. 818) and from them it appears that a mere demand by the creditor without even a threat of, much less a resort to, legal proceedings is sufficient pressure to rebut the presumption of a preference."

It would have been more satisfactory if the grantor had been called; but he was not within the jurisdiction. There is, however, clear and distinct evidence that the conveyance was made in response to a demand for payment.

This evidence satisfied the trial Judge and he made his finding accordingly. I am not prepared to reverse that finding. The evidence, if true, and the trial Judge believed it, clearly brings the case within the doctrine laid down by Sir Henry Strong.

I would dismiss the appeal with costs.

MELLISH, J.:—This action is brought by the plaintiff on behalf of himself and other creditors of Nicholas Williams to set aside a conveyance made to the defendant by the said Nicholas Williams on September 15, 1919.

The action is based on the grounds that at the time of the conveyance the debtor was insolvent and that it was made with intent to defeat, hinder, delay or prejudice his creditors and had, in fact, such effect as far as the plaintiff is concerned.

The trial Judge dismissed the action on the ground that under the evidence he could not find such an intent on the part

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of the debtor. The conveyance was made to the debtor's father, and I am unable to conclude that the finding of fact in this respect is wrong. The Judge finds that the conveyance was made under "pressure" which I understand to mean that it was induced under such stress of circumstances as to justify the exclusion of such an intent.

The evidence of pressure in the sense of insistence of a creditor is very slight, but under the circumstances slight pressure on the part of defendant, who was the defendant's father, may have been very effective. The debtor evidently did not want his father to know the real state of his affairs, and might well fear pressure from him more than that from any other source.

In my opinion, there is another insuperable obstacle to the success of this appeal. To justify our setting aside the judgment appealed from, we must, as I understand the law, find that this intent to defeat, hinder etc., existed also on the part of the defendant who is the grantee under the conveyance. Under the evidence I am unable to come to any such conclusion. The trial Judge apparently believed him and I think such belief quite justifiable.

The appeal should be dismissed with costs.

ROGERS, J. (dissenting) :—A conveyance of a son's homestead property to his father, the defendant, is attacked by the plaintiff, a creditor, as an unjust preference under the Assignments Act, R.S.N.S. 1900, ch. 145. The trial Judge reports that "the substantial defence relied upon was that the conveyance sought to be impeached was made as the result of pressure" and his conclusions are summarized in these words: "While there are some circumstances in the case which excite suspicion I do not feel free to disbelieve the defendant's version of the circumstances under which the deed was given and I have come to the conclusion that the deed was made under circumstances which establish the defence of pressure." It was sought by the defendant on the appeal notwithstanding that the case was fought out below on the only point dealt with by the judgment under review to sustain the dismissal of plaintiff's action on the further ground that there was not sufficient evidence to establish a *primâ facie* case of unjust preference on the part of the son, because it was alleged the proof failed to show a concurrent intent to prefer on the part of both father and son, inasmuch as, it was suggested, the father did not know that the son was insolvent and that unless he did, he could not be said to be accepting a preference over other creditors. The trial must, however, have proceeded on the footing that an un-

just preference had, in fact, been established including, of course, as a necessary element, the father's knowledge of the son's condition of insolvency, otherwise the doctrine of pressure which is used only to rebut the presumption arising from the facts raising at any rate a *primâ facie* case under the Act, would not have been invoked as it would have been quite unnecessary. To my mind, it is clear beyond question on the evidence not only that the son who absconded within 4 weeks of the giving of the deed to the father, was hopelessly insolvent and that the father who kept the deed off the records until the son had disappeared knew full well the son's financial condition from his own dealings with him alone. The homestead, usually the last to be given up to creditors, was transferred at a valuation of $700, a fair price, while the father's claims including his liabilities as surety considerably exceeded this sum. Practically all his personal effects were under chattel mortgage; he owed plaintiff some $1,200 (of which the defendant says he was not aware) and numerous other debts. He was engaged in a lumbering operation, a new and hazardous venture, of which the father knew and it was in that connection the indebtedness to plaintiff was incurred. The law on this subject of knowledge of insolvency has been correctly summarised by Townshend, J. in *Hart* v. *Allen* (1902), 40 N.S.R. 352, a case frequently cited and followed at *nisi prius* in these words:—

"A transferee's knowledge of the insolvent condition may be implied if knowledge is shown of circumstances from which ordinary men of business would determine that the debtor was unable to meet his liabilities."

The defendant not only knew of the son's actual state of insolvency, that is of his "inability to pay his way and meet his creditors" but even if in fact he should have said he did not, he should be held to have known under the facts in proof. The existence therefore of an unjust preference even if open to question on this appeal is *primâ facie* established and the real point litigated is as to whether the defendant has satisfied the burden thus put upon him by bringing himself within the doctrine of pressure and thereby rebutting the plaintiff's case by showing that the preference could not have been voluntary and unjust because the father as a creditor brought pressure to bear upon the son to secure or satisfy his debt and the son yielded to his importunity or request. If this be so, the law remained unbroken and the general creditors have no reason to complain because they are thus outside the law or they have not brought themselves within it. R. S. Cassels, in his little book on the As-

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signments Act, at p. 14, speaks of "the absurd length to which the doctrine of pressure had been carried" but if on the evidence before us in this case this appeal fails, the doctrine, I fear, will be carried to a yet more absurd length.

It would appear that a demand or even a request for payment or for security will on the part of the preferred creditor, if it has the desired effect on the debtor so that it can be said that the governing motive on the part of the debtor is not to grant a preference but to comply with the demand or request, brings the doctrine into being thus saving the secured creditor and incidentally destroying the intended usefulness of the Act. It is too late to doubt the state of the law for it reached this, its high water mark, in the case of *Stephens* v. *McArthur*, 19 Can. S.C.R. 446, a case of course binding upon us, and to be followed where the circumstances in evidence justify its application. Certainly, there should be no extension of the doctrine, nor should its present limits, if it has limits, be in practice widened still further by accepting other than the clearest and best obtainable evidence of all the surrounding circumstances under which the principle is sought to be applied. Not only must the demand or request be established by evidence, to the satisfaction of the trial tribunal, but the fact that the debtor yielded and yielded *bonâ fide* to the favoured creditor's importunity or request, if you will, rather than to his own desire to place his favoured creditor in a preferred position by placing his property in hands of other than those who would apply its proceeds ratably among all his creditors are the real questions of fact to be decided,—and their decision peculiarly requires affirmative evidence on the part of the grantor owing largely to the fact that the tribunal determining the facts is dealing with the state of the debtor's mind at the moment he is supposed to be yielding himself to the superior force which has been brought to bear upon him. The evidence in the case at Bar is very scanty, two or three lines of it, given by the father of the defendant only, who is mightily interested in supporting the transaction, without corroboration and in the absence of the grantor, the son, who could alone satisfy the Court that he gave way to the father's solicitation rather than to his own interests. This is the evidence bearing on the issue of pressure and all of it:—

"Q. Now then tell us how you got the deed? A. I went to him and I says the money has been due long enough on the thresher and I wanted to get some money. He said, how will the deed of this house suit you, and I said I will take it as far

as it will go, and I took the deed. Q. What about the balance? A. I told you a minute ago, I would pay the two notes as far as it would go."

That is to say, he was taking the house over at a value agreed upon of $700 and he was thus securing his own indebtedness $525 and two notes in respect of which he was surety of about $225 "as far as it would go." Now, it is to be noted that there is not on the fair construction of the words used any demand or even request for security. He "wanted to get some money" just as any creditor wants to get past due debts. The answer of the son "How will the deed of this house suit you?" certainly, can hardly be said to be responsive to the father's wish for money. Nothing was suggested by the father about security or a deed: on the other hand the words as to the deed are on their fair interpretation a purely voluntary suggestion on the son's part and the father's reply that he "will take it as far as it will go" simply meant that the father at the son's instance and without even a request from the father takes the deed to secure himself and two other favoured creditors for whose debts he was responsible. And, too, the son is not called; he may well have either confirmed this interpretation of the words used or he may have admitted that he yielded to what he might say he regarded as a demand or request for security. Certainly, the father has not said so, and in the nature of things he could not speak as to the mental processes of the son and these alone can determine the real issue for trial. Of course, in many cases sufficient evidence of pressure can be proved by the circumstances and perhaps by parol testimony of others beside the actual creator of the impeached transfer. In the case of *Molsons Bank* v. *Halter*, 18 Can S.C.R. p. 88 one would almost presume the very great influence to which a debtor who has improperly used trust funds would be subjected in order that he might make good a breach of trust and many other cases of import might be cited; but where a transaction is confined to two persons and the grantee alone (vitally interested as he is in supporting his own position) is called, the Court has the right to assume that the other party, if not called, cannot lend any aid in supporting the transaction. At the close of the case, counsel for the defendant "asked for an opportunity to get the evidence of Nicholas Williams (the son) as to his indebtedness to Copp" (the plaintiff) but the Judge quite properly at that stage declined to accede to the request, but there is no suggestion even then that his evidence was being sought for the more useful purpose of proving the real issue counsel relied upon. I

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have carefully examined very many of the authorities, whose name is legion, treating on this much discussed subject and I do not think I depart from any of them in urging the necessity of clear and unequivocal evidence in the proof of the two concurrent states of mind-pressure exerted by whatever the means, slight though they may be, and easy of proof, by the mere statement of the grantee, and the same pressure in reality felt by the grantor, difficult of proof in the grantor's absence. Many of the cases dealing with the doctrine of pressure, including those in the Supreme Court of Canada referred to on the argument will be found collected and commented upon by Killam, J. afterwards a valued member of the Supreme Court of Canada, in the case of *Colquhoun* v. *Seagram* (1896), 11 Man. L.R. 339. There the only evidence of pressure was that of the assignor who stated that he signed the impeached assignment of book debts to his wife at the request of a solicitor acting for her, she stating that she had left her affairs in her solicitor's hands. It is to be noted that there the assignor gave evidence as well as the assignee and there were no findings of circumstances of suspicion. The case went back for a new trial as the Judge of first instance had not dealt with the point: and it is interesting particularly for the views expressed by all three of the appellate justices. Dubuc, J. at p. 344 says:—

"The question is to determine the real motive which prompted the debtor to make the conveyance, namely: to find out whether he was induced to make the assignment by the pressure brought to bear upon him or whether he did it voluntarily with the intent to prefer the one creditor over the others. Of course, the motive prompting a man's actions is an operation of the mind and cannot be positively determined by another person. Generally, however, it can and has to be ascertained from the actions and conduct of the party and from the surrounding circumstances. The question is one for the jury or for a judge acting as a jury."

And at p. 353, Killam, J. said:—

"On a careful review of the authorities I find the question to be whether the debtor was actuated solely by a voluntary desire to prefer the creditor. . . . . I think it better to abstain from attempting to lay down any rule as to the exact effect of indisputable evidence of the facts of request and compliance therewith. Much will depend upon the strength of the case on one side or the other."

And at pp. 357, 358, Bain, J. said:—

"In the present case even if we consider that the evidence

shews that the assignment was really demanded by the plaintiff's solicitor I cannot think that it was given by Colquhoun from his yielding to anything that can properly be called pressure . . . . The inference I draw from the evidence is that he gave the assignment not because he was constrained or influenced to give it by pressure but because he wished to give it and I think it was given voluntarily with the intention that the plaintiff should have the preference over the other creditors."

It is not difficult to infer what short work any one of these justices would have made of the case if the only evidence of pressure came from the grantee unsupported by either corroborative evidence or circumstances. I have been unable to find any instance in the books where the doctrine of pressure was allowed to prevail on the mere statement of the grantee of the conveyance under attachment.

For the reasons stated, I would allow the appeal and set aside the transaction with the appropriate directions, and all with costs.

So far I have dealt with the case on the ground that the evidence read even in the more favourable light for the defendant (although nothing should be intended in his favour) falls short of proving the facts which have to be established in rebuttal, but on the assumption that there is such evidence, I would decline to sustain the judgment dismissing the action on a very simple but not on this account a less important ground, namely that the Judge misdirected himself as to the real probative value of the defendant's unsupported evidence as shewn by his statement that he "did not feel free to disbelieve the defendant's version of the circumstances under which the deed was given," a statement following the reference to the suspicious circumstances which were excited in his mind. The circumstances were indeed suspicious and he hesitates no doubt because he realises how easy it would be to establish pressure on the mere uncorroborated statement of the grantee that he had "requested" the money or security as the case may be; a grantee who holds the deed in his own possession unregistered until the grantor, his son, absconds or is about to abscond and who delays the plaintiff with specious promises of settlement until after the 60 day period has expired and because also he realises that transactions between father and son should always be subject to close scrutiny; but he thinks he is not to disbelieve or disregard the father's sworn statement. But the Judge was not called upon to disbelieve the defendant; he could not only

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as has hereinbefore been suggested construe the equivocal language he used strictly rather than liberally but I think, with deference, that he should have said that in the presence of suspicion and in view of all the circumstances the defendant had failed to satisfy the burden upon him. If the mere statement of a defendant (even if its import be sufficient as to its words) is to be accepted in cases of this nature and amid suspicion and doubt, it is to be feared the law has carried us even beyond the "absurd lengths" referred to in an earlier paragraph of this opinion. It is not suggested that the trial tribunal could not as a matter of law accept the statement of one party to a transaction such as that under attack (if indeed the statement furnished that *primâ facie* proof which I think is lacking in this case) but as a matter of sound practice the trial Judge should have directed himself (as he would have directed a jury) to the effect that when the circumstances were suspicious and the burden was upon the defendant and the defendant was the only witness to a transaction between himself and his son, who was not produced as a witness, and the transaction was one which benefitted the father to the exclusion of the general body of creditors and there was not even corroboration in the surrounding incidents, he was quite free to conclude that he was not satisfied that the burden upon defendant has been sustained. The case of *Koop* v. *Smith* (1915), 25 D.L.R. 355, 51 Can. S.C. R. 554, may, I think, be read with great acceptance in this connection. That was a case where a sister was endeavouring to uphold a conveyance attacked by creditors and the trial Judge declined to sustain it on the uncorroborated testimony of the brother in proof of the existence of an alleged debt to secure which the conveyance was given. A judgment of the Supreme Court of British Columbia reversing the trial Judge was in turn reversed by the Supreme Court of Canada and the case is helpful in pointing out how carefully evidence of the class under consideration should be dealt with when its real probative value is brought to the test.

Duff, J. at p. 358 says:—

"It is a maxim of prudence based upon experience that in such cases a tribunal of fact may properly act upon that when suspicion touching the reality or the *bonâ fides* of a transaction between near relatives arises from the circumstances in which the transaction took place then the fact of relationship itself is sufficient to put the burden of explanation upon the parties interested and that, in such a case, the testimony of the parties must be scrutinized with care and suspicion; and it is very

seldom that such evidence can safely be acted upon as in itself sufficient."

The rule or maxim casting the burden of explanation in case of suspicious transactions especially as between near relatives seems to be a well established one and is supported by a large body of precedent. See, for example, Bump, on Fraudulent Conveyances, p. 51: *Merchants Bank* v. *Clarke* (1871), 18 Grant 594: *Gowans* v. *Chevrier* (1889), 7 Man. L.R. 62 at pp. 66, 68 and in our own Courts, *Daucet* v. *Side Sode* (1916), 27 D.L.R. 732, 49 N.S.R. 485 at p. 486.

For these further reasons I would allow the appeal, and if they were the only grounds I would direct a new trial upon the payment of the costs of the appeal and of the abortive trial.

Appeal dismissed.

REX v. CALDER.

Alberta Supreme Court, Appellate Division, Stuart, Beck, Hyndman and Clarke, JJ.A., and Walsh, J. April 28, 1922.

EVIDENCE (§XIIL—990)—THEFT—BY CONDUCTOR OF TRAIN—NOT TURNING IN FARES PAID—SUFFICIENCY OF PROOF—IDENTIFICATION.

Failure on the part of the Crown to prove that a certain train of which the accused was conductor was the only one running over the railway on the date on which the accused was charged with stealing fares paid to him by passengers, is sufficient ground on which to quash a conviction for theft where the parties paying the fares are unable to identify the accused as the person to whom the fares were paid, although the omission was caused by its being tacitly assumed by all parties that such was the case. The Court is not justified in taking judicial notice of such fact or concluding from its common knowledge that there was only the one train.

APPEAL from the refusal of a District Court Judge to grant a reserved case, upon a conviction for theft. Conviction quashed.

David Campbell and *H. A. Friedman*, for appellant.

N. D. Maclean, K.C., for the Crown.

STUART, J.A.:—I agree with the view taken of this case by my brother Hyndman. No doubt the omission to prove that there was on the day in question only one train carrying passengers between Athabasca and Edmonton was a mere oversight, natural enough if the situation was such that every one tacitly assumed that to be the fact. But there is a question of legal principle involved here and although the consequence almost certainly is that a guilty man will be relieved, I am unable to see how we can avoid that result if we apply the law impartially as it is our chief duty in this Court of Criminal Appeal to do.

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I should, in some circumstances other than those admitted to have existed here, and to which I shall refer, have been favorable to a suggestion that we exercise our powers under the Code in the direction of ordering a new trial, so that what appears to have been merely an accidental omission might be supplied by the Crown. But the charge in this case was not laid for a year and a half after the offence was committed, although the informant, the individual wronged, namely the railway company, had knowledge of the facts almost at once, and the trial did not take place for another 6 months. It was admitted by counsel for the Crown on the appeal, who was acting for the railway company at the trial in association with the crown prosecutor that the company had deliberately refrained from laying the charge against the accused until after the conclusion of a certain civil action for damages arising out of an accident pending against the company, in which the company desired to use his evidence in its favor. If the Crown is to be given the rather unusual advantage of a new trial in order to remedy an omission for which it was really responsible then the accused would be still entitled to raise on the second trial all defences that were possible. And there are some slight indications, at least with respect to the method and rules of accounting and as to the method of collecting fares that the accused might, I do not say would, be able to bring out something more favorable to himself than he did at the trial. I do not think this is at all likely, but it is certainly possible. And the delay might in such case be found to prejudice him considerably, for instance in respect of witnesses available.

If the Judge at the trial had directed a verdict of acquittal and had given the reason that now appears, it may be asked, could the Crown have in any form asked for a new trial to remedy the omission? I am not sure that the position is any different here.

For these reasons, I do not think this is a case in which we should take the course of ordering a new trial, but that the appeal should be allowed on the one point indicated by my brother Hyndman and the conviction quashed.

BECK, J.A.:—With hesitation I concur in the result reached by my brother Hyndman. I hesitate because I think it was in all probability assumed by the Judge, the counsel and all parties concerned that train 112 was the only train carrying passengers which ran from Rochester to Edmonton on the day in question. Such an assumption was a proper one to act upon

if the fact assumed was one of common knowledge of all parties concerned.

This defect might be cured by directing a new trial, but, though I think the accused in all probability guilty, I am disinclined to put the accused to any further punishment than he has already suffered by reason of the present proceedings largely because of the long time during which the railway company held the charge over him instead of laying the charge promptly upon learning the facts.

HYNDMAN, J.A.:—This is an appeal from the refusal of His Honour Judge Taylor to grant a reserved case upon the grounds hereafter set forth; but it is agreed between counsel that should he come to the conclusion that a reserved case ought to have been granted that it be disposed of as though a case had been stated.

The defendant, on July 26, 1921, was charged that he did on or about January 6, 1920, on the Canadian Northern Railway between Athabasca and Edmonton, in the Province of Alberta, being then and there employed in the capacity of a railway conductor, and being in charge of train 112 on the said railway, and having received from Henry Alfred the sum of $2.35 on terms requiring him to account for the same to the said railway, did fraudulently convert the same to his own use and did thereby steal the said sum of money.

There were also three additional charges identical with the one mentioned, of receiving a similar amount from J. A. Alfred, George W. Mock and Romeo Rivet, respectively, all alleged to have been committed on the same day and place.

Having been committed for trial on August 31, 1921, he was tried before Taylor, D.C.J. on February 22, 1922, pleaded not guilty and after trial was found guilty.

The questions asked to be reserved are:—

"1. Was I right in holding that there was sufficient evidence shewing the terms upon which the money the accused was charged with stealing had been received by him to justify conviction? 2. Was I right in convicting the accused in the absence of evidence proving the exact fare payable from Rochester to Edmonton? 3. Was I right in convicting the accused in view of the fact that no duplex tickets were sold, or issued to the passengers? 4. Was I right in holding that there was sufficient evidence to justify conviction? 5. Was I right in holding that the case against the accused is distinguishable from the case of *Rex* v. *Thompson* (1911), 21 Can. Cr. Cas. 80, and that the principles there laid down are not applicable here?"

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The material evidence in brief is that the accused was the conductor of train No. 112 on the day in question running from Athabasca to Edmonton. According to the appellant's factum it would be assumed that the passengers in question travelled on this train and paid their fares, either to the accused as conductor, or to some person apparently acting in that capacity, but it was explained at the argument that this was not inserted with the object of making any such admission but merely in connection with the theory that someone other than the conductor might have collected the fares, assuming it was the accused's train the parties were on, and I think this explanation should be considered satisfactory.

The witnesses one and all refused to swear that the official to whom they paid their fares was the accused. They could not identify him but say that whoever it was, he collected fares from time to time in all parts of the train in the usual way. It seems to me, however, that in the absence of evidence to the contrary it was competent for the trial Judge to infer that it was the regular conductor, whoever he might be.

But there is the further weakness in the Crown's case and that is that there is no proof that this was the only train which ran that day on the route mentioned, and there is nothing to shew that the three passengers boarded a train at the hour the accused's train passed the point at which they embarked.

Certain returns were made by the accused at the conclusion of his run shewing the number of tickets, etc. sold and the number of passengers in his train and do not account for the fares of the passengers in question. Had the witnesses identified the accused or had it been conclusively proven that train 112 was the only train that day there would be no doubt as to the accused's receipt of the fares. This raises question No. 4 of the case asked to be reserved, viz:—

"Was I right in holding that there was sufficient evidence to justify conviction."

It seems to me that the question is a proper one and, under the circumstances, should have been reserved.

It is not a question in any way touching the weight of evidence but one affecting an essential ingredient in any criminal charge, namely; Identification with the act complained of.

Unless the Court can take judicial notice of the fact, or conclude from their common knowledge that train 112 was the only one passing over this railway on January 6, 1920, then in the absence of identification there remains the possibility that there was another train and that these passengers travelled upon it

and paid their fares to another conductor altogether. But I am entirely ignorant of any authority which enables us to take such judicial notice, nor do I think there is common knowledge on such a matter.

I doubt if, even in a civil action to recover the amount of their fares, the evidence on this point would be sufficient to enable the railway to recover. *A fortiori* in a criminal charge must the evidence be held insufficient?

The case is really one founded on circumstantial evidence, the accused not having been identified, and his guilt must be established, if at all, from the circumstances, if proved, that he operated train No. 112 on January 6, 1920, and that these parties travelled on that train because there was no other upon which they could have travelled. This last circumstance has not been established. That being so, there remains the certainly not unreasonable theory that another train or trains might have travelled the line that day and that it was on one of those that Alfred and the others travelled. It seems to me that the omission to provide this link in the chain of circumstances would be fatal to the validity of the conviction. It is not a case of doubt about the circumstance of the train being the only one but that of there being no proof at all. The whole case as it now appears in effect, amounts to this; that the Crown failed to prove that these passengers actually travelled on the accused's train.

That being so, I think the appeal should be allowed as to question 4, and that such question should be answered in the negative.

If I am correct in the answer to the question last mentioned the conviction ought to be quashed accordingly.

While it is not necessary to deal with the other questions, it is desirable to refer to question 1: "Was I right in holding that there was sufficient evidence shewing the terms upon which the money the accused was charged with stealing had been received by him to justify conviction?"

I think this question should be answered in the affirmative. The conductor on a train is merely the servant of the company operating it. He has no interest whatever in the fares beyond collecting and accounting for them. If it is once shewn that he has, in fact, received them and has not turned them in to his employer, a *primâ facie* case is established against him and the onus is shifted to his shoulders to account for his failure to hand over the money.

In this case however the Crown has gone further than mere-

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ly shewing receipt of money by the conductor but also that such money was accounted for promptly for there is in evidence the returns of the accused for both the 3rd and 6th January. From these facts I think it ought properly to be inferred that it was the custom and duty of a conductor to report immediately the business transacted on each trip.

I would answer questions 2 and 3 in the affirmative. The fact that an error in amount may have been made in charging for fares paid as such, or the omission to issue formal tickets cannot in any degree alter the obligation of the conductor to pay over moneys received as fares. The receipt of the money on behalf of the company is the essential point, and not the method by which such fares are to be recorded.

I fail to see the propriety or importance of question 5 and am of opinion that the trial Judge was right in refusing to reserve it.

In coming to the conclusion I do in favor of the accused I wish to make it clear that the reason for so doing is entirely on the technical ground that the Crown omitted to prove that only one train passed over its line that day, which from a general survey of the whole case was probably a fact, and failure to prove this was I think due to an oversight or a not unreasonable assumption that it was common ground such was the case.

The accused of course is entitled to take advantage of everything in his favor, either technical or on the merits. But for this oversight I would affirm the conviction. I would therefore quash the conviction and order the discharge of the accused.

CLARKE, J.A.:—I agree that the conviction cannot be upheld on the evidence taken at the trial as submitted on the application for a stated case, and as the majority of the Court think the prisoner should be discharged I reluctantly concur but would have preferred that a new trial be ordered.

WALSH, J. concurred with STUART, J.A.

Conviction quashed.

SUNDER SINGH v. MACRAE.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher and McPhillips, JJ.A. March 21, 1922.

SOLICITORS (§IIB—25)—AUTHORITY OF SOLICITOR TO ACCEPT NOTICE OF APPEAL.

The rule in British Columbia following the English rule is that so long as something remains to be worked out under a judgment a solicitor's retainer continues so as to entitle him to accept notice of appeal, but where there remains nothing to work out under the judgment the solicitor in the action cannot without fresh instructions from his client accept service of a notice of appeal.

[*Reg.* v. *Justices of Oxfordshire*, [1893] 2 Q.B. 149, applied.]

MOTION to quash appeal on ground of improper service of notice of appeal. Motion granted.

R. C. Lowe, for motion.

D. S. Tait, contra.

MACDONALD, C.J.A.:—The rule is well established by the decision of the Court of Appeal in England, in *Reg.* v. *Justices of Oxfordshire*, [1893] 2 Q.B. 149, that where there is no rule of Court such as Rule 3 of Order 7, applicable to the case, then if there remained nothing to work out under the judgment, the solicitor in the action cannot, without fresh instructions, accept service of a notice of appeal. In other words, his retainer expires when the action as such is at an end. The practice in this province follows along the same lines, *Arthur* v. *Nelson* (1898), 6 B.C.R. 316, in that case the Court held following, *Lady De La Pole* v. *Dick* (1885), 29 Ch. D. 351, that so long as something remains to be done in the action, the solicitor's retainer continues and he may accept a notice of appeal. In these two cases the Judges did not decide the wider question as to whether or not the retainer in the litigation extended beyond the action to appeals which might be taken from the judgment. They simply decided that so long as something remained to be worked out under the judgment, his retainer continued so as to entitle him to accept notice of appeal. The case in the Court of Appeal above referred to, decides the status of a solicitor in cases not covered by the rule, and where nothing remains to be worked out under the judgment, and decides that his retainer is at an end when there remains nothing to be done in the action and that he cannot accept notice of appeal without fresh instructions from his client.

In this case nothing remains to be done in the action. Each party has succeeded on claim and counterclaim for an equal amount and neither party were given costs. That is an end of the action and applying the principle of *Reg.* v. *Justices of Oxfordshire, supra*, the solicitor's retainer had expired before notice of appeal was served upon him, and he was, therefore, not a person upon whom notice of appeal could properly be served.

MARTIN and GALLIHER, JJ.A. would grant the motion.

MCPHILLIPS, J.A. (dissenting):—This is a motion to quash the appeal upon the ground that the notice of appeal was only served on the solicitor for the defendants in the action in the County Court not upon the defendants. It would appear that the order for judgment which is of date November 14, 1921, leaves nothing to be worked out as the amount found due the

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plaintiff upon the claim is met by the same amount allowed the defendants upon the counterclaim and neither party was awarded costs—however, the plaintiff is appealing from the judgment and served notice of appeal on the defendants' solicitor on the record on February 14, 1922—the solicitor refused to accept service but nevertheless was served with the notice of appeal which he did not refuse to take and he made no statement that he was not still the solicitor for the defendants or assign any reason for not admitting service other than he wished to reserve all his rights. When the notice of appeal was served the order for judgment had not been taken out. This was not done until February 24, 1922. The solicitor on the record—the same solicitor attended on February 24, 1922, upon the settlement of the order for judgment and did not then state nor did he at any time state, that he was not still the solicitor for the defendants. On February 21, 1922, the solicitor for the plaintiff applied to his Honour Judge Lampman to amend his notes made at the trial, and on February 24, 1922, the solicitor for the defendants appeared and took the preliminary objection that leave could not be granted, that the appeal was a nullity as the defendants had not been served with the notice of appeal. This objection was however overruled by the County Court Judge, and the solicitor for the defendants then stated that he reserved all such objections. Upon this motion to quash, the solicitor has sworn that he is a member of the firm of solicitors who are the solicitors for the defendants and that he was the counsel at the trial in this action for the defendants. Now the situation is this—can it be said that the notice of appeal has been effectively given? Section 121 of the County Court Act (ch. 53, R.S.B.C. 1911) provides that the rules governing appeals from the Supreme Court shall govern appeals from the County Court to the Court of Appeal—this brings in Order 7 R. 3, and the solicitor is deemed to be the solicitor of the party he appeared for "until the final conclusion of the cause or matter." In England the further words "whether in the High Court or the Court of Appeal" have been added, but even previous to these added words, the practice would appear to have been to look upon service upon the solicitor on the record as sufficient—no change of solicitor being filed as provided for by O. 7 R. 3—as note in the Annual Practice 1922, at p. 1097:—

"Service on the solicitor on the record of the party is good service although he has ceased to act." (*Lady de La Pole* v. *Dick*, 29 C. D. 351; and see now O. 7. R. 3).

It is true we have not the added words—but it may be well said—that these words were words added out of abundance of

caution. That we have not these added words—does not conclude the matter—"until the final conclusion of the cause or matter" are words that call for interpretation and if it had been necessary to interpret them to decide *Lady de La Pole* v. *Dick*, *supra*, there is no doubt in my opinion but it would have been decided that service on the solicitor on the record was sufficient and constituted good service of the notice of appeal. Observe what Bowen, L.J., and Cotton, L.J., said at p. 354:—

Bowen, L.J. "There can be no doubt that the authority of the solicitor continues until final judgment; but have you investigated the question how far it continues after final judgment."

Cotton, L.J.: "It would be very inconvenient for it not to continue as long as there is a right of appeal."

Fry, L.J., said at p. 357: "I give no opinion on the question whether the authority of the solicitor on the record continues as long as the right of appeal exists."

Now it becomes necessary for this Court to decide this point, and in deciding it, it will be a decision not only governing appeals from the County Court, but as well from the Supreme Court, as it is upon the practice and procedure of the Supreme Court that the matter has to be determined. (Sec. 121, County Court, ch. 53, R.S.B.C. 1911). I cannot advise myself that there can be a "final conclusion of a cause" until the time for appeal has past—an appeal results in determining what the judgment of the Court below should have been—it may be an affirmance, reversal or variation—and until the time for appeal has past—it cannot be said that there has come a "final conclusion," and if an appeal be taken, the person to serve with the notice of appeal is in accordance with all reason the solicitor on the record. In passing it may be observed that in Holmested and Langton, 4th ed. (1915)—Ontario Judicature Act, at p. 1091, this is stated:—

"The retainer of a solicitor continues after judgment so as to make service of notice of appeal on him good service on the client until the client takes proper steps to inform his opponent that he has withdrawn his authority: *De La Pole* v. *Dick*, 29 Ch. D. 351."

In Daniell's Chancery Practice, 8th ed. (1914) vol. 2 at p. 1130, it is stated:—

"Service of notice of appeal on the solicitor on the record for any party to the proceedings is good service even though such solicitor states that he no longer acts for the party."

Note (r) is referred to at the same p. 1130—which reads:—

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O.VII, 3. "This Rule sets at rest the difficulty which was raised in *De La Pole* v. *Dick*, 29 C.D. 351."

In *Hett* v. *Pun Pong* (1890), 18 Can. S.C.R. 290, Strong, J., at p. 295 said:—

"In *Lady de La Pole* v. *Dick*, 29 Ch. D. 351,—it was held that solicitors continued to represent their client after judgment witsout any further retainer for the purpose of appealing against the judgment, and this decision proceeded upon the principle that the retainer of the solicitor does not terminate with the judgment but continues thereafter in the case of the solicitor of the party recovering the judgment for the purpose of obtaining the fruits of it, and in the case of the solicitor of the party concerned by it, for the purpose of defending him against the execution."

Each case must be decided upon its special facts—can it be said that there has been "a final conclusion of the cause" when there is the absolute constitutional right of appeal that may be exercised and is being exercised in the present case? It is common sense if nothing else, that the solicitor on the record is the proper party to serve the notice of appeal upon. Apart from questions of practice, it is trite law, that notice to the solicitor is notice to the client; and here we have the solicitor making an affidavit as late as March 3, 1922, in support of this application to quash, stating that he is a member of a firm of solicitors who are the solicitors for the defendants; and he is still the solicitor on the record, in the face of this. Is it possible to give effect to this motion? With every respect to all contrary opinion, it, in my opinion, would be a travesty upon the law to so decide. Some reliance was placed upon the case of *Reg.* v. *Justices of Oxfordshire*, [1893] 2 Q.B. 149. That case was referred to by Lord Coleridge, J., in *Godman* v. *Crofton*, [1914] 3 K.B. 803, at p. 811, 83 L.J. (K.B.) 1524, Lord Coleridge said:—

"The case of *Reg* v. *Justices of Oxfordshire*, [1893] 2 Q.B. 149, turned on the terms of s. 31, sub-s. 2, of the Summary Jurisdiction Act, 1879, which are in substance the same as those in the Act we are considering. But there had been no service upon the solicitor in that case, because the facts shew that at the time of service he had ceased to represent the respondent. In *Holloway* v. *Coster*, [1897] 1 Q.B. 346, the ground of the decision is that it is sufficient if the notice reaches the person to whom it is to be given although it is not personally served upon him. The case, however, upon which I rest my judgment is that of *Pennell* v. *Churchwardens of Uxbridge*, 31 L.J. (M.

C.) 92, where Blackburn, J., delivering the opinion of the Court, held that a solicitor acting for an appellant had presumably authority to receive a case on behalf of the appellant. Inasmuch as the case was not transmitted to the Court within three days after the appellant had received it, the Court could not allow the appeal to be entered, but Blackburn, J., clearly expresses the view that where a solicitor acting for one party does an act which is fairly within the scope of the authority conferred upon him the other side may assume that he still retains his position and has authority to accept notice. In the present case the solicitors had acted for the respondent; there was evidence to shew that they were still so acting when this notice was received; they were agents of the respondent to receive the notice; the reasonable inference is that they received it on behalf of their client, and there being no evidence to the contrary, we think that the terms of the statute have been complied with. The officer of the Court must therefore draw up the order."

Can there be any question here that the solicitor is not still acting for the defendants? He has sworn to it, what more is needed? Further, can it be doubted that the notice of appeal has reached the defendants although it has not been served upon them? It is really idle to contend otherwise. The case of *Reg.* v. *Justices of Oxfordshire, supra*—offers no obstacle at all upon the facts of the present case—as Lord Coleridge put it, "there had been no service upon the solicitor in that case, because the facts shew that at the time of service he had ceased to represent the respondent." In the present case at the time of the service the solicitor served was the solicitor upon the record, was then acting and even after the service of the notice of appeal, was acting for the defendants (respondents), and as pointed out, made an affidavit supporting this motion to quash shewing that he was still their solicitor. (See Scrutton, J., in *Bayley* v. *Maple & Co., Ltd.* (1911), 27 Times L.R. 284 at p. 285 2nd col.) It may well be said that for nearly half a century in the Province of Ontario and in this province as well, the practice has always been to serve the solicitor upon the record with the notice of appeal—it would not only be "very inconvenient" to now hold otherwise, but be destructive of a well recognised practice extending over, as I have said, half a century or more.

Why should we be asked to determine such a point at this late date and particularly why should we determine it—on this motion which lacks even a scintilla of merit? The solicitor on the record says he is the solicitor for the defendants and the

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defendants have each sworn that they have not been served with the notice of appeal—the affidavits being drawn and filed by the firm of which the solicitor on the record for the defendants is a member. That there has been no express decision upon the point is not determinative of the matter. This Court of Appeal is as well entitled to pass upon the question as the Court of Appeal in England, and in deciding as I do that the notice of appeal is good and sufficient—being served upon the solicitor upon the record—I venture to say that that would have been the decision of the Court of Appeal in England and the Court of Appeal of Ontario if it had ever become necessary to decide the matter. *Motion granted.*

ALDERSON v. THE KING.

Exchequer Court of Canada, Audette, J. May 18, 1922.

EVIDENCE (§IIB—105)—ONUS OF PROOF—ANIMAL CONTAGIOUS DISEASES ACT AND REGULATIONS THEREUNDER.

A. applied for and obtained, under the provisions of sec. 88 of the Regulations passed under the authority of the Animal Contagious Diseases Act, a license to feed to his hogs, garbage obtained from outside, which license contained the following: "In consideration of the granting of a license to me I hereby agree . . . (4) to forfeit all claim to compensation, in case it is necessary to destroy any of my hogs, as a result of hog cholera unless it can be shown that the infection came from some other source than garbage feeding."

Held: That the onus of proving that the cholera in question came from some other source than the garbage feeding was upon the suppliant.

PETITION OF RIGHT seeking to recover $7,482 value of a number of hogs slaughtered by officers of the Department of Agriculture, under the Animal Contagious Diseases Act.

I. F. Hellmuth, K.C., and *Gibson*, K.C., for suppliant.

McGregor Young, K.C., for respondent.

AUDETTE, J.:—The suppliant, by his Petition of Right, seeks to recover the sum of $7,482 representing, as alleged, the value of 212 hogs slaughtered, without justification, as suffering from hog cholera, by officers of the Department of Agriculture of the Dominion of Canada, under the provisions of the Animal Contagious Diseases Act, R.S.C. 1906, ch. 75.

The respondent, by the statement in defence, avers, among other things, that the hogs were rightfully slaughtered in accordance with the Act and that by the terms of his license to feed garbage, the suppliant forfeited all claim to compensation.

The evidence adduced on behalf of the suppliant and the respondent as to whether or not the hogs in question were affected by cholera is absolutely conflicting and directly opposed the

one to the other. All of the suppliant's evidence shews that the hogs were in perfect health and all of the respondent's evidence shews that some of them were actually affected or had been in contact with or in close proximity to hogs affected by hog cholera.

In weighing contradictory evidence, one must add to or take from such evidence according to the surrounding circumstances, probabilities and improbabilities of the case.

According to the suppliant's evidence the hogs were in perfect health, were taking their food and showed no sign of illness or disease at the time of their destruction.

According to the respondent's evidence, four duly qualified and graduated veterinary doctors of very large experience and well versed in the diagnosis of hog cholera found the suppliant's piggery infected with the disease.

Is it possible to reconcile this conflicting evidence?

While I do not charge dishonesty in the suppliant's evidence, I cannot overlook the fact that it is the evidence of interested parties,—that is the evidence of the owners of the pigs, his son, the manager of the piggery, and the two employees and that the evidence adduced on behalf of the Crown is by parties personally disinterested.

The failure to detect the symptoms of cholera on the part of the suppliant, may have been the result of want of observation and more especially the want of knowledge possessed by men skilled in the art of diagnosing a disease, or of the ability to find even the apparent and exterior indicia of the same, by ante mortem examination, which, in this case, was afterwards confirmed by post mortem observation.

On the morning of April 19, 1920, while in course of an inspection with Dr. Tennent, lay-inspector Baker noticed and called Alderson's (jr.) attention to a sickly pig in pen No. 12, which Alderson in his testimony described as a sickly pig, not smart, a cull. The temperature of the pig was then taken and it shewed 105 3/5.

On the afternoon of the same day Dr. Hall,—while Doctor Richards, Monaghan and Tennent were present.—made a post-mortem examination of that pig which revealed the clear evidence of hog cholera.

On arriving at the piggery, Dr. Hall was shewn a hog—a shoat—which he found down and unable to rise. It shewed discoloration of a portion of the hip up to the abdomen, snuffling of the nose and general prostration,—all of these ante mortem clinical symptoms indicating hog cholera.

Dr. Hall added that there was infection distributed all

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through the pens and that the hogs were shewing clinical manifestation of the disease.

Dr. Hall in both his ante mortem and post-mortem examinations is confirmed by the three other doctors. In face of such evidence, I feel I must accept the finding of the men of the art in preference to the evidence of the suppliant.

Under the circumstances 212 of the hogs were ordered to be slaughtered.

Under the provisions of Regulation No. 6, made under the authority of secs. 28, 29, 30 *et seq*, of the Act, it is provided that: "6. Hogs affected with hog cholera or swine plague, or which have been in contact with or in close proximity to hogs affected with hog cholera or swine plague, shall . . . be forthwith slaughtered."

I, therefore, find that the hogs in question were rightly slaughtered according to law and the killing of the same was duly justifiable.

This suppliant wishing to feed garbage to his hogs, under the provisions of sec. 88, 3-4 of the Regulation, made application for a license to do so as is shewn by ex. No. 2 and obtained the license which is filed as ex. No. 1. This application contains the following condition:—

"In consideration of the granting of a license to me, I hereby agree (1) to maintain my hogs in a clean, sanitary condition; (2) to sell no hogs except for immediate slaughter; (3) to notify the veterinary inspector if sickness appears among my hogs, and (4) to forfeit all claim to compensation in case it is necessary to destroy any of my hogs, as a result of hog cholera unless it can be shewn that the infection came from some other source than garbage feeding."

There is not a tittle of evidence on the record—one way or the other—to shew whether or not the infection in question in this case came from some other source than garbage feeding. The onus was upon the suppliant and he has not discharged it.

Therefore, it is with regret I have to come to the conclusion that the suppliant is not entitled to any compensation for the hogs so slaughtered. The Court has no other course to follow than the one dictated by law,—if any benevolence is to be shewn the suppliant, it is for the officers of the Crown to consider and apply it.

In the view I take of the case, it becomes unnecessary or useless to advert to the question of salvage and other minor questions raised at trial.

There will be judgment declaring that the suppliant is not entitled to any portion of the relief sought by his Petition of Right. *Appeal dismissed.*

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Recorders Court, District of Montreal,. Quebec, Geoffrion, Recorder. March 3, 1922.

CONSTITUTIONAL LAW (§IA—20)—BOARD OF RAILWAY COMMISSIONERS OF CANADA—JURISDICTION—GENERAL ORDER AS TO INSPECTION OF BOILERS OF RAILWAY COMPANIES—CITY BY-LAW—JURISDICTION OF CITY TO ENFORCE.

The Board of Railway Commissioners by the adoption of a General Order, regulating for all companies under its jurisdiction the inspection of steam boilers which are used in the operation of railways . . . . has taken away the jurisdiction of a city to enforce against a railway company a by-law requiring the inspection of such boilers by the city inspector.

ACTION for infringement of a city by-law requiring certain boilers to be inspected by the city inspector before being used. Action dismissed.

C. A. Harwood, K.C., for defendant.

GEOFFRION, RECORDER:—The Court, having heard the parties, examined the evidence and the exhibits filed and deliberated. Inasmuch as plaintiff sues defendant, alleging that on November 3, 1921, in the City of Montreal, defendant illegally made use of some boilers for the production of steam at a pressure exceeding 5 pounds per square inch, to wit all three boilers placed within a certain immovable occupied by defendant and situate between numbers 2120 and 2142 of St. James St., in the said city, without the said boilers having been previously examined and tested in the course of the year by the inspector of the City of Montreal, contrary to municipal by-law No. 108 and plaintiff demands that seeing its default it be condemned to the fine provided for in such case;

Inasmuch as defendant pleads that by the Railway Act of Canada, 9 & 10 Geo. V. ch. 68, it is subject to the jurisdiction of the Board of Railway Commissioners for Canada; that on February 16, 1921 said Commission passed Order No. 330 regulating for all companies under its jurisdiction the inspection of steam boilers which are used in the operation of the railway, other than locomotive boilers or boilers used exclusively for the purpose of heating and decreeing that from June 1, 1921 the inspection of said boilers should be made by its own agents; that the steam boilers in question in this cause are not used exclusively for the purpose of heating, but that defendant uses the same to generate steam for the purpose of washing and heating its coaches and that they thus form an essential part of its material and equipment; and that consequently the adoption of said General Order by the Board of Railway Commissioners for Canada has, as a result, removed the inspection

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of these boilers from the jurisdiction of the City of Montreal and of its inspectors and demands the dismissal of the complaint:—

Considering that defendant, in the operation of its railway falls under the exclusive jurisdiction of the Board of Railway Commissioners for Canada: Considering that defendant uses the boilers in question in this cause for the production of steam required for the cleaning and heating of its coaches before placing them at the disposal of the travelling public in winter; Considering that said boilers constitute an essential and necessary part of the material and equipment of defendant; Considering that if municipal corporations may in virtue of the powers on them conferred by Provincial Legislatures, adopt by-laws to suppress or attenuate certain local nuisances, and order, for example, the cleaning of ditches which border the railway in such a way that they do not become a source of inconvenience for the neighbours, they (the municipal corporations) must not, nevertheless, interfere with the operation of a railway; Considering that in railway matters the federal law has precedence over provincial law when there is conflict between the two or when both decree upon the same subject; Considering that it is true that plaintiff exercises the right of inspecting the said boilers since 1869, under the terms of its charter, but that the Board of Railway Commissioners by the adoption of General Order aforesaid has drained the source where the municipal authority drew its jurisdiction.

Dismissed defendant's complaint.

ANNOTATION.

CONSTITUTIONAL LAW—JURISDICTION OF BOARD OF RAILWAY COMMISSIONERS, AS TO INSPECTION OF BOILERS, USED IN THE OPERATION OF RAILWAYS.

BY

C. A. HARWOOD, K.C., OF THE MONTREAL BAR.

The two questions which Recorder Geoffrion raised were:

(1.) Has the Board of Railway Commissioners for Canada jurisdiction in the matter?

(2.) If so, is its jurisdiction exclusive?

(1.) MacMurchy & Denison, ed. 2 (1911), The Canadian Railway Act, pp. 49 *et seq.* shew that the jurisdiction of the Commission has been constantly extended since its creation both by legislation and by judgments of the Court until, considered as an executive and judicial power, its authority is altogether unique. Its decisions can be revised by the Board alone, (sec.

51), can be changed only by the Governor-in-Council (sec. 56 (1.)) and the only appeal allowed is to the Supreme Court on questions of jurisdiction, (sec. 56, (2)).

"Though it is a creature of a Dominion statute, the Privy Council has upheld its jurisdiction for certain purposes over municipalities created by the Provinces. The field of its operations is being gradually extended . . . . The evident tendency of recent legislation is to place all matters connected with the methods of railway construction and *operation* under the exclusive control of one authority acting *both as a Court of original jurisdiction and as an executive body*, whose decisions and orders are final except for the limited remedy by way of appeal given by the Act"—MacMurchy, p. 50.

The Canadian Railway Digest, 1920 p. 578, contains a number of decisions which give an idea of the extensive jurisdiction of the Board. For example: It may fix the proportion in which a municipality shall be called upon to contribute to the construction and upkeep of gates on the railway crossings, etc. 1919, (Can.) ch. 68, secs. 256-259.

C.P.R. v. *County & Township of York* (1896), I.C.R.C. 36, 27 O.R. 559; (1898), 1 C.R.C. 47, 25 A.R. (Ont.) 65, and other decisions. *G.T.R. Co.* v. *Kingston* (1903), 4 C.R.C. 102, Section 287 of the Canadian Railway Act, 1919, ch. 68, gives in general terms the powers of the Commission.

Sections (g) and (l) cover the point in question in this case.

It is apparent that the present sec. 287 is composed partly of secs. 30, 269 and 275 of the Act of 1906 ch. 37, with additions thereto, although in the Act of 1906 it is not specifically mentioned that the Commission has power to legislate with the view of prohibiting the emission of dense smoke by locomotives, etc. Nevertheless on November 25, 1908, the Board issued Order No. 5678, known to-day as General Order No. 18 prohibiting this practice and it is stated in said Order: "In pursuance of the powers conferred upon it by secs. 30 and 269 of the Railway Act and of all other powers possessed by the Board in that behalf." Two decisions of the Courts of Ontario maintain the exclusive jurisdiction of the Commission in such matters: They are *R.* v. *C.P.R.* (1914), 33 O.L.R. 248, 23 Can. Cr. Cas 487, Dec. 28, 1914, confirmed in the Appeal Division of Ontario, March 9, (1915), 25 D.L.R. 444, 33 O.L.R. 248 at p. 250, 24 Can. Cr. Cas. 226. *Rex* v. *G.T.R.* (1916), 37 O.L.R. 457, 27 Can. Cr. Cas. 138.

The trial Judge adds (33 O.L.R.) at p. 249: "The Dominion authorities having undertaken to pass regulations dealing with

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this question, the jurisdiction of the municipality, if it ever had any, is, I think, ousted. . . . .

This is, I think, something incident to the operation of a railway, and forms part of the railway legislation, over which the Dominion alone has control . . . . That which was held to be within the provincial jurisdiction in *C.P.R.* v. *Notre Dame de Bon Secours*, [1899] A.C. 367, was something quite apart from the operation of the road . . . ''

G.T.R. v. *McKay* (1903), 34 Can. S.C.R. 81 at p. 92 Sedgewick, J.:

''An examination of the Railway Act will shew that it intended to deal with the whole subject of the management and operation of railways.''

G.T.R. v. *Att'y Gen'l for Canada.* (In re Railway Act) (1905), 36 Can. S.C.R. 136, Taschereau, C.J. says at p. 141:—

''The exclusive jurisdiction of Parliament over federal railways must include the power to enlarge or restrict their rights and duties in the administration of their various roads so as to make them uniform all through the Dominion. It is certainly expedient, not to say more, that upon such railways the relations between the corporation and its employees should be governed by the same rules all over the Dominion, and that the right of an employee of such a company, or of his personal representatives in the event of his death, to recover compensation if he is injured or killed in the performance of his duties, be not different whether the accident happens in British Columbia, for instance, or in Nova Scotia or in Quebec, or made dependent upon the locality where he joined the service of the company And the federal Parliament alone can pass such a law for the Dominion.

These federal corporations are created and these railways are operated in the public interest of the Dominion at large, and whatever the federal Parliament thinks it expedient to decree in relation to their management and administration in that same public interest it must have the power to do.''

Under the rules governing the interpretation of Statutes, the Board would have jurisdiction because the Act was passed with a certain object, and a tribunal constituted to carry out that object; consequently that tribunal is vested with all the powers to that end even though such powers are not specially mentioned.

Beauchamp, Jurisprudence of the Privy Council, vol. 1, p. 765 No. 127.

Inasmuch as the Dominion Parliament has provided what it

deems to be adequate means for the settlement of this matter through the machinery of the Board of Railway Commissioners, provincial legislation, even if otherwise applicable, ceased to have any validity.

Under sec. 10 (a) of art. 92 of the B.N.A. Act 1867, defendant's railway is excepted from the exclusive jurisdiction of the Provincial Legislature, and by sec. 306 ch. 29, 1888, this railroad is declared to be "a work for the general advantage of Canada" and is, therefore, subject to the legislative authority of the Parliament of Canada.

Lefroy's Federal System p. 90. "By section 91 the Imperial Parliament unequivocally, but in general terms, declares its intention to be, to place under the jurisdiction of the Dominion Parliament all matters excepting only *certain particular matters* assigned by the Act to the local legislatures."

Parliament has the right to make laws for the peace, order and good government of Canada, etc. On the contrary, in each province the legislature shall have exclusive jurisdiction to make laws relating to matters within the categories of subjects hereinbelow enumerated.

In this enumeration under sec. 92, public safety is not mentioned.

Ex parte Pillow v. *City of Montreal* (1883), 27 L.C.J. 216.

Held that the power of a Dominion Parliament to pass a general law of nuisances as incident to its rights to legislate as to public wrongs is not incompatible with a right in the Provincial Legislatures to pass the clause authorizing municipal institutions to pass by-laws with the object of abating insalubrious or dangerous establishments in a province.

Wheeler, Confederation Law of Canada, 1896.

Laws of this nature (such as make it a criminal offence to set fire to a house, to overwork a horse, or exposing diseased cattle), designed for the promotion of public order, safety or morals, and which subject those who contravene them to criminal procedure and punishment, belong to this subject of public wrongs rather than to that of civil law. They are of a nature which falls within the general authority of Parliament towards laws for the order and good government of Canada and have direct relation to criminal law.

It is evident that the order in question does not affect civil rights, but refers rather to the peace, order and good government of Canada and would, therefore, be within the exclusive jurisdiction of federal authority of sec. 91 of the B.N.A. Act.

See Lefroy p. 91, re Dominion residuary power.

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Extent and scope of Dominion residuary power—idem Lefroy p. 99.

(2) The jurisdiction of the Board of Railway Commissioners is exclusive:—

Lefroy—Federal System.

Page 123, "Where, in respect to matters with which provincial legislatures have power to deal, provincial legislation directly conflicts with enactments of the Dominion parliament, whether the latter immediately relate to the enumerated classes of subjects in section 91 of the British North America Act, *or are only ancillary to legislation on such subjects,* or are enactments for the peace, order and good government of Canada in relation to matters not coming within the classes of subjects assigned exclusively to the provincial legislatures, nor within the enumerated classes of section 91, the provincial legislation must yield to that of the Dominion parliament. For before the laws enacted by the federal authority, within the scope of its powers, the provincial lines disappear" . . . .

Page 124. *Nor does it make any difference whether the provincial enactments be prior in date to the conflicting* Dominion enactments, or subsequent. But as their lordships also point out in the last mentioned case, the Dominion Parliament has no authority to repeal directly any provincial statute, whether it does or does not come within the limits of jurisdiction prescribed by section 92, any more than provincial legislature can repeal a Dominion Act. This case further shews that it makes no difference whether the Dominion legislation in question be under the general residuary power of the Dominion parliament, or under any of its enumerated powers, for it was under the former, and not under the latter, that the Board placed the power to pass the Canada Temperance Act. . . . ."

Page 125. "Those decisions have established that where as here, a given field of legislation is within the competence both of the parliament of Canada, and of the provincial legislature, and both have legislated, the enactment of the Dominion parliament must prevail over that of the province if the two are in conflict," as they clearly are in the present case . . . .

Page 126. "But the rule as to predominance of Dominion legislation, it may be confidently said, can only be invoked in cases of absolutely conflicting legislation *in pari materia,* when it would be an impossibility to give effect to both the Dominion and the provincial enactments. And, of course, provincial legislation which is merely supplemental to Dominion legislation,

may be perfectly good, at any rate when the latter is not within one of the enumerated classes of subjects."

Page 166. "It is true, *a fortiori*, that in assigning to the Dominion parliament legislative jurisdiction in respect to the general subjects of legislation enumerated in section 91, the Imperial parliament, by necessary implication, intended to confer on it legislative power to interfere with, deal with, and encroach upon, matters otherwise assigned to the provincial legislatures under section 92, so far as a general law relating to those subjects so assigned to it may effect them, as it may also do to the extent of such ancillary provisions as may be required to prevent the scheme of such a law from being defeated. The Privy Council has established and illustrated this in many decisions. Thus, to take a recent judgment, in *The Bell Telephone case*, [1905] A.C. 52, their lordships held that, if a work or undertaking falls within item 29 of section 91, being within the exceptions to item 10 of section 92 (whereby provincial legislatures are given the exclusive power to make laws in relation to local works and undertakings other than certain specified classes), the Dominion parliament has exclusive jurisdiction, not only to incorporate, but to grant the powers required for the construction and establishment of the proposed work, even if, in granting such powers, there be involved an apparent invasion of matters otherwise within exclusive local jurisdiction. And, as we have seen, *Dominion legislation, whether on one of the enumerated classes in section 91, or by way of provisions properly ancillary to legislation on one of the said enumerated classes, will override and place in obeyance provincial legislation which directly conflicts with it.*"

Tennant v. *Union Bank of Canada*, [1894] A.C. 31, 63 L.J. (P.C.) 25:—

"The legislation of the Dominion Parliament, so long as it strictly relates to the subjects enumerated in sec. 91 is of paramount authority even though it trenches upon the matters assigned to the provincial legislature by sec. 92."

Jacobs Railway Act, p. 22.

The proposition seems established that if the two legislations, federal and provincial, meet then the Dominion legislation must prevail.

The true question is whether this law is ancillary to railway legislation and there is no doubt but that it is.

Veilleux v. *Atlantic & Lake Superior Railway & Transportation Co.* (1910), 12 C.R.C. 91, 39 Que S.C. 127. *Cushing* v. *Dupuy* (1880), 5 App. Cas. 409, L.J. (P.C.) 63. *St. Francis*

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CITY OF MONTREAL v. G. T. RAILWAY CO.

Geoffrion, Recorder.

Hydraulic Co. v. *Continental Heat & Light Co.*, [1909] A.C. 194, at p. 198:—

"Where a given field of legislation is within the competence both of the Parliament of Canada and of the provincial Legislature, and both have legislated, (in case of conflict), the enactment of the Dominion Parliament must prevail."

There can only be one legislation applicable to this case—See Clement's Canadian Constitution (1916) wherein he quotes Von Savigny and says among other things:—

Page 465. "It follows that there cannot be two Statutes determining in different ways any one of the legal relations which is to arise from any given set of facts."

Page 468. "Provincial legislation therefore, though plenary is only so *'and subject to the provisions of section 91'*: that is to say subject to the right of the Parliament of Canada to legislate fully upon all matters which strictly, that is to say, really, fall within the 29 enumerated classes of section 91."

Page 469. "With regard to the two *residuary areas* of sections 91 and 92 respectively, that is to say the opening clause of section 91 and No. 16 of section 92 the same rule of federal paramountcy obtains."

See Clement, pp. 470 and 471.

One could also read with advantage ch. 21, p. 412 of Clement and ch. 25, p. 472.

Fredericton v. *The Queen* (1880), 3 Can. S.C.R. 505, Gwynne, J. at p. 568:—

"All subjects of whatever nature *not exclusively* assigned to the Local Legislatures are placed under the supreme control of the Dominion Parliament; and no matter is exclusively assigned to the local legislatures unless it be within one of the subjects expressly enumerated in sec. 92, *and is at the same time . . . . does not involve any interference with any of the subjects comprehended in any of such items.*"

Finally, another question: Could it not be said that the above order of the Board of Railway Commissioners has been inspired to meet cases foreseen by secs. 247 and 248 of the Criminal Code. If so, this legislation will be exclusively of federal jurisdiction. See judgment in *Union Colliery Co.* v. *The Queen* (1900), 31 Can. S.C.R. 81.

MORRISON v. COMMISSIONERS OF DEWDNEY, DYKING DIST.

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British Columbia Court of Appeal, Martin, Galliher, and McPhillips, JJ.A. March 7, 1922.

DAMAGES (§IIIK—205)—TEMPORARY INJURY TO PROPERTY—RIGHT OF REVERSIONER TO RECOVER DAMAGES.

Temporary injury to property does not entitle a reversioner to damages on the ground that it affects the present saleable value of the reversion; the injury must be permanent so as to affect the property when the reversioner comes into possession before he can recover.

[*Rust* v. *Victoria Graving Dock Co.* (1887), 36 Ch. D. 113, followed.]

DAMAGES (§IIIK—207)—STATUTORY POWERS GIVEN TO CONSTRUCT DRAINAGE WORKS AND DYKES—NECESSITY OF KEEPING IN REPAIR—LIABILITY FOR NON-REPAIR—B.C. DRAINAGE, DYKING AND DEVELOPMENT ACTS, AND AMENDMENTS—CONSTRUCTION.

Under the powers given to the defendant under the Drainage, Dyking and Development Act Amendment Act, B.C. Statutes 1919, ch. 23, sec. 6, and previous Acts, the powers given to the defendants to construct and to repair run together. The Commissioners are not compelled to construct, but having decided to construct, and having constructed what would, if allowed to go into disrepair, be a dangerous menace under flood conditions, they are bound to keep such works in repair, and are liable in damages, for injuries caused by insufficient or faulty repair.

[*McPhalen* v. *Corporation of the City of Vancouver* (1910), 15 B.C.R. 367, followed.]

APPEAL by defendant from the judgment of Hunter, C.J.B.C., in an action to recover damages for injuries caused by failure to keep a dyke in repair. Allowed in part.

A. H. MacNeil, K.C., for appellant.

S. S. Taylor, K.C., for respondent.

MARTIN, J.A. would allow the appeal in part.

GALLIHER, J.A. :—The only question involved in this appeal is one of liability. The amount of damages given if liability is found, is not in dispute, except as to nominal damages granted the plaintiff, Ellen M. Morrison. With respect to these latter damages, I am of the opinion that they cannot be awarded.

Evidence was adduced to the effect that by reason of the flooding, the future selling price of the lands would be affected and the claim was made for injury to the reversion. The lease to the present tenant had some 4 years to run from the date of the flooding. This very point is dealt with in *Rust* v. *Victoria Graving Dock Co.* (1887), 36 Ch. D. 113, 35 W.R. 673, on an appeal from Chitty, J. There it was held that a reversioner can only recover damages where the injury to the property is permanent so that it will continue to affect it when the reversioner comes into possession. and he is not entitled to

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damages in respect of a temporary injury on the ground that it affects the present saleable value of his reversion.

This case is referred to and distinguished in *Tunnicliffe & Hampson Ltd.* v. *West Leigh Colliery Co.*, [1906] 2 Ch. 22.

In adverting to the *Rust* case, Collins, M.R., says at p. 28:—

"The plaintiff's land had been flooded and certain houses damaged and the Court of Appeal while allowing the expense of repairing the houses, and the rent during the repair, disallowed a sum estimated by a referee as a loss likely to arise from reduced rental for four years after the repairs were completed in consequence of the prejudice against the neighborhood caused by the flood."

And distinguishes the case then under consideration from the *Rust* case. The circumstances in the *Rust* case are very similar to the case at Bar, but be that as it may, the matter seems set at rest by the decision of the House of Lords in the *Tunnicliffe* case, *supra*, reversing the judgment of the Court of Appeal, [1908] A.C. 27, 77 L.J. (Ch.) 102. That action was brought by the owners of cotton mills for damages for subsidence caused by the mining operations of the defendants and the question was whether such damages ought to include compensation for the depreciation of the selling value of the property due to the apprehensions which a purchaser might be expected to entertain of the possibility of future damage. The facts in that case were much stronger than in the *Rust* case, *supra*, or in the case at Bar, yet the House of Lords held such could not be awarded. Lord Macnaghten, at p. 29 of the Appeal Cases, puts it thus:

"I think that this case is concluded by authority. In my opinion it is impossible to reconcile the judgment under appeal with the principles laid down in this House in *Backhouse* v. *Bonomi*, (9 H.L.C. 503;) and *Darley Main Colliery Co.* v. *Mitchell*, (11 App. Cas. 127).

It is undoubted law that a surface owner has no cause of action against the owner of a subjacent stratum who removes every atom of the mineral contained in that stratum unless and until actual damage results from the removal. If damage is caused, then the surface owner 'may recover for that damage', as Lord Halsbury says in *Darley Main Colliery Case*, 11 App. Cas. 127, at p. 135, 'as and when it occurs'. The damage, not the withdrawal of support, is the cause of action. And so the Statute of Limitations is no bar, however long it may be since the removal was completed; nor is it any answer to the surface owner's claim to say that he has already brought one or more

actions and obtained compensation once and again for other damage resulting from the same excavation.

If this be so, it seems to follow that depreciation in the value of the surface owner's property brought about by the apprehension of future damage gives no cause of action by itself. That was the conclusion reached by Cockburn, C.J., in his dissentient judgment in *Lamb* v. *Walker*, 3 Q.B.D. 389, which was approved in this House in the *Darley Main Colliery Case*, 11 App. Cas. 127. I think, as the Chief Justice thought, that this conclusion necessarily follows from the principles asserted by the noble and learned Lords who took part in *Backhouse* v. *Bonomi*, 9 H.L.C. 503, and particularly by Lord Cranworth and Lord Wensleydale."

And Lord Ashbourne, at p. 32:—

"To give damages for depreciation because a purchaser, from the fear of future damage, would give less after the subsidence would be a method of doing that which the law as laid down in this House would not sanction. Cockburn, C.J., well put the position in his judgment in *Lamb* v. *Walker*, 3 Q.B.D. 389, which has been accepted as law: "Taking the view I do of the leading case of (*Backhouse* v. *Bonomi*), 9 H.L.C. 503, I am unable to concur in holding that, in addition to the amount to which he may be entitled for actual damage sustained through the excavation of the adjacent soil by the defendant, the plaintiff is entitled to recover in respect of prospective damage, that is to say anticipated damage expected to occur, but which has not actually occurred and which never may arise' ".

And Lord Loreburn, L.C., at p. 34:—

"To say that the surface land would sell for less because of the apprehension of future subsidence is no doubt true. To say that the depreciation in present value caused by that apprehension ought to be included as an element of compensation, is, in my view, unsound. For that is asking compensation, not for physical damage which has in fact arisen, but for the present influence on the market of a fear that more such damage may occur in future."

On the appeal against the remaining plaintiff's judgment, the case is one of very considerable difficulty owing to the peculiar condition of the soil in that neighborhood, and the fact that so much technical evidence of experts has been taken differing more or less on crucial features of the case.

I agree with the trial Judge that cases of this sort are much better tried with the aid of assessors skilled in this sort of work, but like him, we have to grapple with it as best we can.

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After several days spent in reading the evidence, examining the exhibits and trying to understand and apply them, I find no little difficulty in arriving at a conclusion on the facts.

Much evidence has been adduced as to the method of construction and the materials used therein, and while I think we must regard all the experts as competent men, still, we find a sharp line of cleavage between the experts on one side and on the other.—This is more particularly noticeable as between the plaintiff expert, Hermon, and the defendants' experts.

Mr. Hermon goes very carefully into the method of construction and the material that should have been used, and while it may be that to have followed out his ideas would have resulted in a safer and better structure (which defendants' experts dispute), still, under the authority of the statute under which the Commissioners proceeded with the work, if they have fulfilled all the requirements of that statute, (and I think we must hold under the evidence that they have), then they have erected a structure in accordance with approved plans and specifications and any subsequent changes made have been rather in the nature of strengthening than weakening the bank.

It is to be regretted that defendants were unable to procure the specifications upon which the work carried out by Webster was based, but there is the evidence of the engineers on the work that these plans and specifications were carried out absolutely and we would not, I think, be justified in casting any doubt upon that.

The problem of dyking in this district and many other districts along the Fraser, is a difficult one, owing to the depth of quicksand underlying the surface and which when the river rises in flood becomes strongly impregnated with water but I would hold upon the evidence that this has been intelligently dealt with and that there was not faulty construction of the dyke or canal.

The defendants raise the further point that by reason of the rise in water between July 15, (the day the dam broke) and the 18th, the plaintiff's land would have been flooded, in any event, from another source not controlled or affected by these works.

There is conflicting evidence on this point, but I would hold that with the assistance the Morrisons had on hand they could have taken care of that gradual rise of water within the 2 days by continuing to do what they were engaged on at the time the bank broke, *viz.*, raising the level of their natural dyke or ridge of high land.

Then there is the theory that a sand boil bursting up within a few feet of the toe of the dyke,(which they class as an act of God) was the cause of the bank breaking. The existence of a break in the surface of the ground near the dyke is established, but the evidence as to the effect of this is not sufficiently definite and convincing to enable me to hold that such was the case. It seems to me that it was the lack of or insufficiency of repair that caused the bank to give way when the time of stress came. This, I think is a fair inference to be drawn from the evidence as a whole.

I would prefer to put the defendants' liability, if any, on this ground, as it seems to me better established than that of faulty construction.

If this finding of fact is well founded, it remains only to consider whether, under the statute, a liability to repair and maintain is cast upon the defendants.

The work was constructed in 1911 and 1912, but I think it necessary to go back to the consolidation of the B. C. Statutes of 1897, being ch. 64 of vol. I of those statutes. Under the head of "Powers and Duties of Commissioners," and at sec. 18 (1) we find the Commissioners are given power to build, make, operate, etc., dykes, dams, etc., and goes on to recite,

"And it shall be their duty to execute or cause to be executed, the works, etc., and to see that the same are duly operated and maintained in a proper state of repair."

This section is carried through in the R.S.B.C. 1911, ch. 69, without change. This Act, (the Drainage, Dyking & Irrigation Act) was again consolidated and amended in 1913, ch. 18, and sec. 52 of that Act takes the place of sec. 18 R.S.B.C. 1911.

Section 52, as amended by sec. 6 of ch. 23, of 1919, reads as follows:—

"The commission shall have power to execute or cause to be executed, the works shewn upon the plans referred to in section 29 and 51 hereof, filed as aforesaid or decided upon in accordance therewith and to see that the same are duly operated and maintained in a proper state of repair.

In executing, maintaining and operating the said works, the Commissioners shall have power to construct, build, dig, make, operate and maintain such dykes, dams, weirs, flood gates, . . . as they may deem advisable for draining, dyking, or irrigating the lands in the district: provided that no such works shall be executed until plans shewing the location thereof have been deposited in the Land Registry Office, pursuant to the provisions of this Act and that no works injuriously affecting

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natural or artificial waterways shall be executed until approved by the Minister of Lands.

It shall be their duty to attend to the making, levying and collecting of taxes and to properly apply all sums collected and generally to carry out the provisions of this Act."

Had sec. 18 (1) of ch. 69, of R.S.B.C. 1911, remained without change, I think there can be little doubt that the plaintiffs could maintain an action and that the defendants would be liable. The point came before this Court in *McPhalen* v. *Corporation of the City of Vancouver* (1910), 15 B.C.R. 367, where we held the city liable for non-repair. This case was carried to the Supreme Court of Canada and our judgment affirmed (1911), 45 Can. S.C.R. 194. Their Lordships in the Supreme Court dealt fully with the leading English cases bearing upon the subject, including cases in the House of Lords and Privy Council and I need not do more than refer to that case.

The point to be decided then is: Has the change in our statute above referred to weakened the effect of that case as an authority, as applied to the existing change? In my view it has not, though it has made the matter more difficult to determine. The duty cast upon the Commissioners in the original statutes to maintain in a proper state of repair (in viewing the intention of the Legislature) if it is to be deemed to be relieved against by subsequent enactments, those enactments should either be in express words, or at all events in such language as would enable us to say the Legislature must have so intended.

It is true the wording has been altered in the repealing Act and had the duty not been before expressly imposed we might find difficulty in concluding liability. Where we find words directly imposing a duty and no express words relieving against that duty in a later statute, we are then entitled to gather from the Act generally what was the intention of the Legislature.

Now turning again to sec. 52 of the Act of 1913, ch. 18 the words are "the Commissioners shall have power to execute or cause to be executed the works shewn upon the plans . . . *and to see* that the same are duly operated and maintained in a proper state of repair."

It seems to me that a reasonable construction of those words would be to say that the power to construct and the power to maintain in proper repair run together. The Commissioners are not compelled to construct, and if they do not no question of repair could, of course, arise, but if on the other hand they

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decide to construct and do construct, are they free from any duty or obligation to repair under the statute? Once having exercised their powers of construction of what would, if allowed to go into disrepair, be a dangerous menace under flood conditions, I can scarcely conceive of a Legislature intending to relieve them of a duty previously imposed in express words, unless they in just as express words so intimated.

In the result, the appeal against Ellen M. Morrison is allowed, and as against the other plaintiffs, dismissed.

MCPHILLIPS, J.A.:—I am in agreement with the judgment of my brother Galliher.

Appeal allowed in part.

SCHWARTZ v. GUERIN (Two Cases).

Alberta Supreme Court, Appellate Division, Stuart, Beck, Hyndman and Clarke, JJ.A., and Walsh, J. April 29, 1922.

MORTGAGE (§ID—15)—MORTGAGES GIVEN BY WIFE AND SON OF DEBTOR TO SECURE INDEBTEDNESS—PURPORTING TO BE FOR PRESENT ADVANCES TO MORTGAGOR—NATURE AND EFFECT OF AND REAL PURPOSE NOT EXPLAINED—VALIDITY—RELIEF FROM.

Where two real estate mortgages are given, one by the wife and the other by a son just past 21 years of age, but prior to a complete emancipation, on property owned by them, and it is alleged that such mortgages were given to secure a past indebtedness of the husband and father, and each of such mortgages on its face purports to be given as security for a present advance to the mortgagor, the onus is on the person seeking to enforce such mortgages to prove that these securities were fully and intelligently explained to and understood by the mortgagors, who were entitled to be very clearly told that they were not in fact what they professed to be, but were of quite a different character and given for a quite different purpose, and if they executed them in the absence of such an explanation as gave them a proper understanding of their true nature and effect, they are entitled to relief from them.

APPEAL by two mortgagors from the dismissal of their actions to set aside a real estate mortgage made by the plaintiff in each action to the defendants. Reversed.

L. M. Johnstone, K.C. and *W. S. Gray*, for appellants.

A. M. Sinclair, K.C., and *A. C. MacWilliams*, for respondents.

The judgment of the Court was delivered by

WALSH, J.:—Three actions were tried together in which the plaintiffs were respectively Joseph Schwartz, his wife Anni Schwartz and his son William Schwartz, and in each of which Joseph H. Guerin is the sole defendant. The purpose of each action was the same, namely to set aside a real estate mortgage made by the plaintiff in it to the defendant. These mortgages all arose out of the same transaction. The main question of

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fact in dispute was whether they were given as the plaintiffs allege in security for a loan of $16,000, (the aggregate amount of the three mortgages),which the defendant agreed to advance upon the strength of them for the purpose of paying off the wholesale creditors of Joseph Schwartz in his mercantile business and which advance was admittedly not made either in whole or in part, or whether they were taken as the defendant says in security for the then existing indebtedness of Joseph Schwartz to the Farmers & Merchants Bank of Sweet Grass, Montana, of which the defendant is the president. After a trial which lasted for more than a fortnight the actions were dismissed, the finding on the above issue of fact being against the plaintiffs. Joseph Schwartz has submitted to the judgment against him but the other plaintiffs have joined in this appeal from the judgment dismissing their actions.

The finding that these mortgages were in fact given in security for the indebtedness of Joseph Schwartz to the bank by no means disposes of the case of these appellants. If they are liable to the defendant at all they are clearly so as the trial Judge finds simply as sureties for Joseph Schwartz. Their mortgages state that they are in consideration of the respective sums of $1,000 and $3,000 loaned by the mortgagee to the mortgagor. There is not the slightest reference in either of them to Joseph Schwartz's indebtedness. Besides this, each of them has attached to it a type-written addition in which the mortgage moneys are recited as "being advanced to the mortgagor" and another type-written addition in which they are recited as "for money loaned to the said mortgagee by the said J. H. Guerin." Furthermore the certificate by the notary public of "acknowledgment of wife" attached to Joseph Schwartz' mortgage, though about the truth of it there is the gravest doubt, certifies that she was aware, not of the nature and effect of the transaction represented by the mortgage but of the nature of its contents. Each of these mortgages is, therefore, on its face a security for something other than that for which the trial Judge finds it to have been in fact given.

Mrs. Schwartz is an uneducated Hungarian who can write her own name but does not read or write English at all and understands it with difficulty.

At the time of signing the mortgage William Schwartz was in the 24th year of his age. He had acquired a quarter section of land as a homestead by the usual method of entry and improvements. This homestead adjoined his father's farm in the same section. It seems to be clear enough on the evidence

that the family, the father, the mother and the children, including this son, William, lived together as one family on the father's farm until 1918. The father had started a butcher business in Milk River sometime in 1915; the rest of the family continued to live on the farm until 1918 when, on account of the mother's health, they moved to Milk River and joined the father, who in December of that year established the mercantile business hereinafter referred to. The son, William, looked after the farm, he speaks of the two homesteads as one farm, and helped with the necessary work in the spring and fall, but his home, was with the family in Milk River. With the exception of the times when he was absent at the farm, he helped his father in the butcher business. At the suggestion of Guerin, the business was advertised in the name of J. Schwartz & Son—William being the son intended, but he was not a partner as the defendant well knew and was not consulted about it. He merely did in connection with it what his father told him, helped generally in the business principally in looking after the farmers' accounts as distinguished from the wholesalers and received no salary, wages nor share of profits. He says that he had no trouble in getting a few dollars from his father whenever he wanted it. He never questioned his authority over him. He had a power of attorney from him under which he did some banking business but he had no bank account of his own and seems to have owned nothing but his homestead. It is quite clear that William never became "emancipated" from his father's domination and that all that he did in connection with the transactions was done simply because his father asked him to do it and furthermore that this relationship between the father and the son was quite well known to the defendant.

The conditions under which these mortgages were signed are related for the defendant only by himself. No other witness called for him during the entire course of this long trial had the slightest knowledge of the negotiations which led to their execution. Neither the witness Boyce nor the notary public Dunblazier, both of whom swear that they were present when they were signed, was asked and so did not say whether or not any and if so what explanation of them was given of them and no other witness for the defendant except himself speaks of it. Recourse must, therefore, be had to his evidence and to it alone for his version of these transactions. He says (p. 1527) that the only occasion on which he ever spoke to Mrs. Schwartz about giving this security was when the mortgages were signed. His version of the explanation of it then given to her in

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direct examination by his own counsel at p. 1305 is as follows:

"Q. One of these mortgages is signed by Mrs. Schwartz. Do you know what, if any, information was given to her as to what she was doing when she was signing that mortgage? A. She knew what it was for. Q. How did she know? A. She knew Mr. Schwartz' business pretty well. Q. How do you know that? A. Because I have heard her discuss it and I explained to her the purpose of the mortgages and we always do that in signing mortgages. Q. Did you do it in this case? A. Yes, as usual."

On cross-examination at pp. 1500-1503 he confirmed what he had said on his examination for discovery, that he explained the mortgages to the three mortgagors when they were all together, that he explained the mortgages to Mrs. Schwartz by telling her what they were, that he asked her to read them over which she did not do and that he told her the mortgages were for what they represented. He could not give the exact words he used but being asked for the gist of them he said: "In talking about the mortgages or signing the papers the bank makes it a rule to make sure that those signing know what they are doing. In other words we always explain to them the nature of the transaction." Being asked if he could remember anything he told Mrs. Schwartz about the mortgages on the day they were signed he said "nothing other than I spoke to her in a general way along the lines I have just mentioned," referring apparently to the foregoing answer. These are the only references in his evidence to the explanation given Mrs. Schwartz.

On direct examination he was asked nothing about any explanation which he gave William. In addition to the above extracts from his cross-examination he said that he had no special conversation with him that he could recollect. He speaks (pages 1527-1529) of an earlier conversation which he had with Joseph Schwartz at which William was present and which he heard but being asked what the conversation was he answered "I cannot tell you."

These references cover the entire field of the defendant's evidence upon this point. I think it falls far short of proving that he explained to these people the real purpose of these mortgages. They undoubtedly knew that they were signing mortgages on their own land to help the husband and father in his business difficulties but there is not a word in his evidence indicative of a communication to them by him that mortgages which purport on their face to be given to secure the repay-

ment of loans than being made to them were in fact securities for the existing debt of another. If his statement that he told Mrs. Schwartz that they were taken "for what they represented" is to be taken literally it means that instead of informing her of their real character he told her that they were taken to secure advances to be made by him for that is what they represent. I can find nothing in his evidence to justify a holding that he told them that they were mortgaging their lands to him as security *pro tanto* for the debt owing by Joseph Schwartz to his bank and no finding upon this question was made by the trial Judge.

Apart from what was said and done by himself on the occasions to which he refers he left to Joseph Schwartz the responsibility for getting these securities. The following extract from the defendant's cross examination at p. 1529 gives his version of the arrangement as to this between Joseph Schwartz and him:—

"Q. Then you left everything to Joseph Schwartz and told him you wanted security, his wife and his son's signature and you left it all to him? A. Yes. Q. That is right is it not? A. Yes. Q. And relying upon the fact that they would do whatever Joseph Schwartz wanted them to do in the matter to help him out? A. It was understood that they were going to sign the mortgage with him. Q. It was between you and Joseph Schwartz? A. Yes and with Willie Schwartz too.

This last answer apparently has reference to the earlier conversation with the son above referred to and that is all that there is to associate him with his father in the negotiations for the security. Unless Joseph Schwartz made the facts plain to the appellants there was no sufficient explanation to them of the real purpose of their mortgages.

Now the evidence of Joseph Schwartz and the appellants shews quite clearly that no such explanation was given. They unite in saying that the information given the wife and the son by the father was to the effect that the defendant would advance him in cash the amounts of these mortgages to be used in discharging his liability to the wholesalers. There is not in the evidence of any one of them even a suggestion that they were told that they were being given for the purpose for which the defendant successfully contended at the trial. It may be that because of the finding of fact as to the true consideration being against them their evidence should not be accepted. Even so, I think that all that we could do would be to disregard it entirely and treat it as if it had not been given. We certainly

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would not be justified in turning it completely around and reading it as though they had sworn exactly opposite to what they did swear to and had admitted that Joseph Schwartz had told them that the mortgages were exactly what the trial Judge has found them to be. There is certainly nothing in their evidence to justify the assumption that this information was conveyed to them by Joseph Schwartz. The only thing that the defendant has to go on to prove that he did what was incumbent on him in this respect is his own evidence of his unsatisfactory and quite insufficient explanations to them and even that is denied by the appellants. I think, therefore, that there is absolutely no evidence to justify a finding that the real purpose of these mortgages was disclosed to or understood by either of these appellants, accepting as I do the opinion of the trial Judge as to what that real purpose was.

During the argument, I was impressed by the circumstance that Mrs. Schwartz had, before the execution of the mortgage and mortgage notes in August 1919 signed plain notes, some as early as January 1919. But upon examining the evidence carefully, I find rather a confirmation of her story in the circumstances connected with these notes.

It appears that Joseph Schwartz started his mercantile business at Milk River sometime in December 1918. It was a considerable business and he naturally incurred liabilities immediately to wholesale houses. Consequently when we find Mrs. Schwartz joining with him in notes commencing in January 1919, it is natural to suppose that she thought they were for the purpose of borrowing money to meet liabilities to the wholesale creditors.

I summarize her evidence upon this point. She says (p. 31) that she signed notes first, then a mortgage; that it was Johnston, who came to her and got her to sign the notes; the first time, shortly after they opened the store; that Johnston told her that Joseph Schwartz had $16,000 loan and he could not get the loan unless she signed the notes and that when she signed the notes the loan would go through, in a week or so possibly; that her husband was present and said the same thing (p. 32).

Doubtless Joseph Schwartz had in fact got advances on the strength of these notes but that fact, of course, cannot lead to the liability of Mrs. Schwartz upon a mortgage given under the impression that it was for the purpose of a present advance.

Johnston gives absolutely no account of the circumstances under which these earlier notes were procured from her. He says (p. 1213) that no explanation whatever of the liability

she was assuming was given her by him and that he had not the faintest idea what she knew about the notes as he did not talk with her at all when he got her to sign. While this is in contradiction of her evidence it is, if true, very suggestive of the absolute lack of care on the part of the defendant in informing this ignorant woman of the character and extent of the liability she was assuming. William also seems to have signed some earlier notes but his evidence on this point (p. 130 *et seq.*) is very confusing.

It is argued that because of the liability of the appellants through the medium of these notes for the debt of Joseph Schwartz, it is quite reasonable to suppose that they knew that their mortgages were meant to secure the payment of the same. Even if upon the facts, which I have just stated from the evidence, it could be certainly said that these appellants were ever liable on these earlier notes, which I doubt, because they do not seem to have been given any more information about the liability they were assuming under them than they were with respect to their mortgage, it by no means follows that they were willing to secure the payment of that liability upon the only property they had in the world particularly when it would be largely, if not entirely, exempt from seizure and sale under execution against them.

A circumstance which, in my opinion, lends great strength to the contention that Mrs. Schwartz at any rate did not understand the real purpose of the mortgages is the fact of a receipt for them being given by the defendant. I do not intend to discuss here the much debated question as to the form of this receipt as that is unnecessary. The defendant says that he gave it to her because she insisted upon it as she wanted to have something to shew for the mortgages. If she knew that the mortgages were being given in security for her husband's liability I am quite unable to understand either her anxiety for a receipt or why it was given at all. The debt had been contracted and the execution of the mortgages entirely closed the transaction. Why should a receipt for them be thought of if she knew that that was their purpose? But if they were given for a purpose not already accomplished but for one to be effected in the future and failing the completion of which they were to be returned to her as she alleges one can quite well understand why something should be given to evidence that state of affairs.

No question of estoppel arises here. The defendant has not by reason of the execution of these mortgages acted upon them

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to his prejudice. The only effect of them so far as he is concerned is to give him security which he did not theretofore have for a debt already contracted and which was in no part incurred upon the promise that it would be given.

Upon these facts I think the onus was clearly on the defendant to prove that these securities were fully and intelligently explained to and understood by these plaintiffs and this he has quite failed to do. He has satisfied the trial Judge that they were, in fact, given in security for the debt of Joseph Schwartz and that, of course, settles the dispute as between those two. The validity of these securities, however, does not depend upon what passed between the defendant and Joseph Schwartz with respect to them but upon what passed between these plaintiffs and either the defendant or Joseph Schwartz as representing him in the transaction. The written contracts are exceedingly plain. They undoubtedly are securities for advances to be made to the mortgagors. The defendant's attempt is by parol evidence to vary the terms of these written contracts and have them declared to be securities for something other than that for which they purport to be. This he can only do upon the clearest evidence not only that the contract which he alleges is the real contract but that it was so understood by the other contracting party. Even if the appellants had been strangers in blood to the man on whose account and for whose benefit these mortgages were given I think it unquestionable that they were entitled to be told and very clearly too that they were not, in fact, what they professed to be but were of a quite different character and given for a quite different purpose and if they executed them in the absence of such an explanation as gave them a proper understanding of their true nature and effect they would be entitled to relief from them. Much more is this the case when one of these is a husband and wife and the other a parent and child transaction, the child not being emancipated from the parents' control. The authorities shew clearly the need for the fullest explanation of such transactions.

In *Bischoff's Trustee* v. *Frank* (1903), 89 L.T. 188 at p. 189 Wright, J. said following what he calls "the ancient leading case of *Gibson* v. *Jeyes* (6 Ves. 266,) that wherever there is a large voluntary benefit, that is a benefit without consideration . . . . it requires if it is challenged, proof by the donee that the donor understood substantially what he was doing." This judgment, however, was reversed by the Court of Appeal whose judgment is unreported but is referred to in *Howes* v. *Bishop*, [1909] 2 K.B. 390 at p. 397, 78 L.J. (K.B.) 796. In

Talbot v. *Von Boris* (1910), 27 T.L. 95 at p. 96, a single judgment of Phillimore, J. he said "The broad and sound principle to follow in a case where a wife became surety for her husband in a transaction under which she was to get an indirect advantage was to make it necessary that the nature of the transaction and what she was doing should have been explained to her." This case is referred to in *Hutchinson* v. *Standard Bank* (1917), 36 D.L.R. 378, at p. 380, 39 O.L.R. 286, a judgment of the Appellate Division as "authority for the proposition that a duty is still upon the husband or the person sustaining a husband and wife transaction to prove that the nature of the transaction was explained to the wife." *Turnbull* v. *Duval*, [1902] A.C. 429, 71 L.J. (P.C.) 84, is a case in which creditors of a husband endeavored to enforce a charge upon his wife's property which he had procured from her by pressure and concealment of material facts. As I am trying to avoid a discussion of the question of marital influence this case is not very helpful, except from the point of view of the effect to be given to Joseph Schwartz' representations to the appellants. The Privy Council held that though the dealings under which this charge was procured were all had between the husband and the wife it was impossible for the plaintiffs to remain unaffected by the husband's pressure and the wife's ignorance for "they left everything to Duval" (the husband) "and must abide the consequences." So far, therefore, as any misapprehension on the part of the appellants as to the character of the securities in question is traceable to the representations of Joseph Schwartz, the defendant must, on this authority, be affected by it and on his own shewing a large part of, if not the entire responsibility, for procuring them was laid by him on the shoulders of Joseph Schwartz. In *Chaplin* v. *Brammall*, [1908] 1 K.B. 233, 77 L.J. (K.B.) 366, a husband procured his wife's signature to a guarantee without sufficiently explaining to her the nature of the document which she did not understand when she signed it. "The plaintiffs fail to shew that the document was properly explained to her . . . . The plaintiffs left everything to the defendant's husband; they furnished him with the document that he might get his wife's signature to it and they must take the consequences of his having obtained it without explaining to her or her understanding what she was signing." And so it was held that the action on the guarantee was not maintainable. This case was considered by the Court of Appeal in *Howes* v. *Bishop, supra,* apparently with approval. Lord Alverstone referring to it at p. 397 says:—

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"In that case there was a finding that the wife's signature was obtained without sufficiently informing her of and explaining to her the contents of the document and that she did not understand it when it was signed by her. It is obvious that those facts give rise to very different considerations." Farwell, L.J. at p. 402 said of it "But in that case Vaughan Williams, L.J., said with reference to the facts 'Ridley, J. has come to the conclusion that in fact no sufficient explanation of it was given to her and that she did not understand it.' On those facts that case was a perfectly plain one and I fail to see why it was reported." There is a very full review of the authorities by the trial Judge and the Manitoba Court of Appeal in *Gold Medal Furniture Co.* v. *Stephenson* (1912), 7 D.L.R. 811; (1913), 10 D.L.R. 1, 23 Man. L.R. 159.

In each of the cases above referred to the security in question was in fact what it purported on its face to be. There was not in any one of them a suggestion that though appearing from its wording to be given for one purpose it was in fact given for another. If there was in them the need of explanation which these decisions emphasise *a fortiori* is explanation of their exact nature necessary to sustain these securities which the holder of them claims to have been given to him for a purpose quite the opposite of that expressed by them.

These are all husband and wife cases and so far as they are based upon that particular kind of relationship they affect, of course, only the case of Anni Schwartz. To William Schwartz' position considerations relating to dealings between parent and child apply but, in my opinion, there was the same need for and absence of explanation to and understanding by him as there was in the case of his mother.

DeWitte v. *Addison* (1899), 80 L.T. 207 (C.A.) is a case in which a mortgage given by a daughter, without consideration, to secure the debt of her father was held invalid because, to the knowledge of the mortgagee, the daughter executed the mortgage without having had any independent legal advice. The Court in giving judgment cites with approval and follows the decision in *Archer* v. *Hudson* (1844), 7 Beav. 551, 49 E.R. 1180, of Lord Langdale who (at p. 560) said:—

"Nobody has ever asserted that there cannot be a pecuniary transaction between a parent and a child, the child being of age, but everybody will affirm in this Court that if there be a pecuniary transaction between parent and child just after the child attains the age of twenty-one years, and prior to what may be called a complete 'emancipation,' without any benefit

moving to the child, the presumption is that an undue influence has been exercised to procure that liability on the part of the child, and that it is the business and the duty of the party who endeavors to maintain such a transaction to shew that that presumption is adequately rebutted; and that it may be adequately rebutted is perfectly clear. This Court does not interfere to prevent an act even of bounty between parent and child, but it will take care (under the circumstances in which the parent and child are placed before the emancipation of the child) that such child is placed in such a position as will enable him to form an entirely free and unfettered judgment, independent altogether of any sort of control."

The law is summarized in this sense in Halsbury's Laws of England vol. 15, tit: Fraudulent & Voidable Conveyances para. 1017.

As pointed out by Mr. Johnstone the decision in *Cox* v. *Adams* (1904), 35 Can. S.C.R. 393 though over ruled by the Privy Council in *Bank of Montreal* v. *Stuart*, [1911] A.C. 120, so far as the husband and wife part of the transaction there in question is concerned, still stands as to the parent and child part of it and it, therefore, remains authority for the proposition that a contract made without independent advice by a child for the benefit of her father to whose dominion and influence she was still subject is not binding.

I think for the reasons I have endeavored to give that these appeals should be allowed and that each appellant should have a judgment setting aside his or her mortgage directing the defendant to discharge it or vacating the registration of it and directing the certified duplicate of it filed as an exhibit herein to be delivered to him or her. The defendant should pay the costs of each action down to the trial, those of Anni Schwartz under col. 3 and those of William Schwartz under col. 4 and should pay one bill of costs of the trial under col. 4 and one bill of costs of the appeal under col. 4. Rule 27 not to apply to any of these costs.

Appeals allowed.

CLARK v. RAYNOR.

Nova Scotia Supreme Court, Harris, C.J., Russell, J., Ritchie, E.J., and Chisholm and Rogers, JJ. April 28, 1922.

SPECIFIC PERFORMANCE (§IE—34)—ACTION FOR WITH COMPENSATION FOR DEFECT IN TITLE—KNOWLEDGE AND CONSENT OF PARTY SEEKING TO ENFORCE—IMPOSSIBILITY OF CARRYING OUT AGREEMENT FOR SALE, FREE FROM ENCUMBRANCE, AT TIME MADE — "ENCUMBRANCE"— MEANING OF—RIGHTS OF PARTIES.

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The word "encumbrance" has no technical meaning in law, and is to be interpreted according to the circumstances, and having regard to the whole contract in which it is found, and where from the evidence it is clear that a party seeking to enforce specific performance of an agreement to convey land, with compensation for an alleged defect in title, was a consenting party to the granting of a lease of a small part of the premises and knew of its terms and conditions at the time the agreement to convey was entered into, and the impossibility of carrying out the agreement to convey except subject to such lease, he will not be allowed after a number of years to set up that such lease is an encumbrance which makes the land practically valueless and so obtain the land for a nominal amount and free himself of a just debt, because a highly speculative undertaking which had his full approbation at the time it was entered into has become a losing proposition.

APPEAL from the judgment of Mellish, J. in favour of plaintiff in an action to enforce the specific performance of an agreement to convey land. Reversed.

Hon. Mr. Johnston, Att'y-Gen'l of Prince Edward Island and *W. E. Bentley,* K.C. and *H. C. Morse,* for appellant.

F. L. Milner, K.C., for respondent.

The judgment of the Court was delivered by

ROGERS, J. :—In this case the plaintiff, with hands anything but clean, seeks the equitable side of the Court for a decree specifically enforcing a contract to convey lands (with compensation to him for an alleged defect in title), a decree which, in my opinion, with deference to the differing views of the trial Judge, strikes at the very fundamentals of those understandings on the basis of which they became associated in business. The judgment under appeal is founded on an extremely literal interpretation of certain clauses and words in an agreement bearing date November 30, 1915, and with little regard to the surrounding circumstances and the significance of two other documents executed in 1913, when the parties first commenced their business relations. Without reference to these circumstances and without due consideration for the other documents, it is quite impossible to ascertain the real intention of the parties and thus correctly apply equitable principles to the matters in controversy.

The plaintiff, Clark, was a small farmer living in Bridgetown, Annapolis, and a cousin of the defendant, Raynor. The latter was an experienced and well to do fox breeder of Alberton, Prince Edward Island, and was one of the pioneers in the business of breeding and raising silver black foxes in captivity. The business in the period just preceding the breaking out of the Great War entered upon a highly speculative phase, and the ruling prices rapidly increased owing to the constantly in-

creasing demand for young foxes required to establish other ranches, not only in the Eastern Provinces but far afield throughout the continent. The ruling price for a well mated pair at the commencement of the war was $15,000, or in that neighbourhood, and they were readily saleable. Had the demand continued for the young animals, substantial gains could be made by those who understood and practised the art of successful procreation and care, and Raynor was undoubtedly one of this class. Clark, who knew his cousin intimately, having been brought up with him, applied to him in 1913 for financial assistance in a farming proposition. Raynor, later, came to Bridgetown and suggested to Clark the establishment of a fox business on the farm which Clark had it in mind to purchase with Raynor's help. The suggestion was speedily adopted by Clark; Raynor purchased the farm, paid the purchase money, $2,600, and the deed was taken in his name. The land had no buildings upon it. It was simply pasture and bush land and suitable for the proposed business. Raynor advanced the necessary money to build a house and barn on the place for Clark and also the beginnings of a ranch, consisting of pens, wire enclosures and other requirements for fox raising. Then the Raynor, Clark and Harlow Black Fox Co. Ltd. was organized. Harlow being apparently another Bridgetown resident, who was willing in a small way to try his luck in an attractive project new to that part of the country. The capital of the company consisted of four pairs of foxes supplied by Raynor at $60,000 for which sum he took all the shares of the company with the exception of qualification shares (loaned I suppose) held by Clark and Harlow. The exact details are unimportant. It is to be noted, however, that Clark remained a director of the company until "along the first of 1919"; he was for one year managing director—not a very efficient one it may be premised —and he later became secretary, a position held by him until his resignation from the Board. It should also be noted that Clark, throughout the period of 1913-1918, had personal charge and supervision of the company's foxes. Raynor in the process of time, sold his shares, or most of them, to the public at par or more, and in 1915 was not, it appears, in control of the company in any way; but he had certain continuous obligations, however, under an agreement between the company and himself which will presently be referred to, and under this agreement he grants remises and leases unto the company for the fox ranches four acres out of the twenty six which were acquired, lying across the centre of the farm laterally. It is advisable

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that this agreement be reproduced here in full. It is as follows:

"The Raynor, Clark & Harlow Black Fox Company Limited, and the defendant entered into an agreement and lease in the following terms:

Articles of agreement and lease made the 12th day of February, A.D. 1913 between The Raynor, Clark and Harlow Black Fox Co. Ltd. of Bridgetown in the County of Annapolis a body corporate of the one part and B. I. Raynor of Alberton in the Province of Prince Edward Island of the other part.

Witnesseth that the said B. I. Raynor for and in consideration of the rents, covenants and agreements hereinafter mentioned, reserved and contained on the part and behalf of the said The Raynor, Clark and Harlow Black Fox Co. Ltd., its successors and assigns to be paid, kept and performed, doth by these presents grant, remise and lease unto the said The Raynor, Clark and Harlow Black Fox Co. Ltd., their successors and assigns, all that piece or parcel of land situate, lying and being near Bridgetown, in the County of Annapolis, bounded and described as follows; beginning at stake set in the lands of B. I. Raynor near the head of the orchard, thence running easterly to a stake set in west line of lands of Avard Anderson, thence running northerly following said Anderson's west line to a stake set in said line, thence running westerly parallel with the first mentioned line to a stake, thence southerly to the place of beginning containing four acres or less. To hold the said premises with appurtenances unto the said The Raynor, Clark and Harlow Black Fox Co. Ltd., their successors and assigns, from the first day of September, A.D. 1913 for and during and until the full end and term of ten years.

And the said B. I. Raynor for himself, his heirs and assigns doth hereby covenant and agree that, the said The Raynor, Clark and Harlow Black Fox Co. Ltd., their successors and assigns paying the sum hereinafter mentioned to be paid by them and performing the covenants and agreements herein contained on their part to be performed, the said The Raynor, Clark and Harlow Black Fox Co. Ltd., their successors and assigns shall all times during the said term have, hold and enjoy the said demised premises without any manner of let, suit, trouble, or hindrance of, or from the said B. I. Raynor his heirs or assigns or any other person or persons whomsoever.

And the said B. I. Raynor in consideration of the premises and of the sum of one dollar to him in hand paid by the The Raynor, Clark and Harlow Black Fox Co. Ltd., hereby promises and agrees to and with the said The Raynor, Clark and Harlow

Black Fox Co. Ltd. to make and execute unto them a new lease, *similar in all respects to this*, and for a similar period of ten years, of the premises aforesaid upon the request in writing of the said The Raynor, Clark and Harlow Black Fox Co. Ltd., made within twenty days prior to the expiration of the term granted by these presents except that he will not agree to personally supervise the said ranch any time during the last period of ten years.

And the said B. I. Raynor for himself, his heirs and assigns doth hereby covenant and agree with the said The Raynor, Clark and Harlow Black Fox Co. Ltd. their successors and assigns that he and they will construct and equip an up to date fox ranch on the said lands and premises hereby demised and have the same ready for the accommodation of foxes on the first day of September, A.D. 1913 the same to be sufficient to accommodate all foxes owned by the said The Raynor, Clark and Harlow Black Fox Co. Ltd. on that date and will enlarge the said ranch from time to time to accommodate so many pairs of foxes as the said The Raynor, Clark and Harlow Black Fox Co. Ltd. may wish to put in it at any time during the term of this lease up to twenty pairs and will keep the said ranch in good repair during the said term. And also to furnish a keeper who will faithfully, truly and diligently care for, feed and guard and provide all feed and other necessaries for all foxes owned by the said The Raynor, Clark and Harlow Black Fox Co. Ltd. at any time during the said term of this lease and further that the said B. I. Raynor will personally supervise the care of the said foxes for the term of one year from the first day of September A.D. 1913, and said B. I. Raynor further agrees to pay all taxes levied on the property during the term of this lease.

And the said The Raynor, Clark and Harlow Black Fox Co. Ltd. in consideration of the services so to be performed, ranch to be built and kept in repair, keeper to be furnished, taxes to be paid and the performance of all other agreements herein contained on the part of the said B. I. Raynor, the said The Raynor, Clark and Harlow Black Fox Co. Ltd. agrees to pay to the said B. I. Raynor his executors or administrators the sum of twenty per cent of all the profits of the said company each year during the term of this lease.

And it hereby mutually agreed between the parties hereto that A. B. Clark of Bridgetown aforesaid provided that he shall agree to undertake the responsibilities under this lease and agreement in the place of the said B. I. Raynor and that

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he is then the owner of the lands and premises herein described be substituted for the said B. I. Raynor and that the said B. I. Raynor be relieved from any responsibility under this lease and agreement on the first day of September, A.D. 1914.

In witness whereof the parties to these presents have hereunto set their hands and seals the day and year first above written.

Signed, sealed and delivered in the presence of

The Raynor Clark & Harlow Black Fox Company Limited.

Sgd. A. B. Clark, managing director. L.S.

Sgd. D. G. Harlow, secretary. L.S."

Sgd. Chas. R. Chipman.

It is to be noted that the plaintiff, Clark, manager and director of the new company as well as equitable owner of the whole farm, including the reversion of the 4 acres subjected to the ranching agreement, knew all about the agreement, which he helped to complete. It was really of the essence of the whole arrangement, and Clark, of course, in his personal interest assented to it; he would have been the first to complain at this stage had Raynor disputed his equity in the property or had he undertaken to have the enterprise located elsewhere. Raynor was to receive from the company for the use of the lands, for the construction and equipment of an up-to-date fox ranch "on the said lands and premises" (sufficient eventually to provide for twenty pairs of foxes), for providing a keeper and for a year's personal supervision 20% of all the annual profits of the company. The final clause contemplated the ultimate ownership by Clark of the whole property, including reversion of the lease and his substitution for Raynor.

An agreement between Raynor and Clark, dated February 13, 1913, and presumably executed the day following the date of the one already referred to makes the situation in this respect clear. It reads as follows:—

"The defendant and the plaintiff entered into an agreement in the following terms: 'Articles of agreement made in duplicate and entered into this 13th day of February, A.D. 1913, between B. I. Raynor of Alberton in the Province of Prince Edward Island, fox raiser, of the one part, and A. B. Clark of Bridgetown in the County of Annapolis, Province of Nova Scotia, farmer, of the other part.

Witnesseth that the said B. I. Raynor for himself, his heirs, executors, administrators and for and in consideration of the agreement hereinafter made by the said A. B. Clark doth hereby agree with the said A. B. Clark to sell to him the said A. B. Clark, his heirs and assigns the fee simple and inheri-

tance free from all encumbrance except lease and agreement made between The Raynor, Clark & Harlow Black Fox Co. Ltd., and the said B. I. Raynor and dated the 12th of February, A.D. 1913 for the term of ten years with an option on the part of the said The Raynor, Clark & Harlow Black Fox Co. Ltd., to lease the same for a further term of ten years all that certain piece or parcel of land and premises described as follows; Commencing on the north boundary of the Halifax and South Western Railway lands at a point where the same intersects the west line of lands of Avard L. Anderson; thence running northerly the course of the lines until it strikes a blazed fir tree, on the said Anderson's west line; thence turning and running westerly at right angles twenty-eight rods to a stake and stones; thence turning and running southerly parallel with the first mentioned bound until it comes to the said north boundary of the Halifax and South Western Railway land; thence running easterly along the said north boundary of the Halifax and South Western Railway to the place of beginning, containing by estimation twenty six acres more or less.

Also the use and privilege of a right of way eighteen feet wide from the main post road along the west line of Major H. Slocomb's land running northerly until it comes to the top of the hill; thence running easterly to the above described lot of land, said right of way to be used in common with the said Major H. Slocomb and the said B. I. Raynor for the price or sum which the said lands and premises has cost the said B. I. Raynor for land and improvements put there on by him up to the first day of September A.D. 1913 and will at any time within two years from the first day of September A.D. 1913 on receiving from the said A. B. Clark his heirs, executors, administrators or assigns the full purchase price with interest on the same at the rate of six per cent. per annum from the said first day of September A.D. 1913 to the date of payment, execute a proper conveyance of the same in fee simple to the said A. B. Clark, his heirs and assigns free from all encumbrances except the lease and agreement hereinbefore mentioned.

And the said A. B. Clark for himself, his heirs, executors, administrators and for and in consideration of the agreements hereinbefore made on the part of the said B. I. Raynor hereby agrees to purchase the said lands and premises on the terms and conditions hereinbefore set out.

And the said A. B. Clark further agrees to assume all responsibilities of the said B. I. Raynor under a certain lease and agreement made between the said B. I. Raynor and the said

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The Raynor, Clark & Harlow Black Fox Co. Ltd., and dated the 12th day of February, A.D. 1913, from the first of September, A.D. 1914.

In witness whereof the parties hereto have hereunto set and affixed their hands and seals the day and year first above written.

Signed, sealed, and delivered in the presence of Sgd. B.I. Raynor, L.S.

Signed by A. B. Clark in the presence of Chas. R. Chipman Sgd. A. B. Clark, L.S.''

presence of George Tweedy.

Signed by B. I. Raynor in the

It is to be noted that Clark is to become the purchaser ''for the price or sum which the said lands and premises have cost Raynor for land and improvements put thereon by him,'' and that he is to assume Raynor's responsibilities. Though not directly stated the implication is that Clark succeeds to Raynor's position in respect of division of profits when he becomes the actual owner of the farm and the reversion of the leasehold, and in the meantime by verbal arrangement all commissions or profits receivable by Raynor from the company were to be and were actually accounted for by Raynor to Clark. A settlement was made each year in an account in which Clark was charged all outlay which Raynor was bound to make under his agreement with the company, and Clark was credited with all profits earned. Clark signed a note each year, at any rate up to November, 1916, and, thereafter, apparently notes were not given but accounts were sent crediting the earnings and receipts. Clark had the use without rent of the farm and buildings, worth about $300 per year and he was allowed a credit of $300 annually as caretaker of the ranch which Raynor was bound to furnish. Raynor charged Clark 6% on all his advances and he had no other personal profit in the carrying on of the undertaking. Matters proceeded along these lines until late in 1915 when Clark complained that the agreement of 1913 did not provide for his wife in case of his death nor make any provision for his annual allowances as caretaker and accordingly a new agreement was prepared by a solicitor in Prince Edward Island, some changes of a minor character were made in it by a Bridgetown solicitor and it is upon this agreement the action is founded.

It read as follows:—

''Memorandum of agreement made this thirtieth day of No-

vember, in the year of our Lord, one thousand nine hundred and fifteen.

Between:—Benjamin I. Raynor of Alberton in Prince County, in Prince Edward Island, fox breeder, of the one part; and Andrew B. Clark of Bridgetown, in the Province of Nova Scotia in the Dominion of Canada, caretaker, of the Raynor, Clark and Harlow ranch, of the other part.

Whereas the Raynor, Clark and Harlow Black Fox Co. Ltd., is a body corporate duly incorporated under the laws of the Province of Nova Scotia doing a fox business in Bridgetown aforesaid.

And whereas Benjamin I. Raynor is president of the said company and has a contract with the said company to feed, care for and maintain the company's foxes for the period of eight years on the basis of twenty per cent. yearly commission on all the young raised in each year.

And whereas the said Benjamin I. Raynor owns twenty-six acres of land situate in Bridgetown aforesaid, bounded and described as follows: that is to say: Situate at the northeast corner of the town of Bridgetown commencing on the north boundary of the Halifax and South Western Railway lands at a point where the same intersects the west line of land of Avard L. Anderson, thence running northerly the course of the lines until it strikes a blazed fir tree on the said Anderson west line, thence turning and running westerly at right angles twenty-eight rods to a stake and stones, thence turning and running southerly parallel with the first mentioned bound until it comes to the said north boundary of the Halifax and South Western Railway land; thence running easterly along the said north boundary of the Halifax and South Western Railway to the place of beginning containing twenty-six acres more or less.

And whereas the said Benjamin I. Raynor has engaged the said Andrew B. Clark to act as his caretaker of the said company's foxes and feed the same and build all necessary pens and find all feed for the same on the terms and conditions hereinafter mentioned; The said Andrew B. Clark agrees to purchase all necessary feed for the said foxes and will keep a just account of same and will produce vouchers for the same at the time of settlement. The said Benjamin I. Raynor agrees to pay for all feed bought, except that which is produced on the farm, also to furnish the said Andrew B. Clark with material for the building of pens for the company's foxes.

And whereas the said Andrew B. Clark is indebted to the said Benjamin I. Raynor in the sum of nine thousand nine hun-

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dred and sixty-seven dollars by the amount due on a promissory note dated the twenty-third day of September, A.D. one thousand nine hundred and fourteen, payable to the said Benjamin I. Raynor twelve months after the date thereof and on which said note has been paid three thousand dollars, leaving the said balance still due of $9,967.00 with interest at six per cent.

Now this agreement witnesseth that the said Benjamin I. Raynor doth hereby agree to sell to the said Andrew B. Clark, and he, the said Andrew B. Clark doth hereby agree to purchase from the said Benjamin I. Raynor all the said described lands, together with a right of way eighteen feet wide extending from the dwelling house on said described land to Major Slocomb's west line, thence southerly to the Bridgetown Street, together with all building and appurtenances thereto belonging on the terms and conditions following, namely: that the said Andrew B. Clark will feed, care for and attend and supply all necessary feed, and build fox pens in a good reasonable and satisfactory manner for all the foxes of The Raynor, Clark and Harlow Black Fox Co. Ltd., to the number of twenty pairs for the period of eight years from the date hereof and will pay the said Benjamin I. Raynor the balance due on said promissory note, namely: nine thousand nine hundred and sixty-seven dollars, together with interest thereon or such parts thereof as shall from time to time remain unpaid at the rate of six per cent. per annum; said interest to be payable yearly on the thirtieth days of November in each year, the first of such annual payments of interest to be due and payable on the thirtieth day of November next, A.D. one thousand nine hundred and sixteen.

In consideration whereof and on payment of the said principal, money and interest due on said promissory note at any time during the continuance of these presents and the feeding, caring for and attending of said foxes and supply all necessary feed and pens for same as aforesaid, he the said Benjamin I. Raynor doth hereby for himself, his heirs, executors, administrators and assigns, covenant, promise and agree to and with the said Andrew B. Clark to convey and assure or cause to be conveyed and assured unto the said Andrew B. Clark his heirs and assigns, by a good and sufficient deed in fee simple all the said described lands free from all dower or other encumbrances.

Provided, however, and it is hereby expressly understood and agreed by and between the parties hereto that the said Andrew B. Clark is to have the free and uninterrupted use and enjoyment of the said described premises with the appurtenances

thereto belonging during the continuance of this agreement subject nevertheless to impeachment for voluntary or permissive waste save and except what is actually necessary for the construction of any additional fox pens.

And the said Benjamin I. Raynor doth hereby for himself, his heirs, executors, administrators and assigns further covenant and agree with the said Andrew B. Clark, his executors, administrators and assigns to pay him the sum of three hundred dollars per annum, as a salary during the continuance of these presents payable once a year on the thirtieth day of November in each year, the first of such annual payments to be due and payable on the thirtieth day of November A.D. one thousand nine hundred and fifteen, also by way of reducing the principal money and interest due on the said promissory note, he the said Benjamin I. Raynor will credit the said Andrew B. Clark with all net proceeds, he the said Benjamin I. Raynor receives from the sale or other disposition of the twenty per cent. increase in the young foxes raised in the ranch of the Raynor, Clark and Harlow Black Fox Co. Ltd. which he is to receive for the feeding, caring and maintenance of the company's foxes as per the terms of agreement which he the said Benjamin I. Raynor made with the Raynor, Clark and Harlow Fox Co. Ltd. after deducting thereout and therefrom any necessary travelling or boarding expenses, and all other expenses which he the said Benjamin I. Raynor may incur by reason of building pens or paying salaries or on account of having to go to Bridgetown aforesaid on business connected with the said foxes.

And also that at any time during the continuance of this agreement or before the expiration thereof he the said Benjamin I. Raynor will convey in fee simple to the said Andrew B. Clark, his heirs and assigns the said described premises together with the appurtenances thereto belonging on payment of any portion or portions due in respect of said note.

And he the said Andrew B. Clark doth hereby for himself, his heirs, executors, administrators and assigns covenant, promise and agree with the said Benjamin I. Raynor, his executors, administrators and assigns, to carry out all the terms and conditions of this agreement as herein contained and on his part to be observed and performed hereby ratifying and confirming same and also that should he fail to pay the said promissory note or feed, care for and attend the said foxes as herein provided, or should he make default in carrying out the terms and conditions of this agreement that then and so soon as this occurs and on thirty days written notice to that effect given by

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the said Benjamin I. Raynor, his heirs or assigns to the said Andrew B. Clark, his heirs, or assigns that he the said Andrew B. Clark, his heirs and assigns, will immediately at or before the expiry of the time of said notice quit and deliver up possession of the said described premises to the said Benjamin I. Raynor, his heirs or assigns.

Also that during the time the said Andrew B. Clark remains caretaker of the foxes of the Raynor, Clark and Harlow Black Fox Co. Ltd., he will handle the said company's foxes according to their reasonable directions. The said Andrew B. Clark also agrees to feed and care for one pair of foxes now in ranch No. 9, the property of D. G. Harlow, said foxes to be cared for and fed the same as the company's stock.

In witness whereof the said parties have hereunto set their seals and subscribed their names the day and year first above written.

(Sgd.) Benjamin I. Raynor L. S.
(Sgd.) Andrew B. Clark L. S."

It is upon the paragraph third from the last the proceedings for specific performance are based, providing that at any time on the payment of any portion or portions due in respect of the note Raynor would convey the fee. A tender of the money due, some $11,048, is alleged and a refusal on Raynor's part to convey the lands "except upon the condition that the plaintiff would accept a conveyance subject to the lease and agreement under which the Raynor company was in possession of the four acres occupied for ranching purposes."

The impossibility of performance is apparent for Raynor had no more control of the company than has Clark: the reason for the present attitude of Clark is easily understood, for he offers Raynor $1 for a deed and in full discharge of the debt. He seems to have discovered very shortly before action brought that this so called "encumbrance", the lease and agreement of a small portion of the farm entered into with his full knowledge and concurrence and in fact for his benefit, is no longer for his benefit, and that as Raynor in the nature of things cannot remove it, he will take advantage of an assumed difficult situation for Raynor and rid himself of his just debt. But the leasing agreement was entered into not only with the full knowledge and assent of Clark, but it was for his present and continuing benefit for out of the operations of the Raynor Co. and as well as from the operations of the proposed "additional pens" all under Clark's care that he and Raynor both had confident expectations that within a short time not only would

Raynor's debt be paid but that Clark would become the proprietor absolutely of the farm and the valuable reversion of the lease with its possibilities for the future. Raynor states that if it had not been for the war Clark would have been able to pay off the debt within a year or two and this optimism was doubtless present to the minds of both of then; but the evolution of the business from the selling of the young foxes for breeding purposes to the selling of the pelts hastened by war conditions inevitably led to conditions less favourable and to minimised returns. It is much more easy now for Clark to acquire that state of mind permitting him to regard that which he hoped was to be for his enrichment as an "encumbrance" so depreciating the value of the property that it was now only worth a nominal sum and this in the face of possession by him of the property from 1913 up to the time of action brought—as equitable owner for 2 years under the agreement of 1913 with its ancillary verbal understandings and for 5 years under the same arrangement reduced to writing a little more particularly a highly speculative undertaking becomes a losing proposition and assumes the character of an encumbrance. A reading of this brief narrative of the events ought to be sufficient to disclose the real situation and the motives inspiring so unjust an attempt to over reach, for the evidence clearly discloses that Raynor lived closely up to all the arrangement made and that he has been drawn into this unnecessary litigation owing to Clark's inclination to take advantage, if he can, of a few supposedly technical words in the agreement of 1915. In the contract of 1913 *ex abundanti cautela*, the draftsman inserted after the words "free from all encumbrances," the unnecessary reservation "except the lease and agreement"; while in that of 1915 another draftsman, who evidently never saw that of 1913, uses the words "free from all dower or other encumbrances"; while in another paragraph, the one declared upon, there is no reference to encumbrances of any kind.

One can hardly conceive of Clark, say as of December 1, 1915, tendering his money and demanding that the lease under which then, at any rate, he had so great expectations, should be removed as a burdensome encumbrance.

The trial Judge in his reasons for judgment says:—

"One might also perhaps naturally expect under all the circumstances and considering the relations of the parties as disclosed by the evidence that the defendant would have made this agreement to convey subject to the outstanding interest which was acquired by lease from himself to the said company for a

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term of ten years with a right of renewal for ten years more. And a previous agreement between the parties hereto reserved this lease. It would appear, however, that the omission in the agreement sued on to make such reservation was premeditated and deliberate. This is evidenced not only by the fact of the omission itself, but by the correspondence put in evidence. This disposes of the question of hardship to defendant if indeed such question is a relevant matter, which is very doubtful."

With deference, the suggestion that there was premeditated and deliberate intention to impose on Raynor the obligation to remove as a burden the agreement and lease and that this view is justified by the language of the agreement of 1913 as well by the correspondence is not only contrary to the essential relationship of the parties but is not supported by the parol evidence or by correspondence or otherwise. Even when Clark has late in the day been apprised of his supposed technical right he is disingenuous to say the least: "I told him (Raynor) that if he would get me a contract from the company, a 25% contract and remove this lease I would pass him over the money; he said he would do that." This Raynor stoutly denies and states that he, Clark, knew the lease was there, he helped to make it, that it was to subsist, and that the company would not accept Clark in his place as had been contemplated and that Clark was receiving all anticipated benefits. The only correspondence is a letter date November 9, 1915; in which was enclosed a draft of the agreement sued upon in which after referring to the eight years of the Raynor Co. contract outstanding it says:—

"You will take notice that we have given you free use and privilege of all buildings, land and orchard and everything for your own use and benefit and three hundred dollars cash, which we talked about and decided on when I was in Bridgetown. You will also notice that we have agreed to place all money received for the amount of my commission for the care of those foxes less my expenses to be placed against the note, which will be renewed from time to time and as soon as payment is made, you will notice we have agreed to transfer the deed free and unencumbered."

The suggestion that by using the expression "we have agreed to transfer the deed free and unencumbered" the defendant meant that the lease was to be cancelled and the Raynor Co. removed from the premises is entirely at variance not only with Clark's effort to obtain an increase in the profits from 20 to 25% but as has already been suggested, with the contractual

relations of the parties throughout and their continuous adjustments under the contract of 1915 up to the commencement of the action; in fact the terms of the agreement on its face without the aid of the surrounding circumstances are inconsistent with this idea. It refers to the 8 years of the Raynor agreement still outstanding carrying with it 20% profit to Clark through Raynor, the engagement of Clark as caretaker, the building of pens for the company not exceeding twenty; it recognizes the existence not only of the pens then built, but of "additional fox pens"; and it limits Clark's possession to the property not required for the purpose of pens and refers to the accounting by Raynor to Clark for the profits receivable by Clark and the latter's obligation to carry out the "reasonable direction" of the Raynor Co. In short, with respect to the Raynor Co. agreement, Raynor is to be regarded as contracting on behalf of Clark throughout that Clark would redeem and take Raynor's place if the company would agree and failing agreement Raynor was to continue under his obligations (which he could not get rid of) and Clark was in effect to indemnify and save him harmless as to the obligation to care for and feed the foxes and for so doing he became equitable owner of the farm and reversion and would become legal owner so soon as he paid Raynor his debt and advances.

The real meaning of the agreement having been ascertained the rights of the parties are not difficult of determination and are the same in equity as in law. The word "encumbrance" has no technical meaning. It is not one of the "terms of the law" and no definition of it will be found in the older books (Rawle on Covenants p. 90 and see also p. 95).

By the generally accepted definition it comprehends (Rawle p. 90) "every right to or interest in the land which may subsist in third persons to the diminution of the value of the land, but consistent with the passing of the fee by the conveyance," and Wharton, p. 438 describes it as "a claim, lien or liability attached to property, as a mortgage, registered judgment etc." It is apparent, of course, that the word is to be interpreted according to the context in which it is found. The word is not used in the paragraph on which the action appears to be based, but it is used in a preceding paragraph where Raynor undertakes that upon payment and execution of the agreement on Clark's part he will convey "by a good and sufficient deed in fee simple all the said described lands free from all dower or other encumbrances." Under the circumstances and having regard to the whole contract the word as used here must be

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confined particularly when associated with the words "free from all dower" to its narrow meaning, *noscitur a sociis*—for Raynor never could have dreamed of including the lease as coming within the meaning of a word clearly used to protect Clark only against the possible interest of any third party in the land to the diminution of its value (Rawle, p. 95). "If it were said," to use the words of an American Judge in 46 N.J. Law 1 at p. 6, "that a man had encumbered his land, no one from such an intimation would understand that such person had put it to lease." Furthermore, it is well settled in equity that "where the purchaser at the time of the contract knows of the limited interest of the vendor he will not be able to insist upon a conveyance of such interest with compensation." 2 White & Tudor at p. 511 and cases cited; and the doctrine has been carried much further in cases like *James* v. *Lichfield* (1869), L.R. 9 Eq. 51, 39 L.J. (Ch.) 248, 18 W.R. 158, where it was held that the purchaser must be taken to have had present in his mind all those things of which he had notice and those things which necessarily flowed from and were incidental to that notice. It is not, however, necessary in this case to rely on these equitable doctrines because the plaintiff fails on the construction of the contract. He cannot succeed either in law or equity. There was a counter claim for rectification but this remedy is not necessary to give effect to defendant's rights, but he was justified in setting it up.

The appeal should be allowed with costs and the action dismissed with costs.

Appeal allowed.

MARSHALL v. GRAND TRUNK PACIFIC R. Co.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon, and McKay, JJ.A. April 18, 1922.

MASTER AND SERVANT (§IIB—152)—BOILER FOREMAN—LEAKY PLUG IN ENGINE—PLUG INSERTED IN CROSS THREADED MANNER BY FELLOW-SERVANT—PLUG BLOWING OUT WHEN ATTEMPT MADE TO TIGHTEN—INJURIES—CONTRIBUTORY NEGLIGENCE—LIABILITY OF COMPANY.

A claim for damages by an employee is not affected by the mere fact that the fellow-servant whose negligence caused the accident stands towards him in the position of a workman to a foreman, and where such workman has inserted a plug in an engine "cross threaded," the condition of the plug not being apparent, the foreman has a right to assume that the work was properly done, and is not guilty of contributory negligence in taking the proper course to tighten the bolt if it had been properly inserted, although owing to its being inserted in a cross threaded fashion it blows out and injures him.

[*Davidson* v. *Stuart* (1903), 34 Can. S.C.R. 215; *Sharp Traction Co.* v. *Begin* (1918), 52 D.L.R. 686, 59 Can. S.C.R. 680; *Thompson* v. *Ontario Sewer Pipe Co.* (1908), 40 Can. S.C.R. 396; *C.P.R.* v. *Frechette*, 22 D.L.R. 356, [1915] A.C. 871, 84 L.J. (P.C.) 161, distinguished.]

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MARSHALL v. G.T. PACIFIC R. Co.

Lamont, J.A.

APPEAL by defendant from the trial judgment (1921), 62 D.L.R. 666, in an action for damages suffered by plaintiff while in the employ of the defendant, on account of the alleged negligence of the defendant. Affirmed.

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

P. M. Anderson, K.C., for respondent.

HAULTAIN, C.J.S. concurs with LAMONT, J.A.

LAMONT, J.A.:—This is an action for damages for personal injuries received by the plaintiff through the blowing out of the plug of one of the arch tubes of the defendants' engine. The plaintiff was boiler foreman for the defendants at their Melville yards. His immediate superior was one Steeves, locomotive foreman. On October 12, 1920, one of the defendants' engines was run into the round-house to be washed out. This operation requires the removal of a large number of plugs, which are screwed into the boiler, washing the boiler out and then screwing the plugs back into place. The boiler is then filled with water and the fire lighted. When steam has risen, the engine, if it is required, is taken out of the round-house by an hostler and handed over to the engineer who is to operate it. When the engine in question was run into the round-house, two boiler washers, Peat and Ferrier, set to work to wash it out. It was Peat's duty to remove and replace the plugs inside the cab, and it was the plaintiff's duty to inspect the work and see that everything was right. After the plugs had been removed, the plaintiff inspected the holes into which the plugs were screwed and found that the threads in each case were in proper condition. Then, after the plugs were screwed back into place and the boiler filled with water, he again inspected the engine and, as far as he could tell, everything was in proper order. This was about 11 o'clock in the forenoon. At 12 o'clock the plaintiff went off work, returning at 1. About 12.30, steam in the engine having reached 50 lbs. pressure, the hostler took the engine out of the round-house. At this time he did not notice anything wrong. It was not until steam had risen to 150 lbs. pressure that he noticed that one of the plugs inside the cab was leaking. He at once notified Steeves of the fact. Steeves asked the plaintiff to go along with him to see what was wrong. They found steam and water escaping from the plug. Thinking it had not been screwed up tight enough

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and that the steam was escaping for that reason, they put a wrench on the plug to tighten it. At the second turn the plug blew out, covering the plaintiff with scalding water and injuring him very seriously. To recover damages for these injuries the plaintiff has brought this action, alleging that his injuries were caused by the negligence of the defendants' employee in not properly replacing the plug after washing out the boiler. At the trial (1921), 62 D.L.R. 666, the plaintiff testified that the plug would not have blown out if it had not been put in cross-threaded; that it was Peat's duty to see that it was put in properly, and if anything was wrong to report to him; that it was no part of his (plaintiff's) duty to see that the plugs were properly screwed in, beyond what an inspection would disclose; that it was his duty to go with Steeves to fix up the leaking plug; that, having no reason to believe that the plug had been put in cross-threaded, it was reasonable to conclude that all the plug required was to be screwed up tight, and that they put the wrench on it for that purpose. This, he said, was the customary way to fix a leaking plug, and one free from danger if the plug had been properly put in. On this evidence, the case, in my opinion, could not have been withdrawn from the jury, as contended by counsel for the defendants. The jury found that the plaintiff's injuries resulted from negligence of the defendants, and that such negligence consisted in "putting in the plug cross-threaded or improper." They also found that the plaintiff had not been guilty of contributory negligence, and awarded him damages.

From the judgment entered on the jury's finding, the defendants appeal on the following grounds: (a) That there was no evidence on which the jury could reasonably find that the defendants were guilty of negligence.

As I have already pointed out, there was evidence from which the jury were entitled to conclude that the accident was due to the negligence of Peat. Peat was called as a witness, but neither side asked him whether or not he put the plug in cross-threaded. On the evidence, the jury, in my opinion, were entitled to draw the inference that the accident was the result of the plug being put in cross-threaded. (b) That on the evidence the jury should have found contributory negligence on the part of the plaintiff.

I agree with the finding of the jury that the plaintiff acted as a reasonably prudent man would, under the circumstances. It was argued that it was his duty to see that Peat screwed the plug in properly. Although Peat was an employee in the plain-

tiff's department and under him, and although it was the plaintiff's duty generally to see that his men did their work properly, it was no part of his duty to stand over Peat while he screwed the plug in place. Once the plug was screwed in, the evidence shews there was no way of telling that it was cross-threaded without taking it out. There was no duty on the plaintiff to take out the plugs to see if they had been cross-threaded. It was further argued that the plaintiff was guilty of negligence in not inspecting the plug after steam had risen in the boiler. The plaintiff testified that such was not his duty, and although there are general statements in the evidence of the defendants' superintendent that it was the plaintiff's duty to see that the engine was all right, he did not say that it was the plaintiff's duty to inspect it after steam was up. On the evidence I gather that that was the duty of the operating engineer. (c) That the plaintiff voluntarily assumed the risk.

The evidence shews that the plaintiff did not think there was any risk. The tightening of the plug was dangerous only when screwed in cross-threaded; that it was cross-threaded the plaintiff had no knowledge.

There was, in my opinion, evidence from which the jury could properly find that the accident was caused by the negligence of the defendants' employee Peat, and that the plaintiff was not guilty of contributory negligence.

I would dismiss the appeal with costs.

TURGEON, J.A.:—The respondent was a foreman boiler maker in the employ of the appellants. On October 12, 1920, he was badly scalded by escaping steam, the accident being caused by the blowing out of a boiler plug which had been found to be in a leaking condition, and which the respondent was in the act of tightening with a wrench when the blow-out occurred. The jury found that the accident was caused by the plug having been inserted in its socket in cross-threaded fashion through the negligence of one Peat, a boiler washer. In my opinion, the finding of the jury upon this point cannot be disturbed. It is contended, however, on the part of the appellant that the respondent cannot succeed in his action, (1), because he stood towards Peat in the position of a foreman to a workman and was himself charged with the duty of seeing to it that no locomotive was allowed to go out of the sheds in a defective condition, and consequently should have discovered the trouble himself before the actual danger arose, and thus have avoided the accident; and (2) because, in any event, he was guilty of contributory negligence in attempting to tighten the plug in a

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manner which he knew or should have known to be highly dangerous.

As to the first ground, I do not think that a claim for damages by an employee is affected by the mere fact that the fellow-servant whose negligence caused the accident stands towards him in the position of a workman to a foreman. Nor do I think that in this particular case the respondent can be said to have committed any breach of duty in not discovering the unsafe condition of the plug at an earlier moment. I agree with the trial Judge that, upon the evidence, he appears to have discharged any duty of inspection which lay upon him after Peat's work was done.

Regarding the assertion that the respondent became the author of his own injury by wilfully attempting to perform an unsafe operation in tightening the plug with a wrench as he did, I must say that that is strong evidence in favour of the assertion. But, at the same time, there is evidence the other way which the jury chose to accept, and in doing so, I am not prepared to say that they acted unreasonably.

The facts of this case, according to the evidence and the findings of the jury, shew that the defective condition of the plug was due to Peat's negligence in allowing it to become cross-threaded in the socket; that when the locomotive had steam up this condition of the plug caused a leakage; that it was the respondent's duty when called upon by Steeves, the locomotive foreman, to assist Steeves to adjust the plug properly; that in setting to work with Steeves, as he did, to tighten the plug by means of a wrench, the respondent had no reason to know that the plug was cross-threaded and likely, if moved, to blow out under the steam pressure. Consequently the accident was due to Peat's negligence, for which the appellants are responsible.

It was argued in opposition to the respondent's claim that his case comes within the principles applied by the Supreme Court of Canada and the Judicial Committee of the Privy Council in *Davidson* v. *Stuart* (1903), 34 Can. S.C.R. 215; *Sharp Traction Co.* v. *Begin* (1918), 52 D.L.R. 686, 59 Can. S.C.R. 680; *Thompson* v. *Ontario Sewer Pipe Co* (1908), 40 Can. S.C.R. 396; and, *C. P. R.* v. *Frechette*, 22 D.L.R. 356, [1915] A.C. 871, 84 L.J. (P.C.) 161. But, in my opinion, all these cases are clearly distinguishable from the case at Bar. In the *Davidson* case, the defendants had purchased an electric lighting plant which was known to be in bad condition. In order to repair the plant,

they engaged the deceased, an expert electrician, and put him in charge, placing all necessary supplies at his disposal. Three months later he was killed by a shock received in handling an incandescent lamp socket, which was dangerous through defective insulation, and which had been allowed to remain in the plant during the whole time the deceased was in charge. The Court rejected the claim brought by the dependants of the deceased against the company, on the ground that if the lamp in question was dangerous at the time of the accident nobody was to blame but the deceased himself, who had been employed by the defendants because the plant was defective, and who was expected to remedy the defects and might and should have taken steps to remove or repair the dangerous lamp before the accident occurred. In the *Sharp Traction* case, the plaintiff, a skilled engineer, tried to clean a friction pulley situated near some uncovered cog-wheels, while in motion, by holding a rag against it. No reasons are given by the Court for their judgment against the plaintiff, but it seems clear from the recital of the facts that the accident happened through the negligence of the plaintiff himself, who assumed the dangerous risk unnecessarily and well knowing it to exist. In the *Thompson* case, an engineer was scalded by the blowing out of a valve of an engine. The jury found that the defendants were guilty of negligence in three particulars: (1) in allowing the engine to run on an improper bed, (2) in failing to supply the plaintiff with proper appliances for his work, and (3) by the engine being in "bad" condition. The Court held that no inference could be drawn from the evidence that the accident was the result of any of these defects. In *C.P.R.* v. *Frechette,* a brakeman was injured while trying to uncouple cars at night by going in between them while the train was in motion. The Judicial Committee held that, whatever negligence may have been attributable to the defendants on account of insufficient lighting or other defects in their conduct of shunting operations generally, such negligence had nothing to do with the accident, which was caused solely by the imprudence of the plaintiff, who knew the risk and danger attendant upon his act, and went about it unnecessarily and of his own free will.

In the case at Bar, if it had been established that the respondent knew the plug was cross-threaded and likely to blow out if handled, and that he, nevertheless, undertook to set it right by handling it the way he did, it would follow, upon the authority of the above cases, that, being the sole effective cause of the accident, he could not recover. But the facts of the case

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are in reality quite different. As there does not appear to me to be any reason why the finding of the jury upon the evidence should be interefered with, it follows that the appellants are liable to the respondent and that this appeal should be dismissed, with costs.

McKAY, J.A. concurs with LAMONT, J.A.

Appeal dismissed.

CHRISTIE v. LANDELS.

Nova Scotia Supreme Court, Harris, C.J., Russell, J., Ritchie, E.J., and Mellish and Rogers, JJ. April 28, 1922.

EVIDENCE (§IIB—108)—INJURY TO PROPERTY—MAXIM RES IPSA LOQUITUR NOT APPLICABLE—PROOF OF NEGLIGENCE FROM "AVAILABLE FACTS" —INFERENCES OF TRIAL JUDGE—APPEAL.

In cases where injury to property has been caused, and the cause of the damage is unknown, as distinguished from cases in which the maxim *res ipsa loquitur* applies, the Court must decide upon such facts as are available whether negligence on the part of the defendant is the more reasonable inference or not, and where the trial Judge has decided that the facts proved are more consistent with negligence on the part of the defendant than with mere accident, his judgment will not be interfered with on appeal unless it is clear that he has not drawn the proper inference from such available facts. The law does not require proof of the exact fault which caused the damage.

APPEAL from the judgment of Chisholm, J. in favour of plaintiff as against the defendants Fauquier and Porter in an action for the use of plaintiff's saw mill and for the destruction and loss of the mill, less the value of material supplied by defendants for the erection of a new mill. Affirmed.

S. Jenks, K.C., and *A. G. Mackenzie*, K.C., for appellant.

F. L. Milner, K.C., for respondent.

HARRIS, C.J.:—The defendants (other than Landels) had an agreement with the plaintiffs under which the defendants were to have the use of the plaintiffs' saw mill and appurtenances for the purpose of sawing lumber and were to pay for the use of the mill 50 cents per thousand for the lumber cut.

While the defendants were in possession of the mill and using it under the agreement it was burned down and the plaintiffs, alleging negligence, sue to recover damages for the loss.

The defendants (other than Landels) rebuilt the mill in part and continued their operations and plaintiffs allege an agreement by defendants to replace the whole mill and machinery destroyed by the fire—a breach of that agreement—and claim as damages the difference in value between the mill and machinery before the fire and in its partially restored condition.

There was also a small claim for $158 being 50 cents per

1,000 upon 316,000 lumber cut after the mill was restored. The trial Judge did not find that any promise to restore the property had been made but he gave judgment dismissing the action against the defendant Landels with costs and finding the other defendants liable.

There is no appeal from the order dismissing the action as against Landels but the other defendants appeal from the judgment holding them liable.

On the argument of the appeal, the question as to the claim based on the promise of the defendants to restore the mill was not mentioned by either party and is therefore not considered.

Counsel for the plaintiffs put their case upon three grounds: (1) The doctrine of *Rylands and Fletcher*. (2) *Res ipsa loquitur*. (3) Negligence.

In considering the application of the doctrine of *Rylands and Fletcher* (1868), L.R. 3 H.L. 330, 37 L.J. (Ex.) 161, to this case it is to be borne in mind that the plaintiffs' counsel contends that the evidence shews that the fire originated from the furnace or from ashes from the furnace under the boiler on the premises. The furnace and boiler were part of the premises previously used by plaintiffs when they carried on the mill and without the use of which by defendants the mill could not be operated. The furnace and boiler were being used to saw the lumber for which plaintiffs were to get 50 cents per 1,000. The agreement contemplated their use by defendants for the purpose of sawing the lumber out of which or upon which plaintiffs were to get the fire for the use of the mill.

It is well settled that a person is not answerable for damage done by a fire which began in his house or premises or on his land by accident and without negligence, and if the mill had been defendant's own mill and the fire had originated on the premises it seems clear that the defendants would not have been liable as an insurer but only for negligence. In other words, the doctrine of *Rylands and Fletcher* does not apply to the case. Assuming, however, that the circumstances have brought it within the general rule laid down in that case, it is clear that it comes within the exception laid down by the House of Lords.

In *Blake* v. *Woolf*, [1898] 2 Q.B. 426 at p. 428. 67 L.J. (Q.B.) 813, 47 W.R. 8, Wright, J. said:—

"Another qualification of the general rule enunciated in *Rylands* v. *Fletcher* L.R., 3 H.L. 330, is that if the person claiming to be compensated has consented to the dangerous matter being brought on to the defendant's land he cannot recover."

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As I have already pointed out the defendants did not bring the boiler on to plaintiffs land—it was already there, and their agreement contemplated that plaintiffs should use it to operate the mill and without this use the plaintiffs could not get their toll for the use of the mill. The whole object of the agreement so far as plaintiffs were concerned was to earn this toll by the use of the mill by defendants.

Bramwell, B. in *Carstairs* v. *Taylor* (1871), L.R. 6 Ex. 217 at pp. 221, 222, 40 L.J. (Ex.) 129, 19 W.R. 723, after discussing *Rylands and Fletcher* said:—

"But I am clearly of opinion that there is a material difference between the cases. In *Rylands* v. *Fletcher* Law Rep. 3 H.L. 330, *the defendant for his own purposes* conducted the water to the place from which it got into the plaintiff's premises. Here the conducting of the water was no more for the benefit of the defendant than of the plaintiff . . . . here the plaintiffs must be taken to have consented to this collection of the water which was for their own benefit and the defendant can only be liable if he was guilty of negligence."

See also *Anderson* v. *Oppenheimer* (1880), 5 Q.B.D. 602, at p. 608, 49 L.J. (Q.B.) 708: Salmond on Torts, 236: *Ross* v. *Fedden* (1872), L.R. 7 Q.B. 661, 41 L.J. (Q.B.) 270; *Gill* v. *Edouin* (1894), 71 L.T. 762: (1895) 72 L.T. 579, and *Rickards* v. *Lothian*, [1913] A.C. 263, 82 L.J. (P.C.) 42.

If the point had not been so strenuously argued by counsel I would have thought it equally clear that the maxim *res ipsa loquitur* had no application whatever to the case: that was my view on the argument and an examination of the authorities since convinces me that this maxim has no application. If we go back to *Byrne* v. *Boadle* (1863), 2 H. & C. 722, 33 L.J. (Ex.) 13, 12 W.R. 279, where a barrel of flour rolled out of an open doorway on the upper floor of the defendant's warehouse and fell upon the plaintiff, it is easy to see why it should have been held in the absence of any explanation whatever of the occurrence that there was sufficient evidence of negligence to go to a jury. As Salmond on Torts puts it at p. 30:—

"Barrels if properly handled do not commonly behave in this fashion and the improbability of such an accident happening without negligence was sufficient to justify a jury in finding that negligence was the cause of it."

Subsequent decisions holding the maxim to apply are but an application of that doctrine, but here there is no evidence as to what happened except that the mill was destroyed by fire from some unknown cause. Fires are of frequent occurrence and

there is no improbability of their origin being due to causes other than negligence of the occupant of the premises. As Sir Frederick Pollock in his book on Torts says of *res ipsa loquitur*, p. 460 "no general formula can be laid down except in some such purposely vague terms as were used in *Scott* v. *London Dock Co.*, 3 H. & C. 596."

And Salmond on the Law of Torts at p. 30 says:—

"The maxim *res ipsa loquitur* applies whenever it is so improbable that such an accident would have happened without the negligence of the defendant that a reasonable jury could find without further evidence that it was so caused. 'There must be reasonable evidence of negligence,' it is said in *Scott* v. *London Docks Co.*, (3 H. & C. at p. 601) but 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 defendant, that the accident arose from want of care.

There is not, indeed, even in these cases any *legal presumption* of negligence, so that the legal burden of disproving it lies on the defendant. But the plaintiff by proving the accident has adduced reasonable evidence, on which the jurors may, if they think fit, find a verdict for him."

In 21 Halsbury's Laws of England it is stated at p. 440:—

"The cases in which the maxim *res ipsa loquitur* applies are to be distinguished from those in which the cause of the accident is unknown. In the one case further evidence is not required from the plaintiff because the inference is already clear; in the other case it is not required because it would be impossible to give it. The effect of the distinction is that, in the one case, the defendant is liable if he does not produce sufficent evidence to counteract the inference; in the other case, the Court is left to decide, upon such facts as are available, whether negligence on the part of the defendant is the more reasonable inference or not."

I think this case must be considered without regard to the doctrine of *Rylands* v. *Fletcher* or the maxim *res ipsa loquitur*.

The case, I think, is one in which the plaintiffs cannot succeed unless they can establish that the burning of the mill was due to the negligence of the defendants or their servants. The burden is on the plaintiffs to make out a satisfactory case.

It is apparent when one reads the record that the plaintiffs

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absolutely misconceived the law applicable to the case. They closed their case without giving the slightest evidence of negligence and this they could have done only on the theory put forward on the appeal that *Rylands* v. *Fletcher* or *res ipsa loquitur*, or both, applied.

The trial Judge at this stage was moved to dismiss the action and refused, which he could only have done on the same erroneous theory. He tells us in his decision that plaintiffs' counsel contended that the case was one where the occurrence is itself evidence of negligence and that defendants' counsel claimed that the maxim *res ipsa loquitur* did not apply. Had the trial Judge dismissed the action at the close of the plaintiffs' case, as with all deference I think he should have done, that would have ended the matter, but defendants' counsel, when his motion to dismiss was refused, apparently felt uncertain as to the law and he thereupon proceeded to call witnesses to demolish a case which had no existence, and the contention now is that he put in evidence which established negligence of his clients.

The trial Judge dismissed the defendant Landels from the case, and there is no appeal from this. If there was any evidence whatever of negligence it is apparently Landels who was guilty of it, and as I understand the law, it is no excuse for a wrong that the wrongdoer was acting as an agent or servant. If through Landels' negligence the plaintiffs suffered damage so as to make defendants liable, then I think Landels would himself be liable and the decision of the Judge on the question as to Landels' liability and a careful perusal of his whole judgment has convinced me that both the counsel for the plaintiffs and defendants and the trial Judge as well, were all led astray by the same erroneous idea as to the application of the maxim *res ipsa loquitur*. This finding as to the non-liability of Landels is a part of the considered judgment and throws light on the whole judgment.

The trial Judge does not say what the negligence was of which he finds defendants guilty, but apparently his finding is based on what he says in the same paragraph was the argument of the plaintiff's counsel. He says:—

"Mr. Milner contends that the defendants are liable for the loss of the mill; that this is one of the cases where the occurrence is itself evidence of negligence; *and moreover that the defendants were negligent in not having proper appliances to put out fires and in not having a watchman on duty during the night.*" Mr. McKenzie for the defendants claims that the maxim,

res ipsa loquitur, does not apply and that there is no evidence of negligence on the part of defendants, taking all the circumstances into consideration, I think the facts proved are more consistent with negligence on the part of defendants than with a mere accident. I think there is sufficient evidence of negligence to enable the plaintiffs to recover."

It would seem as if the only inference to be drawn is that the trial Judge found negligence upon one or the other of the grounds which the plaintiff's counsel had urged,—upon which he unfortunately does not say. I find myself unable to say that either of them affords any evidence whatever of negligence for reasons which I will discuss later.

There probably never was a case in which it was so important that the tribunal to decide the facts should approach that duty with a proper appreciation of the question as to which party had the burden of proof. If *res ipsa loquitur* applied the mere proof that the mill was burned was sufficient upon which to decide,—if, on the other hand, the burden of proving negligence was on the plaintiffs, then the mere fact that the mill was burned was of no importance whatever unless it was followed by satisfactory evidence of the fact that the fire was caused by the negligence of the defendants. Unfortunately, the trial Judge gives us no indication as to what his final opinion was as to the application of *res ipsa loquitur*. He mentions the fact that the plaintiffs' counsel in closing urged that it applied and defendants' counsel argued the other way but he says nothing as to his own state of mind. We know from the fact that he refused to dismiss the action at the end of the plaintiffs' case that he must have thought the doctrine of *Rylands* v. *Fletcher* or *res ipsa loquitur* applied, otherwise he would have dismissed the case. Clearly he could not—nor could any tribunal—properly decide the question of negligence without first reaching the decision that neither of these doctrines applied to the case. If the Judge had reached that conclusion, I would have expected him to say so or to indicate in some way that he was deciding upon the evidence alone that there was negligence. It is, I think, clear that the trial Judge either thought the case was governed by one or the other or both the doctrine and maxim referred to or he was in too uncertain a state of mind to decide that neither applied. In either event his mind would necessarily be influenced against the defendants upon the question of negligence.

I have felt impelled to discuss these matters because I have to decide what, if any, weight is to be attached to the general

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findings of the trial Judge, and I cannot escape the conclusion that his finding of negligence is based on what I think is an erroneous conclusion as to the application of the maxim of *res ipsa loquitur*, or upon the application of *Rylands* v. *Fletcher*. It was either that or the negligence he had in mind was one of the grounds which he tells us plaintiffs' counsel had put forward as justifying a decision in his favour and it is, I think, clear beyond question that neither of them was evidence of negligence. I feel that I must disregard the finding of negligence and consider the matter without any help from anything said by the Judge.

So far as the two grounds which he says were put forward by the counsel for plaintiffs are concerned, it is sufficient to say that there is no suggestion in the pleadings or evidence that the fire could have been put out after it was discovered, but quite the contrary—the plaintiffs themselves say that nothing could be done. So far as the question of appliances for extinguishing a fire is concerned, and so far as a watchman is concerned, it is to be inferred from what is stated in the evidence that conditions were as they had been when plaintiffs were themselves operating the mill and there is no suggestion by the plaintiffs or any of their witnesses that any particular appliances should have been put there by defendants or that a watchman should have been employed or that the loss of the mill was due to either of these causes.

But it was suggested on the appeal that the fire may have originated from hot ashes or ashes that had once been hot which had been thrown out of the furnace under the boilers on to the ground. The fireman of the boiler was Avard Christie, a nephew of the plaintiffs, and he had been the fireman for his uncles before defendants took the mill. They took him over with the property from plaintiffs and so far as they are concerned it would seem that he ought to be treated as a competent man for the work. He was called by defendants and I quote his evidence as to the conditions, at p. 61.

"Q. Had you worked there before Mr. Landels came there? A. Yes. Q. In the same position? A. Yes. Q. Who for? A. Thomas and Herbert. Q. You remember the night of the fire? A. Yes. Q. What time did you leave? A. We closed down between five and half past. Q. And what did you do just before? A. Closed her up. Q. How much fire in the furnace? A. Not a big fire; just a medium. Q. Just enough to keep her running? A. Yes. Q. And you had cleaned her out had you? A. I don't remember. I might have some time through the day, *but not*

that afternoon, I am sure of that. Q. In the performance of your duty you would do about as you always do? A. Yes. Q. And did on that day? A. Yes sir. Q. That is the general method where you are burning wood? A. Yes, sir."

There is nothing in his cross examination which affects this testimony.

John McClary, who was the engineer, had also been previously with plaintiffs and had been taken over by defendants as part of the outfit also testified as to the cleaning out of the furnace and this is what he says on cross examination by counsel for plaintiffs:—

"Q. Do you remember the day of the fire? A. Yes, sir. Q. Do you remember whether you cleaned her out that day? A. I don't remember cleaning her out that afternoon. She may have been cleaned out that day some time, but I don't remember when I cleaned her out. Q. What do you generally do with the cinders and coal when she is cleaned out? A. I generally throw it right out and throw some water on her. It is only a kind of soot you know. Q. How far from the boiler? A. Right in the building. Q. Did not carry the ashes outside? A. No, just put it in front of the boiler. Q. You put water on them? A. Yes. Q. And why use that? A. Because they were hot. Q. You have not a very good recollection of when she was cleaned last before the fire? A. No, I couldn't positively say whether she was cleaned that afternoon or forenoon, but no doubt some time during the day she had been cleaned out. Q. How high was the wind that day? A. It was not blowing overly strong. Q. Did it increase at night? A. I think it did; I think it blowed a little harder that evening. Q. You left the mill shortly after she was shut down? A. Yes. Q. Did you return to her again before the fire? A. No, not more than standing in front of her, the road that led up to the side of the pond. Q. Was that after supper? A. Yes, that was within twenty minutes before she was fired. I was right there. Q. And was there any sign of fire? A. Never a sign of fire. Q. Were you in the mill? A. No, not at that time. Q. You were only as close to her as the road running by? A. Probably 50 yards away. Standing right on the road in front of her."

RE-EXAMINATION.

"Q. What distance is there between the furnace and the engine room? A. A space probably of 8 feet. Q. Was there a partition? A. Yes, about 6 or 8 feet from the boiler; about 6 feet probably.

"*Mr. Milner—Q. Was there a brick floor on the engine room?*

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The furnace room? A. No, no floor of any kind. Q. Just raw earth? A. Yes."

It is suggested that the fire *may have been* caused by the ashes taken out of the furnace some time in the morning and thrown on the "raw earth" with water thrown on them, that they *may have been* fanned into life in the evening some 8 or 10 hours after, and the fire *may have been* carried by the wind to some partially dried wood somewhere back of the furnace. I can understand *wood coals* embedded in ashes in a closed furnace where no air could get to them being kept alive for some hours, but it is impossible to understand how *ashes* thrown on the ground, then drenched with water and all the time exposed to the air, could possibly live for any length of time. Here some 8 or 10 hours elapsed because the only evidence about the matter is that the furnace was not cleaned out in the afternoon, but may have been in the morning, and the fire originated in the evening. The evidence does not show how far away the partially dried wood was from the place where the ashes were thrown, but it must have been at least 10 or 15 feet as the ashes were in *front* and the wood *behind* the furnace. It is hard, I think, to imagine a more unlikely theory than this to account for the fire. It is pure surmise and there is not the slightest particle of evidence that the fire happened in any such way. It is moreover a theory which, from what the trial Judge says, was not put forward by counsel for plaintiffs on the trial. He tells us what the plaintiffs contended was negligence on the part of the defendants, but he does not mention the theory now suggested.

In *Toomey* v. *London Brighton & South Coast R. Co.* (1857), 3 C.B. (N.S.) 146, 140 E.R. 694, 27 L.J. (C.P.) 39, 6 W.R. 44, Williams, J. said at p. 150:—

"A scintilla of evidence or a mere surmise that there may have been negligence on the part of the defendants clearly would not justify the Judge in leaving the case to the jury; there must be evidence upon which they might reasonably and properly conclude that there was negligence."

This was approved in *Cotton* v. *Wood* (1860), 8 C.B. N.S. 568, by Erle, C.J., p. 572, 29 L.J. (C.P.) 333; and there Williams, J. said at p. 573:—

"I entirely agree with my Lord in thinking that this rule should be made absolute, upon the terms he has stated. I wish merely to add, that there is another rule of the law of evidence, which is of the first importance, and is fully established in all the courts, viz. that, where the evidence is equally consistent

with either view,—with the existence or non-existence of negligence—it is not competent to the Judge to leave the matter to the jury. The party who affirms negligence has altogether failed to establish it. That is a rule which ought never to be lost sight of."

See also *Hammack* v. *White* (1862), 11 C.B. N.S. 588 at p. 595 and at p. 599, 142 E.R. 926, 31 L.J. (C.P.) 129, 10 W.R. 230, where Keating, J. after discussing the evidence said:—

"That being so the case is left in this position that it is equally probable that there was not as that there was negligence on the part of the defendant. The plaintiff, therefore, fails to sustain the issue the affirmative of which the law casts upon her."

That language I think applies to this case and the plaintiff having failed to satisfy the burden of proof cannot succeed.

My attention has been called to the fact that John McClary, whose cross examination I quoted as being the more likely to be favourable to the plaintiffs, had given evidence on his direct examination, which is thus reported:—

"Q. Was there much fire in the furnace when you left? A. Yes, there was. The fire could not get out of there unless someone opened her up. You could not get out of her because she was a new boiler and tight. There was some you could get out of, but not her. *Q. Did you notice any sparks that night? A. No, never noticed no fire around.* Q. Had the boiler been cleaned out? A. She *might have been*, during the day, she is cleaned out, but *she was not cleaned out at night.* Q. Was not cleaned out that night? A. No, *she may have been during the day.* Q. There were no hot ashes outside? A. There *may have been* some outside. They *might have been hot* ashes if they blowed around anywhere, but you would not notice it unless the wind blowed. Q. When was she cleaned out? A. She *may have been* cleaned out at three o'clock in the afternoon, or at noon. Not later than that."

He was being examined as to the time when the furnace had been cleaned out and he apparently could not remember when it was done, and thought it *may have been* cleaned out in the afternoon. The fireman Avard Christie, who gave evidence later, swore that he was sure it had not been cleaned out in the afternoon.

As I read McClary's evidence he not remembering when the ashes had been taken out, and being a cautious witness, said "There may have been some outside. There might have been

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hot ashes if they blowed around anywhere but you would not notice it unless the wind blowed."

It is not very clear just what he means, but apparently all he intended was that if the furnace had been cleaned out late in the afternoon there *might be* hot ashes outside the furnace.

It is only another surmise based on a theory or supposition which disappeared when Christie shewed that the furnace was not cleaned out that afternoon. It was simply another "*may have been.*"

I would allow the appeal and dismiss the action both with costs.

RUSSELL, J. :—This case it seems to me must be governed by the principle laid down in Halsbury's Laws of England, vol. 21 §752, where the distinction is drawn between the case of *res ipsa loquitur* and the case where the cause of accident is unknown. In the latter case, which is this case, "the Court is left to decide upon such facts as are available whether negligence on the part of the defendant is the more reasonable inference or not." The trial Judge has decided that the facts proved are more consistent with negligence on the part of the defendants than with mere accident. This I take to be equivalent to a decision that the available facts are such that an inference of negligence is more reasonable than the inference that there was no negligence. I see no reason for differing from his judgment as to the proper inference to be drawn from the "available facts"; and am therefore of opinion that the appeal should be dismissed with costs.

RITCHIE, E.J. :—Russell, J. has in his opinion stated the principle of law upon which I think this case should be decided; with this opinion and with the amplification of it contained in the opinion of Rogers, J. I agree.

I may add that the keeping of hot wood ashes on the floor in a saw mill is as it seems to me, a dangerous practice, and while there is evidence that, generally, water was thrown on them, there is no evidence that it was done on the night in question.

It was urged that the doctrine of *Fletcher v. Rylands* applied. This, I think, is a very arguable question but it is not necessary to express an opinion in regard to it, and I think it better not to do so.

I would dismiss the appeal with costs.

MELLISH, J.:—The plaintiffs reside at River Hebert in the County of Cumberland and owned a saw mill situate 60 or 70 yards from the front of their house.

In November, 1917, they hired the mill to defendants, Fau-

quier and Porter, negotiations being carried on through said defendants' agent, the defendant Landels. The plaintiffs were to receive for the use of the mill 50c. a 1,000 feet on the timber cut by the lessees.

The defendants went into occupation of the premises where the milling operations were carried on by the defendant Landels as foreman. Two or three weeks after the commencement of these operations and after about 56,000 feet had been sawn the mill was destroyed by fire. The defendants appear to have gone on logging in the vicinity till the following spring when the lessees built another mill on the old site which was smaller and inferior in equipment to the old mill, but which was apparently sufficient for their purposes and sawed in this new mill 316,000 ft. in that year,—1918. There is evidence of the plaintiffs that the defendant Porter told them in January, 1918, that he would replace the mill in the spring and the plaintiff Thomas R. Christie says that he then asked Porter, "Will you replace the mill for us?" to which Porter answered, "Yes." But plaintiffs were not consulted when the saw mill was being erected, nor did they then apparently make any protest or suggestion about it. There is in evidence a bill purporting to be from the plaintiffs to defendant Landels claiming $158 in respect of this cut of 316,000 ft. and in addition some other sums including rent of cook house for 5 months during 1918. The whole amount of the bill is over $300. It is dated November 20, 1918. On December 23, 1918, the defendants Fauquier and Porter sent a cheque in payment of this account after deducting the $158. Plaintiffs by letter dated December 26, 1918, protested to said defendants against this deduction claiming that the new mill was theirs and that they should be paid for the use of it according to the agreement 50c. per 1,000.

No other claim apparently was made against the defendants until the autumn of 1919 when a claim was made by plaintiffs for the loss of the mill and for said sum of $158.

The writ herein was issued December 16, 1919. The statement of claim alleges that the new mill was built to replace the old one and asks for damages by reason of the destruction of the mill through defendants' negligence and payment of said sum of $158.

The defence denies these allegations and sets up that the new mill was the property of the defendants Fauquier and Porter.

The case was tried by Chisholm, J. who gave judgment in favour of the plaintiffs for $2,915, (which is apparently intend-

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ed to be made up of said sum of $158 and the difference in value between the old mill and its equipment and the new one), against the defendants Fauquier and Porter and dismissing the action as against the defendant Landels.

This appeal is accordingly asserted by Fauquier and Porter on the ground that there is no evidence of negligence causing the fire for which they are responsible. The case was argued before us upon the footing, as I understand it, that the sole question for our determination is whether said defendants are responsible for the consequences of the fire which destroyed the old mill.

Plaintiffs would maintain the judgment appealed from on two grounds: 1. That the mill was destroyed through appellants' negligence, and 2, that it was destroyed under circumstances which render them answerable even if not negligent under the rule in *Rylands* v. *Fletcher*.

Dealing with negligence, which appears to be the basis of the judgment appealed from. Although he has not expressed it, I cannot conclude from a perusal of the reasons for the judgment appealed from, that the trial Judge has not identified or considered it necessary to identify or find the specific negligence whether in act or omission upon which the judgment is based. This seems to me to be a matter of considerable importance. Are we to take it that the trial Judge concluded as contended for by the plaintiffs' counsel in his argument before us that the burning of the mill raised a presumption of negligence on the part of the defendants which they failed to rebut, or are we to consider the appeal on the footing that the trial Judge has, apart from the fact that the mill was burnt, concluded that there was sufficient affirmative evidence of negligence on the part of defendants to justify the conclusion that it caused the mill to be burnt.

Dealing with this question on the first hypothesis,—I think that the burden of proving negligence causing the destruction of the mill by fire was upon the plaintiffs and that this burden was not satisfied by merely proving the destruction of the mill by fire.

If the trial Judge decided the case on this footing all the facts on this appeal I suppose must be considered by us merely as jurors. So considering the facts I am not satisfied that negligence causing the loss of the mill on the part of the defendants found liable has been proven. Any evidence, if such there be, of such negligence on the part of the defendant Landels, who was the manager at the mill, must be excluded from

consideration, because the action has been dismissed as against him and there is no appeal from that part of the judgment.

If, however, the judgment appealed from is based upon the correct view of the law, we are, I think, in a different position and have to consider the trial Judge's findings of negligence as in the nature of a general verdict of a jury. The question then for our determination is, I think, whether assuming the defendant Landels was not guilty of such negligence there is evidence which would justify the finding that other employees of the other defendants or the other defendants themselves were guilty of negligence causing the destruction of the mill.

It is important, I think, to remember that it is the defendant's duty *to the plaintiffs* which is in issue: their (defendants) duty to others might have to be measured by a wholly different standard.

Having regard to safety from fire, there might be much wanting in the construction and equipment and perhaps even in the management of the mill for which the defendants would not be responsible *to the plaintiffs*. And it is I think worthy of remark that the plaintiffs who reside very near the mill and presumably were familiar with its operations, neither of them give any evidence of any negligence in the methods of operation as carried on by defendants. We must, I think, assume that the trial Judge did not misdirect himself as to the law, and we are also I think to assume if any evidence of negligence exists which would support the judgment appealed from, that the trial Judge found for the plaintiff on that evidence. I am therefore, led to the conclusion—that the trial Judge found that the mill was destroyed by live ashes being, *unknown to the defendant Landels*, negligently left outside the furnace in such a way that by the action of the wind they were carried to the rear of the boiler where dry wood was piled and so set the building on fire. The evidence I think reasonably shews that the fire started in the furnace room behind the boiler.

The fire started so soon after Landels' visit to the furnace room that the visit is naturally connected in one's mind with the origin of the fire. This connection would be justified if the opening of the furnace room door, if there was any door, would admit the wind so as to blow the hot ashes about. As already intimated, personally I could not make such a finding on the evidence before us, but nevertheless, I am unable to say that it was an unreasonable finding for the trial Judge to make. There is little, if any, contradictory evidence bearing on the issue but, nevertheless, even in such a case, the demeanour of

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witnesses is of importance. I have reached the foregoing conclusion not without doubt.

The appeal should be dismissed with costs.

ROGERS, J.:—The trial Judge, Chisholm, J. in concluding his opinion on the question of negligence says: "Taking all the circumstances into consideration I think the facts proved are more consistent with negligence on the part of the defendants than with a mere accident. I think there is sufficient evidence of negligence to enable the plaintiffs to recover."

I agree with these conclusions, and I am satisfied that the solution of the question of fact involved, whether there was negligence or not, is to be arrived at on the lines suggested by Russell, J. in his judgment. The case lies on the border line and had the trial Judge dismissed the action at the close of plaintiffs' case, as he was moved so to do, I would have had grave difficulty in differing from him, for to do so would mean that the facts at that stage established were such that the only proper and natural inference was that the fire was caused by some act of negligence, notwithstanding the act or omission in fact causing it was unknown, and may have been quite consistent with the entire absence of negligence. The defendants, however, proceeded with evidence with the view evidently of discharging the burden assumed to be upon them of rebutting this inference and in attempting to do so they have, upon proof of the available facts, all of which were peculiarly within their knowledge, satisfied my mind that the proper conclusion is that the fire resulted directly from some act of negligence on the part of their servants. The law does not, under the circumstances in evidence, require proof of the exact fault which caused the destruction complained of.

To use the words of Lord Macnaghten in *McArthur* v. *Dominion Cartridge Co.*, [1905] A.C. 72 at p. 77, 74 L.J. (P.C.) 30, 53 W.R. 305, such a requirement "can hardly be applicable when the accident causing the injury is the work of a moment and the eye is incapable of detecting its origin or following its course." The evidence adduced by the defendants fails to suggest the possibility of any outside agency or even inevitable accident. It seems to be conceded that the fire caught about the boiler or furnace room where wood ashes—a known very common cause of fires—were kept carelessly on the floor within the mill and in close proximity to dry and inflammable material. The only indication of care in respect of them was the statement of the fireman that he generally threw water on them. If it were necessary, and I think it is not, to discover the exact

default which caused the fire, I would have no real difficulty as a juror in concluding that it was want of care in respect of these dangerous ashes.

I would affirm the judgment and with costs.

DOMINION BANK v. MARSHALL. MARSHALL v. CANADIAN PACIFIC LUMBER CO.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin, Brodeur and Mignault, JJ. March 29, 1922.

MISTAKE (§VIB—105)—SALE DIRECTED OF ASSETS OF COMPANY—MISTAKE ON PART OF SOLICITOR PREPARING PARTICULARS—CERTAIN PROPERTY NOT INCLUDED—RECTIFICATION—RESCISSION.

Where a sale of the assets of a company is directed to satisfy a claim for money advanced to the company, and the purchaser believes that he is purchasing all the property of the company, but through a mistake on the part of the solicitor preparing the particulars of sale, a certain lot is not included, although belonging to the company, the purchaser under the sale may rescind the purchase on the ground of mistake, but the Court will not rectify the mistake by ordering a conveyance of the lot to the purchasers.

APPEAL from the British Columbia Court of Appeal sub nom. *Marshall* v. *Canadian Pacific Lumber Co.* (1921), 61 D.L.R. 268, reversing an order of Morrison, J. directing the receiver to execute a conveyance of a certain lot to the purchasers of the assets of a company. Affirmed.

Greer, K.C., and *Shepley*, for appellant.

F. T. Congdon, K.C., for respondent.

DAVIES, C.J.:—For the reasons stated by my brother Anglin, with which I fully concur, I would dismiss the appeal with costs.

IDINGTON, J.:—The attempt to include in the sale a parcel of land which is alleged by the receiver to have a very considerable value and which was not only deliberately omitted from the particulars but also by no fair reading of the advertisement could be supposed to have been offered for sale is rather surprising.

The motion made about 6 months after the vesting order of the Court carrying out the result of the sale as it actually took place, to have that additional property given the purchaser is something for which I venture to think no precedent can be found, and especially so in face of the conditions of sale, amongst which was the following:—

"12. The description of the property in the particulars is believed and shall be deemed to be correct, but if any error of description as to quantity or measurements or otherwise be found therein, it shall not annul the sale, nor shall any compensation be allowed in respect thereof."

There was much said in argument here about the intention

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of the parties concerned to sell the properties of the company in question and it was argued as if that had been advertised, which it was not.

I cannot see that the advertisement suggested any such thing or could convey to the minds of any bidders that such was the intention especially in face of such a condition of sale as I quote above.

The party who was the successful bidder indeed took the trouble to go to the solicitor in charge of the sale to learn from him if the intention was to sell the entire properties of the company and was answered affirmatively that such was the intention.

The solicitor was quite honest in giving such a reply for he laboured then no doubt as he had in framing the advertisement under a mistake of fact, relative to some expropriation proceeding which had been taken at one time but later abandoned.

The fault, so far as I can see, if any was on the part of the bidder whose bid was successful, but who does not seem to have taken any pains to enlighten another bidder, or anyone at the sale, of the mistake in the advertisement.

I do not think such a bidder, or his principals, should profit by any such course of dealing, or try to shift on to an innocent solicitor the entire burden of blame for what happened.

If the bidder imagined he was getting this property now in question he should have warned both the solicitor and others of the mistake which was being made.

And if he did not, then neither he nor his principal has any right to gather to themselves the property in question.

The case of *Re Thellusson*, [1919] 2 K.B. 735, 88 L.J. (K.B.) 1210, so much pressed upon us by counsel for appellant, if read aright, I submit, requires the dictum cited therefrom to be applied, in this case conversely to his client instead of to the receiver and the decision therein indicates that the receiver herein pursued the right course, when after learning of the mistake, as happened, instead of yielding, as he might have done, to please others at the expense of the parties whose rights it was his duty to guard.

In light of the consideration I have given the evidence and the argument presented the foregoing is all I need add to the reasons of Galliher, J. speaking for the majority of the Court below, in which, subject thereto, I agree.

I am of the opinion that this appeal should be dismissed with costs.

DUFF, J.:—It does not admit of doubt, I think, that the Su-

preme Court of British Columbia possessed authority to set aside the sale in question in this appeal; and that on a proper application by the purchaser he would, with the consent of the bank, have been relieved from his purchase on the ground that in the circumstances disclosed a refusal to do so would not have been consistent with fair dealing.

But the present application for an order rectifying the deed raises considerations of a different order.

The plaintiffs in the bondholder's action in whose application the receiver was appointed were entitled to insist upon the terms of the order of July 20, 1917 (under which the advances were made and by which the charge was created securing those advances) being observed; and that the sale should be proceeded by a proper public notice of the nature of the property offered. They were entitled to require that this term of the order framed for their protection should be carried out. The notice actually given was not intended to indicate the particular property in question as one of the parcels offered and it is hardly argued that it did so. It seems to follow that in the absence of some conduct on the part of the respondents precluding them from insisting upon their rights under the order, the appellant is not entitled either technically, or as a matter of substantial justice, to have this parcel conveyed to him.

It is conceivable of course that evidence might have been offered shewing that the selling price could not have been affected by the fact of the parcel in question not being nominated in the advertisement as one of the subjects of the sale. If this were demonstrated and the opposition of the respondents shewn to be merely vexatious, a different question would have arisen. There is no such evidence nor are there any facts in proof giving rise to an equity precluding the respondents from insisting upon the protection which the order provides for.

The appeal must be dismissed with costs.

ANGLIN, J.:—In an action brought on behalf of bondholders a receiver and manager of the assets of the Canadian Pacific Lumber Co. was appointed by order of the Supreme Court of British Columbia and was authorised to borrow from the Dominion Bank a sum not exceeding $310,000, which should become a first charge on the assets of the company. The order provided for a sale of the assets of the company to satisfy the bank's charge in the event of default in re-payment on the date specified. Such default having occurred, a sale of the company's assets took place under the supervision of the Court, whose officer approved the advertisement, conditions and par-

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Anglin, J.

ticulars of sale. The conduct of the sale was in the hands of the bank's solicitor. The purchasers were the London and Canadian Investment Co., co-appellants with the bank. Owing to the bank's solicitor being under the impression that a certain parcel of land did not belong to the Lumber Company, it was omitted from the particulars of sale. The solicitor for the receiver, who was aware that the omitted parcel belonged to the Lumber Company, approved the particulars in the belief that they covered the omitted parcel; and the purchasers at the sale bought under the same erroneous belief. For the omitted parcel it is said on behalf of the bondholders that $75,000 can now be obtained, and their trustee resists an application made on behalf of the bank and the purchasers that the receiver should be directed to execute a conveyance of this parcel to the purchasers. The bondholders do not appear to have participated in the sale or to have been in any way responsible for the omission of the parcel in question from the particulars or for the mistaken impression of the purchasers that it had been included in the sale.

Morrison, J. made the order asked for by the bank and the purchasers; but, on appeal by the trustee for the bondholders, the Court of Appeal set this order aside and dismissed the application, Martin, J.A., dissenting. The applicants now seek the restoration of Morrison, J.'s order.

The appellants have clearly made out a case of mistake on the part of both vendor and purchasers. They may even have established that the receiver was in some measure responsible for that mistake. They have not shewn, however, that a greater price might not have been obtained for the assets of the Lumber Company, had the omitted parcel of land been included in the particulars of sale. That that parcel had a very substantial value admits of no doubt on the material before us. It may well be that the purchasers would have been entitled to rescission on the ground of mistake had they sought that relief. But they appear not to have desired rescission—possibly because they feared that on a re-sale they might not secure such an advantageous purchase. However that may be, what the appellants seek is rectification of their mistake. That can be effected only at the expense of the bondholders, represented by the respondent Marshall. The appellants have utterly failed to shew anything which raises an equity against the bondholders such as might have enabled the Court to direct that the deficiency in the land which the purchasers believed they were acquiring should be made good by the receiver at the bondholders' expense.

I would dismiss the appeal with costs.

BRODEUR, J.:—This is a bondholder's action brought by the respondents under a deed of trust and mortgage made in 1911 in their favour against the Canadian Pacific Timber Co. A receiver was appointed. The company went into liquidation; and, by order of the Court, in 1917, the receiver was empowered to borrow money from the Dominion Bank, the appellant, for the purpose of carrying on business; and it was provided in the order of the Court that the receiver should issue certificates which were constituted a first charge upon the whole of the property and assets of the company and that in default of repayment the bank should be at liberty to sell the whole property at public auction.

The loan was made by the bank, certificates were issued. The loan not having been repaid, the property was offered for sale by public auction in one lot. Conditions and particulars of sale were prepared by the solicitors or the receiver of the Dominion Bank. In the particular of sale however, lot 14 was not included because the solicitor for the Bank then acting for the Government had taken certain expropriation proceedings of this lot some years. Being under the impression that this lot was no more the property of the liquidated company and not being aware that these expropriation proceedings had been later on abandoned by the government, he failed to insert this lot, No. 14, in the particulars of sale amongst the assets to be sold.

This omission having been discovered after the date at which the sale was made to the London & Canadian Investment Co., a motion was made to the Court for an order directing the receiver to convey the said lot 14 to the purchaser. This order was granted by the Supreme Court but was refused by the Court of Appeal.

There is no doubt that there was an intention on the part of the solicitor who drafted the particulars of the sale to include all the properties belonging to the liquidated company. But as he was under the impression that this lot did no more form part of the assets, it was not included. We have no means to find out whether the lot in question would have produced a larger price or not. The only evidence we have with regard to its value is that it is considerable.

It may be also, as is asserted by the manager of the purchasing company, that he was under the impression when he made his bid that he was purchasing the property in dispute, but we do not know whether the other interested persons had the same impression. It is a question of error and mistake; and

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it seems to me that the particulars of the sale are conclusive as to what properties were offered for sale.

The deed might be set aside for error; but I do not think it would be within the power and the duty of the Court to give to the purchaser the lot which was not included in these particulars.

The appeal should be dismissed with costs.

MIGNAULT, J.:—I concur with ANGLIN, J.

Appeal dismissed.

REX v. HILL.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon and McKay, JJ.A. April 18, 1922.

STATUTES (§IIA—105)—SASKATCHEWAN TEMPERANCE ACT, R.S.S. 1920, CH. 194, SEC. 49 (1c)—CONSTRUCTION—AUTOMOBILE GARAGE—MEANING OF.

The words "automobile garage" in clause (c) of section 49 (1) of the Saskatchewan Temperance Act, R.S.S. 1920, ch. 194, do not mean or include premises or buildings which are exclusively used by private persons for housing their automobiles; the words must be construed to mean an automobile garage of the same class as the other places referred to in the clause; that is, a public automobile garage.

CASE stated by MacDonald, J. for the opinion of the Saskatchewan Court of Appeal as to the construction of the words "Automobile garage" in clause (c) sec. 49 (1) of the Saskatchewan Temperance Act.

T. A. Lynd, for claimant.

T. D. Brown, K.C., director of prosecutions for the Crown.

HAULTAIN, C.J.S.:—The following case is stated by MacDonald, J. for the opinion of the Court:—

"Sixteen cases of Scotch whiskey were seized by the Saskatchewan Liquor Commission on the 3rd day of November, 1921. The above named J. Lorne Hill claimed the same, and under proceedings had under sec. 69 of the Saskatchewan Temperance Act, the Justice of the Peace ordered the said whiskey and the vessels containing same to be forfeited to His Majesty.

Hill appealed from the said order, and the appeal came up for hearing before me on the 26th day of February, 1922.

The evidence shewed that the said Hill was the owner of the liquor in question; that he purchased the same in September, 1920, and kept it in his private automobile garage in Saskatoon, from which it was stolen in August, 1921. On these facts I held that an offence had been committed in respect of the liquor in question; namely, the offence of keeping the same in an automobile garage, and dismissed the appeal.

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Counsel for Hill contended that "automobile garage" used in sec. 49 of the Saskatchewan Temperance Act should be construed as meaning only a public garage. The question reserved for the decision of the Court of Appeal is, Was I right in holding that keeping liquor in a private automobile garage constituted an offence under the Saskatchewan Temperance Act? If not, the order of forfeiture should be set aside."

Section 49 of the Saskatchewan Temperance Act (R.S.S. 1920, ch. 194) enacts as follows:—

"49.—(1) No person shall consume liquor at any place except in a dwelling house.

(2) The expression 'dwelling house' means and includes every house or other building or any part of a house or building which is *bonâ fide* occupied and used solely as a place of abode.

(3) Notwithstanding anything contained in this section no liquor except such liquor as may be purchased under the provisions of this Act shall be kept or consumed:—

(a) Other than by the person on whose behalf it was lawfully purchased;

Provided that this prohibition shall not extend to liquor lawfully in the possession of a person for beverage purposes;

(b) Upon the premises of any club, whether incorporated or not, or of any hotel, boarding house or restaurant or any other place of public accommodation, whether licensed or not;

(c) In any building any part of which is used as a livery or feed stable, lumber office, grain elevator, or grain elevator office or engine room or automobile garage;

(d) In any basement, hall or room occupied and used as a bowling alley or for playing pool or billiards, or in any room directly connected by an interior entrance with any such basement, hall or room.

(4) Any person infringing the provisions of this section shall be liable to a fine of $100 for the first offence, and in default of payment to imprisonment for thirty days; in case of a second offence to a penalty of $200, and in default of payment to imprisonment for sixty days; and in case of any subsequent offence to imprisonment for a term of three months without the option of a fine."

The scope and object of this section seem to be to forbid the keeping or consumption of liquor in certain specific premises or buildings which are not restricted to the private use of any person or persons, but are generally available or accessible to the public for the purposes of the business transacted therein.

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The words "automobile garage" as used in this section do not, in my opinion, mean or include premises or buildings which are exclusively used by private persons for housing their automobiles. In many houses, especially of the larger and better sort, automobiles are kept in a part of the building devoted to that purpose. Quarters of that sort are popularly, but improperly, spoken of as a "garage" or an "automobile garage." It surely was not the intention of the Legislature—notwithstanding anything contained in sub.-secs. (1) and (2) of sec. 49—to make illegal the keeping or consumption of liquor in a private dwelling house which includes a private "garage" within its four walls.

I would answer the question submitted in the negative.

The appellant should have his costs throughout.

LAMONT, J.A.:—I concur.

TURGEON, J. A. concurs with McKAY, J.A.

McKAY, J.A.:—The section of the Saskatchewan Temperance Act (ch. 194, R.S.S. 1920) in question, in so far as it applies to this case, is part of section 49, (3) which is as follows:—

[See judgment of Haultain, C.J.S.]

Clause (a) is a restriction as to the person who shall keep or consume liquor lawfully purchased, but it does not apply to this case.

Clauses (b), (c) and (d) name the places where liquor shall not be kept, and the places within the prohibition of clauses (b) and (d) are all places to which the public resort.

When we come to consider clause (c), leaving out for the moment the words "automobile garage," we find that all the places therein named are of the same class, that is, public places.

It would appear then that what the Legislature had in mind when enacting these prohibitory clauses was, to prohibit the keeping of liquor in these public places mentioned. When it added the words "automobile garage" to clause (c), was it the intention to include a private automobile garage as the only one private place where liquor was not to be kept? I think not. In the first part of this sec. 49 it had already enacted that "49. (1) No person shall consume liquor at any place except in a dwelling house," and we know that some dwelling houses have an automobile garage as part of the dwelling house. Why then should the owner of the dwelling—who is allowed to consume liquor therein—be prohibited from keeping it in his private automobile garage and not prohibited from keeping it in his stable?

In Maxwell on the Interpretation of Statutes, 6th ed. p. 574, the author says:—

"When two or more words, susceptible of analogous meaning, are coupled together, *noscitur a sociis;* they are understood to be used in their cognate sense. They take, as it were, their colour from each other; that is, the more general is restricted to a sense analogous to the less general . . . In an enactment (s. 6, 23 & 24 Viet. c. 27 (b)) respecting houses 'for public refreshment, resort and entertainment', the last word was understood, not as a theatrical or musical or other similar performance, but as something contributing to bodily, not mental, gratification."

And again at pp. 583 and 584:—

"But the general word which follows particular and specific words of the same nature as itself, takes its meaning from them, and is presumed to be restricted to the same genus as those words: (*Fenwick* v. *Schmalz*, L.R. 3 C.P. 313) . . . Thus s. 43 of the Customs Laws Consolidation Act, 1876, which provides that 'the importation of arms, ammunition, gunpowder or any other goods may be prohibited by proclamation in Order in Council,' obviously relates only to goods of a like character or description to those specifically mentioned—and not to other things of an entirely different description.

The Sunday Observance Act, 1677 (29 Car. II. c. 7), which enacts that 'no tradesman, artificer, workman, labourer, or other person whatsoever, shall do or exercise any labour, business, or work of their ordinary callings upon the Lord's Day,' has been held not to include a coach proprietor . . . a farmer . . . a barber . . . and possibly a solicitor . . . ; the word 'person' being confined to followers of callings like those specified by the preceding words."

Following the above rules of construction, in my opinion the words "automobile garage" in clause (c) mean an automobile garage being a place of the same class as the other places referred to in said clause; that is, a public place; in other words a public automobile garage, and not a private automobile garage.

With deference to the trial Judge, the answer therefore, in my opinion, to the question submitted should be in the negative.

The appellant should have his costs throughout.

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RAILWAY PASSENGERS ASSURANCE Co. v. STANDARD LIFE ASSURANCE Co.

Supreme Court of Canada, Idington, Duff, Anglin, Mignault and Bernier, JJ. November 21, 1921.

BONDS (§IIB—16)—INDEMNITY INSURANCE—FIDELITY OF AGENT—GOOD FAITH AND SINCERITY AS NECESSARY CONDITIONS—ANSWERS TO QUESTIONS SUBMITTED, INCOMPLETE OR MISLEADING—NULLITY OF INSURANCE BASED ON SUCH ANSWERS.

Indemnity insurance is a contract of good faith and sincerity being one of its necessary conditions, the insured must make complete answers to the insurer regarding questions which the insurer requires to be answered at the time the contract is entered into, in order to acquaint the insurer with the nature of the risk involved, and where the answers are calculated to mislead and do mislead, the insured will not be allowed to defend these answers on the ground that they were true as far as they went or that they were incomplete and that the insurer having chosen to issue the policy cannot afterwards complain of their incompleteness. A policy based upon such misleading or incomplete answers cannot be enforced.

[*Arnprior* v. *U.S. Fidelity and Guaranty Co.* (1915), 21 D.L.R. 343, followed; *Thomson* v. *Weems* (1884), 9 App. Cas. 671, *Joel* v. *Law Union and Crown Ins. Co.*, [1908] 2 K.B. 863, 77 L.J. (K.B.) 1108; *Brownlie v. Campbell* (1880), 5 App. Cas. 925; *London Assurance* v. *Mansel* (1879), 11 Ch. D. 363, 48 L.J. (Ch.) 331, referred to.]

APPEAL by defendant from the judgment of the Court of King's Bench (Que.) in an action to recover upon a fidelity guarantee. Reversed, action dismissed.

H. N. Chauvin, K.C., and *Vipond*, K.C., for appellant.

E. Lafleur, K.C., and *Phelan*, K.C., for respondent.

IDINGTON, J.:—This appeal arises out of an action brought by respondent upon a Fidelity Guarantee, dated April 2, 1914, given it by the appellant, which recited the employment by the respondent, as agent at Halifax, N.S. of one Alfred Shortt, and its having delivered to appellant a proposal and declaration in writing stating *inter alia* the rules and conditions of the employment and the precautions observed by the employer in the management of, and the checks imposed upon, the employed, and which proposal the said employer has agreed shall be the basis of the contract (in question) and be considered as incorporated therein, and for the payment of $15, as the premium for such guarantee for 12 calendar months from April 1, 1914, and then proceeds as follows:—

"Now it is hereby agreed, that if at any time during the continuance of this agreement the employer shall sustain any loss, caused by the forgery, the embezzlement or fraud of the employed in connection with the employment, hereinbefore mentioned which shall be committed after the above date, during

his uninterrupted continuance in the said employment within the meaning of this agreement and the conditions hereto, which shall be discovered during the continuance of this agreement, and within 3 months after the death, dismissal or retirement of the employed or within 3 months after this agreement ceasing to exist, whichever of these events shall first happen, then the company shall, subject to the conditions endorsed, make good and reimburse such loss to the employer to the extent of $3,000 but not further, after such loss, and the cause, nature and extent thereof shall have been proved to the satisfaction of the directors, and such reasonable verification of the statements in the above mentioned proposal as they shall require, and such information as is required hereby or by the conditions hereto shall have been furnished.

Provided always, that this agreement and the guarantee hereby effected shall be subject to the several conditions hereupon endorsed, which are to be deemed to be conditions precedent to any liability on the part of the company under this agreement."

The said Shortt had been for 40 years in the said service when he died on October 26, 1916.

In the year 1910 it had been arranged between the respondent and him that an account should be opened in the Bank of Montreal at Halifax, in the name of respondent, and that moneys coming to the hands of Shortt in the course of his business as such agent and which it was entitled to after deducting his commission, medical fees, and some rent; and that he should have no power over moneys so deposited save by issuing from time to time cheques to respondent for such moneys.

It had also been arranged long before the said guarantee was given that on the first of each month the respondent, whose head office was in Montreal, should send Shortt a list of premiums due by those insured by it through his agency along with notices to be given each of the parties so owing and receipts for him to deliver to the respective parties so concerned upon payment of the premium due.

It was understood, however, that each party so insured had 30 days' grace in which to pay his or her premium.

That might extend the time for remittance that much beyond the due date and hence extend the time for the agent Shortt reporting to the head office, and sending therewith the cheque on the local agency of the Bank of Montreal.

It was stated by counsel for the respondent on the argument before us that the list of accounts so transmitted by it to Shortt should be returned to the head office as soon as possible after

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RAILWAY PASSENGERS ASSURANCE CO. v. STANDARD LIFE ASSURANCE CO.

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the expiration of that month and thirty days' grace and shew thereon what were paid and return the receipts sent him for premiums but which had not been paid.

It is necessary to observe the foregoing facts as to the course of business in order to appreciate the full significance of the answers made by the respondent and the exact measure of the risk the appellant had to run and how it came about that it could undertake same for so small a premium.

The proposal and declaration referred to in the above stated recital seems to have consisted of an application made to appellant by Shortt and brought to the respondent's notice by the following letter:—

"Toronto, Ont., March 31, 1914.

Sir:—

Mr. Alfred Shortt, of Halifax, N.S., having applied to this company for a guarantee in your favour of $3,000, I have requested that you will be good enough to reply as fully as possible to the annexed questions, as your answers and the declaration appended will form the basis of the contract between you and the company.

F. H. Russell, manager and attorney.

To the Standard Life Assurance Co.,
Montreal, Que."

The response thereto consists of answers to nearly 30 questions; one or two not having been directly answered. Of these I think the following may be considered herein:—

"10. With respect to the duties of the applicant, please reply as fully as possible to the following questions:—

A.—In what capacity or office will the applicant be engaged and where?—Agent for Halifax.

B.—In what way will moneys pass through his hands? By collection remittances, by post or how? Collections and new business.

C.—What is the largest sum which he will have in his hands at any one time, and for how long? Say $5,000. He remits monthly.

D.—Is he allowed to pay out of the cash in his hands any amounts on your accounts? If so state nature and extent . . . . Yes, Commission, doctors' fees, etc.

E. How often will you require him to render an account of cash received and pay the same to you?—Monthly.

F.—Are moneys to be paid into the bank by applicant? If so, how often will the bank book be inspected and checked? We do not inspect the bank account.

G.—How often will you balance his cash accounts, and how will you check their accuracy? Please explain fully.—Monthly accounts.

H.—Will the balance on his hands, if any, be counted and paid over or how dealt with? Monthly accounts.

11.—Is there any cash balance at present due to you from him? If so, give particulars . . . . Only for receipts that are in his hands for collection.

13.—Have you a separate banking account into which all moneys are paid by the applicant on your behalf when received? Yes, in Bank of Montreal.

14.—Are cheques countersigned? If so, by whom?—No.

15.—How often does an audit take place? He remits monthly.

16.—When were applicant's accounts last audited, and by whom? His last remittance was received a few days ago.

17. Were all things found in order?—Yes.

21.—Has any person holding the same or similar situation as that to be held by the applicant been detected in any defalcations? If so, please state particulars? No."

Of these for our present purpose I think question 11 and the answer thereto is all that need be considered. The others are instructive and illuminative of what is really meant thereby.

And in light thereof and the evidence the answer is untrue.

It is apparently found by several of the Judges in the Court of Appeal that over $2,000 of old debt was then due and that for moneys which could not fall within the words "only for receipts that are in his hands for collection."

The said Judges, however, take a different view from what I do as to the legal result thereof.

I have read the evidence of all the witnesses in an effort to see if this statement of fact in the answers so made could be verified.

I fail to find any such statement can be supported and I am led to suspect, though I do not herein rest thereupon, that the facts were even worse against the respondent. And what I do find is quite inconsistent with the answers to sub-questions E. G. and H. of question 10.

With great respect I cannot agree with the reasoning of the Judges below who seem to think these assurances of monthly rendering of accounts and requiring payment thereof ineffective and hence of no consequence herein.

I think when the answer to question 11 is considered in light thereof and of the proven facts as existent at the time when the

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answer was made that such an answer is fatal to the claim of the respondent.

Again the answers to questions 16 and 17 should never have been made.

No use applying needlessly harsh adjectives, but when, if ever the slightest attention is paid to the facts disclosed by the system which I have outlined above, relative to the sending out of accounts and receiving them in return such an answer, as implying that all things were found in order, is quite unjustifiable.

And so far as I hold it so that its erroneous statement falls within the latter part of the third condition endorsed on the guarantee, which is as follows:—

"3.—Every renewal premium which shall be paid and accepted in respect of this agreement shall be so paid and accepted with the distinct understanding that on the faith that no alteration has taken place in the facts contained in the proposal or statement hereinbefore mentioned, and that nothing is known to the employer calculated to affect the risk of the company under the guarantee hereby given. If the proposal referred to in the within agreement or any statements therein contained or referred is or are untrue in any respect, or if there be any material fact affecting the nature of the risk whether in relation to the occupation of the employed or otherwise, omitted therefrom, or if there be misrepresentation suppression or untrue averment at the time of payment of the first or any renewal premium or in connection with or in support of any claim, then the within agreement shall be absolutely void, and all premiums paid in respect thereof shall be forfeited to the company,"—and renders the agreement sued on void.

How could anyone compare the lists of moneys to be collected monthly with the actual facts disclosed in many monthly returns, much less the then last, and find all things in order?

There is much confusion in the evidence in the case and otherwise which prevents me from dealing as effectively as I had wished with the point made by appellant's counsel as to the amount paid into the bank in the months of August, September and October of 1916, being the months for which recovery herein is sought.

It is attempted to be answered by an argument of counsel for the respondent that though there was money enough deposited by Shortt during that period to cover all the defaults for the months claimed, yet that had been rightfully applied to cover older deficiencies.

I cannot satisfactorily trace the evidence relied thereon in support of the argument. Nor can I accept the argument as satisfactory for it lands respondent, if correct, hopelessly, I fear, on another horn of the dilemma presented to it here as it often is at every angle of this case.

That deficiency, so far as I can see, was part of an extended chain of fact loaded with more monthly defaults than the respondent can explain away and yet maintain its assurance to the appellant in answering question 11.

It seems clear that the unfortunate deceased was by circumstances driven to resort to the expediency of extending the time for making his final returns and thus get more room for hiding his shortages when due attention to the facts thus disclosed and a stern hand guiding respondent might have saved both him and it.

It is not herein at all a question of what any particular officer acting on respondent's behalf thought or believed.

As I understand the law it is what the actual facts were and which the respondent was bound to know before representing otherwise any view of the facts.

The contract is expressly based by mutual consent upon the facts as ultimately found and presented and I take it absolutely binding respondent to abide thereby no matter how honestly mistaken its officers may have been.

By no means do I mean to suggest that he was wilfully false, or, on the other hand, that he was quite excusable.

There is another ground taken and that is the basis of the conclusion reached by Dorion, J. in the Court below resting upon the answers given by the respondent in the following terms when asked the question put shortly after the renewal for 1915, as follows:—

The letter dated 25th May 1915, of the request is as follows,—

"Dear Sir,—We beg to enclose herewith the customary annual audit statement in connection with the accounts of Mr. A. Shortt, your agent at Halifax, N.S. and in connection with his bond for $3,000. We shall be glad if you will kindly sign same and return to this office. Yours faithfully."

And signed by appellant's manager, is answered by the following:—

"This is to certify that the books and accounts of Mr. Alfred Shortt, were examined by us from time to time in the regular course of business and we found them correct in every respect, all monies or property in his control or custody being accounted

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for, with proper securities and funds on hand to balance his accounts, and he is not now in default.

He has performed his duties in an acceptable and satisfactory manner and no change has occurred in the terms or conditions of his employment as specified by us when the bond was executed.

Dated at Montreal, this 27th day of May, 1915.

D. M. McGouin, manager for Canada."

Accompanied by a letter of same date, as follows:—

"We have your letter of the 25th instant, enclosing audit statement in connection with accounts of Mr. A. Shortt, our agent at Halifax. We return herewith form duly completed."

And the following year a like certificate was given on the like request though not so complete yet objectionable.

Each was untrue in fact tending to deceive the respondent's auditor and hence quite unjustifiable.

It is said these were not asked before renewals for the respective years in question.

I may point out that the original declaration on the application for the guarantee contained the following at its close:—

"I declare that the above statements are true, and I agree that these statements and any further statements referring to this guarantee signed by me shall be taken as the basis of the contract between me and the above named company."

I think these certificates were such further statements such as contemplated and it mattered not whether made in relation to renewals or not though quite likely they were.

The respondent had, by the express terms of the guarantee, the right to cancel it at any time and had a perfect right to ask such a question and be guided by the answer, or refusal to answer.

And that answer should have been honest as neither of these were or are excusable in law however otherwise possibly so in a degree.

The answers brought into operation and effect the terms of the conditions already quoted and rendered the policy void.

Moreover, alternatively these are cogent evidence in the way of debarring the respondent from applying moneys paid in by the deceased in the months for which claim is made from applying same to cover up early defalcations.

The insurance is only against forgery, fraud or embezzlement.

In my opinion, this appeal should be allowed with costs throughout and the respondent's action dismissed with costs.

DUFF, J. (dissenting) :—The questions raised by this appeal

mainly concern the interpretation and effect of the answers given by the insured in a proposal for insurance. They have given rise to differences of opinion. I concur with the view of the majority of the Court of Appeal that the representations were not shewn to be substantially untrue and that there was any material concealment or that the affirmative warranties were not fulfilled is not established. It is convenient perhaps to first deal with the point argued by the appellant to the effect that the proposal contained promises as to the course of dealing which constituted essential conditions of the policy. This is a view of the policy which I think cannot be supported. The declaration with which the proposal concludes is in the following words:—

"I declare that the above statements are true, and I agree that these statements and any further statements referring to this guarantee signed by me shall be taken as the basis of the contract between me and the above named company."

This declaration is obviously restricted in its application to representations and to warranties which are not promissory. The policy recites that the insured "has delivered to the company a proposal and declaration in writing, signed by or on behalf of the employer, stating (*inter alia*) the rules and conditions of the employment, and the precautions observed by the employer in the management of, and the check imposed upon the employer, and which proposal the said employed has agreed shall be the basis of this contract, and be considered as incorporated herein."

The fair meaning of this recital is that the proposal is to be incorporated with the policy according to the terms of the proposal itself. In other words, it is only those answers which profess to state matters of fact, (representations and affirmative warranties) which are incorporated in the policy. As against the insured it would be a departure from the long settled rule requiring the provisions of insurance contracts framed by the insurer and expressed in terms capable of more than one construction to be read according to that construction which is the most favourable to the insured. We are, therefore, concerned on this appeal only with representations of fact and warranties as to fact as distinguished from promissory warranties expressed in the respondent's proposal.

Is there in fact misrepresentation of concealment in respect of the matters complained of? The argument principally turned upon three alleged cases of misrepresentation or concealment. 1. The representation "he remits monthly" is alleged to be

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misleading. 2. The answers to two questions are said to imply an affirmation that Shortt's accounts had been audited and 3, there is said to be an implied representation that on the occasion of the last remittance his accounts had been investigated and found to be in order.

I observe, first, that in construing such a document the answers are not to be read with pedantic strictness; they should be given the meaning which a business man of ordinary intelligence would ascribe to them. So reading these answers I not only find in them no affirmation, express or implied, that the practice was to audit Shortt's accounts but on the contrary answers which most certainly would convey the idea that such was not the practice. So as to the answer concerning the last remittance; that, when read in connection with the preceding answer does not imply that any extraordinary investigation had taken place but only that everything had been found to be in accordance with the usual course of business.

I am, moreover, unable to see that any substantial departure from the truth occurs from the statement "he remits monthly." I think that would not be an untruthful or misleading description of the practice by which the monies received for premiums due in any month were sent forward in a single remittance within such delay as might be considered reasonable by the parties having regard to the statutory allowance of days of grace and the contingencies of settlements with dilatory insurers.

I am unable to agree that the so-called renewal certificates affect the rights of the respondent; they were sent forward in each case after the renewals had been effected. There is no allegation in the pleadings and there is no evidence to shew that the appellant company was influenced by these certificates in refraining from exercising its powers of cancellation. And in the absence of either allegation or proof it would be inconsistent with sound principle to proceed upon the assumption that they were so influenced.

ANGLIN, J.:—Article 2487 of the Civil Code of Quebec reads as follows:—

"Misrepresentation or concealment, either by error or design, of a fact of a nature to diminish the appreciation of the risk or change the object of it, is a cause of nullity. The contract may in such case be annulled although the loss has not in any degree arisen from the fact misrepresented or concealed."

Article 2485 provides that:—

"The insured is obliged to represent to the insurer fully and

fairly every fact which shews the nature and extent of the risk and which may prevent the undertaking of it or affect the rate of premium."

By article 2486 it is declared that:—

"The insured is not obliged to declare facts covered by warranty express or implied, except in answer to inquiries made by the insurer."

The following recital and endorsed "conditional precedent" are taken from the policy sued upon:—

"Whereas Standard Life Assurance Co., Montreal, Quebec, (hereinafter referred to as 'the employer') employs or intends to employ as agent at Halifax N.S. Alfred Shortt, (hereinafter referred to as 'the employed') and desires to effect a guarantee with the Railway Passengers Assurance Co. (hereinafter referred to as 'the company') and has delivered to the company a proposal and declaration in writing, signed by or on behalf of the employer, stating (inter alia) the rules and conditions of the employment, and the precaution observed by the employer in the management of, and the check imposed upon the employed, and which proposal the said employer has agreed shall be the basis of this contract, and be considered as incorporate herein."

3. Every renewal premium which shall be paid and accepted in respect of this agreement shall be so paid and accepted with the distinct understanding and on the faith that no alteration has taken place in the facts contained in the proposal or statement hereinbefore mentioned, and that nothing is known to the employer calculated to affect the risk of the company under the guarantee hereby given. If the proposal referred to in the within agreement or any statements therein contained or referred to is or are untrue in any respect, or if there be any material fact affecting the nature of the risk, whether in relation to the occupation of the employed or otherwise omitted therefrom, or if there be any misrepresentation, suppression or untrue averment at the time of the payment of the first or any renewal premium or in connection with or in support of any claim, then the within agreement shall be absolutely void, and all the premiums paid in respect thereof shall be forfeited to the company."

The proposal or application by the plaintiff for the insurance contains the following questions and answers:—

"10. With respect to the duties of the applicant, please reply as fully as possible to the following questions:

C.—What is the largest sum which he will have in his hands

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at any one time, and for how long? Say $5,000. He remits monthly.

E.—How often will you require him to render an account of cash received and pay the same to you? Monthly.

G.—How often will you balance his cash accounts, and how will you check their accuracy? Please explain fully? Monthly accounts.

H.—Will the balance in his hands, if any, be counted and paid over or how dealt with? Monthly accounts.

11. Is there any cash balance at present due to you from him? If so, give particulars. Only for receipts that are in his hands for collection.

15. How often does an audit take place? He remits monthly.

16. When were applicant's accounts last audited, and by whom? His last remittance was received a few days ago.

17. Were all things found in order? Yes."

It concludes as follows:—

"I declare that the above statements are true and I agree that these statements and any further statements referring to this guarantee signed by me shall be taken as the basis of the contract between me and the above named company."

The facts were that the agent Shortt, although his accounts as rendered, did not disclose it, had stolen upwards of $2,000 collected in premiums at the time the insurance was effected and that this defalcation continued and increased throughout the duration of the policy so that it amounted to more than $5,000 when he died; that there never was any audit of his accounts, or any examination, counting or balancing of his cash on behalf of the plaintiffs; that any thorough audit, any effective balancing of the cash accounts, any real checking of the "monies in his control or custody" or of "the funds on hand to balance his accounts" would have revealed the embezzlement; and that, although it was twice stated that he remitted monthly, he was habitually permitted to hold moneys collected by him for premiums for periods of 80 and even 90 days as this extract from the evidence of the plaintiff's accountant, Bowles, shews:—

"Q. Did you ascertain when May 1916 premiums were remitted? A. They were remitted for the week ending 5th of August.

By the Court:—Q. The June, September 2, and July, Sept. 30. A. Yes. By defendant's counsel:—Q. And April, the June 30 I think you said? A. Yes, the June 30.

Q. And March? A. May 29.

Q. February? A. The week ending May 6; they were received in Montreal really on May 1 as per our stamp; that is February 1916 received on May 1, 1916.

Q. January? A. On March 28.

Q. December, 1915? A. On February 28.

Q. November 1915? A. On January 29."

In fact, the account rendered immediately prior to the application made for the policy on April 1, 1914, which was sent in on March 20, covered the premiums received in January leaving the whole of the February premiums and those received during the first 20 days of March unaccounted for. Whatever excuse the statutory provision for 30 days' grace on payment of premiums may have afforded for allowing the agent to retain the premiums collected during January until March 1 or even a day or two later, it cannot avail to cover withholding them until March 20. It was also the fact that Shortt was never required when rendering his statements to account for or pay over all monies received by him up to the date of the accounting. Moneys received during the preceding 40 to 60 days were not included. Nevertheless the misleading statement is twice made that "he remits monthly."

"All things" would not have been "found in order," a few days before the policy was applied for if any proper audit or investigation, such as the answer to question 17 implied, had the facts taken place. In my opinion the answers to questions 16 and 17 fairly read together, as they must be, were false and misleading; the answers to questions 10 (C) and 10 (E) were calculated to "diminish the appreciation of the risk" to be undertaken; on the answers as a whole the facts were not substantially as represented (art. 2489 C.C.) and the risk which the defendants were induced to undertake was materially different from and greater than the statements in the application would indicate. I cannot find anything in that document which limits the responsibility of the applicants from the truth of the answers made to matters within their own knowledge. On the contrary, there is an express declaration of the truth of the representations and they are made the basis of the contract. *Thomson* v. *Weems* (1884), 9 App. Cas. 671. Viewed as warranties (art. 2491 C.C.) the untruth of the answers in the application, whether taken singly or as a whole, avoids the policy whether known or unknown to the warrantor. (art. 2490 C.C.) *Joel* v. *Law Union and Crown Ins. Co.*, [1908] 2 K.B. 863, 77 L.J. (K.B.) 1108.) Viewed as misrepresentations or concealments of existing facts it is immaterial whether there

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was merely error or design to deceive on the part of the applicant (art. 2487 C.C.): viewed as undertakings in regard to the course of dealing to be pursued by the assured with its agent during the currency of the policy, having been incorporated with it as the basis of the contract their nonfulfillment is equally fatal. (art. 2490 C.C.) The case falls within the principle of the decision of this Court in *Arnprior* v. *U.S. Fidelity and Guarantee Ins. Co.* (1915), 21 D.L.R. 343, 51 Can. S.C.R. 94.

Moreover, in connection with each of the two renewals of the policy a certificate was required from the assured. The two certificates obtained respectively in 1915 and 1916 read as follows:—

"This is to certify that the books and accounts of Mr. Alfred Shortt, were examined by us from time to time in the regular course of business and we found them correct in every respect, all monies or property in his control or custody being accounted for, with proper securities and funds on hand to balance his accounts, and he is not now in default.

He has performed his duties in an acceptable and satisfactory manner and no change has occurred in the terms or conditions of his employment as specified by us when the bond was executed.

Dated at Montreal, this 27th day of May, 1916.

D. M. Gouin, Manager for Canada."

"This is to certify that the books and accounts of Mr. Alfred Shortt, *as rendered by him*, were examined by us from time to time in the regular course of business and we found it correct in every respect, all monies or property in his control or custody being accounted for, and he is not now in default.

He has performed all his duties in an acceptable and satisfactory manner and no change has occurred in the terms or conditions of his employment as specified by us when the bond was executed.

Dated at Montreal, this 9th day of May, 1916.

Standard Life Ass. Co.,

J. R. Eakin, secretary for Canada."

The words "as rendered by him" in the 1916 certificate were inserted in ink. They obviously refer only to the "accounts" of the agent. Books are not "rendered." In these certificates we find three positive statements, (a) that Shortt's books had been examined from time to time by his employers; (b) that all moneys in his control or custody had been accounted for; and in 1915 (c) that he had "proper securities and funds on hand to balance his accounts." All three statements were ab-

solutely untrue and one if not two of them must have been untrue to the knowledge of the officials of the assured. But I find nothing to restrict the statements made in these certificates to matters within their knowledge, or otherwise to qualify them. Nor, in view of the provision entitling the company to cancel the policy at any time, it is of vital moment that the sending in of those certificates was delayed until after the renewal premiums had actually been paid. The power to cancel was not exercised and the policy was kept on foot on the faith of them—at least that must be assumed as against the insured. On this ground, as well as for substantial misrepresentations and concealments of fact in the original proposal of a nature to diminish the insurer's appreciation of the risk, the policy sued upon was in my opinion avoided. Indeed if some of the answers to the questions which are expressly incorporated in and made the basis of the policy should be regarded as merely evasions there is good authority for holding that the insurance was thereby avoided. *Fitzrandolph* v. *Mutual Relief Society of Nova Scotia* (1890), 17 Can. S.C.R. 333; *Moens* v. *Heyworth* (1842), 10 M. & W. 147, 152 E.R. 418, 10 L.J. (Ex.) 177.

Insurance companies should undoubtedly be held to strict compliance with their obligations and defences on their part lacking in merit and substance should be discouraged. On the other hand, the fact that the contract of insurance is *uberrimae fidei* (*Brownlie* v. *Campbell* (1880), 5 App. Cas. 925) must never be lost sight of and an insured cannot be permitted to recover on a policy which he has obtained by making particular statements in regard to material matters which are only half truths—often more misleading than actual falsehoods. *London Assurance* v. *Mansel* (1879), 11 Ch. D. 363, 48 L.J. (Ch.) 331, 27 W.R. 444, or by putting in an application which, taken as a whole, is palpably calculated to create a false impression as to the nature and extent of the risk to be undertaken by the insurer.

I would for these reasons, with respect, allow this appeal and direct judgment dismissing this action with costs throughout.

MIGNAULT, J.:—The question here is whether the appellant is liable, under a guarantee policy issued by it in favour of the respondent, to make good a defalcation committed by one Alfred Shortt who was the agent of the respondent at Halifax. On the latter's death it was discovered, the respondent alleges, that he was short in his accounts to the extent of $5,197.90, and the respondent sued to recover the full amount of the policy, $3,000. It succeeded in the Superior Court for the entire amount

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of its demand, but, in the Court of King's Bench, the judgment was reduced by the sum of $584.36 which the respondent owed to Shortt's estate on a life insurance policy which was payable to his executors. The respondent acquiesced in this reduction, and the appellant claims that the conditions of the policy were violated and that the action should have been dismissed.

The policy was issued in Montreal in 1914, and was twice renewed.

As is usual in such cases, the truth of the answers of the insured to questions made on behalf of the insurer in the application for insurance, and of any further statements of the insured referring to the guarantee, is made the basis of the contract.

The questions and answers contained in the application for insurance and which are material to this enquiry are the following:—10 C, E, F, G, H, 11, 13, 15, 16, 17 (See judgment of Idington, J.)

The evidence clearly shews that some years before the policy Shortt had been guilty of a defalcation for a considerable amount, but, by reason of an inefficient system of control by the respondent, he succeeded in concealing it, and his defalcation, at the date of the policy, amounted to approximately $2,000. At his death, the shortage had reached the figure of $5,197.90.

I have quoted the principal questions and answers contained in the application for insurance. As to these answers Martin, J. in the Court of King's Bench, remarks:—

"It will be observed from these answers that respondent persistently avoided making any direct answers as to an audit or checking the accuracy of Shortt's accounts. What they said amounts to this: we do not inspect the bank account: we do not make any audit: we do not balance his cash account or check their accuracy: we require him to render monthly accounts and pay over cash received monthly.

While the wisdom of accepting such incomplete answers and issuing a policy thereon may be doubted I think there was a full and fair disclosure of all facts shewing the nature and extent of the risk and shewing entire absence of any audit, inspection of the bank account or checking the accuracy of Shortt's monthly statements."

With deference, I am of opinion that it is not enough to say that the appellant issued the policy on incomplete answers. If I am right in thinking that these answers were evasive and misleading, they certainly do not amount to a full disclosure of all facts shewing the nature and extent of the risk.

And indeed, while it is true that the respondent stated that it did not inspect the bank account, some of these answers were framed in a way to give the impression that Shortt's cash accounts would be monthly balanced and their accuracy checked. To reply "monthly accounts" in answer to questions enquiring how the cash accounts would be balanced and checked, and how the balance in Shortt's hands would be dealt with; to say "he remits monthly" when the point was "how often does an audit take place" and "his last remittance was received a few days ago" in reply to an enquiry "when were applicant's accounts last audited and by whom"; and to answer "yes" to the question whether all things were found in order; —is in effect to assure the appellant that a monthly balancing checking and auditing of Shortt's accounts would take place and that, at the last audit made, everything was found in order. The respondent says that the evasive and misleading answers it made were literally true. If so their truth was a species of half truth really quite as deceptive as a false answer. The whole truth was that Shortt's accounts were not balanced, checked and audited monthly, for otherwise the defalcation could not have escaped detection.

This is shewn by the cross-examination of Mr. Bowles, the accountant whose duty it was to check Shortt's returns. The system was to send to Shortt the renewal receipts for the coming month, which the insured could pay within 30 days from maturity, and for which Shortt had to account. Mr. Bowles states that, in 1896, the January premiums received by Shortt were remitted on March 28, the February premiums on May 1, the March premiums on May 29, the April premiums on June 30. This was as admitted by Mr. Bowles, one month late, and the same lax system prevailed during the preceding year, the length of the delay in remitting being somewhat less.

In my opinion, the answers made by the respondent implied a promise that Shortt's accounts would be balanced, checked and audited monthly, and this promise was not fulfilled when he was allowed to remain in arrears from month to month, thus permitting him to conceal or cover up his defalcation.

In *Arnprior* v. *U.S. Fidelity and Guarantee Co.*, 21 D.L.R. 343, the insured in answer to the question: "What means will you use to ascertain whether his accounts are correct?" replied: "auditors examine rolls and his vouchers from treasurer yearly." The rolls were never examined during the continuance of the policy and it was held that this was an untrue representation that avoided the contract. This case seems to me clearly applicable here.

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The contract of insurance is one where the utmost good faith and sincerity must be observed by the insured. This is well stated by Fuzier-Herman vo. Assurance, nos. 588 and 589:—

"588. Insurance being a contract of good faith, and sincerity being one of its necessary conditions, the insured must make exact and complete declarations to the insurer at the time the contract is made regarding whatever matters the latter may have an interest in knowing, in order to acquaint it with the object of the insurance and the risks involved.

589. All policies make their existence dependent upon the sincerity and correctness of the declarations. Indeed the insurer must of necessity be acquainted with the true meaning of its undertaking and the extent of the risk which it is proposed that it should assume; otherwise, there is no meeting of minds as to the thing promised, consent is lacking and consequently the contract is vitiated in principle."

The Civil Code of the Province of Quebec had adopted these principles in their utmost strictness:—

"2485. The insured is obliged to represent to the insurer fully and fairly every fact which shews the nature and extent of the risk, and which may prevent the undertaking of it, or affect the rate of premium.

2487. Misrepresentation or concealment either by error or design, of a fact of a nature to diminish the appreciation of the risk or change the object of it, is a cause of nullity. The contract may in such case be annulled although the loss has not in any degree arisen from the fact misrepresented or concealed.

2490. Warranties and conditions are a part of the contract and must be true if affirmative, and if promissory must be complied with; otherwise the contract may be annulled notwithstanding the good faith of the insured."

Measured by this test, the respondent cannot certainly contend that its replies represented to the assurer "fully and fairly every fact which shews the nature and extent of the risk." Its answers were calculated to mislead, perhaps not deliberately, but none the less effectively. And it should not now be heard to defend these answers by saying that they were true as far as they went, or that they were incomplete and the appellant having chosen to issue the policy cannot complain of their incompleteness. It would seem to me contrary to the principles I have stated to allow the respondent, notwithstanding its misrepresentation, or failure to fully and fairly represent such material facts as the checking and auditing of Shortt's accounts,

to recover on the policy a loss brought about by its own loose method of dealing with its agent.

The policy in question was twice renewed and after each renewal the respondent furnished the appellant with a certificate that Shortt's books and accounts had been examined by it from time to time in the regular course of business and were found correct in every respect. The evidence shews that this statement was not true, no such examination having been made, otherwise it is inconceivable that the defalcation would not have been discovered. The respondent claims that the appellant did not rely on these statements in renewing the policy, for they were subsequent to each renewal, but, being false, they deceived the appellant as to a material fact and induced it to maintain a policy which it would have cancelled. Moreover, if the answers to the questions in the original application amount to a representation that Shortt's books and accounts would be balanced, checked and audited monthly, and I think they do, this representation and the promise it implies has not been fulfilled. I am, therefore, of opinion that the respondent cannot recover on the policy.

The appeal should be allowed and the respondent's action dismissed with costs throughout.

BERNIER, J. (dissenting):—The parties are both insurance companies.

The respondent obtained from the appellant on April 1, 1914, a policy guaranteeing the fidelity of its employee Alfred Shortt, to the amount of $3,000; the appellant undertook in the policy to guarantee the respondent against any fraud or criminal malpractice on the part of its employee.

On the death of the latter, about October 26, 1916, it was discovered that he was behind in his accounts with the respondent to the extent of more than $5,000.

On the appellant's refusal to reimburse the respondent, the latter sued the appellant for the amount of its policy, namely, $3,000. The Superior Court maintained the action; the Court of King's Bench confirmed the judgment but reduced the award to the sum of $2,415.64, without costs on either side in the Court of King's Bench, but with costs of the Superior Court against the appellant.

Amongst its grounds of defence to the action, the appellant alleged false representations and culpable reticence, on the part of the respondent; it also alleges the falsity of the affirmative guarantees and non-performance of the promissory guarantees contained in the replies of the respondent, which replies were

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incorporated in the policy, or form part of it by reason of a declaration to that effect.

Was this first ground of defence proven? I am of opinion that it was not.

The replies to the appellant's written interrogatories, which naturally preceded the issuing of the policy, are not all complete; however, they are not vague and one cannot find in them any trace of concealment or false representations.

For example, here is the answer to question 10-F: Q. Are moneys to be paid into the bank by the applicant? If so, how often will the bank book be inspected and checked? A. We do not inspect the account.

This reply is not complete; it shews, however, that the employee deposits the moneys in the bank and indeed he says so himself in reply to the 13th question.

But the answer becomes important when it comes to making a general review of the trial, to determine if the promissory guarantees of the policy were not carried out.

The answer to question 10-G is equally incomplete; for, since the question resulted from the former question 10-F, it had to be answered in the same way, if the appellant wished the former answer to stand.

The same may be said of the answer to question 11; Q. 11. "Is there any cash balance at present due to you from him? If so, give particulars. A. Only for receipts that are in his hands for collection."

This answer is also important from the point of view of the affirmative guarantee.

But what does it mean more than this: "In so far as I am personally aware my employee does not owe me anything but the monies represented by the premium receipts which I handed over to him, which receipts he must send to the insured after they have paid him their renewal premiums?"

The appellant claims that at the moment when this answer was given, Shortt had already defrauded the respondent. The thing is possible. If it was so, the respondent certainly had no knowledge of the fact. Shortt had been in the respondent's employ for 14 years and enjoyed an excellent reputation.

There is no reason to apply hear any rule of implied warranty on the ground that, if Shortt was defrauding the respondent at the time without the latter's knowledge, the respondent's reply would constitute a false guarantee, and would hence be a ground for annulling the policy.

Q. 15: "How often does an audit take place? A.: He remits monthly."

The answer, according to the evidence that has been made, is true but is not *ad rem*.

But the respondent had already answered to question 10-F: "We do not inspect the bank account."

If the respondent states that it does not examine its employee's bank account, we must infer that it does not audit his account.

Q. 16: "When were applicant's accounts last audited and by whom? A.: His last remittance was received a few days ago."

This last question, being dependent upon the preceding one, had to be answered in a manner consistent with the preceding reply.

It is not complete; but it is plain that the respondent did not make an audit of the accounts which it had with its employee, and furthermore that it had no intention of doing so.

The appellant decided to accept these answers. It issued its policy.

Can it now object to them? I do not think so.

It was not shewn at the trial that the respondent had concealed any detail of its employee's actions or anything which, if known to the appellant, would have induced it to refuse the risk, or which might have influenced the amount of the premium.

What was there to prevent the appellant from requiring the respondent to make audits in future of the books or accounts of its employee, or to take certain precautions which it is obvious, from the written and printed set of questions, were habitually required of policy holders.

It would then have imposed promissory guarantees which, if not fulfilled, would have constituted grounds for cancelling the policy.

The answers given by the respondent became the basis of the contract of insurance between the parties. The following clause accompanied the answers, alleging that they were true and should serve as the basis of the contract: "I declare that the above statements are true and I agree that these statements and any further statements referring to this guaranty signed by me shall be taken as the basis of the contract between me and the above named company."

After the policy was issued, namely, on May 21, 1915, the appellant sent to the respondent for signature a blank certificate relating to its employee. A similar certificate was sent the

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following year, but after the insurance policy had been renewed, namely, on May 9, 1916.

These blanks are printed forms and their tenor is shewn in ex. D-3 and D-2, pages 156 and 162 of the record.

These certificates regarding Shortt's conduct or actions, are nothing but declarations in the sense of art. 2485 of the code.

They add nothing to the clauses and conditions of the policy or to the respondent's answers, which established the basis of the contract.

It seems that the appellant is in the habit of requiring its policy-holders to sign these documents; but, coming after the contract of insurance has been completed, they can hardly influence that contract. I would apply to them the following principle of fire (art. 2570 C.C.) and life (art. 2585 C.C.) insurance "representations not contained in the policy or made a part of it, are not admitted to control its construction or effect."

Hence, these certificates cannot be admitted to affect the meaning of what forms the basis of the contract, namely, the respondent's answers to the appellant's questionnaire.

Nor can I concur with the appellant on its other grounds of defence. For example, it has urged that when the insurance policy was issued, the employee was behind in his accounts and that the respondent not only omitted to state this fact, but even affirmed the contrary.

In the first place has it been proved that Shortt was behind in his accounts in 1914? It is probable that he was; but it is doubtful if the evidence is specific on this point, when we consider the manner in which Shortt made his monthly reports to the respondent, the possibility of delay on the part of the policy holders in paying him their premiums, and the further possibility that he may have had sums of money on deposit in other banks.

The respondent was only bound to guarantee its personal knowledge of Shortt's doings, at the time when it made its application. I have already expressed my opinion on that point.

The appellant contends that it was not proven that the deficit, by virtue of which the respondent claims the amount of the policy, was for the premiums for the months of the particular year specified in its action.

In my opinion, reached after giving the matter a great deal of attention, this pretention cannot be maintained.

As for the last point raised, namely, that this deficit did not amount to such a fraud as the appellant was responsible for ac-

cording to the terms of the policy, I am quite of the opposite opinion.

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

Appeal allowed.

JONES v. THOMAS AND NORMAN.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon and McKay, JJ.A. April 1, 1922.

EVIDENCE (§VI F—544)—CHEQUE—SPECIAL CONDITIONS ON WHICH IT IS TO BECOME EFFECTIVE—CONDITIONS NOT FULFILLED—RECOVERY ON—CONTRADICTORY EVIDENCE—FINDING OF TRIAL JUDGE—FACTS JUSTIFYING DECISION—APPEAL.

The respondents issued a cheque which was delivered to the appellant's solicitor under such conditions that it was to become effective as a cheque only in case a certain contemplated loan by the bank to the respondents was granted. The loan was in fact not made by the bank. The Court held that the appellant could not detach the cheque from all the circumstances and conditions which surrounded it at the time it was issued, and recover on it when the conditions had not been fulfilled. Held also that the case depended almost entirely on the credence to be attached to the witnesses who contradicted each other on all the material points; the trial Judge's decision could be supported by the facts and should not be disturbed.

APPEAL by plaintiff from the trial judgment in an action to recover the face value of a cheque, and in the alternative for money loaned. Affirmed, action dismissed.

P. H. Gordon, for appellant.

F. A. Sheppard, for respondents.

HAULTAIN, C.J.S., concurs with TURGEON, J.A.

LAMONT, J.A. (dissenting):—This is an appeal from a judgment dismissing the plaintiff's action. The plaintiff sued upon a cheque for $2,500, made by the defendants, and, alternatively, for money loaned. The facts briefly are as follows: the defendants negotiated with one Detwiller for the purchase of a business which Detwiller and one Simpson were carrying on under the firm name of Simpson & Co. Detwiller agreed to sell for $7,000. The defendants did not have any money themselves, so they made application to the Imperial Bank for a line of credit sufficient to pay the purchase money. The local manager of the bank assured them that he was convinced the credit would be granted. Before the credit could be arranged for, some of Detwiller's creditors began pressing him for payment of certain debts. Detwiller and the defendant Thomas went to the plaintiff to see if he would make an advance of $2,500 until the defendants obtained their line of credit from the bank. The plaintiff was willing to advance the money, provided they gave him sufficient security. Detwiller agreed to

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furnish certain security, and Thomas agreed to give a cheque for $2,500 signed by himself and his co-defendant. As to the terms upon which this cheque was to be given, the defendant Thomas says:—

"I told him I was willing to give his lawyer, Mr. Keith a cheque to be held in trust, cheque for $2,500, the amount which Detwiller was borrowing from Stanley Jones, as I understood, on the security of a mortgage on the Empire Block. I told him I would be willing to give a cheque to Mr. Keith until that line of credit had come through and until the notes Mr. Detwiller was holding were returned to our bank. I pointed out to Stanley Jones it would be impossible to meet the cheque until our line of credit came through and in that event would be willing to give the cheque to Mr. Keith in trust."

Thomas further says that the plaintiff stated it would be satisfactory if the cheque was left with Mr. Keith. As to this the plaintiff says:—"I understood at the time that if this line of credit did not go through—because Thomas mentioned if there was a hitch he could not meet the cheque—I said I would not push him for that, that we could make arrangements later."

Meaning thereby, he says, that if they could not pay the cheque in a lump sum, they could pay it in instalments, the amount of which could be arranged. This conversation took place just before noon on November 13. Following this arrangement the plaintiff drew his cheque for $2,500, and took it to Mr. Keith, his solicitor, and instructed him to hand it to Detwiller. When he received the securities, Detwiller was to give a cheque for $2,500 in the plaintiff's favour, signed by the defendants. The defendants, some time in the afternoon of the same day, drew the following cheque and handed it to Detwiller:—

"North Battleford, Sask., Nov. 13th, 1916. No. 3501
Imperial Bank of Canada
Pay to the order of
A. Stanley Jones $2,500.00
Twenty-five hundred ..... xxDollars
a-c of purchase price of Simpson & Co's. business
H. Basil Thomas. A. Norman."

The defendants also on the same afternoon wrote to Mr. Keith as follows:—

"North Battleford, Sask., November 13th, 1916.

We have just handed to Mr. H. W. Detwiller a cheque made payable to Mr. Stanley Jones value $2,500.

Mr. Detwiller is to leave this cheque with you as extra secur-

ity for Mr. A. S. Jones against the loan from Mr. A. S. Jones to Mr. H. W. Detwiller now being put through.

This cheque is given on the understanding that it is not to be handed by you to Mr. A. Stanley Jones until the line of credit (now awaiting sanction from the head office of the Imperial Bank of Canada) has been granted to H. Basil Thomas and Albert Norman.

Yours faithfully, H. Basil Thomas, A. Norman."

Detwiller took the defendants' cheque to Mr. Keith and executed the necessary papers in respect of the other securities, and received from Mr. Keith the cheque drawn in his favour by the plaintiff. This he cashed at the bank. Subsequently the bank refused to grant a line of credit to the defendants and their cheque was therefore not paid, and they subsequently refused to pay it.

On this evidence the trial Judge held as follows:—

"So far as the cheque is concerned, the evidence on behalf of the plaintiff shews the cheque in question was given to Mr. Keith, solicitor for the plaintiff, to be handed over to the plaintiff upon the fulfilment of certain conditions; it further shews these conditions have never been fulfilled. Therefore, the cheque should never have been delivered and is not to be considered as delivered to the plaintiff at all."

With deference, I am of opinion that the evidence does not shew that the cheque was given to Mr. Keith subject to any condition whatever. The defendants gave their cheque to Detwiller to give to Mr. Keith, which he did. Detwiller did not tell Keith the defendants' cheque was given subject to any condition, for at the trial he swore that he was not aware that there was any condition attached to it. On November 13 the defendants wrote the above quoted letter, but there is absolutely no evidence that Keith received it before he handed over the plaintiff's cheque. We do not know how the letter got to Keith, or when. The letter itself is evidence that Detwiller had the defendants' cheque at the time the letter was written. Detwiller, being pressed by his creditors and, according to some of the witnesses, being in fear of arrest unless some money was immediately forthcoming, would not be likely to lose any time in delivering the cheque to Keith. If the letter was mailed, the probabilities are that Keith would not receive it until the next morning. We know that Keith received the defendant's cheque from Detwiller and handed him the plaintiff's cheque on the afternoon of November 13, but we do not know when he received the defendants' letter. As the plaintiff sues upon the

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defendants' cheque, the cheque itself is *primâ facia* evidence of indebtedness. The onus is on the defendants to shew that, notwithstanding the fact that they gave their cheque, they are not liable. To do this they must establish not only that their cheque was issued subject to a condition, but that such condition was made known to the plaintiff or his agent Keith.

A perusal of the evidence satisfies me that but for the security furnished by the defendants' cheque the plaintiff would not have made the advance. He says, in fact, that it was his main security. The letter shews that the cheque was to be "extra security" for the plaintiff, and the cheque itself shews that it was "on a/c" of the purchase of Simpson & Co's business. The nature of the transaction is, to my mind, clear. The plaintiff was to advance $2,500 on the strength of the defendants' cheque and other securities, and when the defendants paid their cheque they would have paid $2,500 on account of the purchase money of the business bought from Detwiller. But while this appears to me to be the arrangement arrived at by the parties in their conversation just before noon on November 13, it was open to the defendants when handing over their cheque to Keith to impose any conditions they might think fit as to the use to be made of it. If Keith received their letter or was made aware of the conditions it imposed before he handed over the plaintiff's cheque to Detwiller, the plaintiff, in my opinion, cannot recover. If, on the other hand, Keith, on the strength of the defendants' cheque handed to him by Detwiller, handed over the plaintiff's cheque without being aware of the conditions set out in the letter, the plaintiff is entitled to succeed. As there was no evidence whatever upon this point, there should, in my opinion, be a new trial.

The appeal should be allowed, with costs, and a new trial ordered. The costs of the former trial to be costs in the cause.

TURGEON, J.A.:—This is an appeal from a judgment given by MacDonald, J., of the King's Bench upon a question the determination of which depends upon the credence to be attached to the evidence of witnesses who contradict each other upon all the material points. Counsel for the appellant states in his factum, at p. 5,:—"the appeal therefore resolves itself almost entirely into the question of the respective credibility of the plaintiff Jones (appellant) and the defendant Thomas (one of the respondents)." I agree with this statement. Turning then to the evidence, not only do I think that the trial Judge's decision can be supported by the facts, but I do not see, in view of the documentary evidence in the case, how he could have ar-

rived at any other conclusion. In my opinion there can be no thought of reversing his finding upon the facts. The position of the party may, therefore, be summed up briefly as follows:—

In November, 1916, the respondents Thomas and Norman purchased the business of the firm of Simpson & Co. conducted at North Battleford by one Detwiller. The purchase price agreed to be paid was $7,000. The respondents could not pay this sum in cash, so they gave Detwiller their notes payable in 30 days from November 1, having applied in the meantime to the manager of the Imperial Bank at North Battleford for a loan to meet these notes and pay off Detwiller. They received the assurance of the local bank manager that the loan would in all probability be granted by the bank, but some delay was occasioned by the matter having been referred to the bank's head office. During this time Detwiller was hard pressed for money, and particularly for the sum of $2,500 in which he was indebted to the Home Investment Co. He applied to the appellant in this case for a loan of this amount. Detwiller, the respondent Thomas and the appellant had interviews on the subject, as a result of which it was agreed that the appellant would advance the $2,500 to Detwiller, (and he gave him his cheque for that amount) taking security for the loan as follows:—1. A transfer of 10 shares owned by Detwiller in the Saskatchewan Mortgage & Trust Co.; 2. A transfer of 21 shares owned by Detwiller in the North Battleford Brickfields' Co.; 3. A second mortgage on a building in North Battleford belonging to Detwiller, known as the Empire Block; 4. A cheque for $2,500 in favour of the appellant dated November 13, 1916, signed by the respondents and drawn upon the Imperial Bank at North Battleford, this cheque, if paid to the appellant, to be credited to the respondents on the $7,000 owing by them to Detwiller.

The controversy between the parties arises out of this cheque which formed the fourth item of security. According to the evidence relied upon by the trial Judge, and which I adopt, this cheque was issued by the respondents and delivered to the appellant's solicitor under such conditions that it was to become effective as a cheque only in case the $7,000 loan which the respondents had applied for was granted by the bank. The circumstances surrounding the issuing of this cheque are as follows. The respondents made out the cheque at a time when they had no funds in the bank to meet it, and sent a letter to D. Keith, the appellant's solicitor. This letter is set out in the appeal book at p. 130. (See judgment of Lamont, J.A.)

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Mr. Keith was the appellant's solicitor for general purposes, and had specific instructions from the appellant regarding this particular transaction. He received the cheque and kept it in his possession for a considerable time. The loan from the bank to the respondents was expected to come through within a few days of the date of the cheque. As a matter of fact it did not come through at all, as the bank decided later on not to grant the loan, and the funds to meet the cheque were never placed to the respondents' credit.

Mr. Keith did not carry out the conditions of the respondents' letter of November 13, 1916. He gave the cheque to the appellant some considerable time later, at least a year after the date of its issue. But, in any event, Thomas states in his evidence that, before the cheque was given, he made it plain to the plaintiff that the cheque would be delivered to be used only in case the loan was granted by the bank, and the notes given by himself and his partner to Detwiller for the $7,000 were handed into the bank as agreed. Otherwise, the partners would be in the position of having discharged Detwiller's debt of $2,500 to the plaintiff and of still having notes outstanding against them for the full amount of $7,000. In his judgment the trial Judge states that he accepts Thomas' evidence regarding the transaction. Detwiller did not turn the notes into the bank and the bank did not grant the loan.

In September, 1920, the appellant started this action against the respondents, claiming upon the cheque, and, in the alternative, for $2,500 lent by him to them. The fact is that this money was not lent to the respondents but to Detwiller, and the appellant's claim upon the cheque is limited by the conditions which the learned trial Judge found were agreed to by the parties at the time of its issue. This fourth item of security was of a precarious kind, as the appellant well knew, depending for its value upon a certain advance being made by the bank, which advance was, in fact, withheld. The appellant cannot now detach this cheque from all the circumstances and conditions which surrounded it at the time it was issued, and seek to recover the face value of it from the respondents. He seeks to do so on the theory, which must be rejected, that he made the loan not to Detwiller but to the respondents and that this cheque is evidence of the loan to them. The facts shew that in the meantime the respondents have dealt with Detwiller and the holders of the notes which they gave him as if this cheque had never been issued, and that they have paid off most of the purchase price of the business. In my opinion they were en-

titled to do this, and cannot be met now by this additional claim for $2,500.

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I may add that in dealing with this case I do not think anything is to be gained by referring to the evidence of the plaintiff as to what the understanding was between him and Thomas, or to the evidence of Detwiller. As between the plaintiff and Thomas, they contradict each other absolutely, and the trial Judge accepts the evidence of Thomas. I can see no reason for doing otherwise. In fact all the incidental evidence—the documents in the case, the attitude of the plaintiff for a considerable time after the transaction—everything in short corroborates Thomas and contradicts the plaintiff. As to Detwiller, the trial Judge refuses to attach any credence to his evidence, and in this I am again fully in accord with him. Even, therefore, if it is said, as it has been said, that the respondents might have established more exactly at the trial whether Keith knew, through the respondents' letter of November 13 or otherwise, before he handed the plaintiff's cheque to Detwiller, the terms upon which the respondents' cheque was issued to the plaintiff, in my view the position of the plaintiff and of the respondents remains the same; the plaintiff himself knew full well upon what conditions the respondents' cheque was being issued and handed to Keith, and he consented to make the advance to Detwiller upon these conditions, having of course Detwiller's personal liability and the other securities to rely upon in any event. This is the effect of Thomas' evidence, which the trial Judge believes, and this alone, it seems to me, is sufficient to establish the respondent's defence. Why should they be compelled to go further and to take measures to procure the evidence of Keith, who was the plaintiff's solicitor, who has since left the country and was a resident of California at the time of the action and of the trial; and then to prove negatively that he had not been misled by receiving the respondents' letter too late? It has some bearing on this point, I think, to point out that Keith remained the plaintiff's solicitor for some considerable time after this transaction. There is no evidence of any protest either from him or from the plaintiff that the respondents' letter did arrive too late. Had the plaintiff or Keith been misled upon so important a matter by some slip of the respondents in allowing their letter of Nov. 13 to arrive too late—and in any case it could only have been some hours too late—the most natural thing to expect would be some evidence of a protest or counter-statement by Keith or by the plaintiff at the time of the transaction or shortly afterwards. In my opin-

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ion this letter of the respondents of November 13, merely sets out the terms arrived at previously between the plaintiff and Thomas, it could have no bearing upon the conditions under which Keith was to advance the plaintiff's loan to Detwiller, but only upon the conditions which were to apply to the holding and negotiating of the cheque itself. In my view, therefore, following as I do the Judge upon the facts, there is no question before us requiring evidence from Mr. Keith.

The appeal, in my opinion, should be dismissed with costs.

McKAY, J.A. concurs with Turgeon, J.A.

Appeal dismissed.

MARCOUX v. L'HEUREUX.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin and Brodeur, JJ. December 15, 1921.

CROWN LANDS (§IB—8)—LOCATION TICKET (QUE.)—FAILURE TO COMPLY WITH CONDITIONS—CANCELLATION—LENGTH OF NOTICE REQUIRED—POWERS OF DEPUTY MINISTER—R.S.Q. 1909, ARTS. 1574 TO 1579.

A change in the law as to the necessary length of notice to be given before the cancellation of a location ticket is a matter of procedure only, and the length of notice required at the time the notice is given is sufficient notice. Where the Deputy Minister is fully acquainted with all the essential facts of the case which are sufficient to warrant cancellation, the fact that there are inaccuracies in the report furnished to him are not sufficient to set aside such cancellation. The Deputy Minister has power under Art. 1574 R.S.Q. 1909 to adjudicate and formally sign the cancellation.

APPEAL by plaintiff in an action to set aside an order of the Deputy Minister of Lands, cancelling plaintiff's location ticket for certain lands in the Province of Quebec and issuing a new location ticket to the defendant. Affirmed.

E. Lafleur, K.C., and *Beauregard*, for appellant.

Lanctot, K.C., *Geoffrion*, K.C., and *Major*, for respondent.

DAVIES, C.J.:—This was a dispute between two location ticket holders of Provincial Crown Lands, Lot No. 11 in the Township of Nedelec, Province of Quebec. Marcoux, the plaintiff, appellant, in 1896, obtained his location ticket for the lot which was subsequently cancelled by the Deputy-Minister of the Department of Crown Lands and the lots re-sold under similar location ticket to respondent L'Heureux.

The present action is brought by Marcoux against L'Heureux to have the cancellation of the former's location ticket declared to be illegal on the grounds that (1) proper notice of the intention to cancel was not given, (2) that the Deputy-Minister

had not power to cancel, and (3) that if he had the power to cancel, he did so acting under false representations made to him by the Superintendent Grenier to the effect that Marcoux had not paid the nominal purchase-price of the lot (some $25) and had not made objection to the cancellation.

As to the first ground of proper notice of cancellation, I am of the opinion that it is not tenable. At the time Marcoux obtained his license the statute law required 60 days' notice of cancellation to be given, but, at the time the notice was given, this law had been amended and the time reduced to 30 days.

The contention of counsel for the appellant was that the 60 days required by the statute when the location ticket was issued governed, and that the amendment reducing the time to 30 days did not apply to the location ticket of appellant Marcoux which was granted previously to that amendment.

The statutory provisions at the time of the notice of cancellation was given were arts. 1574 to 1579 of R.S.Q. 1909. They provided *inter alia* for the time and manner in which the notice should be given and that it should "state that the cancellation shall take place if necessary, at any time after thirty days from the date of the posting and that during such thirty days the owner or accupant of the lot may set forth his reasons against such cancellation."

The appellant complied with this statutory right or privilege and filed his reasons against the cancellation with the Department within the thirty days.

As to the conditions or obligations of the licensee under his location ticket non-compliance with which gave rise to a cause for forfeiture, they were: (1) taking possession of the land within 6 months, (2) continued residence thereon and occupation either by himself or other person for at least 2 years, (3) within four years at the outside clearing and bringing under cultivation an area equal to at least 10 acres for every 100 acres and the building of a habitable house at least 16 ft. by 20 ft.

It was not and could not be contended that these conditions were complied with. Appellant never built such habitable house, or resided on the lot personally or by others for him, or cleared or brought under cultivation part of it. The evidence as to such non-compliance was conclusive in my opinion. What was done by him was in conjunction with Mr. Bourbonnais, his brother-in-law, to erect a saw mill on certain other lands obtained by them from the Dominion Government on an Indian Reserve, over à mile distant from the lot in dispute, and to strip or partially strip this Lot 11 and other adjoining

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lots which they held under other location tickets of lumber to supply the mill. The residences of Dr. Bourbonnais and the appellant were erected in proximity to the mill and neither of them on or near the lot in question.

The question then remains whether, even admitting such non-compliance, the necessary notice of cancellation was given before cancellation, i.e. whether the 30 days' notice given was sufficient.

A broad distinction exists and must be drawn, in my opinion, between a statutory change in any of the conditions or obligations of the license, non-compliance with which would give rise to a forfeiture, and such changes in the mode and method by which the Commissioner of Crown Lands when attempting to exercise his jurisdiction to cancel was to be governed. The former are, of course, part of the contract and unless covered by the express words of the amending statute would not be held applicable to location tickets, such as the one in question, previously issued.

But the manner and methods by which the Commissioner should proceed in order to exercise his powers of cancellation were mere procedure. I think the statutory change in the notice required to be given to the licensee of the location ticket before cancellation from 60 to 30 days was of this latter character.

As a fact the appellant Marcoux acted upon this notice and within the 30 days filed with the Department his objections. From the evidence in the case I cannot doubt that they were considered by the Deputy-Minister Taché when he cancelled the location.

It is true that the report of his officer Grenier to him which was made on a printed form recommending the cancellation of this license amongst many others, stated as the ground of such recommendation not only the non-compliance with the conditions of the license as to residence, cultivation, building of habitable house, etc., but also non-payment of the nominal purchase-price and the want of objections to the cancellation. These two latter grounds were inaccurate. The nominal price had been paid and the objections to cancellation had been submitted and were on file.

I have not any doubt at all from the evidence that Mr. Taché, the Deputy, was fully acquainted with all the essential facts of this case, including the payment of the purchase-price, the filing of the licensee's objections to cancellation and the non-compliance with the conditions of the license. Unfortun-

ately, however, Mr. Taché had died before the trial.

The dossier or file before him with reference to this lot in question and the number of times the question had been discussed in the Department and the nature of the objections to cancellation made by the appellant and Dr. Bourbonnais precluded me from thinking that the Deputy could have been misled by the report of Grenier on the two points mentioned. But this Grenier report was one referring to a number of lots besides the one in question as to which lot I am convinced the Deputy Taché knew well the purchase-price had been paid and the objections to cancellation filed. He made his order of cancellation, in my opinion, clearly on the ground of non-compliance with the conditions of the location ticket, those relating to residence, cultivation, building of a habitable house, etc., which was quite sufficient and of which there was the amplest evidence.

As to his power to adjudicate and sign the cancellation, I am of the opinion that the statute, Art. 1574, conferred upon him the express power to do so. If it only meant, as contended, that he could sign on behalf of the Minister himself and that after the latter had determined to cancel, then I would say that the presumption would be that the Minister has authorised him to do so. But I cannot accept the argument as to the limited character of the powers of the Deputy under art. 1244. I think he had ample power to adjudicate and formally to sign the cancellation.

For the foregoing reasons I would dismiss the appeal.

IDINGTON, J.:—The appellant obtained the following location ticket on the date thereof:—

"Agency of Crown Lands, Baie des Pères, 3 Nov., 1896. $4.86.

Received from Elie Marcoux the sum of Four 86/100 dollars, being the first payment of one fifth of the purchase price of 81 acres of land contained in lot No. 11 in the township of Nedélec, P. Q., the balance being payable in four equal payments with interest from this date.

This sale, unless disapproved by the Commissioner of Crown Lands, is made subject to the following conditions; namely:—the purchaser must take possession of the land sold within six months from the date of the present sale and continue to live upon and occupy it either personally or through others at least two years from the present time; and in the course of at least four years he must clear and cultivate a portion of the same equal to at least ten acres for every hundred acres, and build

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upon it a habitable house of at least 16 ft. by 20 ft. No wood shall be cut before the issue of the patent except for clearing, fuel, buildings or enclosures; and all wood cut contrary to this condition shall be considered as having been cut without license on public lands. No transfer of the purchaser's rights shall be recognized in any case where there has been default to fulfil any of the conditions of sale. Letters Patent shall not be issued in any of the conditions of sale. Letters Patent shall not be issued in any case before the expiration of two years of occupancy or before all the conditions have been fulfilled, even though the price may have been paid in full. The purchaser binds himself to pay for all useful improvements which may be found upon the land sold belonging to anyone other than himself. This sale is also subject to any license for cutting wood that may be at present in force and the purchaser shall be bound to comply with the laws and regulations concerning public lands and forests, mines and fisheries in this province. A. E. Guay, Agent."

"Notice: When the Commissioner of Crown Lands is convinced that any purchaser of public lands, or his associate representative or agent, has been guilty of any fraud or abuse or has infringed or neglected to fulfil any of the conditions of sale; or when a sale has been made in breach of the law or in error, he may cancel such sale, take back the land therein designated and dispose of it in the same manner as if it had never been sold (see Article 1283 Revised Statutes of the Province of Quebec)."

The appellant never erected on said land such a dwelling house as the conditions required, never in fact resided thereon, never cleared and cultivated the prescribed quantity of land required by the conditions. Yet he paid in course of time the price named of which the last installment was paid November 7, 1903.

On April 15, 1909, the officers of the Crown Lands Department began proceedings to have appellant's rights forfeited for breach of the conditions in said contract.

The statutory provisions then in force relative thereto were secs. 1574 to 1579 inclusive.

The first of these empowered the Minister for many reasons including such as I have already mentioned above as indicative of conditions to take steps to cancel such sale as above set forth.

By sec. 1575 such cancellation was declared to effect a complete forfeiture, but provided also that the Minister might

nevertheless grant such compensation or indemnity as he might consider just and equitable.

Sections 1576 to 1579 are as follows:—

"1576. Such right of revocation shall not be deemed an ordinary right of dissolution of a contract for nonfulfilment of conditions; it shall not be subject to article 1537 of the Civil Code, and may always be exercised, as occasion may require, whatever time may have elapsed since the sale, grant, location, lease or occupation license.

1577. No cancellation under article 1574 shall be made before a notice is given by the Minister or by a Crown lands' agent authorised by him in the manner hereinafter indicated.

1578. Such notice shall be posted by the Crown lands' agent, or by any person authorised by him, on the door of the church or chapel or other public building nearest to the lots in question, and shall be sent by post card to the purchaser, grantee, locatee, or lessee of any public land or his assigns mentioned in article 1574. The notice shall state that the cancellation shall take place, if necessary, at any time after thirty days from the date of the posting.

1579. During such thirty days the owner or occupant of the lot may set forth his reasons against such cancellation."

It is upon the operative effect of one or all of these provisions that this appeal should turn and upon the question of the Deputy Minister to act instead of the Minister to which I will presently advert.

It was argued before us by the counsel for the appellant that the articles of 1283 of the Revised Statutes of Quebec referred to in the above notice, formed part of the contract in question by virtue of the notice being so given, and by force of the statutory provision existent in said article which was in full force and effect at the date of the location ticket and hence that the 60 days' notice required thereby and so far as like contracts made whilst that was in force imperatively governed the terms upon which the Minister could act in declaring the rights acquired by the location ticket forfeited.

I cannot assent to such a proposition of law.

Of course if I could come to the conclusion, by any correct process of reasoning, that the said statute formed an essential part of the contract or created an obligation on the Crown in relation thereto and that it must be read as if it had formed part thereof, I would find some difficulty in upholding any decision wherein the Minister had acted in that regard without giving the sixty days' notice.

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For example we have many statutory provisions such as those declaring that in certain cases of insurance statutory conditions set forth must be and form part of the terms of that class of contract; in some of our western Provinces provisions that certain named conditions in machine contracts are essential to the validity thereof; and in Ontario and others as well as in England, that certain conveyances of land or leases made pursuant thereto must be held to contain certain covenants or other provisions which must be observed and I think in some cases of leases the right to terminate is made dependant on the observation of certain specified statutory terms.

In all such like contracts falling within the respective ambits of such like statutory rights or obligations the statutory enactment must be read as if it had by consent of the contracting parties formed part of their contract. And the provisions of later enactments cannot be regarded as a means of terminating the contractual relations so formed unless the Legislature in the exercise of its supreme power over all rights of contract or property saw fit to declare same forfeit.

The means of terminating such a contract as in question herein (for breach of contractual condition) I respectfully submit is a subject entirely within the province of the Legislature, a mere matter of judicial procedure or otherwise which may be changed from year to year as it deems fit and forms no part of the contract. Any other view seems to lead to the conclusion that inasmuch as the clause was obliterated by its repeal by virtue of another being substituted, there was left no remedy.

The reorganising of our Courts of judicature often imposes hardships or confers benefits not expected by contracting parties.

And we see by art. 1576, above quoted, how careful the Legislature was to observe that conception of the law by expressly withdrawing therein the peculiar procedure enacted herein from any possible operation of art. 1537 of the Civil Code.

Indeed it goes so far as to substitute thereby rules of its own for the purpose by which, but for the above enactment reliance might have been placed upon some of the other articles of the Code referred to therein somewhat of the character of legislation I have just now adverted to.

I think beyond any question the Minister had the power to determine herein such questions as he did, or his deputy (if in fact he so acted in his stead) did, and the only remaining questions are, first, whether the Deputy Minister had the like power

under and by virtue of art. 1527 of the R.S.Q. 1909, which reads as follows:—

"1527. Without prejudice to the control of the Minister, the Deputy Minister shall have the superintendence of the other officers, clerks, messengers or servants, and the general control of all the affairs of the department. His orders shall be executed in the same way as those of the Minister himself, and his authority shall be deemed to be that of the head of the department, so that he can validly affix his signature in his said capacity, and thereby give force and authority to all acts, receipts, occupation licenses, contracts, or deeds of sale, location-tickets, letters patent, adjudications, revocations of sales or locations, and all other documents within the jurisdiction of the department. The Lieutenant-Governor in Council may, from time to time, whenever he thinks proper, revoke the powers of the Deputy Minister, wholly or in part."

I am of the opinion that the Deputy Minister had in law thereby such a power as exercised herein and now in question.

In any event until the contrary is established by evidence the presumption must be, if only the Minister could determine, that the Minister had so disposed of the matter and the Deputy in signing was properly discharging the duty of affixing his signature to that which his superior had determined.

There is unfortunately no evidence of fact as the Deputy has since died.

The slovenly manner in which the formal judgment was drawn up and submitted by alleging non-payment of the price when in fact paid, and the allegation of absence of any answer on the part of the appellant to the notice, when in fact there was abundant evidence that he had answered it, tends to shake one's confidence in the legal presumption I rely upon, yet I do not think it can be ignored when either party might, as it affected both, have adduced evidence to the contrary if it would have served him.

I suspect each knew there was nothing to be gained thereby.

As to the question so much relied upon, of no hearing given to the other side, I presume the forcible presentation thereof largely depended on the proposition that 60 days' notice was required.

I find that contention untenable and such presentations of the appellant's case as made by himself and on his behalf by Dr. Bourbonnais, his brother-in-law, were such as secured to them all that could be said.

In regard to the case of *Paulson* v. *The King*, 54 D.L.R. 331,

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[1921] 1 A.C. 271, cited in argument as sufficient to entitle appellant to claim waiver I do not, on an examination of the facts, find it applicable here.

The last payment was as stated above made in 1903 and I do not see how that would help to protect appellant to cover his persistent breach of conditions for 5½ years' longer.

And in that connection I may remark that the entire misconception of appellant, as to his rights, seems to have been rather remarkable, else he never should have taken a location on such lot. Yet notwithstanding all that I should have been disposed, if given the power, to exercise that given the Minister, if the facts, possibly one sided, in this case, in regard to the expense of drainage improving the land warranted doing so.

Hence I have from that and undesirable features the case presents considered whether or not costs of this appeal should be allowed but concluded we cannot afford to encourage litigation by acting in regard to costs further that it concerns those directly concerned.

And hence, hoping the intervenant may reconsider some things though deprived of costs, I would dismiss this appeal but only with costs to the respondent and no costs to intervenant despite the excellent argument presented on his behalf enuring to the benefit of respondent.

DUFF, J. (dissenting):—A "license of occupation" under sec. 1270 of the Revised Statutes of 1888 although described in terms as a license confers upon the licensee not only a right of occupation and possession but an interest in the land, a true *droit reel;* an interest, it may be, not easily definable by reference to the ordinary juristic categories and perhaps *sui generis,* but an interest of quite definite characteristics deducible from the statute itself. This was in effect held in a series of cases in the Courts of Upper Canada and Ontario decided upon statutory provisions not differing in substance from the articles of the Quebec statute now before us; and the propriety of these decisions has never been questioned.

Henderson v. *Seymour* (1852), 9 U.C.Q.B. 47; *Henderson* v. *Westover* (1852), 1 U.C.E. & A.R. 465.

It was conceded by counsel for the respondents that failure on part of the licensee to perform the conditions of the license would not *ipse jure* operate to put an end to his interest; that, it was admitted, could only take place through the act of the Commissioner in exercise of the power of cancellation given by art. 1283; and it seems permissible to speak of this divestive condition as one of the elements determining the character of

the licensee's right; and consequently to describe any alteration of the terms upon which this right of cancellation becomes operative (making that right more onerous for the licensee) as an alteration of the law prejudicing the licensee in his substantive rights.

Prima facie therefore any change in the law which would, if applicable, have such effect must, if expressed in general terms, be held to exclude existing licenses of occupation from its purview.

"Retrospective laws are," said Willes, J. for the Exchequer Chamber in *Phillips* v. *Eyre* (1870), L.R. 6 Q.B. 1 at p. 23, 40 L.J. (Q.B.) 28, "no doubt, *prima facie* of questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law. '*Leges et constitutiones futuris certum est dare formam negotiis non ad facta praeterita revocari; nisi nominatum et de praeterito tempore at adhuc pendentibus negotiis cautum sit.*' Accordingly, the Court will not ascribe retrospective force to new laws affecting rights, unless by express words or necessary implication it appears that such was the intention of the legislature."

Is this a case governed by this general principle or does it fall within the special rule that no suitor has a vested interest in any course of procedure? Is the provision of the law requiring 60 days' notice as a condition of the exercise of the power of cancellation a provision relating to "procedure" within the meaning of this rule? I have no doubt that "procedure" within this rule means procedure in a Court of justice and therefore the present case is not strictly within the terms in which this exception to the general principle is commonly stated. On the other hand, the general principle itself is a principle of construction (based, Lord Coke says, 2 Inst. 292, upon "a rule and law of parliament") and the inference from this practice of Parliament must, of course, give way where an intention to the contrary is plainly manifested and this intention to the contrary has sometimes been inferred from the subject matter and the circumstances of the legislation. *Gardner* v. *Lucas* (1878), 3 App. Cas. 583, at pp. 590 and 603. *West* v. *Gwynne*, [1911] 2 Ch. 1, 80 L.J. (Ch.) 578; *Welby* v. *Parker*, [1916] 2 Ch. 1, 85 L.J. (Ch.) 564. Is the analogy between this provision and an enactment relating to procedure in the strict sense, that is to say, a processual enactment sufficiently close and sufficiently obvious to justify that inference?

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Such enactments may safely be assumed to be fashioned with a view to removing anomalies and causes of unnecessary delay and to securing the proper object of all forensic procedure, the judicial determination of controversies about legal rights after a fair hearing of the parties and to be administered accordingly, and (see Maxwell on Statutes, 400 & 401) it is no fair cause of complaint on the part of any litigant that the disposition of his cause should be regulated by rules of procedure so conceived. And when one considers the general inconvenience and confusion which must attend a system under which at one and the same time causes of the same class are regulated by different sets of procedure, the necessity becomes immediately apparent of the canon that such enactments are retrospective in the sense that they apply to all future proceedings irrespective of the time when the rights asserted in such proceedings arose, unless, to refer to Lord Blackburn's judgment in *Gardner v. Lucas, supra,* there is some good reason to the contrary.

These considerations are not fully applicable to the present question. The argument from inconvenience has relatively little or no weight; on the other hand it seems to be a reasonable presumption that the Legislature in reducing the period from 60 days to 30 was acting upon the view that the shorter period would be sufficient and that the reduction would entail no serious risk of injustice; and that the Legislature intended the amendment to be retrospective in its operation, may not unfairly be advanced as a proper deduction from this premise.

As against that it may be said that there is a wide difference between proceedings which take place under the general system of remedial law before a Court of general jurisdiction and a proceeding which merely consists of the steps that a grantor is obliged to take under the provisions of a private instrument or under the provisions of a statute, limited in its application to a particular type of instrument for the purpose of enabling him to exercise a power reserved to him to put an end to the estate or interest created by his grant. The circumstance that the grantor is the Government and that the official whose duty it is to exercise the discretion vested in the Government (although he is to exercise that discretion it must be admitted, on grounds in relation to which he must be assumed to be personally indifferent) suggests an analogy to proceedings in a Court of justice which I must say I think is deceptive. On the whole, although the point is a very debatable one, I think this legislation falls on the other side of the line and must for the purpose of determining the question before us, be treated as legislation

affecting substantive rights and not as an enactment relating to procedure.

I have discussed the questions presented upon the assumption that the appellant's rights as licensee rest upon the provisions of the statute. It was argued that the reciprocal rights of the Crown and the licensee rest upon contract, the terms of the contract being those expressed in the receipt dated November 3, 1896, which is in evidence. We have not before us the regulations under which this receipt is issued and I have heard no good reason for holding that the statutory rights of the appellant—and by that I mean, of course, the rights arising from the enactments of the statute considered in themselves—are to suffer any reduction or impairment or qualification by force of the terms of a departmental receipt. If the relation is to be described as that of a contract, the provisions relating to cancellation are, in my judgment, elements of that contract and indeed I am not sure, even upon the Attorney-General's hypothesis, that the *avis* appended to the receipt in which art. 1283 of R.S. Q. 1888, is brought to the notice of the licensee, would not be sufficient in itself to produce this effect.

The Attorney General places some emphasis upon the last sentence of the receipt which is in these words:—"Cette vente est aussi sujette aux licences de coupe de bois actuellement en force, et l'acquéreur sera obligé de se conformer aux lois et règlements concernant les terres publiques, les bois et forêts, les mines et pêcheries dans cette province;" and the argument derived from this sentence is based upon the contract between the use in the second limb of the sentence, without qualification, of the phrase "lois et règlements concernant les terres publiques &c." and the qualification appended in the first limb to the phrase "licences de coupe de bois" which are limited explicitly to those "actuellement en force"; and the contention is that the employment of the phrase "lois et règlements" without qualification indicates an intention to embrace within the scope of this term of the receipt amendments made during the currency of the license. It seems sufficient to say that this argument proves too much. It is not argued that the terms of the license prescribing the duties of the licensee, for example, in relation to residence or to clearing are intended to be subject to such legislative change; which would be the necessary consequence of adopting the construction contended for.

There is another ground upon which I think the appeal should succeed. Both in R.S.Q. 1888, which the appellant says governed the proceedings, and in R.S.Q. 1909, which the respon-

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dent invokes, there is explicit provision for the presentation by the licensee of his reasons against any proposed cancellation. This provision imports, I think, what would probably be otherwise implied, that a cancellation *parte inaudita* has no validity under the statute. And I think it is established that the appellant, although he did everything it was incumbent on him to do for the purpose of bringing his representations to the attention of the Commissioner, was in effect denied this statutory right. There is no question of intentional misconduct; least of all on part of the Deputy Commissioner, the late Mr. Taché. For some unexplained reason, the statement of the case as presented to Mr. Taché for adjudication by the officials of the Department represented that the licensee was not opposing cancellation. I am quite unable, with great respect, to follow the process by which the effect of the formal official document is sought to be displaced by reference to the vague impressions of departmental officials. There is nothing before us, in my opinion, outweighing or counterbalancing the inference properly arising from the documents themselves.

The facts in evidence, Mr. Lanctôt in his very able argument urged, leave no room for doubt that Mr. Taché in fact at the time of the adjudication was fully acquainted with all the circumstances pertinent to the inquiry with which he was charged. I think that with one qualification Mr. Lanctôt made his point good—but that qualification is fatal to the argument. I cannot infer in face of the formal statement that Mr. Taché had before his mind the fact that the locatee was opposing cancellation or that he had before him the representations which the locatee desired the Commissioner to consider in passing upon his case. Needless to say, speculation as to what the Deputy Commissioner might have done in any event is idle. One term of the condition to which the appellant's rights were subject was that before cancellation he should have an opportunity to present to the Commissioner the considerations by which he desired to induce the Government to withhold its hand and to state these reasons in his own way. That right was denied him. *Qui statuit aliquid parte inaudita altera aequum licet statuerit aequum non fuit.*

ANGLIN, J. (dissenting):—I am of the opinion that the cancellation of the location ticket of the appellant should be declared null and void substantially on the ground on which Pelletier and Martin, JJ. dissented from the opinion of the majority of the Court of King's Bench.

In providing by art. 1579 (R.S.Q. 1909) that the owner or

occupant may, during the 30 days required by art. 1578 to elapse between notice and cancellation, "set forth his reasons against such cancellation," the Legislature impliedly prescribes consideration of such reasons, if furnished, by the officer empowered to order cancellation as a condition precedent to his exercising that right. The appellant made an affidavit setting forth his reasons for opposing the cancellation of his location ticket and it was duly received by the department within 30 days of the posting of the notice. Nevertheless the officer in charge of the file reported *inter alia*, that no opposition had been made, and upon that report, as appears by his certificate subjoined to it, the Deputy Minister ordered cancellation. I am not prepared to accept Mr. Grenier's explanations and impressions as sufficiently dependable to controvert the statements made in that official document. I think it is conclusively established for the purposes of this case that Marcoux's "reasons against cancellation" were not presented to, or considered by, Mr. Taché. There was therefore not only failure to observe the implied condition of jurisdiction imposed by the statute, but a grave disregard of a fundamental canon of natural justice—*audi alteram partem*.

Assuming, but without so deciding, that the notice given as prescribed by arts. 1577-8 R.S.Q. 1909, was sufficient and that the Deputy Minister was empowered by art. 1527 to order the cancellation, I would allow the plaintiff's appeal on the ground above stated.

BRODEUR, J.:—We have to consider in this case if the annulment of a location ticket by the Department of Crown Lands was regular and legal.

On November 3, 1896 the local agent of the Department of Lands sold by location ticket to the appellant Marcoux Lot No. 11 of the District of Nedelec for a nominal sum and the latter bound himself to clear and cultivate this lot and build a house upon it.

About the same time, the brother-in-law of Marcoux, Dr. Bourbonnais, and Marcoux himself, became purchasers of the 10 other first lots in the same district. Dr. Bourbonnais had intended to carry out certain improvements in agriculture and forestry and for this purpose had taken with his brother-in-law under location ticket these 11 lots, which were all wooded. He had thoughts at first of building a sawmill on the first two lots, which are situated on the banks of the Riviere des Quinze, but when he learned that these 2 lots were inundated during the

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greater part of the year, he bought from the Federal Government certain neighboring lots forming part of an Indian Reserve, and adjoining the lots in the district of Nedelec. He then built his sawmill on the lots in the Indian Reserve and at the same time cleared and cultivated these lots and built houses, barns and out-buildings upon them.

Both he and Marcoux omitted to carry out on the provincial lots in the district of Nedelec the obligations which they had contracted. With the exception of a ditch, an abatis and some other minor works, nothing had been done on the Nédélec lots. Proof shews, for example, that no part of these lots was cultivated and that no habitable house was erected upon them as the law and the location ticket required. They were content with paying the price of sale, which was purely nominal, and with representing during several years to the Department of Lands and to the Government that the Nédélec lots were adjacent to the lots acquired by Dr. Bourbonnais on the Indian Reserve and that the building and clearing made upon the latter fulfilled the spirit of the law, if not the letter.

The Department of Lands after 13 years; namely, in 1909, decided to annul the location ticket for the lots granted in the district of Nédélec because the conditions of establishment, residence and cultivation had not been fulfilled, and sold them again under location ticket to the defendant L'Heureux.

The present action, which is in the nature of a petitory action directed against the new purchaser L'Heureux, was begun by Marcoux in order to have this decision of the Department declared illegal and he invokes three principal arguments against its validity:—1. Insufficient notice; 2. that the Deputy-Minister was not competent to make the decision; 3. that false representations were made to the Deputy-Minister and that he neglected to consider the objections raised by Marcoux.

When the location ticket was issued the law required that a notice of 60 days should be given before the Minister could annul the location ticket. Later on this law was amended and the Legislature decided that a delay of 30 days would be sufficient. The Department proceeded under the new law and did not give 60 days' notice. The question which presents itself in this regard is to know if the new law has a retroactive effect.

As a genaral principle laws are not retroactive. When an old law is replaced by a new one dealing with the same subject, the old law alone governs juridical acts that were definitely completed while it was in force and the new law cannot affect them. But it sometimes happens that a juridical act done

while the old law was in force may produce consequences after the new law has become operative. The question then arises as to what law is to govern these consequences. The law cannot affect acquired rights unless it contains a formal enactment to that effect; but public interest demands that the most recent legislation should have its effect upon juridical events which commenced before it was enacted. Acquired rights must be taken to mean legal powers properly exercised. If these powers are not exercised they become prospective and are governed by the new legislation.

In the present case, the Legislature decreed that the Government or the Department of Lands could revoke a location ticket if the settler did not comply with the development conditions, and indicated the procedure to be followed. This is not by enforcing the right of a vendor, who can demand resiliation of the contract for non-payment of the price according to the dispositions of art. 1537 of the Civil Code, for art. 1285 of R.S.Q. 1888, declares formally that the right of revocation shall not be subjected to the dispositions of this article of the Civil Code. This right of resiliation partakes of the nature of public law; and the provisions of art. 1283 and following of the said Revised Statutes determine the conditions under which this right of resiliation is to be exercised and the procedure that must be followed.

The provision regarding delay is either a matter of prescription or of procedure.

The old law governs all prescriptions already completed but the new law governs all prescriptions which were running when it was enacted or which commenced since it came into force. Now the delay of 60 days invoked by the appellant as representing the extent of his right commenced to run after the new law came into force. The new law must therefore be applied, so the Department was not obliged to wait 60 days before declaring that the sale was annulled. A delay of 30 days was sufficient. Now the decision was given more than 30 days after the notice was posted.

If it is a question of procedure, then it is a matter of principle that all laws relative to procedure become applicable immediately. In either case the appellant's contention is not well founded.

The appellant also urges that the cancellation is null because it was pronounced by the Deputy-Minister, and not by the Minister himself.

I see that the plaintiff appellant himself in his declaration

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admits that the Government itself decided to annul the sales in question. But even supposing that the Government or the Minister did not make the decision, the law formally recognises in art. 1244 R.S.Q. 1888 that a Deputy-Minister has the same authority in matters of this nature as the Minister himself, so that he can himself sign any cancellation of a location ticket. It is not surprising that this power should be conferred by law upon the Deputy-Minister, when we consider that in the case in question the location ticket was signed by a mere local lands agent and that it could then be validly annulled by his superior officer, the Deputy-Minister.

In the third place, the appellant Marcoux says that the decision is null because the Department did not validly exercise its powers of cancellation, that it neglected or falsely represented the facts and that it did not give the parties an opportunity to be effectively heard.

I had at first, when the pleadings were being heard, some doubt on this subject; but a thorough study of the proof and of the documents produced convinces me that this third point is also not well taken. It is admitted by the plaintiff Marcoux that he did not fulfill the conditions of settlement and cultivation imposed upon him by his contract and by law. But he adds that the report of Superintendent Grenier, upon which the Deputy-Minister relied in cancelling the sale, contained two errors; namely, that Marcoux had not paid the purchase-price and that he was not opposed to the cancellation. It is quite true that this officer Grenier in a negligent manner, which it is rather difficult to explain, made these statements in his report to the Deputy-Minister. But one must not attach more importance than is necessary to the error or negligence of a subordinate. What we are concerned with is to know if the Deputy-Minister had justifiable reasons for cancelling this location ticket. There can be no doubt on that point. This lot had been granted for a nominal price; namely, about $25. The evident intention of the Government in selling the lot was to have it cleared and brought under cultivation. The purchase-price was of no importance. The object of the Government was to open up these extensive wooded tracts of land, which were capable of an agricultural production that might be made one of the greatest sources of national wealth.

The lot in question should have been cleared long ago and Marcoux should have lived upon it; but he did nothing of the kind. Seven years after he received his grant the local departmental agent reported that the development conditions on this

lot, as well as on the others granted to him and Dr. Bourbonnais, had not been fulfilled. Dr. Bourbonnais then took the matter up with the Minister at that time, who saw fit to temporise and did not annul the sale. The same question was raised from time to time, particularly whenever there was a change of Minister, and Dr. Bourbonnais returned to the charge imploring the Department to be lenient and alleging that the lots in the district of Nédélec formed but one entity with the lots on the Indian Reserve, and that the agricultural development of the latter was progressing rapidly and benefited the lots in the district of Nedelec.

We see then that this situation was continually disputed during several years between the Department and the purchasers. Much correspondence was exchanged on the subject but in 1909 the question became more pressing. The civil and religious authorities and the colonization agents protested against the fact that Bourbonnais and Marcoux were not developing their Nédèlec lots, and then the Minister was obliged to make a definite decision. He had first to consider the demands that were made with respect to Lots 7, 8, 9, and 10 of the same district, and decided formally, evidently after consultation with his government colleagues, that the location tickets issued for these lots should be cancelled. About the same time proceedings were commenced to annul the sale of the other lots and particularly the lot in question in the present case; but as for these latter lots the question became, to speak clearly, a matter of routine, for the decision of the Government and of the Department meant that these sales to Dr. Bourbonnais and Marcoux should be cancelled. The notices required were given. Dr. Bourbonnais and Marcoux made their objections and finally the Deputy-Minister pronounced the cancellation on June 7.

The document which he signed was printed and was in the following terms:—"I the undersigned by virtue of the powers conferred upon me by law revoke and annul the above mentioned sales."

And above this decision of the Deputy-Minister, appeared a report by Assistant-Superintendent Grenier giving the numbers of the lots whereof the sale should be cancelled. This printed report mentioned the default to fulfill the conditions, the default to make payment and the absence of opposition, as reasons for the cancellation.

He had evidently forgotten to strike out in this printed form the references to default of payment and to the objections of the settler. The appellant Marcoux alleges that the Deputy-

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Minister pronounced the cancellation on this erroneous report.

I am convinced on the contrary that the Deputy-Minister, who is now deceased and has not been able to appear as a witness, made his decision with a full knowledge of the facts. He was not ignorant of the fact that for almost 10 years Marcoux, either himself or through his brother-in-law, was in touch with the Department in an endeavour to convince it that the development conditions had been fulfilled in accordance with the spirit if not with the letter of the law. He must also have known that the lots had been paid for. Besides, the nominal price at which the lots had been sold could not affect the case. What was of most importance was residence on the lots and their development. The Deputy-Minister also knew the objections which Marcoux raised to the cancellation. These objections had been examined and considered by the Department during a period of 7 years.

I do not therefore think that the Courts can interfere with the decision reached by the Department. That would be to substitute our discretion for that which the tribunal established by the Legislature can alone exercise.

For these reasons the appeal should be dismissed with costs.

Appeal dismissed.

HASPER v. SHAUER.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon, JJ.A., May 8, 1922.

NEW TRIAL (§II—5)—ACTION TO RESCIND CONTRACT—ADMISSIONS OF PLAINTIFF SHEWING INTENTION TO AFFIRM—CLOSE OF CASE—AMENDMENT OF CLAIM TO INCLUDE DAMAGES FOR DECEIT—JUDGMENT ON CLAIM AS AMENDED—REFERENCE TO LOCAL REGISTRAR TO ASSESS DAMAGE—RIGHT OF DEFENDANT TO BE HEARD ON AMENDED CLAIM—NEW TRIAL AS TO ACTION FOR DECEIT.

Where the admissions of a plaintiff claiming rescission of a contract on the ground of fraud, clearly disclose an intention to affirm the contract, and put an end to any claim which he may have had, to have the contract rescinded, and no alternative remedy is claimed, but no application to dismiss on the one hand or motion to amend on the other is made, and it is only on the argument that it is pointed out that the plaintiff cannot recover on the pleadings as they stand, the trial Judge may grant leave to the plaintiff to amend his statement of claim by adding thereto a claim for damages for deceit, but a judgment based upon the amended claim, given at the trial and directing the local Registrar to assess the damage without giving the defendant an opportunity of meeting the claim as amended will be set aside where it causes an injustice to the defendant, and a new trial will be ordered on the issue of deceit and damages only.

COSTS (§II—26)—SOLICITORS—TRIAL—CLOSE OF PLAINTIFF'S CASE—NO CAUSE OF ACTION ON PLEADINGS—DEFENDANT CONTINUING CASE AND CALLING WITNESSES—RIGHT TO.

Where it is clear at the close of the plaintiff's case that his action should be dismissed on the pleadings as framed, but no application to dismiss on the one hand, or motion to amend on the other is made, and the counsel for the defence proceeds to call his witnesses and examine them at great length as to the defendant's version of the matter, he will not be allowed his costs, after the end of the plaintiff's case at the trial.

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APPEAL by defendant from the trial judgment in an action for rescission of a contract, allowing plaintiff to amend his statement of claim, after all evidence is in at the trial, so as to include a claim for damages for deceit, and giving judgment on the amended claim and directing the local Registrar to assess the damages. New trial ordered to try the issue as to deceit.

LAMONT, J.A.

A. C. Stewart, for appellant.

R. W. Cumming, for respondent.

HAULTAIN, C.J.S. concurs with LAMONT, J.A.

LAMONT, J.A.:—The defendant seeks on two grounds to reverse the judgment of the trial Judge: first, on the ground that the amendment, after the evidence was all in, permitting the plaintiff to claim damages as in an action of deceit should not have been allowed without giving him the opportunity of meeting it; and secondly, that as the plaintiff had not proved any damages, the action should have been dismissed. The facts as set up in the statement of claim briefly are: that on February 5, 1920, the plaintiff agreed to purchase the defendant's farm for $26,653.80, being $60 per acre, payable $7,000 cash, and the balance on half-crop payments. The plaintiff alleges that this agreement was induced by the fraudulent representation of the defendant that the land was arable land of good quality, free from sand and alkali; that when he took possession he discovered that this representation was false. He then goes on to say:—

"That the plaintiff by the representations referred to in the preceding paragraphs hereof has suffered loss and has worked the farm on a loss during the year 1920 in the amount of $1,000 although he carefully and in a good husbandlike manner worked the said land as consistent with the best usages of farming in the district.

The plaintiff therefore claims: (a) Rescission of the contract. (b) Return of the cash payment of $7,000 and interest thereon. (c) Lien on said land for the cash payment $7,000. (d) Damage."

The defendant denied making the representation, and set up that any representation made by him was made with an honest belief that it was true. He also set up that the plaintiff after

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knowledge had affirmed the contract; also that the plaintiff had been guilty of breaches of the agreement; and he counterclaimed for specific performance, and, in default thereof, for cancellation of the agreement and the forfeiture of the payment made. In reply, the plaintiff admitted the breaches of the agreement set out in the counterclaim, and expressed his willingness to have the agreement cancelled subject to a return of the monies paid and damages.

At the trial the plaintiff directed his evidence towards proving the representation inducing the contract, and the damages which he had suffered through farming land which was not as represented; that is, damages to which he would be entitled on a rescission of the contract. The trial Judge found that the representation had been made; that it had been made fraudulently, and that it induced the contract; but he also found that the plaintiff, with full knowledge that the representation made was false, had affirmed the contract by delivering to the defendant one-half of the crop of 1920, and that therefore the contract could not be rescinded. Counsel for the plaintiff then moved to amend by claiming damages "as in an action of deceit." The trial Judge allowed the amendment, although he inclined to the view that the statement of claim set out sufficient to support an action of deceit. He held, however, that the evidence of damage submitted was not sufficient to enable him to assess damages, but he found that the plaintiff had suffered damage, and directed a reference to the local Registrar to assess the amount, and he gave the plaintiff the costs of the action and of the reference.

The contention of counsel for the defendant against the allowance of the amendment after the evidence was all in is, that it set up a cause of action which he was not called upon at the trial to meet. He contends that, when the plaintiff closed his case without putting in evidence of damage, which could be awarded in an action of deceit, he was justified in concluding that all the defendant had to meet was the action for rescission, and that in such an action it is immaterial whether the representation be fraudulently or innocently made, and therefore he did not direct his examination or his evidence to establishing that the defendant had an honest belief in the truth of the representations made. He claims that, had he been called upon to meet an action of deceit, "evidence could have been produced shewing that no damage had been occasioned to the respondent by any representation of the appellant relative to the land in question, and that the appellant had an honest belief in all representations made by him."

I agree with the trial Judge in thinking that a statement of claim which alleges that the plaintiff was induced by the fraudulent misrepresentation of the defendant to enter into a contract and by doing so suffered loss, followed by a claim for damages, sets up, if nothing more appears, an action of deceit; and it seems to me that counsel for the defendant in drafting his statement of defence took that view, for he pleaded an honest belief on the part of the defendant in the truth of any representation made. The statement of claim, however, must all be looked at to ascertain the relief which the plaintiff claims, and the allegations of fact by reason of which he claims it.

Where the allegation which specifically sets out the loss sustained shews that loss to have resulted from the farming operations, and this is followed by a claim for rescission and damages, and where, in addition, the plaintiff at the trial puts in no evidence of such damage as could be awarded in an action of deceit, counsel for the defendant, in my opinion, is justified in concluding that the only damages which the plaintiff is seeking to recover are such damages as he would be entitled to on a rescission of the contract. The measure of the plaintiff's damage in an action of deceit is, as stated by the trial Judge, the difference between the contract price and the real value of the land (if that value be less) at the time the contract was entered into. *Peek* v. *Derry* (1887), 37 Ch. D. 541.

The measure of his damage upon a rescission of the contract would be his loss of profit, consequent upon having to work land whose yielding power was less than represented. Under the circumstances of this case if the plaintiff is allowed to claim damages as in an action of deceit, the defendant is entitled to an opportunity of meeting that issue.

It is contended for the defendant that the proper course, under the circumstances, was to dismiss the plaintiff's action without prejudice to his right to bring an action of deceit.

To adopt that course would be to duplicate the costs of bringing the action down to trial. Rule 250 provides that all necessary amendments should be made for the purpose of determining the real question or issue raised by or depending on the proceedings.

In *Ganzini* v. *Jewel-Denero Mines* (1915), 21 D.L.R. 406, 21 B.C.R. 317, the plaintiff sought to recover damages for loss occasioned by the negligence of the defendant. Certain acts of negligence were set up. At the close of the plaintiff's case the trial Judge held that there was no evidence to go to the jury. Counsel for the plaintiff then asked to amend by setting up

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other acts of negligence. The application was refused and the action dismissed. On appeal, Irving, J.A. said:—

"As a rule, amendments should be allowed freely, provided the application is *bona fide*, and the other side can be compensated for the mistake, but where the application involves a change in the nature of the attack and is made after the evidence for the plaintiff is closed and a motion to dismiss is granted or about to be granted, the discretion of the trial Judge is difficult to review. In the present case I am not prepared to say the learned Judge was wrong."

In the present case I am not prepared to say that the trial Judge was wrong in allowing the plaintiff to amend as he did. But with deference I am of opinion that he was wrong in giving judgment for the plaintiff on the amended claim, with a reference to the local Registrar to assess the damages; and that for the following reasons:—(1) The amended claim put in issue the question of the defendant's honest belief in the truth of the statements alleged to be made by him. This was not an issue in an action for rescission, and the defendant has a right to establish such honest belief if he can. (2) While it is true that land which is not free from sand and alkali is of less value than land which is free, as the trial Judge found, yet that is not the test by which to determine whether or not the plaintiff is entitled to damage. The test is: was the farm as he received it of less value as a result of not being as represented than the contract price. It may not have been worth as much as if it had been free from sand and alkali, but it still may have been worth the agreed price. If so, the defendant did not suffer damage cognisable in law. (3) In my opinion the assessment of damages in a case like the present should not be referred to the local Registrar.

Rule 320, in part, reads:—

"320. In every action or proceeding in which it shall appear to the court or judge that the amount of damages sought to be recovered is substantially a matter of calculation, the court or a judge may either fix the amount or direct that the amount for which final judgment is to be entered shall be ascertained by an officer of the court or other person;....."

Our rule is the same as the English rule. In Chitty's Archbold's Practice, 14th ed., vol. 2, at p. 1329, I find the following:—

"It is questionable what is meant by these words *substantially a matter of calculation*. The Common Law Commissioners, from their report, seem to have considered that the damages

in an action for the non-repair of a house, or the like, are substantially a matter of calculation. In a case of this kind, however, the evidence may be very conflicting, and the damages anything but a mere matter of calculation."

The assessment of damages for non-repair may, in an ordinary case, be considered "substantially a matter of calculation," because there could be little difference of opinion as to the material required and the labour necessary to make the repairs, and these have a market price; but in a case like the present, where the land was sold when prices were booming in this Province, the assessment of damages will, in all probability, have to be decided on the appreciation of very conflicting testimony. Anyone who has had experience in our Courts in land cases must have been struck with the great difference of opinion among real estate men as to the value of land. In such a case, the parties are entitled to have the evidence weighed by the Judge, who has been appointed because his qualifications and experience enable him to properly decide such questions, rather than by an officer of the Court who, in all probability, has had no training or experience which would enable him to properly appreciate and appraise the evidence. Prior to the adoption of the rule in England, the Courts limited cases in which a reference to a Master might be had to actions upon bills of exchange, promissory notes, bankers' cheques, covenants for non-payment of money, and the like, where it was only necessary to compute the amount of principle and interest. Under the rule a wider range is allowed, but the assessment must still be substantially a matter of calculation. As an illustration of a case within the rule, see *Dunlop Pneumatic Tyre Co.* v. *New Garage and Motor Co.*, [1913] 2 K.B. 207, 82 L.J. (K. B.) 605.

In my opinion it cannot be said that in a case like the present the assessment is substantially a matter of calculation.

I would, therefore, allow the appeal, with costs, and give the defendant leave to meet the claim for damages for deceit. As the plaintiff failed to establish his claim at the trial, the defendant is entitled to costs up to the close of the plaintiff's case, when it was, or should have been, known to counsel for both parties that the plaintiff's action for rescission had failed. As to the costs of the trial after that time, I agree with my brother Turgeon. If counsel will go on indulging in legal pyrotechnics for days after the plaintiff has made admissions which any counsel ought to know has put an end to the case, they must do so at their own expense, and not at the expense of their clients.

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As to the counterclaim, I agree with the disposition of it made by the judgment of my brother Turgeon.

TURGEON, J.A.:—The plaintiff brought this action as purchaser in an agreement for the sale of land, claiming rescission of the contract on the ground that he had been induced to enter into it by the fraudulent misrepresentation of the vendor. In his claim he gave particulars of several alleged misrepresentations, but the one on which he relied and to which the evidence was directed at the trial was, "that the land was arable land and of good quality free from sand and alkali." He also claimed damages in the amount of $1,000, representing the loss he sustained in working the farm during the time he occupied it. The defendant (vendor) denied the fraud and asserted that, in any event, the plaintiff had debarred himself from claiming rescission of the contract by electing to affirm the same after having discovered the alleged fraud. He also counterclaimed for cancellation of the agreement for sale and forfeiture of all monies paid thereunder by the plaintiff on the ground of the plaintiff's failure to make certain payments for taxes and insurance then overdue and to crop the land for 1921, asserting at the same time his own ability and readiness to convey the land to the defendant in case of payment. The plaintiff in his reply admitted the facts set up in the counterclaim, but reiterated that upon cancellation of the contract being ordered, all purchase money should be repaid to him, as well as damages as claimed in his statement of claim.

Before the case came on for trial defendant's counsel examined the plaintiff for discovery, and on this examination the plaintiff admitted that in November, 1920, several months after he had acquired full knowledge of the fraud upon which he relied, he paid to the defendant the sum of $1168.60, in grain, to meet the second payment due by him under the contract. There is no doubt that this admission put an end to any claim which he might have had to have the contract rescinded, disclosing as it did a clear election to affirm, by which he was bound. Nevertheless the pleadings were allowed to remain in their original state, no amendment being made or proposed, and such was the condition of the case when it came on for trial on June 8, 1921. The plaintiff himself was the first witness to give evidence at the trial, and in the beginning of his cross-examination he was again questioned regarding the payment of $1168.80 made by him, when he again admitted it. Plaintiff's counsel also called several of his witnesses to corroborate the plaintiff's version of the conversation between the parties prior

to the execution of the agreement, during which conversation the fraudulent misrepresentations were said to have been made, and to testify as to the inferior quality of the land. Having put in this evidence, as well as evidence of the loss sustained by the plaintiff in farming the land during the time he occupied it, plaintiff's counsel rested his case.

Now it is clear to me that under such circumstances the plaintiff's action should have been dismissed forthwith, the counterclaim allowed on the admissions, and an appropriate order made. The plaintiff had alleged fraud, and claimed rescission. There was evidence on which the trial Judge might have found fraud, but the plaintiff's admission of his election to affirm made it impossible for him to obtain rescission, and he claimed no alternative remedy. Nevertheless, no application to dismiss on the one hand, or motion to amend on the other, was made, but defendant's counsel proceeded to call his witnesses and the case was allowed to go on in this manner for nearly two days more, counsel applying himself at great length to shew that the defendant had not misrepresented the land to the plaintiff. To establish this he brought out the defendant's version of the conversation between the parties, and endeavoured to shew that the land was of good quality. Finally the trial came to a close at the end of the third day, and it was then pointed out to plaintiff's counsel during the course of the argument, for the first time, that he could not recover on the pleadings as they stood, the plaintiff's right to claim rescission having been extinguished by his own act in November 1920. Upon this question arising the trial Judge granted leave to the plaintiff to amend his statement of claim by adding thereto a claim for damages for deceit; the deceit consisting of the alleged fraudulent misrepresentation, and the damages being the difference between the value of the land as represented by the defendant and its real value at the time of the sale. Later the trial Judge gave judgment upon this basis. He found in favour of the plaintiff on the allegation of fraud. As to the damages, he says in his judgment:—"The evidence submitted to me at the trial is not sufficient on which I can assess damages on these lines." Regarding the defendant's counterclaim he states that no evidence was adduced to shew that the plaintiff had failed to pay the taxes and insurance, as alleged; but in so stating he evidently overlooked the admissions in the reply. He found, however, and this fact is also admitted, that the plaintiff did not crop the land in 1921, as he had agreed to do, (the land having been sold on crop payments). He refused to grant the defendant

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any relief on his counterclaim, however, because, as he says, "as a result of this action the plaintiff will be entitled to considerable damages which I am directing to be credited on the agreement." He accordingly directs a reference in the following terms:—

"There will be a reference to the local Registrar to ascertain the amount due under the agreement of sale of the said land and to ascertain the damages suffered by the plaintiff, which would be the difference between the value of the land plaintiff got injuriously affected with sand and alkali as above set out, and the land he should have got according to the representation of the defendant, which, with buildings, was worth $60 per acre for 444.23 acres. These damages will be credited on the amount found due under the agreement of sale, on the reference." He allows the plaintiff his costs of the action and of the reference.

With all due deference I must say that I do not agree with this disposition of the case, and, in my opinion, it should not be allowed to stand. In the case both of the plaintiff and of the defendant, the same person acted both as solicitor and as counsel. From the time the statement of defence was served both counsel knew that an allegation was set up which, if true, would bring the action as framed to an end. From the time of the plaintiff's examination for discovery, both knew that this allegation was admittedly true. Nevertheless, down to the end of the trial neither took any notice of it, but went ahead piling up evidence to shew whether or not there had been a fraudulent misrepresentation. Any evidence, out of the mass of evidence put in, which relates to the condition and the quality of the land is directed, not to the question of the real value in money of the land as compared to the selling price—which would be the question to determine in the case of an action for damages for deceit—but only to the question of whether or not there was any misdescription of the land by the defendant in the statements made by him to the plaintiff. The Judge makes this clear in his statement, which I have quoted above, where he says that there is not sufficient evidence on which he can assess damages. I may add that, having perused the whole of the evidence—and there is a superabundance of it—with the greatest care, I must go further and say that I am unable to determine whether at the time the contract was made (February 5, 1920) the purchase price of the land and buildings set out in the contract, of $26,653.80, was more or less than the real value of the property. It is true that later on in his judgment

he stated that "as a result of the action the plaintiff will be entitled to considerable damages," but I must say that I cannot see on what ground he bases this assertion, unless it is on the theory that the plaintiff necessarily suffered damage if the land was not as valuable as he thought it was from the defendant's description of it. But, in my opinion, this theory is erroneous. If a purchaser is induced by fraud to buy a piece of land, or any other property, he may, upon discovering the fraud, repudiate the transaction, give back the property and claim a return of his purchase money; but if upon discovering the fraud he decides to keep the property, he must pay for it; and, in that case, he must pay the purchase price agreed upon because, in affirming the contract, he elects to keep it alive in all its terms. He may assert his right to damages for the deceit practised upon him by way of an action or of a counterclaim, and he will be entitled to recover his claim and to set it off against the vendor if he can shew that the selling price which he was induced to agree to is in excess of the real value of the property, the difference being the measure of his damages, otherwise his claim must fail.

There is, no doubt, evidence on which the trial Judge might have found fraud, as he did, although I am bound to say that a study of the case from the evidence in the appeal book would make it very difficult for me to arrive at a similar conclusion, unassisted, as I am, by the advantage which the trial Judge enjoyed, of hearing and observing the witnesses as they gave their testimony. I must conclude that, in his opinion, a great deal of evidence which appears, when read, to be reasonable and consistent is, in fact, dishonest. But on the question of actual damages the case is different, and it appears to me that at the end of the trial not only had the plaintiff failed to adduce sufficient evidence of damage, as stated by the trial Judge, but he had established no basis at all on which an inquiry might proceed before the local Registrar. If a reference is made, it seems to me the Registrar will have to determine not only the amount of the damages, as in the ordinary case, but also the primary question as to whether there are any damages at all. This would make the Registrar between the parties, the question of fraud, only, being withheld from his enquiry. And in any case the matter is further complicated by the great difficulty which must exist in determining now a question concerning comparative land values in February 1920. In my opinion it is inadvisable for a variety of reasons to make such a matter the subject of a reference to the local Registrar. If the ques-

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tion is to be gone into at all, it seems to me that in justice to all concerned it should be in a trial *de novo* of the whole case before a Judge or a Judge and jury.

In order to justify his finding in favour of the plaintiff and to order a reference to the local master, the trial Judge had to proceed on the amendment to the claim which he allowed on the argument after all the evidence was in. Now I am aware that Rule 239 of the King's Bench Rules, which empowers the Judge to allow amendments at any stage of the proceedings, is a part of the policy which now governs matters of procedure, the spirit of which is that, in so far as possible, all technical obstacles be swept aside and the parties themselves and the real issues between them brought before the Court with the least possible delay, and in such a manner as to avoid multiplicity of proceedings. In pursuance of this policy, a trial Judge will allow an amendment to be made to the pleadings after all the evidence is in, provided the effect of the amendment will be to have the pleadings fit the facts established by the testimony, and provided, moreover, that the introduction of the amendment will not work an injustice to the other party. I realise, therefore, that when an amendment of this nature has been allowed by the trial Judge, the Appellate Court should not interfere and set it aside except for very grave reasons. For instance, a mere injury to the other party will not be sufficient reason for disallowing an amendment if the injury can be compensated by costs, (see cases cited in Annual Practice 1922 at p. 446). But in the case at Bar I am persuaded that an injustice has been done to the defendant which cannot be compensated by costs. He has never had a fair opportunity of meeting, before the Judge, the issue raised against him by the amendment. No variation which we might make to the Judge's order which gives the costs against him both on the action and on the reference, and we should, I think, reverse this order in any event, would be a proper compensation for such an injury.

However, the defendant's injury consists in his not having had a fair opportunity to meet the allegation of deceit causing damages. This injury can and should, I think, be remedied without disallowing the amendment and without putting the plaintiff to the necessity of bringing a new action. This can be done by providing for proper notice and for a trial of the issue, if necessary.

I think, therefore, that the judgment in the Court below should be set aside, and a new trial ordered on the issue of

deceit and damages only, pursuant to the amendment allowed by the trial Judge; the plaintiff's action for rescission being dismissed. The plaintiff will have 30 days within which to file and serve his amended statement of claim, and the defendant 10 days after service to deliver a defence thereto. Thereafter the cause shall proceed in the usual way.

The defendant should have his costs up to the end of the plaintiff's case at the trial, but not thereafter. As between solicitor and client and counsel and client, no costs shall be taxed against the plaintiff for the proceedings at the trial for counsel fee or otherwise, except for disbursements; and, similarly, no such costs shall be taxed against the defendant, except for disbursements, for that portion of the trial occupied by the presentation of the defendant's case.

I think that the reason for this unusual order as to costs, which I regret to be compelled to make, will appear sufficiently from my remarks in the beginning of this judgment regarding the course pursued by solicitors and by counsel throughout the proceedings.

As to the appeal, I believe that counsel for the plaintiff was justified in taking steps to have the judgment recovered by him in the Court below sustained by this Court, so I make no order as between counsel and client. The defendant should have his costs of the appeal.

To deal next with the defendant's counterclaim, all the allegations of which are admitted by the plaintiff, I do not think that a final order for cancellation and forfeiture should be made now, but that, in view of the large amount of money ($8,168.00) paid by the plaintiff, time should be given him to restore his agreement to good standing. He did not grow any crop on the land last year as provided in the contract. Had he done so, one half of the proceeds would have been payable to the defendant and applied on the agreement. Nor has he paid the taxes and insurance monies. Unless the parties can agree upon the sum to be paid by the plaintiff, there will be a reference to the local Registrar to settle the amount of the arrears; the amount of last year's payment of principal and interest to be fixed on an estimate of what crop might have been grown upon the land if the provisions of the agreement had been complied with. The plaintiff will have until December 1, 1922, to pay the amount fixed by the reference; failing which, a final order for cancellation and forfeiture may be obtained by the defendant in the usual course. If, within a reasonable time after this judgment, it appears that the plaintiff does not

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intend to put the land in crop this year, the defendant shall be at liberty to apply to a Judge of the King's Bench for an order empowering him to enter upon the land and to put it in crop himself. The defendant should have his costs of the counterclaim, subject to the disposition I have already made of the costs of the trial.

New trial ordered.

GROULX v. BRICAULT.

Supreme Court of Canada, Idington, Duff, Anglin, Mignault and Bernier, JJ. November 21, 1921.

RECORD AND REGISTRY LAWS (§IIID—30)—SUBSTITUTION—REGISTRATION —ORDONNANCE DE MOULINS—CONSTRUCTION—PRIORITIES.

In the Province of Quebec, a substitution published and recorded after the period prescribed by the Ordonnance de Moulins is effective from the date of such publication and recording, as against persons acquiring title subsequently thereto.

[*Bulmer* v. *Dufresne* (1878), 3 Dorion 90; *Leroux* v. *McIntosh* (1915), 26 D.L.R. 677, followed.]

APPEAL from the Quebec Court of King's Bench in an action in which the appellant intervened to protect rights which he had ceded, in selling substituted lands. Affirmed.

Geoffrion, K.C., and *Handfield*, K.C. for appellant.

Charles Champoux, for respondent.

IDINGTON, J.:—I think this appeal should be dismissed with costs for the reasons assigned in the Court below.

And the doctrine laid down in the case of *Méloche* v. *Simpson* (1899), 29 Can. S.C.R. 375, answers the plea of prescription suggested by the late Mr. Justice Pelletier and allowed here by consent.

DUFF, J.:—This appeal must be dismissed. The determination of the point in dispute is governed by two decisions of this Court, *Méloche* v. *Simpson*, 29 Can. S.C.R. 375, and *Bulmer* v. *Dufresne* (1878), 3 Dorion 90, the effect of which appears from the judgment of Taschereau, J. (who dissented), reported fully in 3 Dorion, 107.

ANGLIN, J.:—For the reasons assigned in the Court of Review and the Court of King's Bench I have no doubt that the donation in question in this action provided for a substitution of two degrees.

The Court of King's Bench having allowed the appellant to raise the contention that this substitution become null because it was not recorded (insinuée) as prescribed by the Ordonnance de Moulins (art. 57), within 6 months from the date of the deed which created it, although no such plea is included in his

defence, he cannot be denied that right here. We are, therefore, again confronted with the question raised, but not decided, in *Leroux* v. *McIntosh* (1915), 26 D.L.R. 677, 52 Can. S.C.R. 1, whether, although not recorded as required by that ordonnance, a substitution subsequently registered under art. 941 C.C. is or is not good as against a person whose interest was acquired after it had been so registered.

It appears to have been authoritatively determined in *Bulmer* v. *Dufresne* (1878), 3 Dorion 90, by the Court of Queen's Bench and by this Court, to quote the head note of that report, "that even before the Registry laws in Lower Canada, the want of *publication et insinuation* of a will creating a substitution within 6 months after the death of the testator did not invalidate the substitution."

The note of this decision in our Digests (Cassels, 2nd-ed. p. 873; Coutlee, p. 1380) would appear to be incomplete. Although diligent search has been made by the Court reporters for the original opinions delivered in this Court they have not been found. The only report of them available is that of the dissenting opinion delivered by Taschereau, J. published in vol. 3 of Dorion's Reports, which he concludes by saying, at p. 115, "I am, however, alone on this point" i.e., in holding that the nullity arising from default of publication and recording within the prescribed 6 months was absolute. The reputation of the Dorion series is so well established that the authenticity of the head note above quoted should, I think, be accepted. We may add to this that in *Roy* v. *Pineau*, (1882), 3 Dorion 146, Dorion, C.J. says at p. 155:—

"The majority of the Supreme Court also held in the case of *Bulmer* v. *Defresne* that a substitution, although registered after the prescribed delay, was valid. The Judges who constituted this majority have not yet published their decision, but they have not been able to confirm the judgment of this Court beyond holding that the substitution, although not registered within the 6 months following the death of the grantor of the substitution, was not null with respect to those who had only contracted after the will had been registered, since they hold that the appellants Bulmer and other could not have bought from the institute something which they knew, or should have known, that the institute had no right to sell by reason of the registration of the substitution."

On the authority therefore of the decision of this Court in *Bulmer* v. *Dufresne*, the title created by the substitution in

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question here must prevail over rights which depend upon instruments executed after its registration in July, 1880.

The judgment of Dorion, C.J. in *Bulmer* v. *Dufresne*, confirmed by the majority of this Court, was based on art. 941 Civil Code. In that case the will of the testatrix, who died in 1834, was published and recorded in the Court of Queen's Bench 9 months after her death. Art. 941 C.C. which is not indicated as new law (Cod. Rep. vol. 5 pp. 192-3) and was intended as an embodiment of the effect of the statute, 1855 (Can.) ch. 101, was treated as an application of the law in regard to judicial publication and recording existing prior to that statute to the registration system which it substituted for such publication and recording. Indeed the perusal of the statute (1855 ch. 101) makes it reasonably clear that its purpose in substituting registration for the former judicial publication was that is should be subject to similar limitations and should entail consequences identical with those attached to the superseded procedure. The concluding words of sec. 2 are as follows:—

"The delays for registration shall be the same as those established by law for the transcription and the publication in Court, and no legal provision having reference to substitutions not specially repealed, shall be affected by this Act, the sole object of which is to substitute the formality of registration in the Registry Offices for transcription and publication in the Courts of Acts containing substitutions."

Although it has been determined by authority by which we are bound *Symes* v. *Cuvillier* (1880), 5 App. Cas. 138, 49 L.J. (P.C.) 54, that the Ordonnance des Donations of 1731 (art. 58 of the Ordonnance de Moulins deals with donations) as a new law was not in force in Canada because never registered by the Superior Council (p. 157) (it follows that the Ordonnance des Substitutions of 1747 was in like plight and it is that ordonnance and Pothier's Commentaries upon it that the Codifiers assign as the sources of art. 941 C.C.—Commissioners' Report, vol. 5, p. 386), two Royal Declarations, one of November 17, 1690, and the other of January 18, 1720 (likewise not registered in Canada) would seem to have been treated in France as merely declaratory of the interpretation which has been put upon art. 57 of the Ordonnance de Moulins and as such, though unregistered, may be regarded as declaratory of the effect given to that article of the Ordonnance in Canada. The nullity of substitutions not published and recorded within the 6 months prescribed by the Ordonnance de Moulins had

before 1747 been held in France in a long series of arrêts to be not absolute but relative merely, i.e. to obtain, where publication and recording had taken place after the expiry of the prescribed 6 months, only in favour of persons who had acquired interests prior thereto. Dorion, C.J. in *Roy* v. *Pineau* (*ubi. sup.* at pp. 150-153) discusses this question at length and we have the authority of that great jurist for the statement that it was the law of Canada long prior to the statute of 18 Vict. that a substitution published and recorded after the period prescribed by the Ordonnance de Moulins was effective from the date of such publication and recording as against persons acquiring title subsequently thereto. In the comparatively recent judgment of Martineau, J. in *Taillefer* v. *Langevin* (1910), 39 Que S.C. 274, at p. 284, *Bulmer* v. *Dufresne*, is cited as well established authority.

Two titles are preferred in support of the claim of the intervenant—one a deed from Flavien Rochon of 1865, and the other a deed from Felix Rochon of 1889. The latter cannot prevail against the substitution registered in 1880. The former, as pointed out in the judgments delivered in the Court of King's Bench, purports merely to transfer "tons les droits et prétentions" of the grantor under the donation containing the substitution. Those rights were *ex facie* subject to the rights of the substitutes.

Registration of the substitution in 1880 being inconsistent with the intervenant having been a purchaser in good faith in 1889, when he took the conveyance from Felix Rochon, (*Méloche* v. *Simpson* (1899), 29 Can. S.C.R. 375), the claim of prescriptive title under art. 2206 C.C. which he was allowed to prefer by consent, cannot prevail.

MIGNAULT, J.:—Respondents, substitutes under a substitution created in 1819 and not yet opened, sued the Canadian Northern Montreal Land Co., Ltd. to interrupt prescription against their eventual rights, and the appellant, who had sold the substituted lands to one Darling, who had resold them again to the company, intervened in the suit to protect, in his quality as guarantor, the rights which he had ceded. He lost his case in the Court of Review and the Court of Appeal, and now appeals to this Court. As regards the merits of his contentions, I may say that the reasons given by the Honourable Judges of the Court of Appeal are so satisfactory that I am able to dispense with a detailed explanation of my opinion, which is to the effect that the appeal is not well founded in fact and should be dismissed.

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Two principal questions were discussed before this Court:—

1. In view of the fact that the substitution which the appeal attacks was not inscribed within the delays prescribed by the Ordonnance de Moulins, but was registered in the office of the Registration Division of Hochelaga & Jacques Cartier on July 6, 1880, as the appellant admits in his intervention, is the said substitution valid?

2. The appellant, having amended his intervention before this Court by consent of the respondents, so as to claim prescription by 10 years with title and good faith, is this new claim well founded?

1. The respondents rely on art. 941 and the decision of this Court in the case of *Bulmer* v. *Dufresne*, May 9, 1879, in support of their contention that the substitution registered in 1880, before the appellant had acquired the rights which he invokes by this intervention (according to certain indications in the record the appellant's title goes back to 1889; this title is not produced) can be opposed to him notwithstanding the default to inscribe it within a delay of 6 months.

In point of fact art. 941 provides that registration of Acts containing substitutions takes the place of their inscription in the office of the Courts and of their judicial publication, which formalities are abolished. And after fixing a delay of 6 months for registration which, when made within such delay, is retroactive to the time of the gift or the death of the grantor, the article adds that, if registration takes place subsequently, its effect commences only from its date.

In *Bulmer* v. *Dufresne*, it was a case of substitution created by will. The testatrix died on July 30, 1834 and the inscription was made on July 15, 1835, more than 6 months afterwards. The fatal delay of the Ordonnance de Moulins was of course invoked against this substitution, but the Court of Appeal (3 Dorion 90) held in 1878, that even before the registration ordinance (1841) and the abolition of inscription (1855), default to inscribe and publish within 6 months, did not render a substitution null.

That judgment was confirmed by this Court, the late Taschereau, J. dissenting. The decision of this Court was not reported in the Supreme Court reports. A mere note referring to it appears in the late Mr. Cassels' Digest, 2nd ed., p. 873, and this note does not mention the point with which we are concerned. However, the report of the decision of the Court of Appeal is followed by the opinion which the late Taschereau, J. had expressed in this Court, and in arguing against the

validity of the substitution for lack of inscription within 6 months, the Judge added that he alone was of this opinion. I have been unable to find in the archives of this Court the opinions of the other Judges, but there can be no doubt that the judgment of the Court of Appeal was confirmed by this Court and the opinion of Taschereau, J. shews that it was confirmed on the very point with which we are now concerned. I, therefore, believe that we can regard the case of *Bulmer* v. *Dufresne* as an authority in favour of the respondents.

And even without this opinion, art. 941 would furnish the respondents with an argument. In France the rigour of the dispositions of the Ordonnance de Moulins had been mitigated by the Royal Proclamations of 1690 and 1712 and by the ordinance concerning substitutions of 1747, the procedure in this latter ordinance (title 2, arts. 28 and 29) being identical with that of art. 941. It is true that the proclamations of 1690 and 1712 as well as the ordinance of 1747 were not registered in the office of the Superior Council of Quebec, but the fact that the codifiers were influenced by them in drafting art. 941 cannot be disguised. They do not regard this as an innovation, since they do not mark this article as being new law. And in many places under this title of gifts *inter vivos* and by will they have been influenced by the ordinances concerning gifts and substitutions which were not registered. If we cannot go so far as to believe that the codifiers held the opinion, which was rather wide-spread at that time, that registration of royal ordinances by the Superior Council of Quebec was not an essential condition of their coming into force in New France—and many of the best minds were formerly of that opinion—at least we can say that they regarded the ordinances concerning gifts and substitutions as being indicative of the existing law and jurisprudence. I must add that this question of necessity for registration of royal ordinances was, I will not say discussed, but referred to in the affirmative by the Privy Council in 1880 in the case of *Symes* v. *Cuvillier*, 5 App. Cas. 138, where this very ordinance regarding gifts was in question and has now been definitely settled. However, as regards the point which concerns us, the opinion expressed by the Court of Appeal in the case of *Bulmer* v. *Dufresne*, seems to have been pretty generally accepted in the Province of Quebec.

This decision of the Court of Appeal having been confirmed by the Supreme Court, I do not think there is any ground for reopening the discussion and I rely on this judgment in holding

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that the substitution in question in this case can be set up against the appellant.

2. The appellant claims prescription by 10 years by virtue of an alleged translatory title as proprietor and in good faith. He promised to produce this title, but has not done so. Supposing, however, that the title did purport to transfer ownership, it is evident that the appellant cannot plead good faith if he knew or was held to know of the substitution when he acquired the property. Now, since this substitution was registered in 1880 before he acquired the property, such registration, as was decided by this Court in the case of *Méloche* v. *Simpson* 29 Can. S.C.R. 375, prevents any subsequent purchaser from invoking prescription by 10 years, since good faith, the essential condition for such prescription, is lacking.

The appellant contends that this doctrine renders prescription by 10 years almost impossible, for if the right invoked has not been registered, it cannot be set up against purchasers who have priority of registration, and if it has been registered before they acquired the property, they cannot claim to have acquired it in good faith. I have already pointed out in the case of *Samson* v. *Décarie*, 66 D.L.R., which is being decided at the same time as present case, that the laws respecting registration have profoundly modified the principles of civil law, and the present case furnishes an example of this influence. Besides, the judgment rendered in *Méloche* v. *Simpson* is binding upon us and the question is thus definitely decided.

For these reasons I would dismiss the appeal with costs.

BERNIER, J.:—This is an appeal from a judgment of the Court of King's Bench confirming the judgment of the Court of Review, which latter judgment had reversed that of the Superior Court. The Superior Court judgment had maintained the intervention and dismissed the action.

The action is one in interruption of prescription.

Three questions are raised before this Court.

1. Did the deed of gift *inter vivos* dated October 25, 1919, create a substitution of one degree only, or of two degrees? 2. Is the substitution null and of no effect as regards subsequent purchasers of the substituted property by reason of not having been inscribed and published in the office of the Court within 6 months from its date or during the life time of the donors? 3. Have the respondents any ground for invoking prescription by ten years with title and good faith?

1. By notarial deed dated October 25, 1919, Jacques Rochon and his wife Marie Meilleur made a gift *inter vivos* to their son

Pierre Rochon of two immovable properties in the parish of St. Laurent, amongst which was included the property in question in this case. In the said deed the donors declared the property to be substituted in the following terms:—

"1. For the benefit of the children and descendants of the said donee, either by first or second marriage, or by any other subsequent marriage, in equal portions without preference to the children of the first or other subsequent marriage, and for the benefit of their descendants in all degrees.

And if the said donee should die without issue, or if his children, who might benefit by the said substitution *in the first degree,* should die without issue, leaving no other descendant of the said donee, the said substitution shall take place in favour of Maire Louise Rochon daughter of the donors, sister of the said donee and wife of the above named Louis Meunier, if she is then living, or if she is dead, then in favour of her children or descendants in all degrees; and, if the said donee and his said sister should die without children and descendants, said substitution shall take place in favour of such of the nearest relatives of the said donees as may be by law entitled to inherit from them . . . . "

I am of opinion that this is a substitution of two degrees.

The donee Pierre Rochon, is an institute in favour of his children, who are the first substitutes; these children in their turn, substitutes in the first degree, are institutes in favour of their own children, if any there be.

Should the donee have no children or grandchildren the substitution of the property is to go to Marie Louise Rochon, if then living, or to her children if she is dead; if the donee himself or his above named sister should have died without children, the substitution would have gone in favour of the nearest relatives of the donors.

There are, therefore, clearly two classes of substitutes in this substitution.

2. The deed of gift *inter vivos* containing the substitution was never inscribed or published in the office of the Court during the lifetime of the donors. It was not registered until 1880.

Is the default to inscribe fatal as regards third parties who may acquire the property?

The Ordonnance de Moulins (1566) declared null and of no effect all substitutions which were not inscribed within the delays therein mentioned. By art. 58 it was provided that gifts should be inscribed within four months from their date, "as

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regards the goods and persons of those living within our kingdom, and within 6 months for those outside our kingdom."

This ordinance was amended by the King's proclamation of November 17, 1690 and also by that of January 13, 1712. These amendments were to the effect that substitutions might be inscribed at any time, but that they should only take effect, as against third parties acquiring the property, from the date of their inscription, if such inscription was made after the delay provided.

The King's proclamation of January 18, 1712 contains the following provisions:—

2. "The said publication and registration shall be made within 6 months from the date of any deed creating substitution by disposition *inter vivos;* and from the death of the testator in case of a substitution created by disposition in contemplation of death."

44. "Substitutions which have not been published or registered within the said delay of 6 months cannot be set up against creditors or third parties acquiring the property; and those which have only been published and registered after such delay, can only be set up from the day of the said publication and registration."

The Act of 1855, ch. 101 made no change in this respect. It says in sec. 2: "The delays for registration of these deeds shall remain the same as those established by law for the transcription and publication in Court, and no legal provision having reference to substitutions, not specially repealed, shall be affected by this Act the sole object of which is to substitute the formality of registration in the Registry Offices for transcription and publication in the Courts of Acts containing substitutions."

This Act was consolidated and incorporated in almost identical words in the Revised Statutes of Lower Canada in 1861. Our Civil Code, arts. 939, 941 and 2103, gives the rules in question.

These articles are not in brackets in the Code, so they must not be considered as new law. We must, therefore, infer that before the Code the law did not nullify substitutions which were not inscribed or registered, but that it permitted inscription or registration saving, however, the rights of third parties that might have been registered in the interval.

The counsel for the appellant objects that the proclamations of 1690 and 1712, as well as the ordinance concerning substitutions of 1747, were not registered with the Superior Council

at Quebec; that be reason of such default of registration these declarations and ordinances did not have the force of law in our province; and that we must therefore be guided by the Ordonnance de Moulins until 1855; and he adds that their Lordships of the Privy Council have expressed the opinion that lack of registration of French ordinances was a bar to their coming into force in Lower Canada: *Symes* v. *Cuvillier*, 5 App. Cas. 138.

Without wishing to enter into a discussion on the question of registration of French ordinances subsequently to the edict creating the Sovereign Council, I must say, however, that the above cited proclamations of the King of France have always, in my opinion, been the law governing the matter. Our codifiers were also of this opinion.

The Ordonnance de Moulins (1566) was intended to apply, according to the terms of art. 58, not only to the Kingdom of France but also in the French Colonies. The subsequent royal proclamations amending this ordinance had a similar application.

Furthermore, to express a personal opinion, I must say that I do not think these ordinances which were of general interest, had to be registered with the Sovereign Council in order to have force and effect in this country.

If the substitution in question in this case was never inscribed, it was nevertheless registered on July 6, 1880, and this registration takes effect from that date. Now, who are the third parties whose rights are registered before that date? The intervenant sold the property in the substituted lands to the defendant on December 16, 1912; his deed of sale is produced, but he did not produce his deed of purchase. None of the deeds anterior to this purchase of property have been produced. It is true that he produced deeds of declaration and ratification, passed before notaries, between himself and Dame Flavie Rochon on June 22, 1911. These declarations enumerate certain contracts passed between the substitutes in 1865, 1880, 1889, 1868, 1881, and 1889. The contents of these contracts are not known. In the list which is given of them it is merely stated that the substitutes simply cede the rights and claims which they might have to the substituted immovables. Now, the transfer of these rights could not constitute an alienation of the right of property, since the substitution was not yet opened and the substitutes were themselves bound to hand over the property.

Besides, these notarial declarations have no authentic force.

The prescription by 10 years with title in good faith invoked by the appellant in this case cannot be maintained either. The

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deed *inter vivos* containing the substitution was registered in 1880 and, therefore, the appellant cannot invoke good faith on his part. As for his title, it only gave him, as I have just said, the rights and claims which his vendors could give him, and the titles which he can invoke have never been produced in the record.

I would dismiss the appeal and maintain the judgment with costs.

Appeal dismissed.

REX v. GALLANT.

Nova Scotia Supreme Court, Harris, C.J., Russell, J., Ritchie, E.J., Mellish and Rogers, JJ. April 28, 1922.

EVIDENCE (§XII L-989)—CRIMINAL LAW—INCEST—EVIDENCE OF SISTER—ACCOMPLICE—CORROBORATION OF EVIDENCE—CRIMINAL CODE, SEC. 1014—STATED CASE.

On the trial of an accused for the crime of incest the sister with whom the crime was alleged to have been committed was called as a witness for the Crown, and gave evidence denying the brother's guilt, and to rebut this evidence the statement of the sister at the preliminary examination was admitted. The brother having been convicted, the following case was reserved for the opinion of the Court: (1) Was Mary Gallant a witness called and examined by the Crown on the trial of Octave Gallant an accomplice; (2) If so was there such corroboration of her evidence as is required by law; (3) Ought I to have warned the jury of the danger of convicting accused on the uncorroborated testimony of the said witness? Harris, C.J., and Rogers thought that the first and second questions should be answered in the affirmative. Russell, J., and Ritchie, E.J., did not answer the questions, and Mellish, J., answered the first question in the negative. The majority of the Court held that there had been no substantial wrong or miscarriage and that the conviction should be affirmed.

CROWN CASE stated by Chisholm, J., for the opinion of the Court of Appeal pursuant to the provisions of sec. 1014 of the Criminal Code. Conviction affirmed.

F. L. Milner, K.C. for prisoner.

F. Mathers, K.C., Deputy-Attorney-General, for the Crown.

HARRIS, C.J.:—I concur with ROGERS, J.

RUSSELL, J.:—The case is that a prisoner was on trial before the Court and jury for the crime of incest, the charge being that he had had sexual intercourse with his own sister. The latter was examined as a witness and gave evidence which if believed by the jury must have resulted in an acquittal. To rebut this evidence the statement of the sister at the preliminary examination was admitted. This evidence, although admissible and admitted for the purpose of neutralising the effect of the testimony given by the witness in the prisoner's favour,

could not be used as evidence against the prisoner and the jury should have been so instructed. Instead of giving such instruction, the trial Judge left it to the jury to say which of the two conflicting statements was true. This instruction might mean only that they were to decide if they saw fit that the evidence in favour of the prisoner was untrue and should therefore be rejected. But 9 jurors out of 10 would not reason so clearly. They would infer from the words of the Judge that if they believed the evidence given at the preliminary investigation to be true they should convict the prisoner. The trial Judge must have considered the evidence admissible for that purpose or he could not have reserved the question whether it needed corroboration. I consider the statement at the preliminary investigation as evidence against the prisoner and that their verdict was based in part on the evidence so considered.

Apart from this evidence altogether I think there was enough evidence against the prisoner to warrant and support the verdict. But I am by no means certain that if it had not been for the evidence of the sister the jury would have been free from doubt as to his guilt. My first impression was that such a doubt, if entertained, would be a reasonable one, but after perusing the opinion of my brother Rogers, I have come to the conclusion that there was no room for a reasonable doubt as to the guilt of the prisoner. The case therefore is, in my opinion, one in which no substantial wrong or miscarriage has been occasioned. I agree that the conviction should be affirmed. I agree also with my brother Ritchie that no useful purpose would be served by answering the questions reserved.

RITCHIE, E.J.:—The charge against Gallant was that he had sexual intercourse with his sister, Mary Gallant, and thereby committed the crime of incest. Gallant was found guilty by a jury. The trial Judge was asked by counsel for Gallant to reserve, and he did reserve, the following case for the opinion of the Court:—

1. Was Mary Gallant a witness called and examined by the Crown on the trial of the said Octave Gallant an accomplice? 2. If so, was there such corroboration of her evidence as is required by law? 3. Ought I to have warned the jury of the danger of convicting the accused on the uncorroborated testimony of the said witness? 4. If the first question should be answered in the affirmative and the second question in the negative and the third question in the affirmative, ought the accused to be discharged or a new trial directed?

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For the purpose of the argument of these questions the Judge attached the following:—

1. The evidence taken on the trial. 2. The evidence of the prisoner taken at the coroner's inquisition. 3. The evidence of Mary Gallant taken on the preliminary investigation. 4. My instructions to the jury.

Mary Gallant is the sister of the accused and the woman with whom he had been found guilty of incest. She was called on the trial by the Crown, but she distinctly and categorically denied that she ever had sexual intercourse with him; she gave no evidence in support of the case for the Crown. This woman in the preliminary examination before the magistrate gave evidence that she had sexual intercourse with the accused and that he was the father of her child. The deposition was put in evidence for the purpose of neutralising the denial which she gave in the witness box. It was clearly not admissible for any other purpose and I assume that it was only received for the purpose which I have mentioned. This being so I am unable to understand why counsel asked the trial Judge to reserve the questions under consideration. Mary Gallant did not, as I have said, give any evidence against the accused. It was properly conceded by the Deputy-Attorney-General that the woman was an accomplice, but so far as the question of corroboration is concerned the Court is asked to decide whether evidence which was not given should have been corroborated. In my opinion the proper way to deal with these questions is to decline to answer them. Counsel for the accused asked to have the case sent back to the Judge to reserve another and entirely different question.

The Deputy-Attorney-General contended that the Court had no power to send a case back to the Judge to reserve a new and entirely different question from that which he had been asked to reserve. The procedure is statutory; it follows if the Court has the power it must be derived from the statute. The only statutory authority is to be found in sub-sec. 3 of sec. 1017 of the Crim. Code, which is as follows:—

"The Court of Appeal may in its discretion send back any case to the Court by which it was stated to be amended or restated."

Sub-section 2 of sec. 1007 of the Code is as follows:—"The Court may in its discretion either hear and determine the matter during the same sittings or reserve the matter for the Court of Appeal as hereinafter provided."

I am of the opinion that upon the true construction of the

sections which I have quoted the Court has no jurisdiction to send the case back to the Judge to reserve by way of amendment or restatement a question which he has not been asked to reserve. I think the application to reserve must be made to the Court before which the accused person was tried, and that amendment or restatement is applicable only to cases where the points reserved are not clearly or sufficiently stated or where the material forming the case is insufficient to properly raise the question reserved. The view that the application must first be made to the trial Judge finds support in the authorities. In *R.* v. *Blythe* (1909), 15 Can. Cr. Cas. 224, at p. 231, Riddell, J. said:—"Upon an appeal taken from my refusal to state a case for the Court of Appeal, I understand that the grounds upon which I had been asked to state a case were not pressed, or if pressed not successful, but that a new ground was urged upon the Court of Appeal. As the Court thought they had no jurisdiction to entertain that application without a refusal upon my part to state a case upon that ground, I am now applied to to state a case accordingly."

I also refer to the following cases cited by the Deputy-Attorney-General: *R.* v. *Carlin* (1903), 6 Can. Cr. Cas. 507; *R.* v. *Jenkins* (1908), 14 Can. Cr. Cas. 221; *R.* v. *Daun* (1906), 11 Can. Cr. Cas. 244.

If it was a question of the exercise of discretion under the evidence in this case I would exercise that discretion against the accused.

I would decline to send the case back to the trial Judge for amendment or restatement.

MELLISH, J.:—The defendant was found guilty of having sexual intercourse with his sister, Mary Gallant. The trial Judge has reserved the following questions of law for our consideration at the instance of defendant's counsel:—

(Set out in full in the opinion of Ritchie, E.J. *ante* p. 539.)

The record returned by the trial Judge shews that this witness gave evidence denying the intercourse with the accused, and alleged that the child which she had was begotten not by the prisoner but by a man named Gaudet. She denied having admitted on the preliminary examination that defendant was the father of the child and the Crown then called the Magistrate before whom the deposition was taken. The deposition was proved by the Magistrate, and read to the jury as part of the Crown's case, as I infer from the trial Judge's charge.

Whether this witness was in fact an accomplice is not I think the point raised by the first question. The only way in

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which the question is relevant to this case arises by interpreting the question to mean—whether for the purpose of dealing with her testimony she can be regarded as an accomplice. This as it must be on a reserved case is a question of law.

The trial Judge apparently thought she could be an accomplice, otherwise no such questions could under the circumstances have been reserved. With great respect I think this conclusion not justified. It could only be arrived at by accepting the evidence given by her before the Magistrate as affirmative evidence against the accused, which was apparently done. This being done such evidence, if believed, from its very nature might make her an accomplice, and for that reason apparently the question is before us in its present form.

The fact that the trial Judge may have made an error in respect of the use of such evidence, but for which he would not have so ruled, does not, I think, absolve us from the duty of answering the first question, which I think must be answered in the negative.

The other questions submitted therefore require no answer.

In these circumstances, I think, under sec. 1018 of the Code the verdict should be set aside and a new trial ordered.

The evidence contained in the deposition referred to is most damaging to the accused; so much so, that I think it impossible to say that the jury was not affected by it in a manner prejudicial to the accused. If so, I think a substantial wrong has been done and it is irrelevant for us to consider whether or not a conviction would have been justified without the evidence of this particular witness.

The accused is entitled not to be tried by us.

ROGERS, J.:—The conclusion arrived at by Ritchie, E.J., is, I think, correct, although I have reached it in part perhaps by a different process of reasoning. There was the most ample evidence both circumstantial and testimonial on which the prisoner could well have been convicted without reference either to the evidence of the sister on the trial or to her deposition which was used to contradict her testimony which denied complicity. The admissions made by the accused to both physicians, in the case of the one that the sister was "his woman" and in the case of the other "his wife" and the further statement made by the woman in the presence of the accused to a neighbour who talked with her both before and after the confinement shewing that the two were living together as man and wife, a statement confirmed by the accused himself to the same witness, the proof of a former conviction of the prisoner for the

same offence with the same woman shewing the presence of guilty passion. The *King* v. *Ball*, [1911] A.C. 47, 80 L.J. (K.B.) 591, all coupled with the evidence of the prisoner before the coroner when the death of the child, admittedly that of the sister, was inquired into, tend to prove, in my opinion, a very strong if not conclusive case and a verdict of guilty on such evidence could not well be disturbed. The sister had, however, been examined before the Magistrate on the preliminary hearing and upon her evidence there it would appear the prisoner was brought to trial. The Crown Prosecutor under the circumstances could hardly avoid calling her and he was doubtless taken by surprise at her denial of the brother's guilt. He was compelled to neutralise her present evidence by her former contrary statement on oath. Her attention was called to the deposition which was read to her and upon her persistence in her denial the committing Magistrate was called to confirm and he did confirm the correctness of the deposition.

On this state of facts an application was granted for the reserved case and I can see no difficulty in answering or sound reason for refusing to answer the first two of them, although the result is the same,—the affirmance of the conviction. The sister was clearly to be regarded as an accomplice for the purpose of the trial. She was put forward by the Crown because she was supposed to be involved in the crime and she is to be treated as an accomplice quite irrespective of the value or effect of her evidence and I would therefore answer the first question affirmatively.

The second question is as to whether there was such corroboration of her evidence as is required by law. The answer must also be in the affirmative, for while her evidence proved in the result useless there was in my view ample evidence of guilt without seeking any assistance from the neutralised evidence of the woman. The third question it now becomes unnecessary to answer for there was no reason to warn the jury in the words of that question of the danger of convicting on uncorroborated evidence for no such danger was within the limits of possibility.

It has been suggested (though the question was not reserved) that the trial Judge should have warned the jury that the contradictory evidence of the Magistrate and the deposition taken by him were introduced and were only to be regarded by them as being calculated to destroy the woman's denial upon the trial and was not to be treated as substantive evidence. The statute imposes no such requirement. Indeed the use of the deposition

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seems by the statute itself to be left pretty much in the hands of the Judge himself. The last lines of the section (Canada Evidence Act ch. 145, R.S.C. 1906 sec. 10) providing that "the Judge at any time during the trial may require the production of the writing for his inspection and thereupon make such use of it for the purposes of the trial as he sees fit," and see *The Queen* v. *Garner* (1889), 6 Times. L.R. 110. It is very difficult even by a warning to prevent a jury from being influenced by a former statement used on the trial for a specific purpose only, and this is one of the reasons why the policy of the law in this regard has been questioned (See Greenleaf on Evidence ed. 15 sec. 465a.) In some cases I can well understand why it should be wise that the trial Judge should warn the jury of the precise purpose of the contradictory evidence but this is a matter of prudence under the circumstances rather than of positive requirement. The Judge has I think in his charge dealt satisfactorily with the point now under discussion. He deals at length with all the evidence (other than that of the woman) and he even points out, after referring to her statements before him and those before the Magistrate, that it is for the jury to determine whether she told the truth before them or before the preliminary tribunal; there is no suggestion that the deposition and the testimony of the Magistrate are to be treated as substantive evidence, rather, it may be said that he impliedly intimates that her contradictory statements are to be disregarded for their repugnancy and that it was for the jury to determine the matter for themselves on the evidence *aliunde*. I think this is a reasonable interpretation of the charge. I agree with Ritchie, E.J., that the Court should not exercise its discretion (if indeed it can do so) either to order a new trial or to send the case back for amendment or for the purpose of having a new case submitted. The conviction should be confirmed.

Conviction confirmed.

COUNTY OF ARTHABASKA v. CORP'N OF CHESTER EAST.

Supreme Court of Canada, Idington, Duff, Anglin, Mignault and Bernier, JJ., November, 21, 1921.

HIGHWAYS (§IIA—20)—MUNICIPAL CODE (QUE.) ART. 447—ROAD NOT YET IN EXISTENCE—CONFINED WHEN BUILT TO LOCAL MUNICIPALITY—POWER OF COUNTY CORPORATION TO DECLARE IT A COUNTY ROAD.

A County Corporation has no power under art. 447 of the New Municipal Code (Que.) to declare a road, which does not yet exist, but which when opened and built, will be entirely within the territory of a local Municipality to be a county road, although such road would connect with other roads in neighboring Municipalities, and form a highway of great importance to the county.

[*Bothwell* v. *Corporation of West Wickham* (1880), 6 Q.L.R. 45, followed.]

APPEAL by a county corporation from a judgment of the Quebec King's Bench in an action to have a road declared to be a county road under sec. 447 of the Quebec Municipal Code. Affirmed.

St. Laurent, K.C., and *Perrault*, K.C., for appellant.

A. Taschereau, K.C., and *Girouard*, for respondent.

IDINGTON, J.:—Any jurisdiction we have to interfere herein must rest upon that part of sub-sec. (b) of sec. 46 of the Supreme Court Act R.S.C. 1906, ch. 135, falling within the words therein as follows:—"or to any title to lands or tenements, annual rents and other matters or things where rights in future might be bound."

When the notice to quash made herein was dismissed the fact that there had been expropriations made in virtue of the proceedings appellant had taken was pointed to as within said subsection.

Upon due consideration of all that has developed in argument herein I fail to find anything of that kind, or approximately so, as part of the subject matter of the appeal.

The mere surmise that ultimately some such questions may possibly arise, turning upon the question of whether or not that which has been done by the appellant is or is not *ultra vires*, cannot give us jurisdiction to overrule the decisions of the Courts below acting within the jurisdiction given by the Legislature in way of a supervising power over municipal assertions of authority such as appellant pretended to exercise and is in question herein by virtue of the powers given it in the Municipal Code.

I am, therefore, by reason of such question of possible want of jurisdiction all the more inclined to abide by the reasoning of the majority of the Court of Appeal which presents cogent reasons against such an extreme and unusual exercise of authority as appellant has pretended to exercise and seeks herein to have maintained.

The primary idea of a county road is one running through more than one local municipality.

If the appellant had seen fit to construct the road in question, at its own expense, and then desired to abandon such a road once constructed to the local municipality and thus cast the burden of its maintenance upon the local municipality, I could conceive of its action being somewhat more in accord with the spirit, as well as the literal language of the rather confusing legislation bearing upon the question than it seems to be.

I am loath to accept the conclusion that the Legislature, in

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light of the jurisprudence that preceded its latest enactment, really designed to give the appellant such a curious power as is pretended to have been given it.

If it had intended thereby to assign the counties the power of directing a local municipality to open and construct in a single municipality a road confined within same and to maintain same, it should have done so by a clear expression of such purpose and swept away all other old conflicting and embarrassing provisions inconsistent therewith.

I would dismiss this appeal with costs.

DUFF, J., (dissenting):—I concur with the Chief Justice of Quebec in his opinion as to the effect of art. 447 of the Municipal Code. I only add that the reasons given by the Chief Justice establish in a manner entirely satisfactory to my mind that the construction adopted by him is the only construction which avoids the alternative of doing violence to the object of the Legislature as disclosed by an examination of the provisions as a whole. That being so I find no difficulty in reading the words "under the control of a local corporation" as equivalent to belonging to a class of roads under the control of a local corporation. In this view all the difficulty arising from the verbal structure of the clause in question disappears.

The only remaining point is the question whether the course of decision in Quebec has been such as to establish the law in the sense contended for by the respondent.

I shall first consider the effect of the decisions relied upon. They begin with the decision of the Court of Review in *Bothwell* v. *West Wickham*, 6 Q.L.R. 45. The Court of Review in that case considered the meaning of sec. 758 of the old code which, with certain modifications, is now sec. 447 of the existing Municipal Code. The decision was given in 1880. The question arose on an appeal from the judgment of the Superior Court of Arthabaska which had ordered a peremptory writ of mandamus to issue condemning the township of West Wickham to open and complete a certain road within a specified time under a penalty of $1,000 for default. The road in question was one situated entirely within the local limits of the township and by force of art. 755 of the existing Code it fell within the category "local road." The County Council in January 1877, declared the road to be a county road and ordered that it should be commenced and finished on two severally named dates. In the following September and prior to the date of commencement provided for by the order of the previous January the County Council professed to declare the road to

be a local work. The Court of Review reversed the order of the primary Court on various grounds, among others that the order of the County Council was inoperative for want of the notice and publication required by law; that in any case the Superior Court had exceeded its powers in the imposition of the penalty; that the *procés verbal* was too vague to enforce by mandamus and finally that the County Council had no authority under the powers conferred by arts. 758 and 759 effectively to declare a non-existent local road a county road for the purpose of getting jurisdiction under these articles.

It will be observed that the real question for consideration before the Court of Review as regards the construction of art. 758 and strictly the only question arising under that article was the question whether or not the County Council had authority by force of it to order the township municipality to open and construct a local road which had not previously been established. As regards that question the language of the article was explicit; no authority was given by the article to require the local municipality to incur the expense of opening or constructing any road. Assuming the County Council had power to declare a non-existent road a County road and thereby to acquire jurisdiction to establish it as a lawful highway, it is quite plain that the article gave no authority to the County Council to place upon the local municipality the burden of opening and constructing the road. It is true that art. 762 must apply to roads to be made as well as to roads already made. I entertain no doubt myself as to the effect of this provision in its relation to the power under art. 758 to declare a local road a county road. The authority, I think, was plainly given. It is equally clear, I think, that as regards such roads the power of the County Council did not include the authority to direct that the local municipality should assume the whole or any part of the cost of constructing or opening it but that this authority to impose a financial burden upon the local municipality in respect of such roads extended only to the cost of maintenance and reparation.

The judgment of the Court no doubt does rest in part upon its view of the proper construction of arts. 758 and 762, but the practical point decided was the one just mentioned, the point that, assuming authority to open the road vested in the County Council, the cost of construction must be borne by the Council and not by the local municipality.

In order of date, the next case relied upon is *Giguère* v. *Beauce*, 19 Que. K.B. 353, decided in 1910. The judgment of

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Carroll, J., which is the only judgment appearing in the reports points out that the decision of the Court of Revision in *Bothwell's* case had no relevancy to the question then before the Court of Appeal. As to the judgment delivered in *Nicolet* v. *Villers* (1918), 27 Que. K.B. 289, I am not able to discover there any opinion or judgment which has any relevancy.

The civil law recognises the effect of a series of decisions although the doctrine of precedent as known to the common law has strictly no place in it. Examining the decisions bearing upon the point before us, I am unable to discover anything like such a continuity of adjudication upon the precise point we have to pass upon, as would be necessary to establish a law independently of the meaning of the words of the statute themselves. There is no doubt the circumstances which must be taken into consideration that the statute was enacted without very serious change in its language after the first of these decisions was delivered; but the rule of statutory construction applied by the English Courts that where a Superior Court has given a meaning to a set of words used by the Legislature and the Legislature has reproduced these words, *prima facie* it is taken to have adopted the meaning thus given to them is a rule which at all events in the imperative form in which it is applied in common law jurisdictions cannot be said to be binding upon Courts administering the law of Quebec. One very obvious reason for this is that a decision by a Superior Court under the Quebec system is not an "authority" in the sense in which common lawyers use the term; it is important and weighty evidence as to what the law is, but no more. The tribunal which pronounced the decision may with perfect propriety decline to follow it. The presumption, therefore, that the Legislature in re-enacting a statutory provision which has already been construed intends thereby to stereotype the meaning which has been ascribed by a single decision to the enactment delivered in *Schmidt's* case (1912), 3 D.L.R. 69, 46 Can. exceedingly little force. There is another reason and it is this. In this country, I have fully developed this point in a judgment delivered *Schmidt's* case (1912), 3 D.L.R. 69, 46 Can. S.C.R. 45, which was afterwards approved by the Privy Council 15 D.L.R. 755, [1914] A.C. 197, it has long been recognised that such a presumption does violence to the fact and consequently as early as 1891 an enactment was passed by the Dominion Parliament applying to all Dominion statutes and this enactment has since been reproduced in most of the Provinces in which such a rule could have been supposed to have

sway negativing the existence of the rule and directing tribunals called upon to construe statutes to construe them according to their real meaning and without regard to any such supposed presumption. This legislation, as I say, was passed as is well known in recognition of the fact that the presumption which, no doubt in England has a sound foundation in the practice of Parliament with regard to the drafting and preparation of statutes, was in this country a mere artificial rule resulting frequently, where it was applied in the frustration of the legislative intention.

The appeal, in my opinion, should be allowed.

ANGLIN, J.:—This is an action brought under the supervisory power conferred on the Superior Court by art. 50 C.C.P., to quash and set aside a *procès verbal* and its homologation by the council of the appellant corporation and subsequent proceedings for the opening and construction as a county road of a contemplated highway situated wholly within the limits of the local municipality of St. Norbert. The facts out of which the litigation arises are detailed in the judgments delivered in the Superior Court and the Court of King's Bench ((1921), 31 Que. K.B. 475) and in the opinions prepared by my brothers. A number of minor matters dealt with in the judgments below were but slightly pressed in this Court and would not seem to call for further discussion.

Having regard to the nature of the jurisdiction invoked by the plaintiffs, the contest is virtually limited to the questions whether the impugned *procès verbal* and its homologation were *ultra vires* of the county council and, if not, whether there is such gross and palpable injustice in the distribution made of the cost of the proposed works as would warrant interference on the ground of oppression.

Counsel for the appellant in supporting the jurisdiction of the county council contended (a) that the road in question forms part of a highway which will run through two or more local municipalities and is, therefore, *ex natura* a county road; (b) that under art. 451 of the Municipal Code of 1916 a county council is empowered to establish as a county road a highway to be wholly situate within a local municipality although no action towards creating it or determining its situs has yet been taken by the proper authority of such local municipality.

(a) The appellant's case on this branch is rested on an alleged declaration by it, made under the authority of the first paragraph of art. 447 M.C., that a highway already constructed by the local authority in the adjoining municipality of Chester

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North, with which the projected road in St. Norbert would connect, thus providing a through road to the provincial highway leading from Victoriaville to Arthabaska, should become a county road. Without pausing to examine in detail the proceedings of the county council relied upon as containing or implying such a declaration in regard to the road in Chester North, I shall content myself with again stating, as I did during the argument, that I fail to find in them anything of the kind. The power conferred by art. 447 is so extraordinary that it is not too much to expect that its exercise should be explicit. Not only is there no explicit declaration by the County Council that the road in Chester North "shall in future be a county road" but, if that would suffice, there is nothing to warrant an inference that the County Council ever meant to assume responsibility for its control, maintenance and repair, which such a declaration would involve.

(b) If the question as to the construction of art. 451 M.C. were *res integra*, it may be that I would have accepted the view clearly and forcibly presented by the Chief Justice of Quebec in his dissenting opinion. But it was determined 41 years ago by a strong Court (Meredith, C.J., Stuart, J. and Caron, J.) in *Bothwell* v. *Corporation of West Wickham* (1880), 6 Q.L.R. 45, and in a carefully considered judgment that the words "road to be made" (chemin à faire) in art. 762 of the former municipal code meant a road already established by the local authority, although not yet constructed, and that they did not include "a road which previously did not exist in any way." That judgment was approved in *Giguère* v. *Comté de Beauce* (1910), 19 Que. K.B. 353, and was followed in *Brunet* v. *County of Beauharnois* (1911), 18 Rev. de Jur. 141. The legislature in re-enacting the former art. 762 M.C. in 1916 as art. 451 of the new municipal code practically in *ipsissimis verbis* (the only change is the addition of the words "bridge or water course" twice after the word "road") may be taken to have intended that it should receive the well established construction thus put upon it. Their Lordships of the Judicial Committee said in a Quebec case, *Casgrain* v. *Atlantic & North West Rly. Co.*, [1895] A.C. 282 at pp. 300, 301, 64 L.J. (P.C.) 88:—

"Their Lordships cannot assume that the Dominion Legislature, when they adopted the clause verbatim in the year 1888 were in ignorance of the judicial interpretation which it had received. It must on the contrary be assumed that they understood that sec. 12 of the Canadian Act must have been acted

upon in the light of that interpretation. In these circumstances, their Lordships, even if they had entertained doubts as to the meaning of sec. 12 of the Act of 1888 would have declined to disturb the construction of its language which had been judicially affirmed."

The section there in question dealt with the power of a municipality to sanction the closing of a public street. It has been construed in two decisions rendered in Upper Canada in 1857. The principle underlying this judgment is recognised in the French authorities. Thus we find Baudry-Lacantinerie in the first volume of his Traité de Droit Civil, para. No. 261, saying:—"lorsque le législateur reproduit une règle déja formulée par la loi, il est probable qu'il lui conserve le sens qu'elle avait."

See too, Fuzier-Herman, Rep. vbo. Lois et Décrets, No. 375. I refrain from citing other well known English authorities to the same effect. They may be found conveniently collected in Maxwell on Statutes, 6th ed. at p. 542, and in 27 Hals. para. 263. I had occasion to apply this principle of construction in the recent case of *Arnold* v. *Dominion Trust Co.* (1918), 41 D.L.R. 107, 56 Can. S.C.R. 433.

There is no provision in the Quebec statutes such as has been introduced in other legislative jurisdictions (R.S.C. 1906, ch. 1, sec. 21 (4); R.S.O. 1914, ch. 1, sec. 20), to exclude this well-known rule of statutory construction, based on the presumption that Parliament knows the law, that its re-enactment, especially in a consolidating Act, implies the adoption by the Legislature of judicial construction placed upon the language of a statute.

Since the new Municipal Code was enacted the Court of King's Bench (Archambault, C.J., Lavergne, Cross, Caron and Pelletier, JJ.) in *County of Nicolet* v. *Village of Villers* (1918), 27 Que. K.B. 289, has put the same construction on art. 451 of the new code as was formerly given to art. 762 of the old code.

Much reliance was placed by counsel for the appellant on the introduction of the words "construction and opening" into para. 3 of art. 447 of the new code, which replaced former art. 758, as warranting, if not requiring, the wider construction put upon the new art. 451 by the Chief Justice of Quebec in the present case. But an examination of art. 447 itself seems to answer that argument. In the first place the word "opening" follows the word "construction" indicating that the physical opening or the declaring of the constructed road open for traffic is meant rather than the formal determination to

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create a road, which of course precedes its construction. Moreover, in the phrase in para. 3, "for the construction, opening, maintenance and repair of such road," the words "such road" clearly refers to the road mentioned in para. 1, and that should (but for its extension by art. 451) be understood to mean a road having actual physical existence as distinguished from the "road to be made" dealt with by art. 451. Otherwise art. 451 would have no office—a consequence always avoided, if possible, in construing a statute. *Reg.* v. *Bishop of Oxford* (1879), 4 Q.B.D. 245, 48 L.J. (Q.B.) 609.

The words "construction and opening" were required in art. 447 (3) to provide for the case of a road not yet made but determined on by the local authority, which the county council was held to have had authority under sec. 762 of the old code to declare a county road. The county council could formerly determine how the cost of maintaining and repairing such a road could be borne. It can now make a like provision for the cost of its "construction and opening"—which was formerly *casus omissus*. The purpose of this change is, therefore, sufficiently met and reasonable effect is given to it without imputing to the Legislature the very improbable intent of thus indirectly interfering with the construction of former art. 762 when re-enacting it without material change as art. 451.

Greenshields, J. has in his judgment made a useful comparative analysis of the relevant provisions of the new and the old codes.

On the ground, therefore, that the construction of the words "road to be made" (chemin à faire) in art. 451 M.C. had been long established in the jurisprudence to the Province of Quebec and that the Legislature far from suggesting any intention that that construction should be departed from in the future has rather indicated its purpose to adopt and confirm it, I am of the opinion that the judgment of the majority of the Judges of the Court of King's Bench should be upheld.

MIGNAULT, J:—The principal question which this case raises is to determine if under art. 447 of the new Municipal Code a county corporation can declare a road, which does not yet exist, but which, when opened and built, will be entirely within the territory of a local municipality, that is to say, in the present instance, of St. Norbert, to be a county road. The road in question as planned would connect with other roads either opened or to be opened, in neighbouring municipalities, thus forming a highway of great importance for the County of Ar-

thabaska. And it is the corporation of this county which ordered the present road to be opened and built.

The Court of Appeal denied this power to the county corporation and the latter appeals to this Court. The majority of the Judges of the Court of Appeal (the Chief Justice dissenting) are guided by the jurisprudence of the Province of Quebec, which takes as its point of departure the unanimous decision of the Court of Review in Quebec in 1880 in the case of *Bothwell* v. *Corporation of West Wickham*, 6 Q.L.R. 45, in which action the Court was composed of Meredith, C.J. and Stuart and Caron, JJ.

In that case it was a question of the interpretation of arts. 758 and 762 of the old Municipal Code, which correspond to arts. 447 and 451 of the new Code, and Meredith, C.J. speaking for the Court, interpreted the expression "road to be made" in art. 762 as meaning a road which, although it had not been made, had been established by competent authority, and the Chief Justice added at p. 48: "We do not think that a county council could establish a local road, which previously did not exist in any way, in order immediately afterwards to convert the local road so established into a county road."

This decision established the jurisprudence. It was declared well founded by the Court of Appeal in the case of *Giguère* v. *Comté de Beauce*, 19 Que. K.B. 353, and in the case of the *County of Nicolet* v. *Village of Villers*, 27 Que. K.B. 289, the same Court, without mentioning it, gave judgment in the same manner. Finally there is the decision of Mercier, J. in the case of *Brunet* v. *County of Beauharnois*, 18 Rev. de Jur. 141, where the Judge formally accepts the authority of the decision of the Court of Review in *Bothwell* v. *Corporation of West Wickham*.

Is it expedient now to reverse this jurisprudence?

The appellant argues that the new arts. 447 and 451 have been drafted in a different manner from arts. 758 and 762 of the old Code. The new articles apply not only to roads, but to bridges and water-courses, but this change is unimportant and the appellant only alludes to the fact that in the last paragraph of art. 447 the words, "construction and opening" have been inserted before the words "maintenance and repair," which stood alone in the old art. 758. I reproduce this paragraph as it reads in the old and new Codes:—

"The county council after having declared a local road to be a county road may, when occasion requires, determine by *procès-verbal* which corporations shall be liable for the mainten-

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ance and repair of the road and for the building and repairing of the bridges, and shall declare in such *procès-verbal* what proportion each corporation shall contribute."

"A county corporation after having declared that a local road, bridge, or water-course shall be a county road, bridge or water-course, may when occasion requires, determine by by-law or *procès-verbal* which corporation shall be liable for the construction, opening, maintenance and repair of such road, bridge, or water-course, and may declare in such by-law or *procès-verbal* what proportion each corporation shall contribute."

A careful reading of the first paragraph of art. 447 and art. 758 of the old Code shews that it is only a question of existing roads since they are spoken of as being under the direction of a local corporation. The third paragraph of art. 447 has in view what follows the declaration made in virtue of the first paragraph, and differing from the old art. 758, mentions, besides the maintenance and repair of the road, its construction and opening. At first sight this appears to exceed the scope of the first paragraph, but as it is a question of responsibility for the cost of the work done on the road, it is not impossible to reconcile the two paragraphs by saying that a local corporation is limited to ordering the opening of a road which is local and hence comes under its control. The county corporation, after having declared this local road to be a county road, can determine by by-law or *procés verbal* which corporation shall be responsible for the cost of construction and opening, as well as for the maintenance and repair of such road. Thus interpreted, it seems easy to reconcile paragraphs 1 and 3 of art. 447.

Let us now turn to art. 451, the text of which hardly differs at all from that of the old art. 762, the new article applying to bridges and water-courses as well as to roads. This article says in substance that the powers conferred by art. 447 on the county corporation can be exercised with regard to a road, bridge or water-course to be made, in the same manner as for roads, bridges or water-courses already made.

These expressions "road to be made", "roads already made," are worthy of some attention. A road *to be made* is not necessarily a road of which the opening has not been ordered. A *procès-verbal*, let us suppose, orders a new local road to be opened in a place where no road previously existed. Henceforth it can be said that this road exists legally and is under the direction of the local corporation, but it is still *to be made*, the operations which will give effect to the order for this open-

ing being the acquisition of the land and the material construction of the road. One can and must, therefore, distinguish between ordering the road to be opened and making a road which has already been decided upon.

Now since the local road which the county corporation declared to be a county road is "a road under the control of the local corporation" (art. 447, para. 1) this road may very well be a road *to be made*, that is to say, a road which has been merely ordered to be opened. There is, therefore, perfect harmony between art. 447, para. 1 and art. 451, and no rule of interpretation exists to give the latter article a meaning which would set it at variance with the first, for example, by taking "road to be made" to mean a road the opening of which has now even been ordered and hence one which is not under the control of any corporation. On the contrary, all the rules of legal interpretation insist on reconciling whenever possible, all the provisions of any one law, and that is what we must endeavour to do in the case of the Municipal Code.

I see very well that it might be urged that by reconciling arts. 447 and 451, I am rendering the latter article almost useless, for I include practically everything it says within the first paragraph of art. 447, in so far as it speaks of roads to be made. I may reply that the object of art. 451 is to remove all doubt as to the interpretation of arts. 447 and 448 and that in accepting this extensive interpretation, one is not rendering useless art. 451, which confirms it, but one is only responding to the wish of the Legislature, which expressly requires that art. 447 should be so interpreted. I am, therefore, not prepared to say that the case of *Bothwell* v. *Corporation of Wickham*, was badly decided, but when I have any doubt on this point it seems to me that it is better that this Court should accept, when it can reasonably do so, the jurisprudence of the different Provinces in matters relating to municipal law. The Courts of each Province by their situation in the various centres of population, are in a better position to appreciate the scope of the laws enacted for the government of municipalities, especially rural municipalities and, for my part, I believe that it is preferable to respect jurisprudence like that upon which the Court of Appeal has based its decisions, than to provoke disorder in municipal affairs by reversing this jurisprudence and thus placing the government of villages and counties in a new aspect. To do otherwise a very specific text would be required and I do not find such a text in the new Municipal Code.

It is possible that opposition on the part of a small munici-

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pality might paralyse, in the present instance, the efforts of the Corporation of the County of Arthabaska to insure the well-being of its ratepayers and provide for the creation of adequate means of communication between them. And it may be all the more necessary to increase the powers of the larger units, such as county corporations, since the latter under the new Municipal Code have no longer a appellate jurisdiction from the decisions of local corporations. If this is so, it is a matter for the attention of the Legislature, for the Courts can only conform to the law.

So, I am of opinion that the appeal should be dismissed with costs. I would not give costs to the corporation of St. Norbert, which, although the road in question is within its territory, did not contest the respondent's action, but contented itself with watching the proceedings.

BERNIER, J. (dissenting):—This action was taken by the local Corporation of Chester East against the Corporation of the County of Arthabaska to have a *procès-verbal*, made by a special superintendent of the latter corporation by virtue of a resolution of the Council of the County of Arthabaska, which decreed that a road situated entirely within the municipality of St. Norbert in the County of Arthabaska was a county road, declared null, illegal and *ultra vires*.

The Superior Court dismissed the action; the Court of King's Bench, sitting in appeal, reversed the judgment of the Superior Court, Lamothe, C.J., dissenting. The Corporation of the County of Arthabaska appeals from this latter judgment.

It is expedient to state the circumstances of this case in order to explain the action of the Council of the County of Arthabaska.

On December 13, 1916, the following petition, signed by certain ratepayers of the Corporation of Ste. Helene de Chester-Est, Chester North and St. Norbert (three municipalities situated in the County of Arthabaska) was presented to the County Council of Arthabaska:—

"*Petition for a Road*

To the prefect and other members of the County Council of Arthabaska:—

Sirs,—The petition of the undersigned respectfully represents as follows:—

1. That at the present time there is a public road running from Ste. Helene de Chester to the dividing line between Chester North and St. Norbert. 2. That by *procès-verbal* drawn by B. Feeney a part of the above mentioned road was recently

opened in the fifth range of Chester North and a *procés verbal* made in respect thereof, as appears by the said *procès-verbal* attached to these presents. 3. That it is possible to connect the main provincial road running between St. Norbert and Arthabaska with the road described by the said B. Feeney, at a point 300 ft. north-west of Pont Gosselin; that a petition to this effect has been presented to the Corporation of St. Norbert and a *procès verbal* prepared by J.N. Poirier, annexed to the present petition, treats favourably of the project to open the said road, but the said Corporation of St. Norbert has refused to homologate the said *procès-verbal*. 4. The road in question, as more fully described in the *procès-verbal* of the said J. N. Poirier, is a road of public utility for the three municipalities of the County of Arthabaska; namely, Ste. Helene, Chester North and St. Norbert, and that such road will have the effect of shortening the distances between Arthabaska and Victoriaville by about a mile and that it would further have the effect of enabling travellers to avoid the long and steep hills lying between the 7th and 8th ranges of the District of Arthabaska, and that the opening of the said road is really a matter of considerable interest to the general public of the county; 5. That in consequence there is reason for decreeing that the proposed road, to be built from the dividing line between Chester North and St. Norbert to the provincial road at a point 300 ft. to the north-west of Pont Gosselin, and more particularly described in the above mentioned *procès-verbal* of J. N. Poirier, should be declared to be a county road by virtue of art. 451 of the new Municipal Code, and for proceeding subsequently to have a *procès-verbal* drawn in respect of the said road under the direction of the County Council.

Wherefore your petitioners pray that you may be pleased to give all notices required by law, that at the first regular meeting of this council the said proposed road be declared to be a county road, its construction regulated by by-law or by *procès-verbal*, and a special superintendent appointed to inspect the ground, draw up the *procès-verbal*, if such be necessary, and make a report to the council for homologation.

Dated this 13th December, 1916."

On March 14, 1917, this petition was taken under consideration by the County Council. It was decided to give public notice to the effect that at its next meeting the council would pass a by-law decreeing that the road described in the above mentioned petition would henceforth be a county road and that this should include the bridges. Such notice was given.

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On June 13, 1917, the County Council duly passed a resolution declaring that the proposed road, as well as the bridges and culverts that were to be built in connection with it, from the boundary line between the municipality of Chester North and the municipality of St. Norbert, running towards the north-west to the provincial road, crossing the lands known and designated on the official cadastre of the Parish of St. Norbert under Nos. 250, 251, 253, 255, 256, 258, 259, 260 and 262, should thenceforth constitute a county road and bridges, under the jurisdiction of the Corporation of Arthabaska.

On June 30, 1917 public notice was given of the passing of this resolution.

On August 15, 1917 J. N. Poirier, notary public, appointed special superintendent by the County Council for the purpose of making a report in connection with the foregoing resolution, drew up a *procès-verbal* concerning the road in question. Amongst other dispositions it contains the following:—

"1 The road shall be opened, built and maintained from a point on the dividing line between the municipalities of St. Norbert and Chester North situated about 200 ft. from the east side of the Riviere Gosselin, opposite to the road already opened in the fifth range of Chester North, to the provincial road, at a point about 300 ft. west of Pont Rouge on the River Gosselin, after traversing lots 1, 2, 3 and part of lot 4 of the seventh range of the District of Arthabaska in the Parish of St. Norbert, that is to say, to the point where this road has already been marked by Bennett Feeney in his quality, about two years ago, and by me last autumn. (1916). 2. This road, from a point of departure opposite the road opened in the fifth range of Chester North, which the present road is intended to continue to the Provincial Road, shall cross in a straight line in a northerly direction . . . "

The description of the lots which the road is to cross follows:—

"12. All works upon the road ordered by the present *procès-verbal* shall be carried out by the Corporation of the County of Arthabaska by tender and contract awarded and passed in accordance with the rules laid down in title 20 art. 624 and following of the Municipal Code; but at the expense and charge of the Corporations of the Parish of St. Norbert and Chester East, each of these two corporations being obliged to contribute to the cost of opening, building and maintaining the road, ditches, enclosures, fences, bridges, paths and approaches, in proportion to its assessment as shewn on the valuation roll in

force in the municipalities, whenever payment thereof may be due and exigible.

The Corporation of the County of Arthabaska shall itself divide, collect and pay the cost of these works.

13. The Municipality of Chester North is exempted from contributing to the cost of the works on the road ordered by the present *procès-verbal* because it has already opened and is bound to build and repair, by and in virtue of a *procès-verbal*, on its own territory, a road with which the present road is to form a single continuous highway, partly in Chester North and partly in St. Norbert."

On August 23, 1917, public notice was given that the *procès-verbal* would be taken under consideration and homologated, with or without amendments, or rejected by the council of the County of Arthabaska on Sept. 12, 1917.

On September 10, 1917, certain ratepayers of Chester East presented to the Council of Chester East a petition relating to the foregoing *procès-verbal* asking the said council to have it amended so as to make the proposed road either a county road at the charge of the county for opening and maintenance forever, or at the charge of the signatories of the petition of December 13, 1916, or else to have it declared a local road at the charge of St. Norbert. The council of Chester East passed a resolution granting this petition.

At its meeting of September 12, 1917, the County Council of Arthabaska homologated the Poirier *procès-verbal;* the mayors of Chester East, Chester North and St. Norbert were present at this meeting and voted for the homologation of the report. They had also voted in favour of the resolution of the County Council passed on June 13, 1917, declaring the road to be a county road.

After this homologation of the *procès-verbal* the County Council proceeded to make the necessary expropriations for the construction of the road, and for this purpose paid various sums totalling nearly $3,000.

It was only on February 19, 1919, that the Corporation of Chester East took an action against the Corporation of the County of Arthabaska to have the *procès-verbal* in question annulled. In the conclusions of the action there is no request made for the annulment of the resolution of the County Council declaring that the road should be a county road. It is only the annulment of the *procès-verbal* that is asked for.

The local corporations of Chester North and St. Norbert were called into the case, but the Corporation of St. Norbert did not

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appear, and that of Chester North appeared by attorney but did not plead to the action.

The two principal points to be decided in this case are to establish (1) if the Poirier *procès-verbal* and its homologation by the County Council were *ultra vires* the powers of the said council; and, (2) if the road in question was of general utility to several municipalities in the County of Arthabaska so as to justify the County Council in declaring the proposed road to be a county road.

It is a question of the interpretation of certain articles of the new Municipal Code, and, amongst others, arts. 444, 445, 447, 449, 451, 453 and 574.

By virtue of art. 445 M.C. a local road is one which is situated entirely within a local municipality. Under art. 446, such a road is under the direction of said council, which is made responsible for it by art. 453.

However, by art. 447, the County Council has the right to take possession of such a local road; it has the right to declare it a county road; it has the right to place it under its own direction and become responsible for it, or under the direction and responsibility of several other local municipalities in the county.

So far the Municipal Code has been speaking and legislating in respect of a local road *opened and built*, that is to say, *existing*.

But the powers of the County Council are much more extensive.

By art. 451 it is said that a County Council has all these same powers with respect to a local road *to be made*, that is to say, a road which has not yet been opened, does not yet exist, has not yet been built, and is in fact non-existent.

Article 451 reads as follows:—"The powers conferred by arts. 447 and 448, on the county corporation and the board of delegates, may be also exercised by them in regard to any road, bridge or water-course *to be made, in the same manner* as for a road, bridge or water-course *already made.*"

It would seem that a simple reading of this last article should not leave the slightest doubt in one's mind. It is not ambiguous, it is clear and precise.

However, by virtue of certain decisions, particularly in the case of *Bothwell* v. *Corporation of West Wickham*, 6 Q.L.R. 45, and in the case of the *County of Nicolet* v. *Village of Villers*, 27 Que. K.B. 289, it was declared, if not decided, that whenever the application of this art. 451 has to be considered the

following distinctions must be made: either (1) a local road *to be made* has already been decreed or created by authority of the local council, or else (2) it has not been so decreed and created. In the first case the County Council can declare the proposed road to be a county road; in the second case it cannot do so.

Why this arbitrary distinction when art. 451 itself names no such distinction?

This question is answered by citing art. 445 and art. 446, by virtue of which the local council has sole jurisdiction over roads situated entirely within its local municipality, and even if such roads are declared to be county roads by virtue of art. 447 and 448, they remain local roads. It is added that in consequence of these articles the dispositions of art. 451, regarding roads *to be made*, must be understood as meaning a road *which has at least been decreed and planned; opened*, in a word, by the local council.

In other words, a local road must have been opened and planned in order to give the County Council the power to declare it a county road and order it to be built.

The reason advanced for making the distinction which art. 451 does not make is that it would be repugnant to the principles of municipal autonomy to permit a county council to replace a local council in the exercise of the powers of the latter, and to build roads on its territory without the concurrence, or against the will of the local council.

This argument may be rebutted on the ground that there is as much if not greater violation of such autonomy, in the power of a county council to take possession of a local road made, than to arrogate to itself the right to open a new road. In both cases the Legislature wished to establish an exception to the jurisdiction of the local council. The same reason of general utility applied in both cases.

It must not be forgotten that the County Council is composed of the mayors of all the local councils in the county; that it is sometimes armed with a sort of general control over the local municipalities in the general interest of the county. That this is so is amply evidenced by the fact that before 1916, when the new Code came into effect, an appeal lay to the county council from any resolution or decision of the local council.

If a county council thinks that a road traversing different municipalities should be built in the general interest of the county, that the said road would benefit several municipalities and diminish the difficulties of existing highways, should it not

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have the power to order such a new road to be built? Is that not the *raison d'être* of art. 415?

An then, despite the general utility of the new or proposed road, as recognized by the county council, could a local council be permitted to obstruct the whole project by refusing to build its part of the road in its own territory, thus preventing even the opening of the road?

To answer in the affirmative would be, it seems to me, to run counter to the spirit of the Municipal Code.

Article 451 was, as I understand it, sufficiently clear to justify the opinion that there is no ground for making a distinction between roads *to be made*, already decided upon by local authority, and roads *to be made*, not yet decided upon by that same authority.

But there is something more: The new Municipal Code amended art. 447, para. 3, to which art. 451 refers. It seems that in order to remove all doubt regarding the interpretation of art. 451, it inserted in art. 447, para. 3, two words which complete the already clear and precise interpretation of art. 441.

In fact para. 3 of art. 447 now reads as follows:—

"A county corporation, after having declared that a local road, bridge or water-course shall be a county road, bridge or water-course may, when occasion requires, determine by *by-law* or *procès-verbal*, which corporation shall be liable for the *construction*, *opening*, maintenance and repair of such road, bridge or water-course, and may declare in such by-law or *procès-verbal* what proportion each corporation shall contribute. (Arts. 758, 855a, 858 and 878, combined and amended)."

And art. 451 provides that a county council can, in the case of a road *to be made*, exercise all the powers mentioned in this paragraph as relating to a road already made.

Before the new code then, a county council apparently did not have any control, except as regards the costs of *maintenance and repair* of a road to be made, and now it also has control of the *opening* and *construction* of the road.

It seems absurd to believe that these words were added without a special meaning.

Let us examine the meaning of the word *opening* of a road.

The opening of a road includes two distant phases; the first I would call the creative stage of the road and the second the material stage. The first belongs to the municipal authorities, the second is merely executive.

Once a municipal council has passed a by-law or homologated

a *procès-verbal* ordering a road to be opened, such road is legally open. What is more, it is completely planned by the terms in which it is described in the by-law and by the designation of the cadastral lots which it is to traverse. The situation of the road exists legally. The council is thenceforth quite cognizant of the cost of the proposed road and can immediately distribute the burden amongst the municipalities which the road will benefit. This is what the new art. 447, para. 3, established.

This first phase in the opening of the road is, therefore, the more important; since the second, the material phase, is only the executive part of the municipal ordinance. To draw up a *procès-verbal* involves expense. The Superintendent appointed to open the road must inspect the ground, call together persons interested, give notices, draw up his report, etc.

Now the council can distribute this expense just as it can distribute the cost of *executing* the municipal ordinance, i.e., the cost of *construction*. This is also enacted by art. 451.

Thus, then, under the new Code, the county council controls the *opening* and *construction* of a road *to be made* just as before the new Code, it had control and jurisdiction only over the *maintenance* and *repair* of an existing or proposed road.

Otherwise what would be the meaning of the words opening and construction and the cost of such opening and construction, which are inserted in art. 447 of the new Code?

According to well known rules of interpretation, it cannot be supposed that these words were inserted for no purpose or to add nothing to the former meaning of the article.

I am, therefore, of opinion that the Poirier *procès-verbal* and the resolution of the County Council pronouncing the proposed road to be a county road, were not *ultra vires* the powers of the County Council of Arthabaska.

I do not believe there can be any doubt regarding the common interest of the municipalities of Chester East, Chester North and St. Norbert in the proposed road.

The new road crossed or is to cross these three municipalities. It joins the provincial road which leads to some very important centres. According to the testimony of Mr. Dumont, Director of Roads for the Provincial Government, corroborated in its essentials by other testimony, the road would be a great improvement over the existing road in St. Norbert which has many inequalities which present great difficulties to wheel traffic, many long hills, etc.

I can see no evidence of injustice amounting to oppression, such as would entitle a Court of Justice to set aside the muni-

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cipal ordinance of the County Council on this point. Besides, as has been seen, a great number of the citizens belonging to these three municipalities asked to have this new road established and, if there was any opposition it was for the County Council, which included amongst its members the official representatives of these municipalities, to decide as to the validity of the arguments advanced. There is no ground for intervention on this point.

I would therefore maintain the appeal before this Court, quash the judgment of the Court of King's Bench sitting in appeal and re-affirm the judgment of the Superior Court with costs.

Appeal dismissed.

CURPHEY v. PERRY.

Nova Scotia Supreme Court, Harris, C.J., Ritchie, E.J., Mellish and Rogers, JJ. May 4, 1922.

DAMAGES (§IIIE—146)—FRAUD ON SALE OF REAL PROPERTY—MEASURE OF COMPENSATION.

A practical farmer who has lived on the land and knows its condition, and who deliberately makes false and fraudulent statements concerning it, by which he induces one having no experience in farming to purchase the property to his prejudice, is liable in damages to such purchaser.

APPEAL by plaintiff from the trial judgment in an action for damages, by reason of having been induced to purchase a farm from the defendant by his false and fraudulent representations. Reversed.

T. R. Robertson, K.C. and *H. W. Sangster*, for appellant.
S. Jenks, K. C. and *B. W. Roscoe*, K.C. for respondent.

HARRIS, C.J.:—The plaintiff purchased a farm at Horton Landing from the defendant. It had been advertised by the Valley Real Estate Agency at Wolfville in the catalogue of that company and the description given therein was as follows:—

"B/14. Price $6,500. 30 acres cultivated, few rods from the station of Hortonville, 7 acres bearing orchard 7 acres marsh. Farm in high condition, yields 35 tons of hay and 400 to 600 barrels apples. Excellent 8 roomed house; 40 x 50 barn, wood, workshop, carriage, poultry and ice houses. Very productive property in desirable location."

The plaintiff had applied to the Valley Real Estate Agency for information about farms and was shewn this description of the Perry property in the catalogue and was taken to the

place by the manager of the agency and shown over the property by the defendant. He decided to buy, and an agreement was drawn up by which the defendant agreed to sell and the plaintiff agreed to buy for $6,000 the defendant's farm at Hortonville of 30 acres as per "Valley Real Estate catalogue B/14 with appurtenances."

There is some dispute about a conversation which plaintiff says took place in which he said to defendant that he was relying upon the statements in the catalogue. Defendant denies that this took place and Mr. Roop of the agency said that he did not remember it. It is, I think, of little or no importance whether it took place or not because the defendant on cross-examination admitted that he had given the information in the catalogue to Mr. Illsley, the manager of the agency, for the purpose of selling the property and for the people to act upon, and he expected the plaintiff to act on it in buying and he also said that he believed the plaintiff did act on it. The plaintiff himself swears that he did rely upon this information. Moreover as has been pointed out the contract makes the catalogue the basis of the agreement. It is contended by counsel for the plaintiff that the information contained in the catalogue was false in four particulars:—(a) That there were not 30 acres of cultivated land. (b) That the farm was not in high condition. (c) That it did not yield 35 tons of hay, and (d) That it did not produce from 400 to 600 barrels of apples.

So far as the 30 acres of cultivated land is concerned it is admitted that in order to make up this acreage the salt marsh has to be included and as it is not cultivated land it is argued that the statement is false. No one familiar with salt marsh would suggest that it is cultivated land, but the plaintiff saw the marsh land and knew that it was part of the 30 acres. When the deed was produced and before the money was paid there was a discussion between plaintiff and his wife on the one side and defendant on the other, and it was made clear to plaintiff that the whole acreage including the marsh was about 29 or 30 acres and they accepted the deed and paid over the money with full knowledge that the marsh was part of the acreage. He had been living on the place before this conversation and must have known that the tide ebbed and flowed over this marsh and it is difficult to understand how he could have been deceived about it. If this was the only question I would have no hesitation in saying that plaintiff had failed to establish any ground for either rescission or damages.

The second ground urged is that the representation that the

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farm was in high condition was false. The evidence convinces me that the farm was not in high condition. There is no evidence that the farm ever produced 35 tons of hay except that of the defendant to the effect that he had 35 tons in 1913 of salt hay and fresh hay together. The average yield must have been far below that stated and the defendant must have been aware of that fact when he gave the information to the agency.

Again, with regard to the yield of apples it is clear that the orchard never produced 600 barrels. It had produced 500 in 1920 and in 1913 the yield was 560, but in 1921 it was only 210, and the average from 1913 including 1913 and the 500 in 1920 (and omitting 1916 in respect to which there was no evidence) was only 320 barrels.

So far as 1916 is concerned the duty was thrown on defendant to shew the yield if it would help him. The rule as laid down in Kerr on Fraud and Mistake, 5 ed. p. 481 is that:—"If the evidence establishes a *prima facie* case of fraud or shews that an instrument is false in any material part the burden of shewing that the transaction was fair lies upon the party who seeks to uphold it."

The evidence I think shews that the statement that the farm produced from 400 to 600 barrels of apples was untrue.

While it may be with regard to the question as to whether the marsh was cultivated land or not that the inspection of it by the plaintiff who could see the actual conditions would preclude him from raising any question about the matter (see 1 Williams on Vendor and Purchaser, 611 & 612, and Smith on Fraud, 114 and 192) that does not apply to the statements with regard to the yield of hay and apples nor does it in my opinion apply to the representation as to the condition of the land. It is obvious that no inspection of the property would shew what the yield of apples and hay had been. With regard to the condition of the land, I do not see how walking over the land would give even an experienced farmer full information with regard to its state of cultivation.

It would no doubt give some indication to the practical farmer, but to a man who, like the plaintiff, had no experience in farming, his walk over the land would give him little or no knowledge as to whether the land was in a high state of cultivation or not. He certainly would get no information that some three acres of the land was infested with conch. It is, however, no answer to say that he might have ascertained the facts if he had used due diligence. Jessel, M.R. in *Redgrave*

v. *Hurd* (1881), 20 Ch. D. 1 at pp. 13, 14, 51 L.J. (Ch.) 113, 30 W.R. 251, said:—

"If a man is induced to enter into a contract by a false representation it is not sufficient answer to him to say. 'If you had used due diligence you would have found out that the statement was untrue. You had the means afforded you of discovering its falsity, and did not choose to avail yourself of them.' I take it to be a settled doctrine of equity, not only as regards specific performance but also as regards rescission, that this is not an answer unless there is such delay as constitutes a defence under the Statute of Limitations. That, of course, is quite a different thing. Under the statute delay deprives a man of his right to rescind on the ground of fraud, and the only question to be considered is from what time the delay is to be reckoned. It had been decided, and the rule was adopted by the statute, that the delay counts from the time when by due diligence the fraud might have been discovered. Nothing can be plainer, I take it, on the authorities in equity than that the effect of false representation is not got rid of on the ground that the person to whom it was made has been guilty of negligence."

I do not lose sight of the principle that if a man does make enquiries that may be evidence tending to shew that he relied only on his own judgment but that does not affect the present plaintiff under the facts in evidence here.

The defendant was a practical farmer and he had lived on this property and there is no doubt that he knew the condition of the property and he must be taken to have known that the statements to which I have referred were untrue. As Lord Selborne said in *Smith* v. *Chadwick* (1884), 9 App. Cas. 187 at p. 190, 53 L.J. (Ch.) 873, 32 W.R. 687:—"the law justly imputes to every man an intention to produce those consequences which are the natural result of his acts." If he wilfully makes a false statement knowing it to be false and with the view to induce another to act upon it, who does so accordingly to his prejudice, the law imputes to him a fraudulent intent. The law is well settled with regard to executory contracts that innocent misrepresentation may be a ground of rescission while to sustain an action for deceit the misrepresentation must be fraudulent. It is equally well settled that after a conveyance of land has been executed there must be actual fraud to warrant a judicial rescission between vendor and vendee.

In other words actual fraud must be established to the same

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extent and degree to support an action for rescission where a conveyance of real estate has been executed as to support an action for damages for deceit.

There is in this case clear evidence of fraud establishing the right of the plaintiff to either rescission or damages for deceit, and the question is which remedy ought to be given.

The plaintiff in his statement of claim seems to have put forward damages as his main claim and rescission as an alternative only.

There was no tender of a reconveyance before action and plaintiff continued to occupy and work the farm all through the season of 1921 and so far as appears is still in possession. Moreover, there may be under the circumstances real difficulties in working out relief on the basis of rescission and it is not clear that there can be *restitutio in integrum*.

While possibly none of these matters standing by itself would be regarded as sufficient ground for refusing rescission in a proper case, yet the cumulative effect is such, I think, as to lead us to confine the plaintiff's remedy to damages under all the circumstances of the present case.

The damages I would fix at $1,250 for which amount plaintiff will have judgment with costs of the appeal and action.

RITCHIE, E.J.:—I agree with the opinion of the Chief Justice except that in the event of the question of damages arising hereafter I am not prepared to limit the damages to $1,000. The price paid for the farm was $6,000. As to its real value I accept the evidence of F. H. Johnson: he fixed the value at $4,070. It is difficult to be exact and to avoid any possible injustice to the defendant I would (if I had to decide as to the amount) assess the damages at $1,500.

MELLISH, J.:—This is an action of deceit in which damages are claimed to have been suffered by the plaintiff by reason of his being induced to purchase a farm from the defendant by his false and fraudulent representations for the price of $6,500. Plaintiff claims to have spent not only the purchase price $6,500 on this property, but also time, labour and money for repairs,—$2,000: and claims as damages $7,000 or alternatively, rescission and repayment of said moneys and damages with incidental relief.

The trial Judge, Russell, J., found in favour of defendant and dismissed the action. Plaintiff has appealed.

Mr. T. R. Robertson, K.C., in opening the appeal on behalf of plaintiff strenuously contended that the plaintiff was entitled

to damages for deceit or at least as for breach of warranty in respect of the representations made by defendant before the sale was completed even if said representations were not fraudulent. He was followed by Mr. Sangster, K.C., who claimed that as the representations were fraudulent plaintiff was entitled to rescission. Both propositions may have been correct. It was open to plaintiff of course to found his action as affirming the contract and simply claim damages or to make the equitable claim for rescission with incidental damages, or to do as he has done, viz: make one claim the alternative of the other.

The Court must, I think, regard an alternative claim as one which is only to be considered in the event of the main claim being untenable. *Hipgrave* v. *Case* (1885), 28 Ch. D. 356, 54 L.J. (Ch.) 399.

The trial Judge seems to have believed the evidence of the defendant and I cannot say that he is wrong in this, but with all respect I widely differ from him as to the importance to be attached to the statements in the descriptive catalogue. I further think that no false or exaggerated statements made by the plaintiff can be taken as a justification for the misrepresentations complained of. They were likely to mislead and I think must be held to have misled the plaintiff.

The appeal should be allowed with costs and the plaintiff have judgment for $1,250 damages and costs.

ROGERS, J., concurs with HARRIS, C.J.

Appeal allowed.

THE KING v. HUDSON'S BAY Co.

Exchequer Court of Canada, Audette, J. January 27, 1921.

EXPROPRIATION (§IIIC—157)—COMPENSATION—RIGHT OF LESSEE—LEASE NOT REGISTERED AS REQUIRED BY PROVINCIAL STATUTE—EXPROPRIATION ACT, R.S.C. 1906, CH. 143, SECS. 25 AND 26.

Where land expropriated by the Dominion Crown is leased for a period of years and the lease is not registered as required by the Registry Act of the Province in which the land is situate, the lessee acquires no interest in the lease within the meaning of secs. 25 and 26 of the Expropriation Act, R.S.C. 1906, ch. 143, which entitles him to compensation in respect of the expropriation.

INFORMATION exhibited by Attorney-General for Canada to have it declared that certain properties expropriated at Esquimalt, B.C., for dry dock, were vested in the Crown and to have the value thereof fixed by the Court.

H. W. R. Moore for plaintiff.

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Ex. C.

THE KING v. HUDSON'S BAY CO.

Audette, J.

H. W. Robertson and *H. G. Lawson* for defendants Hudson Bay Co. and trustees for the Puget Sound Agricultural Company.

E. Miller for the Alunite Mining and Products Co.

AUDETTE, J.:—This is an information, exhibited by the Attorney-General of Canada, whereby it appears, *inter alia*, that certain lands, belonging to two of the defendants, were, under the provisions of the Expropriation Act, taken and expropriated for the purposes of a public work of Canada, namely, a dry dock, at Esquimalt, B.C., by depositing on February 4, 1920, a plan and description of such lands, in the office of the Registrar General of Titles at the city of Victoria, B.C.

Three parcels of land were so expropriated and they are respectively described in the information under the head of firstly, secondly and thirdly.

The lands first and secondly described belonged at the date of the expropriation to the defendant, the Puget Sound Agricultural Co., represented herein by trustees, and the lands thirdly described belonged to the Hudson's Bay Co.

The Crown, by the information, offers to pay the defendants, or whomsoever shall prove to be entitled thereto, the sum of $2,000 per acre for the said lands and real property and damages, if any, resulting from the expropriation. At the opening of the case, the plaintiff also produced in evidence exs. 3, 4, 5 and 6, thereby establishing that the above-mentioned amount had been tendered the defendants before the institution of the action and had been refused.

The Puget Sound Agricultural Co., by the amended statement of defence, claims compensation at the rate of $5,000 per acre, together with the sum of $870.71, being the proportion of the taxes from February 4, 1920, to December 31, 1920 paid by them and assessed against their lands by the corporation of the township of Esquimalt previous to the filing of the information.

The Hudson's Bay Co., by the amended statement of defence, claims compensation at the rate of $5,000 per acre, together with $382.71 paid as taxes under the same conditions and circumstances mentioned in the previous paragraph.

There is the further claim of the Alunite Mining and Products Co., as lessees of the lands owned by the Hudson's Bay Co. This claim will be hereafter dealt with by itself.

The only question in controversy between the plaintiff and the two first defendants, proprietors of the lands taken, is one of the *quantum* of compensation to be paid under the circumstances of the case.

(His Lordship here cites from the evidence as to value and continues.)

Having thus analysed the evidence adduced on both sides, I am now confronted by the task of finding the proper mean between the divergent valuations of the witnesses for the plaintiffs and the defendants. The Court has to steer a safe course between Scylla and Charybdis—between the optimist and the pessimist in values.

The owners, after the expropriation, should be neither richer nor poorer than before. It is intended they should be compensated to the extent of their loss, and that loss should be tested by what was the value of the property to them, and not by what will be its value to the expropriating party.

This property in Esquimalt Harbour, is situate between the railway and the water, the difference in the level between them being somewhere about 67 feet, and is of a rocky, rugged, surface, the topography or configuration of the same being very uneven, with the exception of two or three acres, on the west.

As residential property, it has many disadvantages, in that the land is so uneven, and that there is no road leading to the western and central pieces, and that to build such a road a very large amount of money would have to be expended besides the cost of survey for subdivision, and the building of an aqueduct. Moreover, it being immediately in the neighbourhood of an Indian Reserve, would, for such a purpose, make it very undesirable. With respect to that class of property, we have evidence on behalf of the owners that in 1920 there was no demand, no market for an unimproved residential property. The neighbourhood of a noisy ship-yard, with oil and other dirty substance spreading on the beach—as was realised on the day of the visit to the premises, would also add to the disadvantage for residential purposes.

Approaching the property as an industrial site, its configuration must also be taken into consideration and more especially the very large amount of money that would have to be expended before making it available for such purposes. The amounts are so large, that a prospective purchaser—excepting the Crown putting up a public work—would hesitate before purchasing—in fact a business man would in preference choose some other water front if he really required a spur and a levelled area, and would not readily purchase.

I have had the advantage, accompanied by counsel for all parties, of viewing the premises in question, and after con-

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sidering the evidence it appears, to me, inconceivable that the lands in question could be assessed at this blanket value of $5,000—if one stops to consider the almost prohibitive expenditure that would be required to make it available for industrial purposes—the residential purposes being considered the less advantageous use of the two, under the circumstances. The expenditure is so great to place the property in a state of development for either residential or industrial purposes, that it goes to the market value of the land itself.

But there is more in this case. The two parcels of lands, east and west, belonging to the Puget Sound Agricultural Co., although partly water front, as above mentioned, do not carry with it the right to erect a wharf—a right that can only be obtained from the Crown who is now expropriating. Not having this right, as stated by witnesses heard on behalf of the owners, that makes a great deal of difference in arriving at the market value of the land. The parcel of land held by the Hudson's Bay Co. has a pre-confederation right to erect a wharf of 100 feet in length—by a narrow width, as shewn upon the ground. That of itself makes this piece of land more valuable than the other two.

There is no evidence that the eastern and western parcels ever earned any revenues. The central piece never brought large revenues—the lease in force at the time of the expropriation constitutes the best revenue it ever yielded and this is on account of the spacious building erected thereon.

The Crown has tendered and also offered, by the information, $2,000 an acre for the three parcels of land, in full satisfaction for the same, the real property and all damages, if any, resulting from the expropriation.

While I have come to the conclusion to accept these $2,000 an acre for the land taken, as an ample and fair compensation under the circumstances, I cannot apply that quantum to all three pieces. The eastern piece is of irregular shape, besides its irregular surface, terminating in a pointed or jib lot, tending to decrease its value—with 1.02 acres not water front and 1.07 acres adjoining water only at high tide. The western lot has a road of access, and comes within the general description given above. For these two pieces of land together, as belonging to the same proprietor, I accept as ample compensation this offer of $2,000—although part of the western piece can hardly have that value.

But, if the eastern and western parcels are worth $2,000 an acre, as tendered and offered by the Crown, the central

parcel with a large and substantial building and the right to build a wharf 100 feet long, is obviously worth more than $2,000 an acre. Accepting that basis I will fix a value of $2,000 an acre for the lands owned by the Puget Sound Agricultural Co., and $2,500 for the lands owned by the Hudson's Bay Co., together with the sum of $12,000 for the substantial stone warehouse thereon erected.

The cost of the issue between the Crown and the Puget Sound Agricultural Co. will be in favour of the Crown, and the costs on the issue between the Crown and the Hudson's Bay Co., will be in favour of the latter.

Coming now to the claim made by the defendants in respect of the taxes for 1920, and which I find were improvidently paid—when a general remittance was made in respect of all lands held by them in that municipality, I have obviously come to the conclusion that such a claim cannot come within the scope of the present action. It is a distinct and separate claim over which the Court, under the present information, has no jurisdiction, but which must be the subject matter of a separate action brought against the Crown after obtaining a *fiat*. The Crown is not amenable to taxes. (See sec. 125 B.N.A. Act).

There is further to be considered in the case of the claim of the Alunite Mining and Products Co., which company at the date of expropriation were lessees of the lands owned by the Hudson's Bay Co., above referred to, and upon which there was a large building and a small dilapidated wharf of one hundred feet in length.

On July 2, 1919, the Hudson's Bay Co. leased to the Alunite Co., the warehouse and lands above referred to for the term of five years, at the annual rental of $720 during the first year of the term; $1,080 during the second year; $1,200 during the third year of the term; and $1,500 during the fourth and fifth years of the term—such yearly rentals to be payable by equal half yearly payments in advance on July 2 and January 2 in each year.

The lessees had no right to sub-let or assign the lease. They were, however, allowed to make such repairs, as mentioned in the deed, to the warehouse in question, towards which expense the lessors contributed to the amount of $500.

During the summer of 1919, the lessees started to work at the repairs, when shortly afterwards they became aware the Crown was going to expropriate and no work was done after

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Christmas of that year—the full repairs being not quite completed at that date.

The lessees contemplated extending the wharf another one hundred feet, provided leave could be obtained from the Crown, and they looked upon the site as favourable for the development of their business, such as alleged in the lease, considering the facilities, as expressed by witness Baird, for a spur line.

The plaintiff having expropriated on February 4, 1920, they looked around for another site, and although the evidence discloses that there were water front properties available in Esquimalt Harbour and around Victoria, they contend they could not be suited and went to Vancouver, where they entered into a lease of a property for 21 years, renewable up to 63 years, and erected a building upon these new demised premises. They did not order machinery until they were settled at Vancouver, as they had not the money to pay for it, says witness Baird.

Under the circumstances, the lessees, by their statement in defence claim the sum of $63,900. The Crown did not tender or offer any compensation.

Coming to the question of the *quantum* of such compensation, one must realise that, as Nichols, on Eminent Domain, ed. 2, pp. 714, 715, says:

"To fix the market value of an unexpired term is no simple matter. Leases commonly are not assignable without the consent of the landlord, and are so infrequently sold, and vary so much in length of term, rent reserved and other particulars as well as in the character of the property, that it is almost impossible to apply the customary tests of market value to a leasehold interest."

However, we have in this case the great advantage of having to deal with a lessee who is not carrying on his business—who does not operate shops and has not a going concern; but who at the very inception of his lease becomes aware that the property is to be expropriated for public purposes. He becomes aware of it within a month or two after signing his lease, although the expropriation only takes place on February 4, 1920—the lease bearing date July 2, 1919.

The lessee cannot claim expected profits, but he can be allowed the reasonable expenses of seeking new locations, the loss of time, the cost of moving, the refund of repairs, and all such expenditure incidental to such cancellation of the lease, and loss occasioned thereby. They had the right to remain in undisturbed possession to the end of the term.

In this case, apart from the amount paid for rent, for

improvements and repairs, moving, etc., there was no direct evidence to shew what was the value of this unexpired period of the lease.

Before arriving at any conclusion upon the amount of the compensation, I cannot refrain from saying that it is almost inconceivable that a company could most improvidently install expensive machinery, contemplate enlarging the small wharf in question, and building a spur at a most prohibitive price, etc., with a lease for the short life of five years. This is especially true, when it is considered that one of the executive officers of the company admitted they did not order the machinery before they were installed at Vancouver, because they had not the money to pay for it—and when another witness stated in his examination, in January, 1921, that they expected to be in operation within two years. That would bring them to 1923 and the lease would expire in 1924. Decidedly the company is better off with a lease for a life of practically 63 years. Under those circumstances with a long lease there would seem to be some justification to expend, the amount stated, on the undertaking of such works. The Vancouver lease is decidedly a better commercial proposition.

Taking all the circumstances into consideration and going over the bill of particulars, which has been explained by evidence at trial, I would have come to the conclusion to allow the Alunite Mining and Products Co. the sum of $1,800 with interest and costs, but for the provincial law standing in my way.

Counsel at Bar, for the plaintiff, sets up that the lessees have no legal right to recover, no right of action, because their lease was not registered as required by sec. 104 of the Land Registering Act of British Columbia, ch. 127 of R.S.B.C. 1911, and which reads as follows:—

"104. No instrument executed and taking effect after the thirtieth day of June, 1905, and no instrument executed before the first day of July, 1905, to take effect after the said thirtieth day of June, 1905, purporting to transfer, charge, deal with, or affect land or any estate or interest therein (except a lease-hold interest in possession for a term not exceeding three years), shall pass any estate or interest, either at law or in equity, in such land until the same shall be registered in compliance with the provisions of this Act; but such instrument shall confer on the person benefited thereby, and on those claiming through or under him, whether by descent, purchase, or otherwise, the right to apply to have the same registered. The provisions of

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this section shall not apply to assignments of judgments. 1906, c. 23, s. 74, 1908, c. 29, s. 6."

The liability of the Crown in the present controversy, is to be determined by the laws of the province where the cause of action arose: B.N.A. Act, sec. 92, sub-sec. 13; *The King* v. *Desrosiers* (1908), 41 Can. S.C.R. 71 at p. 78; *The King* v. *Armstrong* (1908), 40 Can. S.C.R. 229 at p. 248.

But for the provincial statute, the lessees would have come under secs. 25 and 26 of the Expropriation Act and would have been entitled to compensation. Be that as it may, I must give effect to the provincial statute and find that, under the circumstances, the lessees' claim must be dismissed. Taking, however, into consideration, the hardship of the lessees' situation I will allow no costs to either party.

Therefore, there will be judgment, as follows:—

1. The lands and property expropriated herein are declared vested in the Crown as of the date of the expropriation, February 4, 1920.

2. The compensation for the land and property taken and for all damages whatsoever, if any, resulting from the expropriation, is hereby fixed at the total sum of $47,110 with interest from February 4, 1920, to the date hereof, and payable in the manner and proportion and only upon the sums hereinafter mentioned.

3. The defendant the Hudson's Bay Co. are entitled to recover from the plaintiff the sum of $12,450 for the lands, and $12,000 for the warehouse, with interest as above mentioned, upon their giving to the Crown a good and satisfactory title free from all charges, mortgages or incumbrances whatsoever.

4. The defendants, Russell Stephenson, Leonard Daneham, Cunliffe and Robert Molesworth Kinderly, trustees for the Puget Sound Agricultural Co., are entitled to recover the sum of $22,660 *without interest* (see sec 31, Expropriation Act), upon giving to the Crown a good and satisfactory title free from all charges, mortgages and incumbrances whatsoever.

5. The claim of the Alunite Mining and Products Co. is hereby dismissed; but under the circumstances without costs.

6. The plaintiffs are entitled to costs on the issues as between them and the Puget Sound Agricultural Co.

7. The defendants the Hudson's Bay Co. are entitled to costs as against the plaintiff.

Judgment accordingly.

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Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin, Brodeur and Mignault, JJ. February 7, 1922.

CONSTITUTIONAL LAW (§IA—20)—POWERS OF B.C. LEGISLATURE TO PROHIBIT EMPLOYMENT OF CHINESE AND JAPANESE ON CROWN PROPERTY — B.C. STATS. 1921, CH. 49—B.N.A. ACT, SEC. 91—POWERS OF DOMINION LEGISLATURE—VIOLATION OF JAPANESE TREATY ACT—1913 DOM. STATS. CH. 27.

The legislature of British Columbia had no authority to enact ch. 49 of its statutes of 1921, entitled "An Act to validate and confirm certain Orders in Council and Provisions relating to the employment of Persons on Crown property." The Orders in Council which it attempted to validate by this Act provide that "in all contracts, leases and concessions of whatsoever kind entered into, issued or made by the Government, or on behalf of the Government, provision be made that no Chinese or Japanese shall be employed in connection therewith." The Court held that the words "leases, licenses, contracts and concessions" embodied in the Orders in Council, were comprehensive enough, and were clearly intended to deprive the Chinese and Japanese of the opportunities which would otherwise be open to them of employment upon Government works carried out by the holders of Provincial licenses, contracts or concessions, and that such legislation was within the exclusive legislative authority of the Dominion under sec. 91 of the B.N.A. Act, to make laws "for the peace, order and good government of Canada" with relation to any matters coming within the classes of subjects described in sub-sec. 25, as naturalization and aliens. Held also, that the legislation conflicted with the Japanese Treaty Act 1913 of the Dominion of Canada, ch. 27, whereby it was declared that the Japanese Treaty Act of April 3, 1911, was sanctioned and declared to have the force of law in Canada.

[*Union Colliery Co.* v. *Bryden*, [1899] A.C. 580, 68 L.J. (P.C.) 118, *Cunningham* v. *Tomey Homma*, [1903] A.C. 151, applied.]

CASE submitted by His Excellency the Governor General in Council for the hearing and determination of the Supreme Court of Canada as to the validity of ch. 49 of the Statutes of British Columbia 1921, the questions submitted under sec. 60 of the Supreme Court Act in pursuance of a recommendation by the Privy Council. The report of the Privy Council wherein the questions submitted and the facts of the case are fully set out is as follows: Copy of a report of the Committee of the Privy Council appointed by His Excellency the Governor-General-in-Council, on November 12, 1921.

The Committee of the Privy Council have had before them a Report dated Oct. 12, 1921, from the Minister of Justice, submitting that the Consul General of Japan, by letter of May 4, 1921, addressed to the Minister of Justice, suggested that Your Excellency should exercise the power of disallowance with regard to a statute of British Columbia, assented to April 2, 1921, entitled "An Act to validate and confirm certain Orders in Council and provisions relating to the Employment of Per-

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sons on Crown Property," being ch. 49 of the volume of statutes for the current year; the Consul General alleging that the Act is *ultra vires*.

It is enacted by sec. 2 of this statute that two Orders of the Lieutenant Governor of British Columbia in Council, dated May 28, 1902, and June 18, 1902, respectively, copies of which are scheduled to the Act, are validated and confirmed, and that they shall for all purposes be deemed to have been valid and effectual from the respective dates of their approval. These Orders in Council were designed to give effect to a resolution of the Legislative Assembly of British Columbia passed on April 15, 1902, whereby it was resolved "that in all contracts, leases and concessions of whatsoever kind entered into, issued, or made by the Government, or on behalf of the Government, provision be made that no Chinese or Japanese shall be employed in connection therewith."

Moreover, it is enacted by sec. 3 of the statute in question as follows:—

"3. (1) Where in any instrument referred to in the said Orders in Council, or in any instrument of a similar nature to, any of those so referred to, issued by any Minister or Officer of any department of the Government of the Province ,any provision has heretofore been inserted or is hereafter inserted relating to or restricting the employment of Chinese or Japanese, that provision shall be deemed to have been and to be valid and always to have had and to have the force of law according to its tenor.

(2) Every violation of or failure to observe any such provision on the part of any licensee or other person to whom the instrument is issued or delivered or with whom it is entered into, or who is entitled to any rights under it, whether the violation or failure has heretofore occurred or hereafter occurs, shall be sufficient ground for the cancellation of that instrument, and the Lieutenant-Governor in Council may cancel that instrument accordingly."

Upon reference to the Attorney-General of British Columbia he reports that his Government maintains the constitutionality of the Act, and expresses his intention of taking proceedings which would bring the question before the Courts.

As the validity of this statute depends upon the interpretation of the legislative powers of the Province under the B.N.A. Act, and as the time for the disallowance will expire on April 18, 1922, one year after the date on which the authenticated copy of the Act was received by the Secretary of State, the

Minister states that he considers it desirable that Your Excellency's Government should be advised as to the enacting authority of the Province by the Supreme Court of Canada.

The Minister accordingly recommends that pursuant to the authority of sec. 60 of the Supreme Court Act the following questions be referred to the Supreme Court of Canada for hearing and consideration, viz.:

1. Had the Legislature of British Columbia authority to enact ch. 49 of its statutes of 1921, entitled "An Act to validate and confirm certain Orders in Council and Provisions relating to the Employment of Persons on Crown Property"?

2. If the said Act be in the opinion of the Court *ultra vires* in part then in what particulars is it *ultra vires?*

The Committee concur in the foregoing recommendation and submit the same for Your Excellency's approval.

(Signed) RODOLPHE BOUDREAU,
Clerk of the Privy Council.

E. L. Newcombe, K.C., for Att'y Gen'l for Canada.

C. H. Tupper, K.C., for Japanese Ass'n.

Charles Wilson, K.C., for Shingle Agency, B. C.

J. W. deB. Farris, K.C., with *J. A. Ritchie*, K.C., for Att'y-Gen'l for B. C.

DAVIES, C.J.:—In the matter submitted by His Excellency The Governor General in Council for our hearing and consideration respecting the validity of ch. 49 of the Statutes of British Columbia, 1921, 1st sess. two questions were asked:—

"1.—Had the Legislature of British Columbia authority to enact chapter 49 of its Statutes of 1921, entitled 'An Act to validate and confirm certain Orders in Council and Provisions relating to the Employment of Persons on Crown Property'? 2.—If the said Act be in the opinion of the Court *ultra vires* in part only, then in what particulars is it *ultra vires?*"

The Orders in Council which are scheduled to the Act in question and are attempted to be validated thereby provided that "in all contracts, leases and concessions of whatsoever kind entered into, issued or made by the Government, or on behalf of the Government, provision be made that no Chinese or Japanese shall be employed in connection therewith." These general words "contracts, leases and concessions" are expressly defined in the statute referred to us to include the various instruments specified in the long enumeration contained in the Order in Council dated June 18, 1902. Moreover, by the earlier Order in Council dated May 28, 1902, set out in the schedule to the Act, "all tunnel and drain licences issued by virtue of

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the powers conferred by sec. 58 of the Mineral Act and sec. 48 of the Placer Mining Act," and "all leases granted under the provisions of part 7 of the Placer Mining Act" are to be read subject to the clause or prohibition in question.

I am of the opinion that the description "leases, licences, contracts and concessions," embodied in the Orders in Council attempted to be validated by the said Act is comprehensive enough to comprise substantially all instruments which may be issued by the Provincial Government in the administration of its assumed powers, except grants of land in fee, and that the object and intention of these Orders in Council clearly is to deprive the Chinese and Japanese of the opportunities which would otherwise be open to them of employment upon Government works carried out by the holders of Provincial leases, licences, contracts or concessions.

By sec. 2 of the statute it is enacted that the said Orders in Council "shall, for all purposes, be deemed to be and to have been valid and effectual according to their tenor from the respective dates of their approval."

Section 3 sub-sec. (1) goes further and enacts:—"Where in any instrument referred to in the said Orders in Council, or in any instrument of a similar nature to any of those so referred to, issued by any Minister or officer of any department of the Government of the Province, any provision has heretofore been inserted or is hereafter inserted relating to or restricting the employment of Chinese or Japanese, that provision shall be deemed to have been and to be valid and always to have had and to have the force of law according to its tenor."

In this manner the Legislature attempts to legalise any prohibition or restriction of any employment of Chinese or Japanese upon works of or under the Government or its lessees, licencees, or contractees which in the discretion of any Minister or Departmental Officer might be embodied in the instrument.

In my opinion this legislation is ultra vires the Provincial Legislature: (1) because by sec. 91 of the B.N.A. Act, 1867, it is within the exclusive legislative authority of the Dominion, notwithstanding anything in that Act, to make laws "for the peace, order and good government of Canada" with relation to any matters coming within the classes of subjects described in sub-sec. 25 of sec. 91 as "naturalization and aliens."

This provision of the B.N.A. Act, 1867, was construed by the Judicial Committee of the Privy Council with relation to British Columbia legislation affecting Chinese and Janapese in two appeals to that Board: *Union Colliery Co.* v. *Bryden*,

[1899] A.C. 580, 68 L.J. (P.C.) 118, and *Cunningham* v. *Tomey Homma*, [1903] A.C. 151.

I confess it seems somewhat difficult to reconcile on all points the observations made by their Lordships who respectively delivered the judgments of the Judicial Committee in these cases. The interpretation of the *Bryden* decision given by the Lord Chancellor when delivering judgment of the Board in the *Tomey Homma* case must be accepted by all Courts in Canada. He said, at p. 157:—

"That case (the Bryden case) depended upon totally different grounds. This Board, dealing with the particular facts of that case, came to the conclusion that the regulations there impeached were not really aimed at the regulation of coal mines at all, but were in truth devised to deprive the Chinese, naturalised or not, of the ordinary rights of the inhabitants of British Columbia, and in effect, to prohibit their continued residence in that province, since it prohibited their earning their living in that province."

His Lordship then observes:—

"It is obvious that such a decision can have no relation to the question whether any naturalised person has an inherent right to the suffrage within the province in which he resides"—(which was the question then before the Board).

I am of the opinion that the legislation now in question is of the character described by Lord Watson in the *Bryden* case, as not being within the competency of the Province. His Lordship says at p. 587:—

"Their Lordships see no reason to doubt that by virtue of sec. 91 sub-sec. 25, the legislature of the Dominion is invested with exclusive authority in all matters which directly concern the rights, privileges, and disabilities of the class of Chinamen who are resident in the provinces of Canada. They are also of opinion that the whole pith and substance of the enactments of s. 4 of the Coal Mines Regulation Act, in so far as objected to by the appellant company, consists in establishing a statutory prohibition which affects aliens or naturalised subjects, and therefore trench upon the exclusive authority of the Parliament of Canada."

(2) I am also of the opinion that the legislation in question conflicts with the Japanese Treaty Act, 1913, of the Dominion of Canada (ch. 27). By this Act, in sec. 2, it is declared that the Japanese Treaty of April 3, 1911, set forth in the schedule to the Act "is hereby sanctioned and declared to have the force of law in Canada," with the exception of two provisions neith-

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er of which is pertinent in any way to the question now before us.

Paragraph 3 of art. 1 of the scheduled treaty states that the subjects of the high contracting parties "shall in all that relates to the pursuit of their industries, callings, professions, and educational studies be placed in all respects on the same footing as the subjects or citizens of the most favoured nation."

The Parliament of Canada derived the authority for the enactment of the Japanese Treaty from sec. 132 of the B.N.A. Act, 1867, which provides that "The Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or any Province thereof, as Part of the British Empire towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries."

There is no general provincial prohibition or disqualification affecting the citizens or foreign nations other than those of Japan and China in British Columbia, and while the statute now in question is not expressed generally to prohibit or disqualify Japanese and Chinese from all employment, it does provide that "in all contracts, leases, licences and concessions entered into, issued or made" by or on behalf of the Crown as represented by the Government of British Columbia, "no Japanese or Chinese shall be employed in connection therewith."

Thus the Province attempts to discriminate and to put the Japanese on a footing less favourable than that of the subjects of the most favoured nation.

This is contrary to the obligations of the Treaty and in direct conflict with the Dominion statute which must prevail under the powers conferred by sec. 132 of the B.N.A. Act above quoted.

I cannot doubt that the Japanese if employed upon the works which are by the statute in question prohibited to them would be so employed "in the pursuit of their industries, callings, professions." Certainly the words "industries, callings," would cover all manual labour, or other labour of a kindred character. Modern dictionaries define industry to include systematised labour or habitual employment, especially human exertion employed for the creation of value: labour.

There is only one Crown, although it may act "by and with the advice and consent of" the several Parliaments or Legislatures of the whole of the British Empire. The Crown which "by and with the consent and advice of the Lords and Commons of the United Kingdom" enacted the B.N.A. Act, 1867,

conferring upon itself acting "by and with the advice and consent of the Senate and the House of Commons of Canada" the power to sanction treaty obligations affecting the Dominion of Canada or a Province thereof, is the same Crown which became in 1911, a party to the Japanese Treaty, the provisions of which declared that, "they (the Japanese) shall in all that relates to the pursuit of their industries, callings, professions, educational studies be placed in all respects on the same footing as the subjects of citizens of the most favoured nation." It is the same Crown which in 1913, "by and with the advice and consent of the Senate and the House of Commons of the Dominion of Canada" in execution of the powers conferred by sec. 132 of the B.N.A. Act, 1867, sanctioned the Japanese Treaty and enacted that it should have "the force of law in Canada"; and it is the same Crown which in 1921, "by and with the advice and consent of the Legislature of British Columbia" enacted the statute in question here. If this Act is *intra vires* it is in absolute conflict with the Treaty and the Dominion Statute because it prohibits the employment of Japanese in the pursuit of their "industries and callings" in British Columbia on all Provincial Government works, or on works on land held by leases, licenses or concessions authorised by the Legislature of British Columbia. Thus the Japanese are placed on a footing less favourable than that of the subjects or citizens of more favoured nations.

The Crown was undoubtedly bound by the force of the Japanese Treaty Act of 1913 to perform within Canada its treaty obligations, and, if so, I cannot understand how it can successfully be contended that the Crown can by force of enactments of a Provincial Legislature directly or indirectly break its treaty obligations.

For these reasons I am of the opinion that the Legislature of British Columbia had not the authority necessary to enact ch. 49 of the 1921 Statutes of British Columbia.

As my answer to the first question is in the negative, any answer to the second question submitted is unnecessary.

IDINGTON, J. (dissenting):—Under sec. 60 of the Supreme Court Act R.S.C. 1906, ch. 139, we are asked the following questions:—

"I.—Had the Legislature of British Columbia authority to enact chapter 49 of its statutes of 1921, entitled 'An Act to validate and confirm certain Orders in Council and Provisions relating to the Employment of Persons on Crown Property'?

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2.—If the said Act be in the opinion of the Court *ultra vires* in part only then in what particulars is it *ultra vires?*"

The second section of the said Act declares certain Orders in Council set forth in a schedule to the Act to have been and to be valid and effectual.

Then sec. 3 of ch. 49, 1921, herein reads as follows:—

"(1) Where in any instrument referred to in the said Orders in Council, or any instrument of a similar nature to any of those so referred to, issued by any Minister or officer of any department of the Government of the Province, any provision has heretofore been inserted or is hereafter inserted relating to or restricting the employment of Chinese or Japanese that provision shall be deemed to have been and to be valid and always to have had and to have the force of law according to its tenor.

(2). Every violation of or failure to observe any such provision on the part of any licensee or other person to whom the instrument is issued or delivered or with whom it is entered into, or who is entitled to any rights under it, whether the violation or failure has heretofore occurred or hereafter occurs, shall be sufficient ground for the cancellation of that instrument, and the Lieutenant-Governor in Council may cancel that instrument accordingly."

The schedule seems to me (save as to one item) to deal entirely with the Crown lands, timber, coal and other minerals and mines and water the property of the Crown on behalf of the Province of British Columbia.

That Province was brought into the Canadian Confederation by virtue of sec. 146 of the B.N.A. Act, 1867, and pursuant to the several addresses therein provided for and by the Order in Council of the late Queen resting thereon also so provided for.

The agreement evidenced thereby appears on page LXXXV to CVII prefixed to the statutes of Canada for 1872.

The terms thereof render operative and effective as to the Legislature of British Columbia the like powers enjoyed by the Legislatures of the other Provinces of Canada under sec. 92 of the said B.N.A. Act of 1867, and each of them contained in items 5, 10, 13, and 16, are of vital importance herein as are also other provisions of said Act such as sec. 109, which reads as follows:—

"109.—All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New

Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same."

Section 10 of the respective addresses which formed the basis of Union and of the Order in Council bringing the Union into effect, reads as follows:—

"10.—The provisions of the 'B.N.A. Act, 1867', shall (except those parts thereof which are in terms made, or by reasonable intendment may be held to be specially applicable to and only affect one and not the whole of the Provinces now comprising the Dominion, and except so far as the same may be varied by this Minute) be applicable to British Columbia in the same way and to the like extent as they apply to the other Provinces of the Dominion, and as if the Colony of British Columbia had been one of the Provinces originally united by the said Act."

That renders operative sec. 109 of the B.N.A. Act, 1867 and, I submit, rendered all therein specified subject to the jurisdiction of the responsible Government of British Columbia which thereby had power to enact such Orders in Council relative to the administration of all the said properties as the Legislature of said Province should see fit to support so long as it so saw fit to support same.

The Act now in question, of the Legislature of British Columbia seems therefore well within the powers so assigned to it.

There being numerous acts of the Legislature of British Columbia, such as the Land Act R.S.B.C. 1911, ch. 129; the Forest Act, 1912, ch. 17; the Mines Act R.S.B.C. 1911, ch. 161; and amendments thereto, each and all seem to be expressly enacted relative to the administration of such Crown Properties by Ministers respectively specified therein, it would not seem to require anything further than the Orders in Council made in course of such administration to give validity to any licenses or contracts relative to the regulations of such properties of the Crown.

Mr. Ritchie's argument on behalf of the Attorney-General of British Columbia in taking this point seemed to me to suggest quite properly that the Acts now called in question are of minor consequence and that even the veto power if exercised would fall short of reaching the alleged evil complained of herein.

The mode of the administration of any of the properties in question seems as much subject to the will of the Legislature as that of any private owner to the will of the owner thereof.

The conditions of the licenses for operating upon same binding the licensees not to employ in doing so Chinese, Japanese or

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other Orientals may be offensive to some minds and may economically speaking be very questionable, but how can it be contended that any private owner might not so stipulate in such a license or other contract in relation to his own property?

Counsel for the Minister of Justice and for the company which challenged the right of the Government of British Columbia to so stipulate, respectively admitted on argument that the private owner could so stipulate in relation to his own property despite the treaty hereinafter referred to but counsel for the Japanese Association relied upon an American decision laying down the doctrine that it would be against public policy to so contract.

The obvious answer is that the Legislature in control of the subject matter is the power to create or dictate any such Provincial public policy and that must be predominant unless and until the Dominion Parliament acting *intra vires* declares otherwise.

The decision in the case of *Union Colliery* v. *Bryden*, [1899] A.C. 580, was presented in argument but not as decisive of the questions raised herein.

I may point out that it was a general regulation as applicable to a private mine which was in question therein and that the judgment seems to be rested upon item 25 of sec. 91 of the B.N.A. Act of 1867—"Naturalization of Aliens"—and was followed by the decision in the case of *Cunningham* v. *Tomey Homma*, [1903] A.C. 151, where the Lord Chancellor, in giving the judgment of the Court above does not, at foot of p. 156 and following page, seem to maintain the doctrine in the judgment in the former case to the full extent declared therein and as understood by the Courts in British Columbia attempting to abide by it. Hence the judgments of these Courts were reversed.

I submit that the powers I have referred to above as given the Legislature of British Columbia in relation to its control of the properties in question herein are quite as explicit as anything given it in relation to the franchise.

The disposition of the question raised in the *Colliery* case however, does not end there for in the case of *Quong Wing* v. *The King* (1914), 18 D.L.R. 121, 23 Can. Cr. Cas. 113, 49 Can. S.C.R. 440, the question of discrimination against a Chinaman, in this instance a naturalised British subject, within the ambit of our Canadian Naturalisation Act, R.S.C. 1906, ch. 77, was again raised.

The majority of this Court held that, despite what was held

in the *Colliery* case the Legislature of Saskatchewan had the power to discriminate against him, in the same spirit as evident in relation to what is in question herein, and in the way that appears in that case.

An application on his behalf to the Court above, for leave to appeal from such decision here, was refused.

And that although, as our Naturalization Act then stood by sec. 24 thereof it provided as follows:—

"24.—An alien to whom a certificate of naturalization is granted shall, within Canada, be entitled to all political and other rights, powers and privileges, and be subject to all obligations to which a natural-born British subject is entitled or subject within Canada, with this qualification, that he shall not, when within the limits of the foreign state of which he was a subject previously to obtaining his certificate of naturalization, be deemed to be a British subject unless he has ceased to be a subject of that state in pursuance of the laws thereof, or in pursuance of a treaty or convention to that effect."

The question most urgently pressed in the present case by way of challenging the validity of the Act now in question herein, was the Act of our Dominion Parliament, assented to on April 10, 1913, and known as the Japanese Treaty Act, 1913, declaring the treaty to have the force of law in Canada.

Section 3 of art. 1 of the said treaty seems to contain all that can be even plausibly relied upon in such a connection. It reads as follows:—

"3.— . . . . Shall in all that relates to the pursuit of their industries, callings, professions and educational studies be placed in all respects on the same footing as the subjects or citizens of the most favoured nation."

Compare the forceful effect of the language used in the Naturalization Act above quoted and that just quoted from the treaty.

The former was turned down in this Court, and, in the Court above, held not worthy of a hearing as against a provincial legislative enactment, of the same tenor and purposes as that challenged herein.

I do not pretend that the aggregate consequences flowing from the Saskatchewan Act 1912, ch. 17, would be at all equal to those flowing from the policy of the Legislature of British Columbia in doing as it pleased with its own, and complained of herein.

But I do pretend that the principle involved in the Saskatchewan Act, relative to a naturalised Chinaman, assured by

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our Naturalization Act of his right as such, in the terms above quoted, is of more serious import than anything contained in said sec. 3 of art. 1 of the treaty above mentioned.

When we are asked to strain and positively wreck our Constitution as outlined in the B.N.A. Act assuring Provinces of such powers as challenged herein, I have no doubt of what my answer should be to the questions submitted.

I, before doing so, should observe that at one time in the course of the argument and consideration of the matters involved in item "n" of the schedule to the Act, which reads as follows.—"(n) Public works contracts the terms of which are not prescribed by Statute;" I was inclined to doubt if that article was maintainable.

On mature consideration I am, however, unable to discriminate between the rights of a property owner with which I have been dealing and the rights of a Government executing a non-statutory contract such as covered by the last quotation.

Having considered all the supplemental factums presented in support of the argument at the hearing, I am tempted, with great respect, to suggest that the argument based upon the prerogative of the Crown, and obligations of the Crown, as if one and indivisible throughout the Empire, seem to overlook the many and varying limitations thereof brought in with the recognition of responsible government in Canada, over three-quarters of a century ago.

Even some forms of treaty must be read as being subject thereto.

I would, therefore, answer the first question in the affirmative which renders it unnecessary to answer the second.

I cannot, however, forbear asking what possible difference it can make so long as in these days of public ownership the Government of British Columbia could, I submit, act directly and select its own workmen to clear its forests and exclude the Chinese and Japenese so long as public opinion would support them in doing so.

DUFF J. :—The attack upon the provincial statute rests upon two principal grounds, 1st, that it is repugnant to the Dominion Act of 1913 declaring the accession of Canada to the Japanese Treaty and giving to the provisions of that treaty the force of law throughout the Dominion, and 2nd, that the provincial legislation considered in itself, abstraction made from the operation of the Dominion Statute of 1913, is without legal force for the reason that it is an enactment "in pith and substance" relating to the subject of aliens and naturalised subjects and on

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the principle of *Bryden's* case, [1899] A.C. 580, is *ultra vires*.

To consider, first, the second of these grounds of attack. The provincial statute professes to attach to the leases, licenses, contracts and concessions which are the subject of the scheduled Orders in Council a condition which contains a stipulation that no Chinese or Japanese shall be employed by any of these classes of licensees, lessees and concessionaires in the exercise of the rights granted and in the case of contracts by any contractor in connection with the public work to which his contract relates; and the condition also contains a provision authorising the cancellation of the rights of any grantee or contractor who disregards the stipulation. The instruments to which this condition applies are of two classes:—1st, contracts under which the contractor's remuneration would, in the ordinary course, be a payment of money out of the public funds of the Province, and 2nd, grants of rights in and in relation to the public property of the Province but grants of limited and particular rights only of which a mining lease so called may be taken as typical. A single word of explanation may be convenient at the outset in relation to the water power certificates under the Water Clauses Consolidation Act, 1897, ch. 190. These water power certificates were certificates granted to incorporated companies by the Lieutenant-Governor in Council on certain specified terms and subject to such further terms as he in his discretion might see fit to exact, conferring a right upon the company receiving the certificate to apply for power purposes water power made available by authority of water records granted under the same Act and giving to the company in addition extensive compulsory powers for the construction, maintenance and operation of its works. The precise point to be noted is that in the year 1892 the Legislature of British Columbia, following legislation of a similar but much more elaborate character passed in the year 1890 by the Dominion Parliament relating to what was then known as the North West Territories, now the Provinces of Alberta and Saskatchewan, declared that all unappropriated waters, that is to say, all water in the Province not appropriated under statutory authority should be the property of the Crown in the right of the Province; so that water power certificates authorising the diversion and the application of unappropriated water for the purposes of the companies possessing such certificates are in effect conditional grants of special rights over and in relation to a subject which by the statute law of British Columbia is the property of the Crown.

The conclusion to which I have come is that the decision of the

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Lords of the Judicial Committee in *Bryden's* case, does not in principle extend to provincial legislation attaching to contracts of the kind and to grants of public property of the character to which the statute relates a condition in the terms of that now under consideration.

It is most material, I think, first of all to notice the nature and extent of the control exercisable by the Legislature of a Province over its public assets. The B.N.A. Act provided for the distribution not only of power, legislative and otherwise between the Dominion and the Provinces but for the distribution of responsibilities and assets as well. The responsibilities assumed by the Provinces were onerous and extensive; administration of justice, including police, public health, charitable institutions, colonisation, including highways, municipal institutions, local works, including intraprovincial transport and above all, education. The responsibility in respect of agriculture and immigration was assumed jointly. In the sequel immigration has gradually become almost exclusively a Dominion matter while agriculture has been left very largely to the care of the Provinces. The scheme of Confederation necessarily involved a division of assets and an allotment of powers of taxation. The division of assets is the subject matter which concerns the sections of the Act numbered, 102 to 126 inclusive. By these sections the whole mass of the duties and revenues over which the Provinces possessed the power of appropriation at the time of Confederation is divided between the Dominion and the Provinces. The sections in which their respective rights are defined being secs. 102, 108, 109, 117 and 126.

Two characteristics of these provisions have often been judicially noted, 1st, they do not displace the title of the Crown in the public property. What is dealt with is the power of appropriation possessed by the Provincial Legislature at the time of Confederation (sec. 102); and 2nd, this power of appropriation is treated (secs. 108, 109, 117, 92 (5)) as equivalent to property. The interest of the Dominion as well as that of the Provinces in the public property both in that assigned by the sections mentioned and that afterwards acquired as the result of taxation or from other sources of revenue is, as Lord Watson said in the *Maritime Bank's* case, [1892] A.C. 437, 61 L.J. (P.C.) 75, this right of appropriation; and as was said again by Lord Watson in the *St. Catherine's Milling Co.* case (1888), 14 App. Cas. 46, 58 L.J. (P.C.) 54, this right of appropriation is equivalent to the entire beneficial interest of the Crown in such property. Ultimately in each case this power of appro-

priation rests with the Dominion or the Provincial Legislature as the case may be and that not by virtue alone of any special enactments of secs. 91 and 92 relating to property but in the case of the Provinces by force of the provision giving the Provinces control over the provincial constitution; and the legal effect of these provisions as Lord Watson said in the *St. Catherine's Milling Co.* case, at p. 58, is to exclude from Dominion control any power of appropriation over the subjects assigned to the Provinces which are placed under the control of the Provincial Legislatures. As regards the Provinces this control by the Legislatures over the proceeds of taxation and over the property assigned to them by the enactments of the B.N.A. Act is essential to the system set up by the B.N.A. Act. Provincial autonomy would be reduced to a simulacrum if the proceeds of provincial taxation were subject to the control of some extra-provincial authority and such proceeds are placed by the provisions referred to on precisely the same footing in respect of the legislative power of appropriation as the existing assets distributed by the Act. The title to all such property is vested in His Majesty but in His Majesty as sovereign head of the Province (*Maritime Bank's* case, [1892] A.C. at pp. 443, 444); as regards the appropriation and disposal of such property His Majesty acts upon the advice of the Provincial Legislature and Executive. No extra provincial authority is constitutionally competent to give such advice.

I do not mean to imply that the Provinces in exercising their powers of ownership over provincial property may not be subject to restrictions arising out of the provisions of competently enacted Dominion legislation. In the *Fisheries* case, [1898] A.C. 700, Lord Herschell delivering the judgment of the Judicial Committee pointed out that Dominion legislation might in certain cases, in theory at least, so restrict the exercise of the provincial proprietary rights as virtually to effect confiscation of them.

But while that is so Lord Watson pointed out as already mentioned, in *St. Catherine's Milling Co.'s* case that the legal effect of the provisions of the Act dealing with the distribution of assets was to exclude the assets assigned to the Province from the Dominion power of appropriation save for the purpose mentioned in sec. 117. There is therefore this limit to the effect of Dominion legislation in this connection. The Dominion has no power to deal with provincial public assets as owner. This is illustrated by the decision in the *Fisheries* case, in which it was held that notwithstanding the Dominion power of regulation

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of fisheries the authority remains with the Province to settle the conditions upon which rights shall be granted in respect of fisheries vested in the Province as owner; and at p. 713 Lord Herschell explicitly says on behalf of the Judicial Committee that an attempt on the part of the Dominion to deal with provincial public property as owner cannot be supported as an exercise of legislative authority under sec. 91.

This authority of the Province in relation to its public property seems necessarily to involve the exclusive right to fix the conditions upon which public money shall be disbursed and rights in or in respect of provincial public property granted. That seems to be involved in the conception of such authority as equivalent to ownership. True it is that by sec. 106 and by sec. 126 it is provided that the duties and revenues over which the Dominion and the Provinces are respectively given the power of appropriation shall be appropriated to the public service of the Dominion or of the Province as the case may be. What is an appropriation to the public service of the Dominion or to the public service of a Province? Is that a question reviewable by a Court? Without deciding finally that point it is quite plain that the question whether a given appropriation by the Dominion Parliament or by a Provincial Legislature is an appropriation for the public service within the meaning of these enactments is a point upon which any Court would be slow to pass. I doubt very much if such a question is reviewable judicially.

The present reference presents the question (as it was argued by counsel on behalf of the Dominion as well as on behalf of the private interests opposed to the validity of the legislation) as a question depending upon the application of *Bryden's* case. *Bryden's* case was considered in the later case of *Cunningham* v. *Tomey Homma*. There are expressions in the later judgment which appear to throw some doubt upon the earlier decision but I do not think the Judicial Committee in 1903 intended to overrule the central point of the decision of 1899. In the earlier case Lord Watson laid down that the rights and disabilities of aliens constituted a matter exclusively within the legislative jurisdiction of the Parliament of Canada and having come to the conclusion that the legislation in question there did "in pith and substance" deal solely with this subject, he held that the legislation was beyond the jurisdiction of the Province. According to the interpretation of *Bryden's* case laid down in 1903 the Coal Mines Legislation had been obnoxious to constitutional restrictions in the sense that in principle it involved

an assertion of authority on the part of the Province to exclude Chinese aliens and naturalised subjects from all employments and thus by preventing them earning their living to deny them the right of residence within the Province. That I think is the pith of the earlier legislation according to the interpretation placed by the later decision upon the judgment in *Bryden's* case—an assertion of authority on the part of the Province to exclude Chinese aliens or naturalised subjects from residence in the Province. I shall come presently to consider the Act of 1921 from this point of view, but before doing so it is important I think, to observe that the minor premise of the judgments in *Bryden's* case and *Tomey Homma's* case was that the legislation impeached in *Bryden's* case was legislation which in substance and effect if not in its very terms it would have been competent to the Dominion to enact in exercise of its power to make laws in relation to aliens and naturalisation; but while I do not think an affirmative answer to the question would by any means be necessarily decisive upon the point upon which we have to pass at present it is I think pertinent and worth while to examine the question whether or not the enactment now in question is an enactment which in whole or in part would have been competent to the Dominion under sec. 91.

I have already in a general way pointed out the characteristics of the scheduled Orders in Council. They enact that there shall be engrafted upon each instrument of the class mentioned a stipulation against the employment of Chinese and Japanese and the statute provides that a breach of this stipulation will confer upon the government of the Province a right of cancellation. Is this an enactment competent to the Dominion under its legislative authority in relation to the subject of aliens? The Judicial Committee in *Parsons'* case, 7 App. Cas. 96, and very lately in the judgment delivered by Lord Haldane in the *Great West Saddlery Co.'s* case, 58 D.L.R. 1, has pointed out that the scope of the enactments of secs. 91 and 92 must be determined, and in many cases the question is one of more than a little nicety, by reference to the context furnished by the two sections as a whole. Their Lordships in *Tomey Homma's* case, [1903] A.C. 151, had to consider the scope of the legislative authority conferred in respect of the subject of naturalisation in its relation to the provincial authority upon the subject of the provincial constitution and they reached the conclusion that this limitation at all events was imposed upon the Dominion authority that it was not of such scope as to place any restriction upon the provincial power to prescribe the conditions of such privileges

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as that of the right to exercise the provincial legislative suffrage. It would appear to admit of little doubt that similar considerations apply with perhaps much greater force to the Dominion authority in respect of aliens. An authority to legislate on the subject of aliens (the subjects of the provincial constitution and municipal institutions being assigned to the province) would not seem *prima facie* to embrace the authority to provide that all aliens should possess the same right to the provincial legislative suffrage as British subjects or the same right to sit in the Legislature and to hold seats in the provincial executive or the same right to exercise the municipal franchises or to be members of municipal councils or to be municipal officials or (the exclusive authority to legislate on the subject of provincial officials being allotted to the Province) to provide that aliens should possess equal rights with British subjects in respect of employment in the civil service of the Provinces. Similar considerations again would appear to me sufficient to establish the exclusion from that authority of the power to require that aliens shall be on the same footing as British subjects in respect of the beneficial enjoyment of appropriations by Provincial Legislatures from public provincial funds or in respect of grants of interests in provincial property.

An attempt on part of the Dominion to enact the Act of 1921 would pass beyond the scope of the authority given by sec. 91. The restrictions imposed by the scheduled Orders in Council affect, it must be observed, naturalised British subjects and native born British subjects. Clearly the Dominion could not on any ground capable of plausible statement pass a law restricting the right of grantees of interests in provincial property in relation to the employment of native born British subjects; the *Tomey Homma* case, [1903] A.C. 151, seems to negative the existence of such an authority in relation to naturalised subjects. The proportion of naturalised and native born British subjects of Japanese and Chinese race to the whole of the population within that category in the Province of British Columbia must be considerable. These considerations alone seem to present a formidable difficulty in the way of supporting such legislation as Dominion legislation under its authority in relation to aliens and naturalisation.

But the Dominion authority must fail, I think, upon a broader ground. For the purpose of explaining that ground more clearly I shall assume that the condition in question affected all aliens and aliens alone. The Dominion authority in respect of aliens it must be taken I think in consequence of the decision

in *Bryden's* case comprehends the right to define the rights and disabilities of aliens in a general way. But whether it comprehends the right even by general enactment to attach to grantees of rights in provincial property a special disability in relation to the employment of aliens, is, I think, at least gravely questionable; and the difficulty is not diminished when one considers the question in relation to grants of public monies. Assuming aliens to be under no applicable general disability is it truly legislation on the subject of aliens to prohibit the employment of them in circumstances in which they are to be paid out of public funds? To prohibit the Provincial Government from employing an alien in any circumstances? To place a like prohibition upon municipalities? I am not convinced that an affirmative answer can be given to these questions.

But the legislation in question goes a step—and a very long step—beyond this. It professes to attach to contracts entered into with the Provincial Government, to grants made by the Provincial Government, a stipulation and a condition the character of which has already been described, making the rights of the contractor or grantee defeasible upon nonperformance of the stipulation. It does not appear to me to admit of doubt that to impose by law such a stipulation and such a condition as part of such instruments would be an attempt on the part of Parliament to intervene in the disposition of the public funds of the Province and the control and disposition of the public property of the Province as owner; and therefore to transcend the restriction which as already mentioned is plainly laid down upon the activities of the Dominion parliament in exercise of the authority given by sec. 91 of the B.N.A. Act and plainly required by the decisions above mentioned. On this ground alone for the reason above given the irrelevancy of *Bryden's* case seems established.

But to come to a more particular consideration of *Bryden's* case and *Tomey Homma's* case and the application of the principle of these decisions to the statute of 1921 and the scheduled Orders in Council. The view taken in *Bryden's* case as explained by *Tomey Homma's* case of the Coal Mines Regulation Act was, as I have said, that it involves an assumption on the part of the Province to deal with the fundamental rights of aliens and naturalised subjects in a manner and degree not consistent with a recognition of their right of residence in the Province. In *Bryden's* case it was held that the necessary and indeed the only effect of the prohibition contained in the statute there under consideration was to prevent the class of Chinamen in-

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habiting British Columbia (aliens and naturalised subjects) from pursuing the occupation of underground coal mining. The statute and Orders in Council now under review have no such effect in fact or in principle. There is no prohibition directly levelled against Chinese and Japanese. There is a stipulation imposed, it is true, *ab extra* by the law upon instruments of the classes affected enforceable against grantees and concessionaires by the penal sanction of forfeiture which in effect excludes the employment of Chinese and Japanese, whether aliens, naturalised subjects or native born subjects in connection with the exercise of rights or the performance of duties under such instruments, but the stipulation and the condition are strictly limited to the employment of such persons in such circumstances. There is no prohibition affecting a lessee under the Placer Mining Act 1891, ch. 26, for example, or the holder of a certificate under the Water Clauses Consolidation Act in activities having no connection with the rights given by such instruments, and there is no general prohibition generally affecting any single occupation.

The last mentioned point requires perhaps a little elaboration. The Orders in Council as affecting the lumbering and logging industries, for example, are without operation in all cases in which the right to cut timber is incidental to the ownership of the land and in cases where the right to cut timber is derived through any grant of any character other than licenses and leases of the specific kinds mentioned in the Orders in Council. Without proceeding to further detail it is sufficient to point out that the vast areas of land in different parts of the Province granted as subsidies for aid in the construction of railways and the timber on those areas are quite unaffected by anything in these Orders in Council. There is, for example, the great land grant in Vancouver Island embracing about one fifth of the whole area of the island given in aid of the construction of the E. & N. Ry. There is the railway belt stretching from the coast to the eastern boundary line of the Province granted to the Dominion under the terms of union, and besides there are the large areas in southern British Columbia given by the Legislature in aid of railway construction some 30 years ago. So as to coal mining. The effect of these Orders in Council on the industry of coal mining must be trivial because it has no application except to coal mining in lands in which the title does not remain in the Crown. So again with regard to metaliferous mining. The statute does not affect mining on Crown granted mineral claims except in a very limited degree

or in mineral claims worked under the provisions of the Mineral Act R.S.B.C. 1897, ch. 135, before the issue of a Crown grant; and as regards placer mining it applies only to placer mining leases under the specified provisions and does not affect such mining pursued on placer mining claims. So again with regard to the grants of water rights. The right to divert water for agricultural purposes, for ordinary domestic purposes, for community supply, is not affected by the condition laid down, which affects only power certificates under Part IV of the Act. As regards contracts for public works, the incidence of the Order in Council is no doubt intended to be limited and I think that it is the proper construction of it to contracts with the Government where the remuneration of the contractor is derived from the legislative appropriation of public monies. Obviously the Legislature has not by the Act of 1921 attempted to deny the Chinese and Japanese the right to dispose of their labour in the Province nor has it attempted to prohibit generally the employment of Chinese and Japanese by grantees of rights in the public lands of the Province.

It should be noted that the provisions of the B.N.A. Act 102 to 126, in so far as they affect the public lands, contemplate not only the raising of revenue but an object at least as important, the distribution of these lands for the purpose of colonization and settlement. As Lord Selborne said in the *Mercer's* case (1854), 5 De G. M. & G. 26, 43 E.R. 778, 23 L.J. (Ch.) 246, 2 W.R. 251, the provisions are of a high political nature; they are the attribution of Royal territorial rights for the purposes of not only revenue but for the "purposes of government" as well.

In some of the Provinces perhaps the most important responsibility resting upon the Legislature was the responsibility of making provision for settlement by a suitable population. This is recognised by the provision of the Act which gives to the Provinces (subject to an overriding Dominion authority) the power to make laws in relation to the subject of immigration.

I find it difficult to affirm that a Province in framing its measures for and determining the conditions under which private individuals should be entitled to exploit the territorial resources of the Province is passing beyond its sphere in taking steps to encourage settlement by settlers of a class who are likely to become permanently (themselves and their families) residents of the Province. I see no reason for thinking that the Province of British Columbia in providing, for example, that persons entitled to take advantage of the privileges given

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by the Crown Lands Act R.S.B.C. 1897, ch. 113, in relation to pre-emption of the public lands is entering a sphere which does not properly belong to it in enacting that such persons shall be either British subjects or those who have declared their intention to become British subjects.

These considerations are not irrelevant because they point to the conclusion that it cannot be affirmed (a condition of the applicability of *Bryden's* case) in respect of such legislation as that before us that it has no other effect than its effect upon the unrestricted opportunity which Chinese and Japanese might otherwise enjoy in disposing of their labour. That cannot be affirmed because it is impossible to say that the Legislature in imposing such conditions had not in view some object falling within the scope of its political duties in relation to the interests and responsibilities committed to it.

The next point which naturally arises for consideration is whether effect should be given to the contention made on behalf of the Dominion that the Dominion statute of 1913 can be sustained as enacted in exercise of the power of the Dominion in relation to aliens. There are grave objections to this contention. One of the provisions of the treaty which is declared to have the force of law is a provision which puts Japanese subjects on the same footing as regards education as British subjects. The subject of education, as already mentioned, is committed to the provincial jurisdiction by sec. 93. One of the provisions which, as I have already said, must be regarded as fundamental. I am unable to agree that the authority of the Dominion with regard to the subject of aliens is comprehensive enough to support an enactment in the terms of the treaty clause on this subject and it is impossible, I think, to suppose that Parliament in declaring this clause to have force of law was professing to exercise any authority under sec. 91. But there is an objection based upon a broader ground. I am unable for the present at all events to agree with the view that the Dominion authority in relation to aliens comprehends the power to give to aliens rights having primacy over the rights of the Provinces in relation to grants of public money or grants of interests in public lands. I will not elaborate this point, my reasons will sufficiently appear from what I have already said.

I now come to sec. 132, which is in these terms:—

"132. The Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any Province thereof, as part of the British

Empire, towards foreign countries arising under treaties between the Empire and such foreign countries."

It is a condition of the jurisdiction created by this section that there shall be some obligation of Canada or of some Province thereof as part of the British Empire towards some foreign country arising under a treaty between the Empire and such foreign country. A treaty is an agreement between states. It is desirable, I think, in order to clear away a certain amount of confusion which appeared to beset the argument to emphasise this point that a treaty is a compact between states and internationally or diplomatically binding upon states. The treaty-making power, to use an American phrase, is one of the prerogatives of the Crown under the British constitution. That is to say, the Crown, under the British constitution, possesses authority to enter into obligations towards foreign states diplomatically binding and, indirectly, such treaties may obviously very greatly affect the rights of individuals. But it is no part of the prerogative of the Crown by treaty in time of peace to effect directly a change in the law governing the rights of private individuals, nor is it any part of the prerogative of the Crown to grant away, without the consent of Parliament, the public monies or to impose a tax or to alter the law of trade and navigation and it is at least open to the gravest doubt whether the prerogative includes power to control the exercise by a colonial Government or Legislature of the right of appropriation over public property given by such a statute as the B.N.A. Act. All these require legislation. As regards these matters the supreme legislative authority in the British Empire is, of course, the Parliament of the United Kingdom. Three views are perhaps conceivable as to the scope of the authority arising under sec. 132. It might be supposed that it was intended to give jurisdiction only in relation to those matters which are committed to the authority of Parliament by sec. 91 and other provisions of the B.N.A. Act. It might be supposed, on the other hand, to constitute a delegation of the entire authority of the Parliament of the United Kingdom, insofar as the execution of such authority might be required for the purpose of giving effect to the treaty obligations of the Empire within Canada or in relation to Canada. On the other hand it may be supposed that a less sweeping authority is conferred by this section; that it is subject to some limitations arising out of co-ordinate provisions of the B.N.A. Act itself. As to the first of these views, it may, I think, be at once rejected upon the ground that otherwise the section would be quite unnecessary. As to the other two;

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there are certain fundamental terms of the arrangement upon which the B.N.A. Act was founded, and these it is difficult to think it was intended that Parliament should have power to disregard in any circumstances. But it is unnecessary to pass upon these points. The authority given by sec. 132 is an authority to deal with subjects of imperial and national concern as distinguished from matters of strictly Dominion concern only; and I am satisfied it is broad enough to support the legislation in question. The treaty validated by statute of 1913 deals with subjects which are ordinary subject matters of international convention: with precisely the kind of thing which must have been in the contemplation of those who framed this section. The effect of the Act of 1913 is, in my opinion, at least this: that with respect to the right to dispose of their labour, the Japanese are to be in the same position before the law as the subjects of the most favoured nation. Equality in the eye of the law in respect of these matters is what I think the legislation establishes. Does the Act of 1921 in its true construction infringe these rights of Japanese subjects? In my opinion it does. It excludes them from employment in certain definite cases. It is not, I think, material that the Province in passing the Act is engaged in administering its own corporate economic affairs. If it goes into effect, it goes into effect (as a law of the Province) abrogating rights guaranteed by the treaty. It is thus not only a law passed against the good faith of the treaty but it is, in my opinion, a law repugnant to the treaty and as such I think it cannot prevail. I think, moreover, that the Act of 1921 views Japanese and Chinese as constituting a single group and since it cannot take effect according to its terms that it must be treated as inoperative *in toto*.

ANGLIN, J.:—The competency of the Legislature of British Columbia to pass ch. 49 of its statutes of 1921 is the subject of a reference to this Court by His Excellency the Governor General in Council, made under sec. 60 of the Supreme Court Act. The statute in question purports to validate certain orders of the Provincial Executive Council providing for the insertion, in leases of Crown lands, Crown licenses and other documents, of clauses precluding the employment by Crown lessees and licensees of Chinese and Japanese labour. Its validity is challenged on two distinct grounds: (a) that it impinges on the exclusive jurisdiction of the Dominion Parliament over "Naturalization and Aliens" (B.N.A. Act, sec. 91 (25)); (b) that it derogates from rights assured to the Japanese in Canada by a treaty between H.M. the King and H.M. the Em-

peror of Japan, "sanctioned and declared to have the force of law in Canada" by 1913 (Can.) ch. 27, sec. 2.

It seems obvious that, inasmuch as the latter ground of attack concerns only the Japanese, it will, in any event, be necessary to consider the former ground in order to answer the question propounded in so far as it relates to the Chinese, who are also affected by the impugned legislation and the Orders in Council it purports to confirm. Their Lordships of the Privy Council have frequently intimated that in dealing with matters akin to that now before us, those upon whom the duty of determining them is thrown will be well advised so far as possible to restrict their expressions of opinion to what is essential for the determination of the particular question in hand. *Citizens Ins. Co.* v. *Parsons* (1881), 7 App. Cas. 96, 51 L.J. (P.C.) 11; *Hodge* v. *The Queen* (1883), 9 App. Cas. 117, 53 L.J. (P.C.) 1; *Att'y Gen'l for Manitoba* v. *Manitoba Licence Holders' Ass'n.*, [1902] A.C. 73. It would therefore seem to be desirable that the question as to the effect of the Japanese Treaty and of its sanction by the Canadian Parliament should be entered upon only if the impugned legislation should be held not to invade the jurisdiction of the Dominion Parliament under sec. 91 (25) of the B.N.A. Act. I accordingly take up this latter question.

If the British Columbia Legislation, when properly appreciated, falls within the legislative jurisdiction conferred on the Dominion Parliament by sec. 91 (25), in view of the concluding proviso of sec. 91—"Any matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local and private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces"—it should not be upheld merely because it may in some aspect be regarded as an exercise of legislative power conferred by one of the sub-sections of sec. 92.

In determining the validity of legislation which it is sought to uphold under, and which may *ex facie* purport to have been passed in the exercise of, certain legislative powers conferred by the B.N.A. Act, their Lordships have intimated that the Courts should have regard to "the pith and substance of the enactment" rather than to its form or to any gloss put upon it (*Union Colliery Co.* v. *Bryden*, [1899] A.C. 580)—that they should ascertain at what the legislation is really aimed and should accordingly determine where legislative jurisdiction to enact it is to be found. *Great West Saddlery Co.* v. *The King*, 58 D.L.R. 1, [1921] 2 A.C. 91, and *Att'y Gen'l for Canada* v.

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Att'y Gen'l for Alta. (*the Board of Commerce* case), 60 D.L.R. 513, [1922] 1 A.C. 191, are recent instances in which their Lordships have so dealt with Canadian statutes.

To paraphrase Lord Watson's language in the *Bryden* case—the leading feature of the Orders in Council dealt with by the legislation in question consists in this—that they have, and can have, no application except to Japanese and Chinamen who are aliens or naturalised subjects, and that they establish no rule or regulation except that, these aliens or naturalised subjects shall not work, or be allowed to work, upon, or in the development of, any property leased from the Government of British Columbia or in private enterprises which are operated in whole or in part under licenses from that Government: "the pith and substance of the enactments" objected to consists in establishing a prohibition which affects aliens or naturalised subjects in matters that directly concern their rights, privileges and disabilities as such: they therefore trench upon the exclusive authority of the Parliament of Canada.

While the judgment in the *Bryden* case is undoubtedly explained and somewhat restricted in its application by what the Lord Chancellor said in pronouncing the judgment of the Board in the *Tomey Homma* case, [1903] A.C. 151, the authority of the former decision remains unchallenged. The legislation now before us in my opinion much more closely resembles that condemned in the *Bryden* case than that upheld in the *Tomey Homma* case, where a matter of Provincial electoral franchise, and therefore of the constitution of the Province, was the subject of the legislation, or in the subsequent *Quong Wong* case in this Court, (18 D.L.R. 121) where a law for the suppression of a local evil was upheld. Properly appreciated, the Orders in Council which the British Columbia legislation of 1921 purports to validate are devised to deprive Chinese and Japanese, whether naturalised or not, of the ordinary rights of the inhabitants of British Columbia in regard to employment by lessees and licensees of the Crown and are not really aimed at the regulation and management of Crown properties or Crown rights. I am unable to distinguish the case at Bar in principle from the *Bryden* case. If the authority of that decision is to be destroyed, it must be by the Judicial Committee itself and not by this Court.

I would therefore answer the first question on the reference in the negative, which renders an answer to the second unnecessary.

BRODEUR, J. (dissenting in part):—The question we have to consider on this reference is whether the British Columbia Legislature has the right to prohibit the employment of Chinese and Japanese on Crown lands or on public works.

On April 2, 1902 the Legislative Assembly of that Province passed a resolution declaring that in all contracts, leases and concessions made by the government, provision should be made that no Chinese or Japanese should be employed in connection with these contracts, leases or concessions.

Such a resolution was never embodied before 1921 in any statute of the Legislature and was not then part of the law of the land. Further it could not be disallowed by the federal authorities under the powers conferred by secs. 55 and 90 of the B.N.A. Act because it was not a statute.

In conformity with the said resolution however the Government of the Province passed on May 28, 1902 and on June 16, 1902 Orders in Council carrying into effect the resolution of the Legislative Assembly and since the passing of these Orders in Council the Government has inserted in its contracts for the construction of provincial public works a provision that no Chinese or Japanese should be employed in connection with such works and has caused it to be inserted as a term of its contracts and leases conferring rights or concessions in respect to the public lands belonging to the Province, a provision that no Chinese or Japanese shall be employed about such premises.

In 1920 the Provincial Government of British Columbia referred to the Court of Appeal of that Province the question whether the Japanese Treaty of April 3, 1911, operated as to limit the legislative jurisdiction of the Legislative Assembly.

The Court of Appeal unanimously decided that it was not competent to the Provincial Legislature to insert in these public contracts or leases in respect of public lands a provision that no Japanese shall be employed upon such works or lands.

In 1921 the Legislature of British Columbia passed the statute, ch. 49, by which the two Orders in Council of May 28, 1902 and June 18, 1902 are declared to have been valid and effectual for all purposes.

The Consul General of Japan having suggested to the Federal Government that this statute of 1921 was *ultra vires* and that it should be disallowed by His Excellency the Governor General, the Federal Government has referred to the Supreme Court the two following questions:—

"1. Had the Legislature of British Columbia authority to enact ch. 49 of its statutes of 1921 'An Act to validate and

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confirm certain Orders in Council and provisions relating to the employment of persons on Crown property?'

2. If the said Act be in the opinion of the Court *ultra vires* in part then in what particulars is it *ultra vires?*''

The question of restricting the employment of Chinese and Japanese labour has been for years a subject of discussion in the Legislature of British Columbia and of litigation before the Canadian Courts and the Privy Council. It has been also the subject of diplomatic relations between the countries interested.

We see that as far back as 1890, ch. 32, the Legislature of that Province passed the Coal Mines Regulation Act by which it prohibited the Chinamen from employment in underground coal workings. The Privy Council, being called upon to pass judgment on the validity of the Act, declared that the statutory prohibition in question was within the exclusive authority of the Dominion Parliament conferred by sec. 91, sub-sec. 25 in regard to ''naturalisation and aliens'': *Union Colliery v. Bryden,* [1899] A.C. 580.

In R.S.B.C. 1897, the Municipal Elections Act was passed and provided that no Japanese, whether naturalised or not, should be entitled to vote. The validity of this Act was also brought before the Courts, and the Privy Council upheld the validity of the Act and decided that the Dominion Parliament, under sec. 91 sub-sec. 25, B.N.A. Act, had exclusive jurisdiction to determine how the naturalisation should be constituted, but that the Provincial Legislature had the right to determine under sec. 92, sub-sec. 1, what privileges, as distinguished from necessary consequences, shall be attached to naturalisation. *Cunningham v. Tomey Homma,* [1903] A.C. 151.

It was said that in the *Tomey Homma* case the Judicial Committee ''modified the views of the construction, of sub-sec. 25 of sec. 29 in the *Union Collieries* decision,'' (*Quong Wing* v. *The King,* 18 D.L.R. 121).

This *Quong Wing* case gives another instance of a legislative enactment against Orientals. It has reference to a prohibition by the Legislature of Saskatchewan against the employment of white female labour in places of business kept by Chinamen, and it was decided by this Court that such a provision was *intra vires* of the Provincial Legislature.

The Privy Council refused leave to appeal in this *Quong Wing* case.

I can, with some difficulty, reconcile these three above decisions. (Clement's Canadian Constitution, 3rd ed. p. 673).

It appears to me however that where a Province deals with

a subject which evidently is within its jurisdiction, as the constitution of its legislative assembly or the making of the civil contract of hire, then it can provide against the Chinese and the Japanese becoming duly qualified electors and employing white girls. But where, under the pretence of dealing with local undertakings, the Legislature undertakes to legislate with regard to naturalisation or aliens, then it is a legislation which is not within its competence. A provincial Legislature cannot discriminate against an alien upon the ground of his lack of British nationality, but a person may nevertheless be under disability, civil or political by reason of racial descent, a disability which he would share with natural born or naturalised British subjects of like extraction. *Quong Wing* v. *The King*, 18 D.L.R. 121.

By the Orders in Council which the British Columbia Government passed in 1902 and which were confirmed by the Act, whose validity is referred to us, the Legislature deals with its own Crown lands and enacts that a certain class of persons will not be permitted to work on those lands. It is a question of internal management which, according to sec. 92 sub-sec. 5 of the B.N.A. Act, is within the competence of the local authority.

I therefore come to the conclusion that the legislation at issue, if it were not for the Japanese Treaty to which I will presently refer, would be *intra vires*. It is certainly *intra vires* as far as the Chinese are concerned.

In 1911, a treaty was made between His Majesty the King and the Emperor of Japan in which it was stipulated that the subjects of the contracting parties "shall in all that relates to the pursuit of their industries, callings, professions and educational studies be placed in all respects on the same footing as the subjects or citizens of the most favoured nation."

This treaty was sanctioned and declared to have the force of law in Canada by the Canadian Parliament in 1913.

Now by the B.N.A. Act sec. 132, it is provided that the Parliament of Canada shall have all powers necessary for performing the obligations of Canada or of any Province towards foreign countries arising under treaties between the British Empire and such foreign countries.

If the treaty had not been adhered to by the Dominion Parliament, it could be contended with force that a Canadian Province was not bound to obey the provisions of this treaty and could discriminate against the Japanese in favour of their foreign subjects. *Walker* v. *Baird*, [1892] A.C. 491, 61 L.J. (P.C.) 92.

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The King has the power to make a treaty, but if such a treaty imposes a charge upon the people or changes the law of the land it is somewhat doubtful if private rights can be sacrificed without the sanction of Parliament. The Bill of Rights having declared illegal the suspending or dispensing with laws without the consent of Parliament, the Crown could not in time of peace make a treaty which would restrict the freedom of Parliament.

In the United States a different rule prevails. Under the United States constitution the making of a treaty becomes at once the law of the whole country and of every state. In our country such a treaty affecting private rights should surely become effective only after proper legislation would have been passed by the Dominion Parliament under sec. 132 of the B.N. A. Act.

We have in the Japanese Treaty Act of 1913 the legislation which is required to give force of law to that agreement, and it becomes binding for all Canadians and for all the Provinces.

British Columbia could not under that treaty give to the Japanese a treatment different from the one given to other foreigners.

I consider the legislation of British Columbia illegal as far as the Japanese are concerned.

I would then answer the first and second questions referred to us: That the Legislature of British Columbia had authority to enact ch. 49 of its statutes of 1921 as far as the Chinese are concerned but that in so far as the Japanese were concerned such statute is *ultra vires*.

MIGNAULT, J.:—In answering the questions submitted by this reference, two decisions of the Judicial Committee must be considered: *Union Colliery Co of British Columbia* v. *Bryden*, [1899] A.C. 564, and *Cunningham* v. *Tomey Homma*, [1903] A.C. 151.

The latter decision somewhat qualified the former, and indicated at p. 157 its scope in the following language:—

"This Board, dealing with the particular facts of that case, came to the conclusion that the regulations there impeached were not really aimed at the regulation of coal mines at all, but were in truth devised to deprive the Chinese, naturalised or not, of the ordinary rights of the inhabitants of British Columbia and, in effect, to prohibit their continued residence in that Province, since it prohibited their earning their living in that Province."

In my opinion, the purport of the legislation and Orders in

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Council referred to in the reference is well described in the above language. So far as it could do so, the Government of British Columbia, with the sanction of the Legislature, has excluded the Chinese and Japanese, naturalised or not, from the field of industry and the labour market in that Province, and has, in effect, prohibited their continued residence and their earning their living in British Columbia. The case comes well within the rule of the *Bryden* case as explained in the *Tomey Homma* case, and therefore the statute and the Orders in Council are *ultra vires*.

During the argument, counsel referred us to the Anglo-Japanese Treaty of April 3, 1911, sanctioned and declared to be law by the Dominion statute 1913, ch. 27, as rendering the impeached provisions void in so far as the Japanese are concerned.

This treaty is not mentioned in the Reference, and inasmuch as I come to the conclusion that this legislation is *ultra vires* under the B.N.A. Act as construed by the above mentioned decisions, it is unnecessary to consider whether the treaty furnishes a further ground of nullity.

I would answer "no" to the first question of the Reference. The second question requires no reply.

The Court answered the first question in the negative. It was therefore unnecessary to answer the second.

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Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, and Turgeon, JJ.A. May 8, 1922.

CONTRACTS (§IIA—128)—AGREEMENT FOR SALE AND PURCHASE OF LAND—EXTENSION OF TIME ON FAILURE OF CROP — "DURING THE CURRENCY OF THIS AGREEMENT"—CONSTRUCTION.

An agreement for the sale and purchase of land contained a clause "that in the event of a total failure of crop in any year during the currency of this contract, that the purchaser shall be required to pay interest only due on this contract, and the vendor agrees to give an extension of time for one year for the payment of the principal.". The final payment under the agreement became due on December 1st, 1919, and in that year there was a crop failure and the purchaser asked for and obtained an extension of one year under the above clause; there was another crop failure in 1920. The Court held, Haultain, C.J., dissenting, that the purchaser (defendant) was not entitled to a further extension; that the phrase "during the currency of this agreement" meant at any time up to the date upon which the parties agreed the final payment should be made, which was December 1st, 1919.

[*Kenyon* v. *Birks*, [1900] 1 Ch. 417, applied; *Corsedd S.S. Co.* v. *Forbes* (1900), 16 Times L.R. 566, 5 Com. Cas. 413 distinguished.]

APPEAL by defendant from an order *nisi* in an action to cancel an agreement for the sale and purchase of land and forfeit

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the monies paid thereunder. Affirmed, with a variation as to the time in which payment must be made.

LeR. Johnson, for appellant.

T. D. Brown, K.C., for respondent.

HAULTAIN, C.J.S. (dissenting):—By agreement in writing, dated August 12, 1914, the appellant Bumstead agreed to purchase and the respondent McEwan agreed to sell a certain quarter section of land for the price of $5,800. The purchase-price was payable in instalments on December 1 in each year, the final instalment of $2,300 being payable on December 1, 1919. The agreement contained the following clause:—

"It is further covenanted and agreed that in the event of a total failure of crop in any year to the currency of this contract that the Purchaser shall be required to pay the interest only due under this contract, and the Vendor agrees to give an extension of time of one year for the payment of the principal."

It was agreed by counsel that "to the currency" should be read as "during the currency."

In 1919, owing to a total failure of crop, the time for the final payment of principal was extended for one year from December 1, 1919, the date upon which it was originally due, in accordance with the above mentioned clause. In 1920 there was again a total failure of crop, and the appellant again claims the benefit of the above clause; contending that, having paid the interest due up to December 1, 1920, he is entitled to have the time for payment of the principal extended for another year.

The respondent, on the other hand, contends that there is no right to an extension of time, on the ground that a crop failure in 1920 did not occur "in any year during the currency of the contract," as the period of "the currency of the contract" terminated on December 1, 1919, when the final payment was to be made.

The whole question turns on the interpretation of the words "in any year during the currency of this contract." If by the terms of the contract the appellant had been under an absolute and unqualified obligation to make the final payment on December 1, 1919, I should have no hesitation in holding that the term of the currency of the contract expired on that date. But, by the express terms of the contract, the time within which this payment was to be made was liable to be extended on the happening of a certain contingency, and was so extended, until December 1, 1920. By virtue of that extension and his payment of the interest up to December 1, 1919, the purchaser's contract was in good standing, and continued to be in good stand-

ing up to December 1, 1920. The contract was valid and subsisting and in full force between the parties. It had not been discharged, either by complete performance or by breach. The appellant, on payment of the balance due under the contract on December 1, 1920, would have been entitled to specific performance by the respondent.

The New English Dictionary defines "currency" as the time during which anything is current, and "current" as meaning "in progress." In view of what I have already said, I am of opinion that the contract was current in 1920, and that a crop failure in that year occurred "during the currency of the contract."

It was argued on behalf of the respondent that a more restricted meaning should be given to the clause in question, because the parties when making their contract could not have contemplated any crop failure after 1919. That seems to be merely begging the question, because they must have foreseen the possibility of a crop failure in any year during the currency of the contract. The words "during the currency of this agreement" were used in an earlier part of the agreement, which provides that the purchaser shall have "the privilege of paying off the whole or any part of the purchase-price at any time during the currency of this agreement." The agreement provided for fixed amounts to be paid at stated times, but, notwithstanding that, the privilege was given of paying off the whole or any part of the purchase-money at any time, whether it was actually due or not. In this instance, the words in question cannot refer to a later date than December 1, 1919. *Prima facie*, the same words should be construed in the same sense in different parts of a statute, deed, will, or any other document. But "many instances occur of a departure from the cardinal rule that the same word should always be employed to mean the same thing." (per Chitty, L.J., in *Thames Conservators* v. *Smeed, Dean & Co.*, [1897] 2 Q.B. 334, at p. 346, 66 L.J. (Q.B.) 716.

This rule of construction is stated by Lord St. Leonards (then Sir E. Sugden, C.) in an Irish case, *Ridgeway* v. *Munkittrick* (1841), 1 Dr. & War. 84, at p. 93, as follows:—"It is a well-settled rule of construction, and one to which, from its soundness, I shall always strictly adhere, never to put a different construction on the same word where it occurs twice or oftener in the same instrument, *unless there appear a clear intention to the contrary.*"

In *In re Birks; Kenyon* v. *Birks*, [1900] 1 Ch. 417, 69 L.J.

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(Ch.) 124, Lindley, M.R., holds that:—"Whenever in a deed or will or other document, you find that a word used in one part of it has some clear and definite meaning, then the presumption is that it is intended to mean the same thing where, *when used in another part of the document, its meaning is not clear.*"

In *Edyvean* v. *Archer*, [1903] A.C. 379, 72 L.J. (P.C.) 85, Lord Macnaghten, delivering the judgment of the Privy Council, after suggesting that the dictum of Lord St. Leonards in *Ridgway* v. *Munkittrick*, cited above, should not be asserted too positively, as a general rule of construction, went on to say, at p. 384:—"A sounder, or at any rate a safer, rule is to be found in the observations of Knight Bruce V.C., on the meaning of this very word 'issue.' 'Before I can restrain that word,' said the Vice Chancellor in *Head* v. *Randall* (1843), 2 Y. & C. 231, at p. 235, 60 R.R. 128,131 'from its legal and proper import, I must be satisfied that the contents of the will demonstrate the testator to have intended to use it in a restricted sense.' "

Words and phrases should be construed with reference to the subject matter to which they are applied, and this case seems to be one in which, unless we "restrain the words from their legal and proper import" and disregard the subject matter to which they are applied, "a departure from the cardinal rule" is justified.

I would therefore allow the appeal, and restore the order of the local Master.

LAMONT, J.A.:—This is an action to cancel an agreement for the sale of land and forfeit the monies paid thereon, under a provision in the agreement that the vendor shall have that right on default of payment by the purchaser.

The facts are all admitted, and, as stated in the judgment appealed from, are as follows:—

"The facts are not in dispute, and a statement of facts has been filed. The statement sets out the amount of money that remained unpaid under the agreement when action was brought on the 29th of January, 1921. The agreement provides for payment of the purchase-price by four instalments of $500 each, on the first day of December, in the years 1915, 1916, 1917 and 1918, and the balance of $2,300 on the 1st day of December, 1919, together with interest at the rate of 7 per cent. per annum from the date of the agreement. The agreement also contains the following clause:—'It is further covenanted and agreed that in the event of a total failure of crop in any year to the currency of this contract that the purchaser shall be required to pay interest only due on this contract, and the

Vendor agrees to give an extension of time for one year for the payment of the principal.'

There was a crop failure in the year 1919, and the defendant asked for, and received an extension for one year for the payment of the principal that is until the 1st of December, 1920. There was another crop failure in 1920. The defendant asks for and contends that he is entitled to a further extension of one year for the payment of the principal, until the 1st of December, 1921. The defendant's contention is that as long as any money remains unpaid under the agreement a total crop failure entitles him to an extension of one year on the payment of principal whether that crop failure occurs before or after the first of December, 1919. The plaintiff's contention is that the defendant is only entitled to an extension for crop failure occurring prior to the first day of December, 1919."

The whole question here is, the interpretation to be placed upon the clause above quoted. The word "to" in the third line of the clause should, I think, be read "during." We have then to determine what the parties meant by a total failure of crop in any year "during the currency of this contract." The sense and meaning of an instrument is to be collected from the language used therein. If that language is clear and unambiguous, effect must be given to it. If it is ambiguous, reference may be had to certain rules of construction which have been laid down by the Courts. Here it is claimed that the language used in the clause in question leaves us uncertain whether the parties intended the extension of time provided for to apply to a failure of crop only in any year up to December 1, 1919, or whether the same was to apply to a failure in the year 1920 by reason of the contract being extended to December 1, 1920, through the crop failure in 1919.

The phrase "during the currency of this agreement" occurs in a previous clause of the agreement. In clause 1., after setting out the dates on which the instalments of purchase-money were to be paid, the clause goes on to say:—"with the privilege of paying off the whole or any part of the purchase price at any time during the currency of this agreement." In this clause, in my opinion, the meaning of the phrase cannot be open to doubt; it means at any time up to the date upon which the parties agreed the final payment should be made; that is, December 1, 1919. Has it the same meaning in the clause in question?

In *Kenyon* v. *Birks*, [1900] 1 Ch. at p. 418, Lindley, M.R., said:—"Whenever in a deed, or will, or other document, you

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find that a word used in one part of it has some clear and definite meaning, then the presumption is that it is intended to mean the same thing where, when used in another part of the document, its meaning is not clear." Unless, therefore, there is something in the language of the clause in question, or in the object with which it was inserted, indicating that the phrase was to have a meaning different from that which the parties intended it to bear in the former clause, it should be given the same meaning in the latter. I can find nothing, either in the language of the clause or in the reason for its insertion, which would indicate that the parties had in mind when they made the contract the interpretation now urged by defendant rather than that contended for by the plaintiff. I am, therefore, of opinion that the interpretation sought to be put upon it by the plaintiff is correct.

For the defendant the case of *Gorsedd S.S. Co.* v. *Forbes* (1900), 16 Times L.R. 566, 5 Com. Cas. 413, was cited. In that case it was held that a clause in an insurance policy agreeing to make a rebate if the vessel was employed in the Eastern trade "during the whole of the currency of the policy," meant, during the time the policy was actually in existence, and that, as the ship had been lost before the expiration of the period provided by the policy, the plaintiffs were held entitled to recover the rebate. This case, in my opinion, affords little assistance, for the reason that it was there held that the words "during the currency of the policy" were used because the parties contemplated that the policy might cease to be current before the twelve months expired. Here we cannot say that the parties had in contemplation any failure of crop after the year 1919.

It was further argued that if there was any doubt as to the meaning of the term "currency", that meaning should be adopted which was most favourable to the defendant, on the principle laid down in the rule that, in certain contracts, the expressions of which are agreed to by both parties and cannot be imputed to the one more than to the other, if the stipulation is capable of two meanings, each equally consistent with the language employed, that meaning will be adopted which is most against the person making the promise, or covenanting, and in favour of the other party. This rule, in my opinion, cannot be applied here. First, because the rule that the words of a covenant are to be taken most strongly against the covenantor is applied as a rule of construction only where other rules of interpretation fail; (Beale's Cardinal Rules, p. 175) and, second-

ly, because it is well settled that the rule has no application where the effect of the covenant is to limit a liability which the defendant in the contract expressly agreed to assume. In such a case the rule is, that, where there is an absolute promise, either in express terms or implied, and an exception engrafted upon it, the exception is to be construed strictly and extends only so far as it is expressed with clearness and certainty, and if the language of the accepted clause be obscure it will not qualify the general liability. This rule is laid down by Brett, M.R. in *Burton* v. *English* (1883), 12 Q.B.D. 218, at p. 220, 53 L.J. (Q.B.) 133, 32 W.R. 655, in the following language:—

"The stipulation is in favour of the shipowners, and is in restriction of their liability under their contract to carry. The general rule is that where there is any doubt as to the construction of any stipulation in a contract, one ought to construe it strictly against the party in whose favour it has been made." See also *Nelson Line, Ltd.* v. *Jas. Nelson & Sons*, [1908] A.C. 16, 77 L.J. (K.B.) 82; *Chartered Bank of India* v. *British India Steam Navigation Co.*, [1909] A.C. 369, 78 L. J. (P.C.) 111.

Here, the defendant expressly covenanted to pay the balance of the purchase-price on December 1, 1919. The clause in question limits his liability in that regard. Under the above authorities, that limit is effective only in so far as it is clear and certain. As the language of the clause leaves it in doubt whether the parties had in contemplation a failure of crop after 1919, it must be construed against the defendant. The onus was on him to establish that his covenant to pay on December 1, 1919 had been qualified to the extent which he claims. As the language used leaves this in doubt, he has failed to discharge that onus.

As the time fixed by the order *nisi* when the defendant was to pay the balance has now passed, it is necessary to fix a new date. The defendant, in consideration of the fact that he made every payment excepting the last and has paid $920 on account of that payment, should, in my opinion, be given until December 1, 1922, to pay the balance of the purchase money with interest to the date of payment, interest and costs. With this variation of the order below, the appeal should be dismissed with costs.

TURGEON, J.A. concurs with LAMONT, J.A.

Appeal dismissed.

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GRAND TRUNK PACIFIC SS. Co. v. SIMPSON.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin, Brodeur and Mignault, JJ. March 29, 1922.

CARRIERS (§IIM—310)—TICKET FOR TRANSPORTATION OF PASSENGER—CONDITIONS LIMITING LIABILITY—KNOWLEDGE OF PASSENGER—FINDING OF JURY—QUESTION OF FACT—INTERFERENCE WITH BY APPELLATE COURT.

There is no arbitrary or definite rule governing the question whether the holder of a ticket entitling him to transportation must be held to have known the conditions, if any, in the contract for transportation contained on the ticket he purchased. It is purely a question of fact, and the finding of the jury will not be interfered with unless clearly contrary to the evidence. The Court held under the circumstances that the finding of the jury that the defendant had not done what was reasonably necessary to bring the conditions to the attention of the plaintiff, a woman of limited business experience and knowledge, and that the defendant was guilty of negligence, for which it was liable, in permitting the plaintiff to land on a wharf known to be dangerous, and in not providing a step from the end of the gang plank to the wharf, was under the circumstances a proper finding.

APPEAL by defendant from the British Columbia Court of Appeal in an action for damages for injuries received by the plaintiff while landing from a steamship of the defendant's on which she was a passenger. Affirmed.

Alfred Bull, for appellant.

G. F. Henderson, K.C., for respondent.

DAVIES, C.J. (dissenting):—I find myself, after weighing fully the able argument at Bar of Mr. Bull for the appellant and after considering carefully the cases cited by him in support of the appeal, strongly of the opinion that the appeal should be allowed.

The Appeal Court decided against the now appellant on the ground "that the fair inference that the jury found by their answers that there was negligence on the part of the company itself apart from the negligence of its servants and that it caused the accident or contributed to it."

I have no doubt whatever that this ground for sustaining the judgment against the company cannot be upheld and on this point I find myself in full accord with the rest of my colleagues.

The main question, however, argued fully at Bar and on which Mr. Bull relied was that the negative answers of the jury to questions 8 and 9; whether the plaintiff knew that her ticket contained conditions limiting the liability of the defendant company (8), and whether the company did what was reasonably sufficient to give the plaintiff notice of such conditions (9); were contrary to the evidence and must be set aside.

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In my opinion, the appeal turns upon the answers of the jury to question (9): namely, whether the company did what was reasonably sufficient to give the plaintiff notice of such conditions.

The jury found also that the plaintiff did not sign the ticket covering her passage from Prince Rupert to Stewart in British Columbia, and while I should be otherwise personally inclined to hold the contrary I am not disposed on this point to interfere with this finding of the jury and will deal with the case on the ground I have before mentioned and on the assumption that the ticket was not signed.

I think it clear from all the decided cases cited to us, which I have carefully read and considered, that no arbitrary or definite rule can be or has been laid down governing the question whether the ticket-holder must be held to have known the conditions, if any, on the ticket he purchased. It is purely a question of fact in each case and the findings of the jury will not be interfered with on the fact unless found to be clearly contrary to the evidence.

Much depends upon the question whether the purchaser of a ticket was an ignorant and illiterate person unaccustomed to travel, in which case a heavy onus would be cast upon a company bringing to his or her notice the limitations of their liability as a carrier of passengers, or, on the contrary, whether the purchaser of the ticket was a person of education, intelligence and experience, in which case on having the ticket put in front of him he ought to have seen that he had what he had applied for, namely a passenger contract, and having seen that ought to have seen that he was entitled to a berth, if that was included, subject to the conditions on the ticket, and having seen that ought to have seen all the rest.

Of course if the ticket handed the passenger was folded up, or enclosed in an envelope, it would, or might, under the facts of the case, limit his duty of seeing the conditions of his contract. Indeed there are many other facts and circumstances which the authorities mention which might dispense with or qualify, his strictly conforming to that duty.

But in the absence of any such facts and circumstances, as in the case before us, it does seem to me clear from the authorities that an educated and intelligent person accustomed to travel and looking after herself, as the plaintiff in this case undoubtedly was, must on purchasing a ticket as the plaintiff did in this case, with conditions on its face limiting the company's

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liability for her carriage, be held bound to have known what these conditions were.

The facts were that the plaintiff's journey was in reality from Seattle to Stewart, but was broken at Prince Rupert, and she identified ex. 3 (the form (Form 32) of ticket issued by the company) as similar to that which she had purchased in Seattle covering her passage to Prince Rupert, which ticket she admits she signed. She was unable to say definitely that she did not sign the ticket which she afterwards purchased in Prince Rupert covering her passage to Stewart, but having signed the ticket in Seattle it must follow that she knew not only that the ticket contained conditions, but moreover the effect of such conditions, and having admitted the similarity of the two it follows that she must have known whether she signed it or not, that the ticket in question contained conditions. The plaintiff was a woman of education and intelligence; her husband was a lawyer and for some years Police Magistrate of Nanaimo; she had travelled considerably, and during the war travelled from British Columbia to Nairobi, Africa, and back, by herself, and formed a habit of looking at her transportation tickets to ascertain that her destination was correctly stated; she probably did so in respect of her ticket to Stewart. She knew that tickets of that nature usually contained conditions as to loss of baggage; there was no rush no crowd at the wicket when she bought her ticket a day or two before the sailing date; she at the same time arranged about her cabin. All this she stated in cross examination and there is no conflict of evidence as to the facts on which the appellant relies.

Now the ticket given the plaintiff was an exact counterpart of ex. 3, which was put in evidence, and which we had the opportunity of examining carefully. It is a long piece of greenish coloured paper, about 10 inches long and two inches broad headed thus:—

"Grand Trunk Pacific Coast S.S. Co. Ltd.
Form 32
Prince Rupert, B.C.
to
Destination Named on Final Coupon.

It is agreed that this ticket is good only when officially stamped, dated and presented with coupons attached for 'One First Class Passage' . . . subject to the following conditions."

Then follow the eleven conditions, No. 7 of which contains the limitations of the company's liability relied on. But that was not all. The coupons attached state in large print the place of

departure leaving blanks for the place of destination to be written in, the date and the number of the stateroom, and what is more important, printed in clear type on its face . . . "Including meals and berth" when officially stamped and dated, and on conditions named in the contract.

So that we have this "large plain piece of paper put before a lady of intelligence" who is going to be a first class passenger on board of this ship, stating not only in its opening sentence "It is agreed that this ticket is good only when officially stamped, dated and presented with coupons attached for one first class continuous passage . . . subject to the following conditions," but having the same notice printed in clear, easily read type on the coupon itself . . . "on conditions named in the contract."

To lay it down as law that under these proved facts and circumstances the ticket purchaser, a woman of intelligence and education, who had travelled extensively, could by simply not reading, or saying she had not read her ticket contract and did not know its conditions, avoid the effect of those conditions and recover damages for injuries she sustained during the voyage arising from the negligence of the defendant company's servants, from which the ticket contract plainly exempted them from liability is, in my humble opinion, contrary to the decisions of the highest Courts of law in England which by the very terms of the contract were to govern in this case.

I think it a dangerous rule to lay down and under the facts of the present case I must decline being a party to it.

The cases on which I rely and which I have carefully read especially that of *Cooke* v. *Wilson & Co.* (1915), 85 L.J. (K. B.) 888, confirm me in my opinion. This case is singularly alike in its facts and almost on all fours with the present appeal. I am quite unable to distinguish it in any material way from the case we are considering.

The other cases are *Hood* v. *Anchor Line*, [1918] A.C. 837, at pp. 845, 846, 87 L.J. (P.C.) 156, in which Lord Haldane delivering the judgment of the Judicial Committee said:—"when he accepted a document that told him on its face that it contained conditions on which alone he would be permitted to make a long journey across the Atlantic on board the steamer, and then proceeded on that journey I think he must be treated according to the standards of ordinary life applicable to those who make arrangements under analogous circumstances and be held as bound by the document as clearly as if he had signed it."

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And *Richardson Spence & Co.* v. *Rowntree*, [1894] A.C. 217, 63 L.J. (Q.B.) 283, where a distinction is drawn between a ticket handed to a steerage passenger, a class of people as said by Lord Ashbourne "of the humblest description many of whom have little education and some of whom have none," and such a ticket not folded up handed to a passenger of intelligence and education as the plaintiff herein.

Under all the circumstances I conclude that on the question of reasonable notice having been given to the plaintiff, the answer must be in the affirmative.

IDINGTON, J.:—This action was brought by the respondent to recover damages suffered by her for which it seems quite clear the appellant would be liable unless protected by the terms alleged to be conditions in the contract for transportation from Prince Rupert to Stewart.

The alleged conditions were printed in small type and numbering eleven in all, without any notice calling attention thereto.

The appellant evidently had adopted a system of requiring the passenger to sign these conditions and having the signature witnessed as the only means of bringing home to the mind of any intending passenger the terms upon which he or she should be carried.

The usual test of whether or not the carrying company had done all that was reasonably sufficient to give the intending passenger notice of the conditions upon which he or she was to be carried, as exemplified in the cases cited to us cannot be applied to this case for they are non-existent.

Neither notice of the ticket being subject to the conditions thereon printed, or usual warning of any kind appears in this case to have been adopted.

The appellant must therefore rely upon proof of the signature of the respondent which is expressly negatived by the finding of the jury, as is also knowledge of the conditions.

The further question was put by the trial Judge to the jury, and answered in the negative:—"9. If, not, did the defendant company do what was reasonably sufficient to give the plaintiff notice of such conditions? A. No."

The jury, I think, were, under such facts and circumstances as in evidence, fully entitled to take that view. Possibly I might not have reached such a conclusion but I cannot say they had no evidence entitling them to so find.

The evidence of the respondent's intelligence on the subject of travel and its attendant conditions was not, to my mind, ac-

cording to her evidence, of the extensive character counsel seemed to urge, if we apply common sense to what she says.

Holding as I do that this case is quite distinguishable from the cases of *Cooke* v. *Wilson*, 85 L.J. (K.B.) 888; *Hood* v. *Anchor Line Ltd.*, [1918] A.C. 837, and many others, I am of the opinion that the appellant should not succeed in face of the findings of the jury as applied to this peculiar case, and, therefore, have not considered fully the ground proceeded upon by the Appellate Court below.

If that is not sound reasoning, then on the facts in evidence, it ought to be made the law that a steamship company should not be permitted to turn out or invite passengers to land on such a dock as the one in question, (publicly proclaimed by its owner, as it seems to have been, to be in a delapidated condition) without taking due care.

I think the appeal should be dismissed with costs.

DUFF, J.:—I concur with ANGLIN, J.

ANGLIN, J.:—The plaintiff in debarking, by invitation of the defendants, from their steamer, on which she was a passenger, on a wharf admittedly in a highly dangerous state of disrepair, was seriously injured. The immediate cause of her injury was stepping into a hole, which she failed to see at the end of the gangway and slightly to the right, while endeavouring to avoid stepping into another hole to the left. The jury found —and their finding is not open to serious question—indeed it was scarcely challenged—that there was negligence *dans locum injuriae* on the part of the defendants in permitting the plaintiff to land on a wharf known to be dangerous. The duty of a carrier of passengers to provide a reasonably safe place for them to debark admits of no dispute. It is part of the obligation ordinarily undertaken in the contract of carriage.

The defendants seek to escape liability by invoking an exemption stipulated in the terms of the special contract upon which they allege the plaintiff travelled. In answer to this defence the plaintiff urges—(a) that the defendants cannot raise it because they failed to give the public notice of the conditions excluding their liability prescribed by sec. 962 of the Canada Shipping Act (R.S.C. 1906, ch. 113); (b) that upon their true construction these conditions, if binding upon the plaintiff, do not cover the negligence complained of; (c) that the plaintiff was not bound by the conditions because she was unaware of them and adequate means had not been taken by the defendants to bring them to her attention.

(a) This reply to the defence was not pleaded, nor, so far

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as appears, raised at the trial. The question of public notice was not thrashed out. Assuming that sec. 962 of the Canada Shipping Act bears the construction put upon it by counsel for the plaintiff, which is at least debatable, the defendants would probably have reasonable ground to complain if it were now held to preclude them from invoking the conditions on which they rely.

(b) The Court of Appeal held that the negligence found was that of the plaintiff company itself as distinguished from that of its servants and upon its true construction the exemption from liability stipulated by the terms printed on the ticket issued to the plaintiff is confined to negligence attributable to the defendants' servants. With great respect, I gravely question the soundness of the view taken on both points. I incline to think that the failure to select for the placing of the gangway a part of the wharf on which a landing could be made with reasonable safety, if such a spot existed, or, if not, to take other adequate precautions to ensure the plaintiff's landing safely was fault ascribable to the company's servants charged with the management of the debarkation of passengers. Upon the construction of the relieving condition itself, while negligence of servants is no doubt specified, the exemption is also in respect of "injury to the passenger . . . through any other cause of whatsoever nature." In view of the context there would seem to be difficulty in applying the *ejusdem generis* rule of construction to these comprehensive words so as to give them the restricted effect for which the plaintiff contends.

(c) But the jury also found that, while the plaintiff knew there was writing or printing on her ticket, she did not know that it contained conditions limiting the defendant's liability and that they had failed to do what was reasonably sufficient to give her notice of these conditions. On this branch of the case, the question to be considered is whether these findings are so clearly against the evidence that they should be set aside as perverse.

As to the finding of ignorance in fact there can be no doubt. The plaintiff expressly denied knowledge, and there is nothing to warrant rejecting her testimony accepted by the jury.

As to the other finding, the jury explicitly found that the plaintiff had not signed the ticket, as the form used contemplated (places being indicated upon it for signatures of the purchaser and of a witness), and as the company's agent deposed was the practice. The plaintiff's recollection was that she did not sign—was not asked to do so. The selling agent had no

recollection on the point. It would be quite impossible to disturb the finding that the ticket had not been signed.

There is no suggestion that the plaintiff's attention was drawn to the conditions in any other way than by handing her the ticket itself when she bought and paid for it. She deposed that although she knew there was printed matter upon the ticket, she had not read it beyond noting that her destination was correctly written in it, on the attached coupon. She knew from a former experience that conditions limiting liability in respect of luggage were sometimes imposed, but nothing as to the conditions in respect of personal injuries. This idiosyncracy, however, having been unknown to the defendants' ticket agent need not be further considered here, *Marriott* v. *Yeoward Bros.*, [1909] 2 K.B. 987, 79 L.J. (K.B.) 1140. Can it be said upon these facts that the finding of the jury that what took place was not reasonably sufficient to give the plaintiff notice of the conditions was so clearly perverse that we should set it aside, make a finding to the contrary and direct judgment for the defendants?

The case at Bar closely resembles the leading case of *Richardson, Spence & Co.* v. *Rowntree*, [1894] A.C. 217. There, as here, the plaintiff was a woman, though probably of a less intelligent class; she was a steerage passenger. The restrictive conditions were printed in small type on the face of the ticket, and without anything, such as the word "NOTICE" in large type, featured in *Hood* v. *Anchor Line*, [1918] A.C. 837, to draw attention to them. The only other possibly distinguishing feature in the *Rowntree* case is that the ticket was handed to the passenger folded up. Here we are not informed whether the ticket was open or folded up, or enclosed in an envelope, when handed to the plaintiff. From its length and their common knowledge of what is customary, the jury not improbably inferred that it was folded up and possibly also that it was placed in an envelope. The judgment of the Court of Appeal in *Rowntree's* case, refusing to set aside the jury's findings, that the plaintiff did not know that the ticket contained conditions relating to the terms of the contract of carriage and that the defendants had not done what was reasonably sufficient to give the plaintiff notice of the conditions and upholding the judgment entered on them for the plaintiff, was affirmed by the House of Lords without calling upon counsel for the respondent. Their Lordships declined to hold that upon such facts the plaintiff was bound as a matter of law by the conditions. The questions whether the passenger knew of the con-

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ditions limiting liability and, if not, whether the means taken to bring them to her attention had been reasonably sufficient were held to be proper in such a case for submission to the jury. This case was much relied on by counsel for the plaintiff.

Counsel for the defendants on the other hand contended that the case at Bar is indistinguishable from the latter case of *Cooke* v. *Wilson Sons & Co.*, 85 L.J. (K.B.) 888, in which the Court of Appeal, while recognizing the authoritative character of the decision in *Rowntree's* case held that, upon the facts in evidence, the finding of the jury that the defendants had not done what was reasonably sufficient to give the plaintiff notice of the conditions was so clearly perverse that it should be set aside and the judgment should be entered for the defendants. Roberta Cooke was "a lady of intelligence"—"a first-class passenger"—"a lady of education"—facts "which must have been obvious to the people who handed her the ticket." The following three circumstances in connection with the ticket itself are dwelt upon by Phillimore, L.J., who delivered the principal judgment. The ticket did not describe itself as a "ticket" or "receipt" but was headed "Passenger Contract." In the first line and in very plain letters were the words "Mrs. Cooke is entitled, subject to the conditions hereof." The conditions themselves immediately followed in small but legible type, similar, I take it, to that in the case at bar, but under the heading "Conditions." There appears to have been nothing to indicate that signature by the passenger, to evidence her acceptance of the conditions, was contemplated, as it clearly was in the case at Bar. Phillimore, L.J., points to the several features of the ticket I have mentioned as calculated to draw the attention of the passenger to the fact that she was taking a "passenger contract" for carriage subject to conditions printed on the ticket. Pickford, L.J., agreeing, states that the proper question being formulated, the answer to it becomes a question of fact in each particular case and adds at p. 896:—"All I say is that upon the particular facts of this particular case, in my opinion, the defendants took sufficient and proper means to bring these conditions to the notice of the plaintiff." Neville, J. the other member of the Court, said at p. 898:—"If all the cases are to be taken into consideration . . . the degree of notice necessary depends upon the degree of the capacity of the recipient". I take it the Judge must have meant—as it was, or should have been, apparent to the defendants' agent when selling the ticket to the passenger. His Lordship also explicitly restricts his

holding to "passenger contracts of the character of the one before him."

While it may be assumed that in the case now before us there was nothing to indicate to the defendants' ticket agent that the plaintiff might not be dealt with as a person endowed with a degree of intelligence not inferior to that of the plaintiff in the *Cooke* case, the features of the "passenger contract" in that case pointed out in the judgment of Phillimore, L.J., as calculated to bring the conditions to the passenger's attention are entirely absent here. The document handed to the present plaintiff is at the outset called "this ticket": the words "subject to the following conditions" are found only in the tenth line of a paragraph of small type: and there is no heading such as "conditions." At the end of a series of eleven distinct conditions, occupying sixty-six lines of small type closely printed, occurs the words "I hereby agree to all the provisions of the above contract and attached coupons.

.....

Signature.

.....

Witness."

The provision thus made for signatures by the purchaser and a witness might well give to the plaintiff, or to any ordinary traveller of her class, the impression that the printed matter above the line indicated for the purchaser's signature was not intended to apply to her—did not concern her—since she has not been asked to affix her signature to it, it is, I think, quite impossible to say that the decision in the *Cooke* case conclusively establishes that in the case at Bar what the defendants did was reasonably sufficient to bring the conditions printed upon the ticket to the notice of the plaintiff as something by which she would be bound.

Another case relied on for the appellant was *Acton* v. *Castle Mail Packets Co.* (1895), 73 L.T. 158, where Lord Russell of Killowen quotes with approval from the judgment of Mellish, J. in *Parker* v. *S.E. Ry. Co.* (1877), 2 C.P.D. 416, at p. 421, 46 L.J. (C.P.) 768, 25 W.R. 564, the statement that where the agreement is not signed "there must be evidence independently of the agreement itself to prove that the defendant has assented to it"; and also the following passage from p. 422: "I am of the opinion that we cannot lay down as a matter of law either that the plaintiff was bound or that he was not bound by the conditions printed on the ticket from the mere fact that he knew there was writing on the ticket but did not know that

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the writing contained conditions." In the *Acton* case the plaintiff was "an intelligent man who had gone about the world" and, in the opinion of the Lord Chief Justice, ought to have known that conditions would necessarily be attached to the passage he was engaging.

"In the circumstances of this case," said his Lordship, "the plaintiff ought to have assumed, and I think he must have known that (the ticket) probably did contain conditions upon which he was about to be carried." Sitting as a trial Judge without a jury, Lord Russell at p. 160, reached the conclusion that, as "a matter of fact the communication of that document to him was (in the circumstances of this case) reasonable notice to him of the terms and conditions upon which his passage money was received from him and upon which the defendants were willing to enter into a contract to carry him." The conclusion reached apparently depended almost entirely upon the impression created by the appearance and demeanour of the plaintiff and his business experience upon the mind of the trial Judge that he must have appreciated the fact that the printing upon the ticket contained conditions intended to bind him as terms of the contract of carriage.

In *Hood* v. *Anchor Line*, [1918] A.C. 837, another case cited for the appellant, it is made abundantly clear that the question with which we are now dealing is one of fact which must be submitted for determination by the tribunal of fact, the function of the Judge, where there is a jury, being simply to see that the proper question is considered by them and the duty of the jury being to determine it, looking at all the circumstances and the situation of the parties. The burden is on the defendant to shew that it has done all that could reasonably be required to bring the limitative conditions to the plaintiff's notice "under the usages of proper conduct in the circumstances." Emphasis was laid in *Hood's* case upon two facts:—Above the conditions was printed "Notice." "This ticket is issued to and accepted by the passenger subject to the following conditions." At the foot of the document was printed very plainly in capital letters "Passengers are particularly requested to carefully read the above contract," and on the face of the envelope containing the ticket was again printed, also in capitals "Please read conditions of the enclosed contract." The case was tried without a jury and their Lordships of the House of Lords agreed with the conclusion of the trial Judge, affirmed in the Court of Session, that the company had done all that was reasonably necessary to give notice to the

plaintiff of the conditions limiting its liability. Their Lordships again pointed out that the questions under consideration are questions of fact which must in each case be determined according to the circumstances in evidence.

The principles to be applied in determining the question of fact which we are considering are well stated by Pickford, J., in *Marriott* v. *Yeoward Brothers*, [1909] 2 K.B. 987 at p. 992.

In dealing with a case such as this it is well to bear in mind the observation of Viscount Haldane in *Kreglinger's* case, [1914] A.C. 25, at p. 40, 83 L.J. (Ch.) 79, that:—

"When a previous case has not laid down any new principle, but has merely decided that a particular set of facts illustrates an existing rule, there are few more fertile sources of fallacy than to search in it for what is simply resemblance in circumstances, and to erect a previous decision into governing precedent merely on this account. To look for anything except for the principle established or recognised by previous decisions is really to weaken and not to strengthen the importance of precedent. The consideration of cases which turn on particular facts may often be useful for edification, but it can rarely yield authoritative guidance." The only principles established by the cases to which we have been referred in regard to the question whether the carrier has done what was reasonably sufficient to bring conditions limiting its liability printed upon ticket to the attention of a purchaser, who does not acknowledge acceptance of them by his signature and has not read them and does not know them to be such conditions, are that it is always a question of fact to be determined in each particular case according to the particular circumstances of that case and that the burden of proof is on the carrier.

Taking into account all the circumstances in evidence, as above detailed, I am not prepared to say that the conclusion of the jury (who had the great advantage of seeing and hearing the plaintiff give her evidence) that the company had failed to discharge the onus of proving that it had done what was reasonably necessary to bring the conditions relied upon to her attention as something by which she was to be bound was so clearly perverse that it should be set aside. Having regard to the facts that the purchaser of the ticket was a woman, presumably of limited business experience and knowledge, that the ticket itself presented nothing calculated to draw her attention to the fact that the printed matter upon its face contained conditions of a contract of carriage by which it was intended that she should be bound (such as the features noted in the *Cooke* case

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and the *Hood* case) and to the further fact of the indication on the face of the ticket of the intention of the company that it should be signed by the purchaser as evidence of acceptance of the conditions printed upon it, it seems to me that a jury could reasonably conclude that it was incumbent upon the defendants to do something more than the evidence discloses was done in this case to direct the plaintiff's attention to the conditions.

Indeed when the facts are analysed we have merely the case of a ticket containing printed conditions not at all conspicuous being sold to a woman of ordinary intelligence. In Cooke's case, so much relied upon by the appellants, Pickford, L.J., expressly repudiates the idea "that in every case it is enough to give a person who can read and write a document which he can read."

I would, for these reasons, dismiss this appeal with costs.

BRODEUR, J.:—The jury in this case found that the appellant company was guilty of negligence "in permitting the plaintiff to land on a wharf known to be dangerous and in not providing a step from the end of the gang plank to the wharf."

It is contended, however, on the part of the steamship company that the ticket on which Mrs. Simpson travelled contained a provision that the company would not be liable for the negligence of the company's servants and that the accident of which she was the victim was due to the negligence of its servants. It is contended also that the accident having taken place on a wharf which was common government property it was not liable.

On the latter point I am of opinion that the company's contention is not well founded. The wharf was, it is true, in a dangerous condition, but it was the duty of the company and was part of its obligations arising out of its transportation contract to see that its passengers should be landed in a safe place.

As to the conditions stipulated on the ticket, I may say that the form of the ticket requires that the purchaser should sign and accept those conditions before a witness. The ticket sold in this case was destroyed by the company and could not be produced. The jury found on somewhat conflicting evidence that Mrs. Simpson never affixed her signature on the document. It was found also by the jury that she was aware that there was something written on the ticket but that she did not know it contained the conditions on which the defendant company relies that the latter did not do what was reasonably sufficient to give the plaintiff notice of such conditions.

In this connection the defendant company claims that there was no evidence to support the jury's findings.

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I am unable to accept such a contention for a great deal of evidence was adduced with regard to the issuing of this ticket and the jury was absolutely justified in making those findings.

The appellant relied very much on the case of *Cooke* v. *Wilson*, 85 L.J. (K.B.) 888. This case of *Wilson* has some features resembling very much the facts we have to deal with in this case, but there is some difference which permits us to distinguish it. The ticket issued in the *Wilson* case contained in large type the word "contract" which should have immediately drawn the attention of the passenger.

All these cases which have been quoted present different aspects and features and shew that each case should be decided on its own merits.

It is therefore a matter for the jury to determine whether the circumstances shew that the purchaser was aware of the conditions contained in the ticket and whether the carrier has done what was sufficient to give the passenger notice of such conditions.

I have come to the conclusion that the verdict of the jury was right and for this reason the appeal should be dismissed with costs.

MIGNAULT, J.:—I concur with ANGLIN, J.

Appeal dismissed.

BIELITSKI v. OBADIAK.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon, JJ.A. May 8, 1922.

DAMAGES (§IIII—165)—FALSE REPORT THAT PERSON HAS HANGED HIMSELF—REPETITION BY PERSONS WHO BELIEVE REPORT TO BE TRUE—REPETITION TO MOTHER OF SUPPOSED SUICIDE—SHOCK AND ILLNESS—LIABILITY OF PERSON ORIGINATING.

One who originates and circulates a false report that a member of the community has hanged himself, which report is repeated by others, and finally is told to the mother of the supposed suicide, who, believing the report to be true, suffers a violent shock and becomes ill, is liable in damages for the injury so caused.

[*Wilkinson* v. *Downton*, [1897] 2 Q.B. 57, followed; *Victorian R. Co.* v. *Coultas* (1888), 13 App. Cas. 222, distinguished.]

APPEAL by defendant from the trial judgment (1921), 61 D.L.R. 494 in an action for damages, for physical illness caused by violent shock, on hearing a report that her son had hanged himself. Affirmed.

P. H. Gordon, for appellant.

G. T. Killam, for respondent.

HAULTAIN, C.J.S. (dissenting):—I am unfortunately not able

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to agree with the other members of the Court in this case, and will try to state my reasons as shortly as possible.

If the illness of the plaintiff had been the result of nervous shock or sudden distress caused by a false statement made wilfully to her by the defendant, he would have been answerable in damages for the consequences of his statement. *Wilkinson* v. *Downton*, [1897] 2 Q.B. 57, 66 L.J. (Q.B.) 493; *Janvier* v. *Sweeney*, [1919] 2 K.B. 316, 88 L.J. (K.B.) 1231.

The statement, however, was not made directly to the plaintiff, but in the first place to one Titula, a farm labourer, working for a man called Haekevitch. Neither Haekevitch nor Titula appears from the evidence to have been in any way related to or connected with the plaintiff. On the day following his conversation with the defendant, Titula left the service of Haekevitch and returned to his own home. On his way home he stopped at the farm of one Slevia and repeated the statement to Annie Slevia. Annie Slevia telephoned to her mother, Frances Slevia, and passed the news on to her. Frances Slevia then informed her daughter-in-law, Katherine Slevia, of what she had heard from her daughter Annie. Katherine Slevia is a daughter of the plaintiff, and after hearing the report from her mother-in-law, Frances Slevia, she telephoned to her mother, the plaintiff. It will thus be seen that, while the statement was first made by the defendant, it was repeated by and through four other persons before it reached the plaintiff.

The repetition of the words was the independent act of each of several persons, not one of whom was authorised, incited, or bound to pass them on. Not one of this series of unauthorised communications can reasonably be considered as the necessary consequence of the original statement of the defendant. The immediate cause of the damage arose from the voluntary act of a free agent over whom the defendant had no control, and for whose acts he is not answerable. *Ward* v. *Weeks* (1830), 7 Bing. 211, 131 E.R. 81.

There is no evidence to shew that the defendant authorised or intended any one of the several repetitions of the statement, or that he intended it to be repeated to the plaintiff.

In short, the damage is too remote, because it was not either the intended or the natural, probable or necessary consequence of the defendant's act.

In *Weld-Blundell* v. *Stephens*, [1920] A.C. 956 at pp. 983, 984, 89 L.J. (K.B.) 705, Lord Sumner says:—

"What are 'natural probable and necessary' consequences? Everything that happens, happens in the order of nature, and is

therefore 'natural.' Nothing that happens by the free choice of a thinking man is 'necessary', except in the sense of predestination. To speak of 'probable' consequence is to throw everything upon the jury. It is tautologous to speak of 'effective' cause, or to say that damages too remote from the cause are irrecoverable, for an effective cause is simply that which causes, and in law what is ineffective or too remote is not a cause at all. I still venture to think that 'direct cause' is the best expression. Proximate cause has acquired a special connotation through its use in reference to contracts of insurance. Direct cause excludes what is indirect, conveys the essential distinction, which *causa causans* and *Causa sine qua non* rather cumbrously indicate, and is consistent with the possibility of the concurrence of more direct causes than one, operating at the same time and leading to a common result as in *Burrows* v. *March Gas and Coke Co.*, L.R. 7 Ex. 96, and *Hill* v. *New River Co.* (1868) 9 B. & S. 303."

I would refer to the following cases: *Lynch* v. *Knight* (1861), 9 H.L. Cas. 577, 11 E.R. 854; *Allsop* v. *Allsop* (1860), 5 H. & N. 534, 157 E.R. 1292, 29 L.J. (Ex.) 315; *Parkins* v. *Scott* (1862), 1 H. & C. 153, 158 E.R. 839, 31 L.J. (Ex.) 331; *Clarke* v. *Morgan* (1877), 38 L.T. 354; *Whitney* v. *Moignard* (1890), 24 Q.B.D. 630, 59 L.J. (Q.B.) 324; *Speight* v. *Gosnay* (1891), 60 L.J. (Q.B.) 231.

In Sir Frederick Pollock's work on Torts (11th ed.), at p. 52, the case of *Allsop* v. *Allsop* (*supra*) is cited as authority for the opinion that spoken words not uttered to the plaintiff or in the plaintiff's presence, but only reported by a third person cannot be taken into account in an action for damages against the original utterer, the consequences being too remote.

Most of the case referred to above were cases of slander in which, the words used not being actionable *per se*, special damage had to be proved in order to maintain the action. In most of them the general principle that a man is only responsible for the natural consequences of his acts was applied, and it was held that, where the special damage resulted entirely from the repetition of words not actionable *per se*, the repetition was not a natural consequence of the speaking of the words. There is no actionable wrong in the mere making a false statement, and no liability on the part of the defendant antecedent to the repetition by somebody else.

See remarks of Martin, B., in *Dixon* v. *Smith* (1860), 5 H. & N. 450, 157 E.R. 1257, 29 L.J. (Ex.) 125; and of Bramwell,

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L.J., in *Bree* v. *Marescaux* (1881), 7 Q.B.D. 434, 50 L.J. (Q.B.) 676.

I think, therefore, that the appeal should be allowed and the action dismissed.

LAMONT, J.A.:—The question to be determined in this appeal is, whether the physical illness of the plaintiff for which the trial Judge (1921), 61 D.L.R. 494, awarded her $200 damages was the actual and probable consequence of the defendant's act.

On October 19, 1920 the defendant stated over the telephone to Kazio Titula and others that Steve Bielitski, a son of the plaintiff, who was at that time absent from home, had hanged himself from a telephone pole. Next morning, Titula telephoned the defendant and asked him again if it was true that Steve Bielitski had hanged himself; to which the defendant replied: "Yes, you can go and ask. You can find out." Titula then said he was going over to Slevia's and would make inquiries about it. The defendant said, "You can go and find out." Titula, believing the statement to be true, told Annie Slevia. Annie Slevia repeated it to her mother Frances Slevia, who repeated it to her daughter-in-law, Katherine Slevia, who was a daughter of the plaintiff and sister of Steve Bielitski. Katherine repeated it to her mother. The plaintiff believing the report to be true, sustained a violent shock and mental anguish, which brought on physical illness and incapacitated her for some time. The story was absolutely false.

On behalf of the defendant, it was contended: (1) That the plaintiff's suffering was not caused by the statement made by the defendant, but by the unauthorised repetition of it by Titula and others, and that this action was analogous to an action for slander; and (2) that, in any event, the damage was too remote.

I agree with the trial Judge that the principles applicable in an action for slander do not apply to the present case. This action is based upon the allegation that the defendant "wilfully, maliciously and falsely represented to the plaintiff and other members of her family that Steve Bielitski had committed suicide."

In *Wilkinson* v. *Downton*, [1897] 2 Q.B. 57, the head-note reads:—

"The defendant, by way of a practical joke, falsely represented to the plaintiff, a married woman, that her husband had met with a serious accident whereby both his legs were broken. The defendant made the statement with intent that it should be believed to be true. The plaintiff believed it to be true, and

in consequence suffered a violent nervous shock which rendered her ill:—

Held, that these facts constituted a good cause of action."

Wright, J., in giving judgment said, at p. 59:—

"One question is whether the defendant's act was so plainly calculated to produce some effect of the kind which was produced that an intention to produce it ought to be imputed to the defendant, regard being had to the fact that the effect was produced on a person proved to be in an ordinary state of health and mind. I think that it was."

And in *Dulieu* v. *White & Sons*, [1901] 2 K.B. 669, 70 L.J. (K.B.) 837, 50 W.R. 76, Phillimore, J., at p. 683, said:—

"I cordially accept the decision of my brother Wright in *Wilkinson* v. *Downton*, [1897] 2 Q.B. 57, that every one has a legal right to his personal safety, and that it is a tort to destroy this safety by wilfully false statements and thereby to cause a physical injury to the sufferer. In that case it will be observed that the only physical action of the wrong-doer was that of speech."

We have, therefore, two questions of fact to consider. Did the defendant wilfully spread a false report; and, if so, did his act cause and was it intended to cause the plaintiff's physical suffering? At the trial the defendant gave no evidence. The evidence that was given shewed that a wholly false report had been fabricated and published. That report was traced home to the defendant. He has not denied originating it, neither has he offered anything by way of explanation, excuse or justification. Under these circumstances, the reasonable inference seems to me to be that the defendant deliberately originated the report and gave it currency. Further, in the absence of any explanation, I think the conclusion should be drawn that he did it with the intention that it should reach the plaintiff. With what other object would he originate and publish such a story? Any reasonable man would know that the natural and probable consequence of spreading such a report would be that it would be carried to the plaintiff, and would, in all probability, cause her not only mental anguish but physical pain.

In an article in 33 Harv. Law Rev. 646, in discussing the question of proximate causes, the writer lays down a rule which, I think, is applicable to the facts here. He said:—

"Though there is an active force intervening after defendant's act, the result will nevertheless be proximate if the defendant's act actively caused the intervening force. In such a

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case the defendant's force is really continuing in active operation by means of the force it stimulated into activity."

If the defendant originated and published the report with the intention that it should come to the ears of the plaintiff and thus cause her physical injury, he was guilty of maliciously and wilfully wronging her, and is liable for such damage as his act may have caused.

In *Wilkinson* v. *Downton*, above referred to, Wright, J., at pp. 58, 59, said:—

"The defendant has, as I assume for the moment, wilfully done an act calculated to cause physical harm to the plaintiff—that is to say, to infringe her legal right to personal safety, and has in fact thereby caused physical harm to her. That proposition without more appears to me to state a good cause of action, there being no justification alleged for the act. This wilful injuria is in law malicious, although no malicious purpose to cause the harm which was caused nor any motive of spite is imputed to the defendant."

The decision in this case was approved of by the Court of Appeal in *Janvier* v. *Sweeney*, [1919] 2 K.B. 316.

In my opinion, the principles laid down in the *Wilkinson* case are applicable here, unless we are compelled to hold otherwise by the judgment of the Privy Council in *Victorian Rly. Commissioners* v. *Coultas* (1888), 13 App. Cas. 222, 57 L.J. (P.C.) 69.

In that case, the railway company's gate-keeper negligently opened a gate so that the plaintiff and his wife, who were driving in a buggy, might cross. When they got on the track they saw a train approaching rapidly. They got across, but the train passed very close to the back of the buggy, but did not touch it. The wife fainted, and the medical evidence shewed that she received a severe mental shock, causing illness. The Privy Council held that damages arising from sudden terror, unaccompanied by any physical hurt but occasioning a nervous or mental shock, cannot, under such circumstances, be considered a consequence which would in the ordinary course of things flow from the negligence of the gate-keeper.

In the *Wilkinson* case, Wright, J. distinguished the *Coultas* case as follows (p. 60):—

"Nor is it altogether in point, for there was not in that case any element of wilful wrong; nor perhaps was the illness so direct and natural a consequence of the defendant's conduct as in this case. On these grounds it seems to me that the case of *Victorian Railways Commissioners* v. *Coultas*, 13 App. Cas. 222,

is not an authority on which this case ought to be decided."

For the same reason I am of opinion that it is not applicable here. I would dismiss the appeal with costs.

TURGEON, J.A.:—This is an appeal from the judgment delivered by McKay, J., in a case heard by him at Yorkton on June 14, 1921, and reported in (1921), 61 D.L.R. 494.

The following facts are set out in the judgment at p. 495:—

"The defendant falsely stated to Kazio Titula and others that Steve Bielitski, a son of the plaintiff who was temporarily absent from home, hanged himself on a telephone pole. Titula believing this report repeated it to Annie Slevia. Annie Slevia repeated it to Frances Slevia, and Frances Slevia to Katherine Slevia a daughter of the plaintiff, and Katherine Slevin believing the report to be true repeated it to her mother the plaintiff. The plaintiff believing this statement to be true suffered a violent shock and became ill.

The plaintiff now brings this action to recover damages from the defendant."

In my opinion the trial Judge was justified in finding in favour of the plaintiff, and I think his judgment should be allowed to stand.

I am strongly of opinion that undue weight has been laid in the argument of this case upon principles peculiar to the law of slander, which it has been sought to apply to the facts before us. The similarity in the means whereby the damage was caused, that is, spoken words, with the substance of slander, has, I think, led us too far afield in our discussion of the limits of the defendant's liability. The cause of action in this case is, in my opinion, different from slander in its essence and in its main incidents. The injury in a case of this kind is not caused to the person of whom the words are published, (as in the case in slander) but to the person to whom they are communicated. Slanderous words uttered to the plaintiff himself are not actionable, publication to a third party being necessary; as is stated in Odgers' on Libel and Slander, (5th ed.) p. 157:—

"And in a civil proceeding it is no publication if the words are only communicated to the person defamed; for that cannot injure his reputation. A man's reputation is the estimate in which others hold him; not the good opinion which he has of himself."

In this action, on the contrary, the essence of the case is that the words which caused the damage were communicated to the plaintiff. On the facts as set out in the evidence, I would hold without hesitation,—and in fact it is admitted by plaintiff's counsel—that if the defendant himself had uttered the words

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complained of to the plaintiff, directly, and to no third party, he would be liable for the damages caused. (*Wilkinson* v. *Downton*, [1897] 2 Q.B. 57; *Janvier* v. *Sweeney*, [1919] 2 K.B. 316). The only question to be considered is whether he is saved from liability by the fact that the false report which he set in circulation reached the plaintiff indirectly through the medium of third parties who picked it up and spread it. Here again the argument on his behalf is based on rules which obtain in the case of slander. It is urged that, as the communication reached the plaintiff through the act of third parties who received it from the defendant, and who, without the defendant's request and being under no moral obligation to repeat it, did repeat it to Steve Bielitski's relatives, who in turn told the plaintiff, the defendant is not liable on the analogy of the law of slander. But the reason for the rule in the case of slander is set out in Odgers, at p. 177, as follows:—

". . . . But if I slander A., I am only liable for such damages as result directly from that one utterance by my own lips. If B., hears me and chooses to repeat the tale, that is B's own act; and B. alone is answerable should damage to A. ensue . . . . For each publication of a slander is a distinct and separate tort, and every person repeating it becomes an independent slanderer, and he alone is answerable for the consequences of his own unlawful act."

So if I hear a slander, I have no business to repeat it, even if I believe it; and if I do repeat it, I do so at my own risk. But if I am informed by a person upon whose word I rely that a friend, well known to both of us, is dead, and believing the sad news to be true communicate it to his relatives, who break the tidings to his mother, I surely am not a wrong-doer, and cannot be held answerable for any damage which the shock may cause to the mother. To hold me a wrong-doer in such a case would make our social relations intolerable and impossible. Nevertheless an injury, possibly a great injury, has been done here, and there is a wrong-doer in the case, namely the defendant who gave the false information in the first place, knowing it to be false, and who rendered the information more than usually harmful to a mother by attributing the death to suicide. The proposition of a separate and independent tort-feesor will not avail to avoid his liability, nor, in my opinion, can it be avoided upon any other ground of remoteness. How can one spread a report of a person's death in a community where the person lives and is well-known and hope that it will not be believed and repeated innocently by third parties, and so reach

the mother? And when it does reach her, is it at all unlikely that it should affect her injuriously? What happened in this case is, in my opinion, exactly what might be expected to happen and is the natural and probable result of the defendant's act, and he is liable for the injury to the plaintiff.

The decision in the case of *Victorian Ry. Commissioners* v. *Coultas*, 13 App. Cas. 222 has been suggested as authority binding upon us against the plaintiff's right to recover in this action, which is based on a claim for illness resulting from mental shock. I think, however, that the *Wilkinson* case, the *Janvier* case, and the case at Bar are all distinguishable from the *Victorian* case, as was pointed out by Wright, J., in his judgment in the *Wilkinson* case at p. 61 of the Queen's Bench report. The judgment in the *Victorian* case dealt with the claim of a person who through the negligence of the servant of a railway company was placed in imminent peril of being struck by a passing train and sustained a mental shock, causing illness, but through fright only, and without being struck. The judicial committee in 13 App. Cas. 222 held that the damages claimed were too remote and that the plaintiff's action must fail on that ground. In reference to the rule of English law on the subject of damages the judgment says at p. 225:—"It is that the damages must be the natural and reasonable result of the defendant's act; such a consequence as in the ordinary course of things would flow from the act."

While the application of the rule as thus expressed might well have ousted the plaintiff's claim in the *Victorian* case, where the negligence of the company was due to the servant's act in opening a gate at the wrong time, committed through mistake and not wilfully, and where the probable harmful consequence, if any, would have been a collision causing injury or death through impact, I fail to see how it can defeat the claim in the case before us, where the only harmful consequence that can follow the wilful communication must be precisely what occurred: illness from mental shock. Whatever may be said of the damages claimed by the plaintiff in this case, I cannot see how they can be described as "too remote." Nor do I think that the *Victorian* case can be cited as authority for the general proposition that damages are never recoverable for illness caused through mental shock. It was certainly not so accepted in *Wilkinson* v. *Downton* and *Janvier* v. *Sweeney*. That their lordships plainly intended to limit their findings of law to the facts of the case before them appears, I think, from the following passage (at p. 225) in their judgment:—

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"Damages arising from mere sudden terror, unaccompanied by any actual physical injury, but occasioning a nervous or mental shock, cannot, *under such circumstances*, their lordships think, be considered a consequence which, in the ordinary course of things, would flow from the negligence of the gate-keeper."

Moreover, I think that to attempt to deduce from the judgment in the *Victorian* case a general proposition excluding all claims for damages for illness caused through mental shock, whatever the circumstances may be, would be to go far beyond the rule as to the effect of judicial decisions on subsequent cases laid down by Lord Halsbury in the case of *Quinn* v. *Leathem*, [1901] A.C. 495, at p. 506, 70 L.J. (P.C.) 77, 50 W.R. 139, where he says:—"Now, before discussing the case of *Allen* v. *Flood*, [1898] A.C. 1 and what was decided therein, there are two observations of a general character which I wish to make; and one is to repeat what I have very often said before—that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all . . . I think the application of these two propositions renders the decision of this case perfectly plain, notwithstanding the decision in the case of *Allen* v. *Flood*."

In my humble opinion the effect of the judgment in the *Victorian* case has been greatly magnified in the references which have been made to it in some of the later decisions.

Some question has arisen as to the sufficiency of the plaintiff's case. Considering the allegations against the defendant contained in the statement of claim, the evidence given at the trial, and the failure of the defendant to offer any explanation of his conduct, I think that the trial Judge was justified in finding, as he did, that the defendant made this false statement wilfully, and in that case the defendant is liable if the statement and the damage suffered can be sufficiently connected as cause and effect.

I agree also with the findings of the trial Judge on the ques-

tion of damages, and approve the amount ($200) assessed by him.

In my opinion the appeal should be dismissed with costs.

Appeal dismissed.

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PANSTOCK CORPORATION v. SPRINGFIELD RAILWAY Co.

Nova Scotia Supreme Court, Harris, C.J., Russell, J., Ritchie, E.J., Chisholm and Rogers, JJ. April 28, 1922.

STATUTES (§IIA—96)—PRIVATE ACT INCORPORATING RAILWAY COMPANY—STRICT CONSTRUCTION—SPECIAL WORDS—LEGISLATIVE INTENT.

Chapter 146 N.S. Stats. 1904, incorporating a railway company and the amendments thereto authorised the company to construct a line of railway "from any point or points upon the Caledonia branch of the said Halifax and South Western Railway Company to a point or points on the timber lands of the Davison Lumber Co. or lands, the timber on which the said last mentioned company has acquired, *or to any point or points on the margin of any river or lake to which logs from such lands may be driven. . . .*" The Court held that the Act authorised the construction of the railway to any point or points on any river or lake to which river or lake logs might be driven from any such lands, and that the words "margin of the lake" could not be restricted in such a way as to leave a hair line between the waters of the lake and the "margin," as to which the defendants would have no title, and which they could not pass, and so defeat the very object and intent of the legislature. The statute applied to the lands after they had been conveyed to another person. The words "of the Davison Lumber Co. Limited" being used in the statute merely to designate the lands in question.

APPEAL from the judgment of Mellish, J. in favour of plaintiff in an action to restrain defendant from entering upon lands of the plaintiff, and to restrain defendant from proceeding with an arbitration under the provisions of ch. 146 of the Acts of 1904 and amendments thereto under an Order in Council of May 27, 1920. Reversed.

V. J. Paton, K.C. for appellant.

J. L. Ralston, K.C. for respondent.

HARRIS, C.J.:—The main question in this case is as to the interpretation of ch. 146 of the Acts of 1904, an Act incorporating the Davison Tramway Co. Ltd., and certain amendments thereto.

By ch. 135 of the Acts of 1905 the name of the company was changed from Davison Tramway Co. Ltd., to "Springfield Railway Company, Limited."

Section 2 of the original Act, as amended by ch. 182 of the Acts of 1920, is as follows:—

"2. The objects of the company shall be:—(a) to acquire, construct and maintain a line or lines of railway or tramway from a point or points on the railway system of the Halifax

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and South Western Railway between Alpena station of the Halifax and South Western Railway, and a point or points on said Halifax and South Western Railway, not more than two and one half miles south of Cherryfield station, and from any point or points, upon the Caledonia branch of said Halifax and South Western Railway Co. to a point or points on the timber lands of the Davison Lumber Co. Limited, or lands the timber on which the said last mentioned company has acquired *or to any point or points on the margin of any river or lake to which logs from any of such lands may be driven*, and to operate the said line or lines of railway or tramway by steam, electricity or other motive power for the purpose of carrying logs, timber, bark, pulp-wood, manufactured lumber, cordwood, supplies, and generally freight of all kinds, and to charge and collect rates and tolls for such carrying."

The words "or to any point or points on the margin of any river or lake to which logs from any of such lands may be driven" were inserted by the amendment of 1920.

Sections 16, 17 and 32 of the Act provide as follows:—"16. For the purpose of executing, operating or carrying on any work under the provisions of this Act the company may acquire by an agreement or take for right of way, station grounds and sidings, any land, rights, privileges or easements.

17. Before taking any land or rights, privileges or easements therein, the company shall file in the registry of deeds for the registration district in which the lands lie, a plan or plans of such part or parts of its right of way, sidings and appurtenances as are required to be taken, said plan or plans being first approved by the Governor-in-Council. 32. The construction of any line of railway or tramway authorised by this Act shall not be commenced until the company shall have submitted a plan and profile of said proposed line to the Governor-in-Council and until the Governor-in-Council by Order-in-Council shall have approved of said plan and profile and the proposed location of said line of railway."

The Nova Scotia Railways Act, ch. 99 of R.S.N.S., 1900, provides as follows:—"8. The Governor-in-Council may inquire into, hear and determine any application, complaint or dispute respecting (a) any right of way over or through lands owned or occupied by any company; . . . .

(q) Any matter, act or thing, which by this Chapter or the special Act, is sanctioned, required to be done or prohibited.

17. Subject to the right to review and rescind its own decis-

ions or orders hereinbefore provided, every decision and order of the Governor-in-Council shall be final."

The Davison Lumber Co., Ltd., referred to in ch. 146 of the Acts of 1904 at that time owned some 78,000 acres of timber lands containing a large quantity of timber and it is alleged and shewn that the logs on these lands can be conveniently driven or floated down certain rivers and lakes into a lake called "Eel Lake."

The defendant company having an agreement with the Davison Lumber and Manufacturing Co., the successors of the Davison Lumber Co., and the present owners of the 78,000 acres referred to, to transport the logs of that company from the margin of Eel Lake to the Halifax and South Western Railway Co., Caledonia Branch, filed its plans in the Registry of Deeds and submitted its plans and a profile of its proposed line to Eel Lake to the Governor in Council in accordance with the special Act and by an Order in Council the Governor in Council approved of said plan and profile and the proposed location of the line of railway. The plaintiff company being the owners of a lot of land adjoining Eel Lake through which the said proposed line is to run brings this action claiming damages for trespass by defendant company on the lands when making its surveys—a declaration that the Order in Council and all proceedings under it are void—a declaration that the plans filed in the Registry of Deeds are invalid and void—and an injunction to restrain defendants from entering upon the lands.

The defendant company justifies its acts under its special Act and the proceedings and order of the Governor in Council. Mellish, J., granted an interim injunction—which he made perpetual after trial—restraining defendants from entering on the plaintiffs lands adjoining Eel Lake under the Order in Council and restraining the arbitration proceedings taken to fix the sum payable by defendants to plaintiffs on the expropriation of the lands for right of way.

The defendants have appealed to this Court.

The first question raised is as to the construction of the amendment to sec. 2 of the Act incorporating the defendant company.

The trial Judge held that this amendment to the special Act was to be construed as authorising defendants to construct their railway only to a place on a lake or river to which logs may as of right be driven, i.e. as a landing place for such logs. He accordingly held that as defendants did not own the shore of the lake at the point in question the Act did not apply and they

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Harris, C.J.

could not expropriate plaintiff's lands. On the argument of the appeal counsel for the plaintiffs sought to restrict the meaning of the words "margin of the lake" in such a way as to leave a hair line between the waters of the lake and the "margin" as to which it was argued plaintiffs would have no title, and which they therefore could not pass. When the words of the Act are clear, as I think they are in this case, a construction leading to such absurd results should not be adopted. It would obviously defeat the very object and intent of the Legislature.

The Act, I think, authorises the construction of the railway to any point or points on any river or lake to which river or lake logs may be driven from any of such lands. That is the plain and natural meaning of the language, and the meaning which effectuates the legislative intent.

The contention fails.

It was also argued that because the Davison Lumber Co., Ltd., did not now own the 78,000 acres of timber lands that the statute was ineffective. The Legislature no doubt was actuated in passing the legislation by a desire to afford means of access to the large block of valuable lands in the interior of the country and to provide a way of getting the lumber on these lands to a mill and a market. There is nothing in the Act to lead one to suppose that it was the intention of the Legislature to restrict the powers of the company to the period during which the Davison Lumber Co. should own the lands. If such had been the intention one would have expected different language to have been employed so as to make that intention clear.

The construction contended for is a forced and unnatural one and I am unable to adopt it.

Another argument urged by counsel for plaintiffs was that certain provisions of the Railway Act with regard to the expropriation of lands had not been complied with. The expropriation here was being carried on under the authority of the special Act the provisions of which were intended to take the place of the general provisions of the Railway Act and the latter do not apply.

Moreover, the question is not raised by the pleadings and was not one of the questions tried out in the action.

Certain objections were taken to the Order in Council passed in this case but the Nova Scotia Railway Act constitutes the Governor in Council a Court for the purpose and provides that:

17. "Subject to the right to review and rescind its own decisions or orders . . . every decision and order of the Governor-in-Council shall be final."

This Court has no power in this action to correct the Order in Council if it is wrong in any respect, and I, therefore, do not consider the objections nor express any opinion whatever as to the validity or correctness of the Order.

I would allow the appeal and dismiss the action both with costs.

RUSSELL, J., concurs with RITCHIE, E.J.

RITCHIE, E.J. (after setting out the facts):—Stating the defence shortly, it consists of a justification under the Railway Act, ch. 99 of R.S.N.S. 1900, and its amendments, and under ch. 146 of the Acts of the Local Legislature of 1903-4, and its amendments, including an amendment passed in the year 1920. The following statutes are material:—

Chapter 146, Acts of 1903 and 1904—Act to incorporate the Davison Tramway Co., Ltd.,

Chapter 135, Acts of 1905—name changed to Springfield Railway Co., Ltd.

Chapter 182, Acts of 1920—an amendment to sub-sec. (a) of sec. 2. Section 2 as amended refers to the objects for which the company is incorporated. Sub-section (a) authorises the company to construct a line of railway "from any point or points upon the Caledonia branch of the said Halifax and South Western Railway Co. to a point or points on the timber lands of the Davison Lumber Co., or lands the timber on which the said last mentioned company has acquired *or to any point or points on the margin of any river or lake to which logs from any of such lands may be driven*" . . . . for the purpose of carrying logs, timber, bark, pulp wood, manufactured lumber, cord wood, supplies and generally freight of all kinds and to charge and collect rates and tolls for such carrying."

The words underlined are the words added by the amendment of 1920.

Section 16. For the purpose of executing, operating or carrying on any work under the provisions of this Act the company may acquire by an agreement or take for right of way, station grounds and sidings, any land, rights, privileges or easements.

The substantial point involved in this appeal is as to the construction of the words contained in the amendment of 1920, namely, "or to any point or points on the margin of any river or lake to which logs from any of such lands may be driven."

It is clear on the evidence that logs may be driven from the lands referred to in the statute down the Medway River to Eel Lake. The statute, I think, applies to the lands after they have been conveyed to another person or company. The words

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"Of the Davison Lumber Company, Limited" used in the statute are words designating the lands in question. The Act which I have to construe is a private one passed at the instance of the defendants and interferes with the property rights of the plaintiffs; it is, therefore, a case calling for strict construction and the language of the statute is to be treated as the language of the promoters of the legislation: this is more particularly so where the property rights of one party are taken away for the benefit of another party, behind the back of the owner, and without notice. The Court was told by Colonel Ralston, K.C. that the plaintiffs had no knowledge of the amendment of 1920 until the hearing of the motion for an interim injunction and this statement Mr. Paton, K.C. did not dispute, but the legislature had jurisdiction to pass the amendment. I find it difficult to understand how any Legislature could bring itself to take away private rights without notice, but it has been done, and though I am prepared to give such legislation the strictest possible construction, still I must give the words used a reasonable construction and give effect to the legislative intent if it is obvious. I must not depart from the crucial rule that if it is possible the words of a statute must be construed so as to give a sensible meaning to them. If I correctly understood the ingenious argument of Mr. Ralston, K.C. I think he would concede that if the amendment of 1920 had said "to a point on the lake" instead of "to a point on the margin of the lake" it would be an end of his case. To give a sensible construction to the legislative words and to carry out the purpose and the object in view, I am driven to the conclusion that it is a point on the lake which the defendants have the right to make the termination of their railway line. To hold that the termination is to be within a hair line of the lake and that the whole object and purpose of the legislation is to be frustrated would, to put it mildly, not be sensible.

In *Ex parte Jennings* (1826), 6 Cowen 518, it was held that "a patent or grant of land by the state, bounded on the margin of a river above tide water carries the land to the grantee *usque filum aquae.*" In this Province the title to all water courses is in the Crown by virtue of the Nova Scotia Water Power Act, ch. 13, 1918. In a note to *Ex parte Jennings* it is said:—"In analogy to the margin of the sea, it would seem that the margin of a fresh water river or creek must be the ordinary water mark. The shores of a river border on the waters edge. And then it would be more than splitting hairs, it would be splitting mathematical lines, to separate the boundary from the river."

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I think the declaration asked for in respect of the Order in Council cannot be granted. The Governor in Council is a judicial body, dealing with a subject matter over which it has complete jurisdiction. The Order in Council is good on its face. If the proceedings complained of are open to review in this Court, it must be on *certiorari* and not by way of collateral attack. I refer to *Phinney* v. *Clarke*, 1894, 27 N.S.R. 384, and cases there cited.

In my opinion, the appeal must be allowed and the action dismissed with costs.

CHISHOLM and ROGERS, JJ. concur with RITCHIE, E.J.

Appeal allowed.

JOLIN v. WHITE AND SAUER.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon and McKay, JJ.A. April 18, 1922.

COURTS (§IIA—161)—JURISDICTION—AMOUNT IN CONTROVERSY—TWO DEFENDANTS JOINED IN ONE ACTION—EACH LIABLE FOR SEPARATE AMOUNT AS REPRESENTED BY CHEQUE—ONE CHEQUE FOR LESS THAN AMOUNT REQUIRED TO GIVE COURT JURISDICTION.

Where a plaintiff joins as defendants in one action makers of two cheques, this proceeding cannot operate to confer a jurisdiction on an Appellate Court which the District Courts Act did not intend it to have, and each defendant being only liable for the amount of the cheque signed by him, an appeal does not lie, in the case of a defendant whose cheque is for less than the amount necessary to give the Court jurisdiction.

APPEAL by defendants from a judgment to recover the amounts of two cheques. Appeal dismissed for want of jurisdiction in the case of one defendant, allowed in the case of the other.

T. D. Brown, K.C., for appellants.

J. C. Secord, for respondent.

The judgment of the Court was delivered by

TURGEON, J.A.:—In this case the plaintiff brought action against the defendant White, a pound keeper, and the defendants Sauer, on two cheques drawn payable to White's order, the one for $57.20 by Christian Sauer and the other for $25.90 by George Sauer, and endorsed by White to the plaintiff. In this action he joined the Sauers as defendants, claiming against Christian for the $57.20 and against George for the $25.90. The trial Judge dismissed the action against White, but gave judgment in favour of the plaintiff against each of the defendants Sauer for the amounts claimed against them respectively. Both these defendants appeal.

It is objected on behalf of the plaintiff that no appeal lies in the case of George Sauer, because, the amount in controversy

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between him and the plaintiff being $25.90 only, his case does not come within the provisions of sec. 56 of the District Courts Act (ch. 40, R.S.S. 1920). In my opinion this objection is well taken and must prevail. Whether the plaintiff was justified or not in joining Christian Sauer and George Sauer in one action, as he did, this proceeding on his part cannot operate to confer a jurisdiction upon this Court which the District Courts Act did not intend it to exercise. The mere joinder cannot affect the amount in controversy between the plaintiff and each of the defendants Sauer. As between the plaintiff and Christian Sauer on the one hand and the plaintiff and George Sauer on the other, we have in reality separate parties and separate causes of action, and the amount in controversy in each case is wholly unaffected by the fact that they were sued in the same writ together with White, who endorsed both cheques. From the beginning to the end of this controversy George Sauer's interest therein was limited to $25.90, and the judgment against him is for that amount. (*Allan v. Pratt* (1888), 13 App. Cas. 780, 57 L.J. (P.C.) 104). To all intents and purposes he is in the same position as if he had been sued separately or alone,—in case the plaintiff had decided to forego his claim against Christian Sauer. The form which the plaintiff chooses to give to his proceedings cannot alter the substance of the case and confer a right to appeal to this Court either upon himself or upon the defendant so as to defeat the intention of the Legislature, which undoubtedly is that small matters in dispute between parties involving sums of less than $50, shall be settled finally in the District Court. George Sauer's appeal must, therefore, be dismissed without costs.

In the case of the defendant Christian Sauer an appeal does lie, and the controversy must be examined on its merits. The action arises out of an impounding of the defendant's horses for being unlawfully at large upon the plaintiff's land and doing damage to his hay stack. It is admitted that the impounding took place and that the horses at the time of the impounding were at large in the neighbourhood of the hay, but it is not admitted that the horses were unlawfully at large, or that they did any damage. It is also established that the defendant gave his cheque for $57.20 to White, the pound keeper, under protest and in order to get possession of his horses. White being compelled by the Stray Animals Act ch. 124, R.S.S. 1920, to retain the horses unless this amount claimed by the plaintiff, as distrainor, was paid to him.

In asserting that his animals were not unlawfully at large,

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the defendant relies on sec. 3 of the Stray Animals Act, which says that, except in cities, towns and villages, it shall be lawful to allow animals to run at large subject to the provisions of the Act, that is, subject (in the case of rural municipalities) to the right of any municipality to prohibit such running at large by enacting a restraining by-law, and that no such by-law was proven by the plaintiff to exist in the municipality in question.

I incline to the opinion that, under the circumstances of this case, the plaintiff should have proved the existence of a stray animals by-law at some time before allowing the case to be reserved for consideration by this Court after argument on appeal. However, I do not believe it is necessary to make any positive finding upon this point, or to dispose of the appeal upon this summary ground, because I am convinced that the plaintiff's action must fail, in any event, upon the substantial question of damages which arises.

This action is brought upon the cheque which has remained unpaid and which is for $57.20. This cheque, bearing in mind the circumstances under which it was given, can be effective only,—if at all,—to compensate the plaintiff for the damage caused by his horses on the occasion of the impounding. (*McCrae* v. *Lyons* (1921), 60 D.L.R. 95, 14 S.L.R. 268). What was this damage? It quite clearly was not the amount of the cheque, because, in explaining how he arrived at this amount, the plaintiff states that the stacks contained at one time 30 loads of hay stacked by him in the fall of 1920; that he valued this hay at between $20 and $30 per ton; that on the day of the impounding (February 5, 1921) he found a number of horses around the hay, some belonging to the plaintiff and some to other parties, and he made it quite clear that he apportioned all the damages caused by animals, whenever caused, among the horses which he found there at the time of the impounding, charging against each horse the sum of $5 per ton. But it is admitted that this hay had been overrun by animals during the whole winter. He clearly cannot recover the full amount of this cheque. Can he recover any portion of its amount according to the evidence? He was not asked and he does not say what damage he estimates was caused by the defendant's horses to his hay on February 5, 1921, nor does he say anything which shows positively that the defendant's horses, in particular, did any damage at all, or furnish us with any basis for arriving at an amount that might be fixed. My own impression, gathered from the evidence, is, that the hay had been

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rendered practically valueless by the depredations of animals during the winter and prior to the impounding. I think that his claim on the cheque must fail entirely.

I would allow Christian Sauer's appeal with costs; the judgment in the district Court against him should be set aside, and the plaintiff's action dismissed with costs.

Judgment accordingly.

DOUGLAS LAKE CATTLE Co. v. REINSETH.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, McPhillips and Eberts, JJ.A. March 10, 1922.

JURY (§IB—5)—RIGHT TO TRIAL BY—ACTION—COUNTERCLAIM—COUNTY COURT RULES, B.C.—ORDER 5, RULE 18—CONSTRUCTION.

Under Order 5, Rule 18, of the British Columbia County Court Rules, if the amount claimed either by the original claim or by the counterclaim exceeds $50, either party is entitled to give a jury notice and to have both claim and counterclaim tried by a jury.

APPEAL by defendant from order of Swanson, Co. Ct. J., of December 15, 1921.

A. D. Macintyre, for appellant.

J. L. G. Abbott, for respondent.

MACDONALD, C.J.A.:—Order 5, Rule 18 of the County Court Rules entitle a defendant to set off or set up by way of counterclaim against the plaintiff's claim in an action, any right or claim whether sounding in damages or not, and the counterclaim is to have the same effect as a cross-action, so as to enable the Court to pronounce final judgment *in the same action both on the original and the cross-claim.*

In the case in appeal, a counterclaim was set up against the plaintiff's claim. Either party was entitled to give a jury notice since the claim as well as the counterclaim exceeded $50. The defendant served a jury notice, the jury was duly summoned and the action was ready for trial with a jury on the morning fixed for trial. The plaintiff's counsel moved for judgment on the claim relying upon the pleadings and admissions of the defendant, and judgment was given accordingly. He then moved to have the jury notice struck out and to have the counterclaim proceeded with before the Judge alone, and this motion was acceded to but the trial was postponed. Mr. Abbott's submission is that while defendant was within his right in serving a jury notice to try the claim of the plaintiff, the jury could try the claim of the plaintiff alone and not the counterclaim and that when judgment was given on the claim, the counterclaim must have been tried by the Judge without the jury, and this appears to have been the view taken by the County Court Judge.

If Mr. Abbott's contention be right, then in no case can the jury try a counterclaim: in every case of a counterclaim when a jury is summoned to try the action there must be two distinct modes of trial. If this be the law it is most unfortunate and is entirely out of harmony with the spirit of modern British judicature which seeks, if it does not virtually compel, an avoidance of multiplicity of actions by making it the duty of him who has a cross demand to set it up by way of counterclaim in his oppenent's action. The intention in providing for the setting up of a counterclaim was that independent causes of actions should be consolidated by pleading, making it unnecessary that each should be commenced separately and tried separately, or consolidated by the Court and tried together. If I am right in my understanding of the objects sought to be attained by the Judicature Acts and Acts and Rules founded upon the principles of the Judicature Acts which our County Court Act and Rules are, then the party who counterclaims, instead of commencing an independent action, was never intended to be deprived of so valuable a right as a trial of his cause by a jury because he adopted the simpler and less expensive method of prosecuting his right.

There are a number of decisions on the meaning of "action" and "plaintiff", as defined in the several Acts and sets of rules in which these terms are defined. It has been held that a counterclaim is not an "action"; it has been held that a claim and counterclaim are to be treated as one "action," and, again that they are not one action. It has been held that a counterclaiming defendant cannot be said to be a plaintiff within the definition; and again that he may be treated as a plaintiff. It has been held that the discontinuance of the action does not discontinue the counterclaim, and that a counterclaim is a proceeding in a cross-action. No case has been decided upon our County Court Act and rules, and while the definition of "plaintiff" is the same in our County Court Act as in the English Judicature Acts, yet the circumstances of its application have not been the same in any decided case as those which appertain to the case at Bar. The nearest approach to a decision in point is *Kinnaird* v. *Field*, [1905] 2 Ch. 361, 74 L.J. (Ch.) 692, 54 W.R. 85, which is a decision of the English Court of Appeal and entitled to very great weight. In that case, the Court thought that a counterclaiming defendant had no right *ex debito justitiæ* to a jury but that in exercise of its discretion, (which is not given the County Court) the Court might direct an issue which ought to be tried by a jury to be so tried. It was really

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an application to transfer the case from the Chancery Division to the Queen's Bench for the purpose of enabling the case to be tried by a jury but the Court decided the real question involved, namely, whether a counterclaiming defendant was entitled as of right to give a jury notice and they held that he was not. While not disagreeing with the other two members of the Court, Vaughan-Williams, L.J., was inclined to take a broader view and hold that the counterclaiming defendant was entitled as of right to a jury had he been in the proper Court. That case was a decision upon a different rule. It is not very satisfactory in view of the doubts of Vaughan-Williams, L.J., and as I am not bound by it, I will give to our own Act and rules such a construction as I think they properly bear, having regard to their context and object.

Now it appears to me that the definition of "plaintiff" which excludes a counterclaiming defendant, shews that the claim and counterclaim were to be considered parts of one action and that it was, therefore, not necessary to bring such a defendant within the definition of "plaintiff" to entitle him to a jury. In other words, it was deemed sufficient that he should be given the right as a defendant to serve a jury notice for the trial of the action, *i.e.*, the claim and counterclaim which were pleaded in the one action. If, therefore, the amount claimed either by the original claim or by the counterclaim exceeds $50, either party is entitled to give a jury notice and to have both claim and counterclaim tried by jury.

If Order 5, Rule 18 be closely examined it will be found difficult to come to any other conclusion. That rule is itself a definition of "action."

The Court is "to pronounce final judgment in the *same action* both on the original and on the cross-claim."

The counterclaim is just as much a part of the "action" for the purposes of the judgment, which involves the trial, as is the claim itself. The claim and counterclaim constitute the "action" and while lawyers, for purposes of distinguishing them, may refer to them as "action" and "counterclaim," and in many respects no doubt they are distinct, yet for the purposes of trial they together fall within the designation of "action."

The course adopted in this case of taking an appeal from an order made in the course of the trial is to be deprecated. The trial having been entered upon ought to have been completed before any appeal is taken. If after the trial there are grounds of complaint against the judgment or any order or ruling made in the course of the trial, they can be ventilated in one appeal.

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I do not say that in no case should an appeal be taken until the trial is completed, but the well established practice to complete a trial once entered upon should not be departed from, unless for very exceptional reasons.

The costs should follow the event.

MARTIN, J.A. would refer the case back for re-hearing.

GALLIHER, J.A.:—I agree in the reasons for judgment of the Chief Justice.

MCPHILLIPS, J.A. (dissenting) would dismiss the appeal.

EBERTS, J.A., would allow the appeal.

Appeal allowed.

REX v. REGINA WINE AND SPIRIT Co.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon and McKay, JJ.A. April 18, 1922.

INTOXICATING LIQUORS (§IIIC—65)—LIQUOR COMPANY STORING LIQUOR WITH LIQUOR EXPORTING COMPANY—BONA FIDE AGREEMENT—EXPORT COMPANY NOT TO TAKE GOODS OUT OF WAREHOUSE WITHOUT PROPER EXPORT ORDER—BREACH OF SASK. TEMPERANCE ACT BY EXPORT COMPANY—SEIZURE OF LIQUOR—RIGHT OF OWNER TO RETURN OF UNDER SEC. 69 (13) OF SASKATCHEWAN TEMPERANCE ACT, R.S.S. 1920, CH. 70.

A liquor company which enters into a *bonâ fide* agreement with a liquor exporting company, whereby such exporting company is to store and keep liquors, wines and beer, of the liquor company, for export, and the export company agrees not to take any goods out of its warehouse until a proper order for export is received, and to remit to the liquor company the original orders so received, is not liable under the Saskatchewan Temperance Act (R.S.S. 1920, ch. 70) for a violation of the Act, by such export company, in breach of its duty, the plain terms of its agreement, and the criminal law, and liquors in the possession of such export company which have been seized by officers of the Crown, for breach of the Act, will be restored under sec. 69 (13) of the Act, to the liquor company on proof of ownership.

[See also (1922), 65 D.L.R. 258.]

CASE stated for the opinion of the Saskatchewan Court of Appeal, as to the proper interpretation of sec. 69 (13) of the Saskatchewan Temperance Act R.S.S. 1920, ch. 70.

A. J. Andrews, K.C., and *D. A. McNiven*, for claimant.

T. D. Brown, K.C., Director of Prosecutions, for the Crown.

The judgment of the Court was delivered by

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

"On December 9, A.D. 1921, the Regina Wine and Spirit Co., Ltd., appealed to me from the order of A. C. Sarvis, Esq., a Justice of the Peace, bearing date of November 25, A.D. 1921, forfeiting to His Majesty, certain liquors seized in the ware-

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house of The Northern Warehousing Co. of Moosomin, Saskatchewan.

On the appeal before me heard on December 16, A.D. 1921, it was agreed that instead of taking the evidence of the witnesses over again, the depositions taken before the said Justice of the Peace would be used, and these would be supplemented by *viva voce* testimony.

After hearing the evidence adduced I reserved judgment until December 20, A.D. 1921, and on that day delivered judgment dismissing the said appeal.

Attached hereto is a copy of the evidence, and of my reasons for judgment.

Supplementing the facts stated in my reasons for judgment, I may say that I was satisfied that the Regina Wine & Spirit Co., Ltd., had not committed, and did not intend to commit any violation of the said Act in respect to such liquor unless the violation actual and intended, though in breach of the agreement between the parties, which agreement I would find was *bona fide* entered into, as there is no evidence to the contrary, by the Northern Warehousing Co. of the said Act can be imputed to the appellant. But on reading sub-sec. 3 and 13 of sec. 69 of the Saskatchewan Temperance Act, as amended by ch. 70, R.S.S. 1920, I held that even if there was no guilt, either actual or intended on the part of the owner, the Northern Warehousing Co. having been guilty, the liquor must be forfeited and I decided accordingly.

The questions reserved for the decision of the Court of Appeal are:—

'1. Was I right in my interpretation of the said sub-sec. 13 of sec. 69, ch. 70, R.S.S. 1920?

2. If not, can the violation, actual or intended of the Act, by the Northern Warehousing Co., be regarded as such violation by the appellant, by its clerk, servant or agent?

3. If questions 1 and 2 be both answered in the negative, should I, on the facts found by me, have dismissed the appeal?' ''

The facts of this case, as I gather them from the evidence, are as follows:—On August 31, 1921, the Regina Wine & Spirit Ltd. and the Northern Warehousing Co. entered into a written agreement whereby the Regina Wine & Spirit Ltd. agreed to ship to the Northern Warehousing Co. such liquors, wines and beers as it might deem advisable, the same to remain the exclusive property of the Regina Wine & Spirit Ltd., and the Northern Warehousing Co. agreed to store and keep the said

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goods in its warehouses at Macklin and Moosomin, and to reship the same to persons, firms or corporations outside the Province of Saskatchewan as orders therefore might be obtained by the Northern Warehousing Co. in pursuance of its business of exporting liquors outside the Province of Saskatchewan, and the Northern Warehousing Co. further agreed not to take any of the goods out of the said warehouses until the proper order for export was received and to mail to the Regina Wine & Spirit Ltd. the original orders so received. The Northern Warehousing Co. was to be paid by the Regina Wine & Spirit Ltd. a commission of 10% on the total amount of orders for goods exported.

In pursuance of this agreement, a certain amount of liquor was shipped by the claimant to the Northern Warehousing Co. at Moosomin and stored by the company in its warehouse.

Towards the end of October, 1921, two special officers appointed for that purpose, procured the sale of several bottles of liquor to them by members of the firm or partnership mentioned above as the Northern Warehousing Co., in the warehouse of that company. The whole stock of liquor in the warehouse was therefore seized, and a claim was fully made for it by the claimant under the provisions of sec. 69 of the Saskatchewan Temperance Act, ch. 70, 1920. Proceedings for an adjudication upon this claim were duly taken before a Justice of the Peace, who decided against the claimant company, which thereupon appealed to the Court of King's Bench. The appeal was dismissed (1921), 60 D.L.R. 461, 14 S.L.R. 320. The Judge who heard the appeal, in his reasons for judgment, finds as a fact that there is no evidence that the liquor sold as above mentioned was a portion of the liquor forwarded by the claimants to the Northern Warehousing Co. He further states, in the stated case, that he is satisfied that the claimant did not commit and did not intend to commit any violation of the Act in respect of such liquor, unless the violation actual and intended by the Northern Warehousing Co. can be imputed to the claimant. He also finds that any such violations of the Act on the part of the Northern Warehousing Co. were in breach of the agreement which was entered into in good faith by the claimant. Notwithstanding those findings, the Judge comes to the following conclusion:—

"I am therefore clearly of the opinion that the evidence establishes that an offence was committed and was intended to be committed in respect of the liquor in question by the Northern Warehousing Co., and that in the face of such facts the ap-

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pellant does not discharge the duty cast upon it by said sub-section 13, even if it establishes that it is the owner of the liquor and that as such owner the appellant itself has not committed or intended to commit any violation of the Act.

The appeal will, therefore, be dismissed with costs."

The sub-section referred to is in the following terms:—

69. "13. If the justice is satisfied by evidence, the onus as to which shall be upon the claimant, that no violation of this Act has been committed or was intended to be committed in respect of such liquor and finds that the claim of the claimant is established, he shall order that the liquor be restored to the owner or other person entitled thereto."

In my opinion, the claimant has amply met the onus imposed by the sub-section. In the first place, as the learned Judge has found, there is no evidence that the liquor sold on the occasion in question was a portion of the liquor belonging to the claimant. One of the "special officers" testifies that the liquor purchased on that occasion was "private stock," and one of the two bottles produced in Court clearly did not belong to the claimant. Other bottles of liquor were also sold on the same day; but no conclusion unfavourable to the claimant should be drawn from that fact, as the bottles were not produced and the evidence shews that the contents of these bottles were consumed by the "special officers" and their friends in the hotel and livery stables, two places in which the consumption of liquor is expressly prohibited by law.

The whole evidence, in my opinion, rebuts the presumption that any violation of the Act was committed, or was intended to be committed in respect of the liquor of the claimant, either by the claimant or by its agent the Northern Warehousing Co.

I am also of opinion that, even if the liquor sold by the agent had been part of the claimant's liquor, the facts as found by the Judge relieve the claimant from liability for violation of the law against sale. The sale of liquor by the agent, even if the liquor belonged to the claimant, was altogether outside the scope of its employment, and was in direct violation of the terms of the agreement which the Judge finds was made in good faith by the claimant.

In *R.* v. *Busy Bee Wine & Spirits Importers of Saskatchewan, Ltd.* (1921), 60 D.L.R. 415, 14 S.L.R. 343, 36 Can. Cr. Cas. 93, it was held by this Court, applying *Boyle* v. *Smith*, [1906] 1 K.B. 432, 75 L.J. (K.B.) 282, that:—

"Where a company, not being licensed to sell liquors within the province, carries on a lawful export liquor business receiv-

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ing its orders by mail and shipping the liquor by express, it is not liable under *The Saskatchewan Temperance Act* for a sale of liquor within the province made by its clerk without the knowledge and contrary to the instructions of its officials; it cannot be assumed that it was in the course of the clerk's employment to sell liquor locally, for that would be to assume he was employed for an illegal purpose, and such must be shewn affirmatively in order for liability to attach to the company."

In this case, the only "violation of the Act" which has been committed is one for which, on the foregoing authority, the claimant is in no way answerable or responsible. It was committed without the knowledge of the claimant, contrary to the express terms of the agreement, and was altogether beyond the scope of the agent's employment, and is not, in my opinion, so far as the claimant is concerned, a "violation of the Act," within the meaning of sub-sec. 13. I would interpret the words "violation of this Act", as used in sub-sec. 13, as meaning an unlawful act of the claimant, or an unlawful act of a servant or agent of the claimant, which could be attributed to the claimant so as to make him liable to the penalty. I cannot accept an interpretation which would expose the claimant to the confiscation of its property because, without its knowledge, consent, authority or connivance, its agents, in breach of their duty and the plain terms of their agreement, in breach of the criminal law as well as of the law of the province, stole and sold some of its liquor illegally at the request or on the solicitation of special officers of the Liquor Commission.

I would therefore answer all the questions submitted in the negative.

The appellant should have its costs of appeal, and of all proceedings below.

Judgment accordingly.

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Nova Scotia Supreme Court, Harris, C.J., Russell, Chisholm, Mellish, and Rogers, JJ. May 5, 1922.

PRINCIPAL AND AGENT (§III—41)—SALE OF SHARES BY AGENT—DELAY IN OBTAINING TITLE—PAPERS SENT TO BANK IN DUE COURSE—IMPLICIT INSTRUCTIONS TO BANK—NEGLIGENCE OF BANK—DELAY—LIABILITY OF AGENT—NO PROOF OF LOSS THROUGH DELAY.

An agent is not personally responsible for any loss or injury caused to any third party except in the case of wrongs, including breaches of trust, and an agent is not liable as such to any third person for the wrongful acts of a sub-agent unless he was a party to the act.

APPEAL from the judgment of Ritchie, E.J. in favour of

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plaintiff in an action claiming damages for failure on the part of defendant to deliver a bill of sale of a share in a vessel purchased by plaintiff from defendant. Reversed.

J. L. Ralston, K.C., for appellant.

W. C. McDonald, for respondent.

HARRIS, C.J.:—The defendant was a shipbroker carrying on business at Halifax. He was the agent of one John T. Moulton and as such agent sold one share of the schooner "Lila E. D. Young" to the plaintiff in January, 1920, for the sum of $700. The plaintiff gave a note for the purchase price, which was paid in May, 1920.

John T. Moulton had purchased the schooner from Bowman Rafuse, who had previously purchased it from the administrators of John B. Young. After plaintiff had paid for the share in May, 1920, he asked for his bill of sale, but the bill of sale from the administrators of Young to Rafuse, which had not been recorded, had been mislaid and so the subsequent transfers could not be recorded. The missing document was found and recorded on January 20, 1921, and a bill of sale was at once recorded from Rafuse to the defendant; and a mortgage was also recorded from the defendant to the Canadian Bank of Commerce for $18,274, dated December 9, 1920. On January 24, 1920, defendant executed a bill of sale to John T. Moulton, which was recorded on January 25, 1920. John T. Moulton executed a bill of sale to plaintiff dated January 29, 1921, which was recorded on February 8, 1921.

The defendant had no interest personally in the vessel at any time. He had acted for John T. Moulton in the purchase from Rafuse and had become liable as a surety on the notes given by John T. Moulton for the purchase price. These notes were held by the Canadian Bank of Commerce and it was understood that the bank should have a mortgage on the unsold shares of the ship to further secure the notes. John T. Moulton resided in Newfoundland and it is not very clear whether the bill of sale was made to defendant by mistake or whether it was thought to be more convenient for the purpose of enabling defendant to execute the mortgage. It is, however, clear, that defendant had no personal interest in the vessel, but was a mere conduit pipe to convey the title to his principal, John T. Moulton. When he came to give the mortgage to the Canadian Bank of Commerce he signed a blank mortgage and sent it to the bank at Lunenburg to be completed from the records there upon 60 shares of the vessel. By a mistake of the bank the blank form of mortgage was filled up upon the whole 64 shares. The

defendant, as soon as he learned that the mortgage covered the whole vessel, sent the bank a new mortgage on 60 shares only and endeavoured to get a release of the first mortgage, but Duff, who was one of the indorsers objected, and it was not until August 2, 1921, that the mortgage was released. The plaintiff's bill of sale from John T. Moulton of his share which was recorded on February 8, 1921, was of course in the meantime subject to the mortgage for $18,274 to the Canadian Bank of Commerce and the mortgage was a blot on the title.

The plaintiff alleges that the defendant personally undertook at the time he purchased the share in January, 1920, to give him a proper bill of sale of it and he claims damages for the delay alleging that he lost a sale of the share and that it has since depreciated in value.

The defendant denied any undertaking otherwise than as agent and if the question as to his having made personally any binding undertaking or agreement is important to the rights of the parties I would find on the evidence that the plaintiff knew from the beginning that defendant was acting solely as the agent of John T. Moulton and that he entered into no agreement personally. This, I think, is the meaning of the finding of the trial Judge, although expressed in different language.

What the trial Judge did was to hold defendant liable, as he expressed it, "upon the equitable principle that where one of two innocent persons must suffer by the wrong of a third person the one who put it in the power of the wrong doer to cause the loss must bear it."

At the same time, he expressly found that the defendant "has not been guilty of anything like fraud or moral wrong doing," and he assessed the plaintiff's damages at $350.

There is an appeal to the full Court and for the respondent it is argued that the defendant is liable for negligence or otherwise in tort.

So far as the delay in giving the plaintiff a bill of sale is due to the fact that Rafuse's bill of sale could not be found, it seems impossible to hold that defendant was in any way responsible for it and I understand on the argument that plaintiff's counsel conceded this, but contended that defendant was liable for the delay caused by the recording of the mortgage; that is, he was responsible for the damaged plaintiff suffered from January 20, 1921 (when the Rafuse bill of sale was found) until August 22, 1921 (when the mortgage was released).

I have carefully read over the evidence with a view to ascertain just what defendant did or omitted to do in connection

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with the giving of the mortgage which would make him responsible to the plaintiff. I cannot find that he was guilty of negligence in signing the mortgage in blank and forwarding it to the bank to be filled up with instructions that it was to cover only 60 shares. If his instructions had been carried out there would have been no trouble. The most that can be said is that the defendant, the agent of John T. Moulton, authorised a sub-agent to carry out a part of the work entrusted to him by his principal and that this sub-agent did it negligently. The bank should not have filled in the mortgage for 64 shares and after this had been done they should have released the mortgage at once, and accepted the new mortgage on the 60 shares, but there is no suggestion that the defendant acted otherwise than in good faith in his endeavours to get the mistake of the bank corrected as quickly as possible. I do not overlook the fact that defendant was an indorser on the note or notes held by the bank, but there is no reason to think that the account given by him of the execution of the mortgage and the delay in releasing it is otherwise than truthful and, if so, defendant was not responsible for it.

In the case of *Stone* v. *Cartwright* (1795), 6 Term. R. 411, it was held that no action lies against an agent for damage done by the negligence of those employed by him in the service of his principal but the principal or those actually employed only are liable.

This case is cited in Bowstead on Agency at p. 453 as authority for the proposition that:—"No agent is liable as such to any third person for loss or injury caused by the wrongful act or omission of a co-agent not being his partner, or of a sub-agent while acting on behalf of the principal unless he authorised or was otherwise party or privy to such wrongful act or omission."

It is quite unnecessary to decide whether the bank or John T. Moulton would be responsible as they are not parties to the action but it is, I think, clear that defendant cannot be held responsible under the circumstances.

Quite apart from this, which I think is fatal to plaintiff's action, I am not at all satisfied that the plaintiff sustained any damage by any act of the defendant. The evidence as to the sale which he says he had made to his son-in-law, Hobrecker, is not at all satisfactory. Hobrecker evidently did not consider himself bound to buy. He refers to his discussion with plaintiff as "a gentleman's agreement" and then says "it is altogether likely" I would have carried it out. He says he

would have gone to some of his friends and made inquiries and "the possibilities are I might have bought it for $700."

This certainly does not look like a sale and it is the only evidence given to support plaintiff's claim that he lost the sale of the share.

I would allow the appeal and dismiss the action, both with costs.

RUSSELL, J.:—I agree.

CHISHOLM, J.:—I agree with Rogers, J.

MELLISH, J.:—The plaintiff in January, 1920, purchased from the defendant, a shipbroker, who was then acting for one John Moulton, to the knowledge of the plaintiff,—one share in the ship "Lila E. D. Young" for the sum of $700 for which plaintiff gave defendant the plaintiff's promissory note dated January 10, 1920, payable 3 months after date. This note was discharged by payment by the plaintiff to the defendant about May 15, 1920. There is a bill of sale of this ship dated January 9, 1920, from Bowman L. Rafuse to the defendant, but this bill of sale was not registered until January 20, 1921, as the bill of sale to Rafuse which was dated January 9, 1920, could not be found. The plaintiff after paying his note, kept asking defendant for a bill of sale of his share, which he finally received, purporting to be from John T. Moulton, dated January 29, 1921. Meantime, by instrument dated December 9, 1920, defendant had mortgaged the ship for a large amount to the Canadian Bank of Commerce. The bill of sale to Rafuse was found and registered on January 20, 1921, at 11 a.m. after which the following documents were registered in the following order:—

"Bill of sale, 64 shares, Rafuse to defendant, on January 20, 1921, at 11.30 a.m.; mortgage, defendant to the bank 64 shares on same date at 12 noon; bill of sale, 64 shares, defendant to John T. Moulton, dated January 24, 1921, and registered next day; bill of sale 1 share John T. Moulton to plaintiff, dated January 29, 1921, and registered February 8, 1921."

Accordingly, when plaintiff received his bill of sale the share which it represented was encumbered by the mortgage to the bank and the plaintiff having failed to get an unencumbered title on April 1, 1921, began this action for damages against the defendant. The mortgage was released after the action was begun on August 22, 1921.

The action was tried in December, 1921, and judgment given against the defendant for $350, damages. Defendant appeals from this on two grounds: first, that the action is not maintain-

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able on the facts proven, and, second, that the damages are excessive.

I am of opinion that the action is maintainable. The defendant knew when the mortgage to the bank was given that the plaintiff had an equitable interest in one of the shares covered by the mortgage and mortgaged it nevertheless to the plaintiff's detriment. The fact that he may not have intended to do so is, I think, as the trial Judge has found, immaterial. If the bank made a mistake (and the question is not in issue on the pleadings) the defendant is nevertheless under the circumstances, in my opinion, responsible for it.

It is said that the only damage in any event for which the defendant is responsible is for the time during which plaintiff's good title was withheld by reason of the mortgage. It is said that in any event even if the mortgage had not been given the plaintiff could not have got a good registered title before January 20, 1921, which appears to be about the time the bill of sale to Rafuse was found.

I am not prepared to say that the trial Judge made any error as to the facts or the law. We are to assume he did not until the contrary is shewn. It may well be that an unregistered bill of sale of an unencumbered share in the ship would have been worth more to the plaintiff than what he got and had when the action was brought. But whether this be so or not, I am not prepared to say the damages are excessive under all the circumstances.

The appeal should be dismissed with costs.

ROGERS, J.:—With respect, I must confess that I cannot see how the plaintiff can be held entitled to hold the judgment which has been rendered in his favour. He purchased through the defendant who, as he knew, was the agent in Halifax of the owner who lived in Newfoundland, one share (1/64) in a vessel. He had similar dealings before and the trial Judge finds (and the evidence amply supports him) the fact of agency and the plaintiff's knowledge of it against the plaintiff, who is seeking to fasten a personal liability on the agent. The defendant was at first delayed in obtaining delivery of a bill of sale because a prior transfer from a former owner was lost and there appeared to be no ready way of obtaining a registrable duplicate; and later on, when the title was taken for convenience and temporarily in the defendant's name with his principal's concurrence, there was further delay owing to a rather unusual circumstance. The owner was indebted in Nova Scotia for advances which had relation to the purchase price of the vessel, and the defendant

was authorised to mortgage his principal's shares to a bank in order to secure this indebtedness. The defendant executed in Halifax a mortgage in blank and directed the officials of the bank in Lunenburg to fill in the blank for 60 shares, omitting 4 shares; of which one had been purchased by plaintiff. Through an oversight on the part of the manager of the bank, or the carelessness of one of its clerks, the mortgage was drawn to cover all the shares and when this was discovered later, the sureties for the debt would not agree to the bank executing the appropriate discharge, so that plaintiff could register his single share unencumbered. It would appear that during these periods of delay—the first from January 20, 1920, to January 20, 1921,—and the second from the latter late to the commencement of the action April 1, 1921, no dividends were paid or other division of profits made to the owners and plaintiff makes no claim for any loss on that score. His averment is that on or about May 20, 1920, he had an opportunity to sell the share (although it is clear he purchased the share in question for investment and not for resale), but that the purchaser refused to buy on account of the title. The offer, he says, was from a close friend or relative and while perhaps one cannot say it lacked *bonâ fides*, yet it is hardly of the character of an ordinary sale based on market values, and one hesitates to fix values or determine rights involving payment in money by others on the possibility of a sale such as that suggested. The price mentioned, $700, was precisely the amount of the purchase money arranged by note a few months previously. The allegation further is that plaintiff was constantly requiring defendant to clear up the title so that he could sell and that when the second difficulty arose there was further delay. The value of shipping having in the meantime gone steadily down, plaintiff says he has suffered loss and that the defendant must respond in damages.

The trial Judge decided that there was a legal liability upon the defendant because he had by creating the opportunity for the bank to make the mistake, violated a duty he owed to the plaintiff. The words of the Judge are: "The bank was told by the defendant to fill up the mortgage and register it, but not to include the plaintiff's share. In violation of the defendant's explicit instructions, the bank wrongfully or through inadvertence filled in the mortgage for the full 64 shares and for a considerable time the bank refused and neglected to make the matter right. It clearly was the duty of the bank the moment it was drawn to its attention that the share was included, to release it from the effect of the mortgage. Ultimately, the bank

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released the share but in the meantime the plaintiff had been injured by the wrong-doing of the bank and the defendant put it in the power of the bank to act as it did.

With deference, I am entirely unable to appreciate on what principle of law liability can attach either to the defendant, the agent, or in fact to the principal were he a defendant or a co-defendant. The cases referred to in the judgment under appeal have no relation, and I speak with all respect to those who accept the contrary view, to the facts in evidence where the agent acting strictly within the limits of his authority, does something which is done as a matter of every day business and on behalf of a principal, and from which it was quite impossible to predict or expect the curious outcome. The defendant as agent had the authority to do all the business he was transacting, including the taking of the title in his own name for convenience and the mortgaging of the 60 shares. There is no suggestion that his instructions to the bank were not as explicit and careful as the Judge has found they were. Surely there was no neglect of any duty owed to the plaintiff. The choice of a bank to complete themselves the transaction authorised was in no respect objectionable; quite the contrary. Yet it is contended that for some reason or other the defendant who gave these "explicit instructions" for his principal and in his business, is to be held personally responsible, and simply because he permitted or put it in the power of the bank to make a mistake or to be inadvertent. It is well settled that an agent is not personally responsible for any loss or injury caused to any third party except in the case of wrongs including breaches of trust, and it is equally well settled that an agent is not liable as such to any third person for the wrongful acts of a sub-agent unless he was a party to the act and I can see nothing in the facts in proof to invite the application of any theory on which liability can be founded. If there was any breach of contract, the remedy is against the principal only.

There is a further difficulty in the plaintiff's way. He has not shewn nor was it possible for him to shew that he has suffered any damages by reason of the delays of which he complains. It is clear that for the first and the longer period, the delay was caused solely by the loss of a bill of sale, vesting the title in the owner from whom defendant's principal had purchased the vessel. There can be no pretence that defendant, the agent, was in any sense responsible for this delay. Furthermore, the plaintiff did not make the delivery of a registrable transfer of the essence of the contract by putting either prin-

cipal or agent on notice. Had he done so he could have if the default continued, recovered back his purchase money. The sale to a proposed purchaser already referred to, would have produced the return of the purchase money only and by forcing rescission, the plaintiff could at any time have got his money back with interest. But, as has been suggested, he was a purchaser for investment and he decided to hold on, impliedly extending the time for the completion of a title which was not immediately necessary unless he again desired to sell. No loss attributable to non-registration is, therefore, to be suggested for the reason stated and this carries us to January 21 when the mistake in registering an unauthorised mortgage was made. The plaintiff was informed of the difficulty, and again he lost a golden opportunity, in fact two of them: he had it in his hands again to rescind the contract and obtain return of his money and interest, or if he decided to hold on to his share he could either again extend the time for performance, as I think he impliedly did, or he could have immediately compelled completion against the principal with whom alone he had contractual relations and the bank which wrongfully or by inadvertence held a wholly unauthorised and legally unenforceable mortgage against plaintiff's share, while it created a cloud on plaintiff's title, must have been immediately removable at plaintiff's instance. It is quite impossible in my view of the law and of the equities of the parties, to attach any liability to the agent, or find that plaintiff suffered actionable injury. If, in any event, there was a liability to respond in damages, the measure would be the difference between the market price at the extended time for delivery, that is a reasonable time after the registration of the mortgage was communicated to plaintiff, and the market price when complete delivery was finally made, a sum very much less than the amount rewarded.

But as in my opinion, no action lies—I would allow the appeal with costs and dismiss the action with costs.

Appeal allowed.

ANTONIOU et al v. ARNETT.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart and Hyndman, JJ.A. February 18, 1922.

EVIDENCE (§IVJ—435)—REFERENCE—DAMAGE TO BUSINESS—ORAL TESTIMONY—PRODUCTION OF ACCOUNT BOOKS—BOOKS IMPERFECTLY KEPT—ADMISSIBILITY OF AS EVIDENCE.

On a reference to the Master to assess the damages to a man in business by reason of delay in opening his business, through not

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obtaining necessary fixtures at a date agreed on, the expense books of the business, after it has been opened, are properly admissible in evidence to show what deductions are to be made from the total receipts during the period in question. The fact that the books are imperfectly kept, if the plaintiff has made an earnest attempt to keep them, amounts rather to a failure of absolute corroboration of the oral testimony than to a disproof of it, and furnishes a proper ground for caution in accepting plaintiff's testimony.

APPEAL by plaintiff from an order of Ives, J. that certain expense books, were not admissible in evidence and varying the Master's report, as to damages referred to him to be assessed by the Appellate Division (1921), 58 D.L.R. 495, by finding no damages proven. Reversed and the report of the Master affirmed.

J. B. Barron, and *A. Barron*, for appellants.

W. H. Patterson, for respondent.

The judgment of the Court was delivered by

STUART, J.A.:—This is an appeal by the plaintiff from a judgment of Ives, J., 16 Alta. L.R. 311.

The action was for damages for delay in supplying and erecting certain fixtures for a restaurant and ice cream parlor. Ives, J., tried the action and held that the defendant was liable in damages and made a reference to the Master to assess them. There was an appeal to the Appellate Division (1921), 58 D. L.R. 495, 16 Alta. L.R. 311 at p. 316 from his judgment and the judgment was in the main upheld with some slight variation as to the period of delay. The reference was then proceeded with and the Master made his report by which he fixed the damages at $2,500 but in his report he referred to the fact that he had admitted in evidence two certain books of account and he reported that if he was wrong in admitting these then there were no damages proven. Upon a motion to confirm the report Ives, J. held the books not admissible and varied the report by finding no damages proven. From this decision the plaintiff appeals.

The judgment upon which the reference took place was for damages for "loss of profits" during a certain period which immediately preceded July 1, 1919, that being the day upon which the plaintiffs were first able to open their shop for business. The method by which, at the reference, the plaintiffs proposed to prove their loss of profit was by enquiring into and proving the profits made during July and August, the first 2 months of their operations, and then after ascertaining these to make an inference as to what the profits would have been during the immediatly preceding period of delay. With respect

to the making of the latter interference, the defendant, respondent, made no serious complaint. The real contest is about the question whether the profits for July and August were ever proven.

The method by which the plaintiff proceeded to prove these profits was this. They proposed to shew the total cash receipts of the business for the 2 months. This they had little difficulty in doing because their bank book was produced and it shewed the deposits from day to day and this added to the plaintiff's testimony that they had no other source from which they received money to be deposited and that the deposits did, in fact, all come from the business, made the total cash receipts fairly well ascertainable. There had been some cash received that was not deposited but this was a comparatively small amount and in any case the plaintiffs were willing to let the amounts shewn by the bank passbook stand as all they could properly claim.

Then the plaintiffs attempted to shew the amounts paid out for materials used in the shop during these 2 months. First, they attempted to shew it by a purchase book in which their bookkeeper had entered the amount of purchases. But during the course of the evidence at the reference plaintiffs' counsel repeatedly admitted that this book was unreliable. In substitution for this plan, the plaintiffs called a number of business men of Calgary, who had, during the same period been conducting the same kind of business and their evidence was to the effect that in such a business for every $100 received from customers from $33-1-3 to $55 was paid out for provisions and supplies. The Master accepted this testimony rather hypothetically saying that "if it is a fair guide" it was sufficient to justify a finding as to what the supplies of the plaintiffs cost them during the period in question. He deducted 33-1-3% from the ice cream parlour receipts and 55% from the restaurant receipts and this left a balance of $14,957.37.

From this amount there was then to be deducted operating expenses. These consisted of electric light, gas, advertising, breakage, replacement, laundry, printing, bookkeeping, wages and sundries which amounted to a total of $6,085.72. This left a net profit, disregarding fixed charges, such as rent, which had to be paid in any case during the period of delay, of $8,871.65, for the two months of July and August or for 62 days. The preceding period of delay had been 25 days and this gave a probable loss during that period, adopting the proportion of 62 to 25, of $3,575. The Master then, on account of the evi-

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dence of the business men referred to as to the state of business in June as compared with July and on account of other uncertainties and possible differences in managing ability etc. stated that he thought he ought to make a further deduction of 30%. By this method he arrived at the sum of $2,500.

It is with regard to the method of arriving at the operating expenses that the chief difficulty arises. The Master said in his report: "There should be charged against this sum (i.e. the $14,957.37) the operating expenses and wages. The cash book ex. A and the ledger ex. B contain the entries touching these items and the bookkeeper C. Mitchell and the plaintiff (Antoniou) gave evidence in support. Their evidence has not been transcribed (i.e. for the Master) and on account of the nature thereof my notes are not very comprehensive. At the request of counsel, however, I am making my finding so far as their evidence is concerned, largely from memory. I am accepting exs. A and B as proved and my report is based on their being properly before me notwithstanding that there are errors in ex. B.

With regard to ex. B, the ledger, the Master had already said that "it is not safe to place too much reliance on the entries therein because the book is incomplete and imperfect and does not contain all the entries of the business it should."

He had already also said, it should be observed and remembered, this; "I believe plaintiff suffered damages by reason of not having his store opened for business from June 6, to June 30, 1919 but I find difficulty in arriving at the amount of same."

Finally he inserted a clause in the report saying "if I have improperly admitted the two books referred to I find that plaintiff has failed to prove any profits."

Another matter argued before us on the appeal was the question of allowing the plaintiffs to call further evidence. To shew what occured I quote again from the Master's report as follows:—

"After the case was closed and during the argument of Mr. Patterson for defendant, Mr. Barron asked to be allowed to put in further evidence. I consented to this notwithstanding Mr. Patterson's objection and as a result, the cash or day book, ex. J, was produced and proved on the evidence of the plaintiff and Mr. Mitchell, the bookkeeper. In answer to Mr. Patterson, Mr. Barron stated his case was then closed so far as further evidence was concerned but that he would not undertake to not apply to offer further evidence. Mr. Patterson then said

that he would not argue until plaintiff's evidence was all in and that he would prefer to not argue at all, if plaintiff were to be allowed to call further evidence every time he (Mr. Patterson) pointed out weaknesses in plaintiff's case.

I then ruled that plaintiff would not be allowed to give further evidence provided it were on a point that he could not reasonably have anticipated or foreseen. Mr. Patterson then proceeded with his argument and after he had gone some length, Mr. Barron asked to recall Mr. Mitchell and the plaintiff to explain certain entries, but I refused this request. Mr. Barron then asked to be allowed to put in original documents as follows:—Time book, original cheques for payment of wages, bank statements, stubs of bank book and a memorandum book of original entries in the cash book and to call plaintiff and Mr. Mitchell to prove them. Mr. Patterson again objected and pointed out that this was to cover up weak points brought to my attention and on further ground that I had ruled against their admission. I refused Mr. Barron's application."

When the matter came before Ives, J. the plaintiffs asked (1) that the report be varied by allowing the damages at $3,575, (2) alternatively, that the plaintiff be allowed to call the further evidence referred to by the Master, (3) alternatively that the report be confirmed and the damages fixed at $2,500, and that interest be allowed thereon.

As stated, Ives, J. took the view that the books referred to were not admissible in evidence and confirmed the Master's finding that in that case there were no damages proven, or, as he put it in his reasons for judgment, he varied the report "so as to find that the plaintiffs have not proved any loss of profits."

With reference to the application to hear further evidence the Judge referred to it as a request "to have the references re-opened that they may offer further evidence in the nature of vouchers, cheques and account books which they actually had before them while the reference was in progress but which they decided not to offer." He refused the application no doubt on the ground suggested in these words.

I cannot find that any order or judgment has been taken out. The appeal is apparently from the reasons for judgment, a course which is contrary to proper practice although there seems to be no rule of Court forbidding it. I think the practice should be discouraged.

With respect, I think the position in regard to the two books of account in question has been rather misapprehended. Re-

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ference was made in the reasons for judgment to passages in Taylor, Best and Phipson under the sub-heads "shop books." But those passages deal mainly with the question of the proof of some individual fact rather than with the question of the admissibility of account books to prove a general result as to profits. It is with this latter question that we have to do here.

Now assuming the total receipts of the business to have been accurately shewn by the bank passbook and the statement of deposits put in as furnished by the bank and assuming the propriety of accepting the evidence of the other business men as to the deduction which ought to be made for the cost of supplies, what remained to be proven was the operating expenses. The entries in the two books of account in question shewing the various items of operating expense were all undoubtedly against the interest of the plaintiff who tendered the books. Every entry shewn on the books tended by so much to decrease the ultimate profit. So that it seems to be clear that all the entries shewing items of expense were admissible as being against the plaintiffs' interest. In the result, therefore, the real problem is not as to the admissibility of these entries but as to the correctness of any assertion that all the entries were made which should have been made, that is, that all the expenses incurred were shown in the books. This would depend upon the reliability of testimony declaring that all such entries had been made and such testimony would have had to be given, no matter how carefully the books had been kept. It would have had to be given, indeed, to shew that the books had been carefully and accurately kept.

Now about this latter question, there seems to be no dispute. The plaintiff does not claim that the books are complete or that absolutely all charges of expenses were entered that should have been entered. The Master in his report expressly finds that the books were imperfectly kept.

The real question, therefore, is whether, because the plaintiff did not keep absolutely accurate accounts and his books are imperfect with respect to the amount of his expenses of operation, it must necessarily follow that he is to be held entirely unable to prove any damages or loss of profit.

It was agreed upon the reference that the evidence at the trial, which had been extended for the previous appeal, should be referred to and taken as part of the evidence on the reference. At the trial the plaintiff swore that he made a profit of $2,000 in July and $2,000 in August and that this was clear profit after paying all expenses including $600 a month

for rent which he had had to pay in June although his business was then closed. He also stated that he and his partners were idle during the period of delay simply waiting for the fixtures in order to open. Before the Master he gave this testimony.

"Q. July and August you took in something like $13,000 in July and $15,000 in August. You took in about $10,000 in September, did you lose money in September? A. No we did not lose. Q. When you took in $7,000 did you lose money on that? A. Yes. Q. How much would you lose on that? A. You have the books. Q. Do you know if you lost then? A. Sure, I don't know how much."

Now, I think it is surely quite proper that a man in business should come into Court and testify that in his business he made a certain profit during a certain period. There are many men in business in a modest or even comparatively large way who are quite able to be sure that they made money and got ahead financially without being able to prove it up to the hilt by the production of carefully kept books. The idea that such men must produce properly kept books before their testimony as to their profits is of any value at all is based merely on the erroneous theory that they must necessarily be either utterly incapable and ignorant of their own interests and affairs or utterly untrustworthy as witnesses. Neither of these grounds for refusing their testimony may exist. It is for the tribunal listening to their testimony to judge. It may be true that, if such a man when asked for his books could produce none whatever the Court would accept his testimony with considerable hesitation. But that is not the case here. The plaintiffs did make an earnest attempt to keep books. They employed and paid a bookkeeper. The books kept were produced. If they had clearly disproved the plaintiff's oral assertions then, of course, that would have been an end of the matter. But the books as produced do not clearly disprove the plaintiff's assertion that his firm made the profiits alleged. As far as they go they support the plaintiffs' claim. It is true that the books were admittedly imperfect but that amounts rather to a failure of absolute corroboration of the oral testimony than to a disproof thereof. It furnishes a proper ground for caution in accepting the plaintiff's testimony and in trusting completely to his knowledge of his own profits. And that, as I conceive it, is just exactly what the Master did.

It is clear that when Antoniou swore that in both July and August he made a profit of $2,000 after paying all expenses including the $600 rent, he must, for the purposes of the re-

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ference be given credit also for the rent. During the period of delay, his rent had to be paid and if it were found that if he had been open during that period he would have merely secured the money out of the business wherewith to pay the rent instead of paying it out of his own pocket as he had to do, then he should be recouped for the loss of this source from which to pay his rent. This means that his testimony at the trial was that he made $2,600 in July and $2,600 in August disregarding for the moment his and his partner's allowance for wages.

It is true that in the judgments the enquiry was directed to "loss of profits" but I certainly intended when I wrote the judgment of the Court on appeal that the rent should be treated in this way. The trial Judge had said in his original judgment "this measure of damage will exclude the item claimed for rent which is dismissed" but that referred, I think, merely to the form of the claim. What the Court intended (and in saying this I have the concurrence of my brother Beck, who was in the former appeal but is not in this) was that an enquiry should be made to ascertain how much in money the plaintiffs were behind compared with what their position would probably have been if the store had been open during the period of delay. It was in this sense that the expression "loss of profits" was understood by the Court when giving judgment on the former appeal.

The plaintiff, Antoniou, then, swore at the trial that his firm had made a profit of $2,600 in July and $2,600 in August 1919 disregarding, as I say, their own allowance for wages which they did not earn during the period of delay. At the reference he clearly stated that even with receipts at $10,000 they would not lose. Their receipts were roughly $13,000. This means that at least they were $3,000 ahead per month.

Upon the former statement at the trial, Antoniou was not, of course, cross-examined but there was every opportunity to cross-examine him upon it at the reference. And there was in fact a long cross-examination as to his profits generally up to the date of the bankruptcy in 1921.

The fact that the plaintiffs went into bankruptcy in 1921 is not at all inconsistent with their having got considerably ahead in July and August 1919. The reason for the bankruptcy is apparent from the statement of deposits furnished by the bank which shewed latterly a disastrous falling off in the receipts of the business.

With respect to the evidence of the other business men as

to the probable cost of materials and supplies, I think that upon such an enquiry as to probable profits the evidence was admissible for what it was worth. And it is to be observed that Antoniou himself gave evidence as to the proportion existing in the actual case between his total receipts and the cost of supplies. This also was admissible though owing to the absence of records its weight was for the referee to estimate.

In my opinion, when the Master stated that he believed that the plaintiffs suffered damages by not having his store opened from June 6 to June 30, 1919 he was bound to make the best assessment of those damages that he could. This the Master did. The defective books shewed a loss, on the principle above stated, of some $3,575. Owing to the admission of defects he actually deducted 30% from this amount and reported the loss at $2,500 so as to be within the margin of safety. This corresponds quite closely to the plaintiff Antoniou's testimony.

In my opinion, such a report, in the circumstances narrated, ought not to be interferred with.

I would, therefore, allow the appeal with costs and order the Master's report to be confirmed and judgment to be entered for the plaintiffs for $2,500 with costs of the trial and of the reference.

With respect to the plaintiff's application to re-open the reference and to hear further evidence I do not see that any good purpose could be served by continuing the expense of this litigation. It is altogether too problematical whether the plaintiff would gain anything by such a course even if he were entitled to ask for it. Without laying down any rigid rule as to calling further evidence on a reference, I think the matter was in the discretion of the Master and that we cannot say that he exercised his discretion improperly. Neither do I think the plaintiff can succeed on his motion to vary the report by increasing the damages to $3,575 in view of the defectiveness of the books on account of which I think the Master was bound to make some allowance. Possibly, the deduction of 30% was a little high but I cannot say that the Master was clearly wrong and the result he arrived at should not, therefore, be interferred with.

Appeal allowed.

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RE WALTERHOUSE ESTATE.

Surrogate Court of County of York, Ontario, Widdifield, Co. Ct. J. April 26, 1922.

WILLS (§IB—20)—EXECUTION—ATTESTATION—BY TESTATOR—BY WITNESSES—SUFFICIENCY OF.

A testator having drawn his will and signed it, handed the paper to a witness and asked him to sign it as witness saying that it was his (deceased's) will. The witness did not remember seeing testator's signature, but could have seen it if he had looked, and probably did see it. The witness then in the presence of the testator subscribed as an attesting witness. The testator called to the other witness, who was working in the same room about ten feet away, and asked him to sign, and after this witness had signed the testator said that it was his (testator's) will that he had witnessed. This witness also could have seen testator's signature if he had looked. This witness did not see the other witness sign, but there was nothing to prevent him seeing if he had looked when such witness was signing. The Court held that the will was properly executed within the meaning of the Wills Act, R.S.O. 1914, ch. 120, sec. 12.

[*Re Webb* (1855), Dea. & Sw. 1, followed; Review of authorities.]

APPLICATION to prove a will in solemn form.

Davis, K.C., for executors.

Dunbar, for contestant. *Ramsay*, for infants.

WIDDIFIELD, Co. Ct. J.:—This is an application to prove in solemn form the will of James H. Walterhouse dated March 17, 1919. Walterhouse was a printer and at the time of making this will he was working in the "*News*" office and Fitzpatrick and Collins, the two subscribing witnesses, were fellow printers, all three working together in the same room. They had known one another for some 8 or 10 years.

The will in question is, as far as a will on a printed form can be said to be, a holograph will. The testator appears to have been a man of intelligence as the will, including the formal attestation clause, is correct in every particular. The inference is that the testator was fully aware of the formalities essential in the proper execution of a will.

On or about the date of the will, in the printing office, the deceased presented the paper to Fitzpatrick and told him it was his (deceased's) will, and asked Fitzpatrick to sign it as a witness. I have no doubt whatever that at this time, the will had been signed by the deceased. Fitzpatrick says he does not recall seeing deceased's signature to the will because the will was "folded up." The will, on its production, shews it never has been folded between the signature of the testator and that of Fitzpatrick. I have no doubt Fitzpatrick could

have seen the deceased's signature if he had looked, and he probably did see it and has forgotten.

Fitzpatrick then, in the presence of the testator, subscribed as an attesting witness. At this time, Collins was in the same room about 10 feet away. He says he did not see Fitzpatrick sign, but there was nothing to prevent him seeing if he had looked when Fitzpatrick had signed. He asked the testator who would be the other witness and the testator indicated Collins. Collins was called over and testator said, "Shorty, will you sign this?" Thereupon, Collins did sign it as the second attesting witness. Collins says that up to this time, nothing was said to him as to the nature of the document he signed, and after he had signed, he made a remark that he might have signed away all his property, when the testator replied it was his (testator's) will he had witnessed. Whether Collins saw the testator's signature or not, I think he had the opportunity of seeing it if he had had sufficient curiosity.

Walterhouse died January 31, 1922 and on February 17, Fitzpatrick made the usual affidavit of execution, purporting to be sworn before a commissioner, whom I understand is a solicitor of this Court. When confronted with this affidavit, Fitzpatrick says it is his signature, but he did not know what he was signing, that it was not read over to him, and he took no oath. He does not look like a man who would sign a paper without knowing its contents. If this evidence is true, and that is the way important evidence like an affidavit proving execution of a will is obtained, there is little to safeguard a testator's estate, and solicitors who sign jurats under these circumstances are guilty of more than a mere indiscretion.

It will be seen from the evidence before the Court there is no suggestion of fraud, or that the testator was not a free agent, or that he was in any way incapable, or that the will does not express his actual and well considered intentions as to his estate. It is, however, contended that the will was not properly executed so as to comply with the provisions of the Wills Act, because not having been signed by the testator in the presence of the attesting witnesses; (1) there is no sufficient acknowledgement of his signature to the will; (2) if there was an acknowledgement, that made to Collins was made *after* he had attested the will and for this reason is not sufficient; (3) that the attesting witnesses did not sign in the presence of each other.

Dealing first with contention (2) Mr. Dunbar relies on a citation from 28 Hals. 552, para. 1095 and cases there referred to:—"The signature of the testator must be made or acknowl-

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edged in the presence of two witnesses, and such witnesses must attest or subscribe the will in the presence of the testator. Wills Act 1837 (7 Wm. IV and 1 Vict. ch. 26) s. 9: and *Betts* v. *Gannell* (1903), 19 T.L.R. 304. The testator's signature must be made or acknowledged when both the attesting witnesses are actually present at the same time. *Wyatt* v. *Berry*, [1893] P. 5, *and both witnesses must attest and subscribe after the testator's signature has been so made or acknowledged.* Each witness should be able to say with truth that he knows that the testator has signed the document; and there is no sufficient acknowledgement unless the witnesses either saw or had the opportunity of seeing the signature, even though the testator should expressly declare that the paper to be attested is his will or should state that his signature is inside the will."

It is that part of the quotation I have italicised that is relied on, and the authorities referred to as establishing the assertion that an acknowledgement must be made to the witnesses before attestation, are:—*Moore* v. *King* (1842), 3 Curt. 243; *Cooper* v. *Bockett* (1843), 3 Curt. 648; *Pennant* v. *Kingscote* (1843), 3 Curt. 642; *Hindmarsh* v. *Charlton* (1861), 8 H.L. Cas. 160, 11 E.R. 388; *Wyatt* v. *Berry*, [1893] P. 5, 62 L.J. (P.) 28; *Brown* v. *Skirrow*, [1902] P. 3, 71 L.J. (P.) 19.

It may be worth while to examine these cases and see if they go the length contended for.

Moore v. *King* was a case where testator signed a codicil in the presence of one witness (his sister). On a subsequent day this witness and another person were present, and the testator requested the other person to attest as a witness, saying in the presence of both parties and pointing to his signature, "This is a codicil signed by myself and my sister as you see. You will oblige me if you will add your signature, two witnesses being necessary." The other party then subscribed in the presence of the testator and his sister, but she did not re-subscribe.

It will be seen that the question was, as stated in the argument, "Can a *witness* subscribe by acknowledging a signature, made in the presence of the testator, but not in the presence of the testator and another witness?"

Sir Herbert Jenner Just in his judgment at p. 253 says:—"I am inclined to think the Act is not complied with unless *both witnesses* shall attest and subscribe *after* the testator's signature shall have been made and acknowledge to them, when both are actually present at the same time. If the one witness has previously subscribed the paper, and merely points out her signature when the testator acknowledges his signature in her presence, and in that of the other witness which latter witness

alone then subscribes, that I hold not sufficient. I have no explanation why the first witness did not re-subscribe. The Act says that the testator may *acknowledge* his signature but it does not say that the witnesses may acknowledge their subscriptions."

In *Cooper* v. *Bockett*, the question of acknowledgment was not in question. What that case did decide was that a will must be signed by the testator before it is subscribed by the witnesses. One would scarcely think this was open to argument. How could witnesses *attest* the signature of the testator if he had not signed? The Judge said at p. 659, "The interpretation which the Court has put upon the section is that the testator must sign or acknowledge his signature before the witnesses attest, and that if the witnesses attest before the signature of the deceased is affixed to it, the will is not duly executed within the provisions of the Act."

The Judge seems to have used the words "sign or acknowledge" because these were the words of the Act, and as if they are both of the same significance. But they are not. A witness could not attest a signature that did not exist, and a testator could not acknowledge a signature he had never made. But a witness could acknowledge a signature already made by the testator whether the acknowledgement was made immediately before or immediately after the witness had subscribed.

In *Pennant* v. *Kingscote*, probate was refused because one of the witnesses swore the will was not signed by the testator in his presence.

In *Charlton* v. *Hindmarsh*, the will was duly signed by the testator in the presence of two witnesses, but the witnesses did not sign at the same time or in the presence of each other. The Lord Chancellor said at p. 167:—"It is settled by the case of *White* v. *British Museum*, (6 Bing. 310) and other decisions to the same effect, that after the will has been signed or acknowledged by the testator in the presence of both the witnesses, there must be the subscription of the witnesses in the presence of the testator."

Here again, the Court uses the general language of the statute. But the *White* case (1829), 6 Bing. 310, 130 E.R. 1299, here particularly referred to, did not decide that an acknowledgment must precede the subscription. What it did decide was that a will of lands (it was under the Statute of Frauds) subscribed by three witnesses, in the presence of and at the request of the testator, is sufficiently attested within that statute, although, none of the witnesses saw the testator's signature and only one of them knew what the paper was. Tindal, C.J. said

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at p. 318, "any declaration before them (the witnesses) that it is his will, is equivalent to an actual signature in their presence and makes the attestation and subscription of the witnesses complete."

Brown v. *Skirrow* does not turn on the question of acknowledgment. It decided that the testatrix did not sign "in the presence" of the witnesses, when one of the witnesses was in the same room but so situated that she could not see the signing.

It will be seen that not one of the cases cited expressly decides that an acknowledgment must precede the actual subscription of the attesting witnesses, and compels the Court to hold that where the acknowledgement and the subscription are parts of one and the same transaction, that is not a compliance with the Act. If the three parties, the testator and the subscribing witnesses, had separated before the acknowledgement was made it might be different.

It will be noticed that the Act (R.S.O. 1914 ch. 120 sec. 12) does not say that the acknowledgment must be made before attestation. It says "Such acknowledgment shall be made or acknowledged by the testator in the presence of two or more witnesses, present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator." But I think there was an acknowledgment before the witnesses subscribed the will.

In *Re the Goods of Janaway* (1874), 44 L.J. (P.) 6, 23 W. R. 385, the attesting witnesses to a will, when they attested the will, did not see the testatrix sign nor did they see her signature to the document. She asked them to sign and told them it was her will they were signing. The Court presumed the signature of the testator was affixed to the will when she asked the witnesses to sign.

In *Inglesant* v. *Inglesant* (1874), L.R. 3, P. & D. 172, 43 L.J. (P.) 43, 22 W.R. 741, the head note is:—

"The deceased signed her will in the presence of one witness. On the entry of the second witness, a person present directed him to sign his name under the testatrix's signature. He did so, and the second witness also subscribed the will. The deceased was in the room, but said no word during the proceeding. The will was lying on the table, open and headed in large characters with the words This is the last will etc. It also had a full and formal attestation clause. Held, that the deceased acknowledged her signature in the presence of two witnesses." Sir J. Hannen said that if the words spoken by Mrs. Lee (the

first witness) to the second witness had been spoken by the testatrix herself, namely an invitation to the witnesses to put their names under the signature of the testatrix, that would have been an acknowledgment sufficient to render the execution valid.

In *Daintree* v. *Butcher* (1888), 13 P.D. 102, 57 L.J. (P.) 76, Cotton, L.J., said at p. 103:—"It is admitted law that it is not necessary for the testator to say 'this is my signature,' but if it is placed so that the witnesses can see it, and what takes place involves an acknowledgment by the testator that the signature is his, that is enough. In my opinion, when the paper bearing the signature of the testatrix was put before two persons who were asked by her or in her presence to sign as witnesses that was an acknowledgement of the signature by her. The signature being so placed that they could see it, whether they actually did see it or not, she was in fact asking them to attest that signature as hers."

The law is thus summed up in Jarman on Wills:—

"When the witnesses either saw or might have seen the signature, an express acknowledgment of the signature itself is not necessary, a mere statement that the paper is his will . . . or a direction to them to put their names under his . . . or even a request by the testator . . . or by some person in his presence, . . . to sign the paper is sufficient." 6th ed. p. 112.

As to the other contention. It is not essential for the attesting witnesses to sign in the presence of each other, although it is usual for them to do so: *Faulds* v. *Jackson* (1845), 6 N. of C. Supp. 1. There was a dictum to the contrary in *Casement* v. *Fulton* (1845), 5 Moo. P.C.C. 130, 13 E.R. 439 but as pointed out in *Re Webb* (1855), Dea. & Sw. 1, 164 E.R. 483, there was probably an error in that part of the report. The matter came up squarely for decision in the last mentioned case and Sir John Dobson, following *Chodwick* v. *Palmer* (an unreported case), held that it was not necessary for the two witnesses to sign in the presence of each other. See also *Brown* v. *Skirrow*, *supra*.

There will be a judgment declaring the will was properly executed.

I think the contestant, from information he obtained from the attesting witnesses, thought there was reasonable grounds for supposing the will had not been duly executed, and on the principles laid down in *Orton* v. *Smith* (1873), L.R. 3, P. & D. 23, the costs of all parties should come out of the estate. I fix the costs of the contestant at $40, and of the Official Guardian at $10. *Judgment accordingly.*

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REX v. LITMAN.

Manitoba King's Bench, Galt, J. March 2, 1922.

CRIMINAL LAW (§IV D—122)—SUMMARY CONVICTION FOR VAGRANCY—HOLDING OVER THE ISSUE OF WARRANT—ACCUSED PROMISING TO LEAVE CITY—ARREST ON WARRANT OF COMMITMENT ON ACCUSED RETURNING AFTER ABSENCE FOR SEVERAL MONTHS FOLLOWING THE CONVICTION—CR. CODE SECS. 238, 239, 739.

Where sentence to imprisonment on a summary conviction by a city magistrate for vagrancy is accompanied by a direction by the magistrate that the warrant of commitment should not issue for 24 hours in conformity with the practice of inducing offenders of that class to leave the city, the warrant may legally be executed although the accused then left the city if he returns while the warrant is still in effect and the term of imprisonment thereunder had not begun to run until the arrest made on his return.

[*R.* v. *Fitzpatrick* (1915), 25 Can. Cr. Cas. 42, 25 D.L.R. 727, distinguished; *Ex parte Doherty* (1899), 5 Can. Cr. Cas. 94, specially referred to.]

APPLICATION for a discharge on a return of a writ of *habeas corpus*. Application dismissed.

L. D. Morosnick, for the accused.

John Allen, K.C., for the Crown.

GALT, J.:—In this matter Joseph Litman petitions for an order for the issue of a writ of *habeas corpus* and a writ of *certiorari* (in aid thereof) directed to the police magistrate for the city of Winnipeg, with a view to securing his discharge from custody.

It appears that on October 26, 1921, the petitioner was charged in the Police Court for "unlawfully having no peaceable profession or calling to maintain himself by, for the most time supports himself by gaming, and is thereby a loose, idle and disorderly person and a vagrant."

The petitioner consented to be tried summarily and the papers shew that he pleaded guilty to the charge. The petitioner says:—

"3. That at the time of the said arrest on trial the said Joseph Litman was asked by a detective if he would leave the City of Winnipeg which the said Joseph Litman agreed to do."

Judgment was given by the Police Magistrate upon the same day whereby the petitioner was convicted and sentenced to six months' imprisonment in the eastern judicial district gaol at hard labour. The magistrate directed the "warrant to be held 24 hours."

The petitioner left the city immediately but returned on or about December 24, 1921, when he spoke to James Melville, the police constable who had informed against him, and who then told him to leave Winnipeg at once or he would be arrested, and

he left Winnipeg at once. But early in the month of February, 1922, he returned to Winnipeg, and on February 3, 1922, he was arrested and conveyed to the common gaol where he now is.

The petitioner claims that his present imprisonment is illegal on several grounds, but the only one seriously argued before me was:—

"(e) Because the said Joseph Litman had been voluntarily released from custody on the charge and from the sentence set out in the said warrant of commitment."

The practice of permitting prisoners who have been convicted of minor offences to leave town and stay away, has for a long time prevailed in Canadian Police Courts. It is always done with the consent and at the request of the prisoner. It seldom happens that it is to the interest of anyone to complain of this practice, so much so that there are very few reported cases dealing with it. One case, however, came before me a few years ago, viz., *R.* v. *Fitzpatrick* (1915), 25 D.L.R. 727, 25 Man. L.R. 627, 25 Can. Cr. Cas. 42. There the applicant, Ida Fitzpatrick, was convicted on March 15, 1915, before a police magistrate of being an inmate of a disorderly house and she was sentenced to three months' imprisonment. The warrant was held for 48 hours to give her an opportunity, if she felt so disposed to take advantage of it, to leave the city. No definite time was fixed as to how long she was to remain away. As a matter of fact she left the city and remained away for three months. Upon her return she was re-arrested on a warrant based on the above conviction. I was under the impression in that case, rightly or wrongly, that the applicant's term of imprisonment had already commenced, and that her absence during the remainder of the sentence was by the grace of the authorities; and inasmuch as the term of her imprisonment had expired I held that she could not again be arrested upon the same charge or warrant.

Among the cases referred to by Mr. Morosnick on behalf of the applicant, during his carefully prepared argument, was *Ex parte Doherty* (1899), 35 N.B.R. 43, 5 Can. Cr. Cas. 94. [Mr. Morosnick also referred to *R.* v. *O'Hearon* (No. 2) (1901), 5 Can. Cr. Cas. 531, on "voluntary escape," and *In re Thomas Lynch* (1906), 12 Can. Cr. Cas. 141, on the power of a magistrate to suspend the issue of a warrant of commitment]. There the applicant, in January, 1899, was convicted of a fourth offence against the Canada Temperance Act, R.S.C. 1906, ch. 152, and was sentenced to 2 months' imprisonment in the county gaol at Hampton. The warrant for his arrest was held over from January till September 1, at which time the constable sought to

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execute it. The applicant, being especially anxious to avoid imprisonment at that particular time, requested the constable to allow him to go at large for a time, which the constable did, having first taken from him a deposit of $100 as security for his appearance when wanted. On September 18, the constable, on the same warrant, arrested the applicant and took him to the county gaol to serve his sentence. The money deposited was returned to him. The Supreme Court of New Brunswick, consisting of Tuck, C.J., Hanington, Landry, Barker and Van Wart, JJ., refused the application, Van Wart, J., dissenting. Tuck, C.J., in delivering judgment, said, at pp. 95, 96:—

"Whatever was done by the constable was done at the instance of Doherty, upon his request and for his benefit and accommodation, and he cannot be heard now to say that it was illegal. As to the delay in issuing the warrant, while if an injustice were being done, this Court could, and no doubt would, interfere, there has been nothing shewn here to make such interference necessary. I am of opinion, therefore, that the matter should be sent back to Mr. Justice McLeod with instructions to refuse the order in the nature of a *habeas corpus*."

Mr. Allen has referred me to the case of *Re Leo Hinson*, decided in 1911 and reported in 156 North Carolina Rep. 250. There the petitioner was convicted of retailing spirituous liquor. The entry in the docket was "judgment of the court that the defendant be imprisoned in the county gaol for eight months." The Judge below found that the trial Judge said to the defendant that if she would leave the county of Wayne and not return, she would not be compelled to serve the sentence of imprisonment, and directed the clerk of the Court verbally not to issue *capias* to carry into effect the judgment pronounced until 15 days after the adjournment of the Court. Within that time the petitioner left the county of Wayne and took up her abode in the adjoining county of Wilson, where she abided until after the expiration of the 8 months, when she returned to Wayne. Thereupon she was taken in arrest upon the *capias* issued by the clerk, as directed by the trial Judge 15 days after the adjournment of said Court, and was imprisoned in the county gaol in execution of the judgment set out above.

In delivering the judgment of the Court, Clark, C.J., says, at p. 252:—

"The opportunity which the withholding of the *capias* afforded the defendant to escape was not a decree of banishment. There was nothing requiring her to leave. If she left it was of her own free will and accord, and was legally a flight

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from justice. The defendant cannot plead her own wrong in leaving the jurisdiction of the court, by her own voluntary act, as a protection against a legal sentence."

The petition was accordingly refused.

In the present case the applicant's imprisonment in the gaol of the district had not yet commenced.

The application must be dismissed.

Application dismissed.

PARKER-EAKINS Co. Ltd. v. ROYAL BANK OF CANADA.

Nova Scotia Supreme Court, Russell, J., Ritchie, E.J., Chisholm and Mellish, JJ. May 4, 1922.

STATUTES (§IIA—96)—BANKRUPTCY ACT—CONSTRUCTION—CERTIFICATE OF JUDGMENT—REGISTRATION OF UNDER REGISTRY ACT, R.S.N.S. 1900, CH. 137—ASSIGNMENT—PRIORITY OF.

Held by Chisholm, J., and Ritchie, E.J., Russell, J., *contra*, and Mellish, J., expressing no opinion, that an authorised assignment although subsequent in date is entitled to precedence over a judgment recovered since the passing of the Bankruptcy Act, a certificate of which is registered in accordance with the provisions of sec. 16 of the Registry Act, R.S.N.S. 1900, ch. 137. Sub-section 16, of sec. 11, as amended by 1920 stats. ch. 34, sec. 7, is the only place where the sweeping provisions of sec. 10, sub-sec. 11, are cut down, and this sub-section applies to judgments or certificates of judgments registered prior to the coming into force of the Bankruptcy Act.

[See Annotations, 53 D.L.R. 135, 59 D.L.R. 1.]

STATED CASE submitted for the opinion of the Court as to whether a recorded judgment in Nova Scotia binds lands to the extent of the amount owing to the judgment creditor notwithstanding an authorised assignment made by the judgment debtor under the provisions of the Bankruptcy Act.

T. R. Robertson, K.C., for plaintiff.

J. McG. Stewart, K.C., for defendant.

RUSSELL, J.:—The plaintiff company recovered judgment against Hilaire LeBlanc on January 7, 1921, for $2,095.65 a certificate of which was duly recorded in the registry of deeds at Yarmouth on the same day. A mortgage of real estate was made by LeBlanc and his wife to the Royal Bank of Canada on January 15, 1921, which was duly recorded in the same registry on the date of its delivery. On June 13, 1921 an authorised assignment was made by LeBlanc to a trustee. A case has been stated by the parties interested for the purpose of raising the question whether the lien of the plaintiff company by virtue of the recorded judgment upon the lands of the assignor has been destroyed or impaired by the operation of the Bankruptcy Act, 1919 (Can.) ch. 36.

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The authorised assignment having been made on June 13, 1921, its effect as to existing rights must I assume depend upon the Bankruptcy Amending Act of 1921 ch. 17 which was assented to on June 4 of that year. As amended by sec. 10 of the Act last mentioned, sec. 11 sub-sec. 1 enacts that every receiving order and every authorised assignment made in pursuance of the Act shall take precedence over (a) all attachments of debts by way of garnishment, unless the debt involved has been actually paid over to the garnishing creditor or his agent; and (b) all other attachments, executions or other process against property except such as have been completely executed by payment to the execution or other creditor, and except also the rights of a secured creditor under sec. 6 of this Act. The phrase referring to the rights of a secured creditor was inserted in the sub-section by the amending Act of 1921. Section 6 of the Act referred to in the passage quoted is the section which vests the debtor's property in the trustee on the making of a receiving order and it contains the provision that the section shall not affect the power of any secured creditor to realise or otherwise deal with his security in the same manner as he would have been entitled to realise or deal with it if the section had not been passed.

Under the provisions of R.S.N.S., 1900, ch. 137, sec. 16, a judgment, a certificate of which is registered in the manner provided in the chapter "shall from the date of such registry bind and be a charge upon any land within the district of any person against whom such judgment was recovered whether such land was acquired before or after the registry of such certificate, as effectually and to the same extent as a registered mortgage upon such land of the same amount as the amount of such judgment."

One would think that by force of this section just quoted a creditor with a recorded certificate of judgment must be a "secured creditor" under the definition given in sec. 2 gg. in which it is enacted that "secured creditor" means a person holding a mortgage, hypothec, pledge, charge, lien or privilege or any part thereof as security for a debt due or accruing due to him from the debtor." The statute of the Province has given to the creditor with a recorded judgment rights which are defined as being as effectual as those of a mortgagee with a recorded mortgage. One would think that as a secured creditor under the definition in sec. 2 gg, his lien was effectually preserved by sec. 6, although in terms sec. 6 refers only to the case of a receiving order. It surely cannot have been intended that the position of a creditor where there has been a receiving order

should differ from his position had there been an authorised assignment. See also as to this sec. 10.

But what are we to make of sub-sec. 10 of sec. 11 (Acts of 1919) which seems to say that after the registration or tender for registration of the authorised assignment it is to have precedence of all certificates of judgments except such as have been completely executed by payment saving only a lien for the costs of registration and sheriff's fees if any. The amending Act of 1920, ch. 34, sec. 7, enacts that the provisions of paras. 1 and 10 of sec. 11, shall not apply to any judgment or certificate of judgment registered against real or immoveable property in Nova Scotia or New Brunswick prior to the coming into force of the Bankruptcy Act. The draftsman of this section must have assumed that the effect of sec. 11 (10) of the original Bankruptcy Act was to destroy the lien given by a recorded certificate of judgment notwithstanding the provisions of sec. 6 of the Act of 1919, and the further proviso of sub-sec. 1 of sec. 11 to the effect that the paragraph vesting everything in the hands of the trustee in the case either of receivership or of an authorised assignment should not apply to any execution or other process issued against real or immovable property under or by virtue of a judgment registered prior to the coming into operation of the Acts which judgment as the result of such registration became under the laws of the Province wherein it was registered a charge, lien or hypothec upon such real or immovable property.

Shall we have to say because of the inference to be drawn from sec. 7 of the Act of 1920 that the concluding words of sec. 6 and those of sec. 10 are only a delusion and a snare, that they keep the word of promise to our ear and break it to our hope? The creditor who holds a recorded judgment is assured that nothing in sec. 6 shall affect his power to realise or deal with his security in the same manner as if the section had not been passed, but he must continue his perusal until he reaches sec. 11, when he will learn that by sub-sec. 10 of that section an authorised assignment will give the general creditors, through their trustee, precedence over his recorded judgment unless he is fortunate to have recovered and recorded it before the passage of the Bankruptcy Act, in which case his security is preserved by sec. 7 of the Bankruptcy Amendment Act of 1920, ch. 34.

This was the conclusion at which I had at first arrived and possibly I should have done well had I been contented with that solution of the problem in view of the opinion held by the

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majority of the Court. The fact that in 1920 the legislation excepting from the operation of sec. 11 recorded judgments in New Brunswick and Nova Scotia was restricted to those recorded before the passing of the Bankruptcy Act does seem to indicate an intention at that date that liens recorded thereafter should not be preserved thus affirming the policy apparent in secs. 6 and 10 of the original Act. But in 1921 a different policy seems to be indicated by the enactment that in the case of a receiving order or an authorised assignment the rights of the secured creditor should be preserved. There is no repeal of our provincial statute giving the holder of a recorded judgment the position and rights of a mortgagee. The policy of the Bankruptcy Act is generally, as Mr. Duncan has pointed out to pay respect to existing provincial legislation. Should we not then say that the latest and therefore governing expression of the legislative will as set forth in the amending Act of 1921 is that the lien of the secured creditor shall be preserved? I think this is the proper answer.

There is clearly a conflict between sections 6 and 10 of the original Act (1919) and sec. 11 (10). The fact of such a conflict can only be questioned by holding that a recorded certificate of judgment did not under the statutes of Nova Scotia give the holder the rights of a secured creditor under sections 6 and 10 which seems to me to do violence to the terms used in the definition of the term "secured creditor." I can see no reason for a distinction suggested between liens created by the voluntary act of the debtor and those acquired by the prudence and activity of the creditor. The proviso to sub-sec. 1 of sec. 11 of the Act of 1919 shews clearly that the terms describing or defining secured creditor cannot be restricted in the manner suggested.

If that amending clause to which I have referred (sec. 10 of the Bankruptcy Amendment Act of 1921) were simply inserted in its place in the Act of 1919 as it would be by the hand of a mere scissors and pastepot reviser it would simply perpetuate the conflicting statements in the Act (sec. 6 and sec. 11 (10)). Parliament must have had some more rational purpose than this and I think one of its purposes was to preserve the lien of the recorded judgment wherever the provincial legislation creates such a lien as it seems clearly to do in this Province.

I therefore would, but for the differing opinions of my brothers although of course with much doubt and misgiving, answer in the affirmative the question submitted for the opinion of the Court and say that the said judgment binds the interest

and title of Hilaire T. LeBlanc in the lands described in the mortgage to the extent of the amount owing under said judgment notwithstanding the authorised assignment in bankruptcy made by said Hilaire T. LeBlanc.

The point suggested that the said LeBlanc must have been insolvent when and because the judgment was recorded against him, was not so far as I can recall urged at the argument of the question, nor was any argument that I can recall addressed to the question what bearing this fact should have upon the inquiry.

RITCHIE, E.J. concurs with CHISHOLM, J.

CHISHOLM, J.:—The Registry Act, R.S.N.S. 1900, ch. 137, sec. 16, enacts:—

"16. A judgment, a certificate of which is registered in the manner by this Chapter provided in the registry of any district, shall, from the date of such registry, bind and be a charge upon any land within the district of any person against whom such judgment was recovered, whether such land was acquired before or after the registering of such certificate, as effectually and to the same extent as a registered mortgage upon such land of the same amount as the amount of such judgment."

On January 7, 1921, the plaintiff, Parker-Eakins Co. Ltd., recovered a judgment against one Hilaire T. Le Blanc in the sum of $2,059.65 and on the same day registered a certificate or docket thereof in the registry of deeds for the county of Yarmouth.

On January 15, 1921, the said Le Blanc and his wife conveyed by way of mortgage certain lands situate within the said county to the Royal Bank of Canada to secure payment of the sum of $14,433.35 and on the same day the said mortgage was registered in the said registry of deeds.

On June 30, 1921, the said Le Blanc, being an authorised assignor, made an authorised assignment, under the Bankruptcy Act to an authorised trustee, which said assignment was registered in said registry of deeds on July 4, 1921.

The plaintiff claims that under the said facts and circumstances its judgment, registered as aforesaid, is a valid security binding the lands described in said mortgage for its full amount in priority to the said mortgage, and notwithstanding the provisions of the Bankruptcy Act; and the question is submitted for the opinion of the Court whether the said judgment binds the interest and title of said Le Blanc in said lands to the extent of the amount owing thereunder, notwithstanding the authorised assignment in bankruptcy made by Le Blanc. Counsel for

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the plaintiff contends (1) that the plaintiff is a "secured creditor" within the meaning of the Bankruptcy Act; and (2) that the provisions of the Bankruptcy Act, if any, which destroy the effect given to a registered judgment under sec. 16 of the Registry Act of Nova Scotia, above quoted, are beyond the legislative powers of the Parliament of Canada.

The Bankruptcy Act, sec. 6 (1) provides that on the making of a receiving order the trustee shall be thereby constituted receiver of the property of the debtor, etc., and the concluding sentence of the sub-section is as follows:—

"But this section shall not affect the power of any secured creditor to realise or otherwise deal with his security in the same manner as he would have been entitled to realise or deal with it if this section had not been passed."

The section has no direct application to the case which is under consideration, the bankruptcy proceedings having been begun by an authorised assignment, but the words quoted may be an aid in the interpretation of other sections which have to be considered.

By sec. 2, which contains definitions, para. gg. the expression "'Secured creditor' means a person holding a mortgage, hypothec, charge, lien or privilege on or against the property of the debtor, or any part thereof, as security for a debt due or accruing due, to him from the debtor."

Section 11 (1) (as amended by 1920, ch. 34, sec. 6; 1921 ch. 17, sec. 10) is as follows:—"11. (1) Every receiving order and every authorised assignment made in pursuance of this Act shall take precedence over,—(a) all attachments of debts by way of garnishment, unless the debt involved has been actually paid over to the garnishing creditor or his agent; and, "(b) *all other* attachments, *executions* or other process *against property*, except such thereof as have been completely executed by payment to the execution or other creditor; and except also the rights of a secured creditor under section six of this Act; but shall be subject to a lien for one only bill of costs, including sheriff's fees, which shall be payable to the garnishing, attaching, or execution creditor who has first attached by way of garnishment or lodged with the sheriff an attachment, execution or other process against property."

By this section, the authorised assignment takes precedence over "all other attachments, executions or other process against property except such thereof as have been completely executed by payment"; and it excepts "also the rights of a secured creditor under section 6 of the Act."

It is only by the issue of an execution, followed by a levy and sale that a judgment creditor can realise the amount due upon a judgment binding lands.

Sub-section 10 of sec. 11 is as follows:—"(10) From and after such registration or filing or tender thereof within the proper office to the registrar or other proper officer, *such order or assignment shall have precedence of all certificates of judgment, judgments operating as hypothecs, executions and attachments against land* (except such thereof as have been completely executed by payment) within such office or within the district, county or territory which is served by such office, but subject to a lien for the costs of registration and sheriff's fees, of such judgment, execution or attaching creditors as have registered or filed within such proper office their judgments, executions or attachments."

Thus far, reading the above sections together, or sub-sec. 10 alone, it is, I think, fairly clear that the assignment is to take precedence over a judgment binding lands under the provisions of the provincial Registry Act.

Sub-sections 1 and 10 of sec. 11 are clear and explicit on the point, and but for the definitive enactment in section 2 (gg), no question could arise. The last mentioned sub-section does not expressly include a judgment, and it is not doing great violence, if any at all, to hold that a judgment, registered against lands, is not a charge lien or privilege within the meaning of the definition.

I am inclined to accept Mr. Stewart's contention that the mortgage, charge, lien, etc., mentioned in this section, means only such liens as arise from the acts of the parties; and not a lien created, as the result of recovering and recording a judgment. There is no other way to harmonise the sections discussed. The opposite view simply disregards the plain and unambiguous provision of sec. 11.

The Bankruptcy Act was passed in 1919 and came into force by proclamation on July 1, 1920. We were told by counsel—and doubtless it is correct—that of all the Provinces of Canada, only in the Provinces of Nova Scotia and New Brunswick, is there legislation, under which a registered judgment becomes as effective a lien on the debtor's lands as a registered mortgage; and it was soon discovered after the Bankruptcy Act was passed that in these Provinces judgments which had long been regarded as equal security to mortgages might be seriously impaired by the Bankruptcy Act; and accordingly on July 1, 1920, the same day that the Bankruptcy Act came into force,

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sub-sec. 16 was added to sec. 11 (as amended 1920 ch. 34 sec. 7).

It is as follows:

"16. The provisions of paragraphs one and ten of this section shall not apply to any judgment or certificate of judgment registered against real or immovable property in either of the provinces of Nova Scotia and New Brunswick prior to the coming into force of this Act, which became, under the laws of the province wherein it was registered, a charge lien or hypothec upon such real or immovable property."

The clear purpose of this amendment is to take judgments in Nova Scotia and New Brunswick, recovered before the Bankruptcy Act came into force, and registered under the provincial statute, out of the general provisions of the Bankruptcy Act which give precedence to assignments over judgments, not completely executed by payment.

I cannot find anything elsewhere in the Bankruptcy Act which cuts down the clear and sweeping provisions of sec. 11 (10), and I am of opinion that the authorised assignment is entitled to precedence over the plaintiff's registered judgment.

On the other point, namely, the constitutionality of sec. 11, sub-secs. 1 and 10, very little need be said. The main purpose of a bankruptcy statute is to make a reasonable distribution of the assets of insolvent persons and at every step, almost, there must be interference with the subject-matter of property and civil rights within the Province. I should regard it as properly coming within the powers of Parliament to enact, not as ancillary merely to its right to legislate on the subject-matter of bankruptcy but as indispensable to effective legislation laws as to how creditors' claims shall rank and how debtors' assets shall be distributed. As to the effect of such legislation by the Parliament of Canada, see *Imperial Oil Co., Ltd.* v. *A. S. McDonald* (1919), 53 N.S.R. 123, and *Re A. S. McDonald Co.* (1919), 50 D.L.R. 417, 53 N.S.R. 238.

MELLISH, J.:—*Prima facie* I think it is to be fairly inferred that the assignor Le Blanc was in insolvent circumstances when the plaintiff company obtained judgment against him. Therefore, I would answer the question submitted in the negative; leaving it an open question whether judgments may not be held as security under the provincial Registry laws in such circumstances as would render sec. 11 of the Bankruptcy Act inapplicable.

The Nova Scotia Registry Act has provided in effect that registered certificates of judgment shall from the date of registry bind the lands of the judgment debtor and to the value of

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such lands create a security for the judgment debt.

A judgment may be obtained against a perfectly solvent person, and not infrequently judgments are given by confession to secure a present advance of money.

Whether it is the intention of the Bankruptcy Act or whether it can properly come within the scope of such an Act to avoid such securities in the event of the debtor's insolvency, I do not think it necessary to determine.

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Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon and McKay JJ.A. April 18, 1922.

MECHANICS LIENS (§V—30)—SASKATCHEWAN MECHANICS' LIEN ACT, R.S.S. 1920, CH. 206—CONSTRUCTION—TO WHAT PROPERTY LIEN ATTACHES.

Under the Saskatchewan Mechanics' Lien Act, R.S.S. 1920, ch. 206, a mechanics' lien may attach to a leasehold interest in land and to the building erected at the request and upon the credit of the lessee, although the buildings are not permanently affixed to the land, and are to remain the property of the tenant with a right of removal at the end of the term. The right of the lien holder is to sell the owner's interest in the buildings and in the lands occupied and enjoyed therewith, and when the lien holder has obtained a valid lien on the land and buildings the termination of the lease does affect the lien on the building.

[*Zabriskie* v. *Greater American Exposition Co.* (1903), 62 L.R.A. 369, applied; *Roll (Peter) & Co.* v. *MacLean* (1913), 13 D.L.R. 519, 6 Alta. L.R. 250, referred to.]

APPEAL by defendants from the trial judgment in an action on a mechanic's lien. Affirmed.

F. L. Bastedo, for appellants.

H. J. Schull, for respondent.

HAULTAIN, C.J.S., concurs with LAMONT, J.A.

LAMONT, J.A.:—At all times material to the questions arising in this special case, Charles McNeil was the registered owner of Lot 4, Block 1, Palmer. A few days prior to July 21, 1919, the defendant Harry Ensor leased from McNeil the said lot for one year. It was a term of the lease that Ensor should be at liberty to construct upon the said lot a store building, which, at the termination of the lease, should remain the property of Ensor. Between July 21 and August 16, 1919, the plaintiffs, at the request of Ensor, sold and delivered to him lumber and building materials for use in the construction of the store building upon said lot. The building was erected, but was not affixed to the soil; it rested on sills placed on the ground. The value of the materials supplied by the plaintiffs was $747.75, of which Ensor paid only $250, leaving a balance unpaid of $497.75. For this amount the plaintiffs, on January 2,

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1920, duly registered a mechanic's lien in the proper land titles office. On April 20 Ensor made an assignment for the benefit of his creditors to the defendants the Canadian Credit Men's Trust Ass'n, who on May 11, 1920, sold the building to the defendant McRae for $1,800.

The question submitted to the Court for determination is: "Are the plaintiffs entitled to a lien under the Mechanics' Lien Act upon the store building mentioned in said statement?"

A mechanic's lien is purely a creature of the statute. The lien being a statutory remedy, a lien holder is entitled to such rights, but only to such rights as the statute gives him. As a right of lien is in derogation of the common law, statutes giving such rights are to be strictly construed so far as they create the right to a lien, but, being remedial in character, they are to be construed liberally so far as they relate to the enforcement of the lien. Wallace's Mechanics' Lien Laws, 3rd ed. p. 33.

Section 4 of the Mechanics' Lien Act, R.S.S. 1920, ch. 206, under which the plaintiffs claim, provides that any person who furnishes any materials to be used in constructing any erection or building for any owner shall, by virtue thereof, have a lien for the price of such materials upon the building and the lands occupied thereby or enjoyed therewith. By sec. 1 (6) an "owner" is defined to include any person having any interest or estate in the lands upon which the materials are placed, at whose request and upon whose credit the materials are furnished.

Section 7 reads as follows:—"7.—(1) The lien shall attach upon the estate or interest of the owner as defined by this Act in the erection, building . . . upon or in respect of which the work or service is performed or the materials placed or furnished to be used and the lands occupied thereby or enjoyed therewith. (2) In cases where the estate or interest charged by the lien is leasehold the land itself may also with the consent of the owner thereof be subject to the said lien provided such consent is attested by the signature of such owner upon the claim of lien at the time of the registering thereof and duly verified."

As the statute provides for the lien attaching to a leasehold interest in land, the defendant Ensor was an owner within the meaning of the Act. The plaintiffs furnished the materials for the price of which the lien is claimed at his request and upon his credit. These materials were used in the construction of the store building erected upon said lot. *Prima facie*, therefore, the plaintiffs have brought themselves within the provisions of

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the Act giving them a right to a lien. Their right, however, is disputed upon two grounds. (1) On the ground that a lien attaches only to real estate, and the building not being affixed to the soil was only a chattel and therefore not lienable; and (2) On the ground that the lien expired with the termination of the lease.

In support of the first of these contentions we were referred to Phillips on Mechanics' Liens, 3rd ed. at p. 308, where the author says:—

"Illustrative of the proposition that the lien attaches only to real estate, it has been held, where the law declares the lien to be 'on the building and lot of land on which it stands . . . including the lot or curtilage whereon the same is erected,' a mechanics' lien must attach to a fixture while it is land, and by virtue of its being land."

And at p. 309, where the following is found:—

"Where a lien is given on the land and the structure, there can be no lien on the structure if there can be none on the land; as where the land is not owned by the one who builds the railroad or other structure. A mechanics' lien cannot be maintained upon a building separate from any interest in the land upon which it is situated."

I agree that no lien can attach to a building erected upon land unless the owner at whose request and upon whose credit the materials were furnished has an interest or estate in that particular land, but I do not agree that the building must be attached to the soil so as to become part of the land itself before a mechanics' lien can attach thereto. And that for two reasons:—First, because the statute has not made the affixing of the building to the soil a condition precedent to a right of lien; and secondly, because, neither the object of the Act nor the evil it sought to remedy require that it should be so affixed. Where a statutory right is given upon the performance of certain conditions precedent, or the existence of certain prerequisites, that right may be claimed the moment that the statutory requirements have been complied with, unless the object of the legislation shews that it could not have been intended that such right should be exercised without something further being done. Here, the plaintiffs have established the fulfilment of every condition required by the statute to entitle them to a lien. That lien, by sec. 7, attaches to the "building" and the "lands" occupied thereby and enjoyed therewith. It will be observed that it does not say that the lien shall attach to the building and the land to which it is "affixed". A building placed on

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sills sitting on the top of the land "occupies" the land on which it is placed just as much as if it were affixed to the soil.

Then, does the object for which the Act was passed require that the building should be affixed to the soil? The object of the Act is stated in Phillips on Mechanics' Liens, p. 309, as follows:—

"The whole object under this act is to prevent the owner of lands, whatever his estate in them, from getting the labor and capital of others without compensation."

And in Wallace's Mechanics' Lien Laws, p. 10, as follows:—

"The object of this legislation is to insure by a cheap and expeditious method the payment for work and materials out of property upon which the work has been done, or for which materials have been provided. The person who has supplied labor and materials is enabled to establish a lien and thus acquire authority to sell the property so as to realise his claim therefor. 'The substance of the enactment is the sale.'"

Such being the object of the legislation, the evil it sought to remedy is, in my opinion, identically the same whether the building is erected on sills placed on the top of the ground or whether it is erected upon a foundation affixed to the soil, and whether the building is to become the property of the landlord at the expiration of the lease or whether the tenant has the right to remove it. To hold, therefore, that a right of lien can only be exercised where the building is affixed to the soil, would, in my opinion, be to impose a condition which neither the object of the legislation nor the language of the Act require. The right of the lien holder is to sell the owner's interest in the building and the lands occupied thereby and enjoyed therewith. In the case of a leasehold interest, that right is to sell the term for which the tenant holds the land and his interest in the building. If the building is to become the property of the landlord at the expiration of the lease, the purchaser would be entitled to have possession of the land and building for the term of the lease, but subject to its provisions. If the building is to remain the property of the tenant with a right of removal, the purchaser, in addition to the term, acquires the tenant's property in the building and his right to remove it.

The law, in my opinion, is accurately stated in Wallace's Mechanics' Lien Laws, at p. 140:—

"A mechanics' lien attaches to the leasehold interest and to buildings erected by one tenant and sold to another, who has acquired a lease of the same interest, and this, notwithstanding the removal of the buildings, at the end of the term, is express-

ly required by the lease," and the author refers to the case of *Zabriskie* v. *Greater America Exposition Co.* (1903), 62 L. R.A. 369. In that case a lien was claimed upon buildings erected for use during the Exposition. They had been erected by a tenant, whose lease required him to remove the buildings at the expiration of the term. The foundations of the buildings consisted of pillars driven into the ground, and the foundation timbers were fastened to these pillars. It was there argued that the buildings "were merely trade fixtures," and that as personal property they were not subject to a mechanic's lien. In giving the judgment of the Appellate Court, Lobingier, C., at p. 374, said:—

"The proposition that a building is not subject to a mechanic's lien unless it enters into and forms a part of the realty has not been adopted by this court. It is now well settled that a lien attaches to a leasehold interest and to buildings erected by the tenant . . . Now, a leasehold interest is but a chattel, however long its term. It is only personal estate if it be for a 'thousand years.' 2 Kent, Com. 342."

And at p. 376, he further said:—

"There would seem to be little, if any, legal difference whatever on this point between reserving the right to remove and imposing the duty to do so. In either case removal is so far contemplated as to afford room for the contention that the building is personalty."

The Court in that case affirmed the validity of the lien.

A number of decisions were cited to the effect that a mechanic's lien cannot attach where the materials are furnished to be used in the construction of chattels, or trade fixtures, which the tenant is entitled to remove at the expiration of his term, among others, the case of *Peters, Rohls & Co.* v. *MacLean* (1913), 13 D.L.R. 519; *sub nom Roll (Peter) & Co.* v. *MacLean et al*, 6 Alta. L.R. 250, was referred to, where the Court said at p. 523:—

"I do not find any authority, however, for including electric light fixtures, or the electric light sign on the outside of the building, as part of the realty. These are properly chattels belonging to the tenant which he would be entitled to remove at the termination of his lease."

In my opinion the right of the tenant to remove the structure at the expiration of his term is not the test by which to determine whether or not the lien can attach. The test under our Act is:—Were the materials furnished "to be used in the making, constructing, erecting, fitting, altering, improving or repairing of any erection, building, land wharf, pier, bulkhead,

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bridge, trestlework, or mine, or the appurtenances to any of them, for any owner, contractor or subcontractor," (s. 4) and did the owner have an interest or estate in land which was to be occupied by the building, etc., or enjoyed therewith? If these are answered in the affirmative, it does not seem to me to be material whether at the expiration of the term the building is to belong to the landlord or to the tenant with a right of removal.

In American & English Encyclopaedia of Law, ed. 1, vol. 15, at p. 18, the law is laid down as follows:—

"A mechanics' lien may attach to the leasehold estate, including the buildings, fixtures and machinery placed upon the real estate by the tenant, although the tenant may have the right and privilege of removing such buildings, fixtures and machinery from the leased premises."

I am, therefore, of opinion that in the present case the plaintiffs obtained a valid lien on the leaseheld interest of Ensor in the land and on his interest in the building.

The other ground upon which the appellants relied was, that, the lease having expired, the lien expired with it. I cannot see any reason why the termination of Ensor's interest in the land should affect the lien on his interest in the building. Once a lien holder has a valid lien upon an owner's interest in the land and in the building, it would seem to me to follow that, if part of the interest to which the lien attached was destroyed, the lien would remain attached to what was left, unless the lien holder himself destroyed or abandoned the lien. At the time the building was sold to the defendant McKee, Ensor's lease had not expired, and the lien, as I have held, attached both to the leasehold interest and to his interest in the building. It was at that time the plaintiff's right to have Ensor's interest in both sold to satisfy the lien. That being so, I do not see how Ensor or his assignee could defeat that lien by making a sale of any part of the property covered by the lien. When the defendant McKee bought the building, he took it subject to the plaintiffs' lien. The fact that the lease subsequently terminated can, in my opinion, operate to destroy the lien on the building only in cases where the assignee's interest in the building ceases with his interest in the land. If under the terms of the lease the tenant's interest in the building passes to the landlord on the expiration of the lease, there would, after that date, be no interest left in the tenant out of which the lien could be satisfied. But so long as the tenant has an interest in property to which the lien has attached, that interest remains available for the satisfaction of the lien.

This is the view expressed in American and English Encyclopædia of law, above referred to, at p. 21, where the following is laid down:—

"A voluntary surrender by a lessee of the leased premises to his landlord, before the expiration of his lease, cannot affect a mechanics' lien upon the leasehold estate which attached whilst the lessee was the owner."

Attention was called to an opinion which I expressed in *Galvin Watson Lumber Co.* v. *McKinnon* (1911), 4 S.L.R. 68 at p. 74. In that case the plaintiff sought to attach a lien to a building the owner of which had no interest in the land. I there expressed the opinion, that, assuming the plaintiffs to have had a valid lien on an interest in land and on the building, as they had themselves deliberately destroyed the lien—in so far as the interest in land was concerned—by acquiring the land and merging the lien in the title, they could not afterwards enforce it as to the building. Whether the opinion I there expressed be sound or not, we need not here inquire; for, in my opinion, it has no bearing on the present case. That opinion was based on the fact that the lien holders had acquired title to the land on which the lien was claimed; thus, by their own act, deliberately merging the lien in the title. In the present case the lien holders had done nothing whatever to prejudicially affect their lien.

I am of opinion, therefore, that this appeal should be dismissed with costs.

TURGEON, J.A. (dissenting):—In this action the respondents claim a lien under the Mechanics' Lien Act, ch. 206, R.S.S. 1920 upon a certain building.

The facts shew that a few days prior to July 21, 1919, Ensor leased Lot 4 in Block 1 in the tp. of Palmer from McNeil, the owner, for a period of one year. Ensor then purchased lumber on credit from the respondents for the erection upon the lot of a store building, the lumber being supplied to him on various dates between July 21 and August 16, 1919. The building was not constructed on a foundation and was not attached to the land, but rested upon the ground on its own weight on sills; and it was a term of the lease between Ensor and McNeil that Ensor should have the right to construct this building upon the lot and to retain the property in it at the termination of the lease. On these facts I am of opinion that the building was a chattel and never became part of the free-hold, (*Morrison* v. *Thomas* (1922), 65 D.L.R. 364). The leasehold interest which Ensor had in the land has now expired, I take it, by effluxion of time.

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In these circumstances I think that the respondents have no lien upon the building, which is a chattel, and that the question submitted to the Court in the stated case must be answered in the negative.

At common law the seller of a chattel has no lien upon it for its purchase-price once he has allowed the buyer to take possession of the chattel, his lien being a right of detention only which ends when the buyer obtains the chattels. The only special right conferred upon him in this Province (leaving the Mechanics' Lien Act out of consideration for the moment) is that contained in sec. 5 of the Exemptions Act, R.S.S. 1920 ch. 51, whereby it is provided that where the price of the chattel is the subject matter of the suit the chattel itself shall not be exempt from seizure under execution, save in certain specified cases. Similarly a mechanic or other person who employs his skill and labour in the improving, altering or repairing of a chattel has a lien thereon for the price of his services, but only so long as he retains the article in his possession. Therefore any right to a lien which the respondent may claim upon the building in question must admittedly be derived from the provisions of the Mechanics' Lien Act.

Section 4 of the Act is, in substance, as follows:—

"Any person who . . . places or furnishes any materials to be used in the . . . constructing, erecting, fitting, altering, improving or repairing of any . . . building shall by virtue thereof have a lien for the price of such . . . materials upon the . . . building . . . and the lands occupied thereby or enjoyed therewith . . . or upon which such materials are placed or furnished to be used."

It may be well to note here that there is no lien given expressly upon the goods which the merchant delivers, that is, the materials themselves, but only upon the building of which these materials become a part and upon the lands occupied thereby or enjoyed therewith.

Now a casual reading of the above sec. 4 without regard to the other provisions of the statute, would possibly make it appear that the intention of the Legislature was to create a lien on the building and a lien on the land to be enjoyed by the lienor as two separate rights, or, at least, as a right capable of being separated into two parts, so that the right against the builders might continue to exist after the other was extinguished. In my opinion this is not the case. I think a perusal of the Act and of the authorities will shew that the right is founded upon an interest in land. At the outset this is apparent from the

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language of sec. 2 (6), which defines "owner" and which shews that no lien can be established even upon the building for materials supplied to a person for the construction of such building, unless such person has an interest in the land upon which the building is to be constructed. *Galvin Watson Lumber Co.* v. *McKinnon et al.* 4 S.L.R. 68. Then it is usual when a lien is given to one person upon property which is in the possession of another to provide some method of recording the lien, written a reasonable time after its creation, whereby all third parties may know of its existence and govern themselves accordingly. The only recording provided by the statute is found in sec. 17 and provides for the registration of the lien in the land titles office in a form which discloses a claim against the specified land in respect of the materials furnished; but this would not be satisfactory notice of a lien upon a movable chattel capable of being transported from one piece of land to another. And finally the sections of the statute which deal with the enforcement of the lien and the powers of the District Court Judge provide merely a remedy against an estate in land, there being no provision for the sale of a structure which is not part of the freehold.

It follows, therefore, that if a merchant supplies upon credit a valuable commodity in the shape of lumber for the erection of a building, he does not retain any lien upon the lumber itself nor does he necessarily acquire a lien under the Mechanics' Lien Act upon the building into which his lumber is converted. If the buyer has no interest in the land, there is no such lien; if the buyer has a lease upon the land, say for one year, and, having obtained the lumber, erects a building which he affixes to the soil so as to make it part of the land, the seller's lien expires with the buyer's lease both as to the land and the building,—the latter having become part of the former,—unless the consent of the landlord has been obtained to allow the lien to attach to the freehold; ch. 206, sec. 7 (2); *Graham* v. *Williams* (1884), 8 O.R. 478; *Webb* v. *Gage* (1902), 1 O.W.R. 325. And finally we have the case, such as the case at Bar, of a buyer possessing leasehold interest in land, who converts the lumber purchased by him into something which, while it may perhaps be called a "building," is not attached to the soil, but remains a chattel, and who retains this chattel as his personal property after his lease has expired. In such a case there is, in my opinion, no lien upon the building, any more than there would be in the case of a buyer having no interest in the land from the outset, as was the case in *Galvin Watson Co.* v. *McKinnon, supra.*

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It is difficult to find judicial authority in this country bearing directly upon the point in controversy. The Canadian cases dealing with the subject are to be found in the Ontario reports, and are based mainly upon the authority of American decisions summarised in the treatise on Mechanics' Liens by Samuel L. Phillips. The following extracts from this author have been quoted with approvel upon several occasions and, in my opinion, they are in harmony with the spirit of our own Mechanics' Lien Act, as I interpret it. In the 3rd edition of Mr. Phillips' work the following remarks will be found at pp. 308 and 309:—

"Illustrative of the proposition that the lien attaches only to real estate, it has been held, where the law declares the lien to be 'on the building and lot of land on which it stands,' to apply only to real estate. So, where 'the debt shall be a lien on such building and on the land whereon it stands, including the lot or curtilage whereon the same is erected,' a Mechanics' Lien must attach to a fixture while it is land, and by virtue of its being land." . . . . "The whole object under this act is to prevent the owner of lands, whatever his estate in them, from getting the labor and capital of others without compensation. Consequently, as long as lumber lay in heaps on the land, it is not subject to the lien, under this statute, nor is lumber, as such, ever subject to this lien. It is not until it has become part of the land, by being converted into realty" . . . "Chattels personal, erected merely for the purposes of trade, and capable of being removed, are not subject to the lien. The lien only attaches to such property and fixtures as form part of the realty. Where a lien is given on the land and the structure, there can be no lien on the structure if there can be none on the land; as where the land is not owned by the one who builds the railroad or other structure. A mechanics' lien cannot be maintained upon a building separate from any interest in the land upon which it is situated."

See *Bunting* v. *Bell* (1876), 23 Gr. 584; *Ludlam-Ainslie Lumber Co.* v. *Fallis* (1909), 19 O.L.R. 419, at p. 425.

It will be noted that the author in giving the effect of the American statutes cites legislation clothed in language very similar to that of our Mechanics' Lien Act, and which at first blush might appear to confer a right against a mere building.

On the other side of the question counsel for the respondents cited the American case of *Forbes* v. *Mosquito Fleet Yacht Club* (1900), 175 Mass. Rep. 432, where a Mechanics' Lien

was held to exist upon a building which was merely personal property and not part of the realty. It is clear, however, that this case was decided after the statute of the State of Massachusetts had been amended so as to provide specifically for the creation and enforcement of such a lien. A perusal of such portions of the statute as are quoted in the judgment will shew that this is the case, and that the findings of the Court are not applicable to our Mechanics' Lien Act. For instance, the following paragraph is to be found in the judgment at p. 436:—

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"In our opinion this makes it clear that Gen. Sts. 150 and Pub. Sts. 191, were intended by the Legislature to give a lien upon buildings the owner of which had no estate or interest in the land upon which the building was erected, etc. . . ."

That this dictum is not applicable to our statute is apparent from the decisions in *Galvin Watson Co.* v. *McKinnon, supra.* And further on the judgment points out that the Massachusetts statute, as amended, makes specific provision for the sale of a building alone in cases where its owner has no interest in the land; whereas, of course, no such provision is to be found in our Act.

The only case in our own Courts which seems to throw any light upon the question is the *McKinnon* case, *supra*, which was decided in 1911 by the Supreme Court of Saskatchewan *en banc.* I gather from the facts recited in the judgments that the building in question in that case was a chattel, unaffixed to the land. McKinnon purchased the lumber from the plaintiffs on credit, and erected this building on a piece of land to which it was not shewn that he had any title or interest whatever. On November 31 he gave a chattel mortgage on the building to the Massey-Harris Co. On December 7 the plaintiffs themselves bought the lot on which the building stood. On December 17 McKinnon gave the Massey-Harris Co. a bill of sale on the building and they removed it from the lot and sold it. The plaintiffs thereupon brought action, claiming to have a lien upon the building. The appeal was heard by Wetmore, C.J., and Johnstone and Lamont, JJ. The first two Judges based their decisions against the plaintiffs on the ground that, McKinnon not being an "owner" of an estate in land within the meaning of the Act, no lien could be acquired through him. Lamont, J. placed his judgment upon different grounds, assuming for that purpose that the lien had been validly created in the first instance, but he held, nevertheless, that at the time the action was brought the plaintiffs had no lien against the building, their lien had be-

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come extinguished by merger when they became owners of the lot in fee simple by purchase. His judgment on this point is as follows:—

"Assuming that the plaintiffs had a valid lien on the lot and building, as to which I express no opinion, I have reached the conclusion that this action cannot be maintained, for the reason that on December 7 the plaintiffs became owners of the lot on which the building was then standing, and whatever interest they could claim in the property under their lien merged in their title as owners. . . . The plaintiffs' lien would, therefore, become merged in the title when they became the owners of the lot on which the building had been erected and on which it was then standing, unless a contrary intention appeared. No contrary intention is disclosed by the evidence, and, the lien being merged, no action is maintainable to enforce it."

But by purchasing the lot the plaintiffs had not acquired the property in the building, it being a chattel and not part of the freehold. The lien which ceased by merger so as to lose its effect even against the chattel, if it ever had any such effect, must have been the lien founded upon the land. And likewise, I take it, the lien in the case at Bar would cease to affect the building, if it ever did affect it,—and I do not think it did,—upon the termination of Ensor's lease, when it became extinguished as against the land.

After disposing of the plaintiff's case on the above grounds the Judge points out that the plaintiffs would have had a remedy of another nature if the building had become part of the freehold:—"If the building was part of the freehold when the plaintiffs acquired title, their action, in my opinion, should have been for trespass *quare clausum fregit*, as the acquisition of the freehold necessarily carries with it all buildings that are a part thereof."

But the buildings not having become part of the freehold, there was apparently no remedy against it which the plaintiffs could pursue.

I am of opinion, therefore, that any intention of the Legislature to create a lien upon a building which is a mere chattel will have to be expressed in language much more positive and explanatory than that of the present Mechanics' Lien Act. I think that the statute in its present form provides no such lien.

I would allow the appeal with costs.

McKAY, J.A., concurs with LAMONT, J.A.

Appeal dismissed.

COMMERCIAL CREDIT Co. OF CANADA Ltd. v. FULTON BROS. N.S.

Nova Scotia Supreme Court, Harris, C.J., Ritchie, E.J., Chisholm and Mellish, JJ. March 20, 1922. S.C.

SALE (§IIIA—59)—BY MANUFACTURER TO DEALER—RESTRICTIONS ON RESALE—GOODS SOLD IN ORDINARY COURSE OF BUSINESS—INNOCENT PURCHASER FOR VALUE—FAILURE TO ACCOUNT FOR PROCEEDS OF SALE—ASSIGNEE OF VENDOR—RIGHTS AND REMEDIES OF PARTIES—NOVA SCOTIA SALES OF GOODS ACT 1910, CH. 1—REGISTRATION OF BILL OF SALE—BILLS OF SALE ACT 1918, CH. 11, SEC. 8—NOTICE TO PURCHASER.

Where a manufacturer enters into an agreement with a dealer that goods comprised in a bill of sale and delivered to such dealer are not to be removed from the place of storage of the dealer until the full payment of the purchase-price is completed, such covenant must be construed as a covenant not to remove or dispose of such goods otherwise than in the ordinary course of trade; and an assignee of such manufacturer, who with knowledge of all the facts, allows the dealer to expose the gods for sale in the ordinary course of trade cannot recover against an innocent purchaser who has paid for and obtained possession of the goods without knowledge of the agreement or assignment; the manufacturer and the dealer having fraudulently failed to turn over the proceeds of the sale. Such purchaser is protected by sec. 27 (2) of the Nova Scotia Sales of Goods Act 1910, ch. 1.

Section 8 of the Bills of Sale Act 1918, ch. 11, provides for the filing of such an instrument, in accordance with the Act, but this does not make it necessary for one who purchases goods exposed for sale in the ordinary course of business, to protect himself by searching the Registry of Deeds, or make him liable although such instrument is filed, if he purchases without notice.

[See Annotation, Sale of Goods, 58 D.L.R. 188.]

APPEAL from the judgment of Russell, J. in favour of plaintiff in an action claiming damages for the alleged wrongful conversion of a motor truck; in the alternative possession of the truck or its value and damages for its wrongful detention; in the alternative foreclosure of an agreement or bill of sale of the motor truck in payment of the amount claimed as due. Reversed.

R. H. Graham, K.C. and *W. C. Macdonald* for appellants.

R. D. McCleave, for respondent.

HARRIS, C.J.:—(dissenting) The plaintiff company sues for damgaes for conversion of a motor truck by the defendants under the following circumstances:

One W. Walter Watt was carrying on business in the city of Halifax as a dealer in automobiles, automobile accessories and motor trucks.

In December 1919, a company was incorporated called the Automotive Supply Co. in which Watt held 92% of the capital stock and of which he was the managing director.

Watt was buying trucks from the Stewart Motor Truck Co. and on their arrival in Halifax he would sell these trucks

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to the Automotive Supply Co. on credit, taking from that company to himself an accepted draft for the cost price and a hire purchase agreement as security. Watt's price to the Automotive Supply Co. was the original cost price with charges plus his own commission. Having taken this security from the company to himself he sold the Automotive Supply Co's acceptance and the security to the plaintiff company which paid him the amount of the same, less, of course, the discount or a commission for the plaintiff company. With this money Watt paid the Stewart Motor Truck Co. for the truck which he had purchased from that company.

The plaintiff company had a charter under the Ontario Companies Act, R.S.O. 1914, ch. 178, and a license from the Province of Nova Scotia, and its business was the purchase of acceptances and securities like those taken by Watt from the Automotive Supply Co.

In March, 1920, Watt imported from the Stewart Co. a 3½ ton special equipped Stewart truck, Model 10, Number 10215, which he re-sold to the Automotive Supply Co. taking from that company an acceptance for $5,936, dated March 22, 1920, payable 2 months after date at the office of the Commercial Credit Co., without interest before maturity, but with interest at 10% per annum after maturity till paid. The Automotive Supply Co., therein referred to as the dealer, also executed to Watt, referred to as the manufacturer, the agreement which contained the following stipulations, among others:—

"The title to and ownership of each motor vehicle and all its equipment and attachments shall remain in the manufacturer until full payment of the purchase-price and of all obligations given therefor, or of any part thereof and of renewals or substitution therefor.

The dealer will provide a proper storage place or shelter for each motor vehicle and all its equipment and attachments, and will not without the previous consent in writing of the manufacturer, remove any motor vehicle or any of its equipment or attachments from the said storage place or shelter until full payment of the purchase-price is completed, and will take the best possible care of each motor vehicle and all its equipment and attachments to preserve it and them from damage, deterioration or injury. The manufacturer shall be entitled at all reasonable hours, upon demand, to enter the premises of the dealer and to inspect and examine the motor vehicle hereinbefore referred to.

Upon full payment of the purchase-price of each motor vehicle and all its equipment and attachments to the manufacturer or his assigns or agents the title thereto and ownership thereof shall forthwith vest in the dealer, and the dealer shall forthwith be entitled to use and deal with each motor vehicle and all its equipment and attachments in such way as he shall see fit.

Until default in the observance of any of the covenants, promises, stipulations or conditions herein contained, the dealer shall be entitled to the possession of each motor vehicle and all its equipment and attachments. But upon default in the observance of the covenants, promises, stipulations or conditions herein contained, or any of them, the whole purchase-price unpaid and outstanding shall at once become due and payable, and the manufacturer or his assigns shall be at liberty forthwith and without notice, to take possession of the said motor vehicle and all its equipment and attachments and to resell, upon such terms and for such price as he or they may deem proper. And the proceeds after deducting all proper expenses, costs, fees and disbursements shall be applied, first, in payment of overdue interest, and secondly, in payment of the balance of the purchase money, and the dealer shall be and continue liable to pay any deficiency.

This agreement shall enure to the benefit of and be binding upon the respective heirs, executors, administrators, successors and assigns of the parties hereto."

Immediately after Watt indorsed the acceptance and assigned the agreement to the plaintiff company, along with five other similar contracts and acceptances given in connection with the purchase and sale of other trucks. The agreement was filed under the Bills of Sale Act 1918 (N.S.) ch. 11.

The plaintiff company on March 23, 1920, paid Watt $19,480.02 in respect to these 6 contracts or agreement of which $5,936 (less $160.27 charges and discount) was for the securities given in connection with the particular truck in question.

The assignment of the agreement referring to the truck numbered 10215 was indorsed on the hire and purchase agreement and was in the words following:—[See judgment of Ritchie, E.J. *post.* p. 708.]

The truck No. 10215 remained in the possession of the Automotive Supply Co. until on or about May 25 or 26, 1920, when it was purchased by the defendants, who had no notice of the lien on the truck and who paid cash for it. The defendants are lumbermen and requiring a truck in their business went

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to a Mr. McKay at New Glasgow, who was an automobile dealer, and he not having a truck of the size required came to Halifax with one of the defendants and there saw Watt, who was salesman, managing director and president of the Automotive Supply Co., and negotiated with him for the purchase of a Stewart truck. No purchase was made at that time, but the next day the defendants, through McKay, telephoned and closed the contract and ordered Watt to ship the truck. The truck was shipped to McKay with a draft for the purchase-price, $6,132.73 drawn by the Automotive Supply Co. on McKay and attached to the bill of lading. The draft was paid by the defendants. This draft was drawn by the "Automotive Supply Company, Ltd., W. Walter Watt, President; Victor Jonsen, Secretary." The defendants say that they thought they were buying from Watt and did not know anything about the Automotive Supply Co.

Shortly after this Watt was arrested for fraud on the information of the plaintiff company and being convicted was sent to the penitentiary at Dorchester, where his evidence was taken in the present suit.

The Automotive Supply Co. did not pay the plaintiff company for the truck in question before it was sold to defendants, nor at all, and later the plaintiffs, finding the truck in the possession of the defendants, demanded its return, and not getting it brought this action.

The trial Judge found for the plaintiff company and there is an appeal to the Full Court.

The first contention of the defendants was that the plaintiff compony by permitting Watt to sell the truck constituted him their agent and estopped themselves from setting up their lien. I cannot find any evidence that the plaintiff company permitted Watt to sell the truck. The agreement expressly provided that the title and ownership was to remain in Watt or his assigns and that the Automotive Supply Co. was to provide storage place or shelter for the truck and that it should not be removed until full payment of the purchase-price. The evidence of Marwood, the plaintiff company's manager, shews that no authority was ever given Watt or the Automotive Supply Co. to sell and under the terms of the agreement no sale was contemplated or could be made until payment had been made to the plaintiff company in full as stipulated in the agreement, and I feel bound to accept Marwood's statement as the trial Judge evidently did as against that of Watt, who had been prosecuted and convicted of fraud in connection with his dealings with the

plaintiff company and whom the trial Judge styles as "a rogue."

There are cases, of which *Walker* v. *Clay* (1880), 49 L.J. (C.P.) 560, 42 L.T. 369 is an illustration, where a covenant not to remove stock subject to a bill of sale has been construed to mean not to remove it otherwise than in the ordinary course of business. Obviously where a bill of sale is taken of all the stock of goods in a shop and the maker is allowed to continue the business which of necessity means that he is selling the stock there seems only one logical way to construe such a covenant, but here there was no bill of sale of the whole stock of automobiles in the warehouses of the Automotive Supply Co. There was a special agreement with regard to one particular truck and there were other and separate agreements with regard to 5 other individual trucks only so far as the evidence shews. There is no evidence that all the stock was subject to agreements. The reasons for the special construction do not exist and the rights of the parties must I think be determined by their contract interpreted in the ordinary way. So interpreted there can I think be no doubt as to its meaning.

No doubt the plaintiff company's manager knew that the Automotive Supply Co. was selling trucks and he knew that Watt was the president of that company, and its selling officer, and it can very well be inferred that the plaintiff company's manager knew they would sell this truck when an opportunity offered, but there is no ground, so far as I can find, for saying that the plaintiff company had any reason to suppose that the truck would be sold or removed until it was paid for, or that the plaintiff company waived the provisions of their agreement or did anything or refrained from doing anything which can estop them from setting up their claim to the truck and I think this objection fails.

Several objections were raised to the agreement as not being in compliance with the provisions of the Bills of Sale Act, ch. 11 of the Acts of 1918. The trial Judge has decided, and I agree with him, that the agreement in question comes within the provisions of sec. 8 of the Act. That section requires that the agreement "shall have written or printed therein the post office address of the . . . bargainor."

In the description of the parties in the agreement it is stated to be "between W. Walter Watt hereinafter called the principal and Automotive Supply Company, Ltd., of (address) 9, Blower St., Halifax, N. S., hereinafter called the dealer."

As a matter of fact, 9 Blower St. was the address of W. Wal-

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ter Watt as well as that of the Automotive Supply Co., Ltd.

The trial Judge held that "the address of Blower Street can be grammatically read as being applicable to both the parties named and if the words can be so read the maxim *ut res majis valeat quam periat* obliges us to read them in that way."

Apart from this there is an affidavit attached to, and filed with, the agreement which is made by "W. Walter Watt of Halifax in the County of Halifax, Merchant" who swears that he is W. Walter Watt one of the parties mentioned in the agreement.

Coates v. *Moore*, [1903] 2 K.B. 140, 71 L.J. (K.B.) 539, 51 W.R. 648 and *Smith* v. *Mc.Lean* (1892), 21 Can. S.C.R. 355 seem to clearly decide that reference can be made to the affidavit to supply the omission in the document if there is one.

This objection I think fails.

Then it is contended that there are a number of differences between the copy of the agreement filed and the original. The section of the Bills of Sale Act in question requires "a true copy of such instrument" to be filed in the Registry of Deeds.

On the argument of the appeal I was inclined to regard some additions to the copy as fatal, but a careful examination of the authorities and of the differences between the copy filed and the original instrument have led me to a different conclusion, although not without some doubt.

The English cases decided on a similar section of the English Act 1878, ch. 31 are authority for the proposition that the criterion is "whether or not the copy differs from the original to such an extent that it would mislead any person of ordinary intelligence as to the effect of the original." Lush, J. in *Burchell* v. *Thompson*, [1920] 2 K.B. 80 at p. 87, 89 L.J., (K.B.) 533.

The language of Bankes, L.J., Scrutton, L.J., and Atkin, L. J., on the appeal in this case expresses the same idea. Reference may also be made to Bacon, C.J., in *In re Hewer; ex parte Kahen* (1882), 21 Ch. D. 871, 51 L.J. (Ch.) 904, 30 W.R. 954, and to *Gardnor* v. *Shaw* (1871), 24 L.T. 319, 19 W.R. 753.

The differences in this case between the copy and the original are that in the original Watt is described as "hereinafter called the principal" and is throughout referred to as the principal. It is I think obvious that the change could not mislead any one.

There are a few other verbal changes or omissions which do not affect the meaning or which are cured by reference to the other parts of the document.

There are also additions to two classes of the agreement which however do not seem to be material or to bring the case within the meaning of the decisions to which I have referred and I find myself unable to say that the instrument in this case is bad because a copy has not been filed as required by the Act.

Another question raised was that the assignment from Watt to the plaintiff company was a bill of sale within the meaning of the Bills of Sale Act and was void because the copy of that assignment filed was not accompanied by an affidavit such as is referred to in secs. 4 and 5 of the Act.

It was also contended that the assignment should have been filed as a separate document and that it was not properly filed because it was indorsed on the back of the copy of the instrument and filed only with it.

I cannot agree with either of these contentions. The assignment in question was an absolute one. The plaintiff company purchased from Watt the acceptance and the security for it and delivered both the acceptance and the security to the plaintiff company at the time. There was no pledge but an absolute sale with delivery.

It is I think clear that no assignment was necessary. The mere endorsement of the acceptance would carry with it the security to the fullest extent.

In the *Central Bank of Canada* v. *Garland* (1890), 20 O.R. 142, a tradesman sold goods to customers taking promissory notes for the price and also hire receipts by which the property remained in him. The notes were discounted by the plaintiff bank who were made aware when the line of discount was opened of the course of dealing and of the securities held.

The securities were not however handed over or assigned. In an action by the bank to recover the securities from the assignee for creditors of the tradesmen, Boyd, C., at p. 147 said:—

"These hire receipts held by Garland are but securities which are accessory to the debt. As between these parties there is no right as there was no agreement to separate the two things and *in equity the transfer of the notes to the bank was a transfer of these securities* . . . The maxim *Omne accessorium cedit principali* covers this case."

On appeal the Court of Appeal affirmed this decision (1891), 18 A.R. (Ont.) 438.

In *Gay* v. *Hudson River Electric Power Co.; Re Quinn* (1910), 180 Fed. Rep. 222, a company sold goods under a contract retaining title until payment of the price. Purchase

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money notes were given and subsequently transferred to a purchaser for value *without transfer of the contract*. It was held that the transfer of the notes carried with it the contract as collateral security for payment of the notes though the transferee was at the time of the transfer ignorant of the existence of the contract.

In *Langdon* v. *Buel* (1832), 9 Wend. 80, at p. 84 the Court said:—

"A mortgage of either real or personal estate is but an accessory or incident to the debt or the security which is given as evidence of the debt. The assignment of the security passes the interest in the mortgage. The mortgage cannot exist as an independent debt."

See also *Jackson ex dem Barclay* v. *Blodget* (1825), 5 Cowen 202 and cases there cited. Barron & O'Brien on Chattel Mortgages, 536.

Our Bills of Sale Act makes no provision for registration of an assignment of a chattel mortgage or bill of sale as does the Ontario Act. (See Barron & O'Brien, p. 535). In Ontario an assignment of a bill of sale is not registered because it is there regarded as a bill of sale but for the purposes apparently of facilitating the discharge of the bill of sale by the assignee. See Barron & O'Brien, p. 540.

Section 7 sub-sec. 3 of our Act in the case where a bill of sale is renewed requires an affidavit from the assignee where the bill of sale has been assigned. An assignment apparently is recognised by the Act, but there is no provision requiring it to be filed or registered. The forms of affidavit referred to in the Act are not applicable to such an assignment.

It is I think clear that an assignment of a bill of sale or of a security under sec. 8 of our Bills of Sale Act is not a bill of sale under the Act and is not required to be registered.

But assuming it to be a bill of sale and that it should be registered it does not help the defendants because the effect of non-registration is to make it void only as against purchasers from, and creditors of, Watt and defendants are not in that class. They purchased from the Automotive Supply Co.

This disposes of all the questions argued by counsel.

I would dismiss the appeal with costs.

There was a cross appeal. It appears that the trial Judge gave plaintiff company judgment for $5,936 and interest thereon from August 17, 1920, to date of judgment.

The plaintiff company cross appeal and claim judgment for $7,420 with interest at the rate of 5% per annum from August 18, 1920, to date of judgment.

The theory upon which the trial Judge seems to have proceeded is that $5,936 was the amount due plaintiff company on the day upon which demand was made for the return of the truck.

The plaintiffs' cross appeal asks for $7,420 which is the price fixed in the agreement in question to be paid by the Automotive Supply Co. to Watt for the truck. The price paid by Watt to the Stewart Co. from whom he purchased it seems to have been $5,936 and the Automotive Supply Co. seems to have sold the truck to the defendants for $6,132.73.

On the theory upon which the judgment seems to have been based the trial Judge did not give the plaintiff company the amount due to it which according to the terms of the note or acceptance was $5,936 plus interest at 10% from a date 2 months after March 22, 1920, or in other words from May 25, 1920.

The case of *Brown* v. *Haynes* (1864), 52 Me. 578 decides that the true measure of damages is the value at the time and place of conversion with interest from that date without any deduction for partial payments, in the meantime.

I find great difficulty in saying that the principle laid down in *Brown* v. *Haynes supra* is not the correct one and fix the value of the truck at $6,132.73 and think the plaintiff company should have judgment for that amount with interest at 5% from August 18, 1920, to date of judgment. This will give the plaintiff company approximately the amount due them and the price paid by defendants for it is no doubt approximately its true value.

There should be no costs to either party on the cross appeal.

RITCHIE, E.J.:—It is unnecessary that I should state the preliminary facts as they appear in the judgment of the Chief Justice. One important consideration is as to whether or not the plaintiffs' right to recover is dependent upon the document called an assignment, which is set out in the statement of claim. If this document is essential to the plaintiffs' right to recover, a question arises as to whether or not it is ineffective as against the defendants. It is important in this connection to look at the pleadings. No amendment was asked for, and if it had been so asked, this is a case in which, speaking for myself, no departure from the case presented to the trial Judge ought to be allowed. Paragraphs 5 and 6 of the statement of claim are as follows:—

"5. On the 22nd day of March, 1920, the said W. Walter Watt bargained, assigned, transferred and set over to the plaintiff company all his interest in the contract set forth in

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paragraph 3 herein and all his interest in the said motor truck and in the said note, by assignment in writing in the following terms:—

Assignment.

"The undersigned, in consideration of the sum of One Dollar and other valuable consideration, hereby bargains, sells, assigns, transfers and sets over unto the Commercial Credit Co. of Canada, all the right, title and interest of the undersigned in and to the within contract, and in and to the goods and chattels therein mentioned, and in and to the note or notes given on account of purchase money, and hereby authorises the said company, in its own name or in the name of the undersigned to do every act, matter or thing necessary to enforce any or all of the covenants, promises, conditions and stipulations of the within contract and to collect and get in the moneys due thereunder or due in respect of the said note or notes."

"6. Under the terms of the contract and assignment herein set forth the title to and ownership in the motor truck therein referred to was vested in the plaintiff company and the plaintiff company was at liberty to take possession of the said motor truck and to sell the same upon default being made as in the said agreement provided."

These paragraphs are attacked in the defence and on the issues so raised the parties went to trial. It is not alleged in the statement of claim that the security passed as an incident to the transfer of the note; on the contrary, it is specifically alleged that it passed under and by virtue of the document which I have quoted. It is, I think, clear on the pleadings that the contention that the security passed as an incident to the transfer of the note is not open. I have a strong opinion that the plaintiffs should be held to the case which they made in their pleadings and at the trial: I think this is not a case for giving the plaintiffs an unasked-for indulgence, because it is their conduct, as I will later on point out, which has given rise to this litigation. The trial Judge, in the judgment appealed from, says: "Watt's rights are held by the plaintiff company by assignment"; so it is clear that the plaintiffs' case as presented to him was, that the plaintiffs' claim rested on the assignment. The plaintiffs by their statement of claim deliberately elected to rest their case on the written assignment. There is a rule that in such a case a party must stand or fall by his pleadings and the course which he took at the trial, and not be allowed to take a point on appeal not taken at the trial. I think this is a case in which that rule should be applied. The plaintiffs' right to recover should, in my opinion, be held to be

dependent on the so-called assignment. The question then arises, is that document a bill of sale within the meaning of the Bills of Sale Act? I am of opinion that this question must be answered in the affirmative because it in terms transfers personal property from Watt to the plaintiff company, and it comes within the definition given in the Bills of Sale Act, ch. 11 of 1918. If a bill of sale, it must, in order to be effective, against the defendants who are *bonâ fide* purchasers, be filed in the registry of deeds, accompanied by a statutory affidavit: it was not so accompanied and therefore I am of opinion that the plaintiffs' case fails.

There are, I think, other reasons for reaching this conclusion. Assuming that the rule is that the transfer of a note passes as an incident security given for its payment, it does not in my opinion do so where there is an express assignment in writing of the security. There cannot be an implied contract in the face of an express contract; there is no room for implication or incident. This is a principle which I think is applicable. In the view which I have expressed it is not necessary that I should decide as to whether or not it is the law that security given for the payment of a note passes with the transfer of the note as an incident. There is American authority both for and against it. I think it is an open question that finds no support in the English authorities; if I am wrong as to this, I am in good company.

In Chalmers on Bills of Exchange, 8th ed., 1919, speaking of collateral security at p. 310, it is said:—"Would the right to the security pass with the instrument? The question has been touched upon but not decided." If it is the law there would seem to have been no object in the section of the Bills of Exchange Act which provides that "a note is not invalid by reason only that it is also a pledge of collateral security with authority to sell or dispose thereof."

Russell, J. was the trial Judge in this case: I do not know how that Judge would have decided this question if it had been raised at the trial, because in ed. 2 of his book on Bills and Notes published 1921, he treats it, at p. 479, as an open question. The late Professor Ames, a very high authority, in his summary contained in 2 Ames Cases of Bills and Notes, at p. 829 says:—"But an agreement relating to the bill or note itself annexed to it merely as an incident *although not itself negotiable* will not destroy the negotiability of the bill or note."

The trial Judge says in his judgment:—"The case is one in which one or other of two innocent parties is bound to suffer

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from the misconduct of a third." If this is so, then which of them should suffer? There is an equitable principle that where one of two innocent persons must suffer by the wrong of a third person, the one who put it in the power of the wrongdoer to cause the loss must bear it. I refer to the judgment of Chisholm, J., in *Robinson* v. *Green* (1917), 36 D.L.R. 631, at p. 643, 51 N.S.R. 204 and the cases there cited. The plaintiff put it in the power of Watt to act as he did, and whether this principle is applicable or not I am of opinion the plaintiffs ought not to be permitted to set up their title to the truck. It is written all over this case that the plaintiffs knew that Watt, either under his own name or under his other name of the Automotive Supply Co., would expose this truck for sale, and make a sale if it could be done. The plaintiffs not only knew it, but they intended that he should do so; if sales were not made that was an end of the business which they were carrying on because it was the sales which provided the money to pay them. There is no escape from this conclusion. As a matter of fact, I think Watt was really selling the plaintiffs' truck for them. Watt, according to the evidence, was a "good salesman"; that was essential if the plaintiffs were to carry on their profitable business. If Marwood, the manager of the plaintiff company, had been present when Watt was making the sale and did not assent the title of his company, there would be a clear estoppel. Is there any difference in principle between Marwood being present, saying nothing, and though not present allowing Watt to have possession of the truck, knowing and intending that he is to sell it so that the proceeds of the sale would in ordinary course be paid to his company? I think not. Watt and the Automotive Supply Co., are of course one and the same. The game is a safe one for the plaintiff company: if Watt pays up well and good, but, if not, take the truck from the unsuspecting purchaser whom they have assisted in deceiving by placing Watt in a position to do so. I regard the whole rather complicated scheme as little if at all short of a fraud on the public.

I would allow the appeal with costs, and dismiss the action with costs.

NOTE:—Since this judgment was delivered the counsel for the defendant has made the admission that after the trial the counsel for the plaintiff sent to the trial Judge a memo raising the point that the indorsement of the note had the effect of transferring the security. The Judge, however, was not asked to amend the pleadings to raise the point and no such amendment was made.

MELLISH, J.:—W. Walter Watt, then of Halifax but at the time of the trial a prisoner in Dorchester Penitentiary, on January 12, 1920, as appears by sales note, Ex. L/1, purchased from the Stewart Motor Corp'n of Buffalo, U.S.A. a motor truck and equipment for $3,470 to be paid for at Halifax by discharging draft attached to bill of lading. On arrival at Halifax the duty and charges brought the price up to $5,775.73 which Watt would have to pay before obtaining delivery.

Before the truck was received by Watt he ostensibly entered into an agreement dated March 22, 1920, with the Automotive Supply Co., by which the latter company agreed to purchase the truck for $7,420. The agreement is Ex. L/2 and indicates that $5,936 accommodation is required to carry out the purchase and that the purchasers are making payments of the balance of $1,484 and that to obtain the accommodation by acceptance at 2 months the purchasers will have to pay a so-called 'service charge' of 2.7% thereon or $160.27, and that these latter amounts, $1,484 and $160.27 are covered by sight draft for their total amount, $1,644.27. Attached to this agreement accordingly there is a draft drawn by Watt upon the purchasers and accepted by them for $5,936 payable 2 months after date. The draft is payable to Watt's order. The agreement provides that the property in the car is to remain in Watt until payment of the price; that until default the purchasers, who are called the 'dealer' are entitled to possession, but that upon his default the vendor, who is called "the manufacturer" may retake possession and sell the truck and apply the proceeds in payment of the price. The agreement further provides that the 'dealer' will provide proper storage and not remove the car therefrom without the written consent of the 'manufacturer'; that the 'dealer' will save the 'manufacturer' harmless from all claims which any person may have by reason of any act or omission in connection with the vehicle and that the agreement should enure to the benefit of and be binding upon the assigns of the parties.

On the back of the agreement is a printed form of assignment conveying all the manufacturer's right, title and interest in the agreement and in the note or notes given on account of purchase money and in the chattels mentioned in the agreement to the plaintiffs. There is also a printed form of indorsement on the note in the following form:—

"Pay to the order of the Commercial Credit Co. of Canada, Ltd., Toronto, Ont., presentment, protest and notice of dishonour being hereby waived."

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Watt signed this indorsement and the above assignment and delivered them with the agreement to the plaintiffs who, on the following day, March 23, advanced him thereon $5,775.73, being the face of the 'accommodation' draft for $5,936 less the plaintiffs said 'service charge' of $160.27. After maturity this draft bears interest at 10% per annum. With this amount $5,775.73, Watt was enabled to get possession of the car, which he accordingly did at Halifax and delivered it to the 'dealer',—The Automotive Supply Co., which latter company thereafter kept it in their garage with other cars at Halifax apparently for sale to the public. On the same day, March 23, the plaintiffs advanced to Watt in all $19,480 the balance over the $5,775.73 being apparently paid in respect of 5 other cars supplied to the 'dealer' in the same way under similar agreements.

Watt, the so-called 'manufacturer' was also president of the 'dealer,' the Automotive Supply Co., which had been incorporated in November or December of 1919. He held 92% of its capital stock, to the knowledge of the plaintiffs' manager. The balance of 8% he gave to two employees, George Mader and Victor Jensen. The three constituted the company. If the agreement in question was intended to mean what it says, Watt was apparently taking $1,484 from the company of which he was president and giving nothing in return for it. No 'dealer' in his senses who knew anything about his business would make any such agreement. Any competitor could undersell him to that amount on this one car. Watt could not hope to make any such arrangement with any 'dealer' who was not controlled by himself. I find it hard to come to the conclusion that the plaintiff company did not know of the real character of the business in this respect. Its printed forms seem to call for the doing of business in this way and the agreement itself indicates that it was made up with the plaintiffs' assistance at least in furnishing the forms and in fixing the 'service charge.' The plaintiff company, as appears from the letters patent creating it, was carrying on such business as would call for familiarity with the prices of motor trucks, and the evidence also discloses that they were purchasing securities having the value of such trucks in view. I cannot therefore conclude that they did not know that from the standpoint of the 'dealer' at least the agreement was altogether unbusinesslike, if indeed they did not know that it represented a transaction as between Watt and the 'dealer' that never was intended to be effective. It is not surprising to find that the $1,484 was never paid by the 'dealer' to Watt. I cannot think it was ever intended it should be paid. At the time

the agreement was made, according to the evidence of Marwood, the plaintiffs district manager, the truck in question was selling at *retail* in Halifax for $7,500. One would think it could profitably be retailed for much less. But under this agreement the '*dealer*' was paying for it $7,580.27. If it was *really* understood that the 'dealer' was doing business in this way. Watt's certificate indorsed on the agreement as to the dealer's financial standing seems somewhat artificial if not ludicrous. Why the plaintiffs were put in a position to claim as assignees rather than as lenders of money on a direct security is perhaps a profitless enquiry. It will be noted from the evidence that the plaintiffs are anxious not to be considered lenders of money perhaps because they were not authorised expressly to carry on a money lending business. Be that as it may, I think that what in effect happened was that plaintiffs loaned $5,936 for 2 months with interest at the rate of over 16% per annum for that period paid in advance and 10% thereafter, having as security the agreement in question and the names of the other parties to the draft for what they might be worth. And it might possibly assist sales to the public if the 'dealer' were able to tell an intending purchaser that he, the dealer, had really paid more for the truck than he was willing to sell it for. This draft was not paid at maturity and the plaintiffs accordingly sought to get possession of the truck some time in July or August, 1920. Meantime, about May 28, the Automotive Supply Co., and Watt, acting clearly each with the knowledge and concurrence of the other, had sold the truck to one D. R. Mc. Kay of Trenton, Pictou County, N. S., for $6,117 and McKay sold and delivered it to defendants for $6,500. About August 17 plaintiffs discovered that the truck was in the possession of the defendants—who refused to give it up on demand. Plaintiffs then brought this action for damages for conversion, detention, etc. The trial Judge gave judgment in favour of the plaintiffs for the amount of the draft and interest thereon since maturity at 5%. From this defendants have appealed.

Assuming that the plaintiffs by virtue of what happened had as against Watt and the Automotive Supply Co., the property in, and the right to the possession of this truck, their rights as against the defendants nevertheless depend upon a variety of circumstances.

Firstly, the Nova Scotia Bills of Sale Act is to be considered (1918 ch. 11). Section 8 of this Act clearly applies to such an agreement as that in question. By its provisions such an agreement must be in writing and a *true copy* filed in the approp-

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riate registry of deeds, otherwise the agreement as against purchasers is null and void. Admittedly in the present case if a '*true copy*' has not been filed in compliance with this section the plaintiffs cannot succeed.

The question is so largely one of fact that the decided cases are, I think, useless except as shewing the meaning in this connection of the words 'true copy' which in themselves are not unusual words, nor I think difficult to understand. A jury dealing with this question under proper instructions could not I think properly have placed before it for its guidance the facts of the decided cases and the conclusions arrived at therein. That might mislead them, because I think the facts of the present case are unique and lead to only one reasonable conclusion.

After a careful comparison of the original agreement and that actually filed, I have come to the conclusion that it would be a clear misuse of language to say that the latter is a true copy of the former. On the other hand, the documents on their face bear the strongest evidence of having been made essentially different. Any one who having compared the documents swore that one was a true copy of the other would, I think, be indictable for perjury. Watt, in his affidavit attached to the paper on file, which with the affidavit has been put in evidence and marked Ex. L/7, swears that it is a copy of the agreement between the parties. If that be so, the agreement of which it is a copy is not before us. If it is not a copy Watt may have thought it was because the paper on file which I have examined is marked 'Certified' by the plaintiffs. The word 'certified' is written in ink, the company's name and the words 'District Manager' are apparently put on with a rubber stamp. "S. Marwood" purports to be an original signature. This certificate is on the first page of the filed paper and forms part thereof, being written on the face of the draft, which is on the same sheet of paper as the agreement and below a line perforated across the paper at the foot of the agreement.

What is said to be the real agreement is marked L/2. The paper on file which it is contended is a true copy is, with the affidavit above referred to, marked L/7. Both papers are filled in on a printed form—L/2 apparently by hand in ink and L/7 by a typewriter.

As to the points of difference: in the first place, the printed forms are different in appearance and in essence. L/2 contemplates a contract between a 'Manufacturer' and a 'Dealer'; L/7 one between a 'Principal' and a 'dealer.' In L/2 there is a

column headed 'Price including accessories and Tax'; in L/7 there is no such heading. In 6 of the 8 numbered clauses of L/2 the word 'Manufacturer' appears; in each of these 6 clauses in L/7 the word 'Principal' is used instead. L/7 has a column for the name of the vehicle; L/2 has no such column. L/2 has a column under the heading 'Number'; L/7 has no such heading; and there are numerous other differences which may be considered more or less formal, but nevertheless quite obvious to any one who may take the trouble to compare the documents. At the end of clause No. 3 in L/7 after the word 'operation' which concludes the clause in L/2 there are the following words referring to the dealer: "and will (i.e. the dealer will) enter into an agreement with any insurance or bonding company from whom the principal may at any time during the currency of these presents obtain a bond of indemnity, to indemnify and save harmless such insurance or bonding company from any claims or demands under the said bond." The quoted words do not appear in L/2 at all. There, the clause ends at the word 'operation'. The added words in my opinion may make the two printed forms of contract essentially different and whether they do or not they at least, I think, prevent either of them from being a "true copy" of the other; and it must not be presumed that they were added for nothing. Next, as to the parts that have been filled in. In L/2 the date of the agreement is clearly in writing "22nd March"; in L/7 apparently the date has been changed by the typist to '22nd' March. In L/2 the truck is described in writing 'Model 10, 3½ ton special equipped Stewart'; under the printed heading 'type'; in L/7 the typist describes it as 'Stewart' 3¼ ton, '10'—under the respective headings of 'Name'; 'Type of body' and 'Model'. In L/2 the draft is dated in writing "Halifax March 22nd" and is drawn payable '2 mths. (in writing) after date, the printed word 'days' being scored out. In L/7 the typist dates the draft 'Halifax N. S. March 12th' and payable '60' days after date. The printed assignment on the back of L/2 is dated in writing 'Mar. 22nd'; that on the back of L/7 is in typewriting 'March 13th'. In L/2 following the printed word 'Address' at the foot of this assignment the words 'Blowers St. Halifax N. S.' are written; in L/7 no address is given.

In my opinion it is reasonably clear that the typist who filled in L/7 did not have L/2 before him for that purpose, but if any, another document bearing an earlier date, probably March 12 on a different printed form. The date of March 22 on L/7 is inconsistent with the attached draft dated March 12 and with

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the date of the indorsed assignment dated March 13. The draft in L/7 drawn at 60 days would, allowing days of grace, fall due on May 14; that in L/2 drawn at 2 months would not fall due till May 25. The obligation of the acceptor and other parties to such documents would obviously differ essentially according as they signed one draft or the other. If the draft in L/2 be taken, as I suppose we must take it, as representing at its maturity the time at which that part of the consideration was agreed to be paid, I cannot see how that transaction can be truly represented by such a draft as that in L/7. And the draft I think is a part of the agreement and intended to represent the 'acceptance' referred to in the body thereof. Counsel for defendants contended that the agreement because it does not contain the P. O. address of the bargainor is not in compliance with the statute and that for this reason the agreement is void as against the defendants. As to that I express no definite opinion, but am disposed to think that the contrary view must be taken considering the case of *Smith* v. *McLean* (1892), 21 Can. S.C.R. 355.

It was also argued that the assignment endorsed on the agreement is a bill of sale and void as against defendants because not accompanied by the statutory affidavit. I have come to the conclusion that the assignment is a bill of sale under the Act.

It is not a mere assignment of the debt but purports to assign the assignor's interest in the chattel mentioned in the agreement. Cf. *In re Davis & Co., ex parte Rawlings* (1888), 22 Q.B.D. 193, 37 W.R. 203, and *In re Isaacson; ex parte Mason*, [1895] 1 Q.B. 333.

A bill of sale as defined by sec. 2 of the Bills of Sale Act, includes 'assignments . . . and other assurances of personal chattel'. I think the document in question falls within this description.

It may also be true, as argued by counsel for the plaintiffs that no such written assignment was necessary and that the plaintiffs in purchasing the acceptance with the agreement attached would be held to have the benefit of Watt's security without any formal assignment. Nevertheless the assignment was put in writing and no implied or equitable assignment can be considered although the plaintiffs might be better off without the writing than with it. Such an assignment as this is not required by the Bills of Sale Act to be put in writing. But if it be put in writing the Act must be complied with. See *The United Forty Pound Loan Club* v. *Bexton*, [1891] 1 Q.B. 28 (n), where Fry, L.J. uses the following language when referring to the English Bills of Sales Act:—"Now it is to be borne

in mind that these statutes do not require that any transaction shall be put in writing; they only require that if a transaction be put in writing and be of a particular character, then it shall be registered otherwise it shall be void." So I think it is the 'transaction' and not merely the writing that is made void by failure to comply with the Act. I further think that defendants are 'subsequent purchasers' within the meaning of subsec. 7 (7) of the Act. I further think that the assignment was an assignment of a chose in action and not merely, if at all, of a thing in possession or of which the assignor had then the right to possession and that the statutory notice of such assignment should have been given to justify this action. Kehoe on Choses in Action, p. 18.

Even assuming that the Bills of Sale Act has been complied with, the plaintiffs nevertheless in my opinion cannot succeed in this action upon other grounds. It is clear, I think, from the plaintiffs' cash book and from the other evidence, documentary and oral, that the Automotive Supply Co., had this particular truck as a part of its stock in trade, along with several others, which were the subjects of agreements similar to L/2 and held by the plaintiffs. It is also, I think, clear that this company had authority to sell these trucks. When one leaves his property with a dealer whose business is to sell such property, and no other reason can be given for his having it, I think such authority should be implied, and indeed, this seems to have been the regular course of business. Marwood's evidence as to this is as follows:—

"Q. It was his (Watt) custom when he sold one of these trucks to go and pay the notes? A. When he sold it for the Automotive . . . Q. It was Watt's custom when he sold a truck to pay you for it whether the note was due or not? A. The Automotive Supply, Watt for the Automotive Supply."

And from the same witness we have the following:—

"Q. You knew that the Automotive Supply Co. were selling these motors did you, you knew that was their business? A. Selling Stewart trucks, yes, sir. Q. They had them in the garage exposed for sale to customers there? A. Yes. Q. And this particular one along with the others; you saw it? A. Yes."

And Mr. Watt, whose evidence in this respect is uncontradicted, says as follows:—

"Q. Apparently the course of business was to sell the truck, then you paid for it? A. Yes. Q. Was to sell the truck before you paid the Commercial Credit Co.? A. Absolutely. Q. They were aware that that was the course of business? (Ob-

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jected to by Mr. McCleave). A. Positive. Q. Marwood was aware? A. All the local managers were fully aware of that. Q. All the managers were aware of that? A. Yes. The trucks had to be sold in order to get the money to pay them. Q. And they acquiesced in that course of business? A. Yes. (Objected to by Mr. McCleave)."

Under this state of facts the plaintiffs are not at liberty to say to the defendants, who are *bonâ fide* purchasers without notice that the sale to them or to McKay is a void one, because the vendors Watt and the Automotive Supply Co., have not applied the proceeds in the way they had a right to expect or because their (i.e. the vendors) powers in respect to delivery were possibly limited by a contract inconsistent with the full disposing power which they allowed the vendors to hold out to the public.

This conclusion is I think in conformity with common law principles which have not been altered but rather reinforced and widened by statutes, which will be hereinafter considered. See, for example: *Pickering* v. *Busk* (1812), 15 East 38, 104 E.R. 758, and Bowstead on Agency, 2nd ed. 274.

The following considerations, closely connected with the foregoing, also lead me to the same conclusion:

Plaintiffs are, I think, at best in the position of creditors, holding security on the stock in trade of the Automotive Co. Whether the document creating such security—I mean the sale agreement between this company and Watt—be called a bill of sale or not, I think immaterial to the point now under discussion. As already noted, by sec. 8 of said Act, this particular kind of agreement (whether it be a bill of sale or not) is required to be in writing. The proper interpretation to be put upon the several numbered classes may not be free from doubt. Clause 4 in part is as follows:—

"4. The dealer will provide a proper storage place or shelter for each motor vehicle and all its equipment and attachments and will not without the previous consent in writing of the principal *remove* any motor vehicle or any of its equipment or attachments from the said storage place or shelter until full payment of the purchase-price is completed, etc."

Speaking of a similar provision in a bill of sale, in *Walker* v. *Clay* (1880), 42 L.T. 369 at p. 370 Lindley, J. says:—

"The covenant by the grantor not to remove any of the things comprised in the bill of sale without the consent of the grantee is not a covenant not to sell for that to my mind would be contrary to the intention of the parties and would destroy

the value of the security. The covenant not to remove the chattels must be construed and regarded as a covenant not to remove or dispose of them otherwise than in the ordinary course of trade."

This I think is the way the removal clause must be construed and regarded here and is the way in which under the evidence the parties so construed and regarded it. The only justification relied on in fact by the plaintiffs for the taking possession of the truck that I can find from the pleadings or evidence is that the draft was not paid. That is the only default alleged in the statement of claim as a breach of contract on the part of the Automotive Co., and the only one proved. See also in this connection the case of *National Mercantile Bank, Ltd.* v. *Hampson* (1880), 5 Q.B.D. 177, 49 L.J. (Q.B.) 480, 28 W.R. 424; and also the case of *Dedrick* v. *Ashdown* (1887), 15 Can. S.C.R. 227. Under the binding authority of this last case even when the mortgage security prohibits a sale by the mortgagor, such prohibition in the case of a chattel mortgage or stock in trade is construed as not intended to include sales in the ordinary course of business.

The effect of the provisions of the Nova Scotia Sale of Goods Act, 1910, ch. 1 remains to be considered. The provisions of the Act I think are not specially pleaded, but the facts which make it applicable are I think sufficiently disclosed in the defence. Its effect was discussed by counsel on the appeal without objection to the pleadings and I think we should deal with it, allowing any necessary amendments.

It may be no amendment is necessary and that we should apply the law applicable to the facts disclosed in the pleadings and evidence whether such law be statutory or otherwise. Subsection 2 of sec. 27 of the said Act is as follows:—"(2) Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner."

Whatever view be taken of the other points raised on this appeal, I am of opinion that under the admitted facts, the de-

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fendants are absolutely protected by this provision. On two grounds it was suggested that this statute had no application. 1st: That the filed agreement (assuming it to have been filed in compliance with the Bills of Sale Act) was 'notice' to the purchaser and 2nd: That the section quoted had no application to an agreement covered by the Bills of Sale Act.

I am unable to agree with either of these contentions. If they are to prevail it is difficult I think to give but a very restricted meaning and purpose, if any, to the foregoing sub-section. As already pointed out, sec. 8 of the Bills of Sale Act, 1918 ch. 11, provides that transactions such as those contemplated by this sub-section shall be evidenced by instruments in writing which must be filed in accordance with the Act, otherwise they are void as against creditors, purchasers and mortgagees of the party in possession.

The foregoing subsection I think 'reinforces' this legislation, to use the language of a recent text writer (Falconbridge on the Sale of Goods, p. 57) and makes such transactions void as against innocent purchasers without notice even if evidenced in writing duly filed. This conclusion implies that filing does not afford the notice contemplated by the Act: and the following authorities I think fortify this conclusion: 25 Hals. p. 201 dealing with the same statutory provision and citing *May* v. *Chapman* (1847), 16 M. & W. 355, 153 E.R. 1225, and *Jones* v. *Gordon* (1877), 2 App. Cas. 616, 47 L.J. (Bk.) 1, 26 W.R. 172.

In the leading case of *Lee* v. *Butler*, [1893] 2 Q.B. 318, 62 L.J., (Q.B.) 591, 69 L.T. 370, Lord Esher, M.R. speaking of the precise words contained in this sub-section, and which are identical with those in sec. 9 of the Factors Act, 1889, ch. 45, says (69 L.T. at p. 370):—

"Those words are as plain as they can be and this case is clearly within them. In this case Lloyd had agreed to buy the goods by a hire and purchase agreement and the goods were put into her possession by the owner; the goods were sold by Lloyd to the defendant who bought them without notice of the right of the original seller and in good faith. If the defendant had known that Mrs. Lloyd was in possession under a hire and purchase agreement, in my opinion he would have had sufficient notice of the right of the plaintiff but he had no such knowledge and acted in good faith. This section was enacted with reference to this very kind of case and does apply to this case."

In another part of the same decision he says:—

"It seems to me that this case is quite clear. The meaning

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of sec. 9 of the Factors Act 1889 . . . is quite plain and only one construction can be put upon that section."

The provisions contained in the above section and in sub-sec. 27 (2) of our Sale of Goods Act are not in my opinion inconsistent with the provisions of the Bills of Sale Act. It may well be that under the provisions of the latter Act an agreement which is not evidenced by writing and filed in compliance with sec. 8 is void even against a party having notice. (See *Edwards* v. *Edwards* (1876), 2 Ch. D. 291, 45 L.J. (Ch.) 391, 24 W.R. 713 and that under the Sale of Goods Act the innocent purchaser is protected provided he had no notice, whether the agreement complies with the Bills of Sale Act or not.

I do not think that the filing in the registry of deeds under the latter Act furnishes the 'notice' contemplated by the sub-section in question. And I certainly do not think that the Bills of Sale Act is to be construed as impliedly enacting that one who purchases goods exposed for sale with the concurrence of the owner by a dealer in the regular and ordinary course of business is bound before buying in order to protect himself from such owner to search the registry of deeds.

The plaintiffs, I think, as before indicated by the common law would be estopped from denying the Automotive Company's right to sell and in *Cole* v. *North Western Bank* (1875), L.R. 10 C.P. 354 at p. 363, 44 L.J., (C.P.) 233, Blackburn, J. states:

"If the owner of the goods had so acted as to clothe the seller or pledger with apparent authority to sell or pledge, he was at common law precluded, as against those who were induced *bona fide* to act on the faith of that apparent authority, from denying that he had given such an authority, and the result as to them was the same as if he had really given it."

And the Bills of Sales Act, I think, like the Ontario Conditional Sales Act R.S.O. 1914, ch. 136 which for present purposes may be said to be embodied in sec. 8 of our Bills of Sales Act "does not enlarge the common law rights of those who allow their goods out of their hands, but it prevents all who have not complied with its conditions from asserting common law rights." (Falconbridge on the Sale of Goods, p. 60 and cases there cited). As impressively stated by Orde J., in one of these cases, *Commercial Finance Corp'n.* v. *Stratford* (1920), 47 O.L.R. 392, at p. 396, speaking of this Conditional Sales Act: "The Act is designed for the protection of persons dealing with one to whom the possession but not the ownership of a chattel has been given, and requires the owner to comply with

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certain provisions of the Act if he desires to preserve his ownership. *But, having complied with those provisions, he stands in no better or higher position than if theAct had not been passed.*"

In dealing with these cases it is however to be remembered that the Ontario Factors Act R.S.O. 1914, ch. 137, contains a provision that sec. 10 thereof, which is the equivalent of sec. 27 (2) of our Sale of Goods Act shall not apply to contracts under the Conditional Sales Act when the provisions of that Act have been complied with by the seller. R.S.O. 1914, ch. 137 sec. 10 (2).

There is no such provision in the Nova Scotia Factors Act, R.S.N.S. 1900, ch. 146, the provisions of which as applicable to a case of this kind are repealed by the Nova Scotia Sale of Goods Act. Nor does the last named Act contain any such provisions restricting the application of sec. 27 (2), which in my opinion governs this case. But whether it does or not, the plaintiffs cannot I think succeed—by reason of the estoppel.

On the grounds above indicated, any one of which is sufficient, namely:—

1. Because the Automotive Supply Co., was held out as having power to sell the truck. 2. Because said company had in fact such power. 3. Because a true copy of the agreement was not filed under the Bills of Sale Act. 4. Because the so called assignment is a Bill of Sale and a copy was not filed with the requisite affidavit, 5. Because the defendants have a good title under the Sale of Goods Act, sec. 27 (2), 6. Because there was no notice of assignment before action.

In my opinion the appeal should be allowed and the action dismissed with casts.

CHISHOLM, J.:—I concur. *Appeal allowed.*

REX v. PING YUEN.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, and Turgeon, JJ.A. November 14, 1921.

INTOXICATING LIQUORS (§IIIA—55)—MENS REA—WHEN EXCLUDED AS AN INGREDIENT OF OFFENCE — DEALER IN SOFT DRINKS HAVING INTOXICATING LIQUORS WITH STOCK IN TRADE—BOTTLED "NEAR BEER" OVER STRENGTH—SASK. TEMPERANCE ACT 1917, CH. 23, SEC. 35 (CF. R.S.S. 1920, CH. 194, SEC. 52.)

The fact that a person engaged in the business of selling soft drinks or non-intoxicating liquors did not know that some of the bottled "near-beer" kept by him for sale contained more than 1.13 per cent. of alcohol in weight and was therefore an "intoxicating liquor" under the Saskatchewan Temperance Act 1917, ch. 23, and that he purchased it in good faith as below the specified

strength, does not absolve him from liability for the penalty provided by sec. 35 of the Act for its possession on his business premises. The doctrine of mens rea does not apply to that offence.

APPEAL by defendant from the judgment of Brown, C.J. K.B., refusing defendant's application to quash the summary conviction made by the Magistrate under the Sask. Temperance Act, 1917, ch. 23, sec. 35 (*Cf.* Sask. Temperance Act R.S.S. 1920, ch. 194, sec. 52). The appeal was dismissed, Lamont, J.A., dissenting.

T. D. Brown, K.C., Director of Prosecutions, for the Crown.

A. T. Procter, for the appellant, defendant.

HAULTAIN, C.J.S.:—I agree with my brother Turgeon, whose judgment I have had an opportunity of looking over.

This is a case of great hardship, because there is no doubt that the defendant purchased the goods in question in good faith and had no knowledge of a violation of the law. But, as Parke, B., said in *Reg.* v. *Woodrow* (1846), 15 M. & W. 404, at p. 417, 153 E.R. 907, "if there is any hardship in the case it does not rest with those who have only to carry the law into effect to remedy it."

The cases cited by my brother Turgeon establish, in my opinion, the proposition that, where the law in the interest of public morality or convenience peremptorily prohibits any act, innocence of intention or belief is no defence. I might cite as additional cases on this point the cases of *Rex* v. *Marsh* (1824), 2 B. & C. 717; 107 E.R. 550; *The Queen* v. *Bishop* (1880), 5 Q.B.D. 259, 49 L.J. (M.C.) 45; *Parker* v. *Alder*, [1899] 1 Q.B. 20, 68 L.J. (Q.B.) 7; *Brooks* v. *Mason*, [1902] 2 K.B. 743; 72 L.J. (K.B.) 19; *Rex* v. *McKenzie* (1921), 60 D.L.R. 163, 36 Can. Cr. Cas. 70; *Rex* v. *Wheat*, [1921] 2 K.B. 119, 90 L.J. (K.B.) 583.

LAMONT, J.A. dissenting):—Section 35 of the Saskatchewan Temperance Act, being ch. 23 of the Statutes of 1917, reads as follows:

"35.—(1) In case any person engaged in the business of selling soft drinks or nonintoxicating liquors keeps or has with his stock of such drinks or liquors or on his business premises any liquor as defined by this Act, such person shall be guilty of an offence and liable, in case of a first offence to a penalty of $100 and imprisonment for thirty days, and in default of payment of such sum to imprisonment for a further period of thirty days; and to a penalty of $200 and three months' imprisonment for a second or any subsequent offence, and in

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default of payment of such sum to imprisonment for a further period of thirty days.

(4) For the purpose of this section the term 'business premises' shall mean and include a room, closet or cupboard opening from or into or giving access to the room or place where soft drinks or nonintoxicating liquor is sold."

The accused was a vendor of soft drinks at Moosomin. Armed with a search warrant, a police officer entered his place of business and took from his stock five bottles of soft drinks. These he took to an analyst at Regina. On examination it was found that three of the bottles contained a percentage of alcohol in excess of the amount allowed by the Act, while the other two contained less than that amount. No two of the bottles, however, contained the same amount. These bottles had all been purchased by the accused as soft drinks from the Pioneer Fruit Co., a wholesale grocery house, in the usual course of his business. The accused was charged with a violation of sec. 35 and convicted. The Magistrate, however, found that the accused did not know that any of the bottles contained more alcohol than the law permitted. It was admitted by the prosecution that it was not possible for the accused to test any bottle without destroying its contents for sale purposes. An application was made to a Judge in Chambers to quash the conviction. This was refused, and from that refusal this appeal is brought.

The ground upon which it is sought to quash the conviction is that the accused purchased these bottles in the ordinary course of his business as soft drinks, believing on reasonable grounds that they were such; and as he satisfied the Magistrate that he had no knowledge that they contained alcohol in excess of the amount allowed, he had established an absence of *mens rea* on his part and, therefore, should have been acquitted.

As a general rule the existence of *mens rea* in the accused is a necessary ingredient in a criminal offence, and a statute creating an offence cannot generally be regarded as making an exception to that rule, unless it expressly, or by necessary implication from its language, declares its intention to do so. *Strutt* v. *Clift*, [1911] 1 K.B. 1, 80 L.J. (K.B.) 114.

It is, however, quite competent to a Legislature to so define an offence that knowledge or intent on the part of anyone doing the prohibited act is not material, and he may be held liable even although innocent of any intention to violate the law. The difficulty in each case is to determine whether or not it was the intention of the Legislature to leave the doer of the prohibited act liable to the penalty in the absence of *mens rea*. What is an

absence of *mens rea*? In *Bank of New South Wales* v. *Piper*, [1897] A.C. 383, at pp. 389, 390, 66 L.J. P.C. 73, the Privy Council defined it as follows:—

"The absence of *mens rea* really consists in an honest and reasonable belief entertained by the accused of the existence of facts which, if true, would make the act charged against him innocent."

The principles involved in the case at bar are considered at length in the two great cases of *Reg.* v. *Prince* (1875), 44 L.J. M.C. 122, 13 Cox C.C. 138, 24 W.R. 76, and *Reg.* v. *Tolson* (1889) 23 Q.B.D. 168. In the former of these cases the Statute, 1861 (Imp.), ch. 100, sec. 55, enacted:—

"Whoever shall unlawfully take . . . any unmarried girl under the age of sixteen years out of the possession and against the will of her father . . . shall be guilty of misdemeanour."

It was proved that the accused took the girl against the will of her father and that she was under sixteen, but he *bona fide* believed and had reasonable grounds for believing that she was eighteen. Fifteen out of the sixteen Judges before whom the case was argued held that he was rightly convicted. Brett, J., alone was for quashing the conviction. The difference of opinion between Brett, J., and the other Judges seems to have arisen in respect of the interpretation of the statute rather than in respect of any principle involved. The conclusion of Brett, J., is as follows (at p. 136):—

"But I come to the conclusion that a mistake of facts, on reasonable grounds, to the extent that if the facts were as believed the acts of the prisoner would make him guilty of no criminal offence at all, is an excuse, and that such excuse is implied in every criminal charge and every criminal enactment in England.

The rest of the Court held that an honest belief on reasonable grounds that she was eighteen was not in that case sufficient. They took the view that a consideration of the provisions of the Act, the nature of the offence and the scope and object of the Act, as stated in the preamble, showed that the intention of the Legislature was to punish the abductor unless the girl was in fact sixteen, and that it imposed upon the abductor the duty of making sure that she was not under sixteen; and if he neglected to perform that duty ,or made a mistake, he must be held liable for the consequences. Another reason also given was, that the accused knew he had no right to take the girl out of her father's possession. Blackburn, J., with whom nine Judges agreed, at pp. 123, 124, said:—

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"For as the case is reserved, we must take it as proved that the . . . girl was in the possession of her father, and that he took her, knowing that he trespassed on the father's rights, and had no colour of excuse for so doing."

The opinion of Bramwell, J., at p. 126, with whom the remainder of the Court agreed, is, in part, as follows:

"The Legislature has enacted that if anyone does this wrong act, he does it at the risk of her turning out to be under sixteen. The opinion gives full scope to the doctrine of *mens rea*. If the taker believed he had the father's consent, though wrongly, he would have no *mens rea*; so if he did not know she was in anyone's possession, nor in the care or charge of anyone. In those cases he would not know he was doing the act forbidden by the statute—an act which, if he knew she was in possession and in care or charge of anyone, he would know was a crime or not, according as she was under sixteen or not."

In *Reg.* v. *Tolson* (1899), 23 Q.B.D. 168, the statute read:

"Whoever being married shall marry another person during the life of the former husband or wife shall be guilty of felony;

Except: (1) When the husband or wife has been continually absent for the space of seven years then last past and has not been known by the accused to be living within that time; (2) When the accused at the time of the second marriage has been divorced from the bond of the first marriage."

The accused went through the ceremony of marriage within seven years after she had been deserted by her husband. The jury found that at the time of the second marriage she in good faith and on reasonable grounds believed her husband to be dead. She was convicted of bigamy. On appeal nine Judges held that the conviction was wrong, while five held it to be right.

In *Rex* v. *Wheat*, [1921] 2 K.B. 119, 90 L.J. (K.B.) 583, the accused was convicted of bigamy under the same Act. The jury found that the accused in good faith and on reasonable grounds believed that he was divorced. It was held by the Court of Criminal Appeal that such believe afforded no defence in law to a charge of bigamy. Avery, J., in his judgment distinguished this case from *Reg.* v. *Tolson, supra*. He pointed out that in the *Tolson* case the accused, believing her husband to be dead, did not at the time of the second marriage intend to do the act forbidden by the statute, namely, marrying again during his lifetime; while in the case before him the accused, although thinking himself to be divorced, did intend to do the

act forbidden by the statute, for he knew at the time of the second marriage that his wife was still alive. In the opinion of the Court the maxim "*actus non facit reum nisi mens sit rea*" was satisfied if the evidence established an intention on part of the accused to do the act forbidden by the statute.

The reports present many other cases which, at first sight, seem difficult to distinguish. See *Cundy* v. *Le Cocq* (1884), 13 Q.B.D. 207, 53 L.J.M.C. 125; *Sherras* v. *De Rutzen*, [1895] 1 Q.B. 918, 64 L.J.M.C. 218; *Reg* v. *Sleep* (1861), 8 Cox C.C. 472; *Reg* v. *Woodrow* (1846), 15 M. & W. 404, 153 E.R. 907; *Rex* v. *Marsh* (1824), 2 B. & C. 717, 107 E.R. 550; *Brooks* v. *Mason*, [1902] 2 K.B. 743, 72 L.J.K.B. 19.

A perusal of the above cases leads me to the following conclusions:—

1. Whether or not an absence of *mens rea* will constitute a good defence in any particular case depends upon the legislative intention as disclosed by the statute.

2. If the language of the statute is clear effect must be given to it, regardless of other considerations, but if the language is not clear it is the duty of the Court to take into consideration the nature of the offence, the scope and object of the statute, the penalty imposed, and any other circumstance which tends to shew the legislative intention.

3. In cases where the prohibited act is the having an article in one's possession, in order to justify the conclusion that the doer of the act is to be held liable irrespective of any knowledge or wrongful intent on his part, it must appear.

(a) that he knew that he had the prohibited thing in his possession, although he may not have been aware that it contravened the statute, and

(b) that the statute, properly construed, meant that if he had the prohibited thing in his possession he had it there at his peril; that the statute cast upon him the obligation of making the investigation necessary to ascertain if such possession constituted a violation of the Act.

Reg v. *Woodrow, supra,* furnishes an illustration. There, the statute made it an offence for a dealer to have in his possession adulterated tobacco. The accused was found with adulterated tobacco in his possession, but he did not know and had no reason to know that it was adulterated, he having purchased it as genuine. It was held that the absence of knowledge and intent

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to do wrong on his part was no defence. Pollock, C.B., [153 E.R. 907, at pp. 415, 416 (15 M. & W.)] said:—

"It appears to me, that, in this case, it being within the personal knowledge of the party that he was in possession of the tobacco (indeed, a man can hardly be said to be in possession of anything without knowing it), it is not necessary that he should know that the tobacco was adulterated; for reasons probably very sound, and not applicable to this case only, but to many other branches of the law, persons who deal in an article are made responsible for its being of a certain quality."

And Alderson, B., said:—

"I cannot say that this man had not the tobacco in his possession, because he clearly knew it. He did not know it was in an adulterated state, but he knew he had it in his possession; and that question of 'knowingly,' it appears to me, is involved in the word possession. That is, a man has not in his possession that which he does not know to be about him. I am not in possession of anything which a person has put into my stable without my knowledge. It is clear, therefore, that possession includes a knowledge of the facts as far as the possession of the article is concerned."

In *Reg* v. *Tolson, supra,* Wills, J., in referring to the statute which prohibited any person from having in his possession Government stores bearing a certain mark without a certificate from the proper authority, at pp. 175 and 176, said:—

"Suppose a man had taken up by mistake one of two baskets exactly alike and of similar weight, one of which contained innocent articles belonging to himself and the other marked Government stores, and was caught with the wrong basket in his hand. He would by his own act have brought himself within the very words of the statute. Who would think of convicting him? And yet what defence could there be except that his mind was innocent, and that he had not intended to do the thing forbidden by the statute?"

Applying these principles to the case at Bar, we have first to ask, did the accused know that he had liquor in his possession? The magistrate found that he did not. He purchased these bottles as soft drinks, believing that they were such. His mind was entirely innocent of any intention to violate the Statute. Then does the section cast upon him the duty of ascertaining whether or not any of the bottles contained any percentage of alcohol in excess of that permitted in soft drinks? I am of opinion that it did not. The scope and object of the Act is to restrict and regulate transactions in liquor. (1917

Sask. ch. 23, sec. 80; 1919-20 ch. 70, sec. 103; 1920 R.S.S. ch. 194, s. 102).

In the judgment of Wills, J., above referred to, *Reg. v. Tolson* (1889), 23 Q.B.D. 168, at p. 175, he said:—

"If the words are not conclusive in themselves, the reasonableness or otherwise of the construction contended for has always been recognised as a matter fairly to be taken into account."

Is it reasonable to suppose that the legislative intention was to cast upon the accused the duty of opening each bottle to ascertain if it exceeded the proper percentage of alcohol? In view of the fact that to do so would destroy the stock for selling purposes and would, in effect, prohibit dealing in soft drinks, there is no way short of going out of the business that he can be safe. In my opinion, it is unreasonable to suppose the Legislature intended any such thing. I can see nothing in the section to warrant such a conclusion. If such had been the legislative intention, I would have expected the section to make it an offence for a vendor to have soft drinks in his possession containing alcohol in excess of the percentage permitted. That, however, is not the prohibited act. The offence is "keeping liquor with his soft drinks."

If a statute enacted that no druggists shall have or keep strychnine with his stock or drugs, I venture to say that not a single druggist would understand by that language that a duty had been cast upon him to examine every package of drugs that he had on his shelves to ascertain if any strychnine had, either by accident or intention, become mixed with his drugs before he received them. The ordinary man, in his opinion, would understand it to mean that, among the packages or bottles constituting the stock a receptacle containing strychnine must not be kept. And that, in my opinion, is the interpretation that should be put upon sec. 35. Sub-section 4 to my mind supports this view. Again, the authorities shew that the nature and extent of the penalty attached to the offence is to be considered. The penalty provided by the section is $100 and imprisonment for thirty days. Can it reasonably be supposed that the Legislature intended to impose a fine and imprisonment upon a vendor of soft drinks because the manufacturer from whom he purchased his stock, either by accident or design, permitted a fraction more alcohol to get into the soft drinks than the law allows, when the vendor was totally ignorant of the fact and had purchased the stock in good faith and when there was no way in which he could ascertain it without

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destroying his entire stock? It would take much clearer language than I find here to lead me to the conclusion that such was the legislative intention. By an amendment which came into force after the accused was charged, but before he was tried, the penalty changed to "not less than $50 and not more than $500" and in "default of payment of such sum to imprisonment for a period not exceeding three months." This amendment, in my opinion, does not help the prosecution. It still leaves the vendor exposed to a heavy penalty, and, in the event of his not being able to pay it, to three months' imprisonment; and, in addition thereto, he is liable to have his stock confiscated. (sub-sec. 2.)

For these reasons I am of opinion that sec. 35 was not intended to impose and does not impose on a vendor the responsibility of testing his soft drinks to ascertain their quality. Full effect, it seems to me, can be given to the language used without importing an intention to require the impossible. If such was the intention of the Legislature, I think we should require that intention to be expressed in much clearer language than has been used here, for, as Lord Selborne, L.C., said in *Pharmaceutical Society* v. *L. & P. Supply Ass'n* (1880), 5 App. Cas. 857, at p. 867 (49 L.J. (Q.B.) 736):—

"The liberty of the subject ought not to be held to be abridged any further than the words of the statute, considered with a proper regard to its objects, may require."

I would, therefore, allow the appeal and quash the conviction.

TURGEON, J.A.:—The appellant is a vendor of soft drinks at Moosomin. On December 6, 1920, a police officer, acting under a search warrant, found upon his premises three bottles of beer which were shewn upon analysis to contain more than 1.13% of alcohol per weight. This beer was, therefore, an "intoxicating liquor" within the definition of the Saskatchewan Temperance Act, and an information was laid against the appellant under sec. 35 of that Act (then ch. 23 of the Statutes of 1917), which is, in part, as follows:—

"35.—(1) In case any person engaged in the business of selling soft drinks or non-intoxicating liquors keeps or has with his stock of such drinks or liquors or on his business premises any liquor as defined by this Act, such person shall be guilty of an offence, etc." [Note (a)]

(a) The Saskatchewan Temperance Act, R.S.S. 1920, ch. 194, secs. 52 (1) and 52 (2), as amended 1920 Sask., includes a corresponding enactment in the following words:—

52. (1) In case any person engaged in the business of selling soft

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The magistrate found the accused guilty and his memorandum of conviction reads as follows:—

"The accused is found guilty. In my opinion the accused did not know that the contents of the bottles contained more than 1.13% absolute alcohol by weight and the fine and costs were paid under protest. Judgment, fine $50.00 and costs $4.50, and in default of payment of the said sums to imprisonment in the common gaol at Regina for a period of 15 days."

It was admitted by the Director of Prosecutions, on the hearing of this appeal, that the accused was innocent of any guilty intention. He bought the bottles from a firm of wholesale grocers and they purported to contain, and he believed that they contained, a beverage not prohibited by the Act; that is, beer of less than the prohibited strength.

He could not have ascertained the fact that they contained liquor in excess of the alcoholic strength allowed by law without having each bottle opened and its contents analysed, a proceeding which, of course, nobody suggests he should have followed. Under these circumstances the question to be decided is: Was the appellant really guilty of an infraction of the Act, in view of the total absence on his part of any wrongful knowledge or intention, of that usual but not invariable element of guilt known as *mens rea?*

A great number of authorities were cited to us by counsel on both sides. The older cases have been reviewed in recent years in decisions given in the various provinces of Canada, and the result is certainly very confusing. I think, however, that it can be said that the well-known rule of *mens rea* applies to infractions of all penal Statutes (whether the subject matter of the statute lies, in Canada, within the jurisdiction of the Dominion Parliament or of the Provincial Legislatures), unless the statute itself expressly or by necessary implication excludes its application, and provides that the mere doing of the act shall call forth the penalty, regardless of the state of mind of the accused. If I am right in this, it remains to be determined whether the appellant in this case can be said to be

drinks or non-intoxicating liquors keeps or has with his stock of such drinks or liquors, or keeps or has on his prmises any liquor as defined by this Act, such person shall be guilty of an offence and liable to a penalty of not less than $50 nor more than $400 and, in default of payment of such sum, to imprisonment for a period not exceeding three months.

52. (2) Any officer, who finds liquor in the stock or upon the business premises of such person, shall seize and dispose of his total stock of liquor, soft drinks or non-intoxicants in the manner provided for the seizure and disposal of liquor by section 69.

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guilty of the offence charged against him, when it is admitted that no knowledge, or intention, or neglect to take feasible precautions against mistakes, can be imputed to him.

Of all the cases cited to us by the Director of Prosecutions and by counsel for the appellant, I think that the two most closely in point with the case at Bar, and from which, consequently, the greatest benefit can be derived, are the cases of *Reg.* v. *Woodrow* (1846), 15 M. & W. 404, 153 E.R. 907, cited in support of the conviction, and *Sherras* v. *De Rutzen*, [1895] 1 Q.B. 918, 64 L.J. (M.C.) 218, cited against it.

In *Reg.* v. *Woodrow* the accused was a retailer of tobacco. The statute in question (3 & 4 Vic. ch. 18) provided that, every retailer of tobacco who received or had in his possession any tobacco which contained any material other than water should be liable to prosecution. It was shewn that the accused had in his possession 54 lbs. of tobacco containing saccharine matter. He had no knowledge of this adulteration, having purchased the tobacco in good faith from the manufacturer. Under these circumstances the accused was held guilty upon an appeal to the Exchequer Division, the Court being composed of Pollock, C.B., Parke, B., Alderson, B., and Rolfe, B.

In the case of *Sherras* v. *De Rutzen*, [1895] 1 Q.B. 918, 64 L.J.M.C. 218, the accused was the licensee of a public house. Section 16 of the Licensing Act of 1872 made it an offence to supply liquor to a police officer while on duty. The accused's public house was nearly opposite the police station. It was the custom at the police station when a constable went off duty to remove his armlet, and the fact of the armlet being off was the means whereby the accused and his servants knew that the constables were off duty. Upon the occasion in question, a constable, while on duty, removed his armlet, and entering the public-house ordered and was served with liquor, thus deceiving the accused's servant into believing that he was off duty. It was held on appeal by Day, J., and Wright, J., that the accused was not guilty.

In the *Woodrow* case (1846), 15 M. & W. 404, the judgment proceeds on the grounds (1) that, in statutes of the class in question, the true intent is that persons who deal in the article specified are made responsible for its being of a certain quality, and (2) that the public inconvenience would be very great if in each case the officials enforcing the Act had to prove knowledge, as they would be very seldom able to do so; and the conclusion was therefore arrived at that if a man is in possession

of the article, and that article falls within the terms mentioned in the Statute, that alone proves the offence.

In *Sherras* v. *De Rutzen*, Wright, J., distinguishes the case from that of *Reg.* v. *Woodrow*. Referring to this last case he points out that there are certain statutes from which the doctrine of *mens rea* is excluded, either by the words of the statute creating the offence or by the subject matter with which the statute deals. He then goes on to say that one of the classes of statutes from which the doctrine is excluded comprised these statutes which deal with acts which are not criminal in a real sense, but which, in the public interest, are prohibited under a penalty, and he instances the Adulteration Acts and *Reg.* v. *Woodrow, supra*. He then expresses his opinion that in the case of the Licensing Act then before the Court, guilty knowledge was necessary, but without explaining the grounds upon which his distinction is based, excepting that he leaves it of course to be inferred that the Licensing Act did not come within the description that he applied to the Adulteration Act, either by its language or by reason of its subject matter, and that consequently the rule of *mens rea* was not extended either expressly or impliedly.

I am of opinion that the case at Bar is governed by the authority of *Reg.* v. *Woodrow*. The same considerations apply, I think, as in that case, and for the same reasons I am forced to the conclusion that the real intent of the section of the Temperance Act, 1917 (Sask.), under which the charge was laid, is to penalise the mere "keeping" or "having" of intoxicating liquors in a stock of soft drinks which are offered for sale to the public. "Soft drinks" or "non-intoxicating liquors" as referred to in the statute are liquors of various sorts, some alcoholic and some non-alcoholic, but containing in the case of the former such a small proportion of alcohol as not to render them intoxicating. Among this variety is beer, which is the specific article dealt with in this case. When the proportion of alcohol in this beer is greater than that allowed by the Act the beer is deemed to be intoxicating, and the merchant who keeps it in stock is guilty of a breach of the Act. Therefore, in the case of beer in this Province, it seems to me to be the true intent of the Act that persons who deal in the article are made responsible for its being of a certain quality, namely, not more than 1.13% of alcoholic content, and when they have a too strong alcoholic article in their possession they are liable to the penalty just as the tobacco dealer is liable under the English Tobacco Act when his tobacco is adulterated. It is true that the accused in *Reg.* v. *Woodrow* could

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have avoided trouble by having his tobacco analysed, and that this precaution was not feasible in this case where the beer was purchased and left in bottles, but I do not think that this provided a sufficient distinction to affect the result. (See *Parker* v. *Alder* (1899), 68 L.J. (Q.B.) 7; [1899] I Q.B. 20, 47 W.R. 142; and *Betts* v. *Armstead* (1888), 20 Q.B.D. 771, 36 W.R. 720, 16 Cox C.C. 418). Pollock, C.B., points out in the *Woodrow* case that, no doubt, hardships must occur through the enforcement of these Acts in particular instances, but, he adds, it is either for the Legislature to alter the law if too great hardship results, or for the department charged with its enforcement to abstain from enforcing it in proper cases. But to hold that in each case a guilty knowledge must be proved, would no doubt make the Act of no practical value.

The Manitoba case of *Rex* v. *Hoffman* (1917), 38 D.L.R. 289, 28 Can. Cr. Cas. 355, 28 Man. L.R. 7, was cited on behalf of the appellant. In that case it was held that, under the Act prohibiting the "having" of liquor in a pool-room, a conviction would not lie against the proprietor of a pool-room because a person lawfully in the room, and not being a servant or agent of the proprietor, had a flask of liquor in his pocket without the knowledge or consent of the proprietor. This case and others of a like kind are clearly distinguishable from our case. In the Manitoba case it was held that the accused did not have the liquor in his possession at all. In *Reg.* v. *Woodrow, supra*, the judgment of Alderson, B., at p. 418 (15 M. & W.) contains the following paragraph which, I think, is applicable to the Manitoba case and to the case at Bar:—

"As to the merits of the case, I think the Court was wrong; because the words of the Act, though they are no doubt very stringent, are nevertheless very clear, and any retailer of tobacco who has an adultered article in his possession is liable to the penalty. I cannot say this man had not the tobacco in his possession, because he clearly knew it. He did not know it was in an adulterated state, but he knew he had it in his possession; and the question of "knowingly," it appears to me, is involved in the word possession. That is, a man has not in his possession that which he does not know to be about him. I am not in possession of anything which a person has put into my stable without my knowledge. It is clear therefore that possession includes a knowledge of the facts as far as the possession of the article is concerned."

I think, therefore, that the order of the Chief Justice of the King's Bench should be affirmed, and the appeal dismissed with costs. *Appeal dismissed.*

B.C. PERMANENT LOAN CO. v. CANADIAN NORTHERN R. CO.

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Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon and McKay, JJ.A. May 29, 1922.

EXPROPRIATION (§IID—101)—ARBITRATION—ARBITRATOR UNDER RAILWAY ACT, CAN. STATS. 1919, CH. 68, SEC. 220—APPEAL—COURT OF KING'S BENCH — COURT OF APPEAL — JURISDICTION TO HEAR APPEAL.

In the Province of Saskatchewan the District Court Judge is the arbitrator under sec. 220 of the Railway Act, Can. stats 1919, ch. 68 and an appeal from him lies to either the Court of King's Bench or the Court of Appeal, and a party dissatisfied with an award may elect to which of these Courts he will appeal.

[*Birely* v. *T.H. & B.R. Co.* (1898), 25 A.R. (Ont.) 88; *Ottawa Electric Co.* v. *Brennan* (1901), 31 Can. S.C.R. 311; *James Bay R. Co.* v. *Armstrong* (1907), 38 Can. S.C.R. 511, [1909] A.C. 624, 79 L.J. (P.C.) 11, applied.]

APPLICATION to quash an appeal to the Saskatchewan Court of Appeal from the award of a District Court Judge acting as arbitrator under sec.. 220 of the Railway Act Can. Stats., 1919, ch. 68. Application dismissed.

C. M. Johnston, for claimants.

Colin E. Baker, for respondents.

The judgment of the Court was delivered by

HAULTAIN, C.J.S.:—In this matter notice of appeal has been given to this Court from the award of the judge of the District Court of the Judicial District of Prince Albert acting as arbitrator under sec. 220 of the Railway Act, 1919, (Can.) ch. 68.

Application is now made to quash the appeal, on the ground that, under sec. 232 (1) of the Act in question, an appeal from the award of a District Court Judge should be taken to the Court of King's Bench and not to this Court.

By sec. 232 (1) the right is given to appeal from an award "to a superior court, or to the court of last resort of the province in which the lands lie if a judge of a superior court has been constituted arbitrator."

Section 219 (1) provides that in the event of arbitration proceedings becoming necessary, "either party may apply to the judge of the county court of the county in which the lands lie or in the province of Quebec or in any other part of Canada where there is no county court to a judge of the superior court for the district or place in which the lands lie to determine the compensation to be paid."

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"County Court" and "county" mean and include "District Court" and "district" in this Province.

Under the provisions of sec. 2 (7) (b) of the Railway Act, 1919, and of ch. 27 of the Statutes of Canada, 1919, "Superior Court" means, in the Province of Saskatchewan, the Court of Appeal and the Court of King's Bench.

The plain meaning and intention of these several provisions is that in the Province of Quebec, where there are no county Courts, a Judge of the Superior Court is the arbitrator, and on appeal from him is, for obvious reasons, to the Court of last resort in the Province; while in Saskatchewan the District Court Judge is the arbitrator, and an appeal from him is to a Superior Court, that is, either to the King's Bench or the Court of Appeal. The section seems to give concurrent appellate jurisdiction to these two Courts, and a party dissatisfied with an award may elect to which of these Courts he will appeal.

This opinion seems to be borne out by the following decisions under the earlier, but practically similar, provisions of the statute law. *Birely* v. *T. H. & B. Rly. Co.* (1898), 25 A. R. (Ont.) 88; *Ottawa Electric Co.* v. *Brennan* (1901), 31 Can. S.C.R. 311; *James Bay Ry. Co.* v. *Armstrong* (1907), 38 Can. S.C.R. 511, [1909] A.C. 624, 79 L.J. (P.C.) 11.

The appeal therefore, in my opinion, has been properly taken to this Court, and the motion to quash should be dismissed with costs.

Motion dismissed.

BYERS v. SINGLETON.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon, JJ.A. April 25, 1921.

COURTS (§IIA—151)—DISTRICT COURT — JURISDICTION IN ACTION FOR SPECIFIC PERFORMANCE OF CONTRACT FOR PURCHASE OF LAND—DISTRICT COURTS ACT, R.S.S. 1920, CH. 40, SEC. 27.

An action for the specific performance of a contract for the purchase of land is not "a personal action in contract or tort" within the meaning of sec. 27 of the District Courts Act, R.S.S. 1920, ch. 40, and the District Court has no jurisdiction to try such action. A counterclaim for rescission of such contract is also beyond the jurisdiction of the District Court.

APPEAL by plaintiff from a judgment of The District Court dismissing an action for money owing on a contract to purchase

land, and allowing defendant's counterclaim for rescission of the contract. Trial judgment set aside.

W. G. Ross, for appellant; *N. R. Craig*, for respondent.

HAULTAIN, C.J.S., concurs with TURGEON, J.A.

LAMONT, J.A.:—I agree with the conclusion of my brother Turgeon, whose judgment I have had an opportunity of reading.

The jurisdiction of the District Court is limited to that given by the District Courts Act, R.S.S. 1920, ch. 40. So far as applicable to this case, that jurisdiction is found in the following provisions:—

"26. The District Court shall not have jurisdiction in any of the following cases: (a) actions in which the title to land is brought in question.

27. Subject to the exceptions in section 26, a District Court shall have original jurisdiction: (a) in all personal actions in contract or tort where the debt, demand or damages claimed whether on balance of account or otherwise does not exceed $500."

The title to land is brought in question where there is a *bonâ fide* dispute as to the plaintiff's title in an action in which title is material.

In *Howorth* v. *Sutcliffe*, [1895] 2 Q.B. 358, at p. 364, 64 L.J. (Q.B.) 729, 44 W.R. 33, A. L. Smith, L.J. said:—

"In order to shew that the plaintiff could not sue in the county Court, he must establish the fact that a question of title did really and *bona fide* come in issue; not merely that the defendant had so pleaded that it possibly might do so, but that it in reality must do so; *Latham* v. *Spedding*, 17 Q.B. 440."

Once it appears that there is a *bonâ fide* dispute as to title involved in the action, the jurisdiction of the District Court is ousted and the action should be dealt with as provided in sec. 33; but that jurisdiction is not ousted, even although the plaintiff's title be a material part of his case, unless his title is disputed. If the defendant wishes to question the title, he should do so in his pleading, (sec. 32). *Stewart* v. *Jarvis* (1868), 27 U.C. Q.B. 467.

In the present case the defendant did not set up in her statement of defence that the plaintiff could not make title, nor did she at the trial ask leave to amend so as to bring the plaintiff's title in question; and on the argument before us her counsel expressly stated that he was not raising any question of title. The defence on which he relied was, that the contract had been induced by misrepresentation. This the

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trial Judge found to be the fact on evidence which justified the finding. That finding would, therefore, be a good defence to the plaintiff's claim if the District Court Judge had jurisdiction to entertain the claim. To give him jurisdiction, the action must be a "personal action in contract or tort." At common law actions were divided into three classes; real, personal, or mixed. These are defined in 1 Hals. at p. 32, as follows:—

"In personal actions the plaintiff claimed a debt, or sought to recover a chattel or damages in lieu thereof, or claimed satisfaction in damages for some injury done to his person or property. In real actions the plaintiff claimed the right to recover lands, tenements, and hereditaments. Mixed actions were suits partaking of the nature of both personal and real actions, some real property being demanded therein, and also personal damages for a wrong sustained."

See also 1 Corpus Juris, 932; *McConnell* v. *McGee* (1917), 37 D.L.R. 486, 39 O.L.R. 460.

A "personal" action, therefore, is one which formerly might have been brought in a Court of common law. At common law, however, a vendor could not sue for the purchase-price of land sold unless he had conveyed the property. In the absence of conveyance, his remedy was an action for damages in a common law Court or a bill for a specific performance in equity. Bullen & Leake, p. 285, note (m); 25 Hals. 409.

Here no conveyance was executed. The only "personal" action, therefore, which the plaintiff would have had at common law was an action for damages. That is not the action he has brought.

In *Landes* v. *Kusch* (1915), 24 D.L.R. 136, 8 S.L.R. 32, it was held that, where the property had not been conveyed, an action by a vendor for the balance of purchase-money was an action for specific performance. Such an action is not a "personal action in contract or tort" within the meaning of the sections above quoted. In my opinion, therefore, the District Court Judge had no jurisdiction to try the plaintiff's action.

The rescission of the contract seems also to be a matter beyond the jurisdiction of the District Court. It is not a "personal action" within the sections, but is a remedy given by equity. Without rescission of the contract there can be no recovery of the amounts paid under it by one party on the ground that the contract was induced by misrepresentation. *Yasne* v. *Kronsen* (1907), 17 Man. L.R. 301.

The return of the money paid is simply an incident of the

rescission, a restoring of the parties to their original position.

The appeal should, therefore, be allowed, and the judgment below set aside. The costs should go as set out in the judgment of my brother Turgeon.

TURGEON, J.A.:—In this case the plaintiff and the defendant were vendor and purchaser, respectively, in an agreement for the sale of a parcel of land described as Lot No. 5 in Block 8 in Mount Royal Addition to the city of Moose Jaw. The agreement was made on April 15, 1912, the purchase-price being the sum of $150, which the defendant agreed to pay in instalments upon dates set out in the instrument, in consideration whereof the plaintiff agreed to convey the said land to her by transfer, subject to the conditions and reservations in the original grant from the Crown. At the time the action was commenced there was still unpaid by the defendant under the agreement a balance of principal and interest amounting to $84.81. The plaintiff asked for judgment for this sum with interest until payment or judgment. The statement of claim contains the following paragraph:—

"7. The plaintiff has at all times performed and is now ready, able and willing to do all things by him to be done under the terms of the said agreement and in particular to convey and assure or cause to be conveyed and assured to the purchaser the said parcel of land by transfer, subject to the conditions and reservations in the original grant from the Crown as covenanted by him under the said agreement."

The defendant did not, in her pleadings, dispute the title of the plaintiff to the land or his ability to convey the same in accordance with the terms of the agreement, but she denied liability, on the ground that she had been induced to enter into the contract by a misrepresentation as to the situation of the land made to her at the time of the sale by one Bower, the agent of the plaintiff. She also set up a counterclaim asking for the rescission of the contract on account of the said misrepresentation and for a return of the money paid by her thereunder. The District Court Judge, after hearing the evidence adduced at the trial, held that the defendant was entitled to rescission of the contract on the ground of misrepresentation as alleged in her pleadings, dismissed the plaintiff's action with costs and allowed the defendant's counterclaim with costs. He directed a return to her of the money paid by her to the plaintiff under the agreement From this judgment the plaintiff appeals.

Upon the argument before this Court, counsel for the plain-

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tiff raised the objection that the subject matter of the defendant's counterclaim, which asked for a rescission of the contract, was beyond the jurisdiction of the District Court and should not have been entertained by the District Court Judge. The question of the jurisdiction of the District Court to deal with the plaintiff's claim was also discussed, the objection being that the title to land was brought in question within the meaning of clause (a) of sec. 26 of the District Courts Act, R.S.S. 1920, ch. 40.

To deal first with the objection of the claim, I find that the plaintiff's title to the land and his ability to convey are not disputed by the defendant either in the pleadings or in the proceedings before the trial Judge, and when a title is not in dispute it cannot be said to be "in question" under the provisions of the aforesaid sections of the Act (see per A. L. Smith, L.J., in *Howorth* v. *Sutcliffe*, [1895] 2 Q.B. 358, at p. 365).

I have come to the conclusion, however, that the plaintiff's action should not have been commenced in the District Court, because it is in its essence one which is beyond the jurisdiction of that Court. The plaintiff has not conveyed the land to the defendant, he merely asserts that he is ready, able and willing to convey, and then asks for judgment for the whole of the unpaid balance of the purchase-money ($84.81). An action so framed is an action for the specific performance of a contract for the purchase of land, (*Landes* v. *Kusch* 24 D.L.R. 136,) and is not "a personal action in contract or tort" within the meaning of clause (a) of sec. 27 of the District Courts Act, which section sets out the general jurisdiction of these Courts. A vendor finding himself in the position of the plaintiff in this case, has two remedies open to him, the one at law for damages, the other in equity for specific performance. In my opinion the District Court can grant the former, but not the latter, of these remedies. The vendor's position upon the default of the purchaser is concisely, and I think, accurately, dealt with in Dart on Vendor and Purchaser, 7th ed., at p. 1024, where the following statement is found:—

"A vendor has a mere pecuniary demand against his purchaser who refuses to complete, which may be enforced by an action at Law. If the conveyance has been executed, he may in such an action recover the purchase-money; if no conveyance has been executed, he has the land, and may recover the difference between the price agreed upon and the estimated price on a resale; and, in either case, any special damage which

he may have sustained by reason of the breach. His case, therefore, is not one in which the relief at Law is inadequate; but, upon the principle of affording mutual remedies, Equity has nevertheless entertained a vendor's bill in every case where the purchaser might sue for specific performance of the contract."

In the English County Courts Act a provision similar to ours giving the County Courts jurisdiction in "personal actions" has been held to mean such actions as may be brought in the King's Bench Division, (8 Hals., p. 428 and cases cited in footnote r). Another section of the English Act (which is not in our Act) expressly confers jurisdiction upon the County Courts in certain claims for specific performance, including the specific performance of contracts for the sale or purchase of land where the purchase-money does not exceed £500; but, save as is specially provided by this section, the Court has no jurisdiction in such cases at all, no matter how small the monetary value of the claim may be. *Reg.* v. *County Court Judge of Westmoreland* (1888), 58 L.T. 417, 36 W.R. 477; *Foster* v. *Reeves*, [1892] 2 Q.B. 255, 61 L.J. (Q.B.) 763, 40 W.R. 695. In this Province the jurisdiction of the District Courts is confined to "personal actions in contract or tort," save certain exceptions which do not include claims for specific performance.

I am also of the opinion that the subject-matter of the defendant's counterclaim is beyond the jurisdiction of the District Court. This counterclaim, being for the rescission of the contract made by the parties, is not a "personal action in contract or tort." Upon this question, as well as upon the previous question regarding the plaintiff's claim, I would refer to the Manitoba case of *Crayston* v. *Massey-Harris* (1898), 12 Man. L.R. 95, where the provisions of the Manitoba County Courts Act limiting the jurisdiction of those Courts, similar in effect to the provisions of our District Courts Act, were examined and interpreted. I agree entirely with the views expressed by Killam, J., and Bain, J., in the Manitoba case. See also *Yasne* v. *Kronsen*, 17 Man. L.R. 301. It may be of interest to note that, since the decisions in the above cases were delivered, the Manitoba Act has been amended so as expressly to confer jurisdiction upon the County Courts of that Province in claims for the cancellation of contracts on the ground of fraud or misrepresentation.

In arriving at these conclusions, I have had to consider the possible effect upon the District Court Judge's jurisdiction of sec. 37 of the Act, which is as follows:—

"37. Subject to section 38 every district Court in any action

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or proceeding in such Court shall have power to grant and shall grant such relief, redress or remedy or combination of remedies, either absolute or conditional, and give such and the like effect to every ground of defence or counterclaim equitable or legal as might and ought to be granted or given in the like case in the Court of King's Bench."

I have examined this section, and take it to mean that it is the duty of the District Court Judge to give effect to equitable principles when dealing with matters properly brought before him; but, in my opinion, it cannot be construed so as to extend the classes of such matters beyond the enumeration contained in clauses (a), (b) and (c) of the aforesaid sec. 27, which confers the jurisdiction in the first instance. To put the case shortly, I think that, save in respect to the observance of equitable principles as provided in sec. 37, a District Court Judge in this Province is in the same position as a Judge of a common-law Court in England before the passing of the Judicature Acts. *Foster* v. *Reeves*, supra.

Neither the claim nor the counterclaim, therefore, were lodged in the proper Court, and both parties are at fault throughout. The plaintiff by bringing his action for specific performance invited the defence and counterclaim which were lodged in reply. Neither side took objection in the pleadings or at the trial to the invalidity of the other's claim. Under the circumstances, I think the appeal should be allowed and the judgment of the trial Judge set aside, but without costs to either party either here or in the Court below.

Appeal allowed.

MARSHALL v. RYAN MOTORS Ltd.

Saskatchewan Court of Appeal, Haultain, C.J.S., McKay, J., and Embury, J. (ad hoc). January 30, 1922.

SALE (§IIC-35)—AUTOMOBILE — ARTICLE APPLICABLE FOR ONE PURPOSE ONLY—IMPLIED CONDITION AS TO FITNESS FOR THAT PURPOSE—NOT REASONABLY FIT—DAMAGES—SALE OF GOODS ACT, R.S.S. 1909, CH. 147, SEC. 16 (1).

An automobile is an article which is applicable to one purpose only, that is to run from place to place, and where a person purchases an "automobile" there is an implied condition within the meaning of the Sale of Goods Act, R.S.S. 1909, ch. 147, sec. 16 (1), that it shall be reasonably fit for that purpose. The fact that the purchaser has his mind made up as to the kind or class of car he wishes to purchase does not shew that he is not relying on the skill or judgment of the seller, unless it is proved that this class of car is not reasonably fit to run from place to place.

[*Preist* v. *Last*, [1903] 2 K.B. 148, 72 L.J. (K.B.) 657, followed; *Chanter* v. *Hopkins* (1838), 4 M. & W. 399, 150 E.R. 1484, distinguished. See Annotation, Sale of Goods, 58 D.L.R. 188.]

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MARSHALL v. RYAN MOTORS LTD.

McKay, J.A.

APPEAL by plaintiff from the trial judgment dismissing an action for damages for breach of an express warranty and in the alternative for breach of an implied warranty that an automobile was reasonably fit for the purposes of the appellant, (1921), 57 D.L.R. 305. Reversed.

P. G. Hodges, for appellant.

F. W. Turnbull, for respondent.

HAULTAIN, C.J.S. concurs with McKAY, J.A.

McKAY, J.A.:—In the judgment appealed from (1921), 57 D.L.R. 305 at p. 306 the trial Judge sets out some of the salient facts herein as follows:—

"By contract in writing, dated May 8, 1920, the plaintiff purchased from the defendant one new Overland automobile for the price of $1,445 and the purchase price was paid and the automobile delivered on said date.

From the outset, the automobile did not work well. The car was purchased on a Saturday and on the following Monday the plaintiff took it back to defendant's garage where some work was done on it. The next day plaintiff started for Gravelbourg in the car. The car again developed trouble on the road. Plaintiff took it to a garage in Gravelbourg. Returning to Regina on May 22 he took car to defendant's garage on May 25 and it remained there until May 29, undergoing repairs and adjustments. When then taken out it shewed some improvement, but a day or two later the old troubles—of which many were specified in the evidence—again developed, and it was again returned to the defendant's garage on June 1 and remained there until June 12, when one Albert Moore drove the car to Moose Jaw for plaintiff. There plaintiff got it and drove it to Gravelbourg on June 14. Plaintiff had so much trouble with the car on the road that he put the car up in a garage at Gravelbourg, and on June 15 wrote defendant that he was refusing the car and demanding either a new car, or a return of his money."

The appellant not getting a new car or the return of his money brought this action, claiming damages for breach of an express warranty in the contract, and, in the alternative, for breach of an implied condition or warranty that the car was reasonably fit for the purposes of the appellant. (Sec. 16 of the Sale of Goods Act, ch. 147, R.S.S. 1909).

The trial Judge dismissed the action and the appellant now appeals.

The reason given by the trial Judge for dismissing the action is not because he found the car was reasonably fit for the particular purpose for which the appellant required it, but be-

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cause he came to the conclusion that the obligation under the express warranty is limited to furnishing free of charge duplicate part or parts to replace faulty part or parts covered by the warranty, and there is no evidence that respondent failed to live up to said obligation; and also because he came to the conclusion that appellant did not rely on the skill or judgment of the respondent, and therefore there was no implied condition that the car would be reasonably fit for any particular purpose.

He did not make any express finding as to whether the car was or was not reasonably fit for the purpose for which the appellant required it. But from reading the above quoted part of his judgment, and the reasons given for dismissing the action, I have come to the conclusion that he must have concluded that the car was in fact not reasonably fit for the purpose for which the appellant required it. However, apart from this, I have come to the conclusion that it was not reasonably fit for the particular purpose for which appellant required it.

I do not think it is necessary for me to refer to the different parts of the evidence to shew why I come to this conclusion. Suffice it to say that the evidence of the appellant and his witnesses shew this, and they were all persons who had had considerable experience with automobiles, and the trouble was not the fault of the appellant.

The question to consider then is: Has the appellant any remedy under the circumstances of this case?

First, under the express warranty.

The contract, on its face, contains the following:—

"It is understood that the standard warranty as printed on the back hereof, applies, and that no other warranty, guaranty or representation whatsoever has been made."

On the back of the contract appears the following:

"Warranty.

Effective February 1st, 1919.

This warranty supersedes and cancels all previous warranties applying to Overland Willys-Six and Willys-Knight Motor Cars.

We warrant each new motor vehicle manufactured by us, whether passenger car or commercial car, against defects in material and workmanship, under normal use and service, for a period of three months after delivery of such motor vehicle to the original retail purchaser; our obligation under this warranty being limited to furnishing free of charge at the factory duplicate part or parts to replace any part or parts covered by

this warranty, which may be adjudged by our authorised inspectors to be faulty either in material or workmanship. This warranty shall not apply to any vehicle which shall have been repaired or altered outside our factory or branches so as, in our judgment to affect its stability or reliability; nor which has been subjected to misuse, neglect or accident, nor to a speed exceeding the factory rated speed, or loaded beyond the factory rated loaded capacity. We make no warranty whatever with respect to tires, rims, ignition apparatus, horns or other signalling devices, starting devices, generators, batteries, speedometers or other trade accessories, inasmuch as they are warranted separately by their respective manufacturers.

The right is reserved to change or modify this warranty without notice.

Willys-Overland Limited, West Toronto, Ontario."

Respondent's counsel contends that this is not a warranty of the respondent, but that of the manufacturer of the car, Willys-Overland Ltd., whose name appears at the bottom of the warranty. It is to be noted, however, that on the face of the contract, where it was signed on behalf of the respondent by P. S. Ryan, the manager of the respondent, the warranty is expressly referred to. In my opinion then, the respondent, by thus expressly referring to it and using it, made it its own and is bound by it.

The obligations, however, under this warranty are limited to furnishing free of charge at the factory duplicate part or parts covered by this warranty, which may be adjudged by its authorised inspector to be faulty either in material or workmanship. The trial Judge has found that there is no evidence of any failure on the part of the respondent to live up to said obligation, and I agree with this finding.

The appellant cannot, therefore, recover under the express warranty.

The next question to consider is, is the implied condition which appellant claims arose under sec. 16, sub-sec. 1 of the Sale of Goods Act, ch. 147, R.S.S. 1909, excluded by the express warranty?

The said subsection reads in part as follows:—

"16. Subject to the provisions of this Act and of any Act in that behalf there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale except as follows:—

1. Where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are re-

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quired so as to shew that the buyer relies on the seller's skill or judgment and the goods are of description which it is in the course of the seller's business to supply (whether he be the manufacturer or not) there is an implied condition that the goods shall be reasonably fit for such purpose."

Respondent contends that this implied condition is excluded by the provision of the express warranty above quoted, "that no other warranty, guaranty or representation whatsoever has been made" other than the standard warranty printed on the back of the contract.

I do not think the implied condition is excluded by these words, as there is no mention of "condition" anywhere.

In *Wallis, Son & Wells* v. *Pratt & Haynes*, [1911] A.C. 394, 80 L.J. (K.B.) 1058, the defendants, the sellers, stated in the sale note of certain seed represented as "common English sanfoin" that "the sellers give no warranty express or implied as to the growth, description, or any other matters; etc." The seed turned out to be "giant sanfoin." The Court held that these words did not exclude the implied condition that the goods shall correspond with the description.

It is however also contended that if it was an implied condition that the car should be reasonably fit for the purpose for which it was required, that condition on the acceptance of the car became a warranty by virtue of sec. 13, sub-sec. (b) ch. 147, R.S.S. 1909, and is excluded by the express warranty.

It is not necessary for me to decide whether the express warranty excludes all implied warranties, as, in my opinion, the implied condition did not become a warranty.

Section 13, sub-sec. (b) is as follows:—

"(b) Where a contract of sale is not severable and the buyer has accepted the goods or part thereof or where the contract is for specific goods the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated unless these be a term of the contract expressed or implied to that effect."

This subsection does not change the implied condition into a warranty, but simply restricts the warranty of the buyer to the remedy he would have under a breach of warranty, namely, damages.

This point was taken in *Wallis Son & Wells* v. *Pratt & Haynes, supra*, and it was there held it did not become a warranty. Chancellor Loreburn, at p. 395, said:—

"But if a thing of a different description is accepted in the

belief that it is according to the contract, then the buyer cannot return it after having accepted it; but he may treat the breach of the condition as if it was a breach of warranty—that is to say, he may have the remedies applicable to a breach of warranty. That does not mean that it was really a breach of warranty or that what was a condition in reality had come to be degraded or converted into a warranty. It does not become degraded into a warranty *ab initio*, but the injured party may treat it as if it had become so, and he becomes entitled to the remedies which attach to a breach of warranty."

The trial Judge has found that "merely asking for an automobile would in my opinion sufficiently make known to the seller the particular purpose for which it was required." *Preist* v. *Last*, [1903] 2 K.B. 148, and 72 L.J. (K.B.) 657, 51 W.R. 678.

I agree with this finding, as I think it comes within the principles laid down in *Preist* v. *Last* that where an article which is *prima facie* applicable to one purpose only is sold by its ordinary recognised description, then, inasmuch as there is a sale for a particular purpose which is understood by both the buyer and the seller, the fact that the buyer does not make known to the seller the particular purpose for which the article is required, otherwise than by the ordinary description of the article, does not exclude the contract of sale from the operation of ch. 71 sec. 14, sub-sec. 1 of the Sale of Goods Act, 1893, and prevent the implication of the condition that the article is reasonably fit for the purpose in question. Of course in the case at Bar there is the evidence that the appellant told the respondent he wanted to go to Gravelbourg on Monday, thus clearly making known to the respondent he wanted the car for the purpose of conveying him from place to place; the particular purpose for which this class of motor car is ordinarily used.

The trial Judge has, however, found that the appellant did not rely on the skill or judgment of the respondent. He comes to this conclusion not because he disbelieves appellant, or on conflicting testimony, but, as he says, on the conclusion he draws from the appellant's evidence. This Court has the same evidence as the trial Judge had before him, and while I realise an Appeal Court should not lightly disturb the finding of a trial Judge on a question of fact, yet, under the circumstances of this case, I think the Court has as equal opportunities as the trial Judge for coming to a correct conclusion on the evidence on this point. The appellant says that on Saturday afternoon, May 8, 1920, when he decided he would buy an Overland car, he went to the Willys-Overland Co., Ltd's place of business, and

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this company referred him to the respondent. He then went to the respondent's place of business, and there met McCullough, (an employee of the respondent), and told him he wanted to buy an Overland car,—light run about, two-seater car. He also told McCullough that he wanted to go to Gravelbourg on Monday. McCullough was not quite sure that he had an Overland in stock to make delivery that afternoon. During the discussion, Ryan, the respondent's manager, came in, and appellant also told him he wanted to buy an Overland car. "There was some argument as to whether they could make delivery of that car on Saturday afternoon, and Mr. Ryan said: 'Look here, if you give us your cheque for $1,445 we will make delivery of the car on Saturday afternoon.'" The appellant gave Ryan his cheque for $1,445, and he got the car that afternoon.

In the course of his judgment the trial Judge says:—

"He" (meaning the appellant) "went to the defendant with his mind fully made up as to the kind of car he wanted. I cannot distinguish this case from *Chanter* v. *Hopkins*, 4 M. & W. 399, 150 E.R. 1484."

With great deference, the trial Judge, in my opinion, laid undue stress on the fact that the appellant went to the respondent with his mind made up as to the kind or class of car he wanted. He seems to have thought that, because the appellant stated the kind or class of car he wanted, that shewed that he was not relying on the skill or judgment of the seller to supply him with one reasonably fit for his purpose. I do not think it has that effect. Appellant still relied on the skill or judgment of the respondent to sell him a car of that class reasonably fit for his purposes. Appellant did not select the particular car himself, he left that to the respondent, and the respondent was unfortunate in its selection of the particular car it sold to appellant. Were it admitted or proved that none of this class of cars is reasonably fit to run from place to place, I think it would be otherwise, because it could then perhaps be rightly held that appellant had selected a car that could not run. But in the absence of evidence, and the fact that respondent is a dealer in this class of car, I think I must assume this class of car is reasonably fit to run from place to place. In fact, respondent practically admits this when its manager Ryan said to appellant: "You know we have difficulty with probably an odd car in a shipment, and you are unfortunate in that you got a car that no doubt has been badly assembled."

In my opinion the case at Bar comes within *Preist* v. *Last*, *supra*, rather than *Chanter* v. *Hopkins* (1838), 4 M. & W. 399, 150 E.R. 1484.

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In the *Chanter* case, the defendant ordered from the plaintiff, the patentee, a furnace known as "Chanter's smoke-consuming furnace," for use in his brewery. It was a failure in defendant's brewery, but the evidence shewed this patent furnace was used to advantage in other places. It was held, no fraud being imputed to the plaintiff, that there was not an implied warranty on his part that the furnace supplied should be fit for the purpose of a brewery; but that, the defendant having defined by the order the particular machine to be supplied, the plaintiff performed his part of the contract by supplying that machine, and was entitled to recover the price of the patent right. In my opinion that case is distinguishable from the case at Bar, as there was evidence in that case that the furnace was used to advantage in other places, and that it was the defendant's own mistake in deciding to put this class of furnace in a place that was not suitable for it. In other words, the furnace could do what it was intended to do, namely consume its smoke, etc., if put in a proper place, but not in a brewery. It was unfit for that.

In the case at Bar, however, the car is not reasonably fit to go from place to place wherever you may try to do so. It is not that the car was put to some work for which it is unfitted, but it is not reasonably fit for any work that this class of car should ordinarily do. It was used for the ordinary purposes for which a car of this class is used, and it is not reasonably fit for that work. Hence, in my opinion, it comes within *Preist* v. *Last*, *supra*. In that case, Collins, M.R., at pp. 660, 661, thus states the facts and his conclusions:—(72 L.J. (K.B.)).

"A draper, who was not skilled in the matter of hot-water bottles, went to the shop of a chemist, whose business it was to sell hot-water bottles, and asked for a hot-water bottle, and an article was sold to him as a hot-water bottle. It seems to me that a contract was thereby made for the seller to supply the buyer with a bottle reasonably fit and capable of being used for the particular purpose for which a hot-water bottle is ordinarily used—that it, a bottle capable of holding hot water in circumstances in which hot-water bottles are ordinarily used, including that of being applied to the human body to give relief from pain. There was, therefore, it seems to me, in this case a purchase of a particular chattel for a particular purpose in circumstances which shewed that the buyer relied on the seller's skill or judgment. That is always, I think, an inference of fact depending on all the circumstances of the case, and all the facts must be looked at in conjunction in order to determine this question."

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In my opinion then there was an implied condition that the respondent should supply the appellant with a car that was reasonably fit for the particular purpose for which appellant required the car, namely, to convey him from place to place, and the respondent did not do so, as the evidence shews it was not reasonably fit to go from place to place, notwithstanding that respondent had put something like 156 hours working time on it, repairing and adding parts to it.

In appellant's letter of June 15, 1920, he gives 4 grounds of complaint. Even if these grounds of complaint were not the cause of the car not running properly, the appellant should not be restricted to these. He is not an expert and he does not know what is the real trouble. The fact remains that the car does not run properly, and it is an implied condition that the respondent should give him one that runs properly. With regard to ground of complaint No. 1, re the generator, the respondent contends that it is not liable for any defect in the generator, as it expressly excludes the generator from the warranty. Notwithstanding that it does not warrant the generator, the respondent would still be liable under the implied condition to supply a car that was reasonably fit for the purposes of the appellant.

Having come to the conclusion that the car was not reasonably fit for the purposes of appellant, and that respondent is liable under the implied condition, the question remains: what damages is the appellant entitled to, as, the property in the car having passed to him, he cannot reject it and repudiate the contract of sale?

The measure of damages is the difference between the value of the car which was delivered to the appellant at the time of delivery and the one which should have been delivered, namely, $1,445. Appellant paid $1,445 for the car delivered. He says it is worth nothing to him, but that he may be able to sell it for $500 or $600. Bowman, one of appellant's witnesses, says it might be sold for $800. The car had been in use for about a month, consequently these figures are, in effect, for the car as a second-hand car. There is no evidence to shew what it would cost to put it in proper running order. Upon the whole evidence I think a fair and reasonable amount to allow for damages would be $445.

The judgment of the trial Judge will therefore be reversed, and appellant will have judgment for $445, with costs of the action and of this appeal.

EMBURY, J. (ad hoc) (dissenting):—The claim of the plain-

tiff, appellant, is laid in damages for breach of warranty in the sale of an automobile by the defendants, respondents, to the plaintiff. The trial Judge dismissed the claim, and from this judgment the plaintiff appeals.

The evidence shews that the grounds of complaint by the plaintiff, appellant, are set forth in a letter written by him to the defendants, respondents, on June 15, 1920; these grounds being as follows:—"(1) The generator was not charging the batteries, and a voltage test shewed open or grounded armatures, which means the generator has to be taken out of the car. (2) The push rods making excessive noise, a thing you were supposed to fix. (3) The carburetter was out of adjustment nearly two full turns, which accounted for inability of the car to climb hills or make any speed. (4) a 12 inch screw-driver was left in the pan of the engine, which luckily did not jam the fan-belt drive."

It will be convenient to consider these 4 grounds separately and in order.

As to the first: The contract between the parties is a written one, and there is a clause respecting warranty from which the following is an extract: "we make no warranty whatever with respect to ..... generators .....". It follows that the first ground of complaint cannot be relied upon.

As to the second: It is, I think, sufficient to say that it is purely trivial, and the evidence with respect thereto is not such as lays a foundation for awarding damages.

As to the third: This alleged defect is one which can be remedied by a simple adjustment, and involves no structural defect in the automobile. I think it must fail.

As to the fourth: This objection is not intended to be taken seriously.

In addition to these four grounds of complaint, there is the general one that the automobile was not fitted for the purpose for which it was to be used; and the appellant contends that this brings the case within the scope of sec. 16 of the Sales of Goods Act, (R.S.S. 1920, ch. 197), which reads as follows:—

"16. Subject to the provisions of this Act and of any Act in that behalf there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale except as follows:—1. Where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required so as to shew that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or

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not) there is an implied condition that the goods shall be reasonably fit for such purpose.''.....

But the trial Judge, after hearing the evidence, has found as a fact that the plaintiff did not rely on the defendant's (respondents') skill and judgment.

It has been urged that the finding of the trial Judge in that respect is erroneous, but I am of the opinion that the finding is in accordance with the evidence. Firstly, for the reasons set out by the trial Judge, and, next, from the manner in which the plaintiff actually made the purchase. It seems to me that his conduct shewed that at this time he distinctly did not rely on the skill of the defendants, and his conduct would further, in my judgment, lead them to believe that he did not so rely. He went into the shop and told them that he wanted to buy the very type of automobile which he purchased, naming it. He was told that they had not such an automobile in stock and doubted if they could deliver it on the Saturday afternoon. Then they said if he would give them a cheque for the purchase price (which he did) that they would undertake to deliver it. He remained in the shop. In the course of about an hour the defendants came in with an automobile, the batteries were connected to it, the horn was adjusted, the plaintiff took delivery and went away with the car. Clearly he gave the defendants no opportunity to exercise their skill and ability in regard to the car at all. His conduct in my judgment, instead of going to shew that he relied on the skill and ability of the defendants, shews unmistakeably that he placed no such reliance whatever. Accordingly, I am of opinion that the finding of fact of the trial Judge on this point should not be disturbed; and that the appeal should be dismissed with costs.

Appeal allowed.

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Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and McKay, JJ.A. April 18, 1922.

COSTS (§I — 18) — *Action in King's Bench — Reversed on appeal—Damages $445 allowed—Formal judgment entered —Appeal—Rule 683.*]—Application to amend judgment so as to permit appellant to tax his costs below on the King's Bench scale under Rule of Court 683 Sask., in an action brought in the Court of King's Bench (1921), 57 D.L.R. 305, which was reversed in the Court of Appeal (1922), 65 D.L.R. 742, where damages to the amount of $445 were allowed.

P. G. Hodges, for appellant; *R. E. Turnbull*, for respondent.

HAULTAIN, C.J.S.:—This action, which was brought in the

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Court of King's Bench (1921), 57 D.L.R. 305, 14 S.L.R. 138, was dismissed by the trial Judge. On appeal the judgment below was reversed (1922), 65 D.L.R. 742, and damages to the amount of $445 were awarded to the plaintiff, with his costs of appeal and in the Court below.

The judgment in appeal was delivered on January 30, last, and formal judgment was drawn up, and entered on February 1 by the appellant, who proceeded to tax his costs of appeal on February 20. On March 18 notice was given of the present application to amend the judgment so as to permit the appellant to tax his costs below on the King's Bench scale, under Rule of Court 683.

In my opinion we have not been shewn and the evidence does not disclose, any good reason why the appellant should be allowed to escape the ordinary consequences of bringing his action in the wrong Court, and I would therefore dismiss the application with costs.

I also think that this application should have been made at the earliest possible moment after judgment was delivered. The necessity for such an application as this could not reasonably have been foreseen before judgment was delivered. An application for King's Bench costs in an action brought in the King's Bench is not contemplated by R. 683 until the plaintiff has recovered judgment for a sum not exceeding $500, but the application should be made as soon as possible after he has recovered such a judgment, and not, as in this case, after an interval of more than a month and a half, while in the meantime formal judgment has been deliberately entered by the appellant himself.

LAMONT, J.A., concurs with HAULTAIN, C.J.S.

MCKAY, J.A.:—This is an application for an order directing the taxing officer as to the particular scale of costs upon which the plaintiff's bill of costs in connection with the trial of this action is to be taxed.

The plaintiff brought this action for damages, claiming $1445, the amount he paid defendant for the car, which he alleged was worthless and valueless. At the trial the plaintiff's action was dismissed with costs, 57 D.L.R. 305, and on appeal therefrom this Court reversed the trial Judge's judgment, and gave judgment for the plaintiff for $445, with costs of the action and of the appeal, 65 D.L.R. 742.

The onus is on the plaintiff to shew why King's Bench Rule 683 should not apply in this case. His counsel contends that if the plaintiff had reasonable grounds for believing that he would recover more than $500 damages, he should be allowed his

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costs on the King's Bench scale, but he has not furnished this Court with any grounds for so believing. The only evidence as to value of the car on behalf of the plaintiff was that given by plaintiff and witness Bowman at the trial, and I can find nothing in that evidence that would justify plaintiff in believing he would get more than $500 damages.

The application should be dismissed with costs.

Application dismissed.

Re NOEL; Ex parte TOWN OF GRAVELBOURG.

Saskatchewan King's Bench, MacDonald, J. February 27, 1922.

BANKRUPTCY (§ II—20)—*Business taxes—Right of Crown to priority.*]—Appeal in an application under the Bankruptcy Act. Affirmed.

[See Annotations, 53 D.L.R. 135, 59 D.L.R. 1.]

P. H. Gordon, for Town of Gravelbourg.

C. C. Owen, for trustee.

MACDONALD, J.:—In my opinion the facts herein are substantially the same as those in *Re F. E. West & Co.* (1921), 62 D.L.R. 207, so far as the latter relate to business taxes. With the decision in *Re West & Co.* I agree.

Whatever meaning, if any, can be given to the expression "assignee for the benefit of creditors" as the same occurred in sec. 449 of the Town Act, R.S.S. 1920, ch. 87, before its amendment at the last session of the Legislature (which amendment does not affect this case), now that the Assignments Act, R.S.S. 1909, ch. 142, has been repealed, the expression cannot, in my opinion, include "trustee in bankruptcy." The expression might be said to be fairly descriptive of the trustee in the case of a voluntary assignment under the Bankruptcy Act, 1919 (Can.), ch. 36, but it is not descriptive of the trustee in bankruptcy under a receiving order. But it seems to me that it cannot be contended that the scheme of distribution should differ in these two cases under the Bankruptcy Act. As the expression is not one used in the Bankruptcy Act, and is not descriptive of a trustee under a receiving order, it cannot be held to mean or include a trustee in bankruptcy even in the case of a voluntary assignment.

Appeal dismissed. No costs.

GILLINGHAM v. CITY OF PRINCE ALBERT.

Saskatchewan King's Bench, Taylor, J. May 2, 1922.

HIGHWAYS (§ IVA—156)—*Sidewalk—Lack of repair—Knowledge of Municipality—Insufficient inspection—Injury to pe*

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destrian—Liability of Municipality for damages—Amount of compensation—Sufficiency of notice.]—Action by a widow to recover damages for injuries sustained by the alleged failure of the defendant to keep a plank sidewalk in the city in repair.

G. A. W. Braithwaite, for plaintiff.

C. E. Baker, for defendant.

TAYLOR, J.:—The plaintiff, a widow, residing for some years in Prince Albert, brings action to recover damages for injuries sustained on or about August 27, 1921 by alleged failure to keep a plank sidewalk in the city of Prince Albert in repair.

The accident happened on the north side of what is known as 20th St., between Fifth and Sixth Avenues, west of Central Avenue. As she was proceeding to pass a young man coming from the opposite direction, he stepped on one end of a loose plank, causing it to fly up so that she stepped in the hole, was thrown, and has been badly injured in consequence. Prior to the accident, she was in excellent health. Owing to the fall, her knee was dislocated, she was bruised on the side, and has endured much pain and suffering, and will never fully recover, though I am satisfied that with the law suit off her mind she will improve considerably more than she has done. At the time of the accident she was 63 years of age, and then earned her own livelihood as a house-keeper. Since that time she has lived with a married daughter, to whom she paid $5 a week as long as her funds held out.

Beyond question, the sidewalk was out of repair, and the only answer of the corporation to the liability on this ground was that reasonable diligence on the part of the city had failed to discover the particular want of repair, and that they were not, therefore, responsible therefor. On consent of counsel, I inspected the sidewalk in question. The evidence shewed that it had been down for a great number of years. Inspection of the sidewalk, so far as could be ascertained from an observation, without raising it, discloses a very bad condition. The grass has so grown up along the sides that, without raising the sidewalk, one could not get a view of the state of the timbers or stringers underneath. The planks on top have been replaced from time to time until there would appear to be about as much replaced planking as original planking; and the planks are not, as suggested by a witness called by the city, of equal widths, but of varying widths from 2 inches to about 12 inches, of different dimensions and laid irregularly, leaving a most uneven surface . It is a poor walk. There were some loose and worn planks when I walked over it on the day of the

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trial. It is on one of the main residential streets in the city, fronting large residences, where a sidewalk in poor condition would be least expected.

The method of inspection followed by the city, simply having a workman walk over the sidewalk at certain intervals without from time to time raising it so as to discover the state of the stringers underneath, is not adequate. It would only shew the defects in the boards on which he happened to tread, and then only when the stringers had become so rotten that they would no longer hold the nails. In other words, when the sidewalk got so bad that it was actually dangerous to pedestrians, the defect might be discovered, but the system would fail to avoid danger. The statute requires the walk to be kept in repair, which has always been interpreted to mean that a municipality must foresee the possibility of wear and avoid danger.

It was suggested that this particular sidewalk had received special attention just prior to a convention in the summer of 1921 at Prince Albert which, meeting along that street, would impose upon it an extra heavy traffic. There was no suggestion that following the convention it had received any special attention, and the suggestion that this particular plank became loose owing to the heavy traffic on the night in question is but a rash guess. I am satisfied that ordinarily speaking the sidewalk was out of repair at the time of the accident within the meaning of the statute, and that this want of repair was the cause of the injury to the plaintiff. There was either a rotted plank on a good stringer or a good plank on a rotted stringer, unless both were rotted.

As to special damages, I would allow only $60. If the plaintiff requires to "take the air" she ought to contrive a less expensive method than in taxicabs. The amount I have allowed for special damages covers only her medical attention and medicines. And in the item allowed for general damages I have taken into consideration the fact that since the accident she has had to be taken care of and will have to be taken care of to a certain extent during the rest of her life. She will improve considerably, but not completely. I assess the general damages at $1,400 making a total for general and special damages of $1,460.

The defendant's counsel argued that the notice of accident was insufficient. The notice duly stated that the plaintiff met with an accident caused by a loose plank in the sidewalk on 20th St. between Fifth and Sixth Avenues in the City of Prince Albert, causing personal injury. It is objected that the notice

fails to shew whether the Avenues referred to were east or west of Central Avenue, and what personal injuries she sustained. The city has not been prejudiced. The city's own books shew that two days later, that is on August 29, a repair was made to this particular sidewalk, though not what repair. It was not shewn that any enquiry was made of the plaintiff or any particulars obtained nor that there is a plank sidewalk between Fifth and Sixth Avenues east on 20th St. In the absence of any evidence that the corporation was in any way misled or deceived, or unable to discover to what portion of its works the notice referred, and in the absence of objection taken at the time, it seems to me that it would be absurd to suggest that the city should escape its statutory liability on the ground of the omission of the word "west," likely a typographical error. Nor do I follow the argument that the notice must specifically state which portion of the body, ligaments, tissues or nerve centres, were injured, and describe in detail the particular injury. It is notice of the claim and of the injury complained of that is required to be given by the statute, and the statute has, in my opinion, been complied with.

It was also argued that a certain agreement entered into between the City of Prince Albert and its debenture holders, which has received the approval of the Legislature, absolves the corporation from responsibility. There is nothing in the Act nor in the agreement, that I can discover, that relieves the municipality of its statutory obligation to keep its sidewalks in repair. It is true that its expenditures are limited, but no evidence was tendered to shew any financial inability on the part of the corporation to keep its walks in repair. In fact, the evidence was directed rather to shew that what the officials in charge consider as reasonable inspection had failed to disclose the particular want of repair. As I have previously intimated, in my opinion an inspection made by simply walking over the top of this sidewalk would fail to disclose any but the most obvious defects, and unless the inspector happened to step on the particular board he would notice nothing wrong Nothing can be inferred from the fact that a board might be of different thickness or not parallel, or otherwise out of position, because the original planking has been replaced by boards of all widths and dimensions, and put in at different angles.

Judgment for the plaintiff for $1,460 and costs.

Judgment for plaintiff.

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IMPERIAL LUMBER YARDS Ltd. v. FERGUSON; Re COCKSHUTT PLOW Co.

Saskatchewan King's Bench, Maclean, J. April 18, 1922.

CHATTEL MORTGAGE (§ IIA—5)—*Validity—Address of mortgagee not stated in the mortgage itself—Address of agent of mortgagee stated in affidavit of bonâ fides—Sufficiency—Chattel Mortgage Act R.S.S. 1920 ch. 200—Construction.*]—Appeal from a local Master in an action arising out of garnishment proceedings. Affirmed.

P. H. Gordon, for plaintiff.

R. W. Hugg, for claimant.

MACLEAN, J.:—This is an appeal from the local Master at Cypress arising out of garnishment proceedings. There was paid into Court in this action under garnishee issued by the plaintiff the sum of $1,905.32. The money is the proceeds of grain sold by the defendant, and which grain was subject to a chattel mortgage made by the defendant in favour of the Cockshutt Plow Co. Ltd. Counsel for the plaintiff contends that the chattel mortgage to the Cockshutt Plow Co. is defective in that it does not state the address of the mortgagee, and that the consideration is not properly expressed. Counsel for the plaintiff also contends that the grain was sold by the mortgagor in the ordinary course of business and the mortgagee has no claim against the proceeds of the grain sold. Counsel for the Cockshutt Plow Co. contends that the plaintiff being a creditor not suing on behalf of himself and other creditors, and not being an execution creditor, is not in a position to attack the validity of the mortgagee.

The word "creditor" as defined in our Chattel Mortgage Act R.S.S. 1920, ch. 200, extends to creditors suing on behalf of themselves and other creditors as well as to execution creditors. That definition would appear to exclude a creditor who is not of one of the classes of creditors mentioned; and it was contended that the decision in *G.T.P.* v. *Dearborn* (1919), 47 D.L.R. 27, 58 Can. S.C.R. 315, did not apply to our Act, where the word "creditors" is defined. That decision was followed by the Court of Appeal in *Procter* v. *Anderson* (1921), 60 D.L.R. 684. But it would appear from a reading of that decision that the creditor in question was of one of the classes included in the definition of "creditors" in our Act. It is not necessary to come to any conclusion, however, in respect to the contention that the plaintiff has no status to attack the chattel mortgage, as I find the chattel mortgage was not defective. It is true the address of the mortgagee is not stated in the chattel mortgage itself, but in the affidavit of *bonâ fides*

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the address of the agent of the mortgagee is stated, and that, in my opinion, is a sufficient address to satisfy the statutory requirements with respect to the address of the mortgagee. The address of the agent of the mortgagee is stated as "the city of Regina." Counsel did not contend that that address was not sufficiently definite. The consideration expressed in the mortgage is an extension of time for payment, and one dollar, and that, in my opinion, is sufficient consideration.

In the mortgage, the mortgagor purports to sell and assign to the Cockshutt Plow Co. all the wheat at that time in the granary on a certain quarter section of land, and the mortgage, therefore, is a conveyance from the mortgagor to the mortgagee of the grain in question, subject of course to the usual provision in respect of payment of the amount secured. The wheat was sold by the defendant to the Lake of the Woods Milling Co., and the proceeds of the sale have been paid into Court. There is no dispute that the money in Court is the money paid for the grain in question, and as the grain was under the mortgage the property of the Cockshutt Plow Co. and the mortgage is valid as against creditors, the Cockshutt Plow Co. is entitled to the proceeds of the grain. *Goodfallow* v. *Trader's Bank* (1890), 19 O.R. 229; *Goebel* v. *Can. Bank of Commerce* (1921), 61 D.L.R. 402, 14 S.L.R. 451. The Cockshutt Plow Co. is, therefore, entitled to payment out of so much of the money in Court as will pay the promissory note to which the mortgage is collateral security. The balance of the money will be paid out as ordered by the local Master.

The appeal is dismissed with costs against the plaintiff, but not against other claimants who did not join in the appeal.

Appeal dismissed.

HODGERT AND BOYD v. PORTER.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon, JJ.A. April 18, 1922.

INJUNCTION (§ II—134) — *Interlocutory — Continuance — Nothing to protect—Accounting between parties.*]—Appeal from an order refusing to continue an interim injunction. Affirmed.

R. D. McMurchy, for appellants.

P. H. Gordon, for respondents.

The judgment of the Court was delivered by

LAMONT, J.A.:—This is an appeal from an order refusing to

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continue an interim injunction. The plaintiff Boyd is the owner of the north half of sect. 4, tp. 17, r. 20, west of the 2nd meridian. In May, 1921, he leased the said land and a dairy business to the defendant. The agreement was that the grain grown on the land and the proceeds of the dairy business were to be divided equally between them, but Boyd was to put the place in repair and to pay one-half of certain expenses in connection with both farming and dairying operations. Boyd found himself unable to perform his part of the agreement. The defendant says Boyd told him to go ahead and carry on the necessary operations and make the payments on behalf of both of them, and reimburse himself out of his (Boyd's) share of the crop. He further says that in August Boyd came to him and told him to market the crop when cut, and to give him whatever might be coming to him. This Boyd has not denied. On September 24, 1921, Boyd assigned his share of the crop to the plaintiff Hodgert. The crop consisted of wheat and oats. The defendant delivered all the wheat at the elevator in his own name. On the morning of December 23, the defendant sold the wheat, and some time later in the day he was served with an interim injunction restraining him from selling or otherwise disposing of Boyd's share of the crop. In January, 1922, an application was made to continue the injunction until the trial of the action. This application was refused, and from that refusal the plaintiffs now appeal to this Court.

On the argument before us it was admitted by counsel for the plaintiffs that there is now no grain of any kind upon the land demised, nor is there any evidence that any of it is in existence. Further, there is no evidence that the defendant disobeyed the interim injunction while it was in existence. He admitted that he had used about one-half of the oats, but he was entitled to one-half in any event. There being now no grain to protect, we cannot enjoin the defendant from interfering with the grain. Furthermore, I agree with the Judge in Chambers that this is simply a matter of accounting between the parties. As Boyd has not denied the defendant's statement that he was to market the entire crop and give him the balance of his share after the defendant had reimbursed himself for monies advanced or paid out on Boyd's account, we must, for the purpose of this application, consider such to be the fact. On the material before us, therefore, the only portion of the crop to which Boyd would be entitled would be the balance after the defendant had been reimbursed for his outlay on Boyd's account. I am, therefore, of opinion that the Judge

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was right in refusing to continue the injunction.

Two days after argument on the motion, but before the Judge in Chambers had handed out his judgment, counsel for the plaintiffs applied to be allowed to file further material; presumably, I take it, to deny the statements of the defendant above referred to. The application was refused. Of this refusal the plaintiffs now complain. In my opinion, when the argument was finished and the Judge had reserved decision, the case was closed, unless the Judge in his discretion chose to open it up. I would dismiss the appeal with costs.

Appeal dismissed.

PARRY v. DUNCAN.

Saskatchewan King's Bench, Brown, C.J.K.B. July 6, 1921.

CONTRACTS (§II A—128)—*Option to purchase land—Time—Signing of peace on conclusion of war—Construction.*]—Action for a declaration as to the date of expiry of an option to purchase land.

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

A. L. Gordon, K.C., for defendant.

BROWN, C.J.K.B.:—In this case the agreement specifically states that the option to purchase is to be open for acceptance by the purchasers "up to the end of one year after the signing of peace upon the conclusion of the war now being waged by Great Britain against Germany and other countries."

The "other countries" with which Great Britain was waging war at that time were, according to the admissions, Austria and Turkey. These parties who sought this privilege were evidently volunteers for service for the war, which would include service for the war against all those countries with which Great Britain was engaged at that particular time. The conclusion of the war, therefore, that would be in contemplation would be the signing of the armistice, and the volunteer would not be released from service until the signing of the last armistice. The year during which the option is to run is not a year from the signing of the armistice or conclusion of the war, but a year after the signing of peace; and therefore, according to my judgment, this would be the signing of the last peace treaty that was signed between Great Britain and these enemy countries. The last peace treaty that was signed, according to the admissions, was signed on August 10, 1920. Therefore the purchasers would have the right to exercise their option any time within a year from August 10, 1920. The repudiation having taken place within that time, there will be a reference, as is contem-

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plated by the admissions, in order to ascertain what damages, if any, the plaintiffs have suffered. The question of costs will be reserved abiding the result of that reference.

I do not wish to be understood as holding that the signing of the peace rather than the exchange of ratifications was the date from which this year of option began to run. It is not necessary for me to decide that point, in the view that I take of this case.

VONDA R.C. SEPARATE SCHOOL v. TOWN OF VONDA.

Saskatchewan District Court, Dickson, District Court Judge. February 1, 1921.

SCHOOLS (§IV—74)—*Taxes—The School Assessment Act 1915 (Sask.) ch. 25, sec. 43—Construction—Separate school—Claim for alleged share of taxes under—Service of notice.*]—Action by a Roman Catholic school district claiming a share of taxes levied and received from certain companies. Action dismissed.

A. Doiron, for plaintiff.

G. H. Barr, K.C., and *H. A. Ebbels*, for defendant.

DICKSON, Dist. Ct. J.:—Plaintiff is a Roman Catholic Separate School District. Defendant is a town within the meaning of the Town Act, 1916, (Sask.) ch. 19. The lands embraced in the school district lie partly in the municipality of the town of Vonda and partly in the rural municipality of Grant No. 372. The Saskatchewan Co-operative Elevator Co. and the Saskatchewan Co-operative Creameries Co., are companies subject to the provisions of the School Assessment Act, 1915, (Sask.) ch. 25. Each of these companies in the year 1919 had its head office in Regina, and had a place of business and property liable to assessment for school purposes in the town of Vonda. In the year above mentioned each of these companies was assessed by the town for public school purposes only and paid in taxes therefor, the elevator company, $88.28, and the creameries company, $123.17. No portion of these sums went to the plaintiff. In the statement of claim plaintiff alleges that it has not received its share of the taxes pursuant to sec. 43 of the School Assessment Act, which according to the computation there set out would amount to $126.02. The plaintiff claims: (1) Payment of the sum of $126.02; (2) In the alternative an account of all moneys had and received by defendant for the plaintiff's use and payment of the amount found due on the taking of such account.

By letter dated April 28, 1919, plaintiff made a demand upon

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the town of Vonda, in pursuance of a resolution in that behalf for the sum of $3,095 required "to finance the school during the present year." In accordance with this demand all proper steps were taken both by defendant and by the Adjustment Board, and all persons interested were notified of the adjustment. Defendant in due course proceeded with the necessary assessment and levy and paid to plaintiff the full amount demanded. Counsel for defendant took exception to the demand on two grounds, namely, that it was sent too late in point of time and also that it was not in proper form. Sec. 35 of the School Assessment Act provides that the demand shall be made "on or before the fifteenth day of March in each year" and (subsec. 3) that there shall be attached to the application "an estimate shewing details." I take this as meaning that the estimate shall shew in detail the purposes for which the amount demanded is required with the sum to be allocated to each. As to both of these points counsel was, I think, correct but I do not think there is anything to be done since defendant acted on the demand and plaintiff accepted the money. The amount asked for was paid in full. There is no greater obligation upon a municipality under the School Assessment Act than to procure for the school district through the proper channels the amount of its annual demand, and pay it over. When that is done the whole obligation is discharged. This appears to me to be the whole of this case. The action is for money had and received. There is no evidence that there was any more than what was paid in due course.

I should feel justified in not going any further but such great stress was laid upon certain steps taken by the plaintiff with the object of securing whatever benefit might be derived under sec. 43 of the Act that I am impelled to deal with that question also. On February 19 or 20, 1919, H. E. Brunelle, then secretary-treasurer of the plaintiff school district, went to Regina where the head offices of the two companies are. He then "served" the creamery company with a notice as he says delivering it to "F. Praguall, treasurer of the company." At the same time he served the elevator company by delivering the notice to "F. E. Peterkin, auditor of the company." It is contended for the defendant that the alleged service was bad in each case because there is no evidence as to the status of either Praguall or Peterkin with reference to the respective companies. Sub-section 3 of sec. 43 of the School Assessment Act governs the manner of service. It may be effected by serving upon any officer or agent of the company upon whom a writ may law-

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fully be served for the company. Praguall who gave the evidence says that he was at the time of service upon him, the treasurer of the creamery company. The treasurer is one of the officers named in R. 18, sub-sec. 3, so there is no doubt of the sufficiency in that case. I have some doubt about the elevator company. In the first place an auditor is not one of those named in the rule and from the nature of his office he does not appear to me to be a "representative" of the company. I should take that to mean one who in the ordinary discharge of his duties in the employ of the company comes in contact or deals with the public on its behalf. One may properly assume that he would bring to the notice of the executive any document served upon or received by him for the company. He would be remiss if he did not do so. One might reasonable expect an auditor to do likewise but I do not think he would come within the meaning of the word "representative." I cannot find any authority on this point. It is a matter of great importance since if the service is bad the notice is quite ineffectual so far as the elevator company is concerned. With some doubt I hold that there was no service on this company.

The notice to the creamery company (I may say that the notices are practically identical) was signed by plaintiff's chairman and secretary-treasurer and under its seal. It conforms with sec. 43 of the Act. No answer was made to this notice. The next step taken by the plaintiff is disclosed by Ex. 2 which is as follows:—

Vonda Separate School No. 18
H. E. Brunelle, Secretary-treasurer,
Vonda, Sask., December 24th, 1919.

The Town Clerk, Vonda, Sask.
Dear Sir:

Re Sask. Co-operative Elevator Co.
Re Sask. Co-operative Creameries Co.
and division of taxes between public and
separate schools of Vonda.

On the 19th day of February, 1919, I served the above two Companies with notice pursuant to Section 43 of the School Assessment Act of Saskatchewan. According to the certified lists of shareholders in the above two companies the Separate School of Vonda is entitled to 72/179 of the taxes levied in the year 1919 for school purposes and the same Separate School of Vonda is entitled of 344/517 of the taxes levied for the year 1919 and received from the Saskatchewan Co-operative Elevator Co. and the Saskatchewan Co-operative Creameries Co. respec-

tively. I understand that out of the taxes received from the Co-operative Elevator $88.28 were for school purposes and according to the above figures the Vonda Separate School is entitled to $35.50 out of that $88.28.

I understand that out of the taxes paid by the Saskatchewan Co-operative Creameries Co. $123.17 were for school purposes and the Vonda Separate School is entitled to $80.02 out of it. Kindly arrange to let the Vonda Separate School have the sum of $115.52 and oblige. Yours truly,

[Sgd.] H. E. Brunelle.

This letter which apparently was received in due course, was the first intimation defendant had that any action had been taken by plaintiff under sec. 43. In the meantime plaintiff had made its demand for money required for school purposes for the current year, all the necessary steps had been taken, assessment made, taxes levied and at the time when the above letter was written a substantial part if not the whole of the amount demanded had been paid over. The demand was made some two months after service of the notice under sec. 43 and although plaintiff knew, as I think I may assume, that the companies had not given any answer, it said nothing about it. The assessment roll was completed on May 31, 1919; under it both companies were assessed for public school purposes only, but plaintiff took no exception to it. Instead they waited until the end of the year when the assessment roll could not be altered before advising defendant of the action they had taken.

Section 43, sub-sec. 2, provides that unless and until any company *to which notice has been given* under that section, gives a notice in pursuance of sec. 42 its assessable property shall be rated and assessed for the public school district and when collected the taxes shall be divided between the public and separate schools in manner therein stated. In the case at Bar defendant had no knowledge of the notice until on or after December 24, 1919. There is nothing in the Act about notifying the municipality of the giving of the notice to the company, but it seems to me that the person seeking to benefit by that section would reasonably be expected to do what was necessary to make it effective. If the municipality has no knowledge of the notice before the levy at the latest, it would not be possible to make the distribution according to this section. To do that the whole levy would need to be recast.

As intimated in *Gratton Separate School* v. *Regina Public School* (1917), 35 D.L.R. 158, and on appeal 38 D.L.R. 217, 10 S.L.R. 455, the company would be compellable to make the

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statement contemplated. The whole matter could also be adjusted in the making of the assessment roll.

It seems to me that plaintiff in suing the municipality is entirely wrong, and has misconceived its remedy if any exists under the circumstances. Action dismissed with costs.

Re THE LAND TITLES ACT; ROYAL TRUST Co.'s CASE.

Saskatchewan, Milligan, Master of Titles. September 15, 1921.

LAND TITLES (§III—37)—*Power of attorney—Sufficiency of for registration under Land Titles Act R.S.S. 1920 ch. 67.*]—Reference under sec. 159 of the Land Titles Act, R.S.S. 1920 ch. 67, as to the registration of a certain transfer, executed under a power of attorney.

MILLIGAN, M.T.:—The transfer in question is executed by the assistant manager and a member of the local advisory board of the Royal Trust Co. under a power of attorney from the Royal Trust Co. registered in the Yorkton land registration district as A.P. 2064 on February 16, 1921. This power of attorney, which has been registered in most if not all of the land registration districts of the Province, after reciting the facts in connection with the corporation and its branch office at Winnipeg and setting out the authority which its manager, assistant manager and local advisory board have in carrying on the transactions and business of the company in the Provinces of Manitoba, Alberta and Saskatchewan, provides for the appointment of the manager or assistant manager and the chairman or one of the members of the Local Advisory Board as the company's agent to execute all documents in the following words:—

"NOW THESE PRESENTS WITNESSETH: that the Company does hereby appoint the manager or assistant manager for the time being and from time to time of its said branch at Winnipeg, and the chairman or one of the members for the time being and from time to time of the Local Advisory Board aforesaid, for it and in its name, place and stead, and on its behalf to sign, execute and deliver any and all documents, instruments and deeds requiring execution by, or the signature of the company relating to business transacted or carried on, or conducted by, through, or at its said Winnipeg branch, including business in which the company is acting in a fiduciary or representative character, or to property (whether real or personal, and including liens, charges, caveats, mortgages and encumbrances thereon) situated in any of the said three Provinces of Alberta, Manitoba or Saskatchewan, and all such documents, instruments and deeds

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signed by the said manager or assistant manager and by the chairman or a member of the Local Advisory Board aforesaid, under the seal or seals of the executing officers shall have full force and effect and be binding upon the company in the same manner and to the same extent as though executed under the corporate seal of the Company."

The questions admitted by the Registrar are as follows:—

(1) Should I de-register said Transfer No. A.S. 225 and restore the register as it was before registration by destroying certificate of title 166 S.Y. and reviving certificate of title 509-111 and doing other necessary things? (2) Should I refuse to register such instruments in the future? (3) Should I de-register said power of attorney No. A.P. 2064 for lack of definiteness? (4) Would it not be well to prohibit the registration of all powers of attorney except those which put the agent in the actual shoes of the principal and allow him to do everything the said principal could do as to (1) any land (general) and (2) a particular piece of land (special)?

In my opinion, this power of attorney from the Royal Trust Co. is a registrable instrument and was properly registered, as the powers given in it are sufficiently definite to be capable of determination and quite evidently within the powers of the company. The only thing that is indefinite is the personnel of the manager or assistant manager "for the time being" and the chairman or one of the members of the Local Advisory Board "for the time being" and I think the Registrar is quite justified in requiring proof that the persons who execute in these capacities under the power of attorney are in actual fact the officials named in the power of attorney. Whether the proof submitted with this instrument by affidavit of a clerk in the company's office at Winnipeg is sufficient may very well be doubted, for while that clerk swears that these persons are known to him to be the assistant manager and a member of the Local Advisory Board respectively of the said company at Winnipeg, there is nothing in his position as clerk and nothing in the affidavit to indicate that he actually does know the facts which he asserts in his affidavit, and it seems to me that the Registrar would be justified in requiring some better proof that the parties who executed this instrument under the power of attorney are in actual fact the officers in question. The proof of this important fact, it seems to me, should be given in some more formal way than this, either by certificate under the seal of the company setting out the personnel of their manager and assistant manager for the time being and the

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personnel of their Local Advisory Board for the time being or, if this is not convenient or practicable, then the affidavit of their manager or assistant manager at Winnipeg proving the facts that the parties executing under the power of attorney are in actual fact the persons who occupy these positions. If the Registrar is satisfied of this fact, then I see no objection to the power of attorney or to the execution of proper instruments under it, but in the case of a power of attorney like this, appointing certain persons by their name of office as the persons from time to time to execute the instruments under the power of attorney, my opinion is that the Registrar is justified in requiring proof to his satisfaction that the persons who do execute are in fact the persons who have the right to execute under the power of attorney.

Re CREDITORS RELIEF ACT.

Saskatchewan District Court, Doak, D.C.J. January 3, 1922.

LIENS (§I—2A)—*Threshers' Lien Act R.S.S. 1920 ch. 208 sec. 2—Construction—Limitation of Lien—Particular kind of grain threshed.*]—Application by sheriff under sec. 13 of the Creditors' Relief Act R.S.S. 1920 ch. 54 to settle a scheme of distribution of certain moneys in his hands realised upon certain executions.

J. H. Lindsay, K.C., for the sheriff.

T. C. Davis, for the claimants.

DOAK, D.C.J.:—The goods seized under these executions consisted of a quantity of wheat grown upon the farm of the execution debtor. Claims were made with respect to the grain so seized by the men who did the threshing and these claims have been satisfied by the sheriff so far as the threshing of the particular grain seized under execution is concerned. The threshers, however, in addition to threshing the wheat of the execution debtor, also threshed a quantity of oats, and the claim which they have made upon the fund is with respect to the latter.

Their contention is that the threshing must be treated as a single performance and that their right to a lien must be taken as subsisting in its entirety over all the grain threshed irrespective of its particular designation, whether, wheat, oats or other grain.

The right of a thresher to a lien upon the grain threshed by him is purely statutory, and it seems to me that a perusal of the statute leaves very little room for doubt upon the point.

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Sec. 2 of the Threshers' Lien Act, R.S.S., 1920, ch. 208, provides that:—

"Every person who threshes or causes to be threshed grain of any kind . . . shall . . . have a lien upon such grain for the purpose of securing payment of the said price. . . . . ."

This is not a case of seeking for the meaning of an ambiguous phrase, but only that of giving effect to the clearly expressed intention of the statute. The primary meaning of the words—a meaning which it does not appear to me admits of any controversy—is that the lien of the thresher is limited in its extent not only to the grain which he has threshed but to the particular kind of grain with respect to which the service which forms the basis of that claim has been performed.

It is therefore not competent for a thresher to claim a lien upon his debtor's wheat for threshing done by him upon his debtor's oats, even although he may also have threshed the former. The lien for threshing wheat binds the wheat, the lien for threshing oats binds the oats and that only.

In making the distribution therefore the sheriff will disregard the claims made by the threshers for threshing oats and distribute the money in his hands without making any allowance for them.

As this is the first time this point has arisen I will not make any order for costs against the claimants, but direct that the sheriff's costs of this application, which I fix at $15 be treated as part of his costs of the execution.

PALMER v. HARVEY.

Saskatchewan Court of Appeal, Haultain, C.J.S., Turgeon, and McKay, JJ.A. January 16, 1922.

BROKERS (§II B—12)—*Sale of land—Real estate agent's commission—Sufficiency of services.*]—Appeal by defendant from the judgment of Bigelow, J. (1920), 55 D.L.R. 703, 14 S.L.R. 19. (Sub. nom. *Saskatchewan Land Co.* v. *Harvey*,) in an action for commission on the sale of land. Affirmed.

[See Annotation on Brokers, 4 D.L.R. 531.]

H. G. W. Wilson, K.C., for appellant.

C. E. Gregory, K.C., for respondent.

The judgment of the Court was delivered by

HAULTAIN, C.J.S.:—A careful perusal of the evidence in this case has led me to the conclusions arrived at by the trial Judge (1920), 55 D.L.R. 703, 14 S.L.R. 19, who after seeing and hearing the witnesses has found against the defendant on conflicting

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evidence. I can add nothing to the judgment appealed from, with which I concur.

The appeal should be dismissed with costs.

G. v. G. AND M.

Saskatchewan King's Bench, Taylor, J. December 24, 1921.

DIVORCE AND SEPARATION (§III E—38)—*Dissolution of marriage—Adultery of wife—Failure to prove marriage strictly—Failure to establish damages against co-defendant—Failure to prove seduction or enticing away.*]—Action by husband for dissolution of marriage on the ground of adultery and for damages for criminal conversation. Action dismissed.

[See Annotation on Divorce, 62 D.L.R. 1.]

F. W. Turnbull, for plaintiff.

W. W. Guggisburg, for defendants.

TAYLOR, J.:—It is alleged that the plaintiff and the defendant were married in Radowitch, in Austria, on September 25, 1899, and this action is to dissolve the marriage on the ground of adultery of the wife. The wife and the co-defendant M. have been living together as man and wife for the last 8 or 9 years; and the plaintiff also asks for damages against the co-respondent.

I am pretty well satisfied that the wife was, even before the separation, the main support of the family. There are three children, and it should be remembered that in those days there was ample work for any man inclined to work. On the whole, I think the facts bring the case within *Starbuck* v. *Starbuck* (1889), 59 L.J. (P.) 20, in that the plaintiff left his wife many years ago, has since been living by himself and does not seem to have concerned himself in any way during the whole period with his wife's conduct, nor contributed to her support. See also *Keslering* v. *Keslering* (1921), 61 D.L.R. 45, 14 S.L.R. 367.

As to the action against the co-defendant for damages for criminal conversation: The plaintiff, in my opinion, failed to prove the marriage strictly and establish any damages. There was not on the part of the co-defendant any seduction of the wife or enticing her away from the home of the plaintiff. The plaintiff cast her off.

The defendants are entitled to costs.

Re LAND TITLES ACT.

Saskatchewan, Milligan, Master of Titles. May 31, 1921.

LAND TITLES (§I—15)—*Land Titles Act, R.S.S. 1920, ch. 67*

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—*Fee payable on registration of mortgage.*]—Reference under sec. 159 of the Land Titles Act, R.S.S. 1920, ch. 67, as to the proper fee to be charged on the registration of mortgage.

MILLIGAN, M.T.—There is no principal amount named in the mortgage, which is given as security for a certain indebtedness to the mortgagee, which is a chartered bank and the registrar is unable to determine the fee under item 6 of the tariff of fees prescribed by Order in Council of April 1, 1920, as under that tariff the registration fees are based on the amount of money secured by the mortgage. The registrar states that he has obtained from the mortgagee a statement to the effect that the total indebtedness of the mortgagor to the mortgagee is approximately $180,000, but the bank places the value of the land mortgaged at $18,000 and expresses its willingness to pay the registration fee on this value, but they are unwilling to pay registration fees on the total indebtedness, as they contend that their security under the mortgage cannot be in any case more than the value of the land. In this contention I think the bank is correct, as the tariff of fees prescribes:

"6. For filing or registering any mortgage or incumbrance where the money secured does not exceed five thousand dollars.....$3.00 and in addition on each thousand dollars or fraction thereof over five thousand dollars secured by the mortgage and up to ten thousand dollars a further fee of one dollar and on each one thousand dollars or fraction thereof, over ten thousand dollars a further fee of fifty cents."

It will be noted that the registration fee provided by the tariff is based on the amount *secured* by the mortgage and I think it is a correct conclusion that the amount secured by this land mortgage is no greater than the value of the land, which the bank places at $18,000, a valuation which the registrar does not dispute. If the registrar is satisfied of this value of $18,000, I think he would be justified in charging a fee on registration of this mortgage of $12, which is the fee provided by item 6 of the tariff on an amount secured by the mortgage of $18,000.

There may be cases to which this principle would not absolutely apply, as, for example, where the amount secured, while not definitely stated in the mortgage, is expressed in the mortgage to be limited to a certain amount, in which case, even if the value of the land was more than that, the registration fee would be placed on the limitation expressed in the mortgage or the money which is secured thereby, but in this case it seems to be clear that the proper basis is the value of the land, which forms the security for the mortgage.

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REX v. HENDERSON.

Alberta Supreme Court, Walsh, J. May 5, 1922.

INTOXICATING LIQUORS (§ III J—91)—*Summary conviction—Appeal—Depositions—Right of Judge on appeal to examine.*]—Motion to quash a conviction for an offence under the Alberta Liquor Act 1916 (Alta.) ch. 4. Dismissed.

W. Beattie, for motion.

C. F. P. Conybeare, K.C., for Attorney-General.

WALSH, J.:—Motion to quash a conviction of the defendant for that he did unlawfully keep liquor for sale, traffic or barter contrary to the provisions of sec. 23 of the Liquor Act, 1916, ch. 4.

Only two of the seven grounds set out in the notice of motion were argued before me, namely that there was no evidence to support the conviction and that the conviction is bad in that it is for more than one offence. The motion was argued after it was known that the Privy Council had restored the conviction in the case of *R.* v. *Nat Bell Liquors Ltd.* (1922), 65 D.L.R. 1, but before the text of the judgment had reached this country. I reserved my judgment, therefore, until I could learn from a reading of the reasons for that judgment what I could and could not do on such a motion. I have had an opportunity to do this and I now know that I cannot look at the depositions even for the purpose of satisfying myself whether or not there was any evidence before the magistrate upon which he could make this conviction. That being so, it is impossible for me to say whether or not there is any such evidence and so the first ground of objection must fail.

I think the other ground must also fail. The conviction for keeping liquor for sale, traffic or barter is not a conviction for more than one offence. If the conviction was for that he did sell, traffic, or barter liquor, it might be open to the objection of being double. But that is not the case. It is the act of keeping the liquor for the prohibited purpose that constitutes the offence here and that act, the act of keeping it for sale, traffic or barter, is but one act. The fact that the conviction improperly charges it to have been kept for one of three purposes does not make it a conviction for more than one offence. In fact the statutory prohibition is only against the keeping it for sale. There is nothing in sec. 23 making it an offence to keep it for traffic or barter. These words in the conviction are mere surplusage which should be disregarded, when it describes as it does the real offence of keeping it for sale. The motion is dismissed but without costs and the money paid in by the applicant will be paid out to him. *Motion dismissed.*

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Re AYRES (INFANTS).

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ. April 29, 1921.

INFANTS (§IC—10)—*Judgment of Foreign Court awarding custody to one parent—Disobedience to order by other parent—Effect given to judgment.*]—Appeal from an order granting a mother the custody of infants and authorising her to remove them from Alberta to the State of Pennsylvania. Affirmed.

The judgment appealed from is as follows:—

SCOTT, J.:—The application is made pursuant to the order of Hyndman, J., dated April 24, 1921, which directed that, upon counsel for the applicant undertaking to serve notice of this application and to pay the Superintendent of Neglected Children the cost of carrying out the order, including the cost of the maintenance of the infants during the time they might be in his possession or custody, directed that he should take possession of them and keep them until further order.

It appears from the material before me on the application that the parents of the infants resided in the State of Pennsylvania and were there living apart from each other; that in 1917 the Court of Common Pleas of Clinton County in that State, within the jurisdiction of which Court the infants then were, made an order awarding their custody to the applicant; that various applications were afterwards made by the father to that Court to set aside that order and award their custody to him and that the only result of his applications was that the Court modified its order by providing that he should have the infants in his exclusive possession on the second and fourth Saturdays of every month and during the second and fourth weeks in July and August in each year provided that he should contribute the sum of $10 per month in money or supplies toward their maintenance and support.

It further appears that on September 13, 1920, the father while in possession of the infants under the terms of the order referred to, removed them to another county in that State and subsequently brought them to this Province. It thus appears that the father is guilty of contempt of the Court referred to.

In *Goddard* v. *Gray* (1870), L.R. 6 Q.B. 139, at p. 148, 40 L.J. (Q.B.) 62, 19 W.R. 348, Blackburn, J., says:—"It is not an admitted principle of the law of nations that a state is bound to enforce within its territories the judgment of a foreign tribunal."

See also Piggott on Foreign Judgments, 6th ed., at pp. 4, *et seq.*

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In *Re McGibbon (an Infant)* (1918), 39 D.L.R. 177, at p. 182, 13 Alta. L.R. 196, Stuart, J., says:—

"This Court ought to and would recognise the general jurisdiction of the Courts of Ontario to decide any controversy between the father and mother as to the proper custody of the child while, of course, retaining our right to appoint a guardian here if, in any particular circumstances, it were shewn to be necessary for the proper protection of the child while here."

I see no reason why this Court should not give effect to the judgment of the Pennsylvania Court, awarding the custody of the infants to the applicant or why an order should not now be made to that effect and authorising her to remove them from this Province to that State.

The applicant will therefore take an order to that effect subject only to the payment by her to the Superintendent of Neglected Children for the expenses incurred by him in obtaining possession of the infants and for their maintenance while in his possession.

The applicant will have the costs of the application.

P. G. Thomson, for appellant.

F. C. Jamieson, K.C., for respondent.

The appeal was dismissed without written reasons.

FRAZIER v. FRAZIER.

Alberta Supreme Court, Blain, Master in Chambers. March 7, 1921.

DIVORCE AND SEPARATION (§VB—52)—*Dissolution of marriage—Action by wife—Interim disbursements—Allowance of—Counsel fee—Disallowance of.*]—Motion by wife for security for costs or for payment of interim disbursements and for counsel fee, in an action by her for dissolution of marriage and an order for maintenance of herself and two children, or in the alternative for a decree for judicial separation with alimony.

[See Annotations, Divorce Law in Canada, 48 D.L.R. 7, 62 D.L.R. 1.]

H. H. Parlee, K.C., and *J. A. McCaffry*, for plaintiff.

E. B. Williams, for defendant.

BLAIN, M.C.:—Some time ago an application was made to me on behalf of the plaintiff for judgment in terms of a settlement alleged to have been made between the parties. The settlement was denied by the defendant and as there is nothing in writing to uphold the settlement I refused the application. The plaintiff then moved for security for costs or for payment of interim disbursements to enable the plaintiff to take the action to trial and for a counsel fee for counsel whom she

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desired to employ. It appears from the affidavit of the plaintiff that she has no separate estate and has not the necessary means to carry on this action and that an order was made for payment of interim alimony but that payments have not been regularly made thereunder and are now in arrears. I refuse security for costs but will make an order that the defendant pay forthwith to the solicitor for the plaintiff for interim disbursements from this date $160, on the undertaking of such solicitor to account for the moneys so paid and not properly expended for the purposes of trial. The plaintiff has succeeded in prosecuting the action up to this stage and I allow only such disbursements as will enable her to take the action to trial. I allow no counsel fee on the ground that it is not in this jurisdiction a "necessary:" *Brown* v. *Brown* (1920), 55 D.L.R. 656, 16 Alta. L.R. 88. In England a counsel fee is allowed, as counsel is a "necessary," but here it is otherwise as the solicitor is also a barrister and may conduct the plaintiff's case at the trial. Subsequent to the argument of the motion for security for costs counsel for the defendant applied for leave to amend the statement of defence by setting up "that the plaintiff does not allege desertion, nor such cruelty as, without adultery, would have entitled her to a decree of divorce *a mensa et thoro*" as required by sec. 27 of the Divorce and Matrimonial Causes Act, 1857 ch. 85 (Imp.). On the argument of this application counsel for the plaintiff asked for leave to amend the statement of claim if so advised. I will allow the defendant to amend his defence as asked, with leave to the plaintiff to amend her statement of claim if so advised.

The three applications may be considered as one and the costs will be the costs in the cause.

FRALECK v. JOHNSTONE AND POUND.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ.A. January 28, 1921.

DISCOVERY AND INSPECTION (§IV—20)—*Seizure and sale under chattel mortgage—Employment of sheriff and bailiff—Rule* 234, *Alta.*]—Appeal by defendant Johnstone from the judgment of Walsh, J. (1920), 55 D.L.R. 306, reversing an order of a Master refusing to grant leave to examine a sheriff and bailiff for discovery.

H. R. Milner, for appellant Johnstone.

Frank Ford, K.C., for defendant, respondent Pound.

January 28, 1921. The appeal was dismissed without written reasons.

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WESTERN CANADA MORTGAGE Co. v. O'FARRELL.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ.A. March 21, 1921.

PLEADING (§IA—12)—*Statutory requirements—Special leave to commence action—Leave not obtained—Leave to continue.*

MORTGAGE (§VI I—135)—*Mortgaged property sold for taxes—Charge against land extinguished—Right of mortgagee to sue on covenant—Stats. 10 Geo. V. 1920, ch 3, sec. 1.*]—Appeal by defendant from the judgment of Simmons, J. (1920), 56 D.L.R. 10, on a case stated on an action on a mortgage.

W. A. Wells, for appellant.

S. W. Field, K.C., for respondent.

The Appellate Division dismissed the appeal without written reasons.

CANADA LIFE ASSURANCE Co. v. YOUNG.

Alberta Supreme Court, Simmons, J. February 22, 1921.

MORTGAGES (§III—45)—*Of land—Purchaser assuming mortgage — Extension of time for payment — Increase in rate of interest—Original mortgagor—Liability.*]—Action on a mortgage.

J. E. A. Macleod, for plaintiff.

J. T. Shaw, for defendant.

SIMMONS, J.:—The defendant was registered owner of lots 1 to 8, both inclusive, in block 51, plan A of the City of Calgary, and by a memorandum of mortgage dated September 14, 1909, he mortgaged the said lands to the plaintiff to secure payment of the sum of $45,000 lent to him by the plaintiff, which mortgage contained the usual covenant as to repayment and also a covenant that the plaintiff might release part of said lands so mortgaged without thereby releasing the defendant from the covenants in said mortgage.

The plaintiff released from said mortgage lots 6, 7 and 8, and the most easterly 15 feet of lot 5. On August 11, 1914, the plaintiff entered into an agreement with M. & M. who had become, by purchase from the defendant, registered owners of said lands, and in said agreement the plaintiff extended the time for repayment of the moneys due under said mortgage and in said extension agreement M. & M. agreed for the consideration therein named that they would pay the principal moneys and interest as in said agreement set forth, and pay interest thereon at 7% per annum. The mortgage bore interest at 6½% per annum.

The agreement with M. & M. provided that "these presents

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shall not create any merger or alter or prejudice the rights and priorities of the said company as against any surety, subsequent encumbrancer or other person interested in the said lands and not a party hereto, or the rights of any such surety, subsequent encumbrancer or other person, all of which rights are hereby reserved."

The defendant sets up by way of defences:—(a) The discharge of parts of said lands from the mortgage; (b) The extension of time for payment in the agreement made by plaintiff with M. & M.; (c) The increased rate of interest provided for in the agreement with M. & M.

The mortgage deed specifically provided that the mortgagee might discharge a part of the lands so mortgaged without impairing the plaintiff's rights under the covenants made by the mortgagor and in addition thereto the defendant consented to the release of the lands that were discharged from the mortgage. As to the increased rate of interest the plaintiff relinquishes any claim thereunder.

There remains only to be considered then the claim that the defendant has been released from the covenants in the said mortgage by the extension of time given to M. & M. In order to succeed on this ground the defendant must establish some impairment of his rights to proceed against M. & M. in the event that he is called upon to pay off the mortgage.

M. & M. have not agreed with the defendant that the rights of the latter shall not be affected as against M. & M., but they have agreed with the plaintiff that all rights of any other party interested in said lands are reserved, as well as the rights of any surety.

The Court of Appeal of Ontario had under consideration a similar provision included in an agreement for an extension of time given by the mortgagee to a subsequent purchaser of land subject to a mortgage, in which the mortgagor was sued upon his covenant in the mortgage to pay the moneys due thereunder. It was held that the provision protected the rights of the surety and the surety (the mortgagor) could not set up that the extension of time to the purchaser of the land had released the mortgagor. I adopt the conclusion arrived at in the Ontario Court and the defence fails. *Trust & Loan Co.* v. *Mackenzie* (1896), 23 A.R. (Ont.) 167.

Judgment for the plaintiff for the amount of the claim with interest at 6½% per annum as provided for in the mortgage and a reference to the clerk to ascertain the amount due.

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RE COCKS ESTATE AND CONSORT TRADING CO.

Alberta Supreme Court, in Bankruptcy, Hyndman, J. November 11, 1921.

BANKRUPTCY (§III—28)—*Goods consigned to bankrupt as agent—Assignment under Bankruptcy Act—Right of consignor to recover from assignee.*]—Claim for recovery of goods consigned to a bankrupt under an agency contract.

[See Annotations on Bankruptcy 53 D.L.R. 135; 56 D.L.R. 104; 59 D.L.R. 1.]

A. L. Smith, K.C., for the trustee.

HYNDMAN, J.:—In my opinion the assignee is entitled only to such interest in the goods or money which was found by the authorised assignee as the bankrupt had at the time of the act of bankruptcy. Registration is not essential in connection with the agency agreement referred to in the argument as the Bankruptcy Act, 1919, ch. 36 supersedes any provincial legislation in that respect.

The claimants are entitled to priority if they can establish that the property in the trust moneys or goods never passed to the assignor in bankruptcy but was at all times in the consignor or principal for whom he acted as agent, and provided further that they are sufficiently ear-marked to be identified. (*Western Trust Co.* v. *Wah Sing*) (1920), 56 D.L.R. 584, 14 S.L.R. 41.

The claimants are therefore entitled to:—(1) Such of the goods as can be identified, found amongst the stock in trade of the assignor in bankruptcy and have not been paid for, which were consigned to the bankrupt under the agency contract; (2) Accounts owing by customers to the bankrupt for goods sold by him, which goods were acquired by the bankrupt under said agency agreement, and which can be identified or ear-marked; (3) Cash on hand which is capable of being ear-marked as the proceeds of the sale of goods held under such agency agreement; (4) If the moneys in the bank can be traced shewing them to be the proceeds of the sale of claimant's goods, and for which the cheque for $117.69 was given, then such cheque should be paid to the holder thereof out of the funds in the bank; (5) The proceeds of the sale of such agency goods sold by the trustee since taking possession should be paid to the consignors (owners) of such goods.

In case the parties are unable to agree as to the amount of money or goods or as to identification there will be a reference to the registrar in bankruptcy to determine such questions, who shall report his findings.

Claimant's costs shall be paid out of the estate.

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Re PENNY LUMBER Co.

Alberta Supreme Court, Blain, M.C. October 12, 1921.

COMPANIES (§VID—337)—*Insolvency—Winding up—Winding-up Act R.S.C. 1906 ch. 144—Seizure by sheriff under execution before winding-up order—Costs—Possession money for time after order—Taxation of fees.*]—Application to determine the fees payable to a sheriff under a certain seizure of goods under execution.

H. R. Milner, K.C., for the sheriff.

J. H. Ogilvie, for the liquidator.

BLAIN, M.C.:—The sheriff at Prince George, B.C., was in possession at the date of the making of the winding-up order, having made a seizure under a writ of execution and a distress warrant in respect of a conditional sale agreement some five days prior to that date. His costs are not disputed except as to the item of $270 charged for possession money from December 1, 1920, till February 28, 1921, 90 days at $3 per day. Item 73 of the tariff of fees payable to sheriffs, found on p. 327 of the Supreme Court Rules of British Columbia, 1906, provides for the payment of $2.50 per diem for each person in possession. The tariff has probably been amended by increasing the fee to $3 though there is no evidence of that before me. The fee for possession is not, I think, one which a sheriff is entitled to collect for his own use, where he is paid by fees, or as revenue, unless he had in person been in actual possession. Where he has placed a bailiff in possession it becomes a disbursement which he is entitled to collect but only to the amount of the sum paid the bailiff and in no case to exceed the fee fixed by the tariff.

Here the sheriff went into possession 5 days before the date on which the winding-up order was made and would in any event assuming the seizure to be legal, and that he had a man in actual possession, be entitled to tax as a disbursement possession money according to the tariff of the province of British Columbia, for the five days he was in possession prior to the taking of the winding-up order. But he claims for 85 days possession money, after this date, and I am asked to determine whether or not he is entitled to same.

Sec. 23 of the Dominion Winding-up Act, R.S.C., 1906, ch. 144, provides: "Every attachment, sequestration, distress or execution put in force against the estate or effects of the company after the making of the winding-up order shall be void." If the sheriff is in possession before the commencement of the winding-up, the execution has been "put in force" before, not

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after, the commencement of the winding-up. *Re London and Devon Biscuit Co.* (1871), L.R. 12 Eq. 190, 40 L.J. (Ch.) 574, 19 W.R. 943. An execution is *put in force* when the sheriff seizes.

In *Re Ideal Foundry & Hardware Co.* (1918), 42 O.L.R. 411, Meredith, C.J.C.P. held in a case in which at the date of the winding-up order, the goods of the company were under seizure by the sheriff, that the winding-up order superseded the execution and that possession should have passed, as it in fact did, from the one officer of the law, the sheriff, to the other, the liquidator. That the winding-up order was made by a Judge of the Supreme Court of Alberta does not affect the position.

In *Richards* v. *Producers Rock and Gravel Co.* (1914), 17 D.L.R. 588, 20 B.C.R. 109, Murphy, J. held that an order having been made by the Supreme Court of Ontario for the winding-up of the company, before seizure in British Columbia by the sheriff under a writ of execution, that the seizure was void under sec. 23 of the Winding-up Act, and in *Re Producers Rock & Gravel Co.* (1913), 14 D.L.R. 289, 18 B.C.R. 375, Hunter, C.J.B.C. held that where a winding-up order was made in Ontario on September 19, 1913, and produced to the registrar of the Supreme Court of British Columbia on October 15, 1913, and execution was levied in Victoria, B.C., on September 26, 1913, and the distress put into force on September 29, 1913, that though the sheriff had no notice of the making of the winding-up order, the execution and distress were void. He says:—

"It is a great hardship on the sheriff that the Legislature has omitted to provide for the case, but the Act makes void all distresses and executions from a particular date, which date is to have effect throughout Canada; therefore, the execution and distress being void, the sheriff cannot be allowed his costs against the liquidator for performing a void act; *ex nihilo nihil fit.*"

Sec. 84 of the Winding-up Act as amended by ch. 75 of 7-8 Edw. VII. (1908) provides that no lien or privilege shall be created by way of execution, if before payment over to the plaintiff of moneys actually levied, the winding-up of the business of the company had been commenced, except, it may be a lien for costs. See *Re Ideal Furnishing Co.* (1908), 17 Man. L.R. 576, decided before the last amendment of this section.

It would seem that where a sheriff had made a seizure of goods of the company before the making of the winding-up order that he is entitled to his costs up to that date, as a pre-

ferred claim. *Re Oshawa Heat & Light & Power Co.* (1906), 8 O.W.R. 415.

This sheriff at the time of seizure appointed as his bailiff in possession one Lipsett, an employee of the company. The liquidator upon his appointment arranged with the said Lipsett to look after the premises and plant on his behalf, so that Lipsett was in continual and actual possession and must be paid for his services either by the sheriff or by the liquidator. The liquidator offered to pay Lipsett for his services since the winding-up order but the sheriff has refused to accede to this, insisting on payment according to his claim. Lipsett is not asking to be paid by both. Counsel for the sheriff referred to *Moroschan* v. *Moroschan*, (1921), 59 D.L.R. 353, 14 S.L.R. 233, in which it was held that where goods seized by the sheriff are taken over by the authorised trustee in bankruptcy under an assignment for creditors, the taxation of the sheriff's costs which the trustee is to pay under sec. 11 (3) of the Bankruptcy Act, 1919, ch. 36, is to be had in the Court from which the execution was issued and not in the bankruptcy Court. The liquidator is not objecting to the taxation or the fees taxed except the amount allowed for possession money, but is disputing the sheriff's right to possession money after the date of the winding-up order. No objection is taken to the fees being taxable under the law of the province of British Columbia and the Winding-up Act seems to provide for allowance and taxation under such law.

I think the sheriff is entitled to be paid for possession money under the seizures in question, possession money for five days but no more. It is not shewn that he is not paying $3 per day to the bailiff and that allowance having been taxed, I direct that the liquidator pay to the sheriff for possession money the sum of $15. Nothing was said as to costs. I think there should be no costs, but counsel may speak to this question if they desire so to do.

Re NORTHERN CREAMERIES Co.; DE LAVAL COMPANY'S CLAIM.

Alberta Supreme Court, Blain, M.C. October 20, 1921.

COMPANIES (§VI A—309)—*Insolvency—Winding up—Winding up Act, R.S.C. 1906, ch. 144—Conditional sale to company—Failure to register contract—Rights of vendor as against liquidator.*]—Application to determine the rights of a vendor, to seize, take possession of and remove certain goods, sold under conditional sale contract.

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S. W. Field, K.C., for the liquidator.

H. R. Milner, K.C., for the DeLaval Company.

BLAIN, M.C.:—On March 15 the DeLaval Co., of Winnipeg, sold to the Northern Creameries Co., Ltd., an emulzer for $525 payable in 3 and 6 months from the date of delivery. The contract is in the form of an order and contains the proviso or condition that the property and title remain in the vendor until the purchase-price shall have been paid in full. The vendor delivered the emulzer but failed to register the contract and no moneys have been paid on account of the purchase-price.

On September 2, 1920, the Northern Creameries Co. executed a chattel mortgage in favour of the Imperial Bank, and on the 30th of the same month gave a chattel mortgage to one James McCarthy. An action was commenced prior to the winding-up order, by the Alberta Supplies Ltd., suing on behalf of itself and all other creditors, to set aside these chattel mortgages. Leave was given the liquidator to continue the actions but after the order for directions had been made, a settlement was arrived at which was embodied in an order of March 16 last, confirming same and under which the mortgagees gave discharges of their respective mortgages and were allowed to rank as preferred and secured creditors for certain sums set out in the order.

On November 22, 1920, an order was made for the winding-up of the Northern Creameries Co. Prior to the winding-up order the Coca-Cola Co. had sued and obtained judgment against the Northern Creameries Co., and on October 26, 1920, had issued and placed in the hands of the sheriff, a writ of execution. The sheriff had not made a seizure and was not in possession on the date of the winding-up order.

I am asked to determine the right of the DeLaval Co. to seize, take possession of and remove the said emulzer.

Neither chattel mortgage, in my opinion, covered the emulzer and I so find. It is not included in the named chattels and the general clause which reads "All shafting, countershafting, belting and machinery used by the mortgagor in carrying on its said business," would not include it. It was no doubt left out of the mortgages because the mortgagor had no property or equity in it, never having paid any part of the purchase-price. It had no interest in the emulzer which it could mortgage. In any event, the chattel mortgages have been discharged.

The failure of the DeLaval Co., to register the contract

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would not affect its validity as between it and the Northern Creameries Co., the purchaser, but it would be null and void as against an execution creditor of the purchaser. *Dominion Register Co.* v. *Hall* (1913), 11 D.L.R. 366, 47 N.S.R. 57. It would be effective, though not registered, against an assignee for the benefit of creditors. *Re Hodges; John Deere Plow Co.* v. *Trusts and Guarantee Co.* (1916), 11 Alta. L.R. 198, and *Can. Equipment & Supply Co.* v. *Cushing* (1917), 37 D.L.R. 401, 12 Alta. L.R. 375. If such an unregistered contract would be effective against an assignee for the benefit of creditors, would it be effective as against a liquidator? The Assignments Act [1907, Alta., ch. 6, and amendments 1913, ch. 2, sec. 12; 1916, ch. 3, sec. 32; 1918, ch. 4, sec. 9] vests in the assignee all the real and personal estate, rights, property, credits and effects of the assignor.

The Winding-up Act, R.S.C., 1906, ch. 144, makes no provision for the vesting of the company's assets in the liquidator but provides that he shall, upon his appointment, 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 that he may deal with them, with the approval of the Court, to the extent of the powers given by the Act. It seems to me clear that the liquidator can have no better title and no higher rights than the company had and that the contract for the sale of the emulzer being effective, though unregistered, against the company is also effective as against the liquidator and I so find.

In *Re Canadian Camera and Optical Co., A. B. Williams Co.'s Claim* (1901), 2 O.L.R. 677, at p. 679, Street, J., in speaking of the position in which a liquidator stands in a compulsory winding-up, says "that, while in no sense an assignee for value of the company, yet he stands for the creditors of the company, and is entitled to enforce their rights, because their rights to prosecute actions themselves against the company and to recover their claims directly out of the property of the company is taken away by *The Winding-up Act.*"

One of the creditors, the Coca-Cola Co. had, at the date of the winding-up order, a writ of execution in the hands of the sheriff, but the writ had not been put in force and the company had acquired no lien or privilege in respect of it. As against this creditor the contract for the purchase of the emulzer was null and void, the requirements of sec. 1, ch. 44 of the Ordinance respecting Hire Receipts and Conditional Sales of Goods, C.O., 1915, ch. 44, not having been complied with by the ven-

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dor. The winding-up order stayed the right of the creditor to proceed, but his right passed to the liquidator and in so far as the liquidator stands in the place of this creditor, the contract is null and void as against him and he is entitled to enforce the right of the creditor in respect of the emulzer to the extent of the amount owing to this creditor, but to that extent only, and I so find. So far as appears the contract was effective as against all other creditors. I decide against the contention of counsel for the liquidator that the Alberta Supplies, Ltd., the plaintiff in the action above referred to, is still entitled to sign judgment, for by the order confirming the settlement the action was discontinued.

It does not appear whether the DeLaval Co., did or did not file with the liquidator a claim in respect of the emulzer. If it did and placed a value on the emulzer its position may possibly be altered. It may have leave to file a claim now.

The question of costs may be spoken to.

SEGAL v. SCOTT.

Manitoba King's Bench, Prendergast, J. April 18, 1922.

DISCOVERY AND INSPECTION (§IV—20)—*Delivery of answers to interrogatories—Right to compel attendance on examination for discovery.*]—Appeal by defendant from an order of the referee compelling him to attend at his own expense an examination for discovery. Affirmed.

J. P. Foley, K.C., for plaintiff.

T. A. Hunt, K.C., for defendant.

PRENDERGAST, J.:—I think I should follow the decision in our own Court of Metcalfe, J. in *Timmons* v. *National Life Assur. Co.* (1909), 19 Man. L.R. 139, and Galt, J. in *Baskin* v. *Linden* (1914), 17 D.L.R. 21, 24 Man. L.R. 352; also of Murphy, J. in the British Columbia case *Shearer* v. *Canadian Collieries* (1913), 4 W.W.R. 913. Although the point was not there in issue Macdonald, C.J.A., expressed the same opinion in *Brydone-Jack* v. *Vancouver Printing and Publishing Co.* (1911), 16 B.C.R. 55, at p. 58.

The appeal will be dismissed with costs to the plaintiff in any event but in the cause.

McCOLL v. CANADIAN PACIFIC R. Co.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Fullerton, Dennistoun and Metcalfe, JJ.A. December 20, 1921.

STATUTES (§IIA—96)—*Workmen's Compensation Act, Man. Stats. 1916, ch. 125, secs. 13 (1) and 61 (4)—Railway Act, 9 &*

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10 Geo. V. ch. 68—Construction.]—Appeal from the judgment of Prendergast, J., 60 D.L.R. 1. Affirmed.

D. Campbell and *D. H. Campbell*, for appellant.

L. J. Reycraft, K.C., and *H. A. V. Green*, for respondent.

John Allen, K.C., for Attorney-General of Manitoba.

The judgment of the Court was delivered by

PERDUE, C.J.M.:—After a consideration of the able presentation of this appeal by counsel for the appellant this Court is of opinion that no reason has been shewn for interfering with the judgment of Prendergast, J., a judgment which the members of this Court regard as embodying the proper conclusions upon the question of law raised in this case. The judgment is therefore affirmed and the appeal is dismissed without costs.

PARR v. TROOP.

Nova Scotia Supreme Court, Harris, C.J., Russell, Chisholm, Mellish and Rogers, JJ. April 1, 1922.

WATERS (§II C—83)—*Interference with ancient well defined water course—Injury to plaintiff's land—Damages—Amount of compensation—Evidence.*]—Appeal from the judgment of Ritchie, E.J. in favour of plaintiff with costs in an action claiming damages for the diversion of a stream of water from its ancient channel and causing the same to flow across the land of the plaintiff. Affirmed.

C. J. Burchell, K.C., and *F. W. Harris*, for appellant.

W. L. Hall, K.C., for respondent.

HARRIS, C.J., RUSSELL and CHISHOLM, JJ. agree with ROGERS, J.

ROGERS, J.:—This is an action for damages alleged to have been caused to lands of the plaintiff, a married woman, by reason of the defendant's interference with an ancient and well defined water course. The interference was the erection by defendant of an earth embankment referred to in the evidence as a dam immediately inside the line between him and Lamb, who owned the lot next adjoining and below him on the stream, the lot having a width of about 70 ft. The next lot below, adjoining the Lamb lot, is that of the plaintiff whose claim is that the embankment referred to caused the waters of the stream in flood time to be so diverted that they were caused to enter the plaintiff's lands eastwardly of the defined course. The trial Judge finds that this "obstruction did have the effect of diverting the natural and well defined course of the water and that it did cause the water to spread over the lot of the plaintiff which it would not have otherwise done and that the plaintiff's land was thereby damaged."

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I would content myself with the adoption *simpliciter* of the judgment under appeal were it not that counsel for defendant argued so persistently that the trial Judge had entirely misconceived the facts and that defendant was justified in creating the obstruction complained of. Counsel appeared to contend on the one hand that the stream was in flood time to be treated as partaking of the character of a river and that any of the proprietors whose lands it traversed could regard it as a "common enemy" and protect their own land without regard to the effect upon the neighbours; and on the other hand that there was no well defined water course at all, and that so far as defendant was concerned he was within his rights in treating the water as surface water and without regard to the immediate effect of his action upon adjoining land owners.

The indisputable facts as well as the geography of the case are however, as has been so succinctly pointed out in the judgment below, against these contentions. The water course takes its rise in the North Mountain and collecting water as it proceeds to find an outlet in the Annapolis River, crosses in a well defined course in turn lands of Crosscup, Troop, Lamb and Parr and enters a road where now it is taken care of on its way to the river by means of a culvert under the care of the municipal authorities. The stream is one of a type common in the hilly country of Nova Scotia, a small brook full of water only during the spring and fall freshets and in times of heavy rainfall. It is none the less well defined—the waters could not find their outlet other than through the Troop-Lamb-Parr lands and the fact that through these lands, particularly those of Troop, the stream owing to the flatness of the land widens out into a "swamp" or "frog-pond" does not at all destroy the well defined character of the stream (Gould on Waters para. 264.) The waters here, as well as on the lands below, are contained by the slope of the land on both sides even in time of extraordinary floods and must find their way through to plaintiff's lands. The predecessor in title of all these proprietors over 25 years ago appears to have undertaken to ameliorate conditions by the construction of an east and west drain on the Troop land just inside this line which would divert the collected waters into a narrow channel and convey them to a north and south drain crossing the Lamb lot in the bottom of which was constructed a wooden box drain covered to the surface by field stone. Thus, during all those years, the waters found their way with a gradual southerly fall (and obviously through the lowest depression to the Parr lands. At this point the Parr

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barn was constructed across the stream and from the southerly side of the barn through the Parr yard an enclosed wooden drain conveyed the flow to the roadway. The finding of the trial Judge of the existence under the circumstances thus briefly detailed of an ancient and well defined water course cannot be open to question. In the fall of 1918 the defendant for the purpose, laudable in itself of re-claiming a portion of his swamp land, piled earth and stones on his land next the Lamb lot thus destroying in effect the cross drain and obstructing the entrance to the north and south drain through the Lamb lands. This resulted in the diversion of the waters on their natural course down stream to a point considerably further west and higher up both on the defendant's land and the Lamb lands and the complaint is that in consequence of this diversion the waters thus improperly diverted to a higher level gained such force upon their descent in search of the natural outlet that they were carried over the stone covered drain, in part now surfaced by grass, so as to reach the Parr property at a point a substantial distance east of the natural course where it passed under the barn and there spreading out around the barn and causing damage to the Parr lands and to the shrubbery and perennial plants there growing. At the argument some doubt was expressed as to whether the diverted waters would not in fact find their way back to the natural course before reaching the Parr lot, but the Judge has found otherwise and upon consideration I think he is fully supported by the evidence. It was shewn that after complaints were made and a part only of the earthwork was removed before the 1921 freshets plaintiff suffered none of the injuries which are complained of in respect of the years 1919 and 1920.

Were there even any doubt however as to the cogency of this evidence the defendant's case appears to me to be completely broken down by the admissions of himself and his engineer, both of whom seem to concede that the diverted waters would if they went with any velocity strike the barn of the plaintiff at a point east of the old water course. If the removal of part of the dam helped the situation it is easy to appreciate the fact that removal of the whole of it would restore conditions under which no damage would be occasioned. It is quite unnecessary to deal with the legal situation. The general subject has been under discussion before this Court quite recently in the case of *Messenger* v. *Miller* (1918), 40 D.L.R. 35, 52 N.S.R. 142, referred to by the trial Judge. The Massachusetts case *Gannon* v. *Hargadon* (1865), 10 Allen 106, (92 Mass.) dealt en-

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tirely with the subject of surface water as the Judge says is not only distinguishable on the facts but it is doubtful whether the decision is in harmony with the English authorities and the better American opinion on the subject. The cases cited on the argument for the defendant are quite inapplicable to the facts in proof. The appeal should be dismissed with costs and if the damages are not agreed upon between the parties before the final order is moved for they should be assessed by the Judge on circuit in term rather than by a special referee, and they must as a matter of course be confined to such as are clearly attributable to the diversion to the careful exclusion of possible injury traceable to default on the part of the plaintiff in caring for the condition of the water course through her own lands.

MELLISH, J.:—I agree that the appeal should be dismissed with costs.

Appeal dismissed.

HARRIS v. HARRIS.

Nova Scotia Supreme Court, Harris, C.J., and Russell and Mellish, JJ. February 4, 1922.

JUDGMENT (§VIIA—271)—*Opening up—Right to apply for relief—Extension of time for answering interrogatories—Terms on which relief granted.*]—Appeal from the judgment of Ritchie, E.J., dismissing with costs plaintiff's application to extend the time for answering interrogatories. On December 10, 1920, an order was made by Chisholm, J., that the time for answering the interrogatories delivered by defendant be continued for 60 days from the date of the order and if the same were not delivered within that time that the action stand dismissed with costs without further order. The judgment now appealed from was to the effect that the interrogatories not having been answered within the time limited the action was dead and that the Judge had no power to vary the previous order.

W. L. Hall, K.C., for appellant.

T. R. Robertson, K.C., for respondent.

HARRIS, C.J.:—In this case an order was made at Chambers for interrogatories to the plaintiff and the time for answering these interrogatories was later extended on account of the plaintiff's absence from the country. Eventually, on December 10, 1920, the time for answering was further extended for 60 days from that date and the order provided that if the answers were not delivered within that time the action should stand dismissed with costs without further order.

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The answers were not filed within the 60 days and judgment was entered for the defendant dismissing the action.

At the time when the order of December 10, 1920, was made and for some time previous, the plaintiff, who is a British subject but a native of Syria, had been in Syria and had been seized and compelled for some months to do military service with the Arabs against the French and he finally deserted from the Arabs and went over to the French with whom he was in sympathy and he continued to do service with the French until January, 1921, when he left Syria and after some unforeseen delays reached Nova Scotia on March 4, 1921.

The plaintiff's real name, and the one by which he was known in Syria, was Hannid Moory and he swears that while in Syria he went to the British Consul in Beyrout to swear the affidavits or answers to the interrogatories and that the Consul refused to take his affidavit unless he could prove that he was the Fred Harris who was the plaintiff in the action, and, being unable to satisfy the Consul on this point, he could not complete the answers. He states that he has always been ready and willing to answer the interrogatories and had come back to Nova Scotia chiefly for the purpose of having his action tried.

Immediately after plaintiff's return to Nova Scotia he moved the Judge at Chambers to extend the time for answering the interrogatories—this was on March 8, 1920—but as the time fixed by the order of December 10 had expired the Chambers Judge refused the application.

Whereupon the plaintiff appealed from the order of the Chambers Judge refusing to extend the time and he also gave notice of appeal from the original order of December 10, 1920, and that he would on the hearing of the motion ask the Court to enlarge and extend the time for appealing from that order.

The two motions came on for hearing and the Court expressed the opinion that the judgment ought to be opened up and plaintiff given time to answer the interrogatories. This view was not seriously contested and the whole question resolved itself into one as to the way in which the costs should be disposed of.

I think, notwithshtanding the misfortunes of the plaintiff, that he must pay the costs of entering the judgment and also of the abortive motion to the Chambers Judge, and the costs of the appeal; and there will be an order accordingly that these costs shall be defendant's costs in the cause in any event.

The judgment will be opened up and the time will be ex-

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tended for answering the interrogatories. I have not mentioned specifically that the time for appealing from the order of December 10, 1920, was extended, but of course that is involved in the decision verbally announced at the argument.

Judgment accordingly.

FOLEY BROTHERS v. McILWEE.

Judicial Committee of the Privy Council, Viscount Cave, Lord Shaw and Lord Sumner. February 20, 1922.

APPEAL (§ VIIIC—675)—*Interlocutory judgment referring matter back—Settlement of matters in dispute.*]—On November 5, 1918, 44 D.L.R. 5, an interlocutory judgment was delivered on this appeal, referring the matter back to the Supreme Court of British Columbia to answer an elaborate enquiry and to take an account, and the further consideration of the appeal was adjourned until the enquiry had been answered and the account had been taken.

The judgment of the Board was delivered by

VISCOUNT CAVE :—The parties have now settled all matters in dispute between them, so their Lordships will humbly advise His Majesty that no further order on the appeal is necessary.

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