Dominion Law Reports

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ANNOTATED

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VOL. 33

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PATENT AND TRADE-MARK CASES

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Alberta Supreme Court, Scott, Stuart, Beck and McCarthy, JJ. January 13, 1917.

VENDOR AND PURCHASER (§ II B—5)—PAYMENT OF PURCHASE MONEY—ASSIGNMENT BY VENDOR—NOTICE—CAVEAT.

If notice of an assignment by the vendor of his rights under an agreement of sale of land has not been given to the purchaser, payment to the vendor of the balance due under the agreement will entitle the purchaser to a transfer of the land; a caveat filed in the Land Titles office after the assignment is not notice, as such, to the purchaser, who is not bound to search the register before making payment.

[*Grace* v. *Kuebler*, 28 D.L.R. 753, affirmed. See annotation following.]

Statement.

APPEAL from the decision of Harvey, C.J., 28 D.L.R. 753, dismissing the plaintiff's action. Affirmed.

A. H. Clarke, K.C., for plaintiff; *E. A. Dunbar*, for defendants.

Scott, J.

SCOTT, J., concurred with BECK, J.

Stuart, J.

STUART, J.:—I think this appeal should be dismissed with costs. The matter has always appeared to me to be a very simple one. But before speaking of the exact point in the case I wish to take the opportunity of making one observation suggested by what occurred. Until I find some Court by whose decisions I am bound, stamping with its approval the practice which seems to have obtained to some extent in this province whereby an owner of land, who has entered into a solemn agreement to convey the land to another upon payment of a certain money, deliberately puts it out of his power to fulfil his contract by himself transferring the land to a third party I must continue to adhere to the opinion that such an action is a reprehensible one. A purchaser may be quite confident of the promptness, good faith and, perhaps I might say, the health of his vendor but that vendor has, I think, no right to place his purchaser in a position where he must rely upon a third party for his title who may not, when the time comes to get that title, be either so prompt or honourable or, indeed, alive. It was to the plaintiff's credit that he did not register the transfer that the vendor gave him.

It is of course quite proper for a vendor to assign the debt due to him from the purchaser but it is certainly not the case

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that the obligations of a contract can, without the consent of the other contracting party, be assigned except in certain exceptional cases of which this is not one. See. vol. 7 Hals., pp. 495 and 504.

A debtor is not bound by the assignment of a debt until he has been given notice of the assignment. The plaintiff here never gave the defendants notice of the assignment of the debt. But he registered a caveat and it was contended that by virtue of the Land Titles Act this amounted to notice.

I am for myself unable to accept that contention. I do not think the Land Titles Act was ever intended to furnish to the assignee of a debt, even though that debt might be due as the purchase price of land, a new way of giving notice of the assignment to the debtor. The plaintiff's interest was primarily in the debt, not in the land. The vendor has, in my opinion, no right to convey the legal estate in the land to him. That would be a breach of his contract with the purchaser. No doubt, by the assignment, the vendor did grant and transfer to the plaintiff all his interest in the land. But that interest was the right to hold the title until he was paid. In as much, however, as the vendor had no right to transfer the title to the plaintiff it is difficult to see what right in the land was really transferred to the plaintiff. Was it the vendor's lien for unpaid purchase money? Perhaps it was, though I find some difficulty in understanding why we should speak of a vendor's lien on land of which he still holds himself the legal estate. The vendor's lien is in such a case nothing other than the right to keep the title in his own name until he is paid and perhaps to exercise with or without the sanction of the Court a right of re-sale.

But granting, as no doubt in some form or other is the case, that the plaintiff had an interest in the land which would support a caveat, I think his caveat protected him merely against other parties who might thereafter acquire an interest from the vendor, his assignor, or from the purchaser. It did not protect him from the exercise by the purchaser of rights which he knew the purchaser had, rights, indeed, which were the very subject of his own contract with the vendor. A caveat under the Land Titles Act is in my view intended as a warning to *strangers*, not to persons with whom the caveator already has privity of contract. The ordinary purchaser's caveat is a warning, not to his vendor

with whom he has contracted, but to strangers unknown to him, who may thereafter contract with his vendor. Here the plaintiff contends that his caveat was at once a warning to the purchaser as a stranger and a notice to him of the assignment of the debt. The attempt is made to make the caveat perform a double function (1) that of a warning to strangers to the transaction, to all persons whatsoever being unknown to the caveator who might try to acquire interest in the land, (2) that of a notice to a party to the transaction, *i.e.*, the debtor, well known to the caveator, of the assignment of the debt. It did perform the first function no doubt, but I cannot see that it performed the second or that it was ever intended to do so by the Land Titles Act. A warning to strangers not to *acquire* any interest except subject to the rights of the caveator is a very different thing from a notice to one whose interest and rights have already been acquired and created, known to the caveator and the subject of his own contract, that he must now exercise these rights in a different way. I think a purchaser of land has a right, as against everyone who knows of his contract, to go on exercising the rights given by the contract by paying the money to the person to whom he has agreed to pay it until some actual notice to the contrary is given to him.

Beck, J.

BECK, J.:—There is really no dispute about the facts. I state them briefly.

John and Arthur Steinbrecker made on June 27, 1912, an agreement to sell certain land to W. A. Kuebler and Carl Brunner. The price was $21,600, payable $4,600 down and the balance in 6 payments of $2,834 or $2,833 on September 27, 1913 to 1918.

The land at the date of the agreement was subject to two mortgages for $2,000 and $500 held by one Thompson. By instrument dated April 5, 1913, the Steinbreckers assigned the moneys then owing by the purchasers to the plaintiff, stated therein to be $17,000 with interest at 6% per annum from June 27, 1912, and by the said intrument purported to grant and transfer to the plaintiff all their interest in the land, but expressly, "subject to the terms, covenants and conditions contained in the said articles of agreement." Concurrently therewith the Steinbreckers executed a transfer of the land to the plaintiff.

The land at that time being subject to mortgage the duplicate

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certificate of title ought to have been and no doubt was in the Land Titles Office.

The plaintiff—and in this perhaps he was right—did not register the transfer to him; but on April 7, 1913, he registered a caveat claiming an interest in the land "under and by virtue of a transfer of the said described property of date 9th (a mistake for 5th) of April, 1913, from John Steinbrecker and Arthur Steinbrecker registered owners to Arthur M. Grace."

Neither of the two purchasers—defendants—had any notice of these dealings between the Steinbreckers and the plaintiff or of the caveat until long after they had paid the Steinbreckers the full amount of the purchase money, which however they paid in entire good faith a considerable time before its maturity.

This action was brought by Grace to recover by way of an action for specific performance the balance of the purchase money, which by the agreement the defendants Kuebler and Carl Brunner had covenanted to pay to the Steinbreckers and which they had assigned as above mentioned to the plaintiff.

Freda Brunner was made a party defendant because she had on January 24th, 1914, registered a caveat claiming an equitable interest as purchaser from her co-defendants or one of them of a one-third interest in the land.

The defendants by way of counterclaim asked that the plaintiff be ordered to transfer the land to them.

It is admittedly settled that, apart from any provisions of the Land Titles Act which may affect the matter, where a mortgagee assigns his mortgage and the mortgagor has no notice of the assignment he is discharged by payment to the mortgagee. *Re Lord Southampton's Estate; Allen* v. *Lord Southampton*, 16 Ch.D. 178.

It is also settled in Ontario that the law is the same notwithstanding the provisions of their Registry Act.

In *Gilleland* v. *Wadsworth*, 23 Gr. 547, reversed on other grounds but accepting this rule (1 A.R. (Ont.) 82), it is said by Moss, J.A. (p. 91):—

> The registration of the assignment would not be notice to Brown (the mortgagor) because a mortgagor paying off his mortgage does not come within the class of persons to whom registration constitutes notice,

And the same Judge proceeds:

> In *Trust & Loan Co.* v. *Shaw*, 16 Gr. 448, the present Chancellor remarked: "I think that the statute proceeds upon this, that a party acquiring land

ought to see whether there is anything registered against that which he is about to acquire; and that he is to be assumed to search the registry for that purpose; but this does not apply to one who is not acquiring, but parting with an interest in lands." This latter part of the rule would reasonably be extended to the case of a person obtaining the removal of a charge from his land.

Furthermore it has been held by Holroyd, J., of the Supreme Court of Victoria, in *Niola* v. *Bell*, 27 V.L.R. 82, that there is nothing in the Victorian Transfer of Land Act (which is substantially the same as our Land Titles Act) to affect the old doctrine of equity that payment made by a mortgagor to the mortgagee, subsequently to a transfer of the mortgage, without notice of the transfer, discharges the mortgagor to the extent of the payments.

> To have destroyed it (that doctrine) the language should have been extremely clear and explicit, because it is a doctrine founded upon the plainest principles of justice, as it seems to me.

This decision seems never to have been questioned as far as I have been able to learn. It is cited with evident approval in Hogg's Australian Torrens System (1905), p. 919, and in his Ownership and Incumbrance of Registered Land (1906), pp. 170, 204.

I cannot see that there is any ground for distinction between the case of a mortgage and a transfer thereof and an agreement for sale and the assignment of the moneys owing to the vendor so as to place the purchaser in the latter case in a worse position than the mortgagor in the former case.

I think no good purpose would be served by examining in detail the provisions of our own Act either by way of a discussion of the general question the answer to which depends to my mind rather upon the general principle that the Act does not destroy equitable rights and interests, as was settled by *Jellett* v. *Wilkie*, 26 Can. S.C.R. 282, or by way of a comparison of the provisions of our Act with those of Victoria. I agree entirely with the Victorian decision already cited.

I think some contention was founded on the fact of payment being made before maturity. Such a contention is answered by the following quotation, which I adopt, from *Gilleland* v. *Wadsworth* (in appeal) already cited (p. 90).

> It was indeed argued that that rule is only applicable where the payment is made in accordance with the terms of the mortgage itself. But this argument is met by the decision of the Lords Justices in *Stocks* v. *Dobson*, 4 DeG. M. & G. 11. Sir George Turner said: "Thus the case stands considered as

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a question of payment. Is there, then, any distinction between actual payment and a *bonâ fide* settlement of accounts between a debtor and his creditor without notice of any assignment? I see no substantial ground of distinction between actual payment and a release to the debtor founded upon a fair and *bonâ fide* arrangement. I take the true question to be, whether there is evidence of there having been a fair and *bonâ fide* arrangement between the debtor and the only creditor of whose title the debtor had notice."

The interest of the defendant Freda Brunner was derived from her co-defendants and stands with theirs.

For these reasons I would dismiss the appeal with costs with the result that the plaintiff's action will be dismissed with costs, and that the defendant's counterclaim will be allowed with costs; subject to the right of the plaintiff to have the reference allowed him by the trial Judge and such relief founded upon the result of any such reference as a Judge may find him entitled to. I added these words because it does not appear from the appeal book that the formal judgment was ever taken out. To conform to the rules the appeal book ought not to have been accepted without the formal judgment appearing in it.

McCarthy, J.

MCCARTHY, J., (dissenting):—The facts of the case in so far as they relate to the agreement of sale of Steinbrecker to the male defendants and the assignment of the said agreement and the transfer of the land therein described by Steinbrecker to the plaintiff have been clearly set out by my brother Beck and it is unnecessary for me to repeat them here.

With great respect, however, I am of the opinion that effect must be given to the caveat registered by the plaintiff prior to the payment by the defendants of the deferred payments under the agreement. It therefore turns upon the question when, if ever, does it become the duty of the purchaser to investigate the title. The defendants could have declined to pay instalments until Steinbrecker exhibited a good title and it seems to me that in the judgments both here and below the fact is overlooked that the defendants had knowledge of an interest in the lands of a third party outstanding and notwithstanding that knowledge they neglected the obvious precaution of a search, and where a search of the register before payment would have disclosed where the outstanding interest was.

I cannot arrive at the conclusion that there is no duty cast upon the purchasers to search more especially where they had notice of an outstanding interest in a party other than from whom

they were purchasing, and if it was their duty to search under such circumstances they would be effected with notice of everything that a search of the register would have disclosed.

Referring to the evidence, it will be observed that the dates of the respective transactions are: June 27, 1912, agreement of sale Steinbrecker to male defendants. April 5, 1913, assignment of said agreement and transfer of same land Steinbrecker to plaintiff. April 7, 1913, registration of caveat by plaintiff reciting said transfer. May 14, 1913 (?) payments by defendants of deferred payments under the agreement $10,500. July 5, 1913, note for $1,500.

It was contended in argument before us that the defendants (respondents) would be justified in relying upon their vendor's covenant as to title and were under no obligation to search. Well they may be, they have still got that, which brings me to the consideration of the relationship existing between the defendants and Steinbrecker and to the conclusion that I draw from the evidence that the defendant had explicit confidence in him and that is why they neglected the obvious precaution of a search of the register, by them everything was left to Steinbrecker, as long as he satisfied them with his covenant, his promises and his securities.

When one of two innocent parties must suffer it would seem to me that the loss must fall upon those who could and should have satisfied themselves as to the title before making the payments deferred under the agreement of purchaser.

The defendants did not investigate the title, never called for the agreement of sale or the certificates of title or concern themselves with the documents or title which were in possession of the plaintiff.

There is but one conclusion I think that can be drawn from the evidence and that is the defendant must have known that Steinbrecker did not control the title papers.

The effect of registering a caveat can be ascertained by reference to *McKillop* v. *Alexander*, 1 D.L.R. 586, 45 Can. S.C.R. 551 (per Anglin, J., giving the opinion of the majority of the Court):

> A caveat when properly lodged prevents the acquisition or the bettering or increasing of any interest in the land, legal or equitable, adverse to or in derogation of the claim of the caveator—at all events as it exists at the time when the caveat is lodged, p. 606.

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Vide also *Royal Bank of Canada* and *La Banque D'Hochelaga*, (*Muller* v. *Schwalbe*), 19 D.L.R. 19.

If as stated by Duff, J., in *McKillop* v. *Alexander* (*supra*), at p. 600, that doctrine of constructive notice has been swept away by the Land Titles Act, it seems to follow that the purchaser's duty is to avail himself of the information which he would derive from a search in the Land Titles Office.

I take it that if the opinion expressed by Duff, J., has that effect then it was the duty of the purchaser to search the register; if it has not that effect the purchaser on the evidence should be effected by constructive notice.

The cases relied on by the respondents relating to assignments of mortgages are distinguishable upon two grounds. (1) They are based upon the statutes which make registration notice only to persons *subsequently* dealing with the property *vide Gilleland* v. *Wadsworth*, 1 A.R. (Ont.) 82. (2) In the case of a mortgagor the registered title is already in the name of the mortgagor, whereas a purchaser under an agreement for sale has no registered title and in order to obtain it must see that he is dealing with a person who is able to give it. *Vide Trust and Loan Co.* v. *Shaw*, 16 Gr. 448.

Under sec. 97 of the Land Titles Act it is provided that registration by way of caveat has the same effect as to priority as the registration of any instrument under the Act.

Assuming that the plaintiff is by virtue of his caveat in the same position as if he had registered his transfer, the only provision for depriving him of his registered title is in case of fraud, *vide* sec. 114, ch. 24 Land Titles Act (Alta.), and it has now here been contended that there was fraud on the part of the plaintiff in registering his caveat and in the absence thereof the Land Titles Act makes the provision for depriving him of his title and the priority which he desires under the Act by virtue of his registration.

As to the failure of the plaintiff to give notice of the assignment of the agreement, see the remarks of Moss, J.A., in *Gilleland* v. *Wadsworth* (*supra*), at pp. 94 and 95.

I am of the opinion that the appeal should be allowed with costs and the defendants' counterclaim dismissed with costs and that the usual order for specific performance should go.

ANNOTATION.

Annotation.

BY ALFRED B. MORINE, K.C.
(Consulting Editor D.L.R.)

The very just and convenient rule of law laid down in this action might have been reached by reasoning less open to criticism, perhaps, than that which was based upon decisions upon the Ontario Registry Act.

The defendants in this action were purchasers under an agreement for the sale of land. A balance due the vendor had been assigned to the plaintiff, and a transfer of the land to him, subject to the agreement of sale, had been executed, but not registered. He had filed a caveat in the Land Titles Office, setting forth that he was interested under a transfer, and subsequently the defendants, who had no actual notice of the assignment, paid to the vendor the balance due on the land. The plaintiff (assignee) sued the defendants (purchasers) for the said balance, and the defendants counter-claimed for a transfer, which was ordered. The real question at issue was, did the caveat constitute notice to the defendants of the assignment to the plaintiff?

The Land Titles Act makes this provision for a caveat: "Any person claiming to be interested . . under any instrument of transfer . . in any land, mortgage or encumbrance, may cause to be filed a caveat in form 'W' . . So long as any caveat remains in force the registrar shall not register an instrument purporting to affect the land, mortgage or encumbrance."

It will be noticed that no provision is made by the Act that a caveat shall, as such, be "notice" to anybody for any purpose, and it is maintainable that it is not even constructive notice to a person subsequently acquiring an interest in land, as registration under the Ontario Registry Act would be. Notice or no notice may be a question of fact only.

Sec. 41 of the Land Titles Act says: "After a certificate of title has been granted for any land, no instrument until registered under this Act shall be effectual to pass any estate or interest in any land (except a leasehold for 3 years or less) or render any such land liable as security for the payment of money." Therefore the parties in this action came before the Court in effect as persons claiming adversely, the defendants for a transfer and registration, the plaintiff to be paid before transfer or registration the balance due under the agreement for sale at the date of its assignment. As against each other they had equitable rights, and both being innocent, the only question was, which had the better equity?

The defendants could say to the assignee, "the moment there is a valid contract for the sale of land, the vendor becomes in equity a trustee for the purchaser (*Shaw* v. *Foster*, L.R. 5 E. & I. App. 321; *Raffety* v. *Schofield*, [1897] 1 Ch. 937), and upon completion of the payments is bound to convey the legal title (*Baldwin* v. *Belcher*, 1 Jo. & Lat. 26). When you took an assignment from the vendor with notice of the previous bargain and sale, you assumed the position of our trustee (*Taylor* v. *Stibbert* (1794), 2 Ves. Jr. 437), and hold the transfer for us. As assignee of the vendor's lien for an unpaid balance of purchase money, you have no claim against us or the land, for the money has been paid to the vendor, and we had not the notice you were bound to give, if you wished to bind us (*London & County Bank* v. *Ratcliffe* (1881), 6 App. Cas. 722, and see *Niola* v. *Bell*, 27 Vict. L.R. 82; *Queensland Trustees* v. *Registrar of Titles*, 5 Q.L.J. 46, and *Peck* v. *Sun Life Ins. Co.*, 11 B.C.R. 215).

Annotation.

Against this argument what had the plaintiff to offer except the suggestion that the caveat he had filed constituted notice to the defendants that he had acquired a right to the balance then unpaid, and even as to that he would have to admit that if anything had been paid between the date of the assignment and the filing of the caveat, he had no claim for it.

The Land Titles Act (sec. 97), says that registration of a caveat shall have the same effect, as to priority, as registration of the instrument under which the caveator claims. But suppose the plaintiff had filed his transfer from the vendor, would not a Court have been bound to decree, under the circumstances, that he held the land as trustee for the defendants, and was bound to transfer to them? McCarthy, J., says that had the plaintiff registered his title, he could not have been deprived of it except, under sec. 114 of the Act, for fraud, and the plaintiff had not been guilty of fraud. But, aside from the point that registration by the plaintiff with intent to hold the land as his own would have been fraud (*McDonald* v. *Leadley*, 20 D.L.R. 157), the Court would have power to order the plaintiff as trustee for the defendants to make a transfer to them, and action under sec. 114 would not be necessary (*Tucker* v. *Armour*, 6 Terr. L.R. 388).

McCarthy, J., referring to the fact that the land was subject to certain mortgages, which the purchasers had agreed to assume, argued that a duty was thereby cast upon the purchasers, to search the registry, and a search would have disclosed to them that the plaintiff had filed a caveat, and upon the assumed existence of such a duty he based the contention that the caveat was notice to the defendants. The statement of the argument seems to answer it; if it were good, notice or no notice by caveat would depend upon the existence of circumstances creating a duty upon the part of the person it was supposed to notify. The alleged duty of the defendants was to themselves, not to the plaintiff; if they trusted the vendor implicitly, it did not lie in the mouth of his assignee to reproach them. If he could not say, you trusted me, it was your duty not to do so, therefore by paying me imprudently, you have lost your money, how could his assignee say so, charged, as he was, with the same equities, and having, as against the purchasers, no right of his own prior to notice to them of the assignment?

Discussing the Ontario cases referred to by the other Judges, as settling that the Registry Act of Ontario did not make registration of an assignment of a mortgage notice to the mortgagor, McCarthy, J., said, that—they were based upon the words of the statute, and that "the registered title is in a mortgagor, whereas a purchaser has no registered title," and therefore should search the register. The fact is, of course, that the rule that "an assignment will not bind the person liable until he has received notice" (Anson on Contracts, 8th ed. 293; *Stocks* v. *Dobson*, 4 De G. M. & G. 11, 15, (43 E.R. 411), was established where and when there were no Registry Acts. The cited Ontario cases merely (1) decided that a mortgagee discharging a first mortgage was not affected with notice of a second mortgage (*Trust & Loan Co.* v. *Shaw*, 16 Gr. 448), and (2) suggested that a mortgagor was, perhaps, not affected with notice of an assignment of a mortgage by the registration thereof (*Gilleland* v. *Wadsworth*, 1 A.R. (Ont.) 82). These decisions, it is true, rested upon the words of the Registry Act, but in this sense only, that but for the words thereof there could have been no doubt whatever that registration was not notice.

The suggestion by Moss, J.A., was not essential to the judgment, and has, therefore, no binding force.

Annotation.

Stuart, J., referring, apparently, to the fact that the vendor had executed a transfer to the assignee, expressed the opinion that it was reprehensible for vendors so placed to so "transfer the land," though quite proper to assign the debt due, for, said he, the vendor thereby puts it out of his power to fulfil his contract, and, perhaps, the purchaser has entered into the contract on the strength of his faith in the personality of the vendor, and the assignee may be a person more difficult to obtain a title from. Later on he said, "the vendor has no right to convey the legal estate to the assignee (*i.e.*, no power, in equity), and he proceeded to question whether any interest in the land would be conveyed by a (registered) transfer made under such circumstances, upon the ground, apparently, that the vendor had in equity parted with the title by the agreement to sell. We venture to think that this opinion and the arguments upon which it is based will not be assented to generally. As already pointed out, the agreement of sale did not confer upon the purchaser any interest in the land under the Land Titles Act (sec. 47). Aside from the Act, the agreement conferred only an equitable interest (or claim?). Either under or apart from the Act, the vendor could legally and effectually transfer the land to any person; to a stranger for his own benefit, to one with notice of the agreement for the benefit of the trustee and for his own protection. We have not hitherto seen it suggested that after an agreement for sale, the land could not effectually be transferred to a third party. On the contrary, the practice has been general (*Brown* v. *London Necropolis Co.*, 6 W.R. 188), and its results clearly defined—that an assignee without notice takes a complete title, and one with notice becomes a trustee (Fry, Specific Performance, 4th ed., p. 98). As to the moral right, that would of course depend in each case upon the question of fact whether the vendor was conscious that the purchaser was damaged by the assignment; and generally whether if he were, it was not a risk he voluntarily assumed. A purchaser who knows that a vendor may legally assign land cannot reasonably complain if an assignment be made which he might have prevented, by a caveat or otherwise. Besides, it by no means follows as a fact in general practice that a transfer can be obtained from a vendor more conveniently than from an assignee with notice. The purchaser has in fact neither legal nor moral right to count upon no change being made in the habitat of the vendor before he desires to obtain his transfer—at least no such right as the law should aim to preserve. The vendor may remove to a foreign land, or may die, and nobody would suggest that he should refrain from death or removal because the purchaser would thereby be inconvenienced. The purchaser under an agreement of sale has a right or interest in the land which he can protect by a caveat; the vendor is under a personal liability also; if the purchaser chooses to depend upon the latter, the personal liability remains even after the vendor has assigned the contract, unless the purchaser has assented to the assignment (*British Waggon Co.* v. *Lea*, 5 Q.B.D. 149). What moral reason can there be why a vendor should not assign his rights?

Finally, sec. 101 of the Land Titles Act, providing that notwithstanding anything to the contrary in the contract an agreement for the sale of land shall be assignable, seems to set the seal of the statute law upon trading in land agreements, and renders rather inexplicable the language of Stuart, J., in this connection.

The decision under discussion tends to convenience. The mortgagor or purchaser who had to search the registry every time he made a partial

Annotation. payment would be very unhappily placed. Partial payments far outnumber all others, and all are protected to some extent by the simple equitable rule that an assignee must notify those affected by the assignment; if the contrary rule prevailed, the inconvenience and uncertainty would seriously hamper the sale of land. Those who do not care to depend upon this rule alone, can register their agreements, or file caveats, as the law may permit, unless the agreements stipulate otherwise. In the case under discussion the plaintiff was the victim of his own negligence.

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CANADIAN PACIFIC R. CO. v. PARENT.

Judicial Committee of the Privy Council, Viscount Haldane, Lord Dunedin, Lord Parker of Waddington, Lord Parmoor and Lord Wrenbury.
January 26, 1917.

1. CARRIERS (§III F—439)—LIVE STOCK—INJURY TO CARETAKER—LIMITATION OF LIABILITY.

A condition in a live stock contract between shippers and a railway company, relieving the company of liability for injury or death of men in charge of cattle while being carried by the railway, is binding on the men so in charge if they accept passes, granted under the contract containing substance of the conditions, the acceptance or otherwise is a question of fact.

[*Canadian Pacific R. Co.* v. *Parent*, 21 D.L.R. 681, 51 Can. S.C.R. 234, reversed.]

2. DEATH (§II A—5)—REMEDIES FOR—QUE. C.C.

Art. 1056 (Que. C.C.) confers an independent and personal right of action upon the consort and ascendant and descendant relatives of a person who dies in consequence of an offence or quasi-offence, not on the representatives (as Lord Campbell's Act does), but the offence or quasi-offence must occur in Quebec.

Statement. APPEAL from the Supreme Court of Canada, 21 D.L.R. 681, 51 Can. S.C.R. 234. Allowed.

The judgment of the Board was delivered by

Viscount Haldane VISCOUNT HALDANE:—This appeal raises questions of importance on which there has been considerable divergence of opinion among the Judges in the Courts below. These Courts have, however, for varying reasons, agreed in holding that the Chief Justice of Quebec, who tried the case, was right in his decree that the respondents were entitled to damages from the appellants for having by the negligence of their servants caused a collision which resulted in the death of one Joseph Chalifour. As certain of the points of law decided were of general interest to the public in Canada, their Lordships gave special leave to appeal, but only on terms as to costs.

The important facts in the case are not in dispute; the real questions are questions of law. The respondents are the widow and son of Joseph Chalifour. He was a stockman employed by the Gordon Ironside & Fares Co. to bring cattle by the appellants' railway from Winnipeg, in Manitoba, to Hochelaga, a suburb

of Montreal, in Quebec. The cattle were consigned to the appellants, under a special live stock contract, dated the 18th September, 1911, which contained a provision exempting the appellants from all liability in respect of the death, injury, or damage of a person travelling with the cattle, in case a pass had been granted to him to travel at less than full fare for the purpose of taking care of them, whether such liability was caused by the negligence of the appellants or their servants or otherwise. Chalifour had signed a separate pass which, for all material purposes, repeated this exemption from liability as regarded himself individually. On September 21, 1911, while on the journey from Winnipeg to Hochelaga, Chalifour was killed in a collision at Chapleau, in Ontario. The collision was due to negligence on the part of the appellants' servants.

By art. 1056 of the C.C.Q. it is provided that:

> In all cases where the person injured by the commission of an offence or a quasi-offence dies in consequence, without having obtained indemnity or satisfaction, his consort and his ascendant and descendant relations have a right, but only within a year after his death, to recover from the person who committed the offence or quasi-offence, or his representatives, all damages occasioned by such death.

It is settled by the decisions of this Board in *Robinson* v. *C.P.R. Co.*, [1892] A.C. 481, and *Miller* v. *G.T.R. Co.*, [1906] A.C. 187, that this article of the Code confers an independent and personal right, and not one conferred, as in the English statute known as Lord Campbell's Act., merely on the representatives as such of the deceased. In Manitoba and Ontario it is otherwise. The analogous right there arises only under statutes which are for this purpose substantially in the same terms as Lord Campbell's Act. There was some doubt expressed in the Courts of Quebec in the present case as to whether the law of Manitoba, assuming it to be relevant, was duly proved. If such proof was material in the Quebec Court, their Lordships are of opinion that, when the case reached the Supreme Court of Canada, this doubt could not properly be entertained. For the Supreme Court is the common forum of the Provinces of Canada, and is bound to take judicial notice of their laws. It is clear that if the law of either Manitoba or Ontario governs the case, the respondents were precluded from claiming.

In these provinces the rule of the English common law prevails that in a civil Court the death of a human being cannot

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be complained of as an injury. The application of this rule is modified by statute in a fashion analogous to what obtains in England under Lord Campbell's Act; but the modification contained in the statutes in these provinces has, like that contained in Lord Campbell's Act, no application unless the wrongful act done would, had not death ensued, have entitled the person injured to maintain an action and recover damages. If Chalifour validly contracted himself out of this right, his representatives could not therefore have sued if the law of either of these provinces governs.

The crucial questions which arise are whether Chalifour, by signing the pass under the circumstances in which he was accepted as a passenger in charge of the cattle at less than the full fare, bound himself to renounce what would otherwise have been his rights, and if so, whether the respondents were precluded from claiming under the article in the Quebec Code? If that article applied, it is not in controversy that the widow and son were proper plaintiffs in this action.

Dealing with the first of these questions, their Lordships have arrived at a conclusion different from that of the majority in the Supreme Court of Canada. Sec. 340 of the Railway Act of the Dominion provides that:—

> No contract, condition, by-law, regulation, declaration, or notice made or given by the company, impairing, restricting, or limiting its liability in respect of the carriage of any traffic, shall, except as hereinafter provided, relieve the company from such liability, unless such class of contract, condition, by-law, regulation, declaration, or notice shall have been first authorised or approved by order or regulation of the Board.
>
> (2) The Board may, in any case, or by regulation, determine the extent to which the liability of the company may be so impaired, restricted, or limited.
>
> (3) The Board may by regulation prescribe the terms and conditions under which any traffic may be carried by the company.

It appears that in 1904 the appellants applied to the Board for approval of their forms of bills of lading and other traffic forms. At the time they and three others were the only railway companies that had thus complied with the requirements of the Act, and there was much diversity in the forms used by different companies. The Board therefore abstained from making any final or definite order on the subject, but made an interim order, the effect of which was to permit the appellants to continue the use of their present forms until otherwise directed. Among the

forms so authorized was that in which the live stock special contract in the present case was made. One of its clauses provided that:—

In case of the company granting to the shipper or any nominee or nominees of the shipper a pass or privilege less than full fare to ride on the train in which the property is being carried, for the purpose of taking care of the same while in transit, and at the owner's risk as aforesaid, then, as to every person so travelling on such a pass or privilege less than full fare, the company is to be entirely free from liability in respect of his death, injury or damage, and whether it be caused by the negligence of the company or its servants or employees or otherwise howsoever.

On the same date as the live stock contract was made, on September 18, 1911, a pass was issued to Chalifour and a man named Adshead, who were the nominees of the Gordon Ironside & Fares Co. Ltd., the shippers under the special live stock contract. The pass was in the following form:—

CANADIAN PACIFIC RAILWAY, WESTERN DIVISION.

Live Stock Transportation Pass.

To Conductors. *Winnipeg, 18th September,* 1911.

The two men whose signatures are subscribed on back hereof are the only persons entitled to pass in charge of thirteen cars live stock (170922, 167196, 166252, 165346, 169796, 168794, 167034, 166496, 167128, 350154, 350130, 164574, 165058). Billed from Cardston to Montreal.

As men in charge of live stock are now only passed to Winnipeg on Stock Contracts, conductors east of Winnipeg will not honour stock contracts for passage.

Conductors in charge of train making last run will take up this pass and turn it to agent at destination of live stock.

Valid only when countersigned by R. E. LARMOUR, *General Freight Agent.*

No. 7512 Countersigned:

H. W. DICKSON, *L.F.A.*

CONDITIONS.

Each of us, the undersigned, having charge of live stock mentioned on face hereof, in consideration of the conditions of the Canadian Pacific Railway Company's Live Stock Transportation Contract, agree with the company, while travelling on this pass, to assume all risk of accident or damage to person or property, and that the company shall be entirely free from all liability in respect to any damage, injury, or loss to any of us or the property of any of us, whether such accident, injury, damage, or loss is caused by the negligence of the company or its servants or employees or otherwise howsoever.

Signatures: Witness: H. DE VILLERS.

F. ADSHEAD. JOSEPH CHALIFOUR.

Countersigned: H. W. DICKSON, *Local Freight Agent.*

Their Lordships are of opinion that if this document was signed by Chalifour under such circumstances as to make it binding on him it relieved the company effectually from all liability for damages caused to him by the accident which hap-

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pened. The Railway Board had approved the condition in the main contract by which, if the company granted a pass at less than full fare to a nominee, such as was Chalifour, it was to be free from all liability. No doubt this condition was contained in a contract made only between the company and the shippers. But it was inserted to regulate the terms on which the nominee, if allowed to travel, was to be accepted, and the nominee, if he validly signed the pass in which its substance was repeated, accepted these approved terms as definitive of the footing on which he was to be carried. In this respect there is no real distinction between the facts and those in *Grand Trunk R. Co.* v. *Robinson*, [1915] A.C. 740, 22 D.L.R. 1, where the pass was written on the same paper as the contract. All that sec. 340 of the Railway Act requires is that the class of condition should have been approved by the Board, and such approval was obviously given in the present case. Their Lordships are unable to agree with the reasons given in the judgment of Duff, J., in the Supreme Court of Canada, for thinking that what was done did not comply with all that sec. 340 required.

The next question to be considered is whether the appellants have discharged the burden of proving that Chalifour assented to the special terms on which he was invited to travel. The evidence on this point is somewhat meagre. No witness has any exact recollection of what took place. Chalifour understood but little English and he could not read or write, though he could sign his name. He had been for 2 years in the employment of the shippers, to look after stock; but he had not been in Western Canada prior to the occasion on which the particular journey was made, and on which his death took place. Before that he had worked in a brewery, apparently in Quebec. It was proved that the appellants kept a French clerk, whose duty it was to give explanations to any nominee who was called on to sign his pass and asked for explanations. This clerk was named De Villers, and he witnessed the signature of Chalifour. He could not remember whether or not he had been asked for any explanation of the conditions; but another clerk, named Anderson, says that he remembers a conversation in French taking place, on the occasion of the pass being signed, between Chalifour and De Villers. He knew Adshead and recalled what took place. The pass, after being signed by Adshead and Chalifour, was delivered to Ads-

head, who was present, along with the latter, when it was given out. Adshead himself was not called as a witness by either party. Under the circumstances, their Lordships are not satisfied that, as was held in *Grand Trunk R. Co.* v. *Robinson*, *supra*, the company was not entitled to infer that Chalifour left it to Adshead to make the bargain for him. But it is unnecessary to decide this. For they think that, having regard to the general course of business and to the exigencies of time and place, the company did enough to discharge the obligation that lay on them to enable Chalifour to know what he was about when he accepted the pass containing the condition to which he signed his name. They are unable to concur with the Judges in the Courts below, who have held that more was required to be done by the company in order to make it reasonable to infer that Chalifour knew, or ought to have known, what he was assenting to when he signed the document. As was pointed out in the judgment of the Judicial Committee in *Grand Trunk R. Co.* v. *Robinson*, the duty of railway companies to reduce delay when serving the public has to be borne in mind in estimating what the law will require in practice.

It follows that, as the statute law of Ontario, the Province where the accident occurred which caused Chalifour's death, did not confer on anyone claiming on his account a statutory right to sue, there was, so far as Ontario is concerned, no other right. For in Ontario the principle of the English common law applies, which precludes death from being complained of as an injury. If so, on the general principles which are applied in Canada and this country under the title of private international law, a common law action for damages for tort could not be successfully maintained against the appellants in Quebec. It is not necessary to consider whether all the language used by the English Court of Appeal in the judgments in *Machado* v. *Fontes*, [1897] 2 Q.B. 231, was sufficiently precise. The conclusion there reached was that it is not necessary, if the act was wrongful in the country where the action was brought, that it should be susceptible of civil proceedings in the other country, provided it is not an innocent act there. This question does not arise in the present case, where the action was brought, not against the servants of the appellants, who may or may not have been guilty of criminal negligence, but against the appellants themselves. It is clear

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that the appellants cannot be said to have committed in a corporate capacity any criminal act. The most that can be suggested is that, on the maxim *respondeat superior*, they might have been civilly responsible for the acts of their servants.

The other point that remains is whether art. 1056 of the Quebec Code which has already been quoted conferred a statutory right to sue in the events which happened. Their Lordships answer this question in the negative. The offence or quasi-offence took place, not in Quebec, but in Ontario. The presumption to be made is that in enacting art. 1056 the Quebec Legislature meant, as an Act of the Imperial Parliament would be construed as meaning, to confine the special remedy conferred to cases of offences or quasi-offences committed within its own jurisdiction. There is, in their Lordships' opinion, nothing in the context of the chapter of the Code in which the article occurs which displaces this presumption in its construction. The rule of interpretation is a natural one where law, as in the case of both Quebec and England, owes its origin largely to territorial custom. No doubt the Quebec Legislature could impose many obligations in respect of acts done outside the province on persons domiciled within its jurisdiction, as the railway company may have been by reason of having its head office at Montreal. But in the case of art. 1056 there does not appear to exist any sufficient reason for holding that it has intended to do so, and by so doing to place claims for torts committed outside Quebec on a footing differing from that on which the general rule of private international law already referred to would place them.

In the result, their Lordships will humbly advise His Majesty that the judgment appealed from should be reversed and that the action should be dismissed. As leave to appeal to His Majesty in Council was given only upon the special terms that the costs of the appeal as between solicitor and client should be borne by the appellants in any event this must be done. As to the costs in the Courts below, their Lordships think that under the circumstances which attend this appeal the parties ought to bear their own costs in these Courts. The effect of this will be that any costs already paid by the appellants to the respondents must be refunded. *Appeal allowed.*

PEART BROS. v. MacDONALD.

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Saskatchewan Supreme Court, Haultain, C.J., and Lamont, Brown and Elwood, JJ. January 6, 1917.

SALE (§ IV—90)—BULK SALES ACT.

A sale of a stock of goods in bulk, unaccompanied by any payment in cash or by promissory note, or other document for the purchase price is not within the Bulk Sales Act (Sask.), 1910-11, ch. 38, sec. 3, and is not fraudulent and void thereunder.

Statement.

APPEAL from the judgment of Newlands, J., in an interpleader between execution creditors. Varied.

G. E. Taylor, K.C., for appellants.

The judgment of the Court was delivered by

Elwood, J.

ELWOOD, J.:—On or about August 14, 1913, one James Parkhill, who was carrying on a retail business in the City of Moose Jaw, sold his stock-in-trade and fixtures to one Andrew D. Nicholson. The agreement, which was in writing, provided that the purchaser should pay for the said stock-in-trade and fixtures by assuming all liabilities of the vendor in connection with the said business with two exceptions, and the balance of the price that the stock-in-trade should come to over and above such liabilities should be paid by certain real estate to be transferred to the vendor.

In consequence of this agreement the purchaser entered into possession and conducted the business for a time and subsequently the sheriff seized the stock-in-trade and fixtures etc., under executions against the purchaser. An arrangement was entered into apparently between the sheriff and the creditors of the purchaser whereby the said Parkhill entered into possession of the stock, sold it out, and deposited the money with the sheriff for the creditors.

The contest in this action is whether or not the execution creditors of Parkhill or the execution creditors of Nicholson are entitled to the moneys so turned over to the sheriff. It is contended on behalf of the execution creditors of Parkhill that the sale from him to Nicholson was fraudulent and void under the Bulk Sales Act, being ch. 38 of the statutes of 1910-11 (Sask.), Sec. 3 of the above Act provided in part as follows:—

> Whenever any person shall bargain for or purchase any stock of goods, wares, or merchandise in bulk for cash or on credit, and shall pay any part of the purchase price, or execute or deliver to the vendor or to his order or to any person for his use, any promissory note or other document for or on

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account of the purchase price of said goods or any part thereof, without first having demanded and obtained from the vendor or from his agent . . a written statement verified by statutory declaration purporting to be such as is provided for in the next preceding section of this Act . . then, such sale shall be deemed to be fraudulent and shall be absolutely void as against the creditors of the vendor, etc.

In my opinion, the sale in question was a sale in bulk. The written statement referred to in the above section was not obtained. The evidence shews that no cash was paid. The evidence does not to my mind shew that anything was paid on account of the purchase price. What he there refers to is in my opinion a reference to money that was probably paid for goods that were subsequently furnished to Nicholson. At any rate, it does not appear that anything was paid on account of Parkhill's liabilities. The purchaser did not execute or deliver to the vendor or to any person any promissory note or document for or on account of the purchase price. The agreement for sale in my opinion was not a document within the meaning of the above section. Therefore, there having been no part of the purchase price paid and no promissory note or other document for or on account of the purchase price having been executed or delivered, I am of the opinion that the sale does not come within the class of sales contemplated by the above Act.

Having reached that conclusion the result in my opinion is that the appeal should be allowed and the order of Newlands, J., varied by declaring that the goods and chattels seized by the sheriff of the Judicial District of Moose Jaw under writs of execution against the goods of A. D. Nicholson and the moneys realised therefrom are the property of the defendants as execution creditors of the said Nicholson. The defendants should recover from the plaintiffs their costs of and incidental to the interpleader proceedings and of this appeal. The plaintiffs should pay the sheriff his costs of and incidental to the interpleader proceedings.

Appeal allowed.

N. S.

S. C.

LEWIS v. GENERAL MANAGER OF GOVERNMENT RAILWAYS.

Nova Scotia Supreme Court, Sir Wallace Graham, C.J., Russell, and Drysdale, JJ., Ritchie, E.J., and Harris and Chisholm, JJ.
January 9, 1917.

CROWN (§ II—25)—RAILWAYS SMALL CLAIMS ACT—CONSTRUCTION AND OPERATION.

The Government Railways Small Claims Act, 1910, ch. 26 (Can.), as amended by Acts 1913, ch. 20, 1914, ch. 9, does not confer jurisdiction to hear and determine claims for damages arising out of the construction

of a railway, but merely those "arising out of operation," although the damages resulting from the construction were caused during the operation of the railway.

APPEAL from the judgment of Finlayson, Co. Ct. J., in favour of plaintiff, in an action for damages caused by a flow of water from a culvert on a government railway. Reversed.

J. McG. Stewart, and *J. A. McDonald*, for appellant; *H. Mellish*, K.C., and *D. D. Mackenzie*, for respondent.

RUSSELL, J.:—I regret that I am unable to agree with the Judge of the County Court in this case. The evidence supports the conclusion of fact at which he arrives, namely, that the damage suffered by the plaintiff was due to faulty construction of the culvert. When the defendant sought to remedy the mischief he did so, not by allowing the culvert to remain and taking new precautions in the operation of the road by keeping the culvert clear or otherwise. What he did was to change the construction of the road by closing the culvert altogether and causing the water theretofore collected at that point to flow in another direction. I do not see how any admissible construction can be given to the Act which will warrant this Court in saying that the claim arises out of the operation of the road.

The case of *Greer* v. *C.P.R. Co.* (23 D.L.R. 337, 51 Can. S.C.R. 338, 19 Can. Ry. Cas. 58) throws no light on the question. The words of the statute there in question were "construction or operation." The Chief Justice considered that an injury caused by burning sleepers at the side of the track was an injury arising out of the operation of the road. This dictum was *obiter* but there can be little doubt that it is correct. And if the injury in this case had arisen from a failure to keep the culvert open, or from negligence in not keeping snow from accumulating and melting, thus causing an increased flow of water, that might be held to be an injury arising out of the operation of the road. No such case is made. The case is that, as the trial Judge says, the damage was wholly due to negligence in constructing this particular section of the road. I cannot think that the case is brought within any reasonable extension of the meaning of the statute by the circumstance that the damages were caused "during the operation of the road." It was stated at the argument that the injury did not arise during the operation of the road, but before the operation of this particular section began. But I

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LEWIS v. GENERAL MANAGER OF GOVERNMENT RAILWAYS.

Harris, J.

consider the question of fact here suggested to be immaterial. The Railway Act seems to draw a clear line between construction and operation, and this injury, even if it occurred during the operation of the road, was clearly due to its improper construction.

HARRIS, J.:—When the Intercolonial Railway was built through North Sydney in 1914, a culvert was put in through which the water flowed from one side of the railroad to the other. After being discharged from the end of the culvert, the water ran down to the plaintiff's premises and damaged his house.

This action was brought under the Government Railways Small Claims Act, ch. 26 of the Acts of 1910 (Can.) as amended by ch. 20 of the Acts of 1913, and ch. 9 of the Acts of 1914.

Sec. 2 of the Act as amended provides that:—

> Any claim against His Majesty *arising out of the operation* of the Intercolonial Railway, and not exceeding in amount the sum of five hundred dollars for damages alleged to be caused by negligence or made payable by statute may be sued for, etc.

It is, I think, obvious that the only claims which come within this Act are those arising out of the operation of the railway, and it is equally obvious that this claim arises out of the construction, and not out of the operation, of the railway. This is the finding of the County Court Judge who said:—

> It did not arise in the strictest sense from the operation of the road. It was wholly due to negligence in constructing this particular section, although the damages were caused during the operation of the road.

After so finding the trial Judge says:—

> The Small Claims Act is, however, remedial legislation, and as such should be given liberal construction; its object was to enable persons having small claims against the railway to have these claims adjusted with the minimum delay and costs incident to claims against the Crown. I think, keeping this purpose in view, that it is not going too far to hold the claim within the provisions of the Act.

With all deference I am absolutely unable to agree with the conclusion of the Judge. It is sufficient to say that the words of the Act are perfectly clear, and they cover only claims "arising out of the operation of the Intercolonial Railway." They do not cover claims "wholly due to negligence in constructing," nor claims caused by construction where the damages arose "during the operation of the road."

It was urged by counsel for respondent that unless the judgment appealed from was sustained, the plaintiff would be without remedy. That may or may not be. This Court can only in-

terpret the law as it stands, and in my opinion it is clear that this case is not within the meaning of the statute. N. S. S. C. Harris, J.

I think the judgment below should be set aside and the action dismissed with costs in both Courts.

The other members of the Court concurred.

Appeal allowed.

PANKHURST v. SMITH.

N. B. S. C.

New Brunswick Supreme Court, Appeal Division, McLeod, C.J., White and Grimmer, JJ. September 16, 1916.

MASTER AND SERVANT (§ V—340)—WORKMEN'S COMPENSATION—LOSS OF HAND.

The loss of all the fingers on one hand amounts to the loss of the whole hand, and justifies the award of the full amount allowed for the loss of a hand under the Workmen's Compensation for Injuries Act (N.B., 1914, ch. 34).

Statement.

APPEAL by defendant from the judgment of McKeown, J., under the Workmen's Compensation for Injuries Act. Affirmed.

The judgment appealed from is as follows:—

MCKEOWN, J.:—The plaintiff has presented to me a petition under the provisions of the Workmen's Compensation for Injuries Act, claiming damages because of an accident which befell him while in defendant's employ, under circumstances detailed below. The matter was heard before me on May 18 and June 13, 1916, and on July 25, 1916.

The case is not free from difficulty and has occasioned me a good deal of consideration. It was exceptionally well tried by counsel and the trouble I have had in coming to a decision arises, not from any uncertainty with reference to the scope of the Act in a case like the present one, but rather from the difficulty I have had in coming to a satisfactory conclusion as to the proper inferences to be drawn from the facts disclosed, especially as there is no appeal upon that ground. Although the operation of the Act as to this particular question is at an end, I think it is due to the counsel that I should express my view as to the law whereupon they differed. We have to deal in this action with the 3rd section of the Act of 1914; and when speaking of the benefits thereby conferred, it is to be understood that the injured workman was put upon the footing of a stranger to his employer. To quote the concluding words of that section:—

The workman, or in case the injury results in death, the legal representatives of the workman, and any person entitled in case of death, shall have

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the same right of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of the employer, nor engaged in his work.

Now the above provision is adopted from the English Employers' Liability Act, 1880, and it is not the only section of our Act which owes its origin to that source. There has been judicial interpretation of the effect of this above quoted provision, and there can be no question that it does not prevent the defence of contributory negligence being raised in a case like the present one. I have given consideration to Mr. Jones' argument based on sec. 5 of the Act as compared with the corresponding section of the Act of 1908, which expressly gave immunity to the employer when the injury was caused to the workman "by reason of his own neglect or carelessness," whereas such words are omitted from the Act of 1914. Notwithstanding this suggestive omission, I am inclined to hold, and do hold, that the defence of contributory negligence is still open to the employer, and, being of that opinion, it is necessary for me to determine whether such defence has been established.

The facts of the case are that on March 29, 1916, and for some weeks prior thereto, plaintiff was working in defendant's sawmill at Rockland, in the parish of Brighton, Carleton County, and on the day last aforesaid, while working for said defendant in such employment at a circular saw edger in said mill, plaintiff's left hand came in contact with said circular saw and all the fingers were taken off. The edger saw revolved through the surface of a table to a height of about 7 inches. Plaintiff had been in defendant's employ around the mill for some 8 weeks—at first as a lumber piler—and he had been working at the edger saw for only a short time. His duty in the latter employment was to handle each board as it came to him and to place it upon the table lengthwise, with one end against the saw, to a sufficient width to take off the wane and to give the board a clean true edge; and, holding the board in place with one hand, to push the table along, thereby carrying the saw through the board. Having thus taken off the first edge, the board was then placed on the other side of the saw and the operation repeated. Although all the witnesses do not agree upon the point, I am of opinion, and find, that the accident occurred while plaintiff was removing the first edge from the board.

Having seen the saw in its place upon the table, and having been shewn how the work in question was carried on, I am not inclined to attribute the accident to the cause ascribed by the plaintiff in his evidence. I agree in the opinion expressed by other witnesses, who testified that it would be almost, if not quite, impossible for the accident to have occurred as plaintiff described it. I have expressed the view, in similar cases previously before me, that a person who sustains an injury through instantaneous contact with machinery is not invariably in a position to give a correct account of how the mishap occurred.

It is one thing to say that the accident did not happen in the way described by plaintiff, but it is quite another thing to say that it was caused by plaintiff's negligence. The saw was a dangerous machine and plaintiff has shewn that it was practicable to guard it, and, if guarded, the danger to the operator would, as testified by the factory inspector, have been reduced to a minimum; and I am quite of opinion that if the saw had been properly guarded, as the factory inspector says it could have been, the accident would have been avoided; and, being of that opinion, it is, therefore, necessary for defendant to shew that plaintiff's negligence was the proximate cause of the accident, inasmuch as defendant has been guilty of a breach of his statutory duty in not having placed a guard upon the saw. Has the defendant discharged this burden? He has shewn that the accident did not happen in the way described by plaintiff—at least I am so convinced. But does it necessarily follow, from that fact, that plaintiff was guilty of contributory negligence in the sense spoken of? It is true that defendant and other witnesses have testified that the mishap could not have occurred unless plaintiff was so negligent, and no doubt to such witnesses it seems reasonable to say so, when one attempts to reconstruct the scene, and to reproduce the conditions and surroundings as they existed in the minds of such witnesses at the time of the accident. In their testimony they judge the event in the light of such reproduction. But such reconstruction does not take into account the unavoidable, and at times almost inexplainable, incidents and accidents which attach to the running of machinery, and which, with no negligence on the operator's part, too often result in accident, and, to meet and avoid which, the law requires such machinery to be guarded whenever practicable. When a person works as near

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to a revolving saw as plaintiff was working on this occasion, it requires little jar to throw his hand against it. I am asked to say that such contact was caused by plaintiff's negligence. He himself denies any carelessness, and says, in effect, that he was exercising his ordinary care, and it is apparent that such care and attention had previously sufficed to carry his hand safely beyond the saw.

I do not accept the version which plaintiff himself gives, but looking over the whole evidence and giving consideration to all the facts and circumstances, I see no reason to conclude that plaintiff was guilty of any carelessness in the way he was doing the work. I think he was as careful as a reasonably prudent and cautious man would be in such work. He is not required to anticipate extraordinary incidents or conditions. A compliance with the terms of the Factory Act by the employer is designed to save the workman harmless, or at least to assist in giving him immunity in such event.

In result, I think and find that the accident happened because the saw was not guarded, and therefore the blame for the accident rests upon defendant's shoulders; and I further find that the plaintiff was not guilty of contributory negligence, and being of that opinion there is nothing left for me but to direct payment of compensation according to the scale and provisions of the Act.

Sub-sec. (2) of sec. 6 of the Act prescribes the amount of compensation recoverable—namely, an amount not to exceed 75 per cent. of plaintiff's weekly wages, where there is a total or partial incapacity for work resulting from the accident. I find in the present case that the accident has resulted in plaintiff being totally incapacitated for work for a period of 17 weeks, and also that he has been, and will be, partially incapacitated for work during the period of his entire lifetime from the same cause. I think that by clause (*b*) of sub-sec. (2) aforesaid, the period of compensation in this case is limited to 200 weeks. Now as to the percentage of his weekly wages which should be allowed, it must be borne in mind that plaintiff is a labouring man, married, and 21 years of age. His handicap during life from this accident is so material that I would not feel justified in allowing him less than the 75 per cent. indicated in the Act. He was in defendant's

employ for nearly 2 months, during which time his wages were $30 a month and board. He calculates the board as equivalent to $15 a month—which I think is very reasonable—thereby estimating his total wages at $45 a month, which amount I accept as the proper basis for estimating the compensation to which plaintiff is entitled, and which for the purposes of this case I estimate at the sum of $10.38 per week, which I find to be plaintiff's average weekly earnings during the period he was in defendant's employ. 75 per cent. of this last named sum amounts to $7.78, and this is the amount of weekly compensation to which I find plaintiff is entitled for a period of 200 weeks.

W. P. Jones, K.C., for respondent.

M. L. Hayward, for appellant.

McLEOD, C.J. (oral):—The Judge has found in effect—and I think under the evidence has rightly found—that the injury suffered was the loss of the claimant's hand. The compensation allowed does not exceed that allowed by the Act for such an injury. The appeal must be dismissed with costs. McLeod, C.J.

WHITE, J. (oral):—I agree. Taking the fair intendment in favour of the judgment we must conclude that our brother McKeown has found that the plaintiff lost his hand under the circumstances detailed in his judgment. White, J.

GRIMMER, J.:—I agree. *Appeal dismissed.* Grimmer, J.

MORTON v. G.T.P. BRANCH LINES CO.

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Saskatchewan Supreme Court, Haultain, C.J., and Newlands, Elwood, and McKay, JJ. January 6, 1917.

MASTER AND SERVANT (§ V—340)—WORKMEN'S COMPENSATION ACT—INJURY IN COURSE OF EMPLOYMENT—FINDINGS.

An accident to a train conductor, while he is in the act of ascertaining whether a particular train is one for which he has been ordered to wait, arises "out of and in the course of his employment;" and a trial Judge is justified in finding that it so arose—though not direct—if sufficiently circumstantial to lead a reasonable man to that conclusion; with such a finding an appellate Court will not interfere.

[*Kerr* v. *Ayr S.S. Co.*, [1915] A.C. 217; *S.S. "Serbino"* v. *Proctor*, [1916] 1 A.C. 464; *Pierce* v. *Provident Clothing & Supply Co.*, [1911] 1 K.B. 997; *Fitzgerald* v. *Clarke*, [1908] 2 K.B. 796, referred to. See also *Nikkiczuk* v. *McArthur*, 28 D.L.R. 279, 9 A.L.R. 503.]

APPEAL from the judgment of Lamont, J., awarding compensation in the sum of $2,000 and costs to the respondent, under the Workmen's Compensation Act, for injuries received while in the appellant's employment. Affirmed. Statement.

W. H. McEwan, for appellant; *P. M. Anderson*, for respondent.

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McKAY, J.

The judgment of the Court was delivered by

McKAY, J.:—The appellant appeals, not against the amount of damages awarded, but on the ground that the accident did not arise out of and in the course of respondent's employment.

According to *Kerr* v. *Ayr Steam Shipping Co.*, [1915] A.C. 217 at 222, and "*Serbino*" v. *Proctor*, [1916] 1 A.C. 464 at 467, the question which it seems to me we should consider in this appeal is, was there any evidence upon which the trial Judge could as a reasonable man come to the conclusion that the accident arose out of and in the course of the respondent's employment?

The evidence is, shortly, that the respondent was employed by the appellant as a freight conductor. His home was in the City of Regina, where he lived with his family. On December 16, 1913, while in such employ, the respondent left North Regina with his train at 3.50 a.m., and arrived at Melville at 3.20 p.m. of the same day. On his arrival at Melville, the respondent's caboose was first put on track No. 4, and shortly after on track No. 9 at the east end thereof; here it remained until the time of the accident in question. When at Melville, on this run, the respondent lived in his caboose.

After respondent's arrival at Melville, he registered the arrival of his train and delivered the way bills at the yardmaster's office, then returned to his caboose where he remained until supper time, when he went to town and got his supper and again returned to his caboose about 8 p.m., where he started to make out his "wheel reports" and "seal reports," which the appellant requires its conductors to make out and send to officials of the appellant company. The respondent says, after his arrival in Melville he was not at liberty to go where he pleased without permission of the yardmaster, and he says he got permission from him to go over to town for his supper.

Gaudry, who was acting yardmaster the night of the accident, and whose duty it was to make up the trains and get them out according to instructions as near as he possibly could, about an hour before the accident had told respondent that there was an order to run him out on the arrival of the "time freight," or words to that effect.

About 9 p.m., while respondent was engaged in making out his reports, a freight train arrived and was put on track No. 10, being the next track immediately south of track No. 9 on which

was respondent's caboose. The yard engine then coupled on the rear end of this freight train and started to pull out ten cars off this train eastward, past respondent's caboose, at the rate of about 10 miles an hour. Some of these were flat cars loaded with rails that had come from Fort William. Rails on cars which have come a long distance sometimes get out of place, and in the winter-time when the rails get frosty it is much easier for them to get out of place than in the summer-time. When the freight train came in on track No. 10, the respondent desired to ascertain if that was the "time freight" with which he was to connect, and he went to the door of his caboose to make inquiries, and went down the steps to see if he could see any of the crew. Not seeing any of them, he proceeded to go to the lead (a main track from which the other tracks branch off) believing that the crew would be there, where he could ask them if that was the "time freight" with which he was to connect. Respondent was walking on the south side of his caboose between tracks 9 and 10 in an easterly direction, going in the same direction as the ten cars which were being hauled on track 10. There was a clearance of a little over 4 feet between the cars on track 9 and those on track 10. The tops of the flat cars carrying the rails were on a level with respondent's shoulders. The night was an ordinary December night, dark, but not exceptionally dark. When respondent had walked to about the middle of his caboose, he was struck with something on the back of his head and "was downed" and became unconscious.

He was found a few minutes later, towards the end of his caboose, lying on his left side on the ground, partly raised up, with his right hand on his head. He was lying a little back towards track 9, pretty well parallel to the tracks, with his head towards the east, near the east steps of his caboose. The respondent was carried into his caboose, and on examination a small incision about half an inch long was found in the middle of the back of his head. The effect of the injury has made the respondent permanently deaf, and he cannot keep his balance after it becomes dark.

Respondent's counsel contends that the respondent was struck and knocked down by a projecting rail on one of the cars which were being hauled past him on track 10 as he was walking

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by his caboose, and that the trial Judge so found, and, in my judgment, the trial Judge was justified in so finding.

The flat cars, loaded with rails from Fort William, which are very apt to get out of place in transit, were being hauled past him at the rate of 10 miles an hour while he was walking between tracks 9 and 10 by his caboose, when something knocked him down. When found a minute or so after, he was lying with his head to the east, near the east end of his caboose, with a small cut in the back of his head. He was found where one would expect to find him if knocked down by a projection from a car, and the wound was where one would expect to find it. The tops of the flat cars would, according to the evidence, reach his shoulders, and the rails from there up.

There are many authorities to shew that a Judge may draw inferences in cases of this kind, but I think it is sufficient to refer to "*Serbino*" v. *Proctor*, [1916] 1 A.C. 464, above cited.

In my opinion there was ample evidence from which the trial Judge could as a reasonable man come to the conclusion that the respondent was struck by a projection from one of the cars hauled past him. And, having so found, he would further be justified in finding that the accident arose out of the employment of the respondent: *Pierce* v. *Provident Clothing and Supply Co.*, [1911] 1 K.B. 997 at 1003.

The risk of being struck by a train or something projecting from the cars on a railway, is a risk that a man working on a railway is specially exposed to, and is incidental to his employment.

With regard to the other question: did the accident arise in the course of respondent's employment?

In *Fitzgerald* v. *Clarke*, [1908] 2 K.B. 796 at 799, Buckley, L.J., says:—

> The words "out of" point, I think, to the origin or cause of the accident; the words "in the course of" to the time, place, and circumstances under which the accident takes place.

If we consider, then, the time, place and circumstances under which this accident took place, the trial Judge, in my opinion, had ample evidence on which as a reasonable man he could come to the conclusion that the accident arose in the course of the defendant's employment.

The respondent's home was in Regina, and when on this run

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while in Melville he lived in his caboose. He was in his caboose just before the accident, where he had a right to be, working at reports required by the appellant company, which it was his duty to prepare. When he heard the freight train arrive, he went to inquire if that was the train with which he was to connect; while so doing the accident happened: *Gane* v. *Norton Hill Colliery Co.*, [1909] 2 K.B. 539 at 544-545; *Moore* v. *Manchester Lines Ltd.*, [1910] A.C. 498 at 500-501.

In my judgment, going out to make inquiries about the train as respondent did was what he might reasonably do during his employment, and he did so during his employment, and where he had a right to be at the time.

I am, therefore, of the opinion, not only that there was evidence upon which the trial Judge could as a reasonable man come to the conclusion that the accident arose out of and in the course of defendant's employment, but that the evidence strongly bears out that conclusion, and the appeal should be dismissed with costs.

Appeal dismissed.

McISAAC v. MARITIME TELEGRAPH AND TELEPHONE CO.

N. S.

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Nova Scotia Supreme Court, Russell, Drysdale and Chisholm, JJ. January 9, 1917.

HIGHWAYS (§ IV B—160)—POLES—COLLISION—LIABILITY OF COMPANY.

Authority by statute to erect poles along the side of a highway, and municipal supervision of such erection, will not excuse a company from liability for injury by collision therewith, if they unreasonably interfere with the free use of the highways by the public.

[*Bonn* v. *Bell Telephone Co.* (1889), 30 O.R. 696, referred to. See *Hamilton Street R. Co.* v. *Weir*, 25 D.L.R. 346, 51 Can. S.C.R. 506.]

Statement.

APPEAL from the judgment of Graham, C.J., dismissing an action brought on behalf of an infant to recover damages for injuries sustained from falling against a pole erected by defendant company in one of the streets of the town of Sydney Mines. Affirmed.

Mellish, K.C., and *D. D. McKenzie*, K.C., for appellant.

H. Ross, for respondent.

Chisholm, J.

CHISHOLM, J.:—The plaintiff, an infant of about 7 years of age, brings the action by her father as next friend and claims damages for injuries which she received from falling against a pole planted in one of the public streets of the town of Sydney Mines by the defendant company. The plaintiff in her statement of claim alleges:—(1) That the defendant company broke

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open a street in the said town and erected a pole or post in the track or path of travellers and persons using the said street and so as to obstruct the free and proper use of the said street, in violation of the provisions of the Act of incorporation of the defendant company, and of the common law rights of the public; and, (2) That the material from the excavation in which the pole was sunk was left piled high in the path and track of travellers and persons using the said street in violation of the provisions of the said Act of incorporation and of the common law rights of the public.

The defendant company denies that by its acts it obstructed the highway as plaintiff alleges and it pleads that under statutory authority and under the direction and supervision of the proper municipal officers as provided in the statute, it erected the said pole or post, and, further, that the said pole or post does not interfere with the use of the highway by the public.

By the Act incorporating the defendant company (statutes of N.S. 1910, ch. 156, sec. 15) it is provided that:—

> The company may construct . . its . . pole lines . . along the sides of and across and under any public highways, streets . . in any city, town, village . . Provided the said company shall not interfere with the public right of travelling on or using such highways, streets . . Provided also that in cities and incorporated towns the opening up of the streets for the erection of pole lines . . shall be done under the direction and supervision of the engineer or such other officer as the council . . may appoint, and in such reasonable manner as the council directs . . And provided also that the surface of the street shall in all cases be restored to its former condition by and at the expense of the company.

To justify the acts of the defendant company it must be shewn:—(1) That the pole was erected along the side of the highway. (2) That the pole so erected did not interfere with the public right of travelling on or using said highway. (3) That the opening up of the street for the erection of the pole line was done under the direction and supervision of the town engineer, or other officer appointed by the council, and in such reasonable manner as the council directed; and (4) That the company restored the surface of the street to its former condition.

(1) The trial Judge has found that the pole was placed reasonably along the side of the highway. The word "side" as applied to highways may be used in more senses than one. It may mean the portion of the highway lying between the centre line

and the line dividing the travelled portion from the gutter or sidewalk, and it has that meaning when, for example, we speak of a carriage being driven on the south side of a street. In the statute under consideration the word "side" must be held to mean either the line which divides the travelled portion of the highway from the gutter or sidewalk, or the area lying between the travelled portion and the outer boundaries of the highway. The statute requires the pole to be erected "along the side" of the highway. If it means the side of the travelled portion, it does not state on which side of the dividing line. It does not direct that it be erected outside this dividing line. It may be erected on the side of the line nearest the centre of the street. It appears from the plan used on the trial that the pole against which the plaintiff fell was erected between the drain or gutter and the centre line of the street. The erection of the pole there was in compliance with the statutory requirement that it must be erected "along the side" of the highway.

(2) The pole must not interefere with the public right of travelling on or using the highway. The trial Judge quotes the language of Boyd, C., when he was considering a similar statutory provision in the case of *Bonn* v. *Bell Telephone Co.* (1899), 30 O.R. 696. The language of the Chancellor is as follows:—

> It is still open for inquiry as to whether the public user has been interfered with—and by that I mean appreciably interfered with—interfered with so as to render the way in some sense dangerous to travel. Theoretically, there is some interference with the public right in the highway wherein the poles may be placed, even although close along either side. In every case of accident, where injury has been caused by the poles, the question will arise as to whether there has been any undue interference with the free use of the road.
>
> The question is not foreclosed, in my opinion, as to cities, towns and villages, because the poles have been planted under municipal direction. It is for the forum of trial—whether before Judge or jury—to determine whether the poles, situated as they are, unreasonably interfere with the free use of the highways so as to become an element of danger to the public.

The trial Judge has found that the pole in question did not unreasonably interefere with the full use of the highway so as to become an element of danger to the public. There is ample evidence to support that finding.

The opening of the street for the erection of the pole must be under municipal direction. There cannot be any successful contention that there was failure to comply with this require-

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ment. The town engineer and a committee of the town council marked on the ground the exact place where the street should be opened and the pole erected and the street was opened and the pole erected at that exact place. The town engineer inspected the job a few days after the pole was erected and found that his directions had been complied with. He says, furthermore, that the loose earth had been removed and taken away. It cannot be successfully contended that the work had not been done in such reasonable manner as the council directed.

(4) It was the duty of the company to restore the surface of the street to its former condition. On this point, also, the trial Judge has found that there was reasonable compliance with the requirements of the statute, and that the company restored the surface of the street substantially to its former condition.

There is evidence to support all the findings of fact of the trial Judge and the plaintiff has not shewn any grounds which would warrant a Court of Appeal in disturbing the findings.

At the argument of the appeal, Mr. Mellish raised the point that the affixing of the climbing cleat to the pole was an act of negligence for which the defendant company was responsible and he cited *Wells* v. *Western Union Telegraph Co.* (1895), 40 N.S.R. 81, and *Stewart* v. *Wright* (1893), 9 T.L.R. 480, in support of his contention. That may or may not be the case. If the cleat was a source of danger, it may be that the defendant company is liable and that it cannot justify under its statutory powers or at all. But the point is not in issue; the allegation was not made in the pleadings; apparently it was not suggested at the trial and it is not mentioned by the trial Judge in his decision. In par. 4 of the statement of claim it is stated by way of description of the accident that the plaintiff fell against the pole, "her eyebrow and forehead striking heavily upon the sharp edge of a climbing cleat on the said post." These words do not put in issue the placing of the cleat on the pole as a negligent act on the part of the defendant company. It would be unfair to the defendant company to permit the plaintiff to raise it now.

The appeal will be dismissed with costs.

Russell, J.
Drysdale, J.

RUSSELL and DRYSDALE, JJ., concurred.

Appeal dismissed.

OAKLEY v. WEBB.

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Ontario Supreme Court, Meredith, C.J.O., and Maclaren, Magee, and Hodgins, JJ.A. November 8, 1916.

NUISANCE (§ I—1)—STONECUTTING YARD.

In determining whether the business of a stone cutter is a nuisance or not the Court should take into consideration the character of the neighbourhood to ascertain the degree of comfort to be expected and whether the premises are being reasonably used or not.

Statement.

APPEAL by the plaintiff from the judgment of Britton, J., dismissing an action to restrain the defendant from carrying on his business as a stone-cutter and sawyer so as to interfere with the health and comfort of the appellant and his family. Affirmed.

G. H. Watson, K.C., and *S. J. Birnbaum*, for respondent.

The judgment of the Court was read by

Hodgins, J.A.

HODGINS, J.A.:—The appellant bought, fifteen years ago, on the north side of Summerhill avenue, and built on the lot a frame house, which he rented but never lived in. In 1913, he built his present residence on the east side of the lot, a solid pressed-brick house, costing $4,500, with nine rooms and a sun parlour on top of the kitchen, which forms the north end of the house. This house was rented for ten months after it was finished, but the appellant has lived in it since July, 1914. His lot has 50 feet front by a depth to the railway right of way of 115-130 feet.

The respondent bought the adjoining hundred feet to the east in 1913, just after the appellant began to build, and put on it, in the spring of 1914: (1) an office building in the south-west corner on the street line; (2) a lean-to for chiselling stone and using the compressor, 14 feet by 60, on the western boundary, north of the office and close to the back part of the house; (3) north of the lean-to, a shed in which the air-compressor is placed; (4) on the north-east part of the lot, a brick building called the machine-shop, with tin roof and wooden front, in which machines are working.

The work in numbers 2, 3, and 4 is complained of, as also the chopping of stone in the yard. The trouble is said to be noise and dust; the noise being caused by the air-compressors and the planer and saws in the machine-shop. The saw is working more constantly than the planer. It is a gang-saw, in which the respondent has had from one to six saws cutting.

In the lean-to there is chopping and planing of stone done,

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producing noise from the hammers and chisels and compressed air.

The action was begun in May, 1915. The operations of the respondent begin generally at 8 a.m., and are over for the day at 4.45 p.m. Both parties have lots in a block fronting on Summerhill avenue and backing on the Canadian Pacific Railway track. The block extends from Maclennan avenue, where it is a mere point, eastward, widening as it goes till lot 11 is reached, where the depth is 225 feet. The whole of it is excepted from by-law 5977 of the City of Toronto, passed on the 18th March, 1912, which makes the lands south and east of it a residential district.

Not far from the appellant's house, about a hundred or a hundred and fifty feet, Nelson, the sanitary excavator and house-mover, has a yard where he keeps his horses and waggons, and from which, when there was rain, a smell emanated—the appellant says from the manure-pit and not from the waggons and barrels. Nelson also has a lumber-yard there, filled with big, heavy lumber used in moving buildings. The Canadian Pacific Railway line runs just at the rear of the appellant's property. Across Summerhill avenue, the houses are so built that their backs are towards the street except east of Nelson's property. There is a small grocery store to the west, in a private house, with a display-window.

The right of the respondent to carry on his business is a legal right; so is that of the appellant and his family to enjoy their life in reasonable comfort. To enjoin the respondent it is necessary to shew that in the exercise of his right he wrongfully invades that of the appellant; in other words, that his business is so carried on as to amount to a nuisance, and so is an unlawful invasion of the competing right of the appellant.

The character of the neighbourhood is an important element in determining the standard of comfort which may be insisted upon. This strip along the railway right of way has been excluded by the municipal authorities from the adjoining residential area. It offers facilities for sidings, and is perhaps the only spot within a large area where shops may be put. It includes a somewhat unpleasant and unsightly storage-yard within its boundaries. Those who settled there must and do accept the railway noise and smoke as part of the conditions of their residence; and the indifference of

all those who live near by to the discomforts caused by the operation of freight and passenger trains is significant of the dulling effects of constant familiarity with the clatter and smuts regularly distributed by those agencies. Levy, one of the appellant's witnesses, says that the block is a business block.

Apart from the evidence of the appellant and his daughter, no one was called by him who spent the days at home, except Burns, who testifies to hearing noise—what he calls excruciating. He says that he does not hear it much when the windows are closed. His testimony is the more notable because he lived in his house for six months while the respondent's operations were in full swing, and then exercised his option to buy it, paying therefor $12,000. Mrs. Mack and her mother, called for the respondent, lived near from January, 1914, to May, 1915, and say they could not hear the noise in their home nor in the yard behind. The other witnesses for the appellant leave their homes in the morning, and so are not able to speak of the effects of the noise except for an hour or so in the morning. The appellant's daughter is the only one affected in health, and her complaint is that the noise gets on her nerves on account of its continuousness.

The respondent's witnesses, except Mrs. Mack, afford examples of those who, like all the local residents in regard to railway noises, have become insensible to the noise produced by the sawing and chipping, from being accustomed to it or from not listening for it.

The respondent says his machinery operated from April, 1914, until December, 1914, without any objection as to noise etc., but that when he started building his office, which is out on the street line, objection was made to its location, and that the only comment made by any one before the action was begun was a casual remark of the appellant's that the saw made quite a noise. The respondent admits that if persons were looking for noises and listening for them the noise of his machines might be heard 200 feet away, but says that ordinarily they would not be noticed, though they could be heard on the street.

I think the rule stated by Middleton, J., in *Appleby* v. *Erie Tobacco Co.*, 22 O.L.R. 533, at p. 536, and adopted by Sutherland, J., in *Beamish* v. *Glenn*, 28 D.L.R. 702, 36 O.L.R. 10, as correct, is the proper test to be applied in this case. It is that "an

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arbitrary standard cannot be set up which is applicable to all localities. There is a local standard applicable in each particular district, but, though the local standard may be higher in some districts than in others, yet the question in each case ultimately reduces itself to the fact of nuisance or no nuisance, having regard to all the surrounding circumstances."

In dealing with the local standard or surrounding circumstances, Lord Selborne, L.C., in *Ball* v. *Ray*, L.R. 8 Ch. 467, 470, insisted that the Court must consider whether the defendant was using his property reasonably or not, *e.g.*, whether in case of a building it was being used for purposes for which the building was not constructed. Buckley, J., in *Sanders-Clark* v. *Grosvenor Mansions Co. Limited*, [1900] 2 Ch. 373, follows this view.

The uncertainty of the test makes the question of nuisance or no nuisance a question of fact, and it is so stated by the House of Lords in *Polsue & Alfieri Limited* v. *Rushmer*, [1907] A.C. 121. In *Gaunt* v. *Fynney*, L. R. 8 Ch. 8, 12, Lord Selborne, L.C., in speaking of nuisances by noise, says: "Such things, to offend against the law, must be done in a manner which, beyond fair controversy, ought to be regarded as excessive and unreasonable.'

In view of these and other cases, and after perusing the whole of the evidence, while I think there was evidence from which the learned trial Judge might have arrived at a different result, I am not sufficiently certain that he came to a wrong conclusion to enable me to assent to a reversal of his finding. He had to consider not only the evidence as to the noise but also the character of the neighbourhood, the reasonable use of the respondent's property, and the weight of testimony offered.

The appeal will have to be dismissed with costs.

Appeal dismissed.

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DONKIN CREEDEN Ltd. v. S.S. "CHICAGO MARU."

Exchequer Court of Canada, British Columbia Admiralty District, Martin, J., in Adm. November 24, 1916.

SHIPPING (§ I—3)—DAMAGE TO CARGO—VENTILATION—"ACCIDENT OF THE SEAS."

A ship properly equipped for ventilation is not liable for damage to a cargo of grain by over heating caused by decreasing the ventilation during inclement weather when good seamanship made that necessary; the damage was an "accident of the seas" within the meaning of the bill of lading.

[*The Thrunscoe*, [1897] P. 301, followed.]

Statement.

ACTION for damages to a cargo of grain. Dismissed.

S. S. Taylor, K.C., for plaintiff; *Bodwell*, K.C., for defendant.

MARTIN, L.J., in Adm.:—This is an action to recover the sum of $1,793.10 for damages to a consignment of 1,112 bags of Manchurian maize shipped on or about March 30, 1915, by the Japanese S.S. "Chicago Maru," owned by the Osaka Shoson Kaisha, (*i.e.* the Osaka Mercantile S.S. Co.), from Kobe to Vancouver. Upon arrival, on or about April 21, 1915, in Vancouver, *via* Victoria, B.C., and Seattle, U.S.A., it was discovered that 957 of the bags were in a damaged condition, being badly heated and mouldy and they had to be sold at a low price in consequence. In the plaintiffs' particulars it is alleged that "the cause of the deterioration of the cargo was the improper stowage of the same, causing insufficient ventilation." Other questions were discussed, but as this is the principal one I shall first address myself to it.

The total number of 1,112 bags were "shipped in apparent good order and condition" at Kobe as the defendant's bill of lading recites, and were stowed, as shewn by the ship's stowage plan, in two separate lots: a small one of 155 bags at the bottom of No. 2 hold, fairly well forward, which suffered no damage, and a large one of 957 at the stern in No. 5 hold. This is deposed to be the best place on the ship because it is far from the engines and has the side of the ship on each side (as shewn on the blue print, ex. 6) and is on top of the tunnel recess and opens forward towards No. 5 'tween deck hatch. This hatch is ventilated with four ventilators, two, on each side, in the fore and two in the after part, which go through the 'tween decks. The cargo was loaded under the superintendence of the Chief Officer, who is now employed on another ship and is not available as a witness. The master, Keichi Hori, has no personal knowledge of the actual stowage of this cargo and deposed only as to the general custom of the ship. He said there were additional wood ventilators on board at the time, but could not speak as to their use on this occasion, though they were used when the ship had a full cargo of maize, or in hot climates, but there was no necessity for them in the North Pacific ordinarily. According to the evidence of John H. Ryan, the supercargo, who superintended the unloading of the cargo at Vancouver, he is positive he saw at least one set of these wooden ventilators on either side of the ship, stowed fore and aft, at the place in question, which would beyond all doubt

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afford sufficient ventilation. In some respects his evidence lacked particularity, but not in this, and I do not feel justified in disregarding it. In bad weather the outer ventilators would be closed, the master testifies, and as a matter of precaution they were supposed to be always closed in the evening. The master could not say exactly how often they were closed on this voyage, but he could remember doing so "about two or three times."

In his examination *de bene esse* the master describes the voyage as "not so rough. . . Just the kind of trip I would expect," which means what would be expected at that season in those latitudes by a skilled mariner. Undoubtedly some exceptionally heavy weather was encountered at one part of the voyage as appears by the log and the protest made at Seattle on April 21, 1915, put in by the plaintiff, *viz.:* on the 5th, 6th, 8th, and 9th of April, on which last day, after the wind force reached the maximum, 10, at midnight on the 8th, and so continued for four hours, "the sea became much higher than the ship ever experienced," though this was her 24th voyage east. The log at midnight of the 8th records, "whole gale and ugly weather, high sea causing ship to labour and strain. Shipping much water constantly and flooded at times;" and at 4 a.m. on the 9th: "Heavy seas washing over all constantly." The "rough sea" continued, the log states, up to 8 p.m. of the 9th, after which it abated for a short time, but recurred at midnight of the 9th, and prevailed on the following day again of the same date, and after being fine most of the 10th, began to be rough in the evening of that day, continuing till the evening on the 11th and afternoon of the 12th (when "shipping much water at times" is noted) and midnight, and 4 a.m. and noon and afternoon on the 13th; and again most of the 14th, after which moderate seas prevailed till the arrival at Victoria on April 17.

The ship sailed from Kobe on April 1, and it is noted, in the log on April 3, 8 a.m., "Opened all hatches and ventilator cover(s) for ventilation," and 8 p.m., "Left the hatches open through the night." On April 5 at 6 a.m., "Put all hatches (on) as taking spray on deck." On the 7th at 8 a.m., "Opened all hatches;" on the 8th at noon, "Shut all hatches." On the 10th at 6 a.m., "Opened all hatches for ventilation;" on the 12th at 9 a.m., "Shut all hatches." These are the only entries relating to ventilation which I can find

after a careful perusal of the log throughout the whole voyage, from which it clearly appears that there must have been many occasions which required the shutting of the hatches and covering the ventilators, with canvas covers, and appropriate action must have been taken thereon from time to time by the watch officer all of which would not necessarily be entered in the log.

After a careful consideration of the whole evidence I can only come to the conclusion that the cargo was properly stowed, and that the system of ventilation was sufficient for ordinary purposes, and that the heating of the maize, assuming it to have been in real and not merely "apparent good order and condition" when shipped was caused by the stoppage of ventilation which, as a matter of good seamanship, was a matter of necessity imposed by the state of the weather. This brings the case within the exception "accidents of the seas" contained in the bill of lading according to the decision in *The Thrunscoe*, [1897] P. 301, wherein a certain portion of the cargo, oats and maize in bulk, stowed low down in the centre of the ship and nearest to the engine had been damaged owing to the interruption, during a storm, of the ventilation which was otherwise sufficient, and it was held that the ship was not liable in such circumstances. And it was later and further held in *Rowson* v. *Atlantic Transport Co.*, [1903] 2 K.B. 666, that the Harter Act (1893, 52nd Congress Sess. 2, ch. 105, invoked herein, under cl. 21 of the bill of lading) did not apply where the ship was "in all respects seaworthy and properly manned, equipped and supplied," as I find this ship to be.

It therefore becomes unnecessary to consider the other questions raised; such as that relating to the real condition of the maize when shipped at Kobe, and I shall only observe in regard to this that the Master, whose evidence was relied upon by the plaintiff, had, it was clear, practically no personal knowledge thereof, the shipment having been left to the superintendence of the Chief Officer, who is not available, as already noted; and even when the bags arrived at Vancouver the damage was not apparent outwardly. The meaning of such statements in bills of lading as "shipped in good order and well conditioned," and "weight and contents unknown" (which are also to be found in this bill of lading) and "apparent good order," had been considered in *e.g.*, *The Peter der Grosse* (1875), 1 P.D., 414; and *Crawford* v. *Allan Line S.S. Co.*, [1912] A.C. 130, to which I refer. *Action dismissed.*

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REX v. FERGUSON.

British Columbia Supreme Court, Macdonald, J. September 28, 1916.

1. COSTS (§ I—12)—IN CRIMINAL PROCEEDINGS—AWARDING AGAINST PROSECUTOR ON QUASHING SUMMARY CONVICTION.

Under the British Columbia practice, the Court on quashing a summary conviction has jurisdiction to award costs against the prosecutor. [*Re Narain Singh*, 13 B.C.R. 477, applied; *R.* v. *Bennett* (1902), 5 Can. Cr. Cas. 456, 4 O.L.R. 205, not followed.]

Statement.

MOTION to quash a summary conviction.

C. W. Craig, for applicant.

R. L. Maitland, for the magistrate.

Macdonald, J.

MACDONALD, J.:—This is an application to quash a conviction of the applicant, made on the 19th April, 1916, by Albert W. Duck, a Justice of the Peace for the Province, for "driving 16 head of horses from the open range and by taking down R. Hazelhurst's fence did leave the said horses on R. Hazelhurst's enclosed land with malice aforethought to do wilful damage." The Magistrate adjudged that the applicant should pay a fine of $20 and $6.50 costs, and in default of payment before May 1st, the applicant should be imprisoned in the common goal of the county of Yale for the term of 14 days, unless such sums and costs and charges of commitment and conveying the applicant to the goal should be sooner paid.

It was submitted, *inter alia*, on the part of the applicant that the conviction did not shew any offence. On the matter coming before me for adjudication, no attempt was made to uphold the conviction and the only question remaining was as to the disposition of costs. The proceedings were intended to be of a criminal nature.

The decisions as to costs in *certiorari* proceedings differ in our Province from Ontario. It was held in the latter Province in *The King* v. *Bennett* (1902), 5 Can. Cr. Cas. 456, 4 O.L.R. 205, that the Court had no jurisdiction to give costs against either the prosecutor or the magistrate, but had power to award costs against an unsuccessful applicant in *certiorari* proceedings either because of the recognizance or of an inherent power of the Court.

I think, in this Province, that the matter of costs as between an applicant to quash a conviction and the Crown is concluded by authority in *Re Narain Singh*, 13 B.C.R. 477. In that case costs were awarded against the Crown and in the Full Court, upon appeal, the following ruling as to costs was rendered:—

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"In this case the Court has decided to adhere to the rule of practice laid down 10 years ago in the case of *Regina* v. *Little* (1898), 6 B.C.R. 321, in which it was established that the Court would and should on occasion give costs either for or against the Crown. That practice, as then established, has never been interfered with by the authorities, although they have had frequent occasion to change the rules; and therefore it must be understood, so far as we are concerned, that we will not interfere with it, especially as, in our opinion, the practice is reasonable."

I follow the principle of this decision in so far as it is applicable to the facts of this case.

I have also considered *Rex* v. *Jones*, 16 B.C.R. 117; *Rex* v. *Oberlander*, 15 B.C.R. 134 at 140, 16 Can. Cr. Cas. 244, 13 W.L.R. 643, and *Kokoliades* v. *Kennedy*, 18 Can. Cr. Cas. 495 at p. 502.

There will be no costs against the magistrate and he is afforded the usual protection.

There will be costs as against the prosecutor, who should bear the same relation to the applicant herein as the Crown bore in the case of *Re Narain Singh*, *supra*. He either ignorantly or negligently invoked the provisions of the criminal law, obtained a conviction and compelled the applicant to launch these proceedings to relieve himself of the liability thus imposed upon him.

Conviction quashed with costs against prosecutor.

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Saskatchewan Supreme Court, Newlands, Lamont, and Elwood, JJ. January 6, 1917.

TAXES (§ III J—165)—PAYMENT UNDER MISTAKE OF FACT.

Payment of taxes under the mistaken belief that it is included in a mortgage is payment under compulsion, and upon discovery of the mistake the money paid can be recovered.

[*Kelly* v. *Solari*, 9 M. & W. 54; *Imperial Bank v. Bank of Hamilton*, [1903] A.C. 49, followed; *Trust Corporation* v. *Toronto*, 30 O.R. 209, distinguished. See also *O'Grady* v. *Toronto*, 31 D.L.R. 632, 37 O.L.R. 139.]

Statement.

APPEAL by plaintiff in an action to recover taxes paid under mistake of fact. Reversed.

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

Grosch, for respondent.

Elwood, J.

ELWOOD, J.:—The facts material to this case are the following: The Rounding Land Co., Ltd., and one Austin mortgaged to the plaintiff lots 36 to 40 both inclusive in block 310 in the City of Regina. Subsequently the plaintiff discharged from said

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mortgage lot 36. On October 27, 1915, the plaintiff caused to be paid to the defendant taxes due against said lot 36, thinking and believing that the plaintiff still held his mortgage against said lot, and that the mortgage had been discharged as against lot 40. At the time of said payment said lot 36 had been advertised for sale under the provisions of the Arrears of Taxes Act, and said sale was to commence on October 28, 1915. The defendant on receiving said payment removed said lot from the list of lots for sale for unpaid taxes and marked the taxes on said lot 36 as paid. The plaintiff as soon as it discovered that its mortgage had been released as to lot 36, which was about a month after said payment, notified the defendant of its mistake and demanded repayment of the taxes, which has been refused.

It was argued before us that the plaintiff having the means of ascertaining whether or not lot 36 was in fact covered by its mortgage, and not having availed itself of those means could not recover; that even if lot 36 were covered by the plaintiff's mortgage, the plaintiff was not bound or liable to pay the taxes and could not recover; and thirdly that in any event the defendant had been prejudiced in that the land had been withdrawn from the list of lots offered for sale, and could not be again offered until the following year.

The cases of *Kelly* v. *Solari*, 9 M. & W. 54, 57, and *Imperial Bank* v. *Bank of Hamilton*, [1903] A.C. 49, 56, to my mind decide that even although the plaintiff may have had the means of knowledge with respect to the lots, yet not in fact at the time of payment having had the actual knowledge is not disentitled to recover.

So far as the liability of the plaintiff to pay is concerned, it is quite true that even if lot 36 had been in the plaintiff's mortgage it could not have been compelled to pay in the sense that it could not have been sued; but on the other hand it could have been compelled to pay in the sense that the land which formed part of its security for the payment of the money covered by the mortgage could have been sold, and the plaintiff would thereby have been deprived of its security. In that sense it could have been compelled to pay just as much as the registered owner of the land; in fact, it is conceivable that the interest of the plaintiff as mortgagee may have been greater than the interest of the registered owner of the land, and in that sense it could have been compelled

to pay. It would have been a proper person to pay; and the actual payment was made for the express purpose of preventing the lot from being sold for taxes.

In *Bize* v. *Dickason*, 1 T.R. 285, 99 E.R. 1097, at 1098, Lord Mansfield, C.J., said:—

> The rule has always been, that if a man has actually paid what the law would not have compelled him to pay, but what in equity and conscience he ought he cannot recover it back again in an action for money had and received. So where a man has paid a debt, which would otherwise have been barred by the Statute of Limitations; or a debt contracted during his infancy, which in justice he ought to discharge, though the law would not have compelled the payment, yet the money being paid, it will not oblige the payee to refund it. But where money is paid under a mistake, which there was no ground to claim in conscience, the party may recover it back again by this kind of action.

The case at bar seems to me to be quite distinguishable from *Trust Corporation* v. *Toronto*, 30 O R. 209. And the distinction seems to me to be contained in the judgment of Street, J., at p. 212.

In the case at bar if the plaintiff had known of the true state of facts at the time of payment the taxes would not have been paid, because, as against the plaintiff, the defendant was not entitled to receive the taxes.

The question of the alteration of the position of the defendant by the payment is discussed in *Durrant* v. *Ecclesiastical Commissioners* (1880), 6 Q.B.D. 234 at 236, and in *Imperial Bank* v. *Bank of Hamilton*, *ante*, at p. 58.

Now what occurred in the case at bar was not that the defendant has suffered any loss, but merely that it has been delayed in a sale of the lot in consequence of the mistake in payment. I am of the opinion that this does not disentitle the plaintiff to recover. On the whole I am of opinion that the payment made by the plaintiff was under a mistaken belief that the lot in question was still covered by its mortgage. There was no liability on the plaintiff to pay the taxes and the defendant, after notice of the mistake, had no ground to claim in conscience the right to retain them.

The appeal, therefore, in my opinion, should be allowed and there should be judgment for the plaintiff against the defendant for the amount of the taxes paid, less the costs incurred in advertising the particular lot for sale. The plaintiff should have its costs of the action and of this appeal against the defendant.

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Lamont, J.

NEWLANDS, J., concurred.

LAMONT, J.:—I agree with the conclusion reached by Elwood, J., that the appeal should be allowed. The facts of the case to my mind bring it within the principle of *Durrant* v. *The Ecclesiastical Commissioners* (1880), 6 Q.B.D. 234, rather than within *The Trust Corporation* v. *Toronto*, 30 O.R. 209. In the former case the plaintiff paid to the defendant certain tithes believing them to be tithes upon land which he occupied and upon which he was bound to pay. It appeared, however, that the defendants had included tithes upon other land which the defendant did not occupy, and in which he had no interest. The Court held him entitled to recover upon the ground that he had paid the tithes upon the second parcel under the belief that he was liable to pay them as part of the tithes upon the first parcel.

In the case at bar, the plaintiffs paid taxes to the defendant on the lot in question believing that such lot was included in their mortgage, which taxes they were obliged to pay to prevent the defendants, who had advertised the lot for sale, from selling the same. As a matter of fact the lot was not then covered by their mortgage. The only difference between the *Durrant* case and the one at bar is that, in the *Durrant* case, if the land for which the plaintiff claimed a return of the tithes had been occupied by him, he would have been under legal compulsion to pay the tithes, while in the present case the plaintiffs could not have been forced by law to pay the taxes.

The fact that the plaintiffs paid money which they could not have been forced to pay does not necessarily make it a voluntary payment on their part.

There may be "practical" as well as "actual legal" compulsion: 7 Hals., paras. 952, 973. See *North* v. *Walthamstow*, 81 L.T. 836 at 837; *Maskell* v. *Horner*, [1915] 3 K.B. 106 at 124.

In my opinion, the payment of taxes by a mortgagee on property included in his mortgage security in order to prevent such property from being sold for taxes, is a payment made under compulsion, just as much as a payment made under a threat of seizure of goods.

If the plaintiffs in this case were not under legal compulsion to pay the taxes, they certainly were under practical compulsion to do so in order to prevent the imperilment of their security.

Appeal allowed.

TRAILL v. NIAGARA, ST. CATHARINES & TORONTO R. CO.

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Ontario Supreme Court, Boyd, C. October 12, 1916.

LIMITATION OF ACTIONS (§ III F—130)—INJURY FROM "CONSTRUCTION OR OPERATION" OF RAILWAY—CARRIAGE.

The time limit imposed by sec. 306, ch. 37 R.S.C. 1906, respecting actions for injuries caused by reason of the "construction or operation of the railway" does not apply to actions arising for injuries to passengers out of negligence in their carriage.

[*Ryckman v. Hamilton, Grimsby and Beamsville Electric R. Co.*, 10 O.L.R. 419; *Sayers v. B.C.E.R. Co.*, 12 B.C.R. 102; *B.C.E.R. Co. v. Turner*, 18 D.L.R. 430, 49 Can. S.C.R. 470, referred to.]

ACTION by a passenger to recover damages for injuries sustained by a collision with another car of the defendants. Statement.

A. W. Marquis, for plaintiff; *George F. Peterson*, for defendants.

BOYD, C.:—The plaintiff was a passenger on a car of the defendants—a Dominion railway company—and was injured by the collision of the car on which he was going with another car of the defendants, stationary on an open switch. Negligence was in effect admitted, and the main question for the jury was the quantum of damages, which they estimated at $1,500. This was subject to a point of law reserved: whether the defendants were liable to be sued after the lapse of time between the injury and the date of the writ of summons—two years or more. Boyd, C.

The defendants relied upon the provisions of the Dominion Railway Act, R.S.C. 1906, ch. 37, sec. 284, sub-sec. 7, and sec. 306.

Section 284 (7) gives a right of action to any one aggrieved by the neglect or refusal of the company to comply with the requirements of the section, from which the company shall not be relieved by any notice, etc., if the damage arises from the negligence of the company; and sec. 306 enacts that "all actions . . . for indemnity for any damages or injury sustained by reason of the construction or operation of the railway shall be commenced within one year after the time" when the alleged cause of action has arisen.

The prescription or limitation clauses of the Railway Act have been uniformly held to apply to actions for damages caused or occasioned in the exercise of powers given by the Legislature to the company for enabling them to construct and maintain the line—but not to actions arising out of negligence in the carrying of passengers. This was laid down by the Court of Queen's Bench in 1856, *Roberts* v. *Great Western R.W. Co.*, 13 U.C.R. 615. The reason of this rule was well defined by Richards, J., soon

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afterwards, in *Auger* v. *Ontario Simcoe and Huron R.W. Co.* (1857), 9 U.C.C.P. 164, 169: "The limitation clauses do not apply when the companies are carrying on the business of common carriers . . . (in the) use (of) locomotives, etc., for the conveyance of passengers and goods, etc., but the liability arises in those cases from the breach of contract, arising from their implied undertaking to carry safely, and to take proper care of the goods, etc." These decisions were accepted as rightly stating the law in *Ryckman* v. *Hamilton Grimsby and Beamsville Electric R.W. Co.* (1905), 10 O.L.R. 419, 429.

This very point was considered by Mr. Justice Duff in 1906, *Sayers* v. *British Columbia Electric R.W. Co.*, 12 B.C.R. 102, and his judgment, affirmed by the Full Court in appeal, was that the restriction of the statute did not extend to causes of action arising out of contractual relations such as those involved in taking passage on the cars.

In the most recent decision bearing on this subject, Mr. Justice Duff, now in the Supreme Court of Canada, refers to the decision in British Columbia, and he says, having reconsidered the question, he has no reason to alter the view therein taken: *B.C. Electric R. Co.* v. *Turner*, 18 D.L.R. 430, 49 Can. S.C.R. 470, 489. Mr. Justice Anglin, in the same case, upon the proposition that a claim for personal injuries sustained in a railway accident is not within the purview of that provision, while very strongly inclining to that view, yet does not base his judgment on it (p. 499).

To my mind (though it does not seem to have been noticed in any case to which my attention has been directed), the Legislature has itself exempted from the limitation clause actions brought against the company upon any breach of contract, express or implied, for or relating to the carriage of any "traffic:" sub-sec. 3 of sec. 306. By the interpretation clause (sec. 2, cl. 31) "traffic" means the traffic of passengers as well as of goods.

Both from the force of decision and from the reading of the Act in its present form, I would hold that the Act imposes no time-limit upon an action for injuries sustained by a passenger by reason of the negligence of the company in the safe and proper conduct of his person to its destination.

Therefore I order judgment to be entered for the plaintiff for the sum of $1,500 damages, with costs of litigation.

Judgment for plaintiff.

MONTREAL PUBLIC SERVICE CO. v. CHAMPAGNE.

IMP.

P. C.

Judicial Committee of the Privy Council, The Lord Chancellor, Lord Dunedin, Lord Parker of Waddington, Lord Wrenbury and Sir Arthur Channell. November 24, 1916.

1. CORPORATIONS AND COMPANIES (§ IV D—65)—ULTRA VIRES—CONTRACT OF EMPLOYMENT—DELEGATION OF DIRECTORS' AUTHORITY.

A contract of service giving the employee power over "all the administration of the business of the company subject only to such direction and control as it is the duty of the directors to exercise" is not such a delegation of the authority of the directors as to be ultra vires the company.

2. MASTER AND SERVANT (§ I E—23)—WRONGFUL DISCHARGE—HINDERING PERFORMANCE OF DUTIES.

A company having engaged a general manager is liable in damages for breach of the contract of employment, if during the currency of the term, by resolution of the directors, it materially lessens his authority under the contract and makes it impossible for him to discharge his duties thereunder.

Statement.

APPEAL from the Quebec Court of Review. Affirmed.

The judgment of the Board was delivered by the

Lord Chancellor.

LORD CHANCELLOR:—Their Lordships do not desire to hear the respondent in this case, for in their opinion the appeal fails.

The real question in dispute is whether or no the appellants have committed such a breach of a contract made by them with the respondent as to entitle the respondent to treat the contract as determined and upon this basis to sue for damages.

The history of the matter is this: A company, known as the Saraguay Electric and Water Co., was originally incorporated by Letters Patent in 1906, but in 1908 it obtained a statutory incorporation, and continued working under this statute until 1912. What happened then is not quite clear, but owing to the provisions of another statute, passed in that year, either the appellant company was established or the old company was re-incorporated under a new name. It is unnecessary to consider the exact operation of the statute, since, for the purposes of this appeal, it is agreed that the appellants should be treated as standing in the position of the original company. In 1912 there was already existing a contract which had been made on July 14th, 1909, between the Saraguay Electric and Water Co. and the respondent. The question is whether that contract has been broken. Its terms are special. It appears that the company were anxious to secure the services of the respondent for a long period of time as their general manager, and the contract, which is a contract of service, accordingly engaged him for a period

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of 10 years at an increasing salary, beginning at $2,000 a year, and going up to $5,000 a year, the first payment to be made on April 1, 1910, some 7 or 8 months after the date of the contract. The first two clauses of the contract give rise to no controversy at all. The third, fourth, and firth are important. The third provides that the respondent shall have the power of engaging the chief engineer and all other employees of the company and of dismissing them, and then it continues:—

and all the administration of the business of the company shall, subject only to such direction and control as it is the duty of the directors to exercise, be left to, and be under the control of, the second party.

—that is the respondent. It is said that so to delegate the authority which was primarily vested in the directors is *ultra vires* the company, and that consequently the whole agreement is bad. In their Lordships' opinion there has been no such general delegation of the powers of the directors as to support that contention. If clause 3 be carefully and critically scrutinised it appears that the power given to engage the chief engineer and the other employees, and the power to dismiss them, is nothing but a description of one of the special powers which are to be enjoyed by the respondent under the general power of administering the business of the company. It is, in fact, nothing but a specification of one of the general duties conferred upon him by the latter part of the clause, which provides in terms that all the administration of the business of the company shall, subject only to such direction and control as it is the duty of the directors to exercise, be left to, and be under his control. With regard to the appointing of the chief engineer and other employees, and their dismissal, although the primary duty of selecting and discharging them rests with the respondent, there still remains the general direction and control, which it is the duty of the directors to reserve. The same thing is made plain by considering clauses 4 and 5. It is not, however, necessary to examine those clauses in detail, having regard to the view their Lordships have expressed as to clause 3. There is therefore no foundation for the contention that this agreement was *ultra vires*.

Now, what subsequently happened was this. On February 3, 1913, two resolutions were passed by the company, the first of which provided that the respondent

be under the direct control and direction of the board of directors who hereby

delegate to the president of the company the control and direction vested in them as to the above-named official, and the said manager and managing director is hereby directed not to take any action as manager and managing director, without the approval in writing of the president, the board of directors hereby delegating to said president all their power for the management of the company when the board is not in session.

The second resolution on the same date appointed Mr. Thornton chief engineer and operating manager of the company,

with full charge of the engineering and operating of the company, and that this official be directly under the control and direction of the board of directors, who hereby delegate to the president of the company the control and direction vested in them over the above-mentioned official.

It is quite plain from a mere cursory examination of these resolutions, that they materially altered powers of the respondent and the duties which he had contracted to perform. Under the contract there were vested in his hands the general powers of management, subject only to the control of the company. Therefore he primarily had power to do all the things that he thought fit, including the employment and discharge of servants. In the execution of his duty if any act of his was not approved by the company it would be open to them, no doubt, to supervise his action, but under the resolutions of February, 1913, all initiative is taken away, and he cannot do a single act without the approval in writing of the president, to whom the directors have delegated their powers of control. It is impossible to think that the duties which the respondent would be called upon to discharge under a contract containing such provisions bore any close relationship to those specified in the contract under which he entered into the service of the company.

Shortly before or after the passing of these resolutions a question arose as to the dismissal by the respondent of two employees of the company, and if the matter had rested merely on that, and nothing further, there might be something to be said for the appellants' contention that this was a dispute with regard to an act of management over which the company had control; but associated with that question was the question which the respondent immediately raised as to the position that he occupied by virtue of the resolutions, and on February 4, 1913, he writes a letter in which he makes the following statement:—

Now I regret to state that I positively refuse to submit to these resolutions of February 3 instant, which, in my judgment, cancels (*sic*) in its essential part my engagement of July 14, 1909, and substituted in its place a new contract entirely different from the first.

IMP.

P. C.

MONTREAL PUBLIC SERVICE CO. v. CHAMPAGNE.

Lord Chancellor.

Their Lordships think that the respondent was quite right in the view that he took as to the effect of those resolutions, and in asserting that the position he occupied under the contract was such as to relieve him from obedience to their terms. If the company had answered by saying that in these circumstances they would rescind the resolutions, no question would have arisen, but they took no such step, and there can be no doubt that the real issue in this case is whether or not the respondent is bound to continue to serve the company under these altered terms of service, or whether he is entitled to rely on the terms as they originally were made. The company have alleged that they are ready and willing to pay him his salary. That would be a very relevant and material matter on the question of damages if they had been ready and willing to continue to pay wherever he went, but they are only ready and willing to pay if the respondent continues in their service upon the terms of the original contract, as modified by the resolutions, and to that he is not bound to submit.

Their Lordships therefore think that the company, by their action in passing and adhering to the resolutions of February 3, 1913, committed a breach of this contract, entitling the respondent to assert that the contract was at an end, and justifying him in maintaining the suit for damages, in which he has succeeded.

Their Lordships therefore think that this appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly. *Appeal dismissed.*

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EX. C.

THE KING v. ROY.

Exchequer Court of Canada, Audette, J. January 10, 1916.

DAMAGES (§ III L—240)—EXPROPRIATION—VALUE OF LAND—SPECIAL ADAPTABILITY.

The compensation awarded for expropriated lands should in no case exceed the price that legitimate competition of purchasers would force it up to. Special adaptability for any purpose is an element in considering the true market value.

Statement. INFORMATION by the Attorney-General of Canada to fix compensation for lands taken for the National Transcontinental Railway Co.

G. G. Stuart, K.C., for plaintiff.

T. Vien, L. St. Laurent and *A. Lachance*, for defendants.

Audette, J. AUDETTE, J.:—This is an information exhibited by the Att'y-

Gen'l of Canada whereby it appears, *inter alia*, that certain lands belonging to the defendant were taken and expropriated, under the authority of 3 Edw. VII. ch. 71, for the purpose of the National Transcontinental R. Co., a public work of Canada, by depositing plans and descriptions on April 7, 1906, and on March 2, 1914, with the Registrar of Deeds for the County of Quebec, P.Q.

The actual quantity of land taken forms *in limine* the subject of controversy. By sec. 8 of the Expropriation Act, the land taken must be laid off by metes and bounds and a plan and description thereof deposited in the registry, in a case where no settlement is arrived at. On April 7, 1906, a plan and a copy of the book of reference were deposited in the registry office, without any such description as required by the statute. The deposit of a plan with a copy of the book of reference, is not a compliance with the Expropriation Act which requires the lands to be described by metes and bounds. This question has already been the subject of judicial pronouncement, and even legislation was resorted to when such error had been fallen into in the case of the building of the Intercolonial Railway, as will more particularly appear by reference to secs. 81 and 82 of the Government Railways Act, R.S.C. 1906, ch. 36.

From the plan alone, as deposited on April 7, 1906, it appears that the area taken from the defendant is 8.55 acres.

Under the provisions of sec. 9 of the Expropriation Act, a corrected plan and description may be deposited with like effect, in case of any misstatement or erroneous description in such plan or description.

Acting under the authority of sec. 9, the plaintiff, through the proper officer, deposited in the said registry on March 2, 1914, a new or corrected plan and description by metes and bounds of the land expropriated, setting forth the area at 7.14 acres—as against the original plan shewing 8.55.

The reason of the conflict in respect of the measurement is explained in the following manner, and was admitted by counsel for the defendant at the argument. By the defendant's title to her property, the farm is of two arpents in width, whilst by the cadastre it is 2 arpents and 6 perches. The cadastre does not constitute a title, but it is merely a description, and I regret to say it is very often erroneous in its descriptions.

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The property was measured by two surveyors. One, Mr. Tremblay, called by the plaintiff, the very person who made the measurements for the corrected plan and description deposited on March 2, 1914, is an officer who has proved himself to be most reliable and accurate all through these expropriations at Quebec. For the defendants one surveyor was examined, taking as his datum a very uncertain and unsatisfactory point and for the purpose of finding the quantity claimed had to take land from the neighbours. At the time he was upon the ground for the purpose of settling these boundaries, some of the neighbours were represented; but the Crown was neither notified nor represented although the owner at that date. To find 7.64 acres the surveyor had to encroach on the neighbours' property and their consent to that effect was not at the date of the trial signified to the defendant. And what would their consent amount to, in any case; the lands on each side of the defendant's property have been expropriated and vested in the Crown ever since the deposit of the plan and description. The neighbours have no title to that portion of this farm expropriated—that title or interest is converted into a claim to the compensation money.

Under all of these circumstances, I find that the area actually expropriated from the defendant, is the area set forth in the information and in the corrected plan and description deposited on March 2, 1914, namely 7.14 acres.

By the information the Crown offers for the land so taken and for all damages resulting from the expropriation the sum of $2,677.50 or $375 per acre. The defendants by their plea aver that the offer by the Crown is insufficient and claim at the rate of $1 per foot the sum of $372,438—a most unreasonable and extravagant claim unsupported by the evidence. The defendants further claim an overhead crossing across the railway track to communicate with a piece of property valued by uncontroverted evidence at $433—a most ambitious and preposterous claim.

The property in question is situate on the south side of the St. Louis Road, 6 or 7 miles from Quebec, with frontage on the highway and running down to the St. Lawrence, in the immediate neighbourhood of the Quebec bridge in course of construction. On the highway, about 400 ft. deep on its width, is a plateau upon which grass or hay grows. Running south from these

400 ft., there is a dip of between 40 to 75 ft., at the foot of which lies the piece of land expropriated. The piece taken was partly swampy and partly covered with a second growth of trees. With the exception of a small 50 ft. strip which could be cultivated, the balance being unfit for agricultural purposes, the soil was composed of boulders and hard pan. After taking possession of this piece of land, a ditch from 4 to 5 ft. in depth was dug to drain it, as it was impossible to use it in the state in which it was, says engineer Montreuil.

The southern part of the property still remaining to the defendants on the southern side of what was the Quebec Bridge Railway running to Champlain Market, is waste land, open bush, upon rocky and swampy soil. There are no buildings upon this property—the owners never resided upon it. It was never operated as a farm, but was used for pasture—the upper part adjoining the highway was rented for pasture.

From 1902 to 1907 the whole lot No. 352 composed of 32 acres was under the municipal assessment, valued at $660.

As is customary in expropriation matters we are facing a great conflict in the opinion evidence respecting the value of the land taken. The sum of $1 a foot is claimed by the pleadings, but no witness testified to such a value. The highest valuation testified to is 25 cts. a sq. ft., and the lowest valuation is $150 an acre. A difference between $150 and $10,890 an acre. Or a variation for the 7.14 acres taken between $1,071 and $77,683.20.

How can these valuations be reconciled? What can help out of this material difficulty, if not sales made in the neighbourhood? What can be better evidence of the market value of the present parcel of land so expropriated, if not the actual and numerous sales made by the adjoining owners under similar circumstances.

As already said in *The King* v. *Falardeau*, 14 D.L.R. 917, 14 Can. Ex. 265, 275, this property must be assessed as at the date of the expropriation, at its market value in respect of the best uses to which it can be put, taking into consideration any prospective capabilities, special adaptability, or value it may obtain within a reasonably near future. The market value of the lands taken ought, however, to be the *primâ facie* basis of valuation in awarding compensation: *The King* v. *Dodge*, 38 Can. S.C.R. 149, 155.

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The question of "special adaptability" has been argued at considerable length with the object of establishing competition of buyers from the alleged railway companies, which, under the statutes creating the Quebec Bridge Co., now merged in the Crown, would likely establish terminals at the northern side of the bridge. Without reviewing here the statutes referred to and the facts as to whether or not the principal railway companies in question have or have not already railway yards in the neighbourhood, it must be admitted that the compensation which should be awarded is in no sense more than the price that the legitimate competition of purchasers would reasonably force it up to: *Sidney* v. *N.E.R. Co.*, [1914] 3 K.B. 629, 641. When it is claimed that the property has a high value on account of its special adaptability for railway purposes, it is not claimed that such special purposes are limited to the Transcontinental, the party expropriating; but that the situation of the land in the neighbourhood of the Quebec Bridge will bring in other railway companies as prospective competitive purchasers. In such case it becomes an element in the general value. As such it is admissible as to the true market value to the owners and not merely value to the taker, as said in the case just cited.

In the present case the land expropriated was of very little value to the owner. It was a piece of swampy and rocky land, mostly covered with second growth and practically yielding no revenue. Therefore, even by the offer made by the Crown the owner is offered more than the land is worth to him for his own purposes, and he is offered the market value of the land enhanced by the special adaptability from the neighbourhood to the bridge, the erection of which, it is estimated would bring competing railway companies who would require land for their own purposes. In the amount offered by the Crown is merged both the intrinsic value, and the market value, of the land enhanced, by this special adaptability for railway purposes due to prospective competitive purchasers, as special adaptability is nothing more than an element of market value: *ibid*, p. 640.

In the case of *Sidney* v. *N.E.R. Co.*, *supra*, a very instructive discussion on this question of special adaptability will be found.

And in the *Cedars Rapids Case*, 16 D.L.R. 168 at 171, [1914] A.C. 569 at 576, Lord Dunedin lays down the rule for guidance upon the subject-matter of special adaptabilities.

Some stress has been placed by the defendant upon the fact that buildings or shops, and a travelling crane have been put upon the land taken, with spurs running to them. But all of this has been made clear by the evidence. These buildings and shops, and the spur lines, including the crane, were only of a temporary nature, put up by the contractors for the second bridge. The contractors for what is called the first bridge did not use it. In 1906 the piers of the first bridge were finished, and part of the ironwork put up. The bridge fell in August, 1907. These spurs and buildings will disappear and there will then be no obstruction in the new road given the defendant.

Now, I have had the advantage of viewing the premises in question, in the company of counsel for the respective parties, and after weighing the opinions of experts, or rather valuators, as against the actual several sales, of the large quantity of land on both sides of the defendant's property, who, in her isolation is holding up for an extravagant and unreasonable price, and applying the principles in the two last cases cited, I have come to the conclusion that to allow, not the bare value of the land, but the most liberal and generous price possible under the circumstances, namely, the sum of $500 an acre, including, as in the sales above cited, all damages resulting from the expropriation—a fair and liberal compensation will have been paid the defendant, including all enhanced value flowing from the element of special adaptability which went to establish the market value of the land at such high valuation.

There is the further question of the crossing over the Quebec Bridge R. Co., which is now vested in the Crown, and the damages to the balance of the property to the south. The Crown has undertaken by the information to give the defendant the crossing therein mentioned that will be part of the compensation awarded herein. However, some question has arisen as to whether or not the crossing as described and tendered, takes the defendant entirely across the said right of way—and if it does not whether the defendant being no more in possession or owner of the land on each side of the said right of way of the Quebec Bridge Co., now merged in the Crown, would be able to obtain a complete crossing from the Railway Commission.

However, the value of the land to the south has been estab-

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lished in this case, by uncontroverted evidence at $25 to $30 an acre. The area to the south is of 628,062 ft. or 14.45 acres. Giving the defendant the benefit of both the highest price and the larger area fixed in round figures at 15 acres, the total value of the land to the south would be $450. This amount will be allowed as representing the damages to the southern part of the property and as arising from the want of a perfect crossing—including also all damages resulting from the road, given to reach the southern part of the property, which subjects the owner to delay and involves a longer distance to travel.

The question of railway damages which might arise from the present expropriation, such as widening the existing severance, has not been much pressed, except in so far as the new road is concerned. Indeed, in the present case this element only comes up as a question of degree as compared with the time before the expropriation. There was before the present expropriation a railway already crossing this property, severing it in two. The owners of property over which one railway has already obtained a right of way is, indeed, entitled to other and different damages from a second railway expropriating lands alongside the first, the property having already adjusted itself to the first invasion: *Re Billings and C.N. Ont. R. Co.*, 15 D.L.R. 918, 16 Can. Ry. Cas. 375, 29 O.L.R. 608. (Reversed in 32 D.L.R. 351.)

In recapitulation, the assessment of the compensation will be as follows:—

For the land taken, *i.e.*, 7.14 acres at $500, inclusive of all general damages as above mentioned, $3,570. Specific damages to the southern part of the property as well as those arising from the crossing and the new road, $450—$4,020. To this amount will be added 10 per cent. for the compulsory taking, $402—$4,422. Therefore, there will be judgment as follows, viz.:—1. The lands expropriated herein are declared vested in the Crown since April 7, 1906, when possession of the same was taken. 2. The compensation for the land and real property so expropriated and for all damages resulting from the expropriation are hereby fixed at the sum of $4,422 with the interest thereon from April 7, 1906, to the date hereof. 3. The defendant is further declared entitled to the road and railway crossing described and referred to in paragraphs 4 and 8 of the information herein. 4. The

defendant Roy is entitled to recover from and be paid by the plaintiff the said sum of $4,422, with interest as above mentioned, and is further declared entitled to the road and crossing also hereinbefore referred to, upon giving to the Crown a good and sufficient title, free from all hypothecs, mortgages, charges and incumbrances whatsoever, the whole in full satisfaction for the land taken and all damages resulting from the said expropriation.

Failing the said defendant to give a release of the hypothecs mentioned in this case, the moneys will be paid over to the hypothecary creditors in satisfaction of the said hypothecs and interest, and the defendant will then be entitled to be paid the balance, if any, of the said compensation moneys after satisfying the said hypothecs. 5. The costs will follow the event.

Judgment accordingly.

THOMAS v. WINNIPEG ELECTRIC R. CO.

Manitoba King's Bench, Macdonald, J. January 23, 1917.

DEATH (§ IIA—5)—CIVIL ACTION FOR CAUSING.

Except as provided by statute, there is no right of civil action for the death of a human being.

[*Baker* v. *Bolton*, 1 Camp. 493; *Osborn* v. *Gillett* (1873), L.R. 8 Ex. 88; *Makarsky* v. *C.P.R. Co.*, 15 Man. L.R. 53, followed.]

Statement.

ACTION to recover damages for injuries causing death.

M. G. Macneil, for plaintiff; *E. Frith*, for defendant.

Macdonald, J.

MACDONALD, J.:—The plaintiff brings this action claiming damages for the loss of the society and service of his wife, and for loss, damage and expense for surgical attendance and hospital fees incurred by him through the alleged negligence of the defendant company.

The statement of claim alleges that the plaintiff's wife was struck by a car of the defendant company, operated by the defendant's servant and agent, and from the shock and force of the said blow died within a short time after receiving the said injuries, and charges that the death was caused by the negligence of the defendant company, setting forth in detail the negligence complained of.

The defendant company demurs to the statement of claim, and submits that it discloses no cause of action.

In *Baker* v. *Bolton*, 1 Camp. 493, the action was against the proprietor of a stage coach, on the top of which the plaintiff and his wife were travelling, when it was overturned, whereby the

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K. B.

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Macdonald, J.

plaintiff himself was much bruised, and his wife was so severely hurt that she died about a month after.

The declaration states that "by means of the premises the plaintiff had wholly lost and been deprived of the comfort, fellowship and assistance of his said wife." Lord Ellenborough said:—

The jury could only take into consideration the bruises which the plaintiff himself had sustained, and the loss of his wife's society and the distress of mind he had suffered on her account from the time of the accident till the moment of her dissolution. In a Civil Court the death of a human being could not be complained of as an injury, and in this case the damages as to the plaintiff's wife, must stop with the period of her existence.

A query follows the report of this case in a footnote:—

Q. If the wife be killed on the spot, is this to be considered *damnum absque injuria*?

This case is followed by *Osborn* v. *Gillett* (1873), L.R. 8 Ex. 88, in which the plaintiff sought damages alleging that the defendant negligently drove a waggon and horses against his daughter, whereby she was wounded and injured, and by reason thereby afterwards died, whereby the plaintiff lost the services and the benefits and advantages which otherwise would have accrued to him from such services, and incurred expense incidental to her burial.

Bramwell, B., questions the accuracy of the report of *Baker* v. *Bolton*, *supra*, and says (p. 96):—

Why was not the plaintiff entitled to recovery for the loss of a month's assistance, and how was he entitled to recover for distress of mind at all? and especially why, up to the time when that distress must have become greatest by the death? . . No argument is stated, no authority cited, and I cannot set a high value on that case, great as is the weight of the considered and accurately reported opinions of Lord Ellenborough after argument.

The majority of the Courts, however, followed the finding of Lord Ellenborough in *Baker* v. *Bolton*. Pigott, B., says:—

But, in addition to this authority, and the general acquiescence in it for so many years, there is a clear parliamentary recognition and statement that such is the law to be found in the preamble to Lord Campbell's Act, 9 & 10 Vict. ch. 93. The language is not confined to cases to which the maxim "*actio personalis moritur cum persona*" applies, but is general.

Whereas no action at law is now maintainable against a person who, by his wrongful act, neglect or default, may have caused the death of another person, and it is oftentimes right and expedient that the wrongdoer in such cases shall be answerable in damages for the injury so caused to him.

In *Jackson* v. *Watson*, [1909] 2 K.B. 193, the action was for breach of a warranty that tinned salmon sold by the defendant to the plaintiff was fit for consumption as human food, the plaintiff claimed damages on the ground that his wife having partaken

of the salmon had in consequence died. Damages were awarded, but held that the death of the plaintiff's wife not forming an essential part of the cause of action sued upon, but only an element in ascertaining the damage arising therefrom, and *Baker* v. *Bolton*, distinguished—but the findings in that case endorsed.

In *Clark* v. *London General Omnibus*, [1906] 2 K.B. 648, *Baker* v. *Bolton*, is cited and approved and it is held that a master cannot maintain an action for injuries which cause the immediate death of his servant. Sir Gorell Barnes says:—

> It is a very remarkable fact that among the whole series of previous decisions, there is no case to be found in which this cause of action has been sustained, and except for the judgment of Bramwell, B., in *Osborn* v. *Gillett*, there is practically no judicial authority for saying that this action can be maintained.

Our Act, ch. 36, R.S.M. 1913—An Act Respecting Compensation to Families of Persons Killed by Accident—provides a remedy, and without this Act and Lord Campbell's Act, there is no right of action.

This point is also decided in our own Courts in *Makarsky* v. *C.P.R. Co.*, 15 Man. L.R. 53.

The demurrer must therefore, be allowed, with liberty to the plaintiff, to amend as he may be advised. Costs of, and incidental to the demurrer and by reason of any amendment to be costs to the defendant in any event of the cause.

[ED. NOTE.—This was a mere question of pleading. The statement of claim was defective.]

Re CANADA CO. & TP. OF COLCHESTER NORTH.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Middleton and Masten, JJ. November 1, 1916.

1. TAXES (§ III D—135)—ASSESSMENT OF MINERAL RIGHTS—APPEAL—ACADEMIC QUESTION.
   On an appeal under the Assessment Amendment Act (Ont. 1916, ch. 41, sec. 6), raising a question as to the value of petroleum mineral rights, the Court will not consider a question whether "other mineral rights" are assessable under sec. 40 (8) of the Assessment Act, R.S.O. 1914, ch. 195, if the question appears to be merely of an academic character.
2. EVIDENCE (§ XI F—790)—AS TO VALUE—ASSESSMENT FOR TAXES.
   Evidence of the value at which the holder advertised mineral rights for sale is admissible for the purpose of assessing them for taxation.

Statement.

APPEALS by the Canada Company from the judgment of the Judge of the County Court of the County of Essex dismissing the company's appeals from the decisions of the Courts of Revision of the Townships of Colchester North, Sandwich South, Maid-

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S. C.

RE CANADA CO. AND TOWNSHIP OF COLCHESTER NORTH.

Meredith, C.J.C.P.

stone, and Tilbury North, affirming the assessments of the appellant company in respect of mineral rights in lands in the four townships. Reversed.

J. M. Pike, K.C., for appellants.

J. H. Rodd, for the township corporations, respondents.

MEREDITH, C.J.C.P.:—Recent legislation has widened, very much, the powers and duties of this Division of this Court in regard to appeals against assessments, made for the purposes of taxation, under the provisions of the Assessment Act, R.S.O. 1914, ch. 195.

The Assessment Amendment Act, 1916, 6 Geo. V. ch. 41, sec. 6, repeals sec. 81 of the Assessment Act, and gives such an appeal "from the judgment of the Judge on a question of law or the construction of a statute, a municipal by-law, any agreement in writing to which the municipality concerned is a party, or any order of the Municipal Board (except an order made under section 80)."

Any party desiring so to appeal shall upon the hearing of the appeal by the Judge, in the first instance, request him to make a note of any such question, and to state it in the form of a special case; and thereupon it shall be the duty of the Judge to make a note of the request; and he may so state such a question: "may" meaning "shall in every proper case," the discretion being a judicial, not a personal, one, to be exercised under a remedial enactment.

And, in addition to that, any party desiring to appeal, may apply to this Division of this Court, and it may, if it see fit, "direct the County Judge to state a special case," as before mentioned, if on the hearing before him he refused to do so.

The practice and procedure on such appeals "shall be the same, *mutatis mutandis*, as upon an appeal from a County Court."

And this appeal comes on for hearing here under the provisions of such legislation, upon that which is, and has been throughout, treated by all parties as a special case stated under the provisions of this recent legislation; yet I may express the hope that the formal character of it may not be treated as a guide in other cases.

But formalities are unimportant in this instance, because the parties are quite agreed upon the questions which they need, and desire, to have considered here; and those questions are

quite within the powers of this Court to consider under such legislation: so that nothing would be gained by delaying the matter until the solicitors should have another opportunity to get the appeal in a better shape as to its form.

The questions the parties desire to have determined here, now, are: (1) whether "mineral rights," other than "petroleum mineral rights," can be assessed, except against the owner of the land in which they exist: and (2) whether the learned County Court Judge was wrong in holding that the evidence adduced before him of the appellants' offers to sell their rights, which are the subject of this appeal, contained in their public advertisements of such offers, offered as evidence upon the appeal to him, was inadmissible.

On the first question it is enough to say that the appellants have not been assessed for any but petroleum mineral rights, and that no one has suggested or now suggests that any other exist in any of the lands their rights in which are the subject of the assessment in question upon this appeal: therefore it would not only be needless but improper to consider the question.

On the other question, I find it difficult to understand how there could be better evidence of the fair value of the appellants' petroleum mineral rights in question, in the circumstances of this case, than such offers to sell as those which they sought to prove in connection with the fact, which it was also sought to prove, that there were no buyers at the advertised prices. That which no one will buy at the price for which it is offered for sale, can hardly be worth as much, and yet these appellants are assessed as if it were worth, in some cases, it is said, four times as much, without any other evidence of any character as to value.

And this case is a peculiarly strong one for the appellants, for in all cases there is, or should be, a person who is, or should be, anxious to buy, that is, the owner of the land in which the petroleum mineral rights exist: and it should not be, but I am not sure that it is not, necessary to say that each owner should be treated alike, that there should be no discrimination against the appellants.

As there was no evidence, as to value of these mineral rights, before the learned County Court Judge, except that which he rejected, and as that evidence ought not to have been rejected,

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RE CANADA CO. AND TOWNSHIP OF COLCHESTER NORTH.

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the assessment of the appellants should have been changed so as to conform to it: and that should be directed to be done now: though, if there had been any other evidence, it might have been necessary or advisable to refer the matter back to the learned Judge.

Our powers in that respect, being such, as to "practice and procedure," as we have "upon an appeal from a County Court," are very wide: see the County Courts Act, R.S.O. 1914, ch. 59, secs. 45 and 46. Nor should it be overlooked that this new practice, as to assessment appeals, forms but one section—sec. 81—of the Assessment Act, and in no way curtails the power conferred on this Court in other sections of the Act: see 82 and 83. The words, "practice" and "procedure," are words of wide import, and, in connection with the words "as upon an appeal from a County Court," must comprise the sections of the County Courts Act which I have mentioned, in so far as they are applicable to such a case as this.

Of new trials the Lord Chief Justice of England said in the case of *Regina* v. *Pallivos, etc., de Bewdley* (1712), 1 P. Wms. 207, at p. 213: "The practice of the Courts is the law in these cases;" and that one reason why that practice was not found to be more ancient was that there were no old reports of motions.

I have no doubt of our power to correct or affirm a County Court Judge, on such an appeal as this, and then leave it to him, where necessary or expedient, to work out the assessment accordingly.

I would allow the appeal accordingly; as well as the other appeals, all of which were treated as being upon the same footing as, and were argued together with, this (Colchester North) appeal.

The irregular manner in which the case was stated and brought here is perhaps reason enough for departure from the usual course as to costs, and for making no order as to costs.

Riddell, J.

RIDDELL, J.:—In certain townships in the county of Essex, the Canada Company, in making grants of land, made in the grant a reservation as follows: "Excepting and reserving to the said company, their successors and assigns, all mines and quarries of metals and minerals, and all springs of oil in or under the said land, whether already discovered or not, with liberty of ingress,

egress, and regress to and for the said company, their successors, lessees, licensees, and assigns, in order to search for, work, win, and carry away the same, and for those purposes to make and use all needful roads and other works, doing no unnecessary damage, and making reasonable compensation for all damages actually occasioned."

In the townships here concerned the assessor made the following assessments, viz.: in Colchester North, $10,722 in respect of "mineral rights" in 5,411 acres; in Sandwich South, $3,828 in respect of "mineral rights" in 2,552 acres; in Maidstone, $5,900 in respect of "mineral rights" in 2,950 acres; in Gosfield North, $17,000 in respect of "mineral rights" in 1,700 acres; in Tilbury North, $4,982, reduced by the Court of Revision to $2,491, in respect of "oil and mineral rights" in 2,491 acres.

The assessments were confirmed by the Courts of Revision, and an appeal was taken to the County Judge—upon the hearing before him the Judge ruled against certain evidence, and also (apparently) against certain objections by the Canada Company to the assessments.

The Judge has signed what purports to be a "special case" for this Court under the Act 6 Geo. V. ch. 41, sec. 6.

The provisions of that statute are quite plain—on the request of either party to an appeal before him the Judge is to make a note of any question of law or construction of a statute, &c., and he "may thereupon state such question in the form of a special case, setting out the facts in evidence relative thereto, and his decision of the same, as well as his decision of the whole matter:" sec. 6 (3). The so-called special case before us does not at all comply with the definite directions of the statute—but we are left to gather from other papers and from counsel what it is we are expected to decide.

One matter is clear from the papers—the Canada Company advertised their rights in the lands in question for sale to the public at the price of "50 cents per acre," and the learned County Court Judge held that this was not evidence for the company as to "actual value." Counsel for the townships objecting, the Judge said: "I think that objection is well taken. But, having been put in by appellants (the Canada Company), it is evidence against the appellants for all other purposes of the

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appeals: and is evidence against the appellants also that the reservations have some value."

Of course, if it is evidence at all, it is evidence—of which notice should have been taken by the Judge—for the company as well as against it.

I am clear that a *bonâ fide* offer on the part of the owner (and there is here no attack on the good faith of the company) to sell anything is some evidence of its actual value: what weight should be given to it by a Judge is a matter for him to decide, but he must consider it.

Were there any power to refer the matter back to the County Court Judge, that course should be pursued: but it seems to me that we are given no power to send the case back—sub-sec. (6) indicates that any change to be made in the assessment roll must be made to appear "by the judgment of the Divisional Court upon the case stated."

Therefore, I think, we must determine as best we can from the material before us what, if any, "alteration should be made in the assessment roll."

I think, as a matter of law, the advertisement is evidence against the company that the mineral rights which they offered for sale had some value, and for the company, in the absence of other evidence of value, the fact that no sale had been made proved that the actual value did not exceed 50 cents per acre. The County Court Judge therefore should have found that the mineral rights were not worth more than 50 cents per acre.

We are asked to decide that, of mineral rights, only petroleum mineral rights are assessable.

While the assessments read "mineral rights" in some cases and "oil and mineral rights" in another, it was admitted before us that only petroleum rights were really assessed, and no other mineral rights were considered by any one, assessors or otherwise. It is therefore an academic question we are asked to decide: and that we should decline to do. If and when the matter becomes of consequence, it may be argued by those really interested and may be decided accordingly.

I would direct that an alteration should be made in the assessments in question to 50 cents per acre. There should be no costs.

Masten, J.

MASTEN, J.:—This appeal comes before us in a manner so unsatisfactory both as to form and substance that the proper

disposition of it would, in strictness, be to dismiss it, not only on the ground that no appeal has really been lodged within the provisions of 6 Geo. V. ch. 41, sec. 6, but also because the matters of substance on which an adjudication is sought have not been so brought before us as to enable us to make a satisfactory disposition of them.

Having regard, however, to the fact that undoubtedly there is a difference between the parties in regard to which the company desired to appeal, and in regard to which both parties have appeared and argued before us—having regard also to the considerations mentioned in the judgments of my learned brothers—I am willing, without deciding any general question of law, to agree in certifying to the County Judge that the assessment roll should be amended by reducing the assessment in question to 50 cents per acre.

There should be no costs to either party.

Middleton, J.

MIDDLETON, J.:—This is the first case under the statute 6 Geo. V. ch. 41, sec. 6; and, in view of the great number of assessment appeals heard by County Judges, care should be taken to ascertain whether this case is one in which a right of appeal to the Divisional Court has been given.

The only case in which the Divisional Court has been given any jurisdiction is upon an appeal from the judgment of the Judge "on a question of law or the construction of a statute. . ."

The appeal is to be by a special case, which is to state "the question of law or construction." The Judge is, at the request of the party, to note the "question of law or construction," and the Judge is thereupon to state the case, setting out the facts in evidence relating thereto, and "his decision of the same, as well as his decision of the whole matter."

That course has not been followed here, but it is sought to argue, in addition to what is undoubtedly a question of law arising upon the facts—the right to assess petroleum mineral rights—another question of law which does not arise upon the facts—the right to assess other mineral rights; and a further question as to the effect, if any, to be given to an advertisement offering to release the petroleum rights in question for 50 cents per acre, a sum much less than the assessment in question.

I feel much doubt as to the question of the admissibility of evidence being a "question of law" within the true meaning of

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this statute, but I cannot find anything in the stated case, as it is called, to indicate that this is one of the questions intended to be submitted. The Judge has undoubtedly said, in the course of his judgment, that the advertisement is not evidence. If he meant that it was not shewn that the advertisement was published with the authority of the company, he was right; if he meant that an offer to sell at a named price, made in good faith, was no indication of value, he was wrong; if all he meant was that he gave no weight to the advertisement as establishing the true value—this is a matter as to which there is no appeal.

Speaking for myself, I decline to answer a question not raised in the way pointed out by the statute, particularly when it is impossible to tell what that question is.

The practice and procedure upon the appeal is to be the same, *mutatis mutandis*, as upon a County Court appeal. The right to grant a new trial is not a matter of practice or procedure, and the statute contemplates the determination by the Divisional Court of questions raised, and if from its judgment it appears that an alteration in the roll should be made, the County Judge is to make the alteration.

Upon the question of law which may be taken to be well raised, petroleum mineral reservations are clearly liable to assessment under sec. 40 (8) of the Assessment Act, R.S.O. 1914, ch. 195.

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

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VERONNEAU v. THE KING.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Idington, Anglin and Brodeur, JJ. October 10, 1916.

INDICTMENT (§ IV—75)—QUASHING—COMPLAINANT BEING GRAND JUROR.

If in fact he took no part in the proceedings of the grand jury which found and presented an indictment, it is not a ground for quashing the indictment that the complainant in the proceedings which led up to the grand jury was himself a grand juror, and was summoned, sworn and attended at the hearing by the grand jury, and that he made statements to another who repeated them to other jurors, with reference to the conduct of the accused.

[*Veronneau* v. *The King*, 31 D.L.R. 332, 26 Can. Cr. Cas. 278, 25 Que. K.B. 275, affirmed.]

Statement.

APPEAL from the judgment of the Court of King's Bench, Crown Side, 31 D.L.R. 332, 26 Can. Cr. Cas. 278, 25 Que. K.B. 275, dismissing a motion to quash an indictment on the charge of perjury against the appellant, whereon he had been convicted at the trial before Globensky, J., and a jury, at Sherbrooke, in the District of Saint Francis, Quebec. Affirmed.

Verrett, K.C., and *Cabana*, for appellant; *Nicol*, K.C., and *Shurtliff*, K.C., for respondent.

FITZPATRICK, C.J.:—In answer to the first question I would say the grand jury was regularly constituted notwithstanding that Bachand, who was the party complainant before the magistrate in this particular case, was sworn as a member of it. A grand juror is not sworn like a petit juror to try and a true deliverance make on the evidence submitted. His duty is to diligently inquire and a true presentment make of all such matters and things as shall be given him in charge *or shall otherwise come to his knowledge*. Until quite recently grand jurors might make presentments of their own knowledge and information without the intervention of any prosecutor or the examination of any witnesses. *Vide* Report of Royal Commissioners on English Draft Code, pp. 32 and 33.

As to the proceedings before the grand jury, it is part of the stated case that Bachand, whose name was on the back of the indictment, was examined, but took no other part in the proceedings. In these circumstances, Bachand was not a stranger in the jury room. His presence is explained and accounted for by the fact that he was a witness before the grand jury in this particular case. And, if Bachand took no part in the proceedings, I do not think his mere physical presence somewhere about could affect the result of the grand jurors' deliberations or constitute an interference with the privacy of their proceedings. There is no impropriety in some one or more proper persons being present with the grand jury during their inquiries on bills of indictment: *Reg.* v. *Hughes*, 1 C. & K. 519. I have not overlooked *Goby* v. *Wetherill*, [1915] 2 K.B. 674, 31 Times L.R. 402. The stated case might have been more explicit on this point, but when the Judge states the fact to be that Bachand "n'a aucunement pris part aux délibérations qui eurent lieu au sujet du dit acte d'accusation." I think he must be assumed to mean that he took no part in the finding of the bill. It would have been wiser, however, for Bachand to have left the room after giving his evidence and, as a matter of ethics or propriety, he should not have been present in the box when the bill was returned.

We must assume for the purposes of this appeal that Bachand took no part, except as a witness, in the discussions or deliberations

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on this indictment or in the finding of the true bill, and I express no opinion as to whether if he had done so the indictment should have been quashed.

I attach little importance to the observations made to Brault, who was also a grand juror.

I should say that if the facts proved had shewn Bachand to have taken any part in the proceedings or in the consideration of the bill found by the grand jury of which he was a member, as to which he was interested or biased, that would have justified the appeal and the quashing of the indictment.

The question is one of fact capable of being proved by evidence. The finding of the learned trial Judge before whom the motion to quash was first made, that the proof established that Bachand did not participate in the proceedings of the grand jury upon this particular bill or in the consideration of the jury's finding of a true bill upon it, approved of by the Court of appeal, if sustained by the evidence, is sufficient to dismiss the motion.

I am of opinion that the evidence to shew this non-participation and non-interference was properly admissible and that it is sufficient to uphold the findings of the Courts below.

I cannot accede to the proposition that the fact of one member of a grand jury being disqualified from interest or bias with respect to one of the bills brought before that body for consideration, affects the constitution of the grand jury generally.

Such a disqualified person cannot take any part in the proceedings or findings of the jury with respect to the bill in which he is interested, but such disqualification is a personal and limited one and does not affect the constitution of the jury as a whole or the right of the juror so partially disqualified from taking part in all the proceedings or findings of the jury on other bills in which he has no interest or bias.

This question of the participation or non-participation of Bachand in the proceedings of the grand jury upon this bill, including their finding upon it, was the main and substantial question argued on this appeal. There were other subsidiary questions mentioned with respect to them. I do not think there was anything in them to justify this Court in interfering with the judgment appealed from.

The first question, which thus comes before us, was stated as follows:—

Le fait que Denis S. Bachand avait été assigné comme grand juré affectait-il la légalité de la constitution du grand jury, et ce dernier pouvait-il légalement rapporter comme bien fondé, l'acte d'accusation porté contre Véronneau, Bachand n'ayant aucunement pris part aux délibérations qui eurent lieu au sujet du dit acte d'accusation, et la décision de cette Cour renvoyant la motion de l'accusé, était-elle celle qui devait être rendue?

The law applicable to the question raised before the trial Judge is stated in sec. 899 of the Criminal Code, as follows:—

No plea in abatement shall be allowed.

(2) Any objection to the constitution of the grand jury may be taken by motion to the Court, and the indictment shall be quashed if the Court is of opinion both that such objection is well founded and that the accused has suffered or may suffer prejudice thereby, but not otherwise.

The fact that the private prosecutor took no part in the deliberations on the subject of the accusation seems to me conclusive against this appeal. His having been summoned and sworn as a grand juror seems to furnish no ground of objection. He was bound to obey the summons and be sworn. It was not competent for him to refuse, for the very good reason that the conduct of the matter lay in the hands of the Crown officer and might not come before that grand jury or they might be directed by the trial Judge, under such circumstances, if he saw fit for good reasons to refrain from dealing with it.

We are asked to presume, notwithstanding the statement of fact contained in the question which is the boundary of any appellate Court's jurisdiction herein, that in fact the private prosecutor so summoned as a grand juror did take part in the deliberations in question herein as such grand juror. In other words, we are asked to presume not only against the stated facts but also against the presumption of law that he did so.

The presumption of law is that he did not and that the Crown officer in charge saw to it as part of his duty, if aware of his being a grand juror, that he was properly instructed in that regard either by the foreman or the trial Judge or himself, and that due order of law was observed.

Possibly he was a witness and, as such, before the grand jury for such length of time as the requirements of giving his evidence or otherwise relative to the presentation of the evidence in accordance with what convenience in the case might demand. Nothing further can be presumed as to the fact of his presence there.

Then it is said he appeared with the grand jury when its foreman presented the "true bill" in Court.

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Again there is no presumption to be drawn therefrom. For aught we know he may merely have taken a seat in the places assigned in the court-room for the grand jurors which he was entitled to do, for many proper reasons. Other bills may, for example, have been returned by the foreman to the Court at the same time as this, or have been expected to have been so presented.

The mere presentation by the grand jurors of a bill forms no part of their deliberations and determination. That is disposed of in the grand jurors' room and the finding there written is simply handed in to the Court. Often Judges presiding at a busy Court direct, as they may, that the foreman alone or such number of jurors as directed may do so, without the whole panel appearing.

And, assuming the worst that can be said of a private prosecutor appearing under such circumstances, it is specially directed by the formal part of the statute I quote, that unless the accused has suffered prejudice thereby the indictment must not be quashed.

I cannot find anything deserving serious consideration in all that has been urged by appellant's counsel to maintain this appeal. To do so would, I submit, be a reversion to technicality which the Criminal Code and its predecessors did so much during last century to eliminate from the law, in order that justice might be done.

I have assumed in favour of the decent administration of justice, but am not to be taken as expressing any opinion, that in law a convicted man is entitled to go free simply because his accuser formed one of those grand jurors who presented his case for trial. I express no opinion on that legal issue, nor shall I till need be.

The appeal should be dismissed.

Anglin, J.

ANGLIN, J. (dissenting):—On November 3, 1914, one Bachand, who had been successfully prosecuted at the instance of the defendant on a charge of attempted murder, laid a complaint against the defendant of having committed perjury in the course of that prosecution. The defendant having been committed for trial, his case came before the Court of King's Bench, in October, 1915. At this term of the Court Bachand was a member of the grand jury. He was present in the jury-box when the grand jury was charged with the considera-

tion of the indictment preferred against the defendant, and again when a true bill was returned. Before the defendant pleaded to the indictment a motion was made on his behalf that it should be quashed because of the presence of Bachand as a member of the grand jury, and also because Bachand had said to one Brault, also a grand juryman, the following words:—

C'est de valeur ce procés là, mais au point où on est rendu là, il va falloir que moi ou Veronneau parte de Coaticook,

which Brault had repeated to other members of the grand jury, while they were assembled for deliberation.

In the reserved case the Judge makes the following statement:

Avant adjudication sur cette motion, il fut établi devant la cour qu'en effet Denis S. Bachand avait été assigné comme grand juré pour le dit terme d'octobre, mais qu'il n'avait aucunement pris part aux délibérations du grand jury sur l'accusation portée contre Veronneau. Il fut aussi établi que les paroles susdites avaient été dites par Bachand à Brault et que ce dernier les avait rapportées dans la salle des délibérations aux autres grands jurés; mais il n'a été aucunement établi que ces paroles aient influencé ces derniers et qu'elles aient eu pour effet de déterminer leur rapport.

Il est vrai que Bachand était dans la boîte des grands jurés quand ceux-ci ont rapporté l'acte d'accusation comme bien fondé contre l'accusé.

In the respondent's factum it is stated that the fact that Bachand took no part in the deliberation upon this case" was proved by the affidavits of two witnesses before the Court." These affidavits are not in the record and, although their production had been demanded, are not forthcoming. In view of the strict provisions as to the secrecy of all that transpires in the jury-room, and the terms of the grand jurors' oath, I find it difficult to understand how the learned Judge was in a position to make the statement which he does as to the abstention of Bachand from taking part in the deliberations on this case. *Rex* v. *Marsh*, 6 A. & E. 236, at page 237; *Rex* v. *Willmont*, 30 Times L.R. 499; Greenleaf on Evidence, par. 252; Taylor on Evidence, par. 943; Archbold, Criminal Pleading (23 ed.), page 103; 4 Blackstone's Com. par. 126. I am likewise at a loss to appreciate the force of the Judge's observation:—

Il n'a été aucunement établi que ces paroles aient influencé ces derniers et qu'elles aient eu pour effet de déterminer leur rapport.

As at present advised I incline to think that we should ignore both the statement that Bachand took no part in the deliberations upon the charge against Veronneau and also the statement that it was not established that the repetition of what he had said to the juror Brault influenced the grand jury.

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But if we are bound by these statements made in the special case, it should be pointed out that it does not appear (as indeed it could not without impropriety, Taylor on Evidence, para. 943) whether the bill against Veronneau was returned by the vote of more than seven members of the grand jury; nor is there an explicit statement that Bachand did not vote upon the bill as a grand juryman although he had refrained from taking part in the deliberation. Bachand having been present in the jury-box when the jury was charged with the consideration of the case against the defendant, and again when the bill was returned, his presence in the jury-room while it was under deliberation seems to be a reasonable inference which is in nowise negatived in the case submitted.

The question reserved for the consideration of the Court is stated in the following terms:—

Le fait que Denis S. Bachand avait été assigné comme grand juré affectait-il la légalité de la constitution du grand jury, et ce dernier pouvait-il légalement rapporter comme bien fondé, l'acte d'accusation porté contre Veronneau, Bachand n'ayant aucunement pris part aux délibérations qui eurent lieu au sujet du dit acte d'accusation, et la décision de cette Cour renvoyant la motion de l'accusé, était-elle celle qui devait être rendue?

In answer to the appeal counsel for the Crown takes the position that there is no right of challenge to a grand juryman individually, that the remedy of an accused person in the case of a disqualified grand juryman was, prior to the Criminal Code, by plea in abatement, that such pleas have been abolished (Crim. Code, sec. 899), that a motion to quash in lieu thereof is permitted only in the case of an "objection to the constitution of the Grand Jury" (*ibid.*) and that an objection that a member of the grand jury was not indifferent because of alleged interest is not an objection to the constitution of the grand jury. *The King* v. *Hayes*, 9 Can. Cr. Cas. 101. His position, therefore, is that, although it should be assumed that Bachand took part in the finding of the true bill against Veronneau, and even that his vote was necessary to its return, nevertheless Veronneau would be without redress because the law affords him no remedy. In the alternative he maintains that, in view of the statements in the reserved case, that Bachand had taken no part in the deliberation of the grand jury, and that it was not proved that his conversation with Brault, though repeated to the grand jury, had in fact affected them, the Court cannot properly hold, although the

objection should be deemed well founded, that "the accused has suffered or might suffer prejudice thereby."

It seems unnecessary to consider the somewhat debated question whether there is a right of challenge to the polls in the case of a grand jury. I appreciate the force of the argument *ab inconvenienti* pressed in the *Sheridan* case, 31 How. St. Tr. 543, and incline to the view that under the old practice an objection to a grand juryman would be properly made when the accused was arraigned either by plea in abatement or by motion to quash the indictment. I agree with Cross, J., that either course would seem to have been open, the latter, however, being the only method available when, as may often happen, the defendant first became aware of the ground of objection after he had pleaded "not guilty." Since the adoption of the provision of the Criminal Code abolishing all pleas in abatement the remedy is by motion to quash.

I also agree with Cross, J., that the view that the phrase "any objection to the constitution of the grand jury" (Crim. Code sec. 899 (2)), covers only objections based on lack by jurors of qualifications expressly prescribed by the provincial statute law, or on disqualification of the officer charged with the duty of selecting and summoning the grand jury, seems to be too narrow. Anything which destroys the competency of the grand jury as a whole or the competency of any of its members, I think affects the constitution of that body and affords a ground of objection which may be raised by a motion to the Court under sec. 899. A grand juror may be well qualified as to all the cases on the docket save one and wholly unfit to pass upon that one. As to that case the jury would not be properly constituted while he sat upon it.

In *The King* v. *Hayes*, 9 Can. Cr. Cas. 101, the contrary view was taken, apparently based largely upon what, with respect, would appear to have been a misconception of sec. 662 of the Criminal Code then in force.

> Every person qualified and summoned as a grand or petit juror, according to the laws in force for the time being in any Province of Canada, shall be duly qualified to serve as such juror in criminal cases in that Province.

Apart from any question as to the constitutional validity of this section as a provision dealing with the constitution of the Court rather than with criminal procedure, it should be noted

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that the qualification which it declared sufficient was not merely that prescribed by the provincial statute law, but qualification "according to the laws in force for the time being in any Province of Canada." I know of no law in force in any province which has taken away the common law right to object to a juror *propter affectum* or deprived an accused in the Province of Quebec of the right, which exists, as in Ontario and the other older provinces, before conviction for an indictable offence, to have his case passed upon first by a body of impartial grand jurors and afterwards by a petit jury likewise composed of indifferent men. 4 Blackstone's Com. par. 306.

The disqualification of interest—*propter affectum*—rests upon the common law maxim, "that no man is to be a judge in his own case," which, as Lord Campbell said in *Dimes* v. *Grand Junc. Canal Co.*, 3 H.L. Cas. 759,

> it is of the last importance . . should be held sacred. And that is not to be confined to a cause in which he is a party but applies to a cause in which he has an interest.

The presence of one interested justice on a bench of magistrates renders the Court improperly constituted and vitiates the proceeding, although the majority, without reckoning his vote, favoured the decision: *Reg.* v. *Justices of Hertfordshire*, 6 Q.B. 753. The same rule is applicable to a grand jury: *The Queen* v. *Inhabitants of Upton St. Leonards*, 10 Q.B. 827. The case last cited is also particularly in point because of the statement made by Bachand to Brault, and repeated to the other grand jurors, which not only put Bachand's interest in the prosecution beyond doubt, but was of a character "not unlikely to influence the grand jury in their decision."

The reasoning and grounds of decision of Peters, J., in *The Queen* v. *Gorbet et al*, 1 P.E.I. Rep. 262, commend themselves to my judgment rather than those which prevailed in *The King* v. *Hayes*, 9 Can. Cr. Cas. 101.

As already stated, I am unable to agree with the view taken by Cross, J., that evidence was legally received that the juror Bachand, though apparently present in the grand jury room, did not participate in the discussion of Veronneau's case. It would, in my opinion, be a practice fraught with very grave dangers to enter upon any such inquiry. The illegality of the presence of a mere stranger in a jury-room is illustrated by the

recent case of *Goby* v. *Wetherill*, [1915] 2 K.B. 674. The presence of a person disqualified by interest, himself a member of the body, must be still more objectionable. Moreover, as already pointed out, the statement that Bachand did not take part in the deliberations of the grand jury on the *Veronneau* case not only does not negative his presence in the jury-room, but is not inconsistent with his having voted on the finding. The true principle, however, is that upon which the decisions of *Reg* v. *Justices of Hertfordshire*, 6 Q.B. 753, and *Rex* v. *Lancashire Justices*, 75 L.J., K.B. 198, and *Reg.* v. *Meyer*, 1 Q.B.D. 173 proceed. As Blackburn, J., said, in the case last cited, "we cannot go into the question whether the interested justice (juror) took no part in the matter (*i.e.*, in the discussion of the case)." See also for a different application of the same principle, *Reg.* v. *London County Council*, [1892] 1 Q.B. 190, at p. 196.

As to the statement of Bachand to grand juror Brault, repeated by the latter (probably in Bachand's presence) in the jury-room, it was of a character calculated to influence other jurymen and it is impossible to know whether it did or did not in fact influence them. Cross, J., was under the erroneous impression that "the trial Judge had found that the communication did not affect the decision of the grand jury."

All that the special case states is that:—

Il n'a été aucunement établi que ces paroles aient influencé ces derniers et qu'elles aient eu pour effet de déterminer leur rapport.

The effect of Bachand's statement upon the grand jury is a field of inquiry not open to us. The statement was improperly before them. It had all the weight of a communication from one of the body itself. The defendant is entitled to have it assumed that it produced some effect.

The accused has been deprived of the substantial right of having his case passed upon by a duly qualified and unbiased grand jury, and it was, in my opinion, quite impossible when the motion to quash was disposed of in the trial Court to affirm that he had not suffered or might not suffer prejudice thereby. *Rex* v. *Willmont*, 30 Times L.R. 499; *Allen* v. *The King*, 44 Can. S.C.R. 331. To hold, as was apparently held by one learned Judge in the *Hayes* case, 9 Can. Cr. Cas. 101, at 118, that because the appellant was subsequently convicted by a petit jury at the trial, to which he was compelled to proceed upon the rejection

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of his motion to quash, it cannot be said that he was really prejudiced by anything which concerned the action of the grand jury, would entail a denial of redress in any case after conviction however gross the improprieties accompanying the finding of the indictment, however prompt the action of the defendant in taking exception thereto, and however erroneous the rejection of his objections.

In my opinion, the motion to quash the indictment should have been granted and the question submitted should be answered accordingly.

Brodeur, J.

BRODEUR, J., dissented. *Appeal dismissed,*

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Re TORONTO GEN'L HOSPITAL TRUSTEES and SABISTON.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., and Riddell, Lennox and Masten, JJ. November 3, 1916.

1. ARBITRATION (§ III—15)—APPEAL FROM AWARD—HEARING OF OBJECTIONS.
A party to arbitration proceedings will not after award made be allowed to raise on appeal to a Divisional Court a ground of objection which might have been taken at the commencement of proceedings.
2. APPEAL (§ VII G—330)—HEARING OF OBJECTIONS.
A Divisional Court will not on appeal hear an objection to an order which it has itself given at an earlier stage in the same proceedings.

Statement.

APPEAL from an order of Falconbridge, C.J.K.B., dismissing a motion to set aside an arbitrator's award fixing the renewal rent to be paid for a new term of a renewable lease. Affirmed.

The order appealed from is as follows:—

FALCONBRIDGE, C.J.K.B.:—Several grounds were taken in the notice of motion. The following are the only ones seriously argued:—

(2) The alleged improper settlement of the amount of the award by the third arbitrator by the splitting of the difference between the sums named by the other arbitrators.

The evidence of the third arbitrator (His Honour Judge McGibbon) entirely displaces and explodes any such theory.

If what was done here is within the mischief aimed at in *Grand Trunk R.W. Co.* v. *Coupal* (1898), 28 S.C.R. 531, and *Fairman* v. *City of Montreal* (1901), 31 S.C.R. 210, then it would not be permissible for any judge or board of arbitrators to fix any figure between the highest and the lowest ones given in evidence.

(3) The improper award, by reason thereof, of a gross and

palpable overvaluation of the renewal rent. This ground is not tenable. The motion is not an appeal from the award. And if it is meant as an appeal, by way of makeweight, to the conscience of the Court, I should say that, so far from shocking the conscience of the Court, the Court, using the highest intelligence it is gifted with, is of opinion that the award is a very reasonable one. One well-known expert valued the property at $61,000—another one, not so well known to me, but apparently qualified by experience, etc., put it at $90,000—4 per cent. on these sums would be $2,440 and $3,600 respectively. The award is $1,400 per annum.

(8) And upon the further ground that the Toronto General Trusts Corporation, the mortgagees of the leasehold land, were necessary parties to the settlement of the amount of the renewal rent, and that no notice was given to that corporation of the said arbitration.

Notice was given to the Toronto General Trusts Corporation, who did not attend, and disclaimed any interest in the matter. (See Mr. Holman's letter produced on the argument of the appeal before me.)

The arbitration proceeded without any suggestion from Sabiston that he wanted the mortgagees before the Court.

Jamieson v. *London and Canadian Loan and Agency Co.* (1897), 27 S.C.R. 435, is not in point. There is no question here of making the mortgagees pay anything. It is merely a question between the Hospital Trust and Sabiston.

The motion will be dismissed with costs.

W. Laidlaw, K.C., for appellant.

H. E. Rose, K.C., for trustees.

MEREDITH, C.J.C.P.:—It may be that the points now raised for the first time in this case, are, as Mr. Laidlaw assures us, points involving questions of great importance: but certain it is that so far as this appeal is concerned they present no great difficulties and are easily well-disposed of. Meredith, C.J.C.P.

The appeal is against an order of the High Court Division dismissing the appellant's application to set aside an award fixing the rent for a new term of a renewable lease.

Mr. Laidlaw's first point, taken now for the first time, and not even mentioned in his notice of this appeal, or elsewhere hitherto, is: that the appellant, having been merely an assignee of the lease,

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and he having in turn assigned it, though only as security for a debt he owed, has no interest in the matter, and that, therefore, the award is a nullity.

But, if so, why all this litigation? If a nullity, how is he hurt by it? Or indeed, if valid, what can he expect to gain by setting it aside, except a new arbitration, in which he now says he has no concern? Or how can it harm him, if he have no interest in the lease? And indeed, if he have: it is said to be optional with him whether it is renewed or not.

And it is quite too late to raise any such point, even if there were something substantial in it. The appellant became a party to the arbitration proceedings at their inception, the party on the one side; and, after conducting, on that side, a long-drawn-out arbitration, including an application to the Court for an opinion on a question of admissibility of evidence, moved against the award on other grounds, and only now, at the last moment, takes this point, stultifying himself in regard to all his earlier conduct in the matter.

If the appellant had taken this ground at the outset, if he had then disclaimed any interest in the lease, all of these costly proceedings might have been avoided: but that he did not, because in truth he had, and has, a substantial interest in the lease, and, had the arbitration been favourable to him, would have taken a renewal of it: but being against him, as he thinks, and having been moved against unsuccessfully, on consistent grounds, and that motion having failed, this ground is taken, doubtless in the forlorn hope that it may upset the award and give the appellant the costs of the motion, and this appeal against it, if not a chance —some are exceedingly hopeful—of another arbitration, upon a new discovery that after all the appellant really has an interest in the lease, a chance supported by an acceptance of the re-assignment of the lease to him which has already been made by the company to whom he assigned it as security only, but which, apparently, has not been yet formally accepted by him.

It seems to me to be a pity to waste time on such a point as this; and that it would have been, even if it had been taken in the notice of this appeal.

The next point is, that the arbitrators wrongly admitted evidence adduced with a view to shewing the rental value of the prop-

erty for factory purposes: and it was on this very point that the arbitrators and parties sought and obtained the opinion of this Division of the Court, and, acting upon it, the arbitrators admitted the evidence: but it is now contended that upon this motion the question is open to the appellant again, and that the opinion then given by this Division was wrong and should be disregarded: relying upon the case of *British Westinghouse Electric and Manufacturing Co. Limited* v. *Underground Electric Railways Co. of London Limited*, [1912] A.C. 673. But, without considering whether sec. 32 of the Judicature Act is or is not applicable, it is hardly reasonable to ask this Division of this Court to reverse its conclusion upon the very point, in this very matter, very recently: and, if it were, I should be obliged to say that I find it difficult to understand how it can be contended, reasonably, that the landlord, in such a case as this, may not give evidence for the purpose of shewing the demised property to be of greater value for some other uses than that to which it has in the past been put, uses to which it may, and can, be put by the tenant, and to go fully into all matters bearing upon the question, subject, of course, to reasonable powers of restriction of evidence in regard to remoteness, etc., etc.

The next point is covered by what has been said as to the last one. It is that the new rental was computed on the basis of the property being used or industrial purposes, when in fact it could not be "made so available." But that was a question of fact upon which the arbitrators might reasonably find as they did: and there is no appeal against the award. Nothing like a ground for setting the award aside, because of anything done or left undone by the arbitrators in this respect, has been shewn.

The next point is, that the arbitrators did not take the subject of municipal taxation into consideration. If anything substantial had been by the arbitrators omitted from their consideration, it would be proper to refer the matter back to them to consider it: but there is nothing to shew—the contrary appears—that they did omit this or any substantial material matter from due consideration. I understand Mr. Laidlaw's point to be that, though fixing the rental upon a use of the land for new purposes, the arbitrators did not take into consideration the question of higher taxation being imposed for such use.

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And the last point is, that the arbitrators did not really make an award; that in truth, two of the arbitrators being wide apart in their estimation of a proper rental, the third arbitrator, without exercising any judgment in the matter, induced, or forced, them to agree upon a sum half-way between the amount which each had found to be the proper sum.

But all this is denied by the third arbitrator, who has testified: that, before any attempt was made to agree upon any amount, he had exercised his judgment independently and had concluded that the amount which has been fixed by the award was the right amount.

The fact that the amount upon which the arbitrators agreed was precisely midway between the two amounts that the other arbitrators had reached, and held out for; and the affidavit of one of the arbitrators, that the amount awarded was not the sum that the judgment of any of the arbitrators had found to be right, but was the result of merely "splitting the difference" between the amount which he, and that which the arbitrator appointed by the respondents, considered right, gave ground for an attack upon the award on this ground, but that attack has been met and fails upon the evidence adduced from the third arbitrator—a County Court Judge.

I would dismiss the appeal.

Lennox, J.

LENNOX, J.:—This is an appeal from the judgment of the Chief Justice of the King's Bench dismissing a motion to set aside the award, and four grounds of appeal are taken:—

1. There is no privity of contract or estate between Sabiston and the trustees, and we are referred to *Jamieson* v. *London and Canadian Loan and Agency Co.*, 27 Can. S.C.R. 435. I find it difficult to see how this objection can be open to the appellant at this time. He appointed his arbitrator, took part in the arbitration proceedings, moved to set aside the award, and appealed to this Court, but never raised this question until the argument of the appeal. More than this, Mr. Laidlaw contends that, by reason of this, the proceedings are a nullity; and, if the facts are as alleged, it may be so—if it is so, the appellant has only to resist enforcement of the award.

But, the point having been taken, it is just as well to deal with it. As to privity of contract, I find that the appellant is the assignee of the lease, that it could not be assigned without

the consent of the trustees, by endorsement on the assignment, by which the appellant acquired the rights of the original lessee, the trustees consented to the transfer, but subject to all the terms of the original demise, and in and by this assignment the appellant agreed to carry out all the provisions and covenants of the lease. When he mortgaged the leasehold, by which, it is argued, he divested himself of all estate in the land, he again bound himself to observe and perform the covenants and obligations of the lease, and remained entitled to possession until default in payment of the mortgage-moneys. Neither does the objection as to privity of estate appear to be well taken, and, if either question is important, this is the important one. Sabiston has not, as I interpret the mortgage, parted with his entire leasehold interest; and, if he has not, the principle upon which the *Jamieson* case was decided does not apply That case turned definitely upon the single question, "Was any part of the term reserved to the original lessee?" And it was held in the Supreme Court of Canada that there was nothing to indicate a reservation except in the *habendum*, and this was indefinite; that by the earlier provisions of the instrument, he had already granted and conveyed the lease, the lands, and entire residue of the term of years without reservation; and, as the *habendum* cannot cut down the grant and was repugnant, the instrument must be construed as an out-and-out assignment, and not as a sublease. Where the lessee reserves to himself or excepts any residue of the term, his estate as to everybody else is as it was before; as to his grantee it is subject to what he has granted. The grant in this case is not of the residue of the term, but of the residue less one day. The lease is better drawn than in the *Jamieson* case, but I would not like to say that it is consistently worded throughout.

I think this objection fails.

2. Evidence was admitted pursuant to a decision of this Court (the First Division) on a reserved case, and the Court erred. This point has the merit of novelty at least. There is only one "Court of Appeal" in this Province, and, however it may be constituted from time to time, and even without statutory direction, it will endeavour to follow its own decisions until reversed by a higher Court. To do otherwise would be a scandal and lead to endless confusion. It is not at liberty to do otherwise: Judicature Act, sec. 32. The *British Westinghouse Co.* case, [1912]

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A.C. 673, was cited as authority for the intervention of this Court. It is quite the other way. There a Divisional Court directed the arbitrator to accept certain properties or goods as elements in determining his award, and that other matters could not be considered. The arbitrator set out the stated case and the decision of the Court upon the face of his award, and of course accepted and acted upon the opinion. Motion was made to another Divisional Court to set aside the award, upon the ground that the opinion upon which the arbitrator acted was contrary to law. The Court dismissed the appeal without argument, on the manifest ground of co-ordinate authority. It went to the Court of Appeal, and in a divided Court the appellant failed on the merits. In the House of Lords, Viscount Haldane, at p. 686, explains that in a higher tribunal, the error appearing on the face of the award, the decision could be reviewed.

3. The arbitrators did not consider or adjust the taxes. They had no right to do so. The lease provides that the taxes are to be paid by the lessee in addition to rent, and the renewal rent is the only thing referred for consideration by the arbitrators.

4. Misconduct of the arbitrators. There is no satisfactory evidence of misconduct. The position of arbitrators is quasi-judicial; each should exercise his own judgment, but not dogmatically or arbitrarily; and each may allow his judgment to be influenced to some extent by the opinion of his associates—it is an argument that he may be in error, and should be thoughtfully and seriously examined into and weighed. The valuation of property is not an exact science. The value can seldom be ascertained by mathematical calculation. The evidence was startlingly divergent in this case. Judge McGibbon alone knows how he arrived at $1,400 a year as a fair rental, and the method he describes was reasonable and proper. He did not, he says, fix upon this sum because it was half-way between $800 on the one hand and $2,000 on the other. "Splitting the difference" does not sound well, and, where it results from disregard of the evidence or failure of the arbitrator to exercise his best judgment, is necessarily improper. But facts, not phrases, are the important consideration here, and I find no ground for believing that improper methods or principles obtained in the making of this award.

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In *Kerr or Lendrum* v. *Ayr Steam Shipping Co.*, [1915] A.C. 217, an arbitration case, Earl Loreburn, at pp. 222, 223, says: "This class of case has led to much refinement. I do not find it very profitable to consider whether the arbiter's award proceeded upon inference or on some kind of speculation which was described in argument by four words successively, namely, conjecture, probability, guess, and surmise. I am not qualified to draw a precise line between the thoughts suggested by those several words. They seem to me to run into one another."

It is not necessary for me to characterise Mr. Garland's conduct, if he acted as he says he acted. Fortunately it is an unusual thing for an arbitrator to concur in an award which he knows to be wrong; and in this case, on his contention, seventy-five per cent. higher than the annual payments ought to have been awarded. That his judgment may have in fact been at fault does not alter the quality of his act. The tenant may not in fact be paying an excessive rent. But, if it should happen that Mr. Garland is ever again called upon to act as an arbitrator, it may be salutary, although not gratifying, for him to reflect that, assuming the correctness of his valuation, by his conscious, deliberate neglect of his plain duty as an arbitrator, he has committed, or assisted in committing, the man who appointed and trusted him to gross annual overpayments of rent for twenty-one years, and amounting, with legal interest at annual rests, to more than $22,000. Comment is idle. I leave Mr. Garland in the limelight he has turned upon himself.

The questions whether a fair rental was fixed and whether the award is binding upon the appellant do not arise upon this appeal. I have referred to the question of privity. There may be other grounds of objection or defence open upon proper proceedings or in answer to proceedings. By the lease the arbitrators were to be appointed and the renewal rent fixed during the currency of the first term. This may be merely directory, and I express no opinion either way. The lease does not, in express terms, bind the lessee to accept a further term. But these are matters that we are not called upon or at liberty to deal with upon this appeal.

The appeal should be dismissed.

RIDDELL and MASTEN, JJ., concurred.

Riddell, J.
Masten, J.

Appeal dismissed.

SASK.

S. C.

CASSIDY v. CITY OF MOOSE JAW.

Saskatchewan Supreme Court, Newlands, Brown and McKay, JJ. January 6, 1917.

1. DAMAGES (§ III L—275)—LOSS OF ACCESS—CLOSING HIGHWAY—MUNICIPAL LAW.

Loss of direct access to one's house or land, occasioned by the closing of a highway, under sec. 509 of the City Act (Sask.), entitles the owner to compensation under the statute.

2. APPEAL (§ I A—1)—FROM MUNICIPAL AWARD—COMMENCEMENT OF PROCEEDINGS.

There is a right of appeal to the Supreme Court of Saskatchewan under sec. 379 of the City Act (Sask. 1915, ch. 16), from an arbitrator's award in a proceeding under the Act, notwithstanding that the proceedings had been commenced prior to the passage of sec. 379.

Statement.

APPEAL by defendant from the judgment of Ouseley, D.C.J. Affirmed.

W. E. Knowles, for appellant; *W. F. Dunn*, for respondent.

Newlands, J.

NEWLANDS, J.:—Cassidy, the respondent in this appeal, was the owner of lots 32, 33, 34 and 35 in block 37, Hillcrest addition to Moose Jaw. These lots abutted on Grey Ave., with a lane at the rear of them. Grey Ave. ran north and south, and by it Cassidy had a right of way to all streets south of his property. The first street that intersected Grey Ave. on the south, and which ran east and west, was Hall St. The City of Moose Jaw entered into an agreement with the G.T.P.R. Co. to close that part of Grey Ave. over which the G.T.P. ran and which lay between the Cassidy lots and Hall St. This cut off Cassidy's lots from all exit to the south. The by-law so agreed upon was passed by the city, and Cassidy claimed $2,000 compensation and an arbitrator was appointed who fixed the damages at $400. From this award the City of Moose Jaw, on behalf of the G.T.P.R. Co., have appealed.

A preliminary objection was taken by the respondent that there was no appeal, the proceedings in this case having been commenced prior to the passing of sec. 379 of the City Act, which gave an appeal to this Court where the claim exceeds $1,000.

Prior to this provision coming into force, proceedings to ascertain damages in such cases were to be adjudicated upon by the District Court Judge as arbitrator. The Act which introduced the above provision as to appeal changed the Court which was to assess the damages to an arbitrator to be appointed by a Judge of the Supreme Court.

The respondent made his application for an arbitrator under

this new Act. He applied to McKay, J., to appoint an arbitrator, and he appointed Ouseley, J., of the District Court. Having brought his proceedings under the new Act, in a Court from which there is an appeal given by the statute to this Court, the respondent is bound by the provisions of the Act and his preliminary objection must be dismissed.

The respondent's right to compensation is under the City Act. Sec. 509 of that Act gives the city the right to close a public highway by by-law. Clause (c) of sub-sec. (2) of that section provides that such by-law shall not be passed until any person who claims that his land will be injuriously affected thereby, and petitions to be heard, has had an opportunity to be heard; and sub-sec. (3) provides that such person shall be compensated for all damages caused to his land by reason of anything done under the by-law.

In *Caledonian Railway Co.* v. *Walker's Trustees*, 7 App. Cas. 259, it was laid down that in order to be entitled to damages in such a case it must be proved that the acts could not be done without statutory authority, and if done without statutory authority would entitle the claimant to an action, and this action must not be merely personal, but the damages must be connected with the land. On p. 276 of that judgment, Lord Selborne, L.C., said:—

> The obstruction by the execution of the work, of a man's direct access to his house or land, whether such access be by a public road or by a private way is a proper subject for compensation.

In this case the respondent had two ways of getting to his property, from the north and from the south. All access from the south is cut off. He, therefore, comes within the case mentioned by Lord Selborne in having a direct access to his land destroyed. He is therefore entitled to compensation under the City Act.

As to the amount of compensation, I may say I would not have allowed the amount fixed by the arbitrator. The lots are not built upon, nor are there any buildings in the vicinity; there is no immediate use nor sale for the property, so that its value is merely speculative. However, I do not feel that there is sufficient evidence for me to alter the amount he was allowed.

As to the costs, sec. 376 gives the arbitrator authority to award costs and says he may direct the scale on which they should be taxed; the scale in question being that of the Supreme or

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District Court. Unless there are special circumstances this scale should be fixed as it is in the Supreme Court, by the amount recovered. In this case the amount recovered is within the jurisdiction of the District Court, and, as there are no special circumstances, the costs should be taxed on that scale.

Newlands, J.

With that exception the appeal should be dismissed with costs.

Brown, J.

BROWN, J.:—I concur in the judgment of Newlands, J., which I have had the opportunity of seeing, but I would like to amplify it slightly by quoting further from the judgment of Lord Selborne in the *Walker's Trustees* case. At p. 284 he says:—

> It was argued for the appellants that these authorities ought not to be extended to any case of the obstruction of access to private property by a public road, when such obstruction is not immediately ex adverso of the property. This limitation, however, seems to me arbitrary and unreasonable, and not warranted by the facts either of *Chamberlain's*, 2 B. & S. 617 or of *McCarthy's* case, L.R. 7 H.L. 243. A right of access by a public road to particular property must, no doubt, be proximate, and not remote or indefinite, in order to entitle the owner of that property to compensation for the loss of it; and I apprehend it to be clear that it could not be extended in a case like the present to all the streets in Glasgow through which the respondents might from time to time have occasion to pass for purposes connected with any business which they might carry on upon the property in question. But it is sufficient for the purposes of the present appeal to decide that the respondents' right of access from their premises to Eglinton St. at a distance of no more than 90 yards, was direct and proximate, and not indirect or remote.

In the case at bar, the plaintiff's property was situated only 200 ft. away from Hall St., and so close that I am of opinion the arbitrator was justified in finding as he did that the right of access was direct and proximate and not indirect or remote.

McKay, J.

MCKAY, J., concurred with Brown, J.

Appeal dismissed.

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EX. C.

GAUTHIER v. THE KING.

Exchequer Court of Canada, Cassels, J. October 30, 1915.

1. ARBITRATION (§ I—5)—REVOKING SUBMISSION—CROWN.

The right of the Crown to revoke a submission to arbitration is not taken away or abridged by the Exchequer Court Act, R.S.C. 1906, ch. 160.

[*Burrard Power Co.* v. *The King*, [1911] A.C. 87; *Powell* v. *The King*, 9 Can. Ex. 364, referred to; *Exchange Bank* v. *The Crown*, L.R. 11 A.C. 157, distinguished.]

2. SPECIFIC PERFORMANCE (§ I—1)—AGAINST CROWN—REMEDY FOR DAMAGES.

Specific performance cannot be decreed against the Crown, and where there is a valid contract which it refuses to carry out, the only remedy is damages for breach of the contract.

PETITION of right for relief claimed by the suppliant as arising out of an agreement entered into with the Dominion Government.

McGregor Young, K.C., for suppliant.

W. D. Hogg, K.C., for respondent.

CASSELS, J.:—The allegations of the suppliant are

That on or about February 15, 1909, the suppliant was granted by the Crown, in the right of the Province of Ontario, a license of occupation to enter upon, possess, occupy, use and enjoy during the term of 21 years certain parcels of land covered by water in the Detroit River in the Province of Ontario, said parcels of land being the land already in occupation of the suppliant.

That during the years 1909 and 1910 negotiations were carried on between the Crown in right of the Dominion of Canada and the suppliant for the purchase by the Crown from the suppliant of certain of said fishing gear and improvements and of the rights of the suppliant under said license of occupation.

The suppliant alleges that pursuant to said negotiations an agreement was arrived at between the Crown and the suppliant as set forth in order in-council dated August 1, 1910, and a letter from the said Deputy Minister to the suppliant dated August 4, 1910, whereby it was agreed that such purchase be made at a price to be fixed by arbitration such arbitration to be final and the award to be accepted by both parties—the purchase to cover so much of the said fishing gear and improvements as should be requested by the Department of Marine and Fisheries for the Dominion of Canada, and otherwise as in the said order-in-council and letter set forth.

The suppliant further alleges that on August 11, 1910, pursuant to the said order-in-council and letter, the Crown, represented by the Minister of Marine and Fisheries, for the Dominion of Canada, and the suppliant entered into a written agreement, whereby it was agreed that the price to be paid by the Crown to the suppliant as aforesaid be referred to the arbitration of F. H. Cunningham, superintendent of fish culture of Ottawa, nominated by the Crown, and one Alfred Miers, nominated by the suppliant, together with a third arbitrator to be appointed by the two arbitrators already nominated, and otherwise as in the said agreement set forth.

The petition proceeds that on or about August 11, 1910, pursuant to the said agreement the said Cunningham and Miers did duly and validly by writing under their hands, appoint one A. F. Healy as such third arbitrator.

The petition further alleges that

On or about September 23, 1910, the said arbitrators, by a majority of them, namely, the said Miers and the said Healy, did duly make and publish their award in writing whereby they awarded to the suppliant the sum of $2,401.90 for fishing gear and buildings taken over by the said Department of Marine and Fisheries, and the annual sum of $9,990 for the relinquishment of all rights under the said license of occupation, such annual payments to commence with and cover the year 1910, and to continue the term of said license of occupation, the whole as in the said award set forth.

The allegation is that prior to the making of the said award, the Minister of Marine and Fisheries gave to the said arbitrators

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a notice stating that by writing under his hand, dated September 28, 1910, he had revoked, annulled and made void their authority as arbitrators, and that he thereby discharged and prohibited them from further proceeding in the matters of the said arbitration.

The petitioner contends that the said notice and the said revocation were invalid and ineffectual, and he claims the benefit of the provisions of the Arbitration Act of the Province of Ontario.

The suppliant prays: "(*a*) That the Crown be condemned to pay him the amount of the said award. (*b*) In the alternative that the Crown be condemned to pay him damages, to be assessed, for the breach by the Crown of its agreement to refer as herein set forth. (*c*) In the alternative for a declaration that the Crown is bound to carry out its agreements to purchase and to refer as herein set forth. (*d*) In the alternative that the Crown be condemned to pay him damages, for the breach by the Crown of its agreement to purchase as herein set forth together with the damages occasioned by the interruption of his fishery business."

The Att'y-Gen'l of Canada, on behalf of His Majesty, filed a defence in which he alleges that the award referred to was made and signed by the two arbitrators, Miers and Healy, after the agreement of submission had been duly revoked and cancelled by the Minister of Marine and Fisheries, by reason whereof the said award was and is now of no effect, and the Crown denies the right of the petitioner to any relief.

The Order-in-Council of August 1, 1910, states that the attached memorandum fully "explains the details connected with the fisheries surrounding Fighting Island as they have arisen since the sale of the island by the Government in 1858."

This memorandum which is stated to be annexed to the Order-in-Council and forms part thereof, is a memorandum purporting to be signed by F. H. Cunningham, superintendent of fish culture, and is dated March 17, 1910. This memorandum and the evidence of Mr. Gauthier give a detailed statement of the rights of the suppliant and the facts connected with his fishery which led up to the agreement referred to in the petition.

It would appear that the island called Fighting Island, situate on the Canadian side of the Detroit River, between Sandwich and Amherstburg, was sold by the Government (Indian Department) in 1858 for the sum of $6,000. This island is situate about 8 miles south of Windsor and 4 or 5 miles from Amherstburg.

Down to the year 1890 the purchaser of this island enjoyed the right of fishing off the island when it was discovered that the sale of the island did not include the right of fishing, but that these privileges were still reserved to the Crown.

The question of the title has been dealt with by the Courts in the case of *Bartlet* v. *Delaney*, tried before Latchford, J., 11 D.L.R. 584, subsequently heard before the Court of Appeal in Ontario, 17 D.L.R. 500, and finally before the Supreme Court of Canada.

Apparently the right of fishing for whitefish is of considerable value. It is stated in this memorandum, that previous to 1890 there was no

close season for whitefish in the Detroit River, and licenses were issued to such as desired to fish and amongst them is Mr. C. W. Gauthier, who fished several stations in the river, amongst them the five stations on Fighting Island.

It also alleges that considerable money was expended by the Gauthier family in preparing these stations.

The memorandum further states:—

It might be explained here that whitefish fishing in the Detroit River is only productive during the close season (November) as it is at this time that the fish are in the river, passing up to Lake St. Clair for spawning purposes.

That in 1892 a close season for whitefish was put in force in Lake Erie and the Detroit River, and of course no licenses were issued to fish in the river during this period, which rendered Mr. Gauthier's fishing stations useless to him as a fishing commodity.

The memorandum states:

That in that year, 1892, the Department took possession of these fishing stations and, notwithstanding innumerable protests from Gauthier, continued to fish for the purposes of procuring eggs for the Sandwich Hatchery up to 1903, in which year Mr. Gauthier took possession of the most important stations, claiming that the fishing was being conducted in American waters.

It appears that Mr. Gauthier's contention was upheld and that in 1903 the November close seasons was abolished and licenses have been issued by the Provincial Government of Ontario to fish these stations.

The memorandum proceeds:

That it has not been possible to make any satisfactory arrangements with Mr. Gauthier to procure eggs for the Sandwich Hatchery and the Department has, at additional expenditure, been securing its eggs from the different points, offering the best facilities for so doing. This process has been expensive and the procuring of the eggs has been largely dependent upon weather conditions.

In February, 1909, the Provincial Government issued to C. W. Gauthier a license of occupation for a period of 21 years

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for certain parcels of land covered with water in front of the western shore of Fighting Island for the sum of $50 per annum.

The memorandum proceeds that:

Whilst this license of occupation conveys no fishing rights the very fact of his controlling the land covered with water creates an exclusive fishing privilege as of course no one could trespass on this area.

This area includes the only five stations in the Detroit River that can be relied upon for the purpose of filling the Sandwich and Sarnia hatcheries with eggs each year.

The International Fisheries Regulations will, when they become law, prohibit all fishing in the Detroit River, except for fish breeding purposes, and will thus render the area referred to valueless to Mr. Gauthier, from the standpoint of commercial fishing but as the lease given by the Ontario Government will still be in force this Department will still be debarred from using these stands.

The memorandum proceeds:

That owing to the great value of the Fisheries of Canada resulting from the Department's fish breeding operations, it is of the utmost importance to successful operations that these fishing stands should be absolutely under the control of this Department, especially as they are situated within a short distance of the Sandwich Hatchery.

In correspondence with the Ontario Government this Department has practically asked them to cancel this lease and Mr. Cochrane, Minister of Lands, Forests and Mines states: "With all respect I do not think we can interfere in the matter further than the way I have indicated, that is to say, when you have acquired Mr. Gauthier's fishery rights, such as they are, we should give you a license of occupation on the same terms we gave it to him, that is, at an annual rental of $50."

The memorandum proceeds:

Every possible means has been taken with Mr. Gauthier with a view to getting him to name a lump sum or an annual payment and transfer this lease to this Department but without success as he refuses to move in the matter except under arbitration.

The Hon. L. P. Brodeur has practically agreed to purchase Mr. Gauthier's fishing gear used in operating these stands and was inclined towards a favourable consideration of settling the matter by arbitration but he reached no final decision.

It was agreed, however, that, should arbitration be finally decided upon, A. Miers of Walkerville should represent Mr. Gauthier, the undersigned (F. H. Cunningham) to represent this Department, and these two arbitrators to have authority to decide upon a third person. Whilst I anticipate considerable difficulty in arriving at what would be considered a fair amount from a Departmental standpoint still, knowing the value that these stands would be to the Department in its endeavours to build up the fisheries of Canadian waters, I recommend favourable consideration to arbitration as being the only means of settling this difficulty of 30 years' standing.

The disputes between the Department of Marine and Fisheries on the one hand, and Mr. Gauthier, the suppliant, on the other, extending for over a period of some 10 years prior to the order-

in-council relied upon, are detailed in this memorandum and are referred to at considerable length in the evidence of Mr. Gauthier.

There is no claim put forward in respect of any supposed grievances on the part of the suppliant detailed but it is important to have them in mind as shewing the reason why during a period of years the suppliant did not utilize all the stations owned by him for the purpose of catching whitefish; and it is also important when dealing with the question as to whether he has ever been out of occupation of his fishing rights.

This memorandum also indicates the reasons why the Department of Marine and Fisheries were anxious to procure by purchase from Mr. Gauthier any right which he had under his license of occupation from the Crown represented by the Province of Ontario.

I think the Crown, represented by the Dominion Government, bound itself to purchase and acquire Mr. Gauthier's rights. The only question that was left open was with respect to the amount to be paid therefor. The parties failing to agree upon a specific sum it was mutually agreed that the sum which was to be paid should be arrived at by arbitration in the manner designated.

I cannot adopt the contention put forward by Mr. Hogg on the part of the Crown that the arbitration was entered upon with the object of ascertaining what amount Mr. Gauthier's rights would be valued at, and that it was open to the Crown after the award, if they desired, to desist from further negotiations. In other words, it is contended by the Crown that they were merely negotiating and with the view of enabling them to say whether they would enter into an agreement or not—this arbitration was to take place, and that then the Crown would decide whether they would continue the negotiations and enter into an agreement or recede from the negotiations. I think it obvious that the intention was that there was to be a complete agreement of bargain and sale, the purchase-money to be arrived at in the manner indicated.

The order-in-council dated August 1, 1910, states that

> On a memorandum dated July 6, 1910, from the Minister of Marine and Fisheries submitting that it is in the interests of the fish cultural service as conducted by the Department of Marine and Fisheries to obtain absolute control of certain fishing stations located off the shore of Fighting Island, in the Detroit River, Province of Ontario;

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That these stations are now in the possession of C. W. Gauthier, of Windsor, Ontario, by virtue of a license of occupation issued by the Provincial Government of Ontario for 21 years, dating from February, 1909, which leases to him certain parcels of land covered by water in front of the western shore of Fighting Island for the sum of $50 per annum;

That the attached memorandum (this is the memorandum signed by F. H. Cunningham previously referred to and which I have quoted at considerable length) fully explains the details connected with the fisheries surrounding Fighting Island as they have arisen since the sale of the Island by the Government in 1858;

The Minister recommends, in view of the value of the stations to the Department of Marine and Fisheries, that the annual amount of money to be paid to C. W. Gauthier for the relinquishment of all rights and privileges conveyed by the lease of occupation be settled by arbitration and that the additional sum to be paid to him for such of his fishing gear as is required by the Department of Marine and Fisheries be also covered by arbitration.

The Minister further recommends—as A. Miers, of Walkerville, Ontario, has been nominated by C. W. Gauthier to act as arbitrator for Gauthier—that F. H. Cunningham, the superintendent of fish culture, be arbitrator for the Department of Marine and Fisheries, and that these arbitrators be authorized to appoint a third party;

Then follows a provision as to the costs, and

The Minister further recommends that the finding of the arbitration shall be final and shall be accepted by all parties interested.

This document is followed up by the agreement bearing date August 11, 1910, between His Majesty the King, represented by Hon. Louis Brodeur, Minister of Marine and Fisheries, and C. W. Gauthier.

It recites the facts and it agrees to refer the matter to arbitration, and contains further provisions, and amongst others,

That the parties shall, on their respective parts, in all things obey, abide by, perform and keep the award so to be made and published as aforesaid.

This is signed by A. Johnson, the Deputy Minister of Marine and Fisheries.

Up to this point it seems to me there is a binding agreement and a contract between the Crown on the one part, and Gauthier on the other, by which the Crown agreed to purchase and Mr. Gauthier agreed to sell the property in question.

Prior to the making of the award, notice was served on behalf of the Crown revoking, annulling and making void Cunningham's authority to act as an arbitrator, and a formal document was served notifying the arbitrators that they were discharged from making any award.

The contention is put forward on behalf of Gauthier that this notification was given without authority of an order-in-

council. If this be a valid objection it has been remedied by the subsequent order-in-council which adopts and confirms the action of the Minister in revoking the authority.

It is conceded that at common law the revocation referred to would be operative and effectual to cancel the rights of the arbitrators to proceed, and the award would be null and void unless the legislation in Ontario takes away the right of the Crown to withdraw.

It is contended, however, by Mr. Young, that the Crown, represented by the Dominion, is bound by the Arbitration Act enacted by the Legislature of the Province of Ontario. This statute is ch. 65, of the R.S.O. 1914.

The statute has been carried into the Revised Statutes from earlier statutes, and is to a great extent similar to the statute in force in England. It first became part of the statute law of Ontario so far as it purports to bind the Crown in 1897, 60 Vict. ch. 16, 346. The Act specifically provides that the Act shall apply to an arbitration to which His Majesty is a party. And it is provided that a submission, unless a contrary intention is expressed therein, shall be irrevocable except by leave of the Court and shall have the same effect as if it had been made an order of the Court.

In the Interpretation Act of the Ontario Statutes is the following:—

"His Majesty," "Her Majesty," "The King," "The Queen," or "The Crown," shall mean the sovereign of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the seas for the time being.

The Exchequer Court Act was enacted in 1887, 50-51 Vict. The provisions of the Arbitration Act as I have stated purporting to bind the Crown first became part of the statute law of Ontario in 1897. If the view suggested that in dealing with rights of action arising in any province regard must be had to the laws of the province as they were in force at the time of the passing of the Act of 50-51 Vict. 1887, is the correct view, then that part of the Arbitration Act of Ontario purporting to make a submission executed by the Crown irrevocable would not apply even if the Crown, represented by the Dominion, were otherwise bound by such legislation. Regard, however, must be had to sec. 10 of the Interpretation Act, R.S.C. 1906:

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The law shall be considered as always speaking and whenever any matter or thing is expressed in the present tense the same shall be applied to the circumstances as they arise so that effect may be given to each Act and every part thereof according to its spirit, true intent and meaning.

I do not think the view put forward can be upheld. If such a construction were placed on the Exchequer Court Act innumerable absurdities might arise as the statute laws of the various provinces are from time to time repealed or varied.

The question raised that the Crown represented by the Dominion is bound by the provisions of the Arbitration Act is an important once. In Fry on Specific Performance, 5th ed. (1910) p. 777, will be found a note of various authorities which, dealing between subject and subject, decide that where the price is to be settled by arbitration and no award has been made the Court cannot decree specific performance. *Wilks* v. *Davis*, 3 Mer. 507, 36 E.R. 195, and *South Wales R. Co.* v. *Wythes*, 5 De G.M. & G. 880, decide that there is no case where the Court has ordered specific performance to proceed to arbitration. *Darbey* v. *Whitaker*, 4 Drew. 134; *Vickers* v. *Vickers*, L.R. 4 Eq. 529, 534, is a case where one party had appointed an arbitrator and had subsequently forbidden him to act. *Jureidini* v. *National British & Irish Millers Ins. Co.*, [1915] A.C. 499, is a case where the ascertainment of the amount of loss by arbitration was a condition precedent of the right to sue as in *Scott* v. *Avery*, 5 H.L.C. 811. The contract having been repudiated in toto the House of Lords entertained the action without the amount being ascertained by arbitration. In the present case the amount has been ascertained by the award of a majority of the arbitrators and the suppliant claims a declaration that the amount found due should be paid.

For reasons which I shall give I am of opinion that the Crown represented by the Dominion is not affected or bound by the provisions of the Arbitration Act enacted by the Legislature of Ontario.

Before doing so I will consider another point of considerable importance. The question raised is that whether the Crown is named in the Arbitration Act or not is immaterial, as wherever a subject is liable if in the action he were a defendant, the Crown represented by the Dominion is liable. I think the law is as stated by the Chief Justice of Canada in *The King* v. *Desrosiers*, 41 Can. S.C.R. 71.

Since the judgment in *The King* v. *Armstrong*, 40 Can. S.C.R. 229, it must be considered as settled law that the Exchequer Court Act not only creates a remedy but imposes a liability upon the Crown *in such cases as the present*, and that such liability is to be determined by the laws of the province where the cause of action arose.

In the *City of Quebec* v. *The Queen*, 24 Can. S.C.R. 420, the view of the late Chief Justice, Sir Henry Strong, is stated as being that the laws of the various provinces govern, and that a plaintiff suing for relief to which he becomes entitled under the provisions of the Exchequer Court, becomes entitled to the same relief as would be granted between subject and subject.

Regard must be had to the fact in question in the case of *Desrosiers* v. *The Queen*. The Chief Justice carefully guards himself by using the words "in such a case as the present." Prior to the stat. 50-51 Vict. ch. 16 (The Exchequer Court Act) an action would not lie against the Crown for tort by a servant. The Exchequer Court Act, by sec. 16, sec. 20 of the present Act, sub-sec. c., expressly provides the remedy and when expressing his view of the law the Chief Justice had reference to this provision, so also Sir Henry Strong.

I have no doubt that in a case such as the *Desrosiers* case, or the *Armstrong* case, where the facts bring the case within the provisions of sub-sec. (c.) of sec. 20, the Crown would be liable if a subject were liable and were defendant instead of the Crown. This I think is obviously the effect of the decision in the *Desrosiers* case. If the remedy were to be only in cases in which the Crown represented by the Dominion was made liable by legislation of the province it would be useless legislation as the local legislature could not enact laws making the Crown represented by the Dominion liable. The liability imposed upon the Crown is as stated by the Chief Justice by the Exchequer Court Act, sec. 20, sub-sec. (c.).

In the case before me the right of action of the suppliant is founded on contract not in tort. It is regulated by sec. 19 of the Exchequer Court Act. Prior to the enactment of the Ontario Legislature (the Arbitration Act referred to) the Crown represented by the Dominion had the right to revoke the submission to arbitration. I am of opinion the local legislature cannot legislate

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so as to take away this right. In *Burrard Power Co.* v. *The King*, [1911] A.C. 87, the question was determined where the province attempted to enact laws interfering with rights of property of the Crown represented by the Dominion. Chitty's Prerogatives of the Crown, p. 283, states:—

> But Acts of Parliament which would divest or abridge the King of his prerogatives, his interests or his remedies, in the slightest degree, do not in general extend to, or bind the King unless there be express words to that effect.

But see Burbidge, J., in *Powell* v. *The King*, 9 Can. Ex. 364, 374; also per Chancellor of Ont. in *Weiser* v. *Heintzman*, 15 P.R. (Ont.) 407.

The case relied on by Mr. Young of *Exchange Bank* v. *The Crown*, L.R. 11 A.C. 157, does not affect the question. This case was decided under the French law prior to Confederation. The Quebec Civil Code was enacted in 1866 continued as law by the Confederation Act.

A further point to be considered is that I could not decree specific performance against the Crown. There would be no means of enforcing any such judgment. In the case before me not merely has the Crown, the defendants in this petition, cancelled the powers of their arbitrator and terminated the proceedings, but by subsequent letter of October 13, 1910, forwarded to the suppliant, they have repudiated the agreement in toto, and declined to further proceed with the purchase.

The letter states that

> Moreover, I am to say that upon further inquiry it appears very doubtful whether you are entitled to any rights or privileges in respect of the fisheries at Fighting Island or under your license of occupation which it would be in the public interest for the government to acquire, and the Minister has therefore decided not to proceed further with the negotiations for purchase. You may consider, therefore, that the government is not contemplating the purchase of your interest in the premises, whatever it may be.

The Crown declines to carry out their contract. This being so the only remedy which the suppliant can obtain is damages for the breach of the contract.

I think if the suppliant can prove damages he is entitled to recover them and be paid the amount by the Crown. It was suggested on the trial that the parties would agree upon a referee who could assess the claim for damages, and if a reference becomes necessary perhaps the parties will agree. It appears from the evidence that the suppliant has never been out of occupation or enjoyment of his fishing privileges. Mr. Gauthier in his evidence puts it in this way:

There were no fishery operations going on at that particular time in August; they were not being occupied. (Referring to the fishery sites.) The season does not begin until November 1, or a week before that, in the fall; so that at that time they were not in actual possession of anybody.

Q. When did they (referring to the Crown) go into possession? A. They did not as a matter of fact go into possession. Q. There was no loss occasioned by the taking away of the fisheries between the order-in-council and the revocation of the arbitration? A. No, and the loss really did not begin until the beginning of the fall season, about a week prior to November 1, etc.

It would therefore appear, that so far as any injury is occasioned to the petitioner by reason of being out of possession of his fishery, there is no loss.

The submission to arbitration, made provision in regard to the costs of the arbitration proceedings. This was all based upon the supposition that the agreement would be carried out. It seems to me that it would be fair if the parties could come together, that the suppliant should be reimbursed by the Crown any loss that he has been put to by reason of these arbitration proceedings. This, however, is a matter for consideration by the parties themselves.

Judgment will issue declaring that there is a valid contract, and that the Crown is liable in damages for breach thereof, and a reference to a party to be named if the parties fail to agree.

I think the suppliant is entitled to costs up to judgment; but subsequent costs and further directions will be reserved until after the report as to damages.

Judgment accordingly.

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Alberta Supreme Court, Appellate Division, Scott, Stuart, Beck and McCarthy, JJ. January 13, 1917.

ASSIGNMENT (§ I—17)—OF CHOSE IN ACTION—CLAIM FOR DAMAGES.

A claim for unliquidated damages arising out of breach of contract is assignable, and is enforceable by the assignee; whether a particular assignment is champertous is a question of fact.

Statement.

APPEAL from the judgment of Ives, J., dismissing the plaintiff's action with costs. Reversed.

D. H. Elton, for appellant.

W. S. Ball, for respondent.

Scott, J.

Scott, J.:—The plaintiffs sue as assignees of a contract dated September 14, 1915, entered into by the defendant with one McClenahan who carried on business as a dealer in grain under the name of The Western Hay and Grain Co., whereby

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the defendant contracted to sell 5,000 bushels of wheat (more or less) at 98½c. per bushel, basis No. 1 F.O.B. Winnipeg station, shipment to be made from traders for delivery at Fort William on October 15.

The defendant delivered only 2,000 bushels under the contract. The assignment of the contract to the plaintiffs which bore no date was made about November 16, 1915, long after the time for the delivery of the grain had expired.

The trial Judge found that at the end of October, 1915, the 3,000 bushels remaining undelivered under the contract could only be obtained at an added cost of $420. He, however, held that at the time of the assignment of the contract to the plaintiffs, the only right which the assignor had to assign was a claim for unliquidated damages for breach of contract, and that such a right is not assignable nor were the damages assignable so as to enable the plaintiffs to sue for them.

The question whether such a right was assignable was not raised by the statement of defence, nor, in so far as appears by the appeal book, was it raised at the trial. As the fact that the assignment was made subsequent to the breach did not appear upon the pleadings the defendant in order to raise the question would have to amend his statement of defence by alleging the fact. If such an amendment had been applied for at the trial the plaintiff would doubtless have applied to amend to add the assignor as a party plaintiff, and such an amendment should have been allowed upon reasonable terms in order to avoid unnecessary litigation.

I am of opinion, however, that the trial Judge erred in holding that the contract was not assignable after breach where the only remedy of the assignor was in action for damages for the breach.

In his reasons for judgment he refers to *Torkington* v. *Magee*, [1902] 2 K.B. 427, in which Channell, J., quotes apparently with approval the view expressed by Lord Esher and Rigby, J., in *May* v. *Lane* (1894), 64 L.J.Q.B. 236, the former to the effect that such a right of action is not assignable, and the latter to the effect that a legal chose in action is something which is not in possession, but which must be sued for in order to recover possession of it, and that it does not include a right to recover damages for breach of contract or a legal right to recover damages arising out of assault.

I may here point out that in neither of the cases referred to did that question arise. The views there expressed are therefore merely *obiter*, and in view of that and of the further fact that neither Lord Esher nor Rigby, J., have stated the grounds on which their conclusions were founded, those cases cannot be regarded as strong authorities upon the question, and they are the only cases I can find in which it has been expressly held that such a right of action is not assignable.

Mr. Warren in his work on Choses in Action (1899) discusses the question at length at pp. 155 *et seq.* and refers to the authorities bearing upon it. He states at p. 161 that the preponderating balance of opinion is in favour of a broader and more liberal interpretation and construction of the term "legal chose in action." than that ennunciated in *May* v. *Lane*, and he shews that the majority of the text writers upon the Judicature Act express the same view.

In *Weinberg* v. *Ogdens*, 22 Times L.R. 58, affirmed 729, it was held that an assignment by a trustee in bankruptcy of the bankrupt's claim for unliquidated damages for breach of an agreement vested the claim in the assignee.

In Blackstone's Commentaries the following is stated at p. 397:—

> If a man promises or covenants with me to do an act and fails to do so whereby I suffer damages the recompense for this damage is a chose in action.

See also *Colonial Bank* v. *Whinney*, 11 App. Cas. 426.

In Hals., vol. 4, p. 364, among the Choses in Action there enumerated is "a right of action arising under a contract including claims for liquidated damages for breach of contract."

In *King* v. *Victoria Ins. Co.*, [1896] A.C. 250, which was an appeal from the Supreme Court of Queensland, the Bank of Australia effected an insurance with the company upon goods shipped in a certain vessel which was injured by a government tug and the goods destroyed or damaged. The bank claimed against the company for loss under its policy. The latter paid the loss and took an assignment from the bank of its claim against the government for damages for their loss. The Court below held that the claim for damages was an assignable chose in action, and that the company was entitled to sue as assignee and gave judgment in its favor. Lord Hobhouse in delivering the judgment of the Privy Council stated that their Lordships did not

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express any dissent from the view expressed in the Court below with reference to the term "legal chose in action," and intimated that the question was not free from difficulty. The appeal was dismissed upon the ground that the company was entitled to be subrogated to the bank's claim. It was also held that the subrogation by act of law would not give the company the right to sue in its own name, but that the difficulty was got over by the express assignment by the bank of its claim. It was thus virtually held that under certain circumstances the assignment of a claim even for damages *ex delicto* would entitle the assignee to sue in his own name.

An objection to the assignment of such a right of action appears to have been relied upon to some extent in that it contravenes the law as to champerty and maintenance (see *Torkington* v. *Magee, supra,* and Warren, at p. 157). The question whether a transaction is of a champertous nature depends to a great extent upon the circumstances of each case. The evidence in the present case rebuts even a suspicion of champerty. It is shewn that a number of persons other than the defendant entered into contracts with the assignor for the sale of grain to him upon the strength of which he resold to the plaintiff at a slight advance the grain so agreed to be sold to him. By reason of the default of the defendant and others he was unable to supply the plaintiffs with the grain he had agreed to sell to them and he assigned the different contracts to them in satisfaction of or as secuirty for the amount which the plaintiffs were entitled to recover from him by reason of his default.

I would allow the appeal with costs and direct that the judgment in the Court below dismissing the action with costs be set aside and judgment entered for the plaintiff for $420 and costs.

Beck, J. McCarthy, J.

BECK and MCCARTHY, JJ., concurred.

Stuart, J.

STUART, J.:—I agree with what has been said by my brother Scott and simply desire to add a reference to the case of the *Colonial Bank* v. *Whinney,* 30 Ch. D. 261 and, in appeal, 11 App. Cas. 426, where will be found a learned inquiry into the origin and meaning of the term "chose in action." Both in the Court of Appeal and in the House of Lords it was assumed that the words meant at least "a right to sue for a debt or damages" and the point involved was merely as to any possible wider extension of

the meaning of the words. If a right to sue for damages is a "chose in action" it is fairly clear that it is assignable even under sec. 10, sub-sec. 14 of the Judicature Ordinance although there seems to be still some doubt as to the assignability of a right to sue for damages for a tort. *Appeal allowed.*

McGUIRE v. McGUIRE.

Nova Scotia Supreme Court, Sir Wallace Graham, C.J., Russell and Drysdale JJ., Ritchie, E.J., Harris and Chisholm, JJ. February 10, 1917.

1. GIFT (§ II—10)—CAUSA MORTIS—ABATEMENT.
A sum of money handed over by a person in last illness bidding the donee "to keep it as I have willed you nothing" is a gift *causa mortis*, not *inter vivos*, and will be treated as a legacy which will abate in the event of an insufficiency of personalty to pay the debts of the donor's estate.

2. EVIDENCE (§ XII I—965)—CORROBORATION—DONATIO CAUSA MORTIS.
In order to properly establish a gift *causa mortis* the evidence of the donee must be sufficiently "corroborated by other material evidence," as required by the Evidence Act, R.S.N.S. 1900, sec. 25, ch. 63.

Statement.

APPEALS by James McGuire, from that part of the judgment of Forbes, J. (County Court), in which he held the sum of $400 handed by the deceased, shortly before her death, to be a gift *inter vivos*, and that such sum should not appear in the executors' account; and by Hugh McGuire, from that portion of the judgment in which he held the sum of $300 handed by the deceased to her sister at the same time, as trustee, to be given to her brother Hugh for certain persons mentioned in an unsigned codicil to her will, to be a *donatio mortis causa* and liable for testator's debts, and to be so held or expended before any real estate could be sold. Also from the paragraph of the judgment in which he found the general rule to be that "the personal property must be exhausted in payment of the testator's debts before the realty can be sold and both exhausted before any abatement of legacies follows." Reversed in part.

A. Roberts, K.C., for appellant James McGuire.

L. A. Lovett, K.C., for appellant Hugh McGuire.

Graham, C.J.

SIR WALLACE GRAHAM, C.J.:—I agree in the opinion that the gift of $400 was but a *donatio causa mortis*, but it fails because there is not, under the Evidence Act, corroborative evidence. In respect to the alleged gift of $300, I think on the other hand that the paragraph in the memorandum pinned to the will and written by W. B. Harlow, now unfortunately deceased, at the instance of the testatrix, as follows:—

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I also give and bequeath to Theresa McGuire, my brother Hugh McGuire's wife, the sum of $100, also his daughter Mary McGuire the sum of $50, also his second daughter Catherine McGuire $50, also his youngest daughter Susan McGuire $50.

is corroborative evidence of the alleged *donatio mortis causa* set up in the oral testimony, and is sufficiently proved.

It is clear also that a *donatio mortis causa* is not entitled to precedence over the testator's debts and funeral expenses. Upon a deficiency of assets to pay the lawful claims of creditors a gift *causa mortis* must give way so far as may be necessary to discharge lawful demands. The representative can reclaim the money discharge from the donee for that purpose. *Drury* v. *Smith*, 1 P. Wms. (24 E.R. 446) 404, 406; *Tate* v. *Hilbert* (30 E.R. 548), 2 Ves. Jr. 111 at 120; *Chase* v. *Redden*, 13 Gray 418 (Shaw, C.J.); *Mitchell* v. *Pease*, 7 Cush. at p. 353; *Pierce* v. *Boston*, 129 Mass. 371.

I quote the reasons given by Shaw, C.J., in *Chase* v. *Redden*, for they will be helpful later:—

> But we think it is equally clear that such a gift "*donatio mortis causa*" cannot avail against creditors. Their right is prior in character. A man is bound to be just before he is generous. Creditors have claims on the justice and legal duty of the debtor whilst donees, legatees and heirs having paid nothing are volunteers and have claims only on his bounty. Strictly speaking, the only property which anyone can give away, voluntarily dispose of, without consideration, is the balance which remains after payment of his debts.

I think it is also clear that the real estate is charged with the payment of debts, funeral expenses, etc., and would be under the doctrine of *Greville* v. *Browne* (11 E.R. 275), 7 H.L.C. 690; *Re Bawden*, [1894] 1 Ch. 693, 698, charged with pecuniary legacies if there were any under this will. There are not. But it is contended that this gift *mortis causa* is very like a legacy, and in effect that the testator's real estate is charged with its payment. That is that assuming the personal property (including the sum of $400 previously mentioned and now available to pay debts) is insufficient to satisfy the testator's debts and funeral expenses, the land specifically devised (it appears that there is no land or personalty in the residue) must first be resorted to to satisfy debts, etc., notwithstanding there is available this $300 the subject of the gift *mortis causa*. With deference, I think not. I think it is not to have precedence of that; that is a solemn devise of land by will, and that land is not to be sold to pay debts without first looking to this money.

The executor must be charged in all events with the $400, and with the said sum of $300, if there is an insufficiency of personalty for the payment of testator's debts and funeral expenses.

HARRIS, J.:—Mary McGuire, during her last illness, was visited by her only sister, Isabella Dowling. On Sunday, March 26, the deceased lady asked her brother, James McGuire, to unlock her safe and hand her from it a satchel. She opened the satchel and took some money out of it and put part of it in her purse and handed the rest to her sister and said there was between $800 and $900 which she wanted to put in her sister's care for the night.

The next day Isabella Dowling says the deceased called her and said she had made a will and devised to Hugh (her brother), "The Pines" and the property with the barn and told her of other devises and bequests she had made. The sister was then alone with the deceased and she says the deceased then said, "I have willed you nothing" and then gave her a sum of money without counting it and said it was a gift from her. This sum turned out, when counted, to be $400. On cross-examination, Isabella Dowling says when she gave her the $400 the deceased said "This is for you and I want you to keep it as I have willed you nothing."

The sister also says that at the same time the deceased told her that she would place a small sum of money in her hands in trust, and if she recovered she was to give it back to her; if she died, the sister was to give it to Hugh, her brother, and her executor; that she had willed his wife and daughters a trifle and to William Canning $50. She said $300 was the debt and she wished her sister to pay it to Hugh and also to pay St. Jerome's Church $25 which was not in the will, and to give the balance to Hugh for the estate. Isabella Dowling says this trust fund was handed to her separate from the $400 and that she kept them separate. She also says there was $525 in this latter sum and she first paid Hugh the $300, then paid $25 to Father O'Sullivan for the church, and the balance of $200 she paid to the executor.

Isabella Dowling was alone with the deceased when all this happened. There was no other evidence. There was no gift in the will of the deceased to the wife and daughters of Hugh McGuire, nor to William Canning, but counsel told us at the

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argument that there was found attached to the will a memorandum in writing, unsigned, and which was not admitted to probate. This memorandum is printed in the case and contains these two clauses:—

I also give and bequeath to Theresa McGuire, my brother Hugh McGuire's wife, the sum of $100, also his daughter Mary McGuire the sum of $50, also his second daughter Catherine McGuire $50, also his youngest daughter Susan McGuire $50.

On the settlement of the estate Forbes, J., of the County Court for District No. 2, sitting as a Judge of the Probate Court, decided that there was a good gift *causa mortis* of the $300 but that it was liable for the testator's debts before the real estate could be sold for payment of debts.

As to the $400 the Judge decided that the gift was *inter vivos*. He said:—

It lacks the chief essential of being conditional on the testator's death. The language is specific "This is for you and I want you to keep it as I have willed you nothing." This was accompanied by a handing over of the money to Mrs. Dowling. This sum will not appear in the executor's accounts.

James McGuire appeals to this Court from the decision of the County Court Judge holding that the gift was a good gift *inter vivos*.

The first question that arises is as to whether the gift of the $400 was *causa mortis* or *inter vivos*. Subject to what I shall say hereafter as to its failure for want of corroboration, I think it must be regarded as *causa mortis*. In 1718 the case of *Lawson* v. *Lawson* (24 E.R. 463), 1 P. Wms. 441, was decided. There the deceased on his deathbed delivered to his wife a purse of gold containing about 100 guineas and bid her "apply it to no other use but her own." The report says:—

The Master of the Rolls was clearly of the opinion that it was a *donatio causa mortis* in regard the testator was then languishing upon his death bed, and therefore it being in nature of a legacy, and not to take effect but in case of the donor's death, under such circumstances a man might give to his wife; and it was the stronger, it being said that she was to apply it to no other use but her own, for consequently she was not to apply it to her husband's use.

In *Miller* v. *Miller* (24 E.R. 1099), 3 P. Wms. 356, the deceased had made a will 2 days before his death in which he bequeathed his wife £150 per annum. On the same day he made a codicil in which he gave her a further annuity and £600 in money to be paid to her immediately after his death. About an hour before his death he called his servant to reach him his

pocket book and took out two bank notes for £300 each, which he ordered his servant to deliver to his wife (then present), adding that he had not done enough for her. The Master of the Rolls held the gift of £600 was *causa mortis*.

In *Gardner* v. *Parker* (1818), 3 Madd. 184, the deceased being seriously ill and confined to his bed, two days before his death, in the presence of a servant, gave the plaintiff a bond for £1,800, saying at the same time, "There, take that and keep it." Sir John Leach, V.C., said:—

> The doubt here is, that the donor has not expressed that the bond was to be returned if he recovered. This bond was given in the extremity of sickness and in contemplation of death and it is to be inferred that it was the intention of the donor that it should be held as a gift only in case of his death. If a gift is made in expectation of death there is an implied condition that it is to be held only in the event of death.

And he held the plaintiff entitled to the bond as a *donatio mortis causa*.

In *Re Beaumont, Beaumont* v. *Ewbank*, [1902] 1 Ch. 889, Buckley, J., quotes the foregoing decision in *Gardner* v. *Parker* with approval.

The $400 would, in my opinion, be a *donatio mortis causa* and not a gift *inter vivos*.

A second question arises as to whether there is any corroboration by material evidence of the donee's evidence.

By sec. 35, ch. 163, R.S.N.S. 1900, it is provided:—

> In any action or proceeding in any Court by or against the executors, administrators or assigns of a deceased person an opposite or interested party to the action shall not obtain a . . decision therein on his own testimony . . in respect to any dealing, transaction or agreement with the deceased, or in respect to any act, statement, acknowledgment or admission of the deceased unless such testimony is corroborated by other material evidence.

Three things were suggested by counsel as being "other material evidence," in corroboration of the evidence of the donee. The first was that Isabella Dowling was the only surviving sister of the deceased, but I am absolutely unable to see anything in this fact which corroborates the evidence of the donee. Persons about to die may or may not give money to their only surviving sisters. There is nothing in this fact tending to corroborate Isabella Dowling's evidence that her sister gave her the $400.

The second fact referred to was that the deceased got her brother James McGuire to take the satchel containing the money out of the safe. Possibly if the gift had been made that night

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this fact might have been some corroboration, but the donee tells us that when the deceased got the satchel she took some money out of it and handed the rest to her sister and asked her to take care of it for the night, and the alleged gift was not made until the next afternoon. The apparent object of getting the money was to get part of the money and have her sister keep the balance for the night for safe keeping. I do not see how it can be said to be any corroboration of the sister's evidence that the deceased the next day got her money back and then gave her $400. Lindley, J., *Re Finch*, 23 Ch. D. 267:—

Evidence which is consistent with two views does not seem to me to be corroborative of either.

I do not think this evidence is capable of being understood in any way as corroborative of the gift the next day.

The third fact referred to by counsel as corroborative was the fact that Isabella Dowling afterwards gave the priest $25. The $25 was part of the $325 and not of the $400 but even if it had been part of the $400 I do not see how the fact that the donee paid over this $25 can be considered as corroborating the donee's story. If she had made up the whole story the gift to the church might very well have been made a part of it for the purpose of giving the whole a reasonable appearance.

I cannot find anything whatever which, under the authorities, can be treated as material evidence corroborating that of Isabella Dowling and in my opinion the gift, for this reason, fails absolutely. *Re Finch*, 23 Ch. D. 267; *Bessela* v. *Stern*, 2 C.P.D. 265; *Re Laws*, 28 Gr. Ch. 382 at 395; *Tucker* v. *McMahon*, 11 O.R. 718, per Armour, J.

Hugh McGuire, one of the executors, also appeals from the decision of the trial Judge in so far as he holds that the *donatio mortis causa* of $300 is liable for the testator's debts and must be held or expended before any real estate can be sold, and also from his decision that the personal property must be exhausted in payment of the testator's debts before the realty can be sold, and both exhausted before any abatement of legacies follows, and also from his decision that the testator had not charged special property with the payment of legacies.

Upon the argument of the two appeals, which were heard together, some question was raised as to whether the gift of the $300 was corroborated by material evidence but I understand

counsel agreed not to raise this question but to treat it as a good gift, *causa mortis*. This no doubt was a proper thing to do because if the unexecuted codicil or memorandum which mentioned these gifts exactly as testified to by Isabella Dowling could be shewn to have been drawn up at her request it would, I think, probably constitute sufficient corroborative evidence particularly in view of the fact that the witness testifying was taking no beneficial interest in that gift.

It is difficult to say from the evidence whether when the $400 the amount of the alleged donation to Isabella Dowling is brought into the estate it, together with the residuary personal estate, will be sufficient to pay all the debts and liabilities of the estate and this makes it necessary to decide what is to happen if there is still a deficiency of personal estate. We understand from counsel that there is no residuary real estate to pass under the devise to James McGuire and we are therefore relieved from considering the question as to whether residuary real estate or the $300 gift *mortis causa* are to be next applied. It is, I think, clear under the circumstances of this case that the $300 gift *mortis causa* must be next applied in payment of the debts if the $400 and the residuary personal estate prove insufficient. Real estate specifically devised cannot be taken for payment of debts until legacies are first exhausted.

A gift *causa mortis* differs from a legacy in at least two particulars: (*a*) Probate is unnecessary, and (*b*) no assent of the executor or administrator is necessary to perfect the title of the donee.

But it is in the nature of a legacy in at least one respect. It is liable on a deficiency of assets for payment of the debts and expenses of the estate to the same extent as a legacy. In 15 Hals., at p. 435, I find it stated: "Gifts *mortis causa* being in the nature of legacies are subject to the debts of the donor."

In 20 Cyc. 1243, it is said:—

> A gift of this nature cannot avail against creditors and the donee takes subject to the right of the personal representatives to reclaim it if necessary for the payment of the debts of the deceased for no man who is unable to pay his debts may give away his property.

A *donatio mortis causa* on principle ought to be liable quite as much as a legacy for payment of debts. They are both ambulatory, incomplete and revocable during the donor's life and

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I do not see why there should be any difference between them so far as the payment of debts is concerned, and, as I understand the authorities, there is no difference. *Smith* v. *Casen* (24 E.R. 447), 1 P. Wms. 406; *Tate* v. *Leithead* (69 E.R. 279), Kay 658, 659; *Tate* v. *Hilbert*, 2 Ves. Jr. 111, (30 E.R. 548).

In *Pierce* v. *Boston Savings Bank*, 129 Mass., at p. 433, Endicott, J., said:—

> It is true that a gift *mortis causa* cannot avail against creditors. In such case the donee is in the same position as legatees and heirs for, strictly speaking, the only property which a person by gift *causa mortis* or by will can voluntarily dispose of without consideration is the balance left after the payment of his debts.

See also *Larabee* v. *Hascall*, 88 Me., p. 519; *Mitchell* v. *Pease*, 7 Cush. 350, p. 353.

It was argued by counsel for respondent that while the *donatio mortis causa* might be liable for debts it was not liable for the costs of administration, and it was pointed out that certain costs had been incurred by the executors in connection with the proof of the will in solemn form and in connection with an originating summons to interpret the will. I do not agree with this contention. In ascertaining whether there are sufficient assets for the payment of debts, the funeral expenses, the expenses of probate, the costs properly incurred by the executors in any litigation such as that referred to have to be first deducted before anything is available for creditors, and it is only after these are paid in full that it can be determined what there is available for the debts of the deceased. See Williams on Executors, 10th ed., 751-753.

In my opinion gifts *mortis causa* are to be treated, so far as the question under consideration is concerned, as legacies and wherever and whenever legacies would be liable for the payment of debts, so also would gifts *mortis causa*, and it follows that if there is a deficit after the $400 and the residuary personal estate are applied the $300 gift *mortis causa* must contribute to the payment of this deficit.

The appeal of James McGuire will be allowed with costs and the appeal of Hugh McGuire dismissed with costs.

Russell, J.

RUSSELL, J.:—The application of the principles of the law relating to *donationes mortis causa* works out what seems to my mind such a manifest injustice that I should have been glad

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if a means had been discovered of referring the case back with the hope of some corroborative evidence being discovered. But I cannot, under the case as it stands, dissent from the opinion delivered by Harris, J. The settled principles have been, I must assume, designed to secure justice in the average case and prevent imposition. The exceptional case must necessarily be decided on the general principle.

Drysdale, J.

DRYSDALE, J.:—I agree in the result, but as to the $400 on the ground solely that there was no corroboration.

Ritchie, E.J.

RITCHIE, E.J.:—As to the alleged gift of $400 to Isabella Dowling, I am forced to hold that it must fail for lack of corroborative evidence. I come to this conclusion with regret, because Mrs. Dowling was examined and cross-examined before the Judge below and he believed her. As to this there is nothing to shew that he was wrong, but I can find no way of escape from the statute which says that she cannot obtain a decision unless her testimony "is corroborated by other material evidence." There is no such evidence.

I agree with Harris, J., as to the other questions covered by his opinion.

Chisholm, J.

CHISHOLM, J., concurred. *Appeal allowed.*

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BYRNE v. THE TOWN OF CHATHAM.

New Brunswick Supreme Court, Chancery Division, McLeod, C.J. September 12, 1916.

TAXES (§ III B—110)—ASSESSMENT—HUSBAND AND WIFE—ESTOPPEL.

A wife, not legally separated from her husband, having paid taxes for several years on property owned by her, with the knowledge that the property was assessed in her husband's name, is estopped from pleading that the property was improperly assessed.

[*The King* v. *Town of Grand Falls*, 13 D.L.R. 266, distinguished.]

Statement.

MOTION to continue an interim injunction.

A. J. Gregory, K.C., for plaintiff.

A. R. Slipp, K.C., and *Robert Murray*, K.C., for defendants.

McLeod, C.J.

MCLEOD, C.J.:—The bill in this case was filed by the plaintiff, asking that the defendants be restrained by an order of injunction from selling certain property owned by her in the town of Chatham, Northumberland county, for taxes for the years 1913 and 1914, which were assessed against T. Ives Byrne, the plaintiff's husband. The plaintiff and her husband, in 1912, and for some years prior thereto, lived in the town of Chatham, where the plaintiff's husband (who was a physician) practised his pro-

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fession. In 1907 Byrne purchased a lot of land situate in the town of Chatham from the Board of School Trustees of the town of Chatham. The deed was dated May 1, 1907, and was registered January 6, 1909. The consideration mentioned in the deed was $850, and he (Byrne) subsequently built a house on the said lot. On June 8, 1908, he conveyed the land by deed to one J. A. Haviland. The consideration mentioned in the deed is one dollar, and other good and valuable consideration. This deed was recorded on January 6, 1909. Haviland, on June 9, 1908, by deed conveyed the land to the plaintiff. The consideration mentioned in the deed is one dollar. This deed was also recorded on January 6, 1909. The property was always taxed in the name of the plaintiff's husband, and the taxes were paid down to and including 1912. The notice of taxation was sometimes served on the plaintiff herself, and she sometimes paid the taxes. In the latter part of 1908, or early in 1909, the plaintiff's husband became involved in some difficulty and left the town. The evidence does not clearly disclose how long he was absent, but I would gather about a year. The property, however, in 1909, was still assessed in the name of the plaintiff's husband, and the plaintiff herself paid the taxes. In that year the property for taxation purposes was valued at $2,000, and Byrne was taxed on that valuation and also on an income of about $500 or $600. When the plaintiff went to pay the taxes she declined to pay the taxes on Byrne's income, and paid only the taxes that were assessed against the property. Byrne returned some time before the year 1911, and in the year 1911 he was elected Mayor of Chatham, being nominated some time in April of that year and after the assessments had been made up. In order to be qualified to be elected as Mayor it was necessary that he should have been assessed in the assessment next preceding the election for real or personal estate to the value of $1,000 and upwards, and he made the necessary declaration under oath that he was duly qualified as by law required for the office of mayor. The only assessment made against him on which to qualify was the assessment on this real estate and the estimate of his income of $500 or $600. In September, 1912, Byrne again got in difficulty and left the town and did not return, and in October of the same year the plaintiff removed to Yarmouth, N.S., where she has since resided. The property in 1912, 1913 and 1914 was assessed in the name of T. Ives Byrne. The assess-

ment for 1912 was paid by the plaintiff. The assessment for 1913 and 1914 was not paid. In January, 1914, one Babineau entered into possession of the property under an agreement of purchase made with the plaintiff, dated January 9, 1914, in which he agreed to pay the taxes that would be assessed against the plaintiff's property in 1914, and also agreed as to the payment of the purchase price. At the time this agreement was entered into, the assessment for 1914 had not been made. This agreement, however, was not carried out by Babineau, and on January 15, 1915, it was cancelled, and a new agreement between Babineau and the plaintiff was entered into whereby Babineau agreed to purchase the property at a certain price, and he agreed with the plaintiff to pay the taxes that had been assessed against the property for 1914 and to pay all future taxes against the property. It appears, however, in evidence that Babineau himself was taxed for the property in 1915. It also appears in evidence that Babineau was willing to pay the taxes for 1914 if the plaintiff would pay the taxes for 1913, but this the plaintiff declined to do or at all events did not do. The town of Chatham, therefore, after taking the necessary steps, advertised a portion of this lot for sale for payment of the taxes for 1913 and 1914, and this action was brought, and an injunction was granted by Crockett, J., restraining the sale, and the plaintiff now seeks to make that injunction perpetual. It is claimed on behalf of the plaintiff that T. I. Byrne did not own the lot, and that the property is not liable for the taxes assessed against him, and that as the plaintiff was living separate and apart from her husband, in order to make her liable for the taxes the property should have been taxed in her name.

There was no legal separation between the plaintiff and her husband. By sec. 11 of the Rates and Taxes Act, being ch. 21 of the Acts of 1913, it is provided that real estate, whether of residents or non-residents, shall be rated in the parish in which it is situate to the person who is the owner or apparent owner at the time the assessors receive the warrant of assessment. The plaintiff and her husband had lived together on this lot from the time the house was built until September, 1912, when Byrne left, as I have stated, and in October of that year the plaintiff moved to Yarmouth. There is no evidence that they again lived together,

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but it is admitted that there was no legal separation. In 1915, however, they were seen together in Halifax, he—Byrne—having enlisted for overseas service and being then in Halifax to sail by steamer for England, and the plaintiff was seen there in company with him, presumably to bid him good-bye.

The question to be determined is, under these facts can the property properly be sold for the payment of these taxes. The assessments were always made in the name of the plaintiff's husband, and from the evidence I think it is perfectly clear that the plaintiff always knew that the property was assessed in his name. She at different times paid the taxes herself, and made no objection to the way they were assessed. In 1909, when Byrne was absent, the plaintiff paid the taxes on the property, but declined to pay the taxes on his income. The trustees (at all events on the assessment of 1914) thought that the property should be assessed in the name of the plaintiff's husband. In that year on the assessment roll they entered first the plaintiff's name, Henrietta B. Byrne, and then changed it and substituted the name T. Ives Byrne, because, as they said, they thought it should be assessed in his name, so there is no doubt that the intention of the assessors was to assess this very property, and there is no doubt that the plaintiff, during all the time that she was living in Chatham knew that the property, though owned by her, was assessed in the name of her husband. The notice of assessment in 1913 was left at the office of the Hon. Mr. Tweedie by Mr. McIntyre, the Town Clerk of Chatham, who thought the Hon. Mr. Tweedie was agent for Mrs. Byrne. Mr. Tweedie, however, denied that he was general agent for Mrs. Byrne, although admitting that he did some business for her and acted for her on some occasions. He certainly acted for her with reference to this lot. He told Mr. McIntyre that the notice should be delivered to Mrs. Byrne, and Mr. McIntyre replied that he could not deliver it to her as he did not know where she lived. The service for 1914 was effected by posting in the manner required by the statute.

The simple question is, the assessment having been thus made, can the property be sold for the payment of taxes? It is claimed on behalf of the plaintiff that she was living separate and apart from her husband. The evidence discloses that her husband left Chatham in September, 1912, and that the plaintiff removed to Yarmouth in October of that year. There is no evidence as to

whether he returned or ever visited her at Yarmouth. The plaintiff herself was not examined as a witness. There is evidence that they were seen together in Halifax in 1915. It is admitted there was no legal separation, and, if it is important on the part of the plaintiff in this case to shew that they were living separate and apart, I don't think that has been done. Byrne, the husband of the plaintiff, did leave Chatham in a similar manner the latter part of 1908 or the first of 1909 and returned, and they lived together. The property has always been taxed in the name of T. Ives Byrne, and I think the evidence shews that this was done with the full knowledge and consent of the plaintiff. Sometimes the notices were served on her personally, and she sometimes personally paid the tax.

Dealing first specifically with the assessment of 1914: In the first agreement of purchase made by Babineau in January, 1914, it was provided that he should pay any taxes that might be assessed on this lot. It may be said, however, with reference to that, that at that time the plaintiff assumed that the property would be assessed to her in her own name. That agreement, however, was subsequently cancelled, and a new agreement was made on January 15, 1915, by which Babineau agreed that he would pay the assessment for 1914. The property had been assessed in 1914 in the name of T. Ives Byrne, and I think it must be taken that the plaintiff knew when that agreement was made that it was so assessed, because in the agreement it is provided that "The said Reuben Babineau shall pay the taxes assessed against the property for the past year." The plaintiff having thus sold the property, or agreed to sell the property, with the provision that these taxes shall be paid, it seems to me has ratified and confirmed what the assessors did, and assented to the property being assessed in the name of her husband, T. Ives Byrne. Mr. Tweedie was certainly acting for the plaintiff in connection with this lot. He says that he did not inform her that the property had been taxed in the name of her husband, but he is not prepared to swear that she knew nothing of the assessment. I think, however, from all the facts, that the plaintiff did know of the assessment of 1913 as well as the assessment of 1914, and no steps were taken to remedy it. Under the Act relating to Rates and Taxes, if property is assessed in the name of the wrong person, the assessors may correct the error any time before an assessment

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is made for similar purposes. So that, if the assessor's attention had been called to the fact that this property was assessed improperly in the name of T. Ives Byrne, they could have made the correction and had it assessed in the plaintiff's name. In holding that the lot is liable for these assessments no injustice is done. The lot is liable for taxation. The assessors intended to tax the lot. They simply taxed it in the name of T. Ives Byrne because they thought the assessment could properly be made in his name. The plaintiff, having known during all these years that this property was being assessed in her husband's name, and making no objection to it—sometimes herself paying the taxes—and having known—as I find she did—that in 1913 the property was assessed in her husband's name, and that in 1914 it was also assessed in her husband's name, and having stood by and made no objection to the assessment, is estopped from now contending that it is improperly assessed in the name of her husband. If the objection had been made, the mistake in the assessment could have been corrected, and her own name entered on the assessment roll in the place of that of her husband. This she did not do, and it would be inequitable now to allow the plaintiff to take advantage of the fact that the property was so assessed and thus escape taxation entirely for those two years. Therefore, under all the facts, I think the plaintiff cannot succeed in this action.

A good deal of evidence was given and discussion had claiming that the property was assessed at too high a value, not that the valuation put on the property was greater than its real value, but that, in comparison with assessments on other properties in Chatham, it was assessed at a higher rate than it should have been. I do not think that that question enters into this case at all. If it did, however, I would be prepared to hold under the evidence given that the valuation on the property is not too high.

The plaintiff cited and relied on two cases: *Central Vermont R. Co.* v. *Town of St. Johns*, 14 Can. S.C.R. 288. That case, however, is not at all applicable to the present. The town in that case had taxed the appellants for a bridge built over the Richelieu river, and the Court held that the bridge was exempt from taxation. The second case was *The King* v. *Town of Grand Falls, ex parte The Grand Falls Co.*, 13 D.L.R. 266, 42 N.B.R. 122. In that case the town had assessed the Grand Falls Company, Limited, on certain real estate in the town, but it appeared that

the company did not own the real estate so taxed at the time the assessment was made. The company, therefore, obtained a rule absolute for certiorari to remove the assessment, and a rule nisi to quash it, and the Court quashed so much of the assessment as made or attempted to make the company liable for taxes on land that it did not own. In this case this property—owned, it is true, by the plaintiff—was assessed in the name of her husband, and had been so assessed for years with her knowledge and without any objection, and she from time to time had herself paid the taxes.

In my opinion, the plaintiff cannot succeed. The injunction must be dissolved and the action dismissed with costs.

MONTARVILLE LAND CO. v. ECONOMIC REALTY LTD.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. October 18, 1916.

APPEAL (§ II A—35)—JURISDICTION OF CANADA SUPREME COURT.

The Supreme Court of Canada has no jurisdiction to hear an appeal under sec. 46 of the Supreme Court Act, R.S.C. 1906, ch. 139, where the only dispute is as to the fulfilment of a vendor's obligation to deliver a property free from certain mortgages.

[*Carrier* v. *Sirois*, 36 Can. S.C.R. 221, referred to.]

Statement.

MOTION to quash an appeal from the judgment of the Court of King's Bench, appeal side, 26 Que. K.B. 51, reversing the judgment of the Superior Court, District of Montreal, and maintaining the plaintiff's action with costs.

The motion to quash the appeal was based on allegations that no money condemnation was asked for by the plaintiff's action except as to cost of a notarial protest, that neither the title to the land nor any future rights therein were in question, and that the entry shewn upon the certificate of the registrar of deeds relating to encumbrances on the land had no reference to a claim due either by the plaintiff or to the defendants, but the amount thereby secured appeared to be due to third persons who were not parties to the action and whose claim could not be affected thereby.

C. Dessaules, K.C., supported the motion.

St. Germain, K.C., *contra*.

The judgment of the Court was delivered by

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—This is a motion to quash an appeal from the Court of King's Bench, appeal side, Quebec, for want of jurisdiction.

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The respondent company, appellant in the Court below, bought from the company, now appellant, several lots of land with a clause in the deed of sale guaranteeing that they were free from certain incumbrances. The words are that the property is sold "franc et quitte de toutes hypothèques excepté celle de $2,000 mentionnée au dit acte."

The action is brought to have it declared that the purchaser, respondent, is not obliged to pay the instalment of its purchase price, now due, until another mortgage, which appears in the registrar's certificate, is discharged. The defendant, appellant, contends that this latter mortgage did not really affect the property, and on that point the controversy turned below. Our jurisdiction is dependent upon the amount of the demand or the nature of the action. Here there is no amount demanded and the matter in controversy does not come within sec. 46, sub-secs. *b* or *c* of the Supreme Court Act (R.S.C. 1906, ch. 139). The only question in dispute is as to the fulfilment of the vendor's obligation to deliver to the respondent a property free from a mortgage other than the one mentioned in the deed. *Vide Carrier* v. *Sirois*, 36 Can. S.C.R. 221.

I am of opinion that the motion should be granted with costs.

Duff, J.

DUFF, J., was not present at the delivery of the judgment and took no part therein. *Appeal quashed.*

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SHOREY v. DOLLOFF.

Quebec King's Bench, Sir Horace Archambeault, C.J., Lavergne, Cross, Carroll and Pelletier, JJ. March 6, 1916.

INSURANCE (§ IV A—161)—ASSIGNMENT TO WIFE—PRIOR GARNISHMENT—EFFECT.

By R.S. Que., 1909, arts. 7378, 7407, it is lawful for a husband to appropriate an insurance policy on his life in favour of his wife, but not when the policy has been sequestrated under a writ of attachment by garnishment.

Statement.

APPEAL from the Court of Review (22 Rev. Leg. 7). Reversed.

The judgment of the Superior Court for the District of St. Francis was rendered by Hutchinson, J., on January 22, 1915. This judgment was reversed by the Court of Review (Archibald, A.C.J., Saint-Pierre, and Bruneau, JJ.), on June 19, 1915. The case is reported in 22 Rev. Leg. 7. This last judgment was set aside by the Court of Appeal, and the first judgment restored.

The appellants obtained judgment for $1,849.90 in 1900,

against the defendant Dolloff who had made an abandonment of his property in 1899. They, in 1908, issued a writ of garnishment against him in the hands of the Manufacturers Life Insurance Co. The garnishee declared: 1. That Dolloff's life was insured in its company for $4,000; 2. That the policy was payable to his executors, administrators or legal representatives; 3. That the insured had made a loan on his policy and had transferred his policy in warranty for the same. No procedure was made in the case, and matters remained in this state till 1914, and Dolloff kept up the premiums on the policy. In April, 1914, Dolloff appropriated the policy for the benefit of his wife, the intervening party, under the provisions of the R. S., 1909, art. 7378. The insured died on June 17, 1914. On July 7, 1914, the appellants obtained a new declaration from the garnishee to the effect that the company had re-imbursed the loan due by the late Dolloff and that there was a balance owing on said policy to the amount of $1,828.62 which was subject to the order of the Court.

On July 10, 1914, the respondent made an intervention praying that the seizure by garnishment and the declaration of the garnishee be held to have lapsed and to have become null and void and that the insurance company be condemned to pay to her the said sum of $1,828.62, for the following reasons: 1. Because the policy in the Manufacturers Life Ins. Co. had been appropriated in her favour under the provisions of 7378 *et seq.* R.S., 1909, and is consequently her property. 2. That the seizure in the hands of the insurance company was never declared *tenante.* 690 C.P. 3. That the supplementary declaration made by the Manufacturers Life Ins. Co. on July 7, was made without authorization and is illegal.

By their contestation the appellants in effect alleged that the sum due under the policy was $1,828.62, that the original declaration of the Manufacturers Life Ins. Co. and supplementary declaration, were legal and binding. The appellants specially say that the respondent had no right or interest to raise the issue which she did, and that all the proceedings in connection with the attachment were valid.

The appellants also put in issue the alleged transfer by the defendant to the respondent, of the amount due under said policy,

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and they ask for the dismissal of said intervention under reserve of all their rights.

The Superior Court dismissed the intervention on the grounds that the policy was made payable to executors, administrators and assigns of the insured, and that the transfer made by him, when he was insolvent, to the intervenant was illegal.

The Court of Review reversed this judgment and maintained the intervention.

The majority of the Court of Appeal reversed the last judgment and maintained that of the Superior Court for the following reasons:—

Considering that at the time of the first declaration as garnishee, the Manufacturers Life Assur. Co., on March 20, 1908, had declared that the husband of the intervenant (present respondent), was insured with it for the sum of $4,000, but that he had made a loan on the said policy for a certain amount and that he had assigned the said policy as a security to the said Manufacturers Life Assur. Co.

Considering that the writ of attachment of moneys in the hands of the garnishees, which was the cause of this declaration, had placed this insurance policy under the control of the Court and that, from that time, nothing could be done in regard to the policy by the judgment debtor so long as the writ of attachment by garnishment was pending;

Considering that neither the judgment debtor nor the garnishees are deprived of such rights as they might have of contesting the said writ of attachment, or to have it declared that the said attachment by garnishment had no effect, and that they have filed no contestation in that regard;

Considering that there has been no peremption of the action and that there never has been a demand made to that effect;

Considering that a writ of execution remains in force so long as it has not been satisfied;

Considering that, after having made its said declaration as garnishee in 1908, the said insurance company has continued to receive the premiums upon the said policy, which has always remained in force;

Considering that, by the death of the assured, the condition for the payment of the amount of the said policy was accomplished; Considering that, by its supplementary declaration of July

7, 1914, the said insurance company has declared that, in virtue of the said policy, it was owing the sum of $1,822.62, and that it is admitted by the parties that this is well founded in fact;

Considering that, after the decease of her husband, the respondent renounced to this succession, but that, availing herself of a clause in the will of her said husband, she has, in her capacity of testamentary executrix of the latter, contested the right of the appellants to have payment of their debt or of any part thereof out of the amount of the said policy;

Considering that this contestation of the said testamentary executrix has been dismissed; that there has been no appeal from the judgment, which has now the force of *res judicata;*

Considering that the personal intervention, separately made, of the respondent has also been dismissed by the Superior Court, but that this judgment was reversed by the Court of Review;

Considering that the said insurance policy was made payable to the heirs, legatees and representatives of the said assured;

Considering that the assured had assumed to appropriate this policy of insurance in favour of the respondent only, several months before his death, at a time when the said policy of insurance was still subject to the said writ of attachment by garnishment and, in consequence, sequestrated in the hands of justice;

Considering that the right of an insured person, in virtue of arts. 7378 and 7407, to appropriate a policy of insurance on his life in favour of his wife does not apply to the case where such policy of insurance and the amount which might become due in virtue thereof have been sequestrated in the hands of justice under a writ of attachment by garnishment which is still pending;

The said judgment of the Superior Court, sitting in review, rendered on June 19, 1915, is set aside and annulled, and the judgment of the Superior Court sitting for the District of St. Francis, and bearing the date of January 22, 1915, is restored in respect of the disposition therein made and the intervention of the respondent is dismissed with costs of all the Courts in favour of the appellants.

Lawrence, Morris & McIver, for appellant; *Cate, Wells & White*, for respondent.

ARCHAMBEAULT, C.J. (dissenting):—I am of opinion that the judgment of the Court of Review is well founded and that it

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ought to be affirmed. I cannot come to the conclusion that the policy of insurance was in the hands of justice when it was transferred to the respondent by her husband.

The insurance company declared, in 1908, upon a writ of attachment issued by the appellants, that it owed nothing to the husband of the respondent; that the policy of insurance of the husband which was taken in the company was transferred as collateral security for a loan of $4,000 made by the assured and that it did not know whether or not it might later on become the debtor of the assured. Thereupon, the appellants did nothing. They ought to have asked that the attachment should have been declared binding, in virtue of art. 690 of the C.C.P. (Que.), but they preferred to cross their arms and, 6 years later, in 1914, the assured appropriated the amount of the policy in favour of his wife, the respondent in the present case.

The company having declared that it owed nothing at the time of the attachment, and the appellants having neglected to have the attachment declared binding for the future, the amount of the policy was not in the hands of justice.

Without doubt, the appellants would have been always in time to have the attachment declared binding, even after several years, but provided that it should be then that the company owed or might become owing something to the assured. But, from the time that the policy became payable to the respondent, and not to the assured or his representatives, the appellants could no longer place in the hands of justice a debt which was not due, having been validly assigned to the respondent.

The effect of a writ of attachment, by garnishment, in my opinion, is to place in the hands of justice the amounts due at the time, but not amounts which might become due later on. It is only by having a declaration that the attachment is binding that it could have application in regard to the debt which had not become exigible. Art 690 of the C.C.P. (Que.) declares that if the amounts due by the garnishee are not due until the expiration of a term, the latter may be ordered to pay them when they become due; but that if they are not due owing to conditions which have not been accomplished, the attachment must be declared binding in order that it may apply to such conditional obligation. So long as the attaching creditor does not procure

such an order, the defendant may dispose of his debt as he pleases, saving the right of the creditors to attack his action as being made fraudulently as to their debts.

It is said that the execution debtor ought to have asked that the attachment should be discharged and that, not having done so, the attachment remained pending. It is true that art. 688 of the C.C.P. says that if the garnishee declares that there is nothing due, the Court should, upon motion by the garnishee or the execution debtor, order that the attachment should be discharged and condemn the attaching creditor to pay the costs. But the husband of the respondent could not invoke the benefit of this provision because the declaration of the company indicated that some day it might be owing something, if certain conditions were accomplished. There was, therefore, no necessity of obtaining the discharge of the attachment. But the attachment did not remain binding even for all that. The appellants could have had it declared binding; but without an order to that effect it was not. Otherwise, the provision of art. 690 means nothing. What need for an order could there be if the attachment remained binding by mere force of law?

The appellants have not protected their rights within the proper time; it is now too late to do so. *Vigilantibus, non dermientibus curat prator.*

I find two judgments rendered by the Superior Court in the sense which I have just discussed. These two judgments are *Lamothe* v. *Piche*, 5 R.P.Q. 164, 180, and *Decelles* v. *Lafleur*, 5 Que. P.R. 439.

Unfortunately for the respondent, there are but two of us of this opinion.

LAVERGNE, J., dissented. Lavergne, J.

PELLETIER, J.:—In 1899, the deceased, Dolloff, had made an assignment of his property for the benefit of his creditors and this insolvency appears to have continued until the time of his death, because his wife, who was his heir in virtue of his will, has renounced his succession. Pelletier, J.

Not only has the widow intervened and demanded payment of the $1,828.62, in virtue of the transfer, but she also has made another intervention as testamentary executrix of her husband, and she prays in this intervention that all the proceedings upon the attachment should be declared null and of no effect.

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We have, therefore, all the interested parties represented in this case and who have together agreed that this is the time to settle the difficulties in this case wherein are presented their respective contentions.

The judgment of first instance dismissed the two interventions; and the respondent, in her capacity of testamentary executrix of her husband, appears to have acquiesced in this judgment from which she had not asserted an appeal.

She has, nevertheless, inscribed for review the judgment which dismissed her personal intervention, and the Court of Review has reversed, as to this intervention, the judgment of the Court of first instance.

The judgment of the Court of first instance dismissed the personal intervention of Madam Dolloff because the transfer of the policy had been made by an insolvent to a person aware of such insolvency and, in consequence, in fraud of the rights of the plaintiff.

The Court of Review has decided that the reasons in question of the judgment of the Court of first instance were not justified (it does not say why nor how) but it maintained the intervention because, in its opinion, a person, even insolvent, may transfer to his wife a policy of insurance made payable to his legal representatives and that the only recourse which then exists is to have it ordered that there should be reimbursement of the premiums which may have been paid to the detriment of the creditors.

The two Courts of first instance have practically ignored what, in my opinion, is the most important point in the case, that is to say, whether Dolloff could have transferred the policy of insurance in question while this policy of insurance was affected by an attachment. I think that the examination of this question and its decision take precedence over all the other points raised in the case and that they are the test of the litigation.

Let us first dispose of the objection raised by the intervenant, that the supplementary declaration of the garnishee was made without her knowledge and that she received no notice of it.

The appearance of the intervenant, her admission that the declaration of the garnishee was correct and the contestation which she makes, as well personally as in her capacity of testamentary executrix of her husband, estop her from now invoking this formal objection.

We are told, moreover, that the plaintiffs, not having asked decision upon their motion to have the attachment declared binding, this motion has had no effect. There can be no doubt upon that point; it is evident that this motion was merely made in order to have time to obtain the supplementary declaration of the garnishee. Therefore that has no importance.

Was the attachment of 1908 still in force in such a manner as to prevent the transfer of the amount of the policy? This, in my opinion, is the whole question.

The Code of Civil Procedure (art. 680), declares that the effect of the attachment is to place the effects and credits of which the garnishee is debtor in the hands of justice. Art. 685 requires that the garnishee should declare what is then due and what might become due later on, and these two articles, read together, have the effect of placing in the hands of justice, not only that which is due at the time when the declaration is made but also what might become due subsequently.

Art. 682 says that if the garnishee declares that nothing is due and it is impossible to shew that there is something due the Court shall, on motion of the garnishee or of the execution debtor, order the discharge of the attachment. From this it results that if neither the garnishee nor the execution debtor asks this discharge of the attachment it remains in the state in which it then was.

Let us notice that in the present case the garnishee declares that Dolloff was owing it something but that it, itself, had a policy of insurance for a greater amount than that which was owing by Dolloff; that went to establish an eventual or conditional debt in respect of which the parties interested thought fit to do nothing, not to have the attachment discharged but to allow it to subsist.

The issue of a writ of attachment is a matter which is subject to peremption, in the same manner as other cases, when there has been no proceeding taken during 2 years. In this case advantage might have been taken of peremption, but that was not done. There were, therefore, two methods in which to put an end to the attachment between 1908 and 1914, that is to say, the discharge provided for by art. 688 and peremption of the case; neither of these methods was adopted. Then, the new Code of 1897 provides an entirely new rule which is noted at art. 603

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of the C.C.P. and which declares that a writ of execution (and the attachment is a writ of execution), remains in force so long as it has not been satisfied.

All these articles read together and construed as it appears to be they should be interpreted, seem to impose the conclusion that the attachment remained in force.

In order to meet all this, art. 690 is invoked which declares that if the moneys or things due by the garnishee are only payable on the expiration of a term, or when the accomplishment of a condition has not yet taken place, the Court may order that the attachment should be declared binding until the accomplishment of the condition; this is an article permitting an advantage to a plaintiff who has proceeded by attachment; the plaintiff may avail himself or abstain from availing himself of this article, but it is in his favour that the provision has been made. But this article does not add that if the plaintiff does not avail himself of the right that is conferred upon him the attachment should be perempted without the necessity of there being a demand made for peremption, or that the discharge should result from the mere effect of law.

In coming forward, in 1914, to declare that, since its appearance in 1908, the events had taken place which constituted it the absolute debtor in place of being a conditional debtor, the company continued the series of procedure commenced against it in 1908.

It appears to me to result from all this that Dolloff could not, to the detriment of his creditors, at a time when he was insolvent, transfer a policy of insurance without having first demanded, as he had the right to do, the discharge of the attachment. He was the judgment debtor and it is to the judgment debtor, as well as to the garnishee, that the Code gives the opportunity to have this discharge; Dolloff did not receive the advantage of this provision and, therefore, he is in the position of one who has transferred a thing of which he had been dispossessed as much as and as long as the attachment continued to be pending.

Consequently, I am of opinion that the judgment of the Court of Review should be set aside and that the intervention should be dismissed with costs.

Carroll, J.

CARROLL, J.:—The principal question for decision in this case is that of the validity of the transfer, made by the husband of

the respondent, of a policy of insurance in the Manufacturers Life Assur. Co.

This transfer was made in the spring of 1914, several months before the death of the husband. This policy was already held by the insurance company as security for a loan made to the husband. The deceased, Dolloff, in 1899, had made an assignment of his estate and he appears to have been insolvent up to the time of his death.

The judgment of first instance declared that the transfer to the wife was null, because it had been made by an insolvent to a person who was aware of his insolvency.

The Court of Review reversed this judgment and declared that an insolvent could transfer a policy of insurance to his wife and that the only existing recourse was to have reimbursement of the premiums paid. But, in my opinion, that is not the question. In 1908 an attachment by garnishment issued against the insurance company and the effect of that attachment was to place whatever had been attached under the hands of justice.

At that time the insurance company declared that it was not owing anything but that, later on, it might become debtor for something. There was, therefore, an eventual obligation which might become a certain debt, as it actually so became upon the death of the husband. There was no proceedings taken either for declaration that the attachment should continue binding or for the purpose of having it discharged.

In my opinion, the object of a motion to have the attachment declared binding is to prevent the party interested from obtaining peremption of the cause at the expiration of two years. It is true that the C.C.P. (art. 690), declares that if the debt is merely payable at the expiration of a term, the debtor may be ordered to pay it when it becomes due, and that if the debt is subject to conditions which have not yet been accomplished, the Court may, on the application of the attaching creditor, order that the attachment should be declared binding until the time of the accomplishment of such conditions. But, as I have said, this article is a provision made in favour of the attaching creditor in order to prevent the execution debtor or the garnishee from obtaining peremption of the cause.

Attachments of which the object is to affect debts with a

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term or debts which may become due eventually or upon the accomplishment of conditions do not strike into vacant space and, so long as the parties have not obtained an order by which they are discharged, the writ remains in force and in regard to the whole of its effect.

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Nova Scotia Supreme Court, Sir Wallace Graham, C.J., Russell, and Drysdale, JJ., Ritchie, E.J., and Chisholm, J. January 9, 1917.

1. EASEMENTS (§ II B—10)—WINTER ROAD—PRESCRIPTION—SUFFICIENCY OF USER.

A communicating path used by the families of adjoining owners habitually visiting each other; a way of access to wood land used for hauling wood during winter months while the snow is on the ground; a gateway used as a short cut for hauling hay during the winter months and by children going to school, without any visible formation of a road to indicate its course and bounds, are not sufficient acts of user as establishing private rights of way by prescription.

2. EASEMENTS (§ II B—10)—"WAYS, RIGHTS, PRIVILEGES AND APPURTENANCES"—PRESCRIPTION—TACKING.

The general words "ways, rights, privileges and appurtenances," in deeds of land, do not include the inchoate enjoyment of a prescriptive right of way until the statutory period has run; but the periods of user, by predecessors in title, may be tacked, if the period before commencement of the action is not connected with any parol license.

Statement.

APPEALS by both plaintiff and defendant from the judgment of Harris, J., in an action for trespass to land, including the removal of fence and gates, the making of roads and crossing on foot and with teams and logs, the cutting and removal of timber, and trespasses with horses and cattle. The Judge allowed plaintiff the sum of $15 for damages to his crops by defendant's horses and in every other respect dismissed plaintiff's claim, without costs. Varied.

H. Mellish, K.C., and *D. D. MacKenzie*, K.C., for plaintiff.

W. A. Henry, K.C., and *J. A. McDonald*, K.C., for defendant.

The judgment of the Court was delivered by

Graham, C.J.

GRAHAM, C.J.:—The defendant denies the allegations and in respect to the locus in two of the cases he sets up rights of way acquired under the provisions of the prescription statute. The Judge has found three rights of way. I shall follow his designation of these. The first one is an alleged footpath between the two dwelling-houses. In respect to this alleged way, on the one hand the defendant has not pleaded it. Paragraphs 4 and 5 of the original statement of defence refer to the other rights of way in question as appears by the words "to the said public highway'

in the former, and in the latter the reference to the other farm. On the other hand, the plaintiff has not claimed damages in regard to the land resulting from any user by the defendant of this path. Indeed, I think a trespass or other action could not have been maintained without more. These families habitually visiting each other (the parties are brothers-in-law) there would be an implied license which would have been an answer to an action of trespass. The plaintiff, in the witness-box, said he was not claiming damages in this matter. I do not think the pleader intended to do so. The written reasons for judgment include a finding in favour of a foot-way but the judgment can be varied by striking out such a finding.

In respect to the wood road at the rear, this is alleged to be a winter road. It appears that the defendant is not now favourably situated in respect to access to his wood land in consequence of a gulch on his own land, and he claims that in the winter time, when the snow is on the ground, it has been usual for him to diverge and haul his firewood over the plaintiff's land. This is the pleading:—

> The defendant at the time of the alleged trespass was the owner of and seised in fee of a lot of land containing 100 acres immediately adjoining the plaintiff's lands and to the south thereof and was in occupation of the same, and he and all those whose estate he then had therein for the last 40 years enjoyed a right of way on foot, with cattle, horses, carriages and carts for the purpose of hauling wood, poles and lumber during the winter months, and while the snow was on the ground over the said lands of the plaintiff to the lands of the defendant and then back to the lands of the defendant over the plaintiff's lands during the winter or while the snow was on the ground for the more convenient occupation of the said lands of the defendant for the purpose of hauling wood, poles and timber over the same to and from the defendant's lands as to the said lands of the defendant appertaining, and the alleged trespass was a use by the defendant of the said way.

The evidence shews no user for sleds, sleighs and so on. It is just twitching, *i.e.*, one stick at a time. How the same track is kept each winter is not clear. There are no definite termini.

What the plaintiff complained of, apparently, was an excessive use, namely, disturbing the soil itself by the hauling of the wood.

The trial Judge having disposed of the facts, I do not propose to disturb those findings. The judgment order has not specified or defined what kind of a way this is and it must be varied for that

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purpose. I think winter road or wood road does not fully describe it.

This brings me to the diagonal road at the front of the farm. The defendant claims that in order to reach another farm of his, also on the highway, but farther along, he has been using the plaintiff's gateway upon the highway instead of his own gateway. That is, on leaving his home, instead of going through his own gateway on the highway, he has cut across the front corner of the plaintiff's farm, using a gateway in the line fence between them, thence going through the plaintiff's highway gate, thence to the farm beyond. I extract the amended pleading in respect to it:—

That at the time of the alleged trespass the defendant was in possession, owner of and seised in fee of two lots of land at Middle River aforesaid.

1. A lot on the southern side of the plaintiff's lot and immediately adjoining, and containing about 100 acres. 2. A lot of land about three quarters of a mile to the north of the plaintiff's lot (known as Simon's lot) and he and all those whose estate he then had therein for upwards of 20 years enjoyed a right of way on foot, and with cattle, horses, carriages, sleighs and carts, during the winter months, or so long as the snow was on the ground for the purpose of using the said land and shortening the distance to and from the same during the said winter months or while the snow was on the ground over the said lands of the plaintiff from the lands of the defendant to the main road and thence to the defendant's land and from the said main road back to the lands of the defendant on the southern side of the plaintiff's lands for the more convenient occupation and use of the said lands of the defendant to the north of the plaintiff's lands as to the said lands of the defendant appertaining and the alleged trespass was a use by the defendant of the said way.

The most tangible thing about the claim is the fact of a gate that existed for 15 years in the line fence between them. Before that, a panel in the fence in the same site as the gate was different from the other fencing and could be removed. The existence of that gate has been satisfactorily explained in the plaintiff's evidence and the latter is not contradicted. It was a gate between the two properties built by the plaintiff on his own portion of the fence for their convenience to enable the threshing machine to be hauled from one barn to the other instead of going around by the highway. While that gateway (the gate was not used in the winter time) was made use of to enable the defendant to reach the highway by the short cut, this was really on a different line from that used between the two barns. The existence of the gateway does not help. The defendant, as I understand his pleading, claims a winter road from one farm to the other (using the high-

way in part). By the evidence it was used for two purposes, the children going to school and the hauling of hay. And in respect to the hauling of hay during the first part of the statutory period, the hay was hauled in winter but during the latter part of the period, *i.e.*, for the last 7 years, that use had been discontinued and the hay had been hauled in August directly from the Simon's farm, as it was cut, directly to the barn on the homestead. Moreover, the plaintiff's own evidence shews, and he ought to know what his claim is, the use of it in winter had been further restricted, namely, to times when the highway was itself blocked, the snow not having been removed under the statute.

There is no pretence of using this short cut at any other time than in winter. In fact, the land was under cultivation. The user of this short cut by third persons, as by John McRae carrying the mail, is not alleged to be under the defendant or his predecessor, and does not help out the defendant's claim for a private way.

The Judge has acquiesced in the view that the use of it for hauling hay in the winter time for the last 7 years having been discontinued, its user as a winter road for the statutory period must be found in other kinds of enjoyment.

Now the defendant himself when asked, as I have shewn, founded his claim for user in the children going to school and hauling down the hay. Those two purposes are very different and I cannot see exactly how one helps out the other. The children on foot do not require a whole winter road. A way of this kind must be a little difficult to prescribe for I do not understand how between the periods of the appearance and disappearance of snow in one season and from one winter to another, the defendant could keep to the site of his winter tracks so nicely as to satisfy the law of prescription as to locality. There was no formed road, of course. I can understand a winter road through the woods where bushes and so on identify the track, enabling the user to be confined to the same locality. I do not dispute that a winter road may be prescribed for, but here I see great difficulty.

In *Knock* v. *Knock*, 27 Can. S.C.R. 664, King, J., p. 681, says:—

Was it then, within the above exception, a formed road made over the alleged servient tenement to and for the apparent use of the dominant tenement? I do not think so. There was nothing upon the land to indicate its course and bounds. As a winter road it would for the most part be traced

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in the snow, and all traces of it would be obliterated with the disappearance of the snow. Being in no sense a formed road, and without the requisite characteristics of permanence and definiteness, it seems impossible to treat it (within the settled law on the subject) as passing, without any words of grant, but by mere implication upon the severance of tenements previously held in unity of possession. Nor does there seem any good reason, growing out of the circumstances of the ownership of land in this country, for relaxing the rules as to the acquisition of rights of way by mere implication.

I think this alleged way fails and that the Judge's finding must be reversed.

The plaintiff, at the hearing, made a contention that, under the Prescription Act, the whole period of user must run in favour of one person, that it will not do to add together periods say of an ancestor and his descendant, or a vendor and vendee; that there is, to use the American phrase, no tacking.

In my opinion it is quite clear that the periods of user can be tacked to constitute the prescribed period where there is privity between such parties. It sounds plausible to say that the general words in deeds of land "ways, rights, privileges and appurtenances, etc.," do not include the inchoate enjoyment which a man takes, passing over his neighbour's land until the statutory period has run. But it is clear from the form of statements of defence used in the reported cases that the periods may be tacked. Such words stating the enjoyment to have been by the "plaintiff and those who preceded him" or "the plaintiff and his predecessors in title" will be frequently found: *Gardner* v. *Hodgson's Kingston Brewery Co.*, [1903] A.C. 229.

But there is direct authority of our own Court to the effect that such periods may be tacked: *Corkum* v. *Feener*, 29 N.S.R. 115. It may be under the decision of *Wallis* v. *Harrison*, 4 M. & W. 538, cited for the plaintiff that when the enjoyment commences with a parol license, executory of course, the transfer of the land to a third person before the statutory period has run determines the license, and those periods cannot be added together. But that would not apply to a case in which the statutory period of user next before the action was brought is not connected with any parol license. I refer to *Tickle* v. *Brown*, 4 Ad. & E. 369 (111 E.R. 826); *Kinloch* v. *Nevile*, 6 M. & W. 795.

On the whole the plaintiff's appeal will be allowed and the judgment varied. The finding of a footpath in the reasons for judgment will be struck out. The finding of a way in winter for

twitching sticks for firewood across the plaintiff's land in the track now in use will be be inserted in the judgment order.

The finding of the diagonal road will be reversed and the plaintiff will have nominal damages, say, one dollar, on that issue for the trespass.

There will be no costs of the appeal, but each party will bear one-half of the costs of printing the appeal book.

The Judge's finding as to the costs of the action will stand.

Appeal allowed.

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Alberta Supreme Court, Appellate Division, Scott, Stuart and Beck, JJ. January 13, 1917.

1. BILLS AND NOTES (§ III A—55)—ENDORSEMENT—AUTHORITY OF PARTNERS.
A member of a partnership by tendering a note for discount and credit to his firm's account, adopts as genuine an endorsement which purports to be that of his firm.
[*Magrath* v. *Cook*, 8 A.L.R. 318; *Standard Bank* v. *McCullough*, *id.* 320, 25 D.L.R. 813, considered.]

2. BILLS AND NOTES (§ V A—105)—RIGHTS OF TRANSFEREE NOT HOLDER IN DUE COURSE.
The transferee of a note, not a holder in due course, who is ready and willing to perform the payee's contract for a transfer of land, for which the note was given, is entitled to enforce payment thereon against the maker of the note.

Statement.

APPEAL by defendant from the judgment of Ives, J. Affirmed.

Sinclair, for appellant; *McGillivray*, for respondent.

The judgment of the Court was delivered by

Beck, J.

BECK, J.:—The action is on a promissory note made by the defendant payable to F. C. Lowes & Co., and endorsed to the plaintiff bank. The defences relied on were (1) that the endorsement was not proved; (2) that the plaintiff bank was not a holder in due course, and therefore took the note subject to the terms of an agreement [illegible] which the note was a part between the maker and the payee for the transfer of a lot to the maker on payment of the note, and that neither the plaintiff bank nor the payees had title to the lot, and the defendant repudiated the note and agreement.

I think the endorsement by F. C. Lowes & Co. was quite clearly proved.

What appears by way of endorsement is: "F. C. Lowes & Co., per Jas. J. Lawrence, Att'y."

Neither the signature of Lawrence nor his authority as attorney were directly proved; but the local manager of the plaintiff bank

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said that the original note, of which that sued on was a renewal, was given to the bank in the ordinary course of business by F. C. Lowes and discounted for him; that Lowes received the full amount of the face value of the note less the interest; that when the original note came due $100 was paid and a new note taken, the old note being charged, and the cash payment and the proceeds of the renewal credited to the account of F. C. Lowes & Co.

It seems to me that under these circumstances it was of no consequence who wrote the payee's name by way of endorsement on the note or whether or not he had authority to do so. Lowes, a member of the partnership of Lowes & Co., a fact implied in the evidence, by tendering the note for discount and credit to his firm's account, adopted the endorsed signature as that of his firm.

There is not the slightest inconsistency, in holding the endorsement proved under these circumstances with the cases of *Standard Bank* v. *McCullough*, 8 A.L.R. 320, 25 D.L.R. 813, and *Magrath* v. *Cook*, 8 A.L.R. 318. Both were cases where the payee was a joint stock company. In neither was the note discounted and placed to the payee's credit, nor was there any evidence of adoption of the endorsement by anyone in such a position to be authorised to do so. In the former case the Court said there were circumstances from which it might be inferred that the secretary who purported to endorse for the company had no authority to do so. In the latter case, the note was endorsed without consideration, and consequently the endorsement was beyond the presumed general powers of the officer purporting to endorse.

The original note had at its foot these words: "For final payment, lot 94, block 11, Evanston; transfer to be delivered when paid."

The local manager of the bank says that the bank must have seen this memorandum, and from it and the bank's knowledge of the business of F. C. Lowes & Co., have drawn the inference that the note was given in payment for the lot; that the bank was not the registered owner of the lot mentioned.

An abstract of title was put in, which shewed that the title to the lot stood in the name of H. B. Alexander, and that there was registered against it a power of attorney, dated and registered in June, 1911 (*i.e.*, before the giving of the original note) from Alexander to Lowes.

The trial Judge (Ives, J.), made an order to the effect that if the plaintiff deposited in Court within 30 days a transfer on a clear title, to the defendant, he might enter judgment for the amount of the claim sued for, without costs, and in default that the action be dismissed.

Such a transfer to the defendant was duly deposited within the time limited, and judgment accordingly went in favour of the plaintiff.

For the purpose of deciding the second defence, I think we may assume, without intimating an opinion one way or another, that the original "note" was not a note, but a mere agreement on the one hand to pay the amount and on the other, immediately on payment to give a clear title to the lot named, and that the renewals, though in form notes, did not place the plaintiff bank in the position of holders in due course of a promissory note. No question was raised from this aspect, by way of objection to the want of F. C. Lowes & Company as parties; and, as it is really of no practical importance, it need not be considered.

In this view what is the result?

The plaintiff bank asks payment: the defendant refuses to pay saying: "You haven's title; I therefore repudiate." Could he do so without more? I think not. Whatever the contract between the defendant and F. C. Lowes & Co. was, we have no evidence of it, except the original note with the underwritten memorandum. It seems to me that there is no inference that the payees of the note were the owners of the lot mentioned, so as to make their ownership an implied condition of the contract, the absence of which was ground for repudiation.

The facts were that, although the payees were not the owners, a member of the payee firm held what is apparently a power of attorney from Alexander the registered owner to sell and transfer the land, and, inasmuch as it appears on the abstract of title it is apparently a power of attorney, in which the land is specifically and properly described, and therefore one, the consequence of giving which, suspended the owner's right to deal with the land (Land Titles Act, sec. 72).

The obligation of the payee, and therefore of the plaintiff bank as their assignees, was, I think, only to be ready and willing to transfer immediately upon payment; it may be, contemporane-

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ously with payment, so that the maker was not bound to pay unless and until the bank could, in exchange for the money hand back a transfer from the registered owner having at the time in fact a clear title. Time was not expressly made the essence of the contract, and I should think a provision to that effect would not be implied.

However, the maker did not only not pay, but refused to pay, and the bank was in fact ready and willing to fulfil its part, unless it can be said that it is evident it was not so, because the necessary proof of that was, that, before action or at all events before judgment, it had the transfer in hand ready for delivery. To hold so, in the absence of a distinct notice from the purchaser expressly or impliedly stating his readiness and willingness to perform the contract on his part, and calling upon the other party to fulfil his within a reasonable stated time, would, I think, be contrary to the obligations even of a vendor of land; and I think the payee or holder of the note was not in as onerous a situation.

In this view I think the decision of the Judge upon the merits was right. This decision to give the plaintiff no costs was questioned, but in view of what appears in the appeal book I think his decision in this respect cannot be interfered with.

I would therefore dismiss the appeal with costs.

Appeal dismissed.

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PATTERSON v. CANADIAN PACIFIC R. CO.

Alberta Supreme Court, Appellate Division, Scott, Stuart and Beck, JJ. January 13, 1917.

CONSPIRACY (§ 11 B—15)—TO INJURE ONE IN HIS EMPLOYMENT—PLEADING. A reasonable cause of action is disclosed by a statement of claim which charges an employer with wrongful dismissal of the plaintiff, and the other defendants with conspiracy to procure such dismissal.

Statement.

APPEAL from the judgment of Ives, J. in an application by the defendants other than the company for an order striking out their names as defendants, and dismissing the action as against them, on the ground that the statement of claim and the particulars furnished by the plaintiff disclose no reasonable cause of action against them.

O. M. Biggar, for defendant, appellant.

J. E. Varley, for plaintiff, respondent.

The judgment of the Court was delivered by

Scott, J.

SCOTT, J.:—The statement of claim alleges that the plaintiff

is an accountant residing at Calgary, that defendant Ogden is vice-president of the company, of which defendant Dennis is assistant to its president, and head of its natural resources department at Calgary and defendants Lethbridge and Mileson its accountant and assistant accountant respectively, in its office at Calgary, that the plaintiff was in the company's employment as accountant for 7 years next preceding April 11, 1916, that for about two years next preceding September 1, 1914, he was in receipt of a salary of $1,800 per annum, that his salary was reduced to $1,200 per annum from that date, that about August, 1913, he was called upon by the president of the company to make certain reports regarding the financial operation of the department of natural resources at Calgary, for the purpose of ascertaining whether an audit was necessary, and that, as a result of his report and of the audit which took place, several of the company's officers were discharged for irregularities discovered, that the said irregularities were participated in by the defendants and each of them, and from and after the audit, which took place in August, September and October, 1914, the said defendants, with intent to protect themselves from the discovery and report of irregularities and improper and unlawful dealings with the company's property and moneys, and with knowledge of the plaintiff's said report, did wrongfully, unlawfully and maliciously conspire and combine together with each other and with others unknown to the plaintiff to ruin the reputation of the plaintiff in his occupation of accountant, and to reduce his standing upon the company's staff, and to induce and procure his dismissal from the company's employment, that in pursuance of such combination they succeeded in having the plaintiff's salary reduced from $1,800 to $1,200 per annum, and in having him unlawfully and without justification or excuse discharged from the company's employment, and without proper legal notice, thereby causing him damage, and that the company on or about April 11, 1916, dismissed him from its employ without justification or excuse and without proper legal notice or wages in lieu of notice. He claims from the company $1,000 damages for wrongful dismissal, and *from all the defendants* $50,000 damages, for the wrongful conspiracy and the wrongful acts done in pursuance thereof.

Pursuant to an order to that effect the plaintiff delivered particulars of the several officers of the company, of the irregulari-

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ties charged, of the plaintiff's report, of the facts and circumstances upon which the plaintiff relies as shewing that the defendants wrongfully, unlawfully and maliciously conspire to ruin his reputation, reduce his standing and procure his dismissal, and of the manner in which and of the extent to which the defendants severally participated in the irregularities referred to and improper dealings with the company's property and moneys.

The cases referred to in the Annual Practice under O. 25, r. 4, which correspond with out r. 255, clearly shew that the power to order a pleading to be struck out on the ground that it does not disclose a reasonable cause of action should be exercised only where the question is beyond doubt. The Court must be satisfied that there is no reasonable cause of action. It should not be struck out if it raises some question fit to be tried by a Judge or jury. It should not be struck out merely because it may be demurrable (see also *McEwen* v. *North West Coal and Navigation Co.*, 1 Terr. L.R. 203).

The same principle should apply where, as in this case, the application is made under r. 28 to strike out the names of defendants on the ground that the statement of claim does not disclose any reasonable cause of action against them.

One of the causes of action charged is that the applicants and the company together conspired with others to the end that the company should break its contract with the plaintiff by unlawfully and without justification or excuse dismissing him from its employment, thereby causing him damages.

In *Lumley* v. *Gye*, 2 El. & Bl. 216, (118 E.R. 749) it was held that an action will lie for maliciously procuring a breach of contract during its existence which produces damage.

In *Quinn* v. *Leathem*, [1901] A.C. 495, Lord Macnaghten referring to *Lumley* v. *Gye*, says at p. 510:—

> Speaking for myself I have no hesitation in saying that I think the decision was right, not on the ground of malicious intention—that was not, I think, the gist of the action—but on the ground that a violation of legal right committed knowingly is a cause of action, and that it is a violation of a legal right to interefere with contractual relations recognised by law, if there be no sufficient justification for the interference.
>
> The only other question is this; Does a conspiracy to injure, resulting in damage, give rise to civil liability? It seems to me that there is authority for that proposition, and that it is founded in good sense. . . . There are also weighty observations to be found in the charge delivered by Lord Fitz-Gerald in *Reg* v. *Parnell*, 14 Cox. C.C. 508. That a conspiracy to injure—an oppressive combination—differs widely from an invasion of civil right

by a single individual cannot be doubted. I agree in substance with the remarks of Bowen, L.J., and Lords Bramwell and Hannen in the *Mogul* case, 23, Q.B.D. 598, [1892] A.C. 25. A man may resist without much difficulty the wrongful act of an individual. He would probably have at least the moral support of his friends and neighbors, but it is a very different thing, (as Lord FitzGerald observes) when one man has to defend himself against many combined to do him wrong.

The majority of the cases bearing upon the question are cases where certain persons conspired to procure another who was not a party to the conspiracy to break his contract, cases where the object of the conspiracy was to procure an employer of labour to dismiss certain employees or to refrain from employing others. Although it is not necessary to express an opinion upon the question I think from the view expressed by Lord Macnaghten which I have quoted that it might be reasonably contended that where the employer conspired with others to the end that he should break a contract entered into by him both he and the others would be liable as co-conspirators to the other party to the contract for the damage thereby sustained by him.

In his particulars the plaintiff alleges that the defendant Lethbridge dismissed him from his employment and that defendant Dennis confirmed that action of Lethbridge. It may be that those defendants had authority to dismiss him, but that authority would not give them or either of them the right to dismiss him under circumstances which would result in a breach of his contract with the company. If they did so under such circumstances the company would be liable to the plaintiff for their action and, for anything that appears to the contrary in the statement of claim, it may be that the company in pursuance of the conspiracy charged, instructed these defendants to commit such a breach of the contract.

If the charge of conspiracy had been against the applicants alone and, had the claim against them been that they had together procured the company to commit a breach of the contract to the plaintiff's damage there would undoubtedly have been a good cause of action against them. It may be open to the plaintiff to apply to amend his statement of claim by claiming, either alternatively or in substitution for his present claim, against the company for breach of its contract and against the applicants alone for conspiracy. Such claims may be joined in the same action under r. 15.

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The words of McGuire, J., in his judgment in a similar application in *McEwen* v. *North West Coal and Navigation Co.* (*supra*), I may here quote as applicable to this application. He says at p. 209:—

> Will it be said that this is a case where there is no question of law to be argued? The counsel for the defendants, Mr. Aikins, has practically answered that in the negative in the very lengthy and able argument which he addressed to this Court and by the formidable array of authorities from England, Ontario and Manitoba which he marshalled before us. To my mind the authorities by no means leave the question beyond the pale of fair argument.

I would dismiss the application with costs including the costs of the proceedings in this division.

Application dismissed.

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HALCRO v. GRAY.

Quebec Court of Review, Archibald, A.C.J., Robidoux and Mercier, JJ. June 24, 1916.

MORTGAGE (§ VI A—70)—HYPOTHEQUE—DEFAULT CLAUSE—DIVISIBILITY.

A provision in a mortgage (hypotheque), that upon the borrower's failure to make payment the property shall immediately vest in the lender, and all sums paid be forfeited as liquidated damages, does not vest the property in the lender, in discharge of the mortgage debt, in bar of the lender's right to sue for same, since under art. 1133 C.C. Que. he may elect between recourse under the penal clause or under the primary obligation; though the loan has been made by two persons jointly it is a divisible obligation, and may be enforced by each separately.

Statement.

ACTION on a hypothecary claim guaranteeing a loan of $900. The following clause in the deed gave rise to the litigation:—

> It is a special stipulation and condition hereof, without which these presents would not have been entered into or made, that in the event of the said borrower failing to pay the said sum, within 30 days from June 1 next, 1915, together with all interest due thereon, that then and in such case the said property shall immediately be vested in and become the absolute property of the said lenders, without any notice, *mise en demeure*, or any formality whatsoever, and all sums paid on account thereof shall be forfeited and held as liquidated damages by the said lenders.

Defendants refused to pay: firstly, because of the foregoing clause in the deed of sale. The defendant not having made his payments on the days agreed upon—plaintiff became *ipso facto* owner of the immoveables hypothecated, and therefore, paid in full. Secondly, because the loan on which the action was founded was made by the plaintiff for $900 and by one Chevrier for $1,500, and was guaranteed *en bloc* by a single hypothec, which deed also contains the clause already recited. The obligation is therefore joint and indivisible and plaintiff could not alone sue for the recovery of his share.

The Superior Court maintained plaintiff's action on February 10, 1916. The judgment of Demers, J., is as follows:—

Were the clause a *pacte commissoire* there is no doubt but that the plea would fail: *Picard* v. *Renaud* (1900), 17 Que. S.C. 353; *Peloquin* v. *Cohen* (1904), 28 Que. S.C. 193—Henrys (vol. 2, p. 338). This last author shews that at all periods from the Roman times down to the present this clause has always been interpreted as a stipulation exclusively made in favour of the vendor. I am of opinion that by analogy the same conclusion must be reached in this case.

The defendant's plea may be summed up in these words: the obligation of the defendant is alternative—he may obtain his discharge either by paying in money or by abandoning the immoveables. This is not what the deed says. What he owes is a sum of money. Before the 30 days subsequent to the maturity plaintiff could sue him for the amount of the loan; this would not be the case if the obligation were an alternative one; for in that case the creditor by his conclusions would have been compelled to allow the defendant the choice between payment and abandonment.

This stipulation therefore as in the case of the *pacte commissoire* is in favour of the vendor only.

For these reasons the action is maintained.

Defendant inscribed in review.

J. DeWitt, for defendant, appellant.

H. A. Hutchins, K.C., for plaintiff, respondent.

ROBIDOUX, J.:—In order to decide the first question raised by the defendant, it is necessary to establish what kind of obligation the defendant contracted in virtue of the clause above cited. Is it a conditional obligation? An alternative obligation? A facultative obligation? Or is it not rather an obligation with a penal clause?

Robidoux, J.

Is it a conditional obligation? Art. 1079 of the Civil Code defines the conditional obligation as that which "is made to depend upon an event future and uncertain, either by suspending it until the event happens or by dissolving it." It is the very existence of the obligation which depends upon a future event. So long as the event does not happen the obligation does not exist.

Was the obligation contracted by the defendant one depending

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upon an event future and uncertain? No. The obligation of the defendant to return to the plaintiff and Chevrier an amount which he borrowed from them existed at the very moment when the loan was contracted and depended on no eventuality. The defendant's obligation is, therefore, not a conditional obligation.

Was the obligation of the defendant an alternative one? The essence of the alternative obligation is thus laid down by Pothier (No. 248):—

> Les choses comprises dans l'obligation sont toutes dues, sans que néanmoins aucune ne soit due déterminément. L'obligation est alternative, lorsqu'elle comprend diverses choses séparées par une particule disjonctive. Telle est l'obligation de vous livrer un cheval ou un boeuf.

It is of the essence of the alternative obligation that the debtor thereof is discharged by giving or doing one or other of the things undertaken, at maturity. The defendant did not have this right. Hence his obligation is not an alternative obligation.

Is the obligation of the defendant a facultative one? In the facultative obligation the person who is bound agrees to give or do one thing with the faculty of discharging himself by giving or doing something else than that promised. Different from this is the obligation of the defendant. At the expiry of the term granted for the reimbursement of the loan he did not have the privilege of discharging himself by offering instead of the sum the property hypothecated. His principal obligation at maturity could only be extinguished by payment of the sum of money.

Did he contract an obligation with a penal clause? We must give an affirmative answer to this question.

In virtue of this clause defendant contracted two obligations: a principal one and a secondary one. The principal obligation is the return of the amount loaned, and the secondary obligation is to allow his creditors to become owners of the immoveables mortgaged in default of his reimbursing the loan in money at its maturity. We find in this clause all the elements of obligations with the penal clause as defined in art. 1131 C.C.

The clause in the deed does not state that in default of payment at maturity the immoveables hypothecated shall become the property of the lenders with the result that the original claim will be extinguished. It simply states that in the event of failure to pay within thirty days after maturity the immoveables hypothecated shall become the property of the creditors.

In order that there be a penal clause it is not necessary that the word "penal" or "penalty" should be used. All authors are agreed on this point. The penal clause may result from other expressions having the same connotation. The words in the clause "that in the event of the said borrower failing to pay the said sum within thirty days" are equivalent expressions.

No doubt, conditional, alternative and facultative obligations resemble in some aspects obligations with the penal clause; but they differ diametrically therefrom in other respects.

The obligation with the penal clause resembles the conditional obligation in that the penalty is due in the event of the inexecution of the principal obligation; but it differs from it in this: when the obligation is conditional it only arises upon the happening of an event, whereas in the case of a penal clause it exists from the very moment of the making of a contract.

There is analogy between the obligation with the penal clause and the alternative obligation. The alternative obligation resembles the obligation with the penal clause in that it comprises two things either of which may be given at the option of the creditor or of the debtor, but it differs therefrom because the obligation with the penal clause carries two obligations which may both become equally exigible: a principal obligation and a secondary obligation.

There is also analogy between the facultative obligation and the obligation with the penal clause in that the debtor of a facultative obligation may obtain his discharge by giving something else than that which he undertook to give, but it differs therefrom because the creditor of a facultative obligation can only demand one thing; the debtor has the choice and not the creditor; whereas the creditor of an obligation with the penal clause can exact at his option either the performance of the principal obligation or of the secondary obligation without the debtor being able to discharge himself by offering to his creditor one or the other.

It is only in the obligation with the penal clause that we find two obligations, the one subordinate to the other, and one of which, namely, the secondary obligation, only arises on the default of the debtor failing to fulfil his principal obligation. We find in the obligation of the defendant in this case the essential characteristic of the obligation with the penal clause.

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Since the plaintiff is the creditor of an obligation with penal clause, there now remains but to see what recourse he may exercise by virtue of this obligation.

Art. 1133 C.C. gives the answer:—

The creditor may enforce the performance of the primary obligation, if he elect so to do, instead of demanding the stipulated penalty. But he cannot demand both, unless the penalty has been stipulated for a simple delay in the performance of the primary obligation.

Plaintiff, in claiming the amount due rather than the immoveables hypothecated, has exercised a recourse which the Code gives him in absolute terms.

The second question raised by the defendant must also be decided in favour of the plaintiff. He bases his contention that plaintiff and Chevrier were bound to exercise together and by the same action their claim against him on the following clause of the deed:—

The present loan is indivisible and may be claimed by the lenders in whole from each of the heirs of the borrower conformably to art. 1133 C.C.

This clause does not at all mean what the defendant wishes it to mean, but simply that if the defendant had died before the payment of his indebtedness, the plaintiff and Chevrier could claim the total amount from each one of his heirs instead of claiming separately from each heir his share.

The principle that joint creditors of an obligation divisible by its nature can exercise separately their recourse is not contested. Only where the object of the obligation is indivisible must they join to demand the performance thereof.

The defendant, therefore, fails on both grounds, and the judgment of the Superior Court is confirmed with costs.

Appeal dismissed.

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MILLER v. ALLISON.

British Columbia Supreme Court, Murphy, J. February 28, 1917.

CONFLICT OF LAWS (§ I C—65)—FOREIGN DIVORCE—REMARRIAGE ABROAD.

Where a British subject domiciled in this country enters into a contract of marriage during a temporary visit to a foreign country, the question of the validity of marriage, as to essentials, not as to form, depends upon the laws of this country.

Statement.

PETITION to set aside a marriage.

McDiarmid, for petitioner; *Higgins*, for respondent.

Murphy, J.

MURPHY, J.:—At the time petitioner and respondent went through the form of marriage in the State of Washington, petitioner was a British subject domiciled in B.C. The intended

matrimonial domicile was B.C. It is to a British Court that application is being made to have this marriage declared a nullity. It is admitted that when the Washington ceremony was performed Allison, respondent's husband, was alive, and domiciled in the State of Idaho. No authority need be cited for the proposition that neither spouse can under British law contract a valid second marriage during the lifetime of the other spouse unless the first marriage has been dissolved by a Court of competent jurisdiction. On behalf of respondent, the principle "a marriage valid where celebrated is good everywhere" is invoked, and it was strongly urged that therefore what I have to decide is whether the Courts of Washington would hold the Washington marriage valid or not. But this position ignores the fact that Miller was domiciled in B.C. when the Washington marriage took place, and that the matrimonial domicile was intended to be B.C. When such is the case the decisions show the essential validity of the marriage is governed by the *lex domicilii*, 6 Hals. 254. As put in *Brook* v. *Brook*, 9 H.L.C. 193, at p. 208:—

> If the contract of marriage is such in essential as to be contrary to the law of the country of domicile, and it is declared void by that law, it is to be regarded as void in the country of domicile though not contrary to the law of the country in which it was celebrated.

Further in the same case, at p. 212, this language is used:—

> It is quite obvious that no civilized state can allow its domiciled subjects or citizens by making a temporary visit to a foreign country to enter into a contract to be performed in the place of domicile if the contract is forbidden by the law of the place of domicile as contrary to religion or morality or to any of its fundamental institutions.

It follows necessarily, I think, that under such circumstances no Court of the country of domicile would allow the question whether the contract was so forbidden by the law of the place of domicile or the facts necessary to be decided to ascertain whether it was so contrary or not to be determined by the provisions of the law of any foreign state or the view of any foreign Court. To rid herself of the difficulty of the first marriage, respondent sets up a decree of divorce obtained in the State of Oregon. I find as a fact that on the proven requirements of the law of that State, as set out in the testimony of John F. Logan, the Oregon Court that purported to grant this decree was without

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jurisdiction. A year's continuous residence is required to found such divorce jurisdiction. The facts are that respondent was during the year in question really resident in Victoria, B.C., where she lived with Miller as his wife. She made a few transient visits to Oregon but remained in that State for only a few days on each occasion. This being so, had Miller and she gone through a form of marriage in B.C., after the Oregon decree was pronounced, I think a prosecution for bigamy would have been successful under our law. Applying then the principles of law hereinbefore cited, I am of opinion that, so far as British jurisdiction is concerned, the pretended Washington marriage was a nullity because respondent was at the time it took place the wife of Allison. I am far from saying that the Courts of either Washington or Oregon would take any different view, given the facts as stated herein, but as already stated I hold the views of either of said Courts are wholly irrelevant as are also any questions as to what are the laws of Oregon and Washington in the premises other than the provisions of the Oregon statute conferring jurisdiction in divorce. The case of *Andrews* v. *Ross*, 14 P.D. 15, shows that the question of how far Miller may have been a party to the deception practised on the Oregon Court can have no bearing on the decision this Court must pronounce.

There will be a decree that the pretended Washington marriage is a nullity.

Annotation.

ANNOTATION.

BY A. B. MORINE, K.C.
(Consulting Editor, D.L.R.)

The judgment in this action was wrong.

When she procured a divorce in Oregon, the respondent was domiciled in Idaho. The whole question of the validity of the divorce depends upon the law of Idaho in reference thereto.

"The English Courts will recognize the binding effect of a decree of divorce obtained in a State in which the husband is not domiciled if the Courts of his domicile would recognize the validity of the decree:" *Armitage* v. *A.-G.* [1906], P.D. 135.

The petitioner, a British subject, residing and domiciled in Victoria, B.C., went through a form of marriage with respondent in the State of Washington, U.S.A. and returned to Victoria to reside.

The respondent also resided in Victoria, B.C. prior to and at the time of the ceremony with petitioner, but her husband, during the same period, and at the time of the ceremony, was domiciled and resident in the State of Idaho, U.S.A.

Prior to the said ceremony the petitioner made transient visits to the State of Oregon, U.S.A., and succeeded in obtaining from the Courts of that State a decree of divorce.

Annotation.

It was found as fact by Murphy, J., that by the law of Oregon, one year's continuous residence in the State is necessary to give its Courts jurisdiction to decree divorce, and that the petitioner had not so resided for the requisite time.

The jurisdiction of the B.C. Court to declare the form of marriage between petitioner and respondent null and void cannot be questioned, for petitioner was domiciled in British Columbia at the time of the marriage, and of the trial, and the respondent, who resided there, claimed to be domiciled there also, by virtue of the alleged marriage to petitioner.

The question, however, of what laws were to be regarded in deciding upon the validity of the ceremony of marriage is quite a different one from that of jurisdiction, and, with respect, it cannot be conceded that the reasoning by which Murphy, J., reached his conclusion was altogether sound.

He quoted *Brook* v. *Brook*, 9 H.L.C. 193, that the essential validity of a marriage is governed by the law of the domicile, not the law of the place of marriage, as authority for his holding that as the petitioner was domiciled in B.C., the Courts there could construe and apply the law of Oregon as to divorce, but that was a case in which the capacity of a person domiciled in England to contract a marriage outside of it was in question, and here there was no question whatever as to the capacity of the petitioner, the party domiciled in B.C., but of the respondent, whose domicile was in the State of Idaho at the date of the ceremony with petitioner. The question before Murphy, J., was not, was the petitioner capable of marriage, for that was undeniable, but was the respondent capable, and the answer to that depended upon the other question, had she been validly divorced according to the law of her domicile?

"The validity of a divorce depends upon the *lex domicilii*." (Eversley, 3rd ed., 482). "The domicile for the time being of the married pair when the question of divorce arises affords the only true test of jurisdiction to dissolve their marriage, and such a divorce will be recognized by the English Courts even if granted for a cause which would not have been sufficient in England." (*Bater* v. *Bater*, [1906], P.D. 209.) "The domicile of a married woman is the same as that of her husband." (Brown and Watts on Divorce, 8th ed., 7). The domicile of the respondent's husband at the time of her divorce was in Idaho. If the divorce was legal there, it was legal in British Columbia. In that case, she had capacity to marry, according to English law, and the marriage in the State of Washington, if valid as to form, was valid in British Columbia, and petitioner became her husband.

Murphy, J., regarded as irrelevant, the question as to the law in the States of Washington and Oregon, except as to the statute of Oregon requiring residence by a petitioner, because of his reading of the decision in *Brook* v. *Brook* (*supra*), and gave no consideration whatever as to the law of Idaho. But this was the real question, was the Oregon divorce of a woman domiciled in Idaho legal by the laws of Idaho? That was, of course, a question of fact within the authority of Murphy, J., to decide, but no evidence concerning it appears to have been given at the trial, and therefore, upon appeal, this case should be sent back for a new trial. It is not unlikely that, according to the laws of Idaho, the divorce granted in Oregon, in this case, would be null and void, on the facts as found by Murphy, J., but Idaho Courts might consider that the apparent defect in the jurisdiction of the Oregon Courts, on the ground of non-residence for the statutory period, was cured by the appearance and

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submission of the husband, and the law of Idaho was a question of fact as to which evidence should have been given and a finding made by Murphy, J. To illustrate that this was the real point—suppose that by the law of Idaho, the Oregon divorce was good, the husband would be free to marry, and the wife also; *per contra*, if the law of Idaho were otherwise. Suppose Idaho refused to recognize the Oregon divorce of parties domiciled in Idaho, the husband would still be bound in Idaho, and the wife also, but according to the judgment of Murphy, J., the wife would be free in B.C. to marry again, if by the laws of Oregon the divorce were good. The question as to the validity of the divorce according to the laws of the State of Washington, where the form of marriage between petitioner and respondent was gone through, was of course unimportant, though much argued, apparently, by counsel for respondent, for the validity of the form gone through was not questioned. A foreign marriage, good as to form, will be recognized in our Courts, if not prohibited by consanguinity, affinity or previous marriage. (Eversley, 3rd ed., 105.)

DOMICILE.

In all actions involving the validity of foreign divorce an absolutely vital question is, what was the domicile of the husband at the time it was procured? No divorce is entitled to recognition in another State unless the Court had jurisdiction by reason of the *bonâ fide* and permanent domicile: *Le M.* v. *Le M.*, [1895] A.C. 531; *Re Sinclair*, [1897] A.C. 469.

"The domicile . . . when the question of divorce arises affords the only true test of jurisdiction to dissolve their marriage (*Bater* v. *Bater*, [1906], P. 209; *Ramos* v. *Ramos*, 27 T.L.R. 515).

"The English Courts will recognize as valid the decision of a competent foreign Christian tribunal dissolving the marriage of a domiciled native in the country where such tribunal has jurisdiction. (*Harvey* v. *Farnie* (1880), 5 P. 153 (1882), 8 A.C. 43).

It is recognized in *Bater* v. *Bater* (*supra*), at p. 217, that the question of nationality is of no importance. (See Eversley on Domestic Relations, 3rd ed., 483.)

The decree of a foreign Court, which has jurisdiction, can undo an English marriage on grounds short of those essential in England. *Bater* v. *Bater*, *supra*; *Harvey* v. *Farnia*, *supra*; *LeMesurier* v. *LeMesurier*, *supra*.

Three important considerations present themselves in each action involving domicile: (1) what is domicile; (2) how is it acquired; (3) how lost.

As to (1):— WHAT IS IT?

Domicile is residence at a particular place with intention to remain there permanently, or indefinitely. (Law of Domicile: Phillimore.) Residence in the place which is in fact the permanent home. (Conflict of Laws: Dicey). Habitation in a place with intent to remain there forever, unless some circumstance should occur to alter that intention. (*Whicker* v. *Hume* and others (1858), 7 H.L.C. 124.) Domicile is a combination of residence and an intention of remaining for an indefinite time. (*Lord* v. *Colvin*, 28 L.J. Ch. 366; Eversley, 3rd ed., 472.)

Domicile is sub-divided into three classes:—(a) of origin, (b) ascribed by law, (c) of choice.

(a) A person's domicile of origin is that which the father had at the birth of the person; not necessarily the place of birth, for the father may have been domiciled elsewhere. If the father be dead, the child takes the domicile of the mother. During minority, the minor's domicile is that of the parents.

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The last domicile of a minor continues after minority ceases until changed by his own act. No person can be at any time without domicile, or have more than one. If the domicile ascribed by law (that of the parents), or acquired by choice, be abandoned, the domicile of origin revives. It does so easily. (*Bempde* v. *Johnstone*, 3 Ves. 198; *Hodgson* v. *De Beauchesne*, 12 Moo. P.C. 285.) There is a presumption of law against an intention to abandon the domicile of origin (*Ibid*).

(b) Domicile is ascribed by law for married women and minors.

As to (2): HOW ACQUIRED.

(c) A domicile of choice is acquired by an independent person by residence in a place with an intention of remaining permanently, or for an indefinite time. There must be a fixed and settled intention of abandoning the domicile of origin. Mere length of residence abroad (and employment there) is not sufficient evidence of this intention (*Winans* v. *A. G.*, [1904] A.C. 287; *Huntley* v. *Gaskell*, [1906] A.C. 56). It is an inference of law derived from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time. (*Udney* v. *Udney*, L.R. 1 Sc. App. 441.)

In *C.* v. *C.* (*post*, p. 151), Middleton, J., said:—"Looked at in the light of all the events, there is much to lead to the conclusion that (the husband) never in fact changed his domicile of origin. He seems to have been a rolling stone, moving in the direction of least resistance, and making his abode where it was easiest to obtain a living, but this is not the way in which the matter (of domicile) should be approached." It is submitted that this was the very way to approach the matter, and that the conclusion, subsequently reached, that the husband acquired a domicile, was absolutely inconsistent with the doubt that he had abandoned his domicile of origin. No person can have two domiciles (Dicey), so that if that of origin had not been abandoned, one of choice was not acquired. The presumption is against abandonment of the domicile of origin, and the existence of a doubt about it should be conclusive against it. To say that a man is a "rolling stone" is equivalent to saying he had not an acquired domicile. How can "a rolling stone" have a permanent home?

Domicile is an inference of law, but intention a question of fact—the difficulty of deciding as to whether a domicile of choice has been acquired is in shewing the intention to remain where residence is taken up, or of relinquishing a domicile in existence. (*Re Stern*, 28 L.J. Ex. 22.) The onus of proving an intention to abandon a domicile of origin rests on those who assert it (*Briggs* v. *Briggs* (1880), 5 P.D. at p. 164; *Jones* v. *City of St. John*, (1899) 30 Can. S.C.R. 122; *Seifert* v. *Seifert*, 23 D.L.R. at p. 445; *Huntley* v. *Gaskell*, [1906] A.C. 56; *Winans* v. *A. G.* (*supra*.)

The question of intention being one of fact, it will be profitable to consider what acts have and have not been regarded as proving intention. In *Bater* v. *Bater*, *supra*, intention to acquire a permanent home in New York was based upon evidence that a husband had left England without an intent of returning, had rented and lived in a house in New York, and had become naturalized there. In *LeMesurier* v. *LeMesurier*, *supra*, it was held that a "permanent" residence was necessary to prove intention, and that *bonâ fide* residence alone did not give "the degree of permanence required." *Firebrace* v. *Firebrace*, 4 P.D. 63, may be usefully perused for its collection of facts regarded as of value in deciding as to intention.

English Courts were formerly inclined to rule that an English marriage

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was indissoluble by a foreign Court of the domicile. (*Lolley's* case, Russ. & Ry. 237; see arg. in *Harvey* v. *Farnie* (*supra*.) This rule has finally given place to the broader one, that "the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage" (*LeMesurier* v. *LeMesurier*, (*supra*); *Rex* v. *Woods*, 6 O.L.R. 41, 7 Can. Cr. Cas. 226).

Nevertheless, it is important to note that the prevailing reason for this change of view was that "the differences of married people ought to be adjusted in accordance with the laws of the community to which they *belong* (by domicile)" (*Bater* v. *Bater*, *supra*). In ascertaining what is the true domicile, English Courts construe that word in its English sense. In many States in America, residence and domicile are not clearly distinguished (*Bater* v. *Bater*, *supra*, at p. 214). In some States, "residence" is by statute made sufficient to found jurisdiction to grant divorce. Such a divorce would not, it is suggested, be recognized in any English Court if the domicile were shewn to be elsewhere when the divorce action was instituted, unless, indeed, it was in a country which would recognize the divorce (*Armitage* v. *A. G.*, *supra*). Certainly it would not be recognized if the domicile were in any English jurisdiction.

In *Rex* v. *Wood*, 25 O.L.R. 63, 19 Can. Cr. Cas. 15, there was a prosecution for non-support of wife. The defence was a divorce obtained in the Ohio Courts. The defendant was married in Ontario, in 1903, and the divorce procured in 1910. The jury had found that the defendant did not acquire an actual and permanent domicile in Ohio. In the judgment of the Court, delivered by Meredith, J.A., it is said: "There is nothing, in the decree or otherwise, to shew that the question of domicile was considered in the Ohio Court, or that the jurisdiction of that Court, to pronounce such decree, at all depended upon domicile; and, if there had been, I am far from thinking that such facts would have precluded the Courts of this province from inquiry into the fact, or from dealing with the rights of the parties upon their own findings respecting it.'

It follows from the jealous care which English Courts have always shewn for the parties to English marriages, from the slow growth of the rule which now recognizes dissolution by foreign Courts of such marriages, from the insistence that "domicile" shall not be confounded with "residence," but shall be construed in the English sense, and that it shall be "real," "*bonâ fide*," "permanent" and "existing" when the proceedings for divorce are taken, that the burden of proof upon one who asserts the validity of a foreign divorce is a heavy one, and that if doubt exists, it should be resolved against the divorce. *Wilson* v. *Wilson*, 2 P. 435; *Bell* v. *Kennedy*, 1 Sc. App. 307; *Wadsworth* v. *McCord*, 12 Can. S.C.R. 469; *Manning* v. *Manning*, L.R. 2 P. 223.

Residence alone is not sufficient for domicile. There must be the necessary *animus manendi*. The change of domicile must be with an intention to make the place the main and permanent establishment *sine animo revertendi*. *Hadlane* v. *Eckford*, L.R. 8 Eq. 631; *Hoskins* v. *Matthews*, 8 De G. M. & G. 13; *Atty.-Gen.* v. *Dunn*, 6 M. & W. 511; *Re Capdevielle*, 2 H. & G. 985; *O'Meara* v. *O'Meara*, 49 Que. S.C. 334; *Adams* v. *Adams*, 11 W.L.R. 358.

Neither length of time nor intention, taken separately, will do to establish a change of domicile, although the two taken together may work a change. The residence of a travelling salesman for the period of one year and a month,

coupled with his affidavit of his intention as to permanent residence, does not establish a sufficient change of domicile for jurisdictional purposes in a divorce proceeding. *Walcott* v. *Walcott* (1915), 23 D.L.R. 261, 48 N.S.R. 322. Annotation.

In *Adams* v. *Adams*, 14 B.C.R. 301, the petitioner, in 1895, when aged about 19, came from Ontario to British Columbia, where he spent some 3 or 4 years in different places. In 1899 he married, and at once removed to the Northwest Territories. In 1907, satisfied of his wife's infidelity, he made her leave for New York. In autumn, 1908, he returned to Vancouver, and took a position in a mercantile house. In January, 1909, he filed a petition for divorce, alleging domicile in British Columbia. It was held that no domicile was acquired to enable him to sue for divorce.

Retaining property in the domicile of origin, or attending and managing the paternal estate therein, shews an intention not to abandon it. In *Lord* v. *Colvin*, 4 Drew 366, a person born in Scotland, resided many years in India, returned to Scotland and lived in his paternal estate for 6 years; then resided in France for 6 years. He was said to have preferred France, and to have been annoyed by his neighbours in Scotland. He had handsomely furnished apartments in Paris. He never let his paternal estate, and attended to the management of it. It was held that he had not abandoned his Scotch domicile. See also *Maxwell* v. *M'Clure*, 3 Macq. H.L. 852.

As to (3): REVERSION TO DOMICILE OF ORIGIN.

Slighter evidence is required that a man intends to abandon an acquired domicile than that he intends to abandon a domicile of origin. *Lord* v. *Colvin*, 28 L.J. Ch. 361. This is doubtless because the Courts of the domicile of origin have what may be called a natural jurisdiction, and inasmuch as they unwillingly concede loss of jurisdiction where a party has acquired a foreign domicile, they gladly assert a return to the domicile of origin, the burden of proof to establish an acquired foreign domicile disappears when an abandonment of it, and a return "home," is proposed.

Akin to this rule, and the reason for it, is the doctrine recently established, that "the rule that 'the domicile of the husband governs the jurisdiction in suits for dissolution of marriage,' may be departed from in proper circumstances," *i.e.*, where nullity has already been declared in the Courts of the domicile. *Ogden* v. *Ogden* [1908] P.D. at p. 82-3; *Stathatos* v. *Stathatos*, [1913] P.D. 46; *Montaigu* v. *Montaigu*, [1913] P.D. 154.

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Ontario Supreme Court, Middleton J. January 23, 1917.

CONFLICT OF LAWS (§ I C—65)—FOREIGN DIVORCE.

The exercise by a foreign Court of the general jurisdiction it is admitted to have under principles recognised by English law will not be inquired into in proceedings in English Courts.

[*Pemberton* v. *Hughes*, [1899] 1 Ch. 781.]

ACTION for alimony. Statement.

Bain, K.C., *White*, K.C., and *M. L. Gordon*, for plaintiff.

Dewart, K.C., and *Harding*, for defendant.

MIDDLETON, J.:—The plaintiff sues for alimony—the defendant admits the plaintiff's right to alimony if there was a valid marriage. The plaintiff obtained a divorce by the decree of the Supreme Middleton, J.

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Court of Cook County, Illinois, on May 2, 1896. Five days later, on May 7, 1896, she married the defendant. The validity of the marriage depends upon the domicile of the parties at the time of the institution of the proceedings in Illinois leading up to the divorce.

The law upon this question had for long been slowly crystallizing and finally came to rest in the authoritative decision of the Court of Appeal in England in *Bater* v. *Bater*, [1906], P. 209. As stated in the headnote: "The domicile for the time being of the married pair when the question of divorce arises affords the only true test of jurisdiction to dissolve their marriage and the Court of the *bonâ fide* existing domicile has jurisdiction over persons originally domiciled in another country to undo a marriage solemnized in that other country and such a divorce will be recognized by the English Courts even if granted for a cause which would not have been sufficient to obtain a divorce in England."

This is in strict conformity with the earlier decisions of *Harvey* v. *Farnie* (1882), 8 A.C. 43, and *Le Mesurier* v. *Le Mesurier*, [1895], A.C. 517, though it somewhat extends the effect of these cases.

The plaintiff and her first husband were originally domiciled in Ontario and were married at Ingersoll, Ontario, on 5th July, 1886. They made their home in Ontario until the husband, who was then out of work, went to Chicago, in September, 1892, his wife following him in June, 1893. While in Chicago he so misconducted himself as to justify divorce. Finally, in July, 1895, his wife left him, returning to Ontario. A week or so later he also came to Ontario—being summoned by wire owing to the illness of his father, who was then thought to be dying. He did not intend to stay in Ontario, but his father did not die as soon as expected, his death taking place on February 16, 1896. During his stay here his wife lived with him, but he again misconducted himself, and his wife finally left him. Divorce proceedings were instituted by her in Chicago, on March 16, 1896, and the bill was served on the husband in Chicago, on March 17, 1896. No defence was entered, and the case was heard on the oral evidence produced for the plaintiff, on 24th April, and the decree pronounced on May 2, 1896.

The husband inherited some property upon his father's death,

and stayed in Ontario to manage it—and abandoned his intention of returning to Chicago. In the fall of 1895, he met a lady, whom he married in Ontario on July 1, 1896, assuming that his wife's divorce set him free from his first marriage. After this marriage he lived some years in Ontario, when, having sold his property, he returned to the States, residing in various places, and finally was divorced from his second wife, and married a a third time.

Looked at in the light of all the events that have happened there is much to lead to the conclusion that he never in fact changed his domicile of origin. He seems to have been a rolling stone, moving in the direction of least resistance, and making his abode where it was easiest to obtain a living, but this is not the way in which the matter should be approached.

I must determine whether, when he went to Chicago in 1892, he went with the fixed intention of making it his permanent home. I think he did. This is in accordance with his own evidence, and the evidence of the plaintiff. The subsequent course of events must be looked at to test the evidence, but in it there is nothing inconsistent with a change of domicile in 1892. In *Seifert* v. *Seifert*, (1914), 23 D.L.R. 440, 32 O.L.R. 433, I reviewed with care the law relating to change of domicile, and nothing would be gained by repeating it here.

Then, finding that in 1892 the "married pair" had acquired a domicile of choice in Chicago, that domicile was not changed until after the decree had been pronounced.

The validity of the Chicago divorce is attacked upon the ground of fraud upon the Court of Illinois. This question is again determined by the decision in *Bater* v. *Bater* (*supra*), for it was there held that: "A divorce granted by a foreign Court being a judgment affecting the status of the parties stands upon the same footing as a judgment *in rem*, and therefore *cannot be set aside* in this country even on the ground of fraud, by a person who was no party to the proceedings in which the judgment was pronounced."

The effect of this is that the defendant here cannot be permitted to indirectly attack this Chicago decree to which he was no party—by it the marriage was dissolved and the status of an unmarried woman was conferred upon the plaintiff. At this point of time the defendant had no right to complain. He

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accepted the situation, and married the plaintiff upon the faith of the status thus conferred upon her, and it would be a monstrous thing to hold that this marriage conferred upon him any status to attack the earlier divorce, and so annul his marriage.

But quite apart from that I have perused the evidence taken in Chicago, and it is clear that no fraud was practised upon the Court. All the material facts as now disclosed upon this trial were before the Chicago Court.

It is not easy to follow the line of attack on the Chicago judgment. The statutes of Illinois referred to by Mr. Patterson, a Chicago lawyer, called for the defence, do not require domicile in the sense that that term has in international law, but residence merely. Case law has established that this residence, though not equivalent to domicile, is not to be a merely transient stay "there must be some intent of permanent business or stay." *Way* v. *Way*, 64 Ill. 406.

My finding of a Chicago domicile includes a finding of such an *animus manendi*, and I am satisfied that the learned, careful and experienced Judge who presided at the trial was also satisfied of his jurisdiction.

The statute quoted by Mr. Patterson, R.S.I. ch. 40, secs. 2 and 5 (identical with the law then in force), provides:—

"(2) No person shall be entitled to a divorce in pursuance of the provisions of this Act who has not resided in the State one whole year before the filing his or her bill or petition, unless the offence or injury complained of was committed within this State or whilst one or both parties resided in this State."

"(5) The proceedings shall be had in the County in which the complainant resides, but process may be directed to any County in the State."

The temporary absence of the married pair in Ontario without any intention when leaving of abandoning the Chicago residence did not, I think, defeat the jurisdiction—and beyond this the offences or injuries complained of were committed within the State, and whilst both parties resided in the State. That subsequent offences were committed out of the State seems to me immaterial.

The question of status of individuals must be capable of determination by the Courts or other appropriate tribunals of some country, and the fundamental principle recognized by international

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law, as already shewn, is that this is the function of the tribunals of the domicile, and much may be said in favour of the view that when once the domicile is ascertained, the inquiry ought to end, and the decision of the Court of the domicile ought to be accepted without further inquiry.

It has been suggested by a very learned author (Dicey, 22 L.Q.R. 240), that the question is still open, and that when it has been found that the foreign Court has, by reason of domicile, from an international point of view, jurisdiction to grant a divorce, it may be open to an English Court to consider whether the foreign Court had jurisdiction under the foreign law to entertain the suit.

I am, however, of the opinion that when once it is made to appear that the foreign Court has a general jurisdiction over the subject with which it has dealt, and that the persons with whose rights and status it has dealt were so resident within its jurisdiction as to be properly subject to the authority of the foreign state, and to owe to it such allegiance as to entitle its Courts to assert jurisdiction over them—then our Courts ought never to attempt to enquire whether this jurisdiction has been properly exercised. This is, I think, the effect of *Pemberton* v. *Hughes*, [1899], 1 Ch. 781-790.

If the inquiry is open, then I think the Chicago Court had jurisdiction. The only evidence before me failed to raise in my mind any doubt upon the question.

The question was carefully considered by a competent solicitor at the time. The importance of it was realized by all concerned, including the defendant, who contemplated marriage with the plaintiff if she secured her divorce, and I have no doubt that at that time it was honestly thought by all that the domicile was in Chicago, and that the Illinois Court had for that reason jurisdiction.

It was faintly suggested in argument that the suit in Illinois was collusive. There is absolutely no evidence to justify this contention.

It is not unimportant to note that when the defendant obtained the marriage license in Ontario, on 7th May, 1896, he described his intended wife as residing in a suburb of Chicago.

The plaintiff is entitled to alimony—unless the parties agree that there must be a reference to the Master to fix the amount.

The plaintiff is also entitled to her costs. I award these as

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between solicitor and client, and intend by this award to give to her as wide a remedy for costs and as near an approach to indemnity as the Court has power to afford.

February 20, 1917. Motion by the plaintiff to vary the minutes of the judgment in an action for alimony.

M. L. Gordon, for plaintiff; *R. T. Harding*, for defendant.

MIDDLETON, J., in a written judgment, said that the plaintiff claimed permanent alimony from the date of the writ of summons, less any sum paid for interim alimony; but there was nothing to justify the claim. Where interim alimony has been ordered, permanent alimony runs from the date of the judgment only—following the English practice, which is set out in a Rule.

The learned Judge awarded the plaintiff "costs as between solicitor and client," and in his reasons for judgment expressed the hope that the plaintiff's costs might be liberally taxed so as to afford the plaintiff as near an approach to indemnity for costs properly incurred as was practicable. The learned Judge was now asked to embody in the formal judgment some provision going beyond the expression "costs as between solicitor and client." He could find no authority for so doing, and he did not think that he should in any way interfere with the responsible duty of the Taxing Officer in determining what costs were reasonably and properly incurred.

The obligation of the husband to pay his wife's costs rests upon his matrimonial obligation. She cannot impose upon him an obligation beyond what is reasonably necessary for the assertion of her rights; but the Taxing Officer ought to consider what has been done; in the endeavour to assert her rights, sympathetically rather than critically, and in the light of the fact that there is no other way in which the plaintiff's solicitor can secure payment, unless the wife encroaches on her alimentary allowance or her friends come to the rescue.

An endeavour must be made to afford the wife protection, but no undue burden must be cast upon the husband by any costs incurred through overcaution or extravagance upon the part of the wife.

AN ACT TO REVISE THE LAW IN RELATION TO DIVORCE.

Section 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly, that every case in which a marriage has been or hereafter may be contracted and solemnized between any two persons, and it shall be adjudged in the manner hereinafter provided that either party

at the time of such marriage was and continues to be naturally impotent; or that he or she had a wife or husband living at the time of such marriage, or that either party had committed adultery subsequently to the marriage, or has wilfully deserted or absented himself, or herself from the husband or wife without any reasonable cause, for the space of two years; or has been guilty of habitual drunkenness for the space of two years; or has attempted the life of the other party by poison or other means shewing malice; or has been guilty of extreme and repeated cruelty; or has been convicted of felony or other infamous crime, it shall be lawful for the injured party to obtain a divorce and dissolution of such marriage contract.

Section 2. No person shall be entitled to a divorce in pursuance of the provisions of this Act, who has not resided in the State one whole year next before filing his or her bill or petition, unless the offence or injury complained of was committed within this State, or whilst one or both of the parties resided in this State.

Section 4. The Circuit Courts of the respective countries and the Superior Court of Cook County shall have jurisdiction in all cases of divorce and alimony allowed by this Act.

Note.—The Illinois statute requires residence in the State for one year *next before* the commencement of proceedings, to give jurisdiction, or commission within the State of the offence complained of, or whilst one of the parties resided there. In this instance the complaint made was of an offence committed in Chicago whilst the parties resided there, but this had been condoned by subsequent cohabitation in Ontario. The later offences if conclusively proved would revive the cause of action which had been abated by the condonation. (*Moorhouse* v. *Moorhouse*, 90 Ill. App. 401; *Sharp* v. *Sharp*, 116 Ill. 509.) If no mention of the condonation and subsequent offence were made in the petition, a fraud was practised on the Illinois Court, by suppression of the truth, yet Middleton, J., says: "The offences complained of were committed in Chicago. . . All the material facts were before the Chicago Court. . . That subsequent offences were committed out of the State (after condonation of those complained of) seems to me immaterial;" that is, that it was immaterial to mention the condonation, and prove the offences which revived a lost right of action. The truth is, that unless later offences had revived the cause of action alleged, that cause was lost by condonation, and therefore the late offences were not only material, but without strict proof of them no decree could have been procured. In alleging these offences, Middleton, J., seems to have relied upon the undisputed evidence of the wife, on a point not at issue in *C* v. *C*; since it is unlikely that the husband in his evidence in *C.* v. *C.* was asked or admitted these later offences. **Note.**

The question of domicile of choice was vital in this case, because the marriage was "English," in that sense of the word which makes the English Courts so jealously regard proof of acquired domicile. The marriage had been celebrated in Ontario, between parties domiciled there, who continued to reside there for years, and returned there after a brief and unhappy residence in Chicago. The husband had gone to Chicago to get work, he gave up his job to wait upon the death of his father in Ontario, and he remained there in charge of property he then acquired, and was actually residing there when the divorce proceedings were commenced, going to Chicago for the purpose of being served with the papers which initiated the proceedings.

Note. Five days after the divorce was granted, the divorcee married again, and a few months later the divorced husband also married a woman he had met before the divorce. Middleton, J., said there was no proof of "collusion"; it can hardly be said there was no proof of mutual "accommodation." Middleton, J., also said: "There is much to lead to the conclusion that the husband never in fact changed his domicile of origin (Ontario). He seems to have been a rolling stone moving in the line of least resistance, making his abode where it was easiest to obtain a living." That language seems to very exactly describe the facts, yet, the Judge found that a domicile in Chicago had been acquired, and a domicile is required to be "permanent," "bonâ fide," "real" and "existing," to use the language of the ruling cases, in order to give jurisdiction which English Courts will recognise.

The question of reversion to the domicile of origin was not dealt with by Middleton, J., except that he says: "The temporary absence of the *married pair* in Ontario, without intention of abandoning the Chicago residence, did not, I think, defeat the jurisdiction, and beyond this, the offences or injuries complained of were committed in the State whilst both resided there." This seems misleading, for the wife "left him" in Chicago, and went to Ontario and they did not live together again until he came to Ontario. When she did return to Chicago, it was temporarily, for the sole purpose of getting a divorce. Furthermore, reversion to domicile of origin would result from the husband's abandonment of the Chicago domicile of choice, and while the fact that the offence was created in Chicago whilst the married pair resided there would give statutory jurisdiction to the Chicago Court to decree a divorce (sec. 2), English law does not recognise jurisdiction based on anything else than "domicile," within the English meaning of that word. The Judge therefore mixed two matters, in the words just quoted.

What the intention of the husband was in leaving Chicago, or what intention he had formed as to domicile, prior to the application for divorce, should be gathered from his acts and surrounding circumstances, and not from his own evidence, since the manifest necessity he was under of justifying his own conduct made his evidence untrustworthy (per Cairns, C., in *Bell* v. *Kennedy*, (1868) L.R. 1 Sc. & Div. 313). Middleton, J., says: "The husband inherited some property upon his father's death (February), and stayed in Ontario to manage it, and abandoned his intention of returning to Chicago. . . Divorce proceedings were instituted in March. . . Afterwards he lived some years in Ontario." The fact that the decision to remain in Ontario was caused by the need of caring for the property acquired in February, establishes almost conclusively that the intention to abandon the Chicago domicile was formed before the divorce proceedings were commenced in March. If so, the domicile of origin (Ontario) had revived, and English law would not recognise any jurisdiction in the Chicago Courts to decree the divorce (6 Hals. 193). To admit that it was the coming of the property into his possession which caused him to decide to remain in Ontario, and then to postpone the date when he formed that intention until he had gone to Chicago to be served with the divorce paper, is too accommodating altogether. It seems quite clear that both parties wanted a divorce, that it would be difficult to get it from the Canadian parliament, and that to allege a continuing domicile in Chicago was very tempting.

The concluding remarks of Middleton, J., that because all the parties concerned knew what they were about when the divorce was obtained,

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there should be a conclusion favourable to the legality of the decree, suggests the existence of an estoppel against the defendant, but the public interest is the main thing to be guarded, and estoppel has nothing whatever to do with the matter. If all the parties knew what they were about, there could be no estoppel of one by the other. A marriage claimed and denied on the ground of an existing marriage; a foreign divorce pleaded, and its legality denied for want of jurisdiction; the question of law should be settled on principles aimed only to preserve the morality of married life.

The unusual directions as to costs given in the main judgment, considered in the light of the later explanation, evidence a very keen and not unnatural sympathy by Middleton, J., with the plaintiff, and suggest that his findings were influenced thereby. "Hard cases make bad law," and no harder cases arise perhaps than cases of this kind; judgments establishing the nullity of proceedings long before inevitably impose hardships; nevertheless preservation of the public interest in the binding nature of the marriage tie and strict examination of all foreign divorce, will in the end prevent more private suffering than will regard for the hardships of particular instances.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Hodgins, JJ.A. January 12, 1917.

MASTER AND SERVANT (§ I C—10)—BREACH OF CONTRACT—TRANSACTIONS ARISING OUT OF BREACH—MEASURE OF DAMAGES.

In an action for damages for breach by a master of a contract of employment profits earned by the servant after the breach, in a transaction arising out of or in consequence of the breach, during the time and with the abilities which would otherwise have been given to the master's service, should be deducted from the salary payable under the contract, in order to assess the damages, even though the transaction has necessitated the investment of capital by the servant and the pledging of his assets.

[*Cockburn* v. *Trusts and Guarantee Co.*, 32 D.L.R. 451, reversed.]

Statement.

APPEAL by the defendants from the judgment of MIDDLETON, J., 32 D.L.R. 451, 37 O.L.R. 488. Reversed.

Sir *George C. Gibbons*, K.C., and *W. J. Boland*, for appellants.

Hamilton Cassels, K.C., for respondent.

The judgment of the Court was read by

Hodgins, J.A.

HODGINS, J.A.:—Appeal by the defendants from the judgment of Middleton, J., who has allowed the respondent $4,000 damages for breach of a contract to employ him for five years. The sole question is, whether that amount or nothing at all should be recovered.

There are really two periods in question, into which the two years for which the respondent sues may be divided. The first is 66 days, during which the respondent was selling the assets he purchased on the 10th and 18th February, 1914; the second, the rest of the two years, when, having joined the company he had formed

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to buy the assets, he became its sales-agent on a commission basis. He made $11,000 profit on his sale of the assets in the 66 days, and lost somewhat as sales-agent.

In answer to the trial Judge, the respondent said that in the two years in question, after the liquidation, he thought he could have got positions at half his old salary, but not more, owing to the depressed trade conditions due to the war.

His claim is $9,000, *i.e.*, $10,000 for two years, less $100 received from the liquidator, and $900 which he allows for the 66 days during which he was disposing of the assets he had bought. The appellants contend that, as the respondent made a clear profit of $11,000 during those 66 days, he has suffered no damage at all.

The allowance of $4,000 suggests that against the $9,000 the learned trial Judge has deducted $5,000, or the amount which the respondent thinks he could have earned during the two years in employment somewhat similar to that he had been in.

The views of the learned Judge, as indicated in 37 O.L.R. at pp. 490, 491, may be summarised thus: "Any extraordinary profit which he may earn as the result of any business or speculation which he may undertake before the term has expired cannot be considered;" and (2) that the prinicple which applies, where the servant does not choose to remain in idleness, but undertakes an entirely different occupation, or enters upon business for himself, is the same as when he does not seek new employment. And this principle is, that "the Court must mitigate the damages by estimating his chance of having obtained employment if he had sought it."

In the result, he excludes the profits as not proper to be considered, and, having done so, then assesses the damage upon the basis of the loss over the estimated probable salary.

The duty of a party to a contract which has been broken by the other party to mitigate the loss is very clearly stated in recent cases. In *Jamal* v. *Moolla Dawood Sons & Co.*, [1916] 1 A.C. 175, Lord Wrenbury says (p. 179): "It is undoubted law that a plaintiff who sues for damages owes the duty of taking all reasonable steps to mitigate the loss consequent upon the breach and cannot claim as damages any sum which is due to his own neglect." This case is followed here in *Hamilton Gas and Light Co. and United Gas and Fuel Co.* v. *Gest* (1916), 37 O.L.R. 132, 31 D.L.R. 515.

In *British Westinghouse Electric and Manufacturing Co. Limited* v. *Underground Electric Railways Co. of London Limited*, [1912] A.C. 673, Haldane, L.C., after stating that the quantum of damages is a question of fact, says (p. 689): "I think that there are certain broad principles which are quite well settled. The first is that, as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed. The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps." After citing the case of *Staniforth* v. *Lyall* (1830), 7 Bing. 169, in which, the charterers having refused to load a ship in New Zealand, the ship-owner was held bound to bring into account the profits of the circuitous return-trip which proved more profitable than the original venture to New Zealand would have been, he says (p. 690): "I think that this decision illustrates a principle which has been recognised in other cases, that, provided the course taken to protect himself by the plaintiff in such an action was one which a reasonable and prudent person might in the ordinary conduct of business properly have taken, and in fact did take whether bound to or not, a jury or an arbitrator may properly look at the whole of the facts and ascertain the result in estimating the quantum of damage."

In two of the expressions used by Lord Haldane are, I think, to be found the solution of the point raised by this appeal. The case is of high authority, the judgment having the adhesion of Lords Ashbourne, Macnaghten, and Atkinson. One of the statements that I refer to is that the quantum of damage is a question of fact, and the other is that the subsequent transaction, if it is to be taken into account, must be one arising out of the consequences of the breach and in the ordinary course of business.

It has been laid down by Mr. Justice Erle in *Beckham* v. *Drake* (1849), 2 H.L.C. 579, at p. 607, that: "Indemnity for the loss of his bargain in respect of his labour would be settled on the same principle as for the loss of a bargain in respect of common mer-

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chandise. If goods are not delivered or accepted according to contract, time and trouble as well as expense may be required, either in getting other similar goods or finding another purchaser, and the damages ought to indemnify, both for such time, trouble, and expense, and for the difference between the market price and the price contracted for. Loss of time and trouble would be occasioned by a breach of contract in respect of goods, as well as by a breach of contract in respect of employment; but they are such time and trouble as have a known merchantable value, and the compensation is measured wholly regardless of the considerations which guide where bodily or mental pain is the direct object of contemplation."

On the quantum of damage for breach of contract the facts are allowed to speak for themselves. This appears from *Erie County Natural Gas and Fuel Co.* v. *Carroll*, [1911] A.C. 105; *Wertheim* v. *Chicoutimi Pulp Co.*, [1911] A.C. 301; and *Bwllfa and Merthyr Dare Steam Collieries Limited* v. *Pontypridd Waterworks Co.*, [1903] A.C. 426; *Brace* v. *Calder*, [1895] 2 Q.B. 253.

In *Sowdon* v. *Mills*, 30 L.J.Q.B. 175, Blackburn, J., said (pp. 176, 177): "If an action is brought by a servant for a wrongful dismissal soon after the dismissal, the Judge tells the jury they must speculate on the chance of his getting a new place and base their damages on that. If the action is delayed until the man has got a place, what was matter of speculation before becomes certain then, and the jury calculate accordingly."

Crompton, J., in *Emmens* v. *Elderton* (1853), 4 H.L.C. 624, at 645, in speaking of a broken contract of service, says: "If he has obtained, or is likely to obtain, another situation, the damages ought to be less, or nominal, according to the real loss."

In *Laishley* v. *Goold Bicycle Co.*, 4 O.L.R. 350, Ferguson, J., held that there were no damages coming to the plaintiff because he had immediately after his discharge obtained appropriate employment where he earned and was paid more than his damages for wrongful dismissal would have amounted to.

There was, if the profits made by the respondent are properly to be taken into account, no damage in fact suffered by him owing to the breach of contract, because in the period of two years he made more than his two years' salary. This raises an interesting question. On the one side it is contended, and it is so held by the

learned trial Judge, that, as this was earned not in similar employment but in a commercial venture which necessitated the respondent pledging his credit and involving his assets, it is not relevant to the question of damages on this contract. On the other hand, it is said that anything that shews that the respondent is not actually out of pocket must be considered in assessing damages. I think that the latter is much too broad a statement, and that it must be modified by eliminating everything that lies outside the idea that the respondent is in some way forced to do something caused by the breach of contract, thus mitigating the results which flow from its breach. If, for instance, immediately after dismissal, the respondent had fallen heir to an estate producing $5,000 a year, or had by a lucky chance speculated in stocks and made a large amount, or if he spent the time which was not previously occupied in his lost employment so profitably as to bring him a good income, then each of these would be something quite apart from the contract and in no way related to its performance or non-performance. But, if his time and ability which he had exchanged for a salary are, upon his employment ceasing, devoted to producing an income to take the place of that salary, whether by way of sale and purchase, commission, or otherwise, then it seems to me very difficult to suggest any reason why the amount he realises from the employment of those very same two factors should not be treated as something to be set off against the damages. He himself credits $900 for the use of his time and ability for these 66 days. It is said that the employment which he was bound to seek necessitated no such responsibility as he undertook, nor any pledging of his assets such as was required to produce the profit of $11,000. As a matter of fact, it turns out that in order to secure his original agreement for salary he had to put up $5,000 in cash. That, however, is only by the way. But, if his time and ability were really engaged, as well as his responsibility and assets, there is still the connection between the contract broken and his efforts to avert its effect, though done in a somewhat, or even in a completely, different way, in order to produce the equivalent of the salary lost and to avoid the consequences to him of the breach. If it becomes evident that his responsibility and assets did in fact earn the profit, and not his time and ability, then the connection disappears. But once grant the connection, and I cannot see why the profits, the making of which involved his time

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and ability, should not be fully taken into account in mitigating the damages.

The true rule as to damages, as stated in *Wertheim* v. *Chicoutimi Pulp Co.* (*ante*), is indemnity, i.e., that the party complaining should, so far as it can be done *by money*, be placed in the same position as he would have been in if the contract had been performed. It is not that he should gain more than he could have got if the contract had been carried out, and be put, not in the same position, but in a much better position. In the *Wertheim* case the purchaser might have had to go into the market and either spend his money, pledge his assets, or incur responsibility in buying the goods, and in the *Erie Gas* and the *Westinghouse* cases (*ante*) the parties complaining actually did expend very large sums in endeavouring to overcome the consequences caused by the breach of contract. So that there is nothing unheard of in the incurring of responsibility or in the expenditure of money or the pledging of means, nor can it be said to introduce an element wholly changing the basis upon which mitigation depends.

Here it may be fairly said that in what he did the respondent was taking a course to protect himself such as a reasonable and prudent person might in the ordinary course of business properly have taken, and that that course arose out of the transaction of hiring and service and its breach. Its effect may therefore be taken into account, even though there was no duty on him to act as he did.

The transaction by which the respondent made this money was a reasonable and most natural one. The company which had employed him went into liquidation, and its assets were for sale. There is, so the respondent states, only one linen concern, a small one, and there was no other market for his talents in that line. His knowledge of the business and assets of the company with which he was connected was such that it was almost inevitable that he should endeavour to save himself in the way he did. His profit resulted from a transaction naturally attributable to the consequences of the breach, and was not of a character independent of it. It directly involved the time and ability which would have had to be devoted to the broken contract, and cannot be compared to a contract with a third party as to something else, which was the case dealt with in *Williams Brothers* v. *Ed. T. Agius Limited*, [1914] A.C. 510.

I cannot agree that the fact that what the respondent did was entirely different from what he was called upon to do, makes an essential difference. It is what he in fact did that is important, though he might not have been bound to do it. If what he did was the consequence of the situation caused by the breach of contract, and resulted in minimising the loss caused thereby, and was not something independent of it, in the sense that it might have happened if there had been no such breach at all, I think the other party is entitled to the benefit of it in mitigation of damages. The point involved here has been decided in New York State, in the First Department of the Supreme Court, in *Richardson* v. *Hartmann* (1893), 68 Hun (75 N.Y. S.C.) 9; see also *Lee* v. *Hampton* (1901), 79 Miss. 321.

Unless one is to adhere to definitions and qualifications, there seems no real answer to the analogy put by Mr. Justice Erle. Even admitting that the duty of a discharged employee is only to seek employment similar in character to what he has lost, yet, if he go beyond his duty and do something else, what he has done cannot be excluded from consideration unless theory is stronger than practice. To inquire into what he has actually earned or made, presents no difficulty beyond that solved in the cases that have been referred to, such as *Staniforth* v. *Evans* and the *Erie Gas* case. See also *The Mediana*, [1900] A.C. 113.

It has been suggested that the financial responsibility incurred by the respondent and the pledging of his assets must be regarded in estimating the amount to be considered as profits properly minimising the loss. It is said by Erle, J., in the passage I have noted, that, in case of the breach of a contract in respect of common merchandise, time and trouble as well as expense may be required in getting other similar goods or finding another purchaser, and that the damages should indemnify against these, as well as the difference in price. There is nothing to shew that the profits here stated at $11,000 are not over and above all the expense properly incurred in earning them, and the case was so argued. While interest and all proper charges should be allowed for, the profits must represent the value of the respondent's time as well as the trouble taken by him. As to the financial responsibility and the risk of his goods, there seems to me no valid ground for making them separate items to be deducted from the profits stated. Their inclusion or exclusion must depend upon the proper

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conception of what it is that requires any credit to be made at all. Is it that the respondent was performing the contract for the appellants, and so is entitled to charge against the appellants as their agent compensation for risk and the pledging of his goods? Or is it that he is only entitled to his true loss, either estimated, if it is incapable of actual ascertainment at the moment, or actual, if what he has done has resulted in that loss being definitely known, or, in fact, being completely obliterated.

I think the latter is the proper conception of his right to damage. If so, I cannot see on what principle he can withhold any part of the actual profit because it has been produced in association with other people or as the result of a combination of his time and ability with other things personal to himself. He is the one who has chosen to act so as to occupy the time for which he claims damage, in a certain, and it may be a more risky or onerous way, and I do not see how that added risk or responsibility can properly be regarded as a factor, as against the appellants, in affecting the actual result produced. These matters, as it turned out, cost him nothing, not even a sleepless night, so far as the evidence discloses, and there is no basis in this case for their separate assessment.

The mode adopted and the difficulties encountered are really no concern of the other party. They are the respondent's own affair, as it seems to me, and merely a means to an end. He did not require to embark on the venture, but, having done so, he is bound to admit that he has in fact suffered no loss by so doing.

I think, therefore, that the appeal should be allowed with costs. The respondent is in strictness entitled to nominal damages, and may have judgment for them, with such costs as would be taxed if he had claimed them in the Division Court, with a set-off to the appellants. If he does not take judgment in this form, the action will be dismissed with costs. *Appeal allowed.*

IMP.

P. C.

WOOD v. HAINES.

Judicial Committee of the Privy Council, Viscount Haldane, Lord Parker of Waddington and Lord Wrenbury. January 25, 1917.

PRINCIPAL AND AGENT (§ III—30)—*Fiduciary relationship—Accounting by agent for misappropriated funds—Action to recover back payments—Documentary evidence as to veracity.*]—Appeal by

plaintiff from the judgment of the Supreme Court of Ontario, Appellate Division (10 O.W.N. 46). Reversed. IMP. P. C.

The judgment of the Board was delivered by

LORD WRENBURY:—This is an appeal against the judgment of the Appellate Division of the Supreme Court of Ontario, which set aside the judgment of the trial Judge and dismissed the action. The action was brought to recover a sum of $29,000 paid by one Jas. Johnston to the respondent Haines under certain 6 transactions to be presently mentioned, and interest upon the amount. Johnston has died pending the action. The appellants are his executors. The transactions in question took place between the year 1906 and the summer of 1908. The action was commenced on December 4, 1914; but no question is raised upon the Statute of Limitation. Their Lordships hold, and the respondent does not dispute, that the defendant stood towards the plaintiff in the position of a fiduciary agent, so that no question upon the statute arises.

The first transaction was one in which the plaintiff paid to the defendant a sum of $2,000 as his subscription for stock in a company which the defendant represented to the plaintiff that he was organising to be known as the British-American Sign Co., Ltd. The other five transactions had to do with a company called the Canadian Forty-mile Gold Dredging Co., Ltd., whose shares were $100 each. This company was reorganised by the name of the Consolidated Gold Dredging Co., of Alaska, whose shares were of $10 each. The plaintiff's case is that in the second, third, fifth, and sixth transactions the defendant, representing himself to be the agent of the company, offered, as the local phrase is, to sell him the company's stock on behalf of the company, or, as it would be expressed in this country, asked him to take an allotment of shares in the company and pay the company the subscription price. The plaintiff's case further is that in the fourth transaction the defendant represented that one, William John Smith, who was a large shareholder in the company, was in difficulties and wanted to dispose of his shares, and induced the plaintiff to buy from Smith (as he supposed) 1,000 shares of $10 each at $6 a share, paying a sum of $6,000.

As regards the first transaction, the plaintiff says that the $2,000 were paid to the defendant for a defined purpose, as above

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stated, that the defendant did not use the money for that purpose, but appropriated it to his own use and applied it towards the purchase of a bankrupt business which had been carried on by a firm theretofore trading as the British American Sign Co. As regards the other five transactions, he says that the moneys paid by him to the defendant for the purchase from the company of the company's stock, or the purchase from Smith of Smith's stock, as the case may be, were not so applied, but were appropriated by the defendant to his own use, and shares of the defendant himself were transferred to the plaintiff in pretended performance of the obligation towards the plaintiff.

The trial Judge found all the issues in favour of the plaintiff. There is a direct conflict of evidence between the plaintiff (who was then alive and gave evidence) and the defendant. The trial Judge, who saw both witnesses, has believed the plaintiff, and, as to the defendant, has said:—

> Concurrent documentary evidence is invaluable where it can have but one meaning, but, subject to this, I attach no value to the defendant's evidence. Unscrupulous, dishonest, and untruthful, is the opinion I have of him after listening to his evidence, carefully noting his demeanour, and asking two or three questions myself; and that he gave rein to his peculiar qualifications for bringing about the transactions complained of in these transactions, and substantially as the plaintiff alleges, I have no doubt whatever.

In the Appellate Division, Meredith, C.J.O., in a long and careful judgment, relies upon discrepancies between evidence given by the plaintiff in his examination on discovery and evidence he gave at the trial and upon documentary evidence found in the certificates and other documents relating to the matter as leading to the conclusion that the trial Judge was wrong in his view of the evidence and in his opinion as to the credibility of the witnesses, and that the plaintiff failed to make out his case. Their Lordships have heard, with immaterial short exceptions, the whole of the evidence in this case read, and are, therefore, in a position as favourable as was the Appellate Division for forming an opinion in this matter. They are not impressed by the discrepancies to which allusion is made. It is to their mind plain that the plaintiff, under the stress of cross-examination, was led to say, for instance, that he made this or that mistake, when, in fact, he had made no mistake at all. They see no reason to doubt that the plaintiff was telling a truthful story. In this they agree with

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the trial Judge. As regards the defendant, if it were for their Lordships to form an original opinion as to whether he is to be believed or not, they would not hesitate, after reading his cross-examination throughout, to say that the finding of the trial Judge as to his credibility is right. But the above is not the right way to proceed in a case where the only question is one as to the credibility of witnesses. It must be an extraordinary case in which an appellate tribunal can accept the responsibility of differing as to the credibility of witnesses from the trial Judge who has seen and watched them, whereas the appellate Judge has had no such advantage.

In the case of documentary evidence, no doubt the case is otherwise. Their Lordships, however, cannot find in the documents anything to throw doubt upon the story which the plaintiff tells. The documents are all consistent with it with the sole exception of the letter of May 15, 1913, if it be an exception. As regards that letter, it was obviously obtained for a purpose. It is in the defendant's handwriting, and, looking at the circumstances under which he procured the plaintiff to sign it, their Lordships regard it as evidence rather against than in favour of the defendant. An honest man does not commonly come and ask for a certificate of honesty. Their Lordships believe the story of the plaintiff and not that of the defendant.

The case, then, is one of payment by the plaintiff to the defendant, as his fiduciary agent, of a sum of $29,000, which the latter has misapplied. As a result, the plaintiff has received certain shares. These he must return, so far as he has not returned them already. The appeal must be allowed. The order will take the form of a declaration that the moneys paid by the plaintiff to the defendant were paid to him as the fiduciary agent of the plaintiff, and have been misapplied: a declaration that the defendant must account for such moneys with interest, and the plaintiff undertaking to return to the defendant the shares not already returned by him: judgment for the plaintiff for $39,600.17, this being the aggregate of the $29,000 and interest. The defendant must pay to the plaintiff the costs of the action in the Courts below and before this Board. Their Lordships will humbly advise His Majesty accordingly.

Appeal allowed.

N. B.

S. C.

McINTOSH v. POIRIER.

New Brunswick Supreme Court, McLeod, C.J., and White, and Grimmer, JJ. November 15, 1916.

APPEAL (§ VI A—280)—*Notice—Failure to enter—Costs.*]—Respondent moved pursuant to notice, for his costs of appeal and of this application on an affidavit setting forth: that in an action in which Lucy McIntosh is plaintiff and Felix Poirier, William Poirier and Joseph Poirier, are defendants, tried before the Chief Justice of the King's Bench Division, without a jury, at the Gloucester Circuit, in August, 1916, a verdict was entered for the plaintiff for $250 damages; that on the 11th day of September, 1916, notice of appeal was served and no notice of withdrawal had been given; that the appeal had not been entered on the appeal paper for the November sittings of the Appeal Division and no factum had been filed or served as required by O. LVIII., r. 8, as amended by 4 Geo. V. c. 38 (Acts, 1914); that a demand of respondent's costs had been made and refused.

The judgment of the Court was delivered by

WHITE, J. (oral):—We have looked at the Act and the several orders and rules thereunder which have any bearing upon this matter, and we find that our rules, so far as they affect the question, are practically identical with the rules under the English Act. The change affected by the Act 4 Geo. V. c. 38, s. 4, in rule 8 of O. LVIII. which, prior to that enactment, corresponded to the English rule, does not affect the question we are now considering.

It is desirable, in all cases where the conditions and our rules will permit, to follow the English practice under corresponding rules in matters of practice and procedure. Formerly the practice in this Court, where a party giving notice of appeal failed to prosecute it pursuant to the rules and practice, was for the respondent at the first opportunity at the sitting of the Court at which the appeal should have been entered (which would ordinarily be the second common motion day, the appellant having the right to move for leave to enter on the first) to move for leave to enter the appeal in order that a motion might be made to dismiss it with costs when reached on the docket: see *Duncan* v. *Reynolds* (1870), 13 N.B.R. 187; *Smith* v. *Halifax Banking Co.* (1895), 33 N.B.R. 1. The present English practice in case of the failure of the appellant to enter is for the respondent to make a demand for his costs, and, if not paid, to move on notice

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to discharge the notice of appeal and for his costs. There is no reason why this practice should not be followed in this Court. We think it desirable that it should be.

As has been stated, the first opportunity at which the motion could be made would ordinarily be the second common motion day, but in this case, as the appeal had been abandoned, we think the motion on the first day is in order, and the notice of appeal will be discharged with respondent's costs of the appeal and of this application as taxed by the Registrar to be paid by the appellants to the respondent or her solicitor forthwith on demand.

Ordered accordingly.

HERBERT v. ANDERSON.

Manitoba King's Bench, Mathers, C.J.K.B. November 17, 1916.

MAN.
K. B.

BROKERS (§ II B—10)—*Commissions—Agreement—"On any terms whatever"—Remuneration from other party.*]—Action for commission on the exchange of real estate. See Annotation, 4 D.L.R. 531.

M. G. Macneil, for plaintiff; *T. R. Robertson*, K.C., and *G. C. Macdonald*, for defendant.

MATHERS, C.J.K.B.:— The commission claimed is 5 per cent. on $65,000, the price placed by the defendant upon the hotel. By the listing agreement the defendant agrees to pay 5 per cent. if a sale is effected "on any terms whatsoever," but at the same time it was expressly stated that he would not exchange for farm lands or real estate as part payment. I think the agency agreement contemplated a sale for money and not a barter, and that the expression, "on any terms whatsoever," refers to terms of payment where the agreement is for a sale for money. If I am right in this conclusion, as I think I am, it follows that the plaintiff's claim for remuneration cannot be based on this agency agreement, but must be based, if at all, upon an agreement to be inferred from all the circumstances, to find a customer, ready, able and willing to take the hotel in exchange for other property. I have no doubt that the defendant knew the plaintiff was endeavouring to procure such a customer, expecting to be paid by the defendant for his services, and that the defendant assented to his so doing. The plaintiff did find such a customer, in the person of Downie, and the defendant accepted the benefit of his services, and entered into a binding agreement, to exchange the hotel for Downie's farm lands. The defendant admits that he knew the plaintiff

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was not doing all this work for nothing, but says he thought he was getting his remuneration from the other party. I cannot accept the defendant's evidence on that point. I believe he knew the plaintiff was working for a commission to be paid by him. He subsequently endeavoured to compromise with the plaintiff by offering him $500. His explanation that he offered the $500 merely as a present is not satisfactory.

The chief ground of defence relied upon by the defendant's counsel is that the plaintiff had an agreement with Downie for a commission of 2½ per cent. on the value of the farm lands.

He argues that the defendant was not aware that the plaintiff was being paid by Downie, and that, in accordance with the principles laid down in *Manitoba & N.W.L. Co.* v. *Davidson*, 34 Can. S.C.R. 255, he cannot recover from the defendant. That case, however, can have no application if the defendant knew that a commission was being paid by the other side. In this case there is direct evidence that the defendant was told during the negotiations and before the agreement was entered into that a commission of 2½ per cent. was being paid by Downie; but, apart altogether from this evidence, the defendant has sworn that he thought the plaintiff was getting his remuneration from Downie. There can, therefore, be no question that he knew or at least believed that the plaintiff was receiving pay from Downie. There is nothing unusual in an agent who brings about an exchange of properties being paid by both owners. And, where parties are aware that such is the case, and both had agreed to pay the agent for his services, he may recover from both: *Thordarson* v. *Jones*, 17 Man. L.R. 295.

I find as a fact that the defendant knew the plaintiff was to be paid by Downie a commission upon the value of the farm lands, and, knowing this, he went on with the negotiations and completed the agreement without any protest or objection. The plaintiff is, in my opinion, entitled to a verdict for the reasonable value of his services. The only evidence I have to go on as to what a reasonable commission is in the case of an exchange is the fact that the plaintiff agreed to act for Downie for 2½ per cent. I, therefore, fix the plaintiff's remuneration at 2½ per cent. on $65,000.

There will be a verdict for the plaintiff for $1,625 and costs.

Judgment for plaintiff.

CALGARY BREWING & MALTING CO. v. ROGERS. SASK.

Saskatchewan Supreme Court, Sir Frederick Haultain, C.J. November 27, 1916. S. C.

BILLS AND NOTES (§ IV B—91)—*Bills of Exchange Act (R.S.C. 1906, ch. 119, secs. 90 (2), 65)—Presentment for payment—By mail—Bill or cheque.*]—Action on account.

Fraser, for plaintiff. *Lockhart*, for defendant.

HAULTAIN, C.J.:—The correctness of the account is not disputed, but the defendant pleads payment of $700, part of the amount claimed under the following circumstances.

The defendant was hotel-keeper at Bienfait, Sask., and was a customer of the plaintiff company. The plaintiff company had apparently been in the habit of drawing on the defendant through a chartered bank at Estevan. The defendant wrote to the plaintiff and requested it to draw in future through the Bienfait branch of the Estevan Security Co., as he did his banking with that company and it would be more convenient for him.

On November 11, 1914, the defendant sent the plaintiff his cheque of that date for $700, to be applied on his account. The cheque was drawn on the Estevan Security Co., Bienfait. The cheque was deposited by the plaintiff in the Bank of Montreal, Calgary, for collection. The Bank of Montreal sent the cheque to the Estevan Security Co. by mail. The Estevan company debited the account of the defendant with the amount of the cheque and sent the Bank of Montreal a draft for the proceeds of the cheque drawn on the Union Bank, Winnipeg. This draft was dishonoured. Very shortly afterwards the Estevan Security Co. failed, with very heavy liabilities. The question now is whether the plaintiff or the defendant is to suffer the loss.

It is argued on behalf of the defendant that there never was any proper presentment of the cheque. The document in question is, so far as the Bills of Exchange Act is concerned, a bill and not a cheque: Bills of Exchange Act, sec. 165. *Trunkfield* v. *Proctor* (1901), 2 O.L.R. 326;

In my opinion there was a due presentation of the bill for payment by sending it through the post office: Bills of Exchange Act, sec. 90 (2); *R.* v. *Bank of Montreal*, 1 Can. Ex. 154 at 167.

Under ordinary circumstances a bill can only be discharged by payment in due course. Bills of Exchange Act, sec. 139, and payment must be made in money (*Morley* v. *Culverwell* (1840),

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7 M. & W. 174, at 183), unless the party to whom payment is to be made consents to some other form of payment or satisfaction: *Camidge* v. *Allenby* (1827), 6 B. & C. 373, 108 E.R. 489; *Guardians of Lichfield Union* v. *Greene*, 26 L.J. Ex. 140.

The Bank of Montreal cannot be held to have accepted the draft on the Union Bank in payment of the bill. The fact that the Estevan Security Co. charged up the amount of the bill against the defendant's account and returned it to him as paid creates rights and liabilities as between the two parties concerned, but cannot, in my opinion, alter the position of the parties to this action.

It was urged on behalf of the defendant that, by sending the bill by mail, the Bank of Montreal made the Estevan Security Co. its agent for the collection of the money, and that as soon as the company charged up the amount of the bill to the defendant it held the actual money as agent of the bank, and the defendant should not suffer for the failure of the company to transmit the money to the bank. If the question of agency arises, I would rather say that the defendant constituted the company as his agent to pay his cheques or bills drawn against his account and that he cannot be allowed to say because his agent made false entries in his account, or charged him up with money it never really paid, that a bill was paid that was not paid.

I think, therefore, that this defence cannot prevail and the plaintiff must have judgment for the amount of its claim and costs. *Judgment for plaintiff.*

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SASK. LAND & HOMESTEAD CO. v. C. & E. R. CO.

Alberta Supreme Court, Walsh, J. December 6, 1916.

COSTS (§ I—2)—*On dismissal of appeal from expropriation award—Taxation—Amount awarded.*]—Appeal from an order of the registrar. Reversed.

C. F. Adams, for plaintiff.

WALSH, J.:—The railway company, requiring certain land of the other company for the purposes of its railway, gave to it a notice to treat under the provisions of the Railway Act, in which it offered to pay $733.05 as compensation for the land and for any damages by the use of its powers therein. The Saskatchewan company refused this offer, and a Board of Arbitrators was ap-

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pointed to determine the compensation to be paid by the railway company. The award of a majority of this Board was that the railway company should pay as such compensation the sum so offered by it—namely, $733.05. From this award the Saskatchewan company appealed to what then was the Court *en banc*, by whom its appeal was dismissed with costs of the appeal to be paid by it. The acting registrar has taxed to the railway company its costs of this appeal under col. 2 of the schedule, because the amount of compensation awarded to the Saskatchewan company is less than $1,000, but more than $400, and from this taxation the railway company appeals.

The appeal is allowed with costs, and the registrar will tax to the railway company double the amount of costs taxable under col. 5 of the tariff which came in force on January 1, 1912, being the tariff which was in effect when the appeal to the Court *en banc* was heard.

Appeal allowed.

CITY OF COQUITLAM v. LANGAN.

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S. C.

British Columbia Supreme Court, Murphy, J. February 26, 1917.

TAXES (§ III D—135)—MUNICIPAL ASSESSMENTS—REVISION—APPEAL.

If a municipality has no power to make an assessment, the party assessed may resist the illegal assessment by an action, but if it has power the only remedy is by appeal to the Court of Revision.

ACTION to recover taxes.

G. A. King, for plaintiff; *P. J. McIntyre*, for defendant.

MURPHY, J.:—It is objected the roll was not delivered by the collector to the clerk pursuant to sec. 239 of ch. 52, B.C.Stat. (1914). But in this case the offices of clerk and collector were filled by one person. Consequently there is nothing in the objection, for such person acted on it in his capacity of clerk and also in his capacity of collector. Nor is there anything in the objection that no formal instructions under sec. 237 to collect the taxes were given to the collector. He did receive the roll and he did take proper steps to collect the taxes. Under such circumstances, I think the maxim *omnia præsumuntur recte acta* applied. Likewise in my opinion the objection that the action should be brought in the collector's name fails. Sec. 275 makes the taxes a debt due to the municipality. There is no provision that suit must be brought in the collector's name and in the absence of authority the wording of sec. 40 of ch. 46 B.C. Stat. (1915) does not seem

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to me to necessarily imply that the collector must sue in his own name, while sec. 275 by making taxes a debt due the municipality does imply that if suit is instituted it must be in the name of the municipality. The main defence is that the assessor never included improvements at all in his roll, and that in consequence the whole assessments for the years 1913, 1914, 1915 and 1916 are invalid. That the assessor did make this omission is admitted. I hold on the evidence that this was done in 1913 with the knowledge of the defendant, who was in that year a member of the counci of plaintiff municipality and sat on the Court of Revision. I hold that pl intiff municipality put it within his power to know that this omission was made in 1914, 1915, and 1916 by sending assessment and tax notices to a proper address to come to his attention. An inspection of these with the knowledge he had of what was done in 1913 would have shewn him that the system of omitting assessment on improvements was being followed in 1914, 1915, and 1916—in making up the assessment roll.

The principle applicable to this defence is, I think, if the power existed to make such assessment as was made, then there is jurisdiction in those doing it, and in such case a remedy is by appeal only. But if the assessment is illegal then there is no jurisdiction to make it, and in such case the person resisting is not compelled to resort to the remedy of appeal but may resist the illegal exaction. *Mun. of Tp. of London* v. *The G.W.R. Co.*, 17 U.C.Q.B. 262; *London Mutual Life Ins. Co.* v. *City of London*, 15 A.R. (Ont.) 629; *Toronto Railway* v. *Toronto Corporation*, [1904] A.C. 809. No question as to the legality of the imposition of the taxes actually sued for herein arises. They are imposed on lands situate within plaintiff municipality owned by defendant and there was clear jurisdiction to impose them. The complaint is that other taxable property was improperly omitted from assessment. This point was, if I understand the judgment, decided adversely to defendant's contention in *Trustees for School, Sec. 24 etc.* v. *Corporation Burford etc.*, 18 O.R. 546.

This decision was based on the so-called curative sections of the Ontario Act. The similar provisions of our Act are broader. Sec. 216 of said ch. 52 gives any person complaining of an error or omission in regard to himself or as having been under-charged or over-charged a right of appeal to the Court of Revision. Sub-

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sec. (*b*) of said section gives any person having a registered interest in any land within the municipality (as has the plaintiff) a right of appeal in reference to the assessment of any other person as being too high or too low or as having been wrongfully inserted or omitted from the roll. Secs. 214, 223 and 227 give wide powers to the Court of Revision to deal with the assessment roll. Provisions are made for appeals from the Court of Revision. Finally, sec. 230 makes the roll as settled by such appeals valid and binding on all parties concerned. I think, therefore, plaintiffs are entitled to judgment for all taxes claimed other than those for the year 1913 in respect of which defendant's name was put on the collector's roll by the collector. There was no authority to do this. Because the defendant paid some taxes, which were thus charged to him, he cannot be said to have agreed to pay those now sued for. Nor do I see that his action in paying some of such taxes estops him from objecting to such illegal act.

Judgment accordingly.

ROBERTSON v. RUR. MUN. OF SHERWOOD.

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Saskatchewan Supreme Court, Newlands, J. November 15, 1916.

Bridges (§ II—11)—*Non-repair—Duty as to highways—Injury to motorist—Municipal liability—Rural Municipalities Act (Sask.), secs. 218, 220.*]—Action against municipality for damages. Dismissed.

McNiven, for plaintiff; *Thomson*, for defendant.

NEWLANDS, J.:—The plaintiff while driving in his motor car along a road in the defendant municipality fell through a bridge on said road that was in a bad state of repair and damaged his car, and on account thereof brings this action for damages.

It is admitted in the pleadings that the highway and bridge in question were within the limits of the defendant municipality. It is further admitted that the bridge was in a state of non-repair, but that it was not dangerous to the travelling public. I find that this last statement is not true, but that the bridge was dangerous to the travelling public. I find further that defendants knew of the state of the bridge, that they took some precautions to warn the travelling public of the dangerous state of the bridge but that such precautions were not sufficient, and I find further that there was no contributory negligence on the part of the plaintiff.

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This leaves two other defences to be considered. These are: 3. The defendant denies that either the said highway, or the said bridge, was on August 19, 1916 (the day of the accident) or at any time prior thereto, or at all, under the direction, control or management of the defendant. 4. The defendant denies that it was the duty of the defendant to keep the said highway or the said bridge or the approach to the said bridge in a state of good repair, or that the defendant was under any duty whatever with respect thereto.

The bridge in question was built by the North-West Territories Government some years ago, and, on account of the piles rotting, the cribbing which kept the earth in gave way, leaving both the bridge and the approach thereto in a dangerous condition.

No evidence was given that this bridge or the control thereof was ever transferred to the defendant municipality.

Sec. 218 of the Rural Municipalities Act provides that the title to all public roads, highways, streets and lanes in every municipality is vested in the Crown, but they are subject to the direction, control and management of the council of the municipality.

Sec. 220 provides that the council shall keep in repair all bridges, culverts and ferries and the approaches thereto which have been constructed or provided by the municipality, or by any person with the permission of the council, or which if constructed or provided by the province have been transferred to the control of the council; and, in default of the council so to keep the same in repair, the municipality shall be civilly liable for all damage sustained by any person by reason of such default.

On a proper construction of these two sections, I take it that a bridge and the approach thereto is to be considered as distinct from the highway itself, and although sec. 218 puts the highway under the control of the municipality, sec. 220 reserves out of such control the bridge and the approaches thereto where the bridge has been built by the government, unless the government has transferred it to the control of the municipality.

As I have said, the bridge in question was built by the North-West Government; it would therefore be taken over as a public work by the government of the province, and as no evidence was

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given that its control was transferred to the municipality, it does not come under sec. 220 and the defendant municipality is not therefore liable under that section.

As this is a case of non-feasance, want of repair only, the defendant municipality is liable only if they are made so by statute, and as they are not liable under the statute in this case, there is no liablity on their part (*Mun. of Pictou* v. *Geldert*, [1893] A.C. 524) and the action must be dismissed with costs.

Action dismissed.

STOTHERS v. BORROWMAN.

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Ontario Supreme Court, Meredith, C.J.C.P., and Riddell, Lennox and Masten, JJ. October 18, 1916.

MORTGAGE (§ IV—50)—*Assignment of mortgage—Right of assignee to include payment of arrears in mortgage-claim.*]—Appeal by the plaintiff from the judgment of Latchford, J., affirming the report of Macbeth, Co. C.J., to whom a reference was directed to take accounts and tax costs. Affirmed.

The reasons for the report, explaining the facts, were as follows:

MACBETH, Co. C.J.:—On the 5th July, 1909, C. W. Hoskins mortgaged certain property in London to the Huron and Erie Savings and Loan Company. The mortgage was given for $2,000, to be repaid in four consecutive annual payments of $50 and a fifth payment of $1,800, with interest at 6 per cent. per annum payable half-yearly.

The wife of C. W. Hoskins is the daughter of the defendant.

Hoskins seems to have had difficulty in meeting his payments, and he asked the defendant to take up the mortgage. On the 31st July, 1913, some time after this request was made, the defendant went to the office of the loan company and stated that he wished to lift the mortgage. He learned that the arrears amounted to $208.65, which the company would accept, but that a bonus of $10 would be charged for prepayment of the moneys not then due. I give his own words for what then took place: "I said I did not like to pay the bonus; and the manager said: 'It has not long to run—let it run till due;' and I said I would lift it then; so I paid the arrears, $208.65, and I told them I would pay the balance when it came due. I got a receipt for money paid. My arrangement with Hoskins was that I should lift the mortgage. I told my daughter . . . that I was going to take up the mortgage.

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. . . I expected my payment would carry it over to the next year."

The receipt has been lost. A copy obtained from the loan company has been put in. It shews that the arrears on the Hoskins mortgage were, for principal, $153.92, and for interest, $54.73: in all $208.65; and that they were paid by T. L. Borrowman on the 31st July, 1913.

Subsequently Hoskins made the following payments on the mortgage:—

1914: Jan. 9, $31.50; Feb. 23, $12; July 5, $100; Aug. 10, $15.05—$158.55.

These payments apparently represent $50 of principal and 12 months' interest, and leave due on the mortgage $1,750 and interest from the 5th July, 1914.

Neither Hoskins nor the defendant in their evidence offered any explanation of the making of these payments by Hoskins.

On the 17th August, 1914, the defendant paid to the loan company $1,768.10, computed as follows:—

Principal, $1,750; interest accrued, $12.08; costs, 1.02; assignment fee, $5—$1,768.10.

No evidence was offered as to the costs, nor was it shewn why the costs of the assignment should be charged against the second mortgagee. It is admitted, however, that the company's mortgage was then assigned to the defendant, and that the debt then due thereon, and assigned to the defendant, was the said sum of $1,768.10.

The plaintiff held a second mortgage, given by Hoskins in 1909; but the defendant did not in fact know of any subsequent incumbrance until after the first mortgage was assigned to him.

The defendant has sold the property under the power of sale in the mortgage assigned to him by the loan company; and he contends that he is entitled to priority over the plaintiff, not merely for the sum he paid on obtaining the assignment, but also for the prior payment made by him.

Except as to the amount of the defendant's costs of selling, which I am directed to tax, the only question on this reference is the defendant's contention in respect of his payment of $208.65.

[The learned Judge then referred to and quoted from *Imperial Loan Co.* v. *O'Sullivan* (1879), 8 P.R. 162; *Watson* v. *Dowser* (1881), 28 Gr. 478; *Brown* v. *McLean* (1889), 18 O.R. 533; *McMil-*

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lan v. *McMillan* (1894), 21 A.R. 343; *Currie* v. *Currie* (1910), 20 O.L.R. 375; Fisher on Mortgages, Can. ed., pp. 597, 598, 670 (c); Halsbury's Laws of England, vol. 21, p. 180; *Patten* v. *Bond* (1889), 60 L.T.R. 583; *Forbes* v. *Moffatt* (1811), 18 Ves. 384; *Burrell* v. *Earl of Egremont* (1843), 7 Beav. 205; *Chetwynd* v. *Allen*, [1899] 1 Ch. 353; *Butler* v. *Rice*, [1910] 2 Ch. 277; *Manks* v. *Whiteley*, [1911] 2 Ch. 448, [1912] 1 Ch. 735; *S.C.*, *sub nom. Whiteley* v. *Delaney*, [1914] A.C. 132; *Noble* v. *Noble* 9 D.L.R. 735, 27 O.L.R. 342, at p. 347.]

It would seem to have been the opinion of Burton, J.A., in *McMillan* v. *McMillan*, that if a stranger, having previously made several payments on a mortgage, paid off the balance and took an assignment, he would not be entitled to a charge for the previous payments unless they were made under an agreement with the mortgagee for an assignment of the mortgage; and Hagarty, C.J.O., and Osler, J.A., inclined to the same opinion. It is suggested with great respect that the later decisions are more favourable to the stranger who pays a mortgage. *Imperial Loan Co.* v. *O'Sullivan*, which at first sight seems opposed to the defendant's claim of a charge for $208.65, is explained by Street, J., in *Brown* v. *McLean*, the explanation being that there was no stipulation or intention, on the part of the person making the advance, that he should have any priority over the second mortgagee; and there may be perhaps some reason to doubt whether *Watson* v. *Dowser* would be decided in the same way to-day: see sec. 64 of the Registry Act, R.S.O. 1914, ch. 124.

I think I must hold that the only question for me is, with what intention did the defendant pay the $208.65 to the loan company in July, 1913? Had he then paid $1,000 or more, there would not be much doubt as to his intention. But he paid only $150 of principal, with some arrears of interest. Did he intend to assist his son-in-law by discharging so much of the mortgage indebtedness, incidentally and unintentionally bettering the position of the second mortgagee, or did he intend it as a payment on account of his projected purchase of the mortgage?

All the facts in this case are admitted, except as to the circumstances under which the payment of $208.65 was made. As to these we have the defendant's evidence, which is uncontradicted, and I think it should be accepted; and I am bound, according to

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the cases, to look at the intention of the party who pays the money and to presume an intention on his part to do what is most for his benefit. And he did "lift" the mortgage, as he says he intended to lift it, in the following year. If he intended to pay the balance and lift the mortgage in the following year, I would presume that he expected the mortgage, when lifted, to be security as well for the money paid in 1913.

I do not think it necessary that there should have been any agreement, written or verbal, between the defendant and the loan company in July, 1913, for the purchase of the mortgage by the defendant.

In *Chetwynd* v. *Allen*, *supra*, Mynors advanced money to pay off a mortgage of property which (though he did not know it) belonged to Mrs. Chetwynd, and £1,000 of Mynors' money were in fact paid to the mortgagee—Mrs. Chetwynd afterwards sought to redeem on payment only of the balance remaining due and payable to the mortgagee. Mynors had no specific agreement with either Mrs. Chetwynd or the mortgagee that as to the £1,000 so paid by him he should stand in the mortgagee's shoes; apparently neither Mrs. Chetwynd nor the mortgagee knew in fact that the £1,000 so paid were advanced by Mynors, yet Mrs. Chetwynd had to redeem Mynors, who was declared entitled as against her to a lien on the mortgaged property for the £1,000 paid on the mortgage.

And in the present case, after the loan company mortgage was assigned to the defendant, could the plaintiff have redeemed without paying the $208.65 advanced in 1913, as well as the $1,750 and interest advanced in 1914? I do not think so. There does not seem to be any reason why the plaintiff should get the benefit of the defendant's payment in 1913.

In *Manks* v. *Whiteley*, [1912] 1 Ch. at p. 763, Fletcher Moulton, L.J., quotes from the judgment of Lindley, L.J., in *Liquidation Estates Purchase Co.* v. *Willoughby*, [1896] 1 Ch. 735, that "the Courts have gone a long way, and very properly, to prevent a second or third incumbrancer from obtaining a priority by a mere accident, and at the expense of other people who never intended to benefit him."

It is not necessary to go very far in the present case. All I have to find is, and I do find, that, when the defendant paid the

$208.65 to the loan company, he did not intend to discharge the mortgage or the mortgaged lands *pro tanto*—and he is entitled as against the plaintiff to a charge for that amount.

I thought at one time that the defendant's position might be affected by the payments made by Hoskins in the first seven months of 1914; but, on consideration, I do not see why it should be. Hoskins had the right to make these payments—there is no evidence that they were made with the defendant's knowledge or privity, if that would make any difference. I do not draw from them any inference opposed to the defendant's contention as to the existence of his charge for $208.65.

The plaintiff's counsel urged strongly that the defendant should not hold the mortgage for more than the debt of $1,768.10, said to be assigned to him by the loan company. But this sum was all that was then due to the loan company—the defendant's lien for the $208.65 resulted from his payment of that amount in the previous year—the legal estate in the mortgaged premises remained charged with the sum for the defendant's benefit.

But forms of instruments are of little importance to-day: *Manks* v. *Whiteley*, *supra*.

On further consideration, I am satisfied that the defendant should not be allowed the $5 paid for the tranfer of the mortgage: *In re Radcliffe* (1856), 22 Beav. 201; and, as the mortgage was, as I assume, payable at the loan company's office in London, and the defendant's solicitor sold the mortgaged property in London, and received the proceeds of sale in London, for the defendant, I do not see why the second mortgagee should pay the expenses of remitting the money to the defendant.

The learned Judge's report was as follows:—

Pursuant to the order of The Honourable Mr. Justice Latchford dated the 5th day of February, 1916, I proceeded to take the accounts herein and to tax the defendant's costs of the sale proceedings under the mortgage referred to in this action, in the presence of the solicitors for the plaintiff and the defendant, and, after hearing the evidence of the defendant and C. W. Hoskins, I now find as follows:—

1. The mortgaged premises were sold by the defendant on the 27th day of November, 1915, under power of sale in the said mortgage contained, and the defendant received thereunder on

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that date the sum of $2,400, together with $12.40 for rebate of insurance premium.

2. There was due to the defendant on the said mortgage on the said 27th day of November for principal and interest the sum of $2,142.37.

3. The defendant also paid for water-rates and taxes upon the mortgaged premises the sum of $132.52.

4. I have taxed the costs of the defendant's sale proceedings at the sum of $127.74.

5. I have set out the foregoing in the schedule hereto, shewing that of the moneys realised from the said mortgaged premises the defendant has in his hands a surplus of $9.77 after payment of the amount due on the said mortgage for principal and interest and of the amounts paid by him for rates, taxes, and costs.

The schedule set out what the defendant had paid, including the $208.65, amounting in all to $2,402.63, and what he had received, viz., $2,412.40, leaving a surplus of $9.77 in the defendant's hands.

LATCHFORD, J.:—Upon consideration, I entirely agree in the findings of fact and the conclusions of law arrived at by the learned Judge, and stated in his reasons for the judgment in appeal.

The motion is, therefore, dismissed, and the report confirmed, with costs of motion, reference, and trial.

P. H. Bartlett, for appellant.

R. G. Fisher, for defendant, respondent.

The judgment of the Court was delivered by

MEREDITH, C.J.C.P.:—The single question involved in this particular case is one of fact: whether the $208.65, the amount involved in it, were really paid upon the mortgage and in reduction of the amount of it, or were paid as part of the purchase-price of the mortgage.

It has been found that the money was paid as part of the purchase-price; and, if that be so, the appeal must be dismissed—this subsequent mortgagee is out of Court. How can he interfere, how can he prevent a transaction of that character, and what difference can it make that the first payment was made a year before the balance was paid and the mortgage was assigned? Or that the mortgagees entered the first payment in their books as a

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payment on the mortgage; or that a recital in the assignment erroneously states the amount then due on the mortgage? These are things of some weight in determining whether the payment was really one upon the mortgage-debt or on the price of the mortgage, but no more. Estoppel is out of the question. Nothing was done or left undone by the second mortgagee on the faith of the mortgage-debt having been reduced by this payment.

That which was transferred when the assignment of the mortgage was made was the amount really due upon the mortgage. No intervening equities have anything to do with the case. The simple question is, how much was due upon that mortgage at that time? It all comes back to that single question; and upon that question the finding is in the respondent's favour, and the evidence supports it.

The respondent unequivocally testified that the payment was not made on the mortgage, but was made as part of the price of it, all of which was not paid then because a "bonus" would have been exacted by the mortgagees over and above the amount of the principal and interest; and that then, at the suggestion of the mortgagees, the amount of the payment then falling due was paid, and payment of the rest of the price was deferred for a year, when payment might be made without the added bonus; there was no contradiction of this testimony, and its truth seems probable. The mortgagor is the husband of the respondent's daughter; the father-in-law would be unlikely to pay off his son-in-law's debts and leave the property subject to new ones; but would save the property in his own name for his daughter's benefit.

And, this being so, the appellant has nothing reasonable to complain of; nor has he any equities, or Registry Act provisions, in his favour which prevent effect being given, as it has been in the judgment in appeal, to the actual intentions of the parties to the payment and receipt of the $208.65. *Appeal dismissed.*

CANADIAN GRAIN CO. v. LEPP.

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Saskatchewan Supreme Court, Lamont, J. December 5, 1916.

PLEADING (§ I S—145)—*Striking out false and vexatious allegations—Statement of defence—Rule 223 (Sask.).*]—Appeal from the order of the local master of Saskatoon wherein he di-

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rected that certain paragraphs of the statements of defence of the defendants Lepp and Strehlow be struck out, and that the plaintiffs have leave to sign judgment against Lepp for the amount of their claim on the ground that the paragraphs in question are false, frivolous and vexatious. Reversed.

P. H. Gordon, for defendants.

LAMONT, J.:—In their statement of claim the plaintiffs allege that they are a grain company with head office at Saskatoon. That on July 30, 1916, a contract in writing was entered into between the plaintiffs and defendant Lepp by which it was agreed (a) that the plaintiff company would act as the agent of the defendant in selling on the Winnipeg Grain Exchange 11,000 bushels of wheat at $1.22 7-8 per bushel for delivery in the month of October, 1916, (b) that the defendant Lepp agreed to deliver to the plaintiffs all grain sold by them on his behalf, and (c) that he would indemnify and save harmless the company from loss arising from his failure to deliver.

The plaintiffs allege they sold on Lepp's behalf 11,000 bushels of wheat at $1.22 7-8, and that on October 5 the said defendant notified them that he would not deliver according to his contract, and authorized them to buy on the market 11,000 bushels to fulfil his contract; that they did so, and that the difference between what they had to pay and what they received was $4,990. They also allege that the defendant agreed to pay them a selling commission of ¼c per bushel. This ¼c a bushel amounted to $27.50. This commission and the $4,990 making a total of $5,017.50, they claim from the defendant.

Both defendants, in their respective statements of defence, specifically deny the above allegations set out in the statement of claim, and, in addition, they set up (1) that the plaintiff company was neither incorporated nor registered under the Companies Act of this province and for that reason, could not maintain the action, and (2), in the alternative, that, if the contract alleged was entered into between the plaintiff company and Lepp, such contract was in contravention of sec. 231 Cr. Code (Can.). The defendant Lepp further set up that if he did enter into the contract he was induced to do so by the representations of the plaintiffs' agent that, in the event of his failure to deliver, no claim would be made against him by the company.

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All the above allegations in the statements of defence were struck out by the local master, with the exception of the one in respect of the commission, which was not attacked. From that order the defendants now appeal.

As against the defendant Strehlow, the plaintiffs allege that he took bills of sale from Lepp, of the grain grown on Lepp's farm, when Lepp was in insolvent circumstances, and with intent to defeat, defraud, hinder and delay the plaintiffs and other creditors of Lepp, and they ask that these bills of sale be set aside. These allegations were denied, but the plaintiffs did not ask to have them set aside.

The application is made under r. 223, which is as follows:

Statements of defence or other pleadings which are false, frivolous or vexatious may on affidavit be set aside, in whole or in part, on such terms as to costs or otherwise as the Court or a Judge thinks fit.

This rule is identical with r. 247 (a) of the rules of Nova Scotia. The Nova Scotia decisions under their rule are, therefore, in point. *Banks* v. *Batton*, 30 N.S.R. 386, at 392.

In *Holmes* v. *Taylor*, 32 N.S.R. 191 at 194, the plaintiff applied to set aside as false, frivolous and vexatious the pleas pleaded by the defendant to an action to recover the amount of an award. The Judge set aside certain of the pleas, but allowed others to stand as raising questions which should be determined on trial.

Gittleson v. *Sydney Household Co.*, 40 N.S.R. 381, in an appeal from an order setting aside a defence under this rule, it was held that the summary jurisdiction to set aside a defence as false, etc., must be exercised with great caution,—a Judge should not weigh the evidence and decide upon its preponderance.

The latest case upon the point which I have been able to find is that of *Stimpson Computing Scales Co.* v. *Allen* (1913), 10 D.L.R., 349, at 352 (47 N.S.R. 90), where Graham, E.J., sets out the N.S. practice in the following words:—

The practice about setting aside a defence as false is pretty well settled. The falsity is the inquiry. The statements in the defendant's affidavits are alone to be regarded, and if there is any conflict the case must go to trial. Then if the facts alleged are true, but its sufficiency is open to question or is embarrassing or is bad in law and admits of argument the case must go to trial. It would not do to proceed in this summary way if there is anything to be tried, and it is only in that way that a defendant can get to the Court of Appeal.

These authorities, in my opinion, establish that in an applica-

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tion under this rule the question to be considered is whether or not the matters and things set up as a defence to the plaintiff's action are true or false. The defence must be shewn beyond question to be false before the plaintiff is entitled to have it struck out. To establish its falsity there must be, so far as facts within the knowledge of the defendant are concerned, an admission express or implied by him that the allegations in his defence are untrue. Such admission may appear from affidavits filed by the defendant or from his examination, if such has been made part of the material to be used on the application, or it may be implied from his failure to deny on oath some material fact within his knowledge sworn to by the plaintiff in his affidavit. But to justify striking it out, it must be clear that the defence is false. If there is a conflict of testimony, that testimony cannot be weighed on an application under this rule.

The test to be applied is, as pointed out in the *Gittleson* case, *supra*, assuming that everything that the defendant testified is true, is there anything to be tried?

With reference to the appeal before me, the first observation I have to make is that I cannot see how judgment for the amount claimed, which included an item of $27.50 for commission, could be entered while the defendant Lepp's denial of the plaintiff's right to the commission was left in his statement of defence. The paragraph containing this defence was not included in the notice of motion.

Then, in my opinion, the paragraphs which deny that the plaintiffs sold 11,000 bushels of wheat on Lepp's behalf, and later repurchased a like amount to complete the contract, should not have been struck out. The only evidence to establish the falsity of these denials is the affidavit of one of the plaintiffs.

In his examination Lepp was asked if he would deny that the plaintiff company sold 11,000 bushels of wheat for him at $1.22 7-8. He said that he did not know; that he could not say whether they did or not. Then, after considerable questioning, the following answers were obtained from him:—"Q. If Mr. Vannatter says he did sell that 11,000 and buy back 11,000 from you at a later date you have no means of contradicting it, have you? A. I could not say. Q. Well, the question I am asking you is, they sold 11,000 bushels and bought 11,000 bushels, are you in a

position to contradict that statement? A. How was this? Q. This is a serious matter, I want the truth and nothing but the truth. Do you want to deny that they sold 11,000 bushels and bought 11,000 bushels, do you deny that? A. I don't know that I could deny it. Q. You don't deny it? A. No."

Questions 116 and 118 I read as explanatory of 119 and 120 which were put in.

The defendant's answers here are no admission that the plaintiff company either sold or bought any wheat on the defendant's account. He could not deny it for he did not know, and said so over and over again.

Where the alleged fact is solely within the knowledge of the plaintiff, a defendant's inability to deny it because he has no knowledge of it cannot be taken as an admission that the fact so alleged is true. Under such circumstances, if the only evidence of the fact is the word of the plaintiff, it is the defendant's right to have him prove such fact in Court in the ordinary way, where he shall be subject to cross-examination, and where inferences from his conduct or demeanour in the defendant's favour, if such should be warranted, may be drawn by the Court.

A defence that a contract was induced by misrepresentation on the part of the plaintiff's agent should only be struck out on a summary application where it is quite clear that there is no foundation for the defence. Taking all the statements of Lepp on this point in his examination, I am not prepared to say they contain admissions which shew that there is no question to be tried. The summary procedure is to be exercised with great caution. The defendant is not called upon to prove that he has a good defence. All that he is called upon to do is to shew that there is a conflict of testimony on a material point. Even if his material does not shew a clear conflict of testimony, if it simply leaves the question in doubt, the plaintiffs' application must fail. It is only where it is clear beyond doubt that the defence is untrue that he is entitled to the benefit of the summary procedure under this rule. A Judge may be satisfied that it is very unlikely that a defence will prevail at the trial, but that is not sufficient to justify him in depriving the defendant of his right to a trial in Court.

There were a number of denials set up in the statement of

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defence which the defendant, in his examination, admitted were untrue. For example, denial of the signing of the contract; denial that the contract contained certain specified provisions; denial that he had authorized the plaintiff company to purchase 11,000 bushels of wheat in October, etc. The contract was produced and the defendant admitted his signature. His written authorization to buy was also produced, and he admitted it. Had these constituted the only defences set up, the order allowing the plaintiffs to sign judgment would have been proper. Where the paragraphs which are properly struck out constitute the whole defence, the plaintiff is entitled to judgment in default of amendment. *McDonald* v. *Maurice*, 8 S.L.R. 254.

Where, however, as here, after striking out the paragraphs which may be properly struck out, the plaintiff has to go to trial to prove his entire case, I do not see that any good purpose would be served by striking out any of these paragraphs. I agree with the remarks of Ritchie, J., in *Holmes* v. *Taylor*, *supra*, where he said: "If the cause is to go to trial, it had better go with the defence unmutilated."

This rule was never intended to afford the plaintiff the opportunity of trying the case piecemeal. The object of the rule was to prevent the delay and expense of an unreal defence. I do not wish to be understood as holding that under no circumstances should a portion of a defence be struck out, but, generally speaking, but little will be gained by striking out an individual paragraph where the plaintiff has to go to Court to prove his case. If he has material sufficient to justify a Court in striking out the paragraph it will usually be found sufficient to establish his allegation at the trial. At any rate, the rules relating to admissions of facts for use at the trial afford the plaintiff ample protection.

The appeal should be allowed with costs, the paragraph struck out restored, and the judgment entered set aside.

Appeal allowed.

REX v. BAUGH. ONT.

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Ontario Supreme Court, Meredith, C.J.O., and Maclaren, Magee, Hodgins and Ferguson, JJ.A. February 7th, 1917.

EVIDENCE (§ IV G—420)—*Depositions taken at former trial of witness absent from Canada—Authentication—Signing by Judge—Cr. Code, sec. 999—Trial for conspiracy.*]—Case stated by the Senior Judge of the County Court of the County of York upon the trial and conviction of the defendant on a charge of conspiring with others to prosecute G. A. Stimson for an alleged offence, knowing him to be innocent thereof.

I. F. Hellmuth, K.C., and *T. C. Robinette*, K.C., for defendant.

J. R. Cartwright, K.C., and *J. B. Clarke*, K.C., for the Crown.

MEREDITH, C.J.O., read a judgment in which he said that the following questions were stated for the opinion of the Court:—

(1) Were such facts proved upon oath from which it could reasonably be inferred that Louis Britain, whose evidence was given at a fomer trial, was absent from Canada at the time of this trial?

(2) Was I wrong in admitting the said evidence, in view of the fact that, at the time the application to admit the said evidence was made, such evidence was not signed by the Judge before whom it was taken, but was signed by me after objection to the receipt of such evidence was taken by counsel for the accused?

(3) Should there be a new trial on the ground of misdirection or nondirection in my charge to the jury?

It was conceded by counsel for the prisoner that the answer to the first question must be in the affirmative; and it should be so answered.

The question as to the admissibility of the evidence of Louis Britain related only to the manner in which the stenographer's transcript of it was authenticated by the signature of the Judge, and not to the other requirements of sec. 999 of the Criminal Code. The previous trial had taken place before the same Judge; and it appeared that a transcript of the stenographer's notes of the evidence, without any authentication of it by the

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Judge, was offered in evidence by the Crown, and that its admissibility was objected to by counsel for the prisoner, whereupon the trial Judge looked over the transcript and signed it, and it was then admitted in evidence.

Nothing is said in sec. 999 as to the time when the evidence is to be signed by the Judge, and there is no reason why it may not be signed at any time before it is admitted in evidence. It was argued by counsel for the prisoner that what is contemplated by the section is, that the evidence shall be signed at the time when or immediately after it is taken; but nothing in the section requires that construction to be given to it; and such a construction would render the section nugatory in all cases in which the evidence is taken down by a stenographer.

The second question should be answered in the negative.

The third question should also be answered in the negative.

It was to be regretted that the Crown insisted upon the second trial taking place before the Judge who presided at the first trial. It was obvious that justice required that the second trial should take place before a different Judge, for it would be difficult for any Judge to rid his mind of impressions he had formed at a former trial when the prisoner had been convicted.

MACLAREN and MAGEE, JJ.A., agreed in the result.

HODGINS, J.A., read a judgment in which he stated his agreement in the result, for reasons given by him.

FERGUSON, J.A., also read a concurring judgment, in which he went into the 3rd question, as to misdirection or nondirection, at considerable length, and referred to authorities. He was of opinion that under sec. 1019 of the Criminal Code and the authority of The King v. Romano (1915), 21 D.L.R. 195, 24 Que. K.B. 40, 24 Can. Crim. Cas. 30, the defendant had failed to make out a case for the interference of the Court; and the 3rd question should be answered in the negative. He agreed also that the first question should be answered in the affirmative and the second in the negative.

Judgment for the Crown.

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Judicial Committee of the Privy Council, Lord Buckmaster, L.C., Lord Dunedin, Lord Parker of Waddington, Lord Parmoor, and Lord Wrenbury. January 23, 1917.

ARBITRATION (§ III—17)—RAILWAY ACT—REVIEW OF AWARD—APPEAL.

The award of arbitrators under sec. 209 of the Railway Act, R.S.C. (1906), is similar to the judgment of a trial Judge. An appeal, upon law and fact, is always open. But an appeal Court will not interfere with the decision, unless there is good and special reason for doubting the soundness of the award.

APPEAL from a judgment of the Supreme Court of Canada in an expropriation proceeding (unreported). Affirmed. Statement.

The judgment of the Board was delivered by

LORD BUCKMASTER, L.C.:—On November 27, 1914, an award was made, in pursuance of the provisions of the Dominion Railway Act of Canada, assessing at the sum of $3,500 the amount to be paid by the respondents—the Toronto Eastern R. Co.—for the compulsory expropriation of land necessary to enable the respondents to run a railway across the appellant's property on the west of the City of Toronto. Lord Buckmaster.

This award was the award of the majority of three arbitrators and was subject to appeal by virtue of sec. 209 of the Railway Act. This section is in the following terms:—

> Whenever the award exceeds $600, any party to the arbitration may, within one month after receiving a written notice from any one of the arbitrators or the sole arbitrator, as the case may be, of the making of the award, appeal therefrom upon any question of law or fact to a superior Court; and, upon the hearing of the appeal, such Court shall decide any question of fact upon the evidence taken before the arbitrators, as in a case of original jurisdiction.

The appellant availed himself of these provisions and appealed to the Supreme Court of Ontario, by whom the appeal was allowed. This judgment was, however, reversed by a majority of three to two in the Supreme Court of Canada, and from this latter judgment the present appeal proceeds.

Before considering the facts and the merits of the case, it is well to examine what is the real nature of the appeal covered by sec. 209. In their Lordships' opinion, it places the awards of arbitrators under the statute in a position similar to that of the judgment of a trial Judge. From such a judgment an appeal is always open, both upon fact and law. But upon questions of fact an Appeal Court will not interfere with the decision of the Judge who has seen the witnesses and has been able, with the

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impression thus formed fresh in his mind, to decide between their contending evidence, unless there is some good and special reason to throw doubt upon the soundness of his conclusions.

The facts which led up to the making of the award in the present case can be shortly stated. In 1911 the respondent railway were proposing to make their track along a line which cut through, from west to east, the property in question. They filed plans shewing this proposed extension of their system on February 24, 1911. Between July 1 and September 9 of that year the appellant purchased practically the whole of the property which he now holds, a small piece of the value of $500 only having been bought at a later date, namely, July 16, 1913. The notice of expropriation was served on September 23, 1912.

The property so purchased was, it is said, a property exceptionally well situated, commanding beautiful views of the surrounding country, and having many advantages rendering it capable of adaptation and development for the purpose of a private residential estate. The total price for the land and buildings as they originally stood was $11,485, and in the improvements which the appellant made he had, at the date of the arbitration, expended a sum which raised the total cost of the property to $34,917. The award of the majority of the arbitrators assessed the damage to this property at a total sum of $3,500. The dissentient arbitrator fixed it at $13,850; and the question is whether the award of the majority can be maintained.

Now, so far as the question of fact is concerned, their Lordships see no reason whatever to justify interference with the award. The arbitrators appear to have scrutinised and examined the evidence on both sides with great care, and, in addition, they paid at least two visits to the property and made a careful inspection for themselves. It would be in a high degree unreasonable to interfere with such a finding of fact, based on such materials, and, indeed, the Supreme Court of Ontario, whose judgment set aside the award of the arbitrators, did not attempt to do so, but rested their judgment upon the ground which really constitutes the only foundation for the appellant's case, namely, that the arbitrators proceeded upon a wrong principle in their valuation, and that, in fact, the property was valued on the footing of its being a farm property, rather than

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a private estate. Their Lordships have carefully examined the reasons given by the majority of the arbitrators, and they cannot find anything whatever in these reasons to justify this conclusion. Indeed, McIntyre, Co.J., clearly shews, in more than one passage in his award, that he did regard the property as a private residential estate, and he objected to the witnesses for the respondent railway company for not sufficiently appreciating the picturesque and unusual character of the spot.

In their Lordships' opinion the arbitrator did not exclude any matter material for consideration, nor did he introduce into his calculations matter irrelevant or calculated unduly or unfairly to lower the amount of damage he was called upon to assess. And the same thing is true of the reasons given by Mr. Macdonnell, who arrived at the same sum total for his award by slightly different methods. It is admitted by counsel for the appellant that the items, under which McIntyre, Co.J., groups the heads of damage, are exhaustive and complete, but he says that the small amounts assessed in respect of each of these heads shew, notwithstanding the passages in his reasons to which reference has been made, that he did in fact disregard the true nature of the property.

Their Lordships cannot accept this view, and they think that the award must be confirmed, and this appeal dismissed with costs, and they have so advised His Majesty.

Appeal dismissed.

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Judicial Committee of the Privy Council, Lord Buckmaster, L.C., Viscount Haldane, Lord Dunedin, Lord Parker of Waddington, and Sir Arthur Channell. January 23, 1917.

NEW TRIAL (§ III C—20)—DEFECTIVE PANEL—RELATIONSHIP OF JUROR.

The omission of a statutory duty to revise the jury list when constituting the panel, not amounting to packing, or the remote relationship to the plaintiff of a juror, who was in fact impartial, which facts were not challenged at the trial, and resulted in no prejudice to the defendant, are not grounds for setting the verdict aside or for a new trial.

Statement.

APPEAL from the judgment of the Quebec Court of Review, 48 Que. S.C. 21 (see also 23 Que. K.B. 48). Affirmed.

The judgment of the Board was delivered by

Sir Arthur Channell.

SIR ARTHUR CHANNELL:—The respondent in this case was plaintiff in an action against the appellant company in the Superior Court at Quebec to recover damages for personal injuries

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sustained by him when travelling in a tramcar of the appellants by a collision with another tramcar of the same company. The action was tried before a special jury, who gave a verdict for the plaintiff for $12,000 on December 12, 1912, and judgment was given for the plaintiff for that amount. The appellants on January 10, 1913, took proceedings to have the judgment set aside on the ground that the jury had not been duly constituted and was without jurisdiction, and also that one of the jurors was relative to and was connected by affinity with the plaintiff and was not indifferent between the parties, and also that in the course of the trial communications in reference to the case passed between the plaintiff, his relatives, and those who were conducting his case, and that juror and other jurors. At the trial there had been no challenge either to the array or to any individual juror.

These proceedings ultimately failed, and by a judgment of the Court of Review of Quebec (48 Que S.C. 21), the judgment in favour of the plaintiff was upheld. From the judgment of the Court of Review this appeal is brought. The questions argued before the Board were whether, on the grounds alleged, or either of them, the judgment at the trial ought to have been set aside, and whether the procedure taken for setting it aside was correct in form. There are also proceedings taken to set aside the verdict and judgment on the ground that the damages were excessive; but these are standing over pending the decision of this appeal. What the appellants did on January 10, 1913, was to present a petition in revocation of judgment, known in Quebec as a *requête civile*, which came on to be heard before Beaudin, J., on January 27, who held, without going into the evidence, that *requête civile* was not the proper way to raise the question. An appeal from this decision was taken to the Court of King's Bench (Appeal side), (23 Que. K.B. 48), which Court, by a majority, on October 30, 1913, allowed the appeal, ordered the reception of the petition, and remitted the record to the Superior Court for proof and hearing of the issues contained in the petition. This proof and hearing took place on November 21, 1914, when the Judge (Monet, J.) heard the evidence and dismissed the petition on the merits. He also disallowed a demurrer by the respondent to the petition, following, in so doing, the judgment of the King's Bench (Appeal side). The appellants appealed to the Court of Review from the decision of Monet, J., disallowing

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his *requête civile*, but the respondent did not appeal from the disallowance of his demurrer. The Court of Review affirmed the judgment of Monet, J., but a majority of the Judges were of opinion that the proceedings were wrong in form, and should have been dismissed on that ground as well as on the merits. The most important question on the appeal to this Board is, as to the effect of serious irregularities in the preliminary proceedings for constituting the jury panel. On this point Monet, J., found that irregularities or breaches of the provisions of law had occurred, but that the appellants could not avail themselves of them because they had not proved any prejudice to have been suffered by them in consequence.

Very elaborate and minute enactments are contained in the R.S.Q. (arts. 3409, 3411, 3414, 3416, 3418, 3421, 3423, 3426, 3427, 3428, 3429, and 3462) for the constitution of a Revising Board to revise annually the jury lists, there being one list of grand and another of petit juries.

The municipalities are directed to give notice to the sheriff of new names of qualified persons and of the deaths, removals, or exemptions of those on the old lists. The Board, of which the sheriff is a member, and apparently president, sit in private to make their revision, but public notice is given before the lists are sent on to the sheriff. There are detailed provisions as to the mode of revision, as to initialling alterations and additions and as to the times of various steps and other matters. The lists so revised serve for criminal and possibly other purposes, and from the list of grand jurors the list for trial of civil cases is made. The sheriff, by art. 3429, immediately after the revision of the list, is to notify the prothonotary, who is then to correct his list. The prothonotary's duties are prescribed by art. 430 and following sections of the Quebec Code of Civil Procedure. He is bound to make a list of the persons qualified to serve as jurors in civil cases by taking from the list of persons qualified to serve as grand jurors in criminal cases which is deposited in his office the names of all persons residing within 15 miles of his office in the order in which such names appear, and he is to revise his list immediately after receiving notice from the sheriff that he has completed the revision of the grand jury list. Then when an order is made for the trial of a civil cause by a jury the names are taken in order from the list to form a panel for that

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case, and proceedings are taken for reducing the number for trial of the cause, which appear similar to what is known in this country as striking a jury under the old practice, still permissible by special order.

On the hearing of the *requête civile* before Monet, J., it was proved that in the year 1912, when the cause was tried, these provisions had for several years been neglected by the sheriff. There had been no revision at all, and old lists had been used. So far as the prothonotary was concerned, it is not clear that he in any way neglected his duties, inasmuch as he used *the list deposited in his office* of grand jurors, although that was, of course, an old one, not duly revised by the sheriff and Board. From that prothonotary's list the names for this jury were duly taken in order. The statutes contain no enactment as to what is to be the consequence of non-observance of these provisions. It is contended for the appellants that the consequence is that the trial was *coram non judice*, and must be treated as a nullity.

It is necessary to consider the principles which have been adopted in construing statutes of this character, and the authorities so far as there are any on the particular question arising here. The question whether provisions in a statute are directory or imperative has very frequently arisen in this country, but it has been said that no general rule can be laid down, and that in every case the object of the statute must be looked at. The cases on the subject will be found collected in Maxwell on Statutes, 5th ed., p. 596, and following pages. When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the acts done. This principle has been applied to provisions for holding sessions at particular times and places (2 Hales, P.C. 50, *The King* v. *Justices of Leicester*, 7 B. and C. 6 (108 E.R. 627), and Parke, B., at pp. 39 and 40, in *Gwynne* v. *Burnell*, 2 Bing N.C. 7 (132 E.R. 3), to provisions as to rates (*R.* v. *Fordham*, 11 A. and E. 73 (113 E.R. 341), *Le Feuve* v. *Miller*, 26 L.J. (M.C.) 175), to provisions of the

Ballot Act (*Woodward* v. *Sussons*, L.R. 10, C.P. 733; *Phillips* v. *Goff*, 17 Q.B.D. 805), and to Justices acting without having taken the prescribed oath, whose acts are not held invalid: *Margate Pier Co.* v. *Hannam*, 3 B. and A. 266 (106 E.R. 661). In the case now before the Board it would cause the greatest public inconvenience if it were held that neglect to observe the provisions of the statute made the verdicts of all juries taken from the list *ipso facto* null and void, so that no jury trials could be held until a duly revised list had been prepared. As to the objects sought to be attained by these elaborate provisions for the mode of preparing the lists, there seem to be three things aimed at: First, to distribute the burden of jury service equally between all liable to it; secondly, to secure effective lists for the use of the Courts of jurors likely to attend when called, and names of dead men, and absent or exempted men being left out; thirdly, to prevent the selection of particular individuals for any jury, commonly called packing. The duties imposed on the sheriff appear intended for the first and second of these purposes, and those of the prothonotary for all the three. His duty to take the names in rotation prevents packing, and his taking the names next after those who last served distributes the burden. In this case the prothonotary had a list in fact, although an old one, and men on it had all been qualified, and probably in most cases remained so. The names were taken in proper rotation, and those ultimately sworn appear all to have been qualified. As to some of the matters, such as the omission to initial correct alterations, it would be impossible to hold that these made the whole list null and void. Having regard to the nature of the sheriff's duties and their object, it seems quite unnecessary and wrong to hold that the neglect of them makes the list null and void; and although the prothonotary's neglect, if it had been in the matter of the order of taking the names, might have resulted in a packed jury, the neglect if there had been any in other matters, would be of the same kind as the sheriff's. It does far less harm to allow cases tried by a jury formed as this one was, with the opportunities there would be to object to any unqualified man called into the box to stand good, than to hold the proceedings null and void. So to hold would not, of course, prevent the Courts granting new trials in cases where there was reason to think that a fair trial had not been had. The view taken by

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Monet, J., that he ought not to interfere where the appellant had shewn no prejudice appears very reasonable, and their Lordships are of opinion that it is also in accordance with the authorities. Taking first the Canadian cases to which counsel referred. The case most relied on was *Grose* v. *Holmes Electric Protection Co.*, 9 Quebec S.C. 374. In this case the facts are to be gathered from the judgment which is set out in full in the report, and it seems that there had been somewhat similar neglect by the sheriff in his duties as to jury lists as in the present case, but the prothonotary also had, in direct breach of the code, omitted names standing next in order, and taken others lower down. This amounted to a process of packing the jury, and might possibly have been done with that intention. The minor breaches such as want of initials are recited in the judgment, but the facts as a whole clearly shew prejudice, to use Monet, J.'s, phrase, and shew the very mischief to have happened which it was one of the objects of the statute to prevent. That a challenge to the array was allowed in that case is quite consistent with Monet, J.'s, decision. *Rex* v. *McCrea*, 16 Que. K.B. 193, also quoted, was a case of murder, and after a verdict of guilty the conviction was quashed on grounds going to the merits, but it was also held by a majority of the Court that the swearing and inclusion in the jury of a person assigned by mistake, but whose name was not written in the panel of jurors, and who had not the qualifications required by law for being one of the jury, is illegal, and a verdict returned by a jury so composed is null, and should be quashed. This seems to have little to do with the matter, as here no juror is shewn to have been disqualified, and if one had been, probably Monet, J., would have held it to be "prejudice." The difference of opinion amongst the Judges in that case arose from the different views taken as to certain sections of the Criminal Code, which have no application to the case now before the Board. *McKay* v. *Glasgow and London Insurance Co.*, 32, L.C. Jurist, 125, 4 Que. S.C. 124, also quoted, merely shews that if a juror is, in fact, interested, and has not been challenged, his interest not being known until after the trial, a new trial will be granted, which obviously has no bearing on the point now under consideration. Of the English cases, *Mulcahy* v. *The Queen*, L.R. 3 Eng. & Ir. Apps. 306, was a writ of error on a criminal conviction taken to the

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House of Lords. The trial had taken place in one year under a commission opened in the previous year. There were lists of jurors duly made out according to the provisions of the statutes relating to the matter for each of the two years. The jury had been taken from the list for the first of the two years, and it was argued that it should have been from the list for the year in which the trial took place. The Judges were summoned and questions put to them in the usual way, and Mr. Justice Willes delivered the opinion of the Judges to the effect that the right list had been taken. This is relied on to shew that such provisions are not merely directory, otherwise the elaborate judgment actually delivered would not have been silent on such a point. But the question there merely was which list should be taken; each list had been duly made, and no provisions as to the making of lists were broken. But Mr. Justice Willes does guard himself against inferences being drawn from his judgment as to points which he had not expressly dealt with by saying, "Assuming therefore that this sort of objection by way of challenge either to the array or the poll is competent in any case of the kind, it was incompetent in this." Another case referred to in the argument was *Williams* v. *Great Western Railway Co.*, 3 H. and N. 869, which shews that the omission to challenge, although the facts were not known until after the time for challenge, is not without effect on the rights of the parties, and a comparison of that case with *Lord Ashburnham* v. *Michael*, 16 Q.B. 620, 117 E.R. 1017, shews that while in England the fact of a juryman being open to challenge, discovered after verdict, may be ground for a new trial, yet it is discretionary with the Court to grant it, and it will not do so when it is of opinion that no prejudice has been done. Their Lordships therefore are of opinion that the decision of Monet, J., on the objection to the verdict founded on the omission duly to revise the lists was right. Counsel for the appellants pressed the Board not to weaken any of the safeguards provided by the legislature for securing fair and impartial juries, but their Lordships fail to see that the decision of Monet, J., has that effect.

As to the next point, the juror objected to was one Hector Barsalou, who was brother of Erasmus Barsalou, who was husband of an aunt of the plaintiff. It is obvious that this is not relationship or affinity. But Erasmus Barsalou had been the tutor or testamentary guardian of the plaintiff, who was at the time of

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the trial not much over 21, and whose father had died when the plaintiff was an infant, so that Erasmus Barsalou had brought him up. Hector Barsalou no doubt knew the plaintiff fairly well as his brother's ward, but that was all, and both he and Erasmus gave evidence satisfactory to the Judge as to interest in the cause. The case as to communications with the jury broke down. The witnesses who gave the strongest evidence as to it were claim agents of the appellant company, and it was their duty to inform the appellants' legal advisers at once if during the trial they observed anything which at the time they really thought serious. During the trial appellants' counsel did have some information given him which led him to ask Hector Barsalou if he was allied to the plaintiff. He answered truly that he was not, and the question was not pushed further.

The Judge finds emphatically that the appellants proved no case on these points. The Court of Review adopted the findings of fact of the Judge. Their Lordships would require a very strong case to induce them to differ with the Judge who heard the witnesses, and on a consideration of the evidence they find no such case, but, on the contrary, agree with the Judge.

As to the point whether a *requête civile* was the proper procedure, their Lordships do not think it open, as neither the decision of the Court of King's Bench nor the disallowance of the demurrer by Monet, J., was appealed from. The decision of the King's Bench was not interlocutory for the purpose of an appeal from it under the rule acted on in this country, as it would have been final if decided the other way.

Even if open a decision on the point is unnecessary, as in their Lordships' view, the *requête civile* failed in proof, and their Lordships would not desire, unless it were necessary, to express any opinion on a question of form and practice in the Quebec Courts, with which the Judges of those Courts are far more familiar than they are. Their Lordships see no reason for interfering, as they were asked to do, with any of the interlocutory orders as to costs, and they will humbly advise His Majesty that the appeal should be dismissed with costs.

Appeal dismissed.

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Exchequer Court of Canada, Audette, J. January 8, 1917.

CROWN (§ II—20)—NEGLIGENCE CAUSING DEATH.

Negligence of a servant in the unlading of coal for the Intercolonial Railway from a ship moored to a pier is "in, on or about" the operation of the railway, within the Exchequer Court Act (R.S.C. 1906, ch. 140, sec. 20(*f*)) as amended by 9 & 10 Edw. VII., ch. 19, for which the Crown is liable.

PETITION OF RIGHT for damages arising out of alleged negligence of a servant of the Crown on a public work. Judgment for suppliant. Statement.

E. Belleau, K.C., for suppliant.

J. E. Gelley, for respondent.

AUDETTE, J.:—The suppliant brought her Petition of Right, on her own behalf and as tutrix to her minor children, to obtain relief from the Crown for the death of her late husband, which occurred as the result of an accident, in October, 1914, at Levis, P.Q., while he was engaged unloading coal for the Intercolonial Railway. And it is further alleged that the accident has been occasioned by the negligence of the Crown's servants while acting within the scope of their duties or employment. Audette, J.

The accident occurred under the following circumstances. The steamer "Wacona" was moored at the Princess Pier, at Levis, and her cargo of coal for the Intercolonial Railway was being unloaded at that pier, a wharf belonging to the Crown, and upon which spur lines of the Intercolonial Railway are constructed up to the crane trestle, at the edge of the wharf. This crane trestle, which is operated by steam, is composed of 3 clams working on booms, under the direction of 3 separate hatchmen superintending 3 separate gangs of men. The clam which caused the accident, and which weighs about 3,000 lbs., goes down in the hold of the steamer and grips coal which it takes up and dumps in the Intercolonial Railway cars for distribution, or deposits the same on the wharf when there is no car available.

On the morning of the day of the accident Begin, the suppliant's husband, was working with hatchman Dumont's gang at bunker or hold No. 3, when, at about 9.30 a.m., Dumont ordered his gang to quit working at No. 3 and go and work at bunker or hold No. 2. This kind of shift was customary—being adopted in order to unload the ship evenly, and to prevent a

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list or disturbance of the cargo. Dumont's gang was composed of from 12 to 15 men. This gang of men then started from No. 3 and worked their way towards the bow to No. 2, and to reach that bunker, as will be seen by reference to plan, ex. No. 2, they had to get out of No. 3, walk on deck a piece and then go down a ladder to that hold, near the place marked "M" on the plan, and work their way back across or past the hatchway of No. 2 hold where Dickson's gang of men of also about 12 to 15 were working at gathering coal for the clam that was dropped through the hatchway in question.

Hatchman Dickson, in charge of the men working at hold No. 2, and under whose control the clam in question was operated, was stationed on deck, on the starboard side of the hatchway. His duty or employment consisted in directing the work of his gang, and especially in directing the clam by signalling to Paquet, the driver of the crane locomotive standing on the trestle on the edge of the wharf in question. And, indeed, Paquet very clearly defines the scope of Dickson's work, as far as it was concerned with respect to the operation of the clam, by stating that hatchman Dickson *is there all the time, he watches every dip of the clam, and if Dickson is not there, I do not work the clam.*

To take the ladder leading to bunker No. 2, Dumont's gang had to pass through the hold or aperture leading to the ladder in question at point "M" on the plan, and that hold was only a few steps from where Dickson was stationed. After quite a number of Dumont's gang had already gone down the ladder, had travelled on the coal and passed by the hatchway through which Paquet's clam was working, Begin, the suppliant's husband, in turn got down the ladder and ran towards the stern on the port side of the steamer, following, as stated by most of the witnesses, nine or ten of his gang who had already passed the same way, and when reaching about the middle of the port side of the hatchway, he was struck on the head by the clam and knocked down, dying a few hours afterwards. Dickson, who was at his post, saw the clam which was coming down under his direction, and at the time when the accident was inevitable and before striking the coal, but not in time to save Begin's life—he put his hands up and ordered it to stop. The clam was stopped at four feet odd from the coal, with the effect of striking Begin with the spring

or bounce produced by the sudden jerk of stopping, only making matters worse.

This case, it is contended, comes within the ambit of sub-sec. (*f*) of sec. 20 of the Exchequer Court Act, as amended by 9-10 Edw. VII., ch. 19, which reads as follows:—

(*f*) Every claim against the Crown arising out of any death or injury or loss to the person or to property caused by the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment upon, in or *about* the construction, maintenance or operation of the Intercolonial Railway or the Prince Edward Island Railway.

It is well to note here that this new sub-sec. (*f*) is very different from sub-sec. (*c*), repeatedly passed upon both by this Court and the Supreme Court of Canada. Sub-sec. (*f*) does not require that the death or injury occur on a public work, but it is sufficient that the negligence complained of be caused by the negligence of the Crown's servant acting within the scope of his duties *upon, in or about* the railway, a public work of Canada.

Therefore, to bring the case within the provisions of sub-sec. (*f*) and recover against the Crown, the damages resulting from the death of her husband, it is sufficient for the suppliant to establish that his death was caused by the negligence of a Crown servant while acting within the scope of his employment, *upon, in or about* the construction, maintenance or operation of the said railway.

Does the evidence in the present case disclose such negligence as would give a right of action, as above mentioned?

There can be no doubt that hatchman Dickson was derelict in his duties and guilty of very serious negligence in allowing a gang of 12 to 15 men to pass and meet, under the hatchway, upon coal whereupon they were also liable to stumble, another gang of men of about the same number, without first stopping the operation of the clam during the space of time necessary to perfect such shift. It was his obvious duty to stop the clam which indeed was part of and attached to the crane trestle, a public work, itself in turn part of the Intercolonial Railway—and the clam is a piece of machinery which travels and works very fast. It is true the evidence discloses that while Ryan, the general foreman says, he would not stop the clam under such circumstances, but the other hatchman Dumont states he has already stopped the clam under such circumstances, when he has ordered

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the shift of a gang. This diversity of opinion between these two witnesses may only go to shew the difference between sound judgment and prudence reckoning with consideration of the value of men's lives, as against recklessness, often acquired as the result of getting familiarised with dangerous works which too often proves fatal. Ryan, however, added that the hatchmen are supposed to take care, and that he never gave orders to the hatchmen to stop the clam when men are passing—that, he says, is left to the judgment of the hatchmen.

However, in neglecting to stop the clam under the circumstances, Dickson obviously failed to do what should be expected of a reasonable prudent hatchman, careful of the limbs and lives of his fellow-men working with him. *Filion* v. *The Queen*, 4 Can. Ex. 134; 24 Can. S.C.R. 482.

The accident happened on board the steamer which was moored at the government wharf, the Princess Pier, upon which extended the Intercolonial Railway trains or cars as far as the crane trestle, from which they were loaded, by means of the clams—and it must be found that the negligence of the Crown's servant, which caused the accident, happened upon, in or about the operation of the Intercolonial Railway, a public work of Canada.

It is found unnecessary to go into further details with respect to the circumstances of the accident.

With regard to the insurance moneys which the suppliant has already recovered, and the $250 she will ultimately receive, they should be taken into consideration in assessing the damages to which she is entitled. I have already discussed this point in *Saindon* v. *The King*, 15 Can. Ex. 305, and will content myself with a reference to that case.

The suppliant's husband was a ship-laborer, 45 years old, earning 37½c. an hour in the intermittent work of unloading these colliers, during the season of navigation, and was also earning outside of that work; but the evidence, both with respect to his earnings on board the vessels and otherwise is very unsatisfactory, and the amount he earned each year cannot be ascertained with any degree of even proximate certainty. There was an average of one vessel a week or so, and it took from 2 to 3 days, or so, to unload them.

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However, in estimating the compensation to which the suppliant is entitled under the circumstances, while it is impossible to arrive at any sum or amount with any mathematical accuracy, several elements must be taken into consideration. One must strive, however, to give the suppliant and her children such damages as will compensate them for the pecuniary loss sustained by the death of a husband and father; to make good to them the pecuniary benefits that they might reasonably have expected from the continuation of his life, which by his death they have lost. In doing so one must also take into account the age of the deceased, which at the date of the accident was about 45, his state of health, the expectation of life, the nature of his employment, a laborer, the wages he was earning and his prospects. But, on the other hand, we must not overlook that the deceased in such a case as this must, out of his earnings, have supported himself, as well as his wife and children, and that there are contingencies other than death, such as illness, as the being out of employment, to which in common with other men he was exposed.

All of these considerations are to be taken into account, and under all the circumstances of the case, I am of opinion to allow the widow the sum of $1,400, and the children the sum of $2,400, to be equally divided among them—making in all the sum of $3,800 for which there will be judgment with costs.

Judgment for suppliant.

ABBOTT v. DAHLE.

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S. C.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Walsh, JJ. January 26, 1917.

LANDLORD AND TENANT (§ IIID—110)—DISTRESS—PRIORITIES—"MORTGAGE FROM TENANT."

A chattel mortgage by one who became a tenant after the mortgage was executed is not a mortgage "from a tenant," within the meaning of sec. 4, ch. 34, C.O. 1898, and the goods are not liable for distress for rent.

[*Re Calgary Brewing & Malting Co.*, 25 D.L.R. 859, followed.]

Statement.

APPEAL from a decision of Taylor, D.C.J., on a summary disposition of an interpleader application on affidavits. Reversed.

H. H. Parlee, K.C., for respondent.

Alex. Stewart, K.C., for appellant.

The judgment of the Court was delivered by

Harvey, C.J.

HARVEY, C.J.:—Abbott is the executor of the will of one

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Gardner, the lessor of certain premises of which one Campbell was the tenant. Dahle is the mortgagee of some of the goods on the leased premises. The mortgage was in default, and a seizure was made, but the goods were not removed from the premises. Subsequently, the rent being in default, a distress was made on the same goods. The District Court Judge held that the landlord's right to the goods was superior to that of the mortgagee.

Dahle was at one time tenant of Gardner, and before the expiration of his tenancy he sold the goods in question, which were then on the premises, to Campbell, and took back a mortgage as part of the purchase price. A few days later his tenancy ceased and then, or later, Campbell became tenant. Whether there was an interval between the two tenancies or not, or whether the goods continued to remain on the premises, does not appear from the affidavits, but it does appear that Campbell paid rent from the time Dahle's tenancy ceased.

The mortgagee rests his claim to priority upon the provisions of sec. 4 of ch. 34, C.O. 1898, which restricts the right of a landlord to distrain only goods of the tenant. But it is provided that the restriction shall not apply in favor of any one claiming title under "purchase, gift, transfer or assignment from the tenant, whether absolute or in trust, or by way of mortgage or otherwise."

Dahle claims under the mortgage from Campbell, who is the tenant, therefore the landlord maintains that the goods are excepted from the restriction of the section, and the simple question is whether the mortgage is "from the tenant" because it is from someone who subsequently became tenant.

Beck, J., held in *Re Calgary Brewing & Malting Co.*, 25 D.L.R. 859, that the "tenant" within the meaning of the section is the person who for the time being holds the premises. In my opinion this is the correct interpretation. The terms "purchase, gift, transfer and assignment" all involve an act, not simply a condition. It is clear that when the mortgage was given it was not a mortgage from the tenant because it was not given by one who was tenant. If it was not given by any tenant it surely could never be said to be a mortgage given by, or, in other words, a mortgage from, the tenant. Its character was determined by the facts existing at the time it came into being, not by those subsequently arising.

It is argued that the property was always on the premises and it is unfair to deprive the landlord of the right of distress. If unfairness to him would be the result of this construction it would be no ground for placing a construction on the words which would lead to injustice to others in many cases, but I fail to see any injustice to the landlord in a conclusion which simply prevents him from taking the goods of another to pay a debt for which that other has no shadow of liability. There certainly would be much injustice done to that other in permitting it, and it is undoubtedly to remove the possibility of that injustice that the statute was passed to take away some of the old common law rights that the landlord had, and the proviso is for the purpose of excepting these cases in which an injustice might be done him.

There is no reason for a suggestion that it was a scheme to deprive the landlord of any of his rights. The rent in default for which the landlord distrained goes back no further than June, 1915, shewing that the rent had been paid by Campbell, after Dahle ceased to be tenant, for more than a year, for the mortgage was given in March, 1914.

I think the appeal should be allowed with costs and it should be declared that the landlord's rights are subject to those of the mortgagee, who should have the costs of the interpleader proceedings. *Appeal allowed.*

Re WEST NISSOURI CONTINUATION SCHOOL.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Kelly and Masten, JJ. January 31, 1917.

1. SCHOOLS (§ III A—55)—CONTINUATION SCHOOLS ACT—BOARD VACANCIES—MANDAMUS.
Members of a township council who refuse to discharge their duties under the Continuation Schools Act, R.S.O. 1914, ch. 267, in filling vacancies in the board of trustees of a township continuation school, may be compelled to do so by mandamus; a formal demand and refusal need not be shewn but refusal may be inferred from their conduct.

2. COSTS (§ I—11)—LIABILITY OF MUNICIPAL COUNCILLORS—MANDAMUS.
Members of a municipal council are liable for costs incurred in proceedings occasioned through their refusal to discharge their statutory duties, and must indemnify the municipal corporation against all liability in respect thereof.

Statement.

APPEAL by the Municipal Council from the order of Sutherland, J. on an application for mandamus to compel the Municipal Council of the Township of West Nissouri, in the

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County of Middlesex, and members thereof, to fill existing vacancies in the West Nissouri Continuation School Board. Affirmed.

SUTHERLAND, J.:—Without canvassing in detail the somewhat complicated facts in this much-litigated matter, I am compelled to the conclusion that the township council should forthwith appoint new trustees of the school board in question so as to enable that board, when thus completed, to deal with the present urgent situation existing as to the continuation school in question.

Unless therefore by Monday next, the 2nd October, the said Township Council for the Township of West Nissouri so fill the vacancies in the said board by the election of new trustees, the order will go as asked. I will make no disposition of the costs of the motion until after the date named.

The order issued directed that Richard Fitzgerald, Reeve of the Township of West Nissouri, and W. F. McGuffin, James Smibert, William Wiseman, and John Pardy, councillors, and the township council, should forthwith fill the vacancies in the Board caused by the resignation of Fitzsimmons, McGuffin, and Wheaton.

Sir *George C. Gibbons*, K.C., for appellants.

W. R. Meredith, for respondents.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—The real appellants in this case are the members of the Council of the Corporation of the Township of West Nissouri; and their appeal is against an order of the High Court Division of this Court requiring them, and the township council, forthwith to fill certain vacancies in the West Nissouri Continuation School Board; the appeal being based upon the sole ground: that no demand, such as the practice of the Court requires, had been made upon the appellants before the application for the order in question was made.

The facts of the case are quite simple: and the duty which the appellants have been ordered to perform is a plain and obvious one.

After much costly litigation, carried to the Supreme Court of Canada, the right of the inhabitants of the township of West Nissouri to, that means of higher education, within the territorial limits of the township, called continuation schools, and the

duty of the appellants to do all that the law requires of them so that such higher education may be efficiently afforded, have been firmly and unmistakably established.

But many of the ratepayers of the township seem to be still actively opposed to the maintenance of such a school, and, unfortunately, to be set upon preventing it by any possible means; the appellants being apparently the leaders of this unwise, as it must prove to be useless and costly, as far as the administration of justice is concerned in it, opposition.

Under the Continuation Schools Act, R.S.O. 1914, ch. 267, it is the plain statute-imposed duty of the appellants to appoint three trustees of the West Nissouri Continuation School; the duty of appointing the other three being upon the County Council of the Corporation of the County of Middlesex; a duty which has been efficiently performed.

There is also imposed upon the head of the council, who is one of the appellants, the statutory duty: to "be vigilant and active in causing the laws for the government of the municipality to be duly executed and obeyed" and to "oversee the conduct of all subordinate officers in the government of it, and, as far as practicable, cause all negligence, carelessness, and violation of duty to be prosecuted and punished:" and he, as well as each of his fellow-members of the council, and co-appellants in this appeal has made the statute-imposed declaration in which he has solemnly promised and declared that he will truly, faithfully and impartially, and to the best of his knowledge and ability, perform the duties of his office: The Municipal Act, R.S.O. 1914, ch. 192, secs. 215, 242, and 193.

In the face of these duties and obligations, these appellants, instead of truly, faithfully, and impartially performing that plain and simple duty, which required the appointment of the school trustees, so that every one entitled to the benefit of the means of higher education, such as the school should afford, might have it, have endeavoured to thwart the law and their plain duty, and are now asking the Court to give its aid to them, in continuing to thwart it; to apply to this case a rule of practice which exists for the purpose of doing justice, not injustice, of protecting those who are willing to obey the law, not to be used by those who are trying to evade it as a means of enabling them to do so.

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Meredith, C.J.C.P.

To the technical objection, of want of demand and refusal, there seem to me to be three complete and obvious answers: (1) that which I have already referred to, that the course of conduct of these appellants shews a settled purpose not to perform this statute-imposed duty, but, instead of giving a loyal support to the law as they know it to be, and honestly and impartially doing all that their office requires of them towards the efficient and successful maintenance of the school, as long as they remain public officers, to thwart the law and prevent the maintenance of the school: in such a case a demand and refusal would be useless, and need not be proved: (2) an effective demand was duly made in the month of August in anticipation of the autumn opening of the public school, a demand which is still effective, because never effectually complied with or intended to be so complied with, the pretended compliances being in truth but further resistance of the duty, and prevention of the effect which an honest and impartial performance of it would have had, the result being still no board: and (3) upon the motion before Sutherland, J., that learned Judge considerately and properly gave to the appellants another opportunity to really perform their duty, and at the same time test good faith; they accepted the offered opportunity, but, instead of filling the offices of trustees of the school honestly and impartially, they made another abortive appointment, though they might have made an effective one of ratepayers quite as competent as they, and impartial.

To give effect to this technical objection, under these circumstances, is quite out of the question. If the appellants do not like the law as it is, it is none the less their duty to yield loyal obedience to it as long as it exists; and in their interests, too, because in the end every one must.

The appeal must be dismissed: the appellants must pay all costs, those of the "township council," if it can have and has any, to be taxed as between solicitor and client.

Riddell, J.

RIDDELL, J.:—In the township of West Nissouri there has been established a continuation school under the Continuation Schools Act, 9 Edw. ch. 90—this school has been declared by the Courts to be legally and validly formed.

But the majority of the voters in that township are not in favour of it, and they have elected to the council men who are of their views.

It is painful for a Canadian to read the proceedings which are in this appeal brought to light—it should be manifest to all of the slightest intelligence that it is the duty of every citizen loyally to obey the law—if he does not like it, it is open to him to endeavour to have it changed, but so long as a law stands it should be obeyed.

Instead of loyally carrying out the law and doing their plain duty under it, the council have more or less ingeniously evaded it.

There is no need of traversing the earlier proceedings—and I begin with a notice given to the board of trustees, on the 1st August, 1916, to proceed with the establishment in fact of the school.

August 3. Three of the trustees resigned: their resignation was accepted.

August 9. A written demand was served on the township council "forthwith to appoint proper persons as School Trustees of West Nissouri Continuation School Board, to fill the vacancies caused by trustees' resignations accepted by you."

August 18. The council pretended to act on this demand: they appointed three trustees who were opposed to the continuation school, and who could be relied upon not to do anything to carry out the law.

August 23. A demand was served on the school board to establish the school, but was not complied with.

August 25. A notice of motion for a mandamus was served on (1) the three trustees who had not resigned, (2) the three who had resigned, and (3) the three newly appointed; whereupon of course, August 26, 27, the newly appointed declined to accept office.

August 31. Mr. Justice Masten made an order that the board, etc., should establish the school.

The council not having effectively filled the school board, a motion was made for a mandamus to compel them to do so—this came before Mr. Justice Sutherland, who retained the motion to enable the council, if they so desired, to do their duty—they did not, and, September 25, my learned brother made an order, directed to the council and the individual members thereof, ordering them forthwith to fill the vacancies.

The council and the individual members now appeal.

The sole ground urged is that there was no demand upon them to do their duty: *Re West Nissouri Continuation School*, 25 O.L.R. 550, 3 D.L.R. 195, see especially pp. 200-1.

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But there was a demand made to fill vacancies—that does not mean to go through the form of filling vacancies, but it means effectually to fill vacancies. The silly form gone through here was in no true sense a filling of the vacancies. If by a stretch of charity we were to believe that the council acted *bonâ fide* in the original appointment, being deceived in the character of the men they appointed, it was their plain duty, on being undeceived, to appoint proper persons—many offered themselves. It is but too obvious that the council are simply playing with their plain duty and endeavouring by shallow trickery to evade the explicit order of the Court—this cannot be allowed.

The appeal should be dismissed with costs, all of which should be ultimately paid by the individual appellants—i.e., they will reimburse the township for any costs for which it is liable either to the respondents or to its solicitors. It would be an outrage to use the money of the township to enable the councillors to fight against their legal duty.

Kelly, J.

KELLY, J.:—The sole ground of appeal set forth in the notice of appeal is, that "there was no demand by the applicants or any ratepayers that the appellants should fill the vacancies on the West Nissouri Continuation School Board or any refusal on the part of the said appellants to fill the said vacancies."

How devoid of merit is the position now taken by the appellants is evident from the efforts made by ratepayers to have the school established and put into operation, and the manner in which the appellants went about doing what was their plain duty to do.

A written demand of the 9th August was served upon them requiring them to appoint proper persons to fill vacancies on the school board. They were then under obligation towards those who were entitled to have the school put into operation to take such steps as their duty imposed upon them to attain that end. Going through the empty form of appointing as trustees those who, they had reason to know, would, by their refusal to act, assist them in their design to set the law at defiance—and especially when there were other properly qualified persons ready and willing to accept the position of trustee and perform the duties of that office—was not a compliance with the demand. The manifest intention of the appellants was so to appoint to the vacan-

cies that the very object of those desiring to have new appointments made would be frustrated. What they did had no greater effect than if they had altogether ignored the demand.

I am of opinion that, under such circumstances, the demand was not properly complied with and its effect was not exhausted by the appellants going through the empty form of making appointments which it was plain to them would be ineffectual to bring about the purpose of the demand.

In view of the opportunity they had of doing what was their plain duty, their conduct amounted to a wilful disregard of their duties and a willingness to defy the orders of the Court.

The appeal should be dismissed with costs.

Masten, J.

MASTEN, J.:—I have had the opportunity of perusing the reasons for judgment prepared by my brother Riddell, and I agree in his conclusions and will add but one word.

I am of opinion that the demand of the 9th August last, requiring the township council to fill the school board, was a continuing demand—and is sufficient to support the order now in appeal, having regard to all the circumstances of this case and to the present practice on mandamus motions, which is not, in my opinion, as exacting and technical as the older cases indicate.

On the argument before us it was urged that the township council could not be expected to appoint new members to the school board in consequence of a remark which fell from me sitting in Chambers as vacation Judge. The motion before me was for a mandamus to the school board as a corporate body, requiring them to rent premises, hire a teacher, and open the school in September.

In the course of my remarks I said: "Such consideration of the governing statutes (Ontario statutes 1909 ch. 90 and 91) as I have been able to accomplish during the course of the argument leads me to the conclusion that the old board of trustees remains intact, and that the resignations of the three resigning trustees are not effective until their successors are appointed and accept office and also until the new board is fully organised for business."

The remark was not in any way necessary to the determination of the motion; and, whether the view expressed was correct or incorrect, it does not, in my opinion, afford any excuse for the failure

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of the township council to do their duty and fill up the school board.

If the view expressed is incorrect, as the appellants contend, it certainly affords no excuse. If it is correct, it emphasises the duty of the township council at once to fill the school board—because the resignation of the three trustees and the effective appointment of their successors are mutually interdependent and ought to be done *uno flatu*. To accept the resignation of the old trustees and stop there, without effectively appointing successors, is to attempt to emasculate the board, and that I take to have been the intention of the township council. I do not think the excuse put forward is such as should commend itself to the Court.

The appeal should be dismissed. *Appeal dismissed.*

Upon the settlement of the minutes of the order above pronounced, there was a dispute as to costs; and counsel for the parties by arrangement and consent appeared and spoke to the minutes before RIDDELL, J. (It was agreed that the learned Judge should consult the other members of the Court, and that the agreement before him should be considered as made before the full Court.)

E. C. Cattanach, for the respondents, the original applicants.

W. Lawr, for the appellants, the members of the council.

Riddell, J.

January 31, 1917. RIDDELL, J.:—I have had communication with the other members of the Court, and the motion made on the 29th January, on the question of costs, may now be disposed of.

We are all of opinion that the whole trouble has been caused by the foolish (I use no harsher word) conduct of the members of the township council, who seem to have imagined that their silly evasion of the order of the Court would be accepted as an honest attempt to obey it. For this they are personally to blame, and they must suffer the legitimate consequences of their folly.

It is said—and it is not unlikely—that their opposition to the school is in accord with the wish of the vast majority of the ratepayers; but it cannot be too strongly stated and firmly insisted upon that an order of the Court must be obeyed, however unpopular it may be.

In our system there is no union of powers, legislative, administrative, and judicial, in one person—we divide and limit power. In its own sphere the electorate is supreme and must have

the council or parliament it desires—the council or parliament when elected is supreme in its own domain, and no Court can interfere with (say) a township council acting in good faith within the ambit of its powers.

The Court is charged with certain duties also—and it also is supreme within its jurisdiction. When a Court makes an order within its jurisdiction, it is the duty of every person affected by it to obey and to obey loyally. It is not a matter for a vote or an issue at an election whether to obey or not; the Constitution has made the Court the final authority: unless and until Parliament enacts otherwise (and Parliament is all powerful in that regard), no one is allowed to exercise private judgment or follow what he believes to be public opinion by wilful disobedience.

The wrongdoing here was that of the individuals, and they cannot hide behind a majority of the ratepayers.

Nor can they be allowed to use public money to pay for the results of their own misconduct—it is too often forgotten that the levying of taxes is an interference with private rights of property; that, consequently, taxes should not be levied except for public purposes; and that, when levied, they are charged with a trust for such purposes. A municipality is not a complaisant benefactor, a fairy godmother, to lavish gifts indiscriminately—the Legislature defines the objects upon which money raised from the people by taxes can be spent—and so far not one of these can fairly be said to include paying for disobedience to a lawful order. The township's money is in no very remote sense the money of all the ratepayers; and the money of not even 15 or 5 or one per cent. is to be used in disputing an order the obedience of which they desire and to the obedience of which they are entitled.

Then we are furnished with a copy of a resolution by the county council, which expresses the judgment of that respected body as to the proper course to be pursued in the future. With that we have nothing to do.

The individual members of the council will indemnify the township against all costs, repaying to the township all costs, between solicitor and client, and all costs the township is obliged to pay. The respondents are to have all their costs payable by these individuals (or, if more convenient, by the township in the first instance).

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IMPERIAL BANK OF CANADA v. HILL.

Saskatchewan Supreme Court, Sir Frederick Haultain, C.J., Lamont, Brown and Elwood, JJ. January 6, 1917.

BILLS AND NOTES (§ V B—130)—TRANSFEREE'S KNOWLEDGE OF MAKER'S RELATIONSHIP—SURETY—DUTY AS TO.

When the holder in due course of a promissory note has knowledge that the maker is in reality a surety only for a third person, the creditor, after notice, is bound to do nothing to the prejudice of the surety.

[*Rouse* v. *Bradford Banking Co.*, [1894] A.C. 586, applied; 31 D.L.R. 574, reversed.]

Statement. APPEAL from the judgment of Newlands, J., 31 D.L.R. 574, in favour of plaintiff, in an action on a promissory note. Reversed.

G. E. Taylor, K.C., for appellant.

W. E. Knowles, K.C., for respondent.

The judgment of the Court was delivered by

Elwood, J. ELWOOD, J.:—The trial Judge held that the defendant was not a surety for Sagar, the joint maker of the note sued on, but that the note was given for a debt owing by the defendant himself.

While it is quite true that the note in question was given for a debt owing by the defendant, it is also true that, on the re-sale to Sagar, the amount of the note in question was included as part of the purchase-price of the land, and the arrangement was that anything paid on the contract of sale of the land was to be applied both on the note and on the contract. It seems to me that the result of the transaction is that, as between the defendant and Sagar, the defendant was surety for Sagar.

The trial Judge finds that the plaintiff had not any knowledge that the note sued on was a part of the transaction with Sagar, and in effect finds that the bank had no knowledge of the fact that the defendant was a surety.

In my opinion there was ample evidence to justify the trial Judge in finding that the bank had no knowledge of the relationship of the parties until on or about November, 1914.

The evidence shews that in July, 1914, before the note in question became due, Sagar gave a quit claim deed to the Annable Co. of his interest in the land, and that after the note became due the land in question was re-sold to Lockwood. The consideration for this re-sale was the transfer of certain securities, which apparently have not been realised on, but which, when realised on, would satisfy the claim of the plaintiff. At the time of the re-sale they were taken at a valuation greater than the claim of the plaintiff. The plaintiff was a party to this re-sale.

At the time the quit claim deed was received from Sagar, the bank, as I have stated above, still had no knowledge of the fact that the defendant was a surety. The effect of the quit claim deed was to release Sagar from any liability, but, as it was at a time when the plaintiff had no knowledge of the fact of the suretyship, such release does not in my opinion affect the right of the plaintiff to recover on the note sued on.

When the quit claim deed was received from Sagar the nature of the security was changed, by a rescission of the agreement of sale to Sagar, and the substitution therefor of the land covered by the agreement of sale.

In *Pledge* v. *Buss* (70 E.R. 585), Johnson, 663 at 668, I find the following:—

> But the Lords Justices have since held that the rights of a surety extend to this, that he is entitled to have every after-taken security kept intact for his benefit.

In *Rouse* v. *Bradford Banking Co.*, [1894] A.C., 586 at 598, Lord Watson says:—

> When two or more persons bound as full debtors arrange, either at the time when the debt was contracted or subsequently, that *inter se* one of them shall only be liable as a surety, the creditor, after he has notice of the arrangement, must do nothing to prejudice the interests of the surety in any question with his co-debtors.

And see also Lord Herschell, L.C., at p. 592.

It seems to me, therefore, that at least in November, 1914, when the plaintiff had notice of the relationship of the parties, and the circumstances of the transaction, a duty was cast upon the plaintiff to do nothing that would prejudice the surety in so far as the land was concerned.

The plaintiff could, I apprehend, at that time and while it still held the title to the land, have proceeded against the defendant upon the note in question; but when it became a party to disposing of the land, then, I am of opinion, that it was bound by the arrangement between the defendant and Sagar and the Annable Co. as to how the purchase price should be applied.

When the re-sale of the land took place it was an actual sale. It is true that what was paid was not money but securities, but it was none the less payment in full. Payment need not necessarily be made in money: Falconbridge, Banks and Banking, 2nd ed. (1913) 718; 7 Hals. 444, and cases there cited.

The securities received in payment for the land were at the

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time taken at a valuation more than sufficient to pay the plaintiff's claim, and I am therefore of the opinion must be taken as satisfaction of the note sued on.

In my opinion, therefore, the appeal should be allowed with costs, and the plaintiff's action should be dismissed with costs.

Appeal allowed.

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SIMSON AND MACFARLANE v. YOUNG.

Alberta Supreme Court, Appellate Division, Scott, Stuart, Beck and Ives, JJ. January 13, 1917.

VENDOR AND PURCHASER (§ I E—25)—RESCISSION—DELAY OF TITLE—AGENT.

An agent for the sale of land acts *functus officio* after the agreement is made, unless otherwise expressly provided, and a purchaser who has made no demand for completion on the vendor, but has upon the agent for sale, is not entitled to rescind the contract because of delay in making title, even though time is expressly made the essence of the contract.

[*Krom* v. *Kaiser*, 21 D.L.R. 700, 8 A.L.R. 287, distinguished.]

Statement.

APPEAL by the defendant from the judgment of Simmons, J. Reversed.

Mackay, for appellant; *Forsyth*, for respondent.

Stuart, J.

STUART, J.:—By an agreement in writing dated March 8, 1913, the defendant agreed to sell to the plaintiffs and the plaintiffs agreed to buy from the defendant certain lots in the City of Calgary for the sum of $3,150 payable, as to $1,550, upon the execution of the agreement, which sum was then paid, and as to the balance of $1,600, on March 1, 1914, upon completion of title.

The plaintiffs allege that both before and after March 1, 1914, they tendered the balance of the purchase-money to the defendant, but that the defendant refused and still refuses to deliver title as agreed. They therefore claim a rescission of the agreement and a return of the $1,550 paid, with interest. The defendant counterclaims for specific performance.

The defendant became the registered owner of the property on April 23, 1913, that is, some 6 weeks after the agreement was signed. There is no question raised as to absence of title in the defendant vendor at the date of the agreement. The whole dispute has arisen on account of a considerable delay on the part of the defendant in furnishing to the purchasers the title as agreed and at the time agreed.

Mrs. Young, the defendant, resided in Ireland. The agreement of sale was entered into on behalf of Mrs. Young by one

Wilkinson who at that time was a real estate agent in Calgary. He in fact signed the agreement sued upon as agent for her. Mrs. Young had not personally employed Wilkinson but he had received his instructions from one Robinson who was with Wilkinson during the previous summer as representing a firm called the Associated Agencies of Canada who were agents for Wilkinson's firm in London, England. Robinson is a brother of Mrs. Young. He had left a price with Wilkinson at which the property could be sold. Early in March, 1913, the plaintiffs offered the price required but before the agreement was closed Wilkinson cabled to Robinson who was then in England for confirmation and received a cable on March 7, saying: "Young accepts offer, Robinson." Wilkinson then prepared and signed, as agent for Mrs. Young, an agreement of sale to the plaintiffs. In this agreement Mrs. Young was described as "of Belfast, Ireland." Later on, Wilkinson, feeling apparently some doubt as to his authority to sign, prepared, so he stated, another agreement in duplicate and sent it over to Dublin, where Mrs. Young in fact resided, and it was signed by her. This agreement however was not produced at the trial and the plaintffs contended that no such second agreement was ever handed to them. One copy, so Wilkinson said, was handed to the plaintiff Simson and one returned to Mrs. Young. Whether the error as to Mrs. Young's residence was repeated in this substituted agreement does not appear. The plaintiffs have sued upon the agreement executed by Wilkinson. The trial Judge doubted the existence of a second agreement.

Wilkinson received the down payment from the plaintiffs and applied it in payment of moneys due from Mrs. Young to her vendor. Title was then procured in Mrs. Young's name, and the certificate of title was sent to Robinson.

A short time before the final payment came due to Mrs. Young, Simson came in to Wilkinson's office and intimated that he would be prepared to make the payment when it fell due. Wilkinson then prepared a transfer and forwarded it to Robinson expecting him to secure the execution of it by Mrs. Young. The letter to Robinson was addressed to him in care of the Associated Agencies of Canada, London, England. These people themselves had nothing to do with the matter and do not seem to have been instructed in any respect by Wilkinson in regard

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to it. Robinson does not seem to have received the letter enclosing the transfer.

Wilkinson, a partner with whom he had been in business, dissolved their partnership in November, 1913, and the partner had continued the business but Wilkinson kept going to the office frequently in regard to outstanding matters.

Simson did not actually tender the money to Wilkinson on or about March 1, but frequently expressed his readiness to pay upon receiving the transfer and there is no dispute about the fact that he and his co-purchasers were always ready and willing to pay. Wilkinson had, indeed, intimated to Simson that he did not wish to take the money until the transfer came to hand. At frequent intervals after March 1, Simson came to see Wilkinson to enquire whether the transfer had arrived. Finally, Wilkinson wrote to his London agents to see if they could locate Robinson and was then told that he was at the front. This, of course, must have been after August 4, 1914.

Simson kept enquiring of Wilkinson for 9 months after March 1, 1914, about the transfer. He never asked Wilkinson about the person to whom he was writing. He seems to have felt that the responsibility was entirely upon Wilkinson. He admitted that he knew Mrs. Young had never been in Calgary, and that he knew that even Wilkinson himself did not know her. On one occasion Wilkinson told him that he had sent another transfer but, when it did not return, even then he seems to have asked no questions as to the probable reason for the delay. Finally, in December, 1914, he put the matter in his solicitor's hands and upon his advice went and tendered the actual cash for the unpaid balance to some one in what had been Wilkinson's office, but not to Wilkinson himself.

In the meantime Mrs. Young had all the time been wondering why she had not got her money and was always ready, able and willing to sign a transfer and give title. In order to save the expense of a commission to take her evidence, her affidavit was admitted at the trial by consent. In that affidavit she states that the sale was negotiated on her behalf by her brother Claude Alleyne Robinson; that shortly before the balance of the purchase-money became payable her husband had written to her brother to remind him of the fact and to arrange that the sale should be

completed, that after repeated letters to her brother had met with no response her husband had on September 12, 1914, written to Wilkinson and Boys of Calgary, enquiring why the money had not been paid; that on October 28, 1914, her husband had received a letter from Wilkinson dated at Calgary October 13, in which Wilkinson stated that he had, just prior to March 1, sent a transfer to Robinson for her signature, that he had had no reply from Robinson although he had written again and that the money was available when the transfer was produced. Mrs. Young in her affidavit also states that this was the first intimation she had had of the necessity of any transfer being executed by her and that her husband wrote to Robinson several times enquiring why the transfer had not been sent to her but could get no reply. She states also that on November 9, 1914, her husband wrote to her London solicitors requesting them to act on her behalf with a view to obtaining a completion of the sale, that on January 13, 1915, her solicitors forwarded to her a transfer to be executed, which she did execute the next day, but on February 1, 1915, she was served in Dublin with the statement of claim in this action and that she had always been ready and willing to complete the sale.

On December 7, 1914, the plaintiffs, by their solicitors, Messrs. Forsyth & Trainor, sent three letters to Mrs. Young in identical terms addressed to her at Belfast, Ireland, at High River, Alberta, in care of Wilkinson, and at Calgary in care of Wilkinson and Boys, in which letters they repudiated the contract in question "in respect of your failure to deliver title to them although they have repeatedly tendered the money and demanded the same." They also demanded a return of the money already paid. None of these letters ever reached the defendant so far as the evidence shews.

The present action was begun on January 15, 1915. On February 15, 1915, the defendant's solicitors tendered the transfer duly executed and the certificate of title to the plaintiff's solicitors.

The certificate of title of which of course the original was in the Land Titles Office, gave the defendant's residence correctly as being in Dublin, Ireland.

Simson admitted that sometime during 1914, he had searched the title in the Land Titles Office and had found the defendant

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to be the registered owner although he said he thought her address there given was Belfast, Ireland.

The trial Judge, in his oral judgment, took the view that the plaintiffs had done all that could be reasonably expected of them. He expressed his view in the following words:—

> If the purchaser did what he should do in the circumstances, he is entitled to rescind. These are not usual circumstances, and if the vendor had (not) done something that he thought an active vendor should do possibly she should not be held because her agent failed to carry out her instructions, but here she did nothing. In the first place, she allowed the transaction to be entirely conducted by agents. She did nothing to inform the purchaser that any other arrangement was made. Here was a purchaser in good faith attempting through the same agent to get title. He even went further, and wrote her at the address given on the agreement, but could get no information. I think that was all he was bound to do. It is so entirely a question of fact as to whether or not I am right in coming to that conclusion.

The statement that the plaintiff had written to the defendant at the address given in the agreement must have been based on a misapprehension of the evidence because I cannot find in the appeal book any assertion by Simson that he had done so unless the letter of repudiation is what was referred to.

The trial Judge was also of opinion that the plaintiffs were entitled to assume that Wilkinson continued to be the defendant's agent for the receipt of the balance of the purchase-money and for the completion of the sale.

Upon this last point I think there is room for some doubt. In the ordinary case an agent for sale is *functus officio* when the agreement is finally made. There is, it seems to me, no presumption that he continues to have authority to act for the vendor in respect of the completion of the agreement. The only fact that might throw another light upon the matter is the admitted receipt by Wilkinson of the down payment and his disposal of it by paying a previous vendor. There is no evidence that the plaintiffs knew what he had done with the first payment. But even assuming that Wilkinson had authority to receive the first payment on behalf of Mrs. Young, that is scarcely sufficient to justify an inference that he had authority to receive the balance or to charge Mrs. Young with having held him out as her agent for the further completion of the transaction.

Moreover, I think there was still something which the plaintiffs should have done before they became entitled to repudiate.

It must be remembered that Mrs. Young was, to their knowledge, the registered owner of the land, a fact which distinguishes the case from *Krom* v. *Kaiser*, 21 D.L.R. 700, 8 A.L.R. 287, they must certainly have known that it could only have been some misunderstanding or lack of information on her part that was causing the delay.

The contract does indeed contain a clause making time the essence of the contract but this clause reads:—

> Time is to be considered of the essence of this agreement, and unless the payments are punctually made at the times and in the manner above mentioned these presents shall be null and void . . . and the vendor shall be at liberty to peaceably re-enter upon and re-sell, etc., etc.

It would appear to be open to some question whether under such a clause it is not merely as against the purchaser that time is of the essence of the contract because the clause possibly might be said to bear its own interpretation in that regard. There is reason in this also, because payment or offer and readiness to pay, must always precede the actual obligation to convey. But however that may be it is clear that the purchasers continued to treat the contract as still on foot long after the time fixed for the completion, and it was therefore I think incumbent upon them to give the vendor a reasonable notice that she must within a reasonable time execute a transfer or otherwise the contract would be off.

Now, what did the purchasers do? In the first place they knew when they bought that their vendor resided in Ireland, and must be taken to have known that this would involve somewhat more time in securing the completion of the title. No one led them to think that Wilkinson held a power of attorney to sign a transfer.

They continued to enquire and enquire of Wilkinson as to when the transfer would be ready. They did not attempt to communicate with Mrs. Young until their solicitors mailed the triplicate notice of repudiation. These notices never reached Mrs. Young, so far as appears. No doubt the plaintiffs were not very severely o blame for that because one at least was addressed to her at the address given in the agreement, *i.e.*, Belfast. But even assuming that one of them had in fact reached her it was not such a notice in my opinion as the purchasers were at that time entitled to give. They were bound to give her a reasonable

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time to convey, the more so because they knew she was registered owner and quite able to convey.

The case is again distinguishable from *Krom* v. *Kaiser*, *supra*, because there the purchaser went personally to the vendor, met him face to face and made repeated demands for title, the vendor not being registered owner and not shewing that he had any right whatever to call for a title from any one else. It is true that it was suggested in that case that repeated demands from the vendor for title and an actual waiting for a reasonable time was sufficient. But we have entirely different circumstances here. The vendor had good title all the time. She was ready and willing to convey at any time on receiving payment. The trouble entirely arose because she never knew that the purchasers were ready to pay. No one ever in fact communicated with her.

Now, I think it is true that the purchasers were not bound to go to her in Ireland and pay her the money there. I rather think the Land Titles office in Calgary was the only place they could safely part with their money and therefore safely actually tender it. See Hogg on Ownership and Encumbrance of Registered Land, p. 187. But though that may be true, it does not follow that they were not bound to communicate with her and notify her that they were ready and that if she did not produce title within a reasonable time the agreement would be repudiated. The contract does not mention any place for payment. If the defendant had lived in Alberta I think the rule would be that the purchaser would have to go to her and offer to pay the money. Then only would her obligation to convey, or to indicate her readiness to convey, have arisen. Her absence from Alberta released them from the duty of going to her. But did it release them from the duty of communication with her? In my view it did not. When they contracted they knew she lived in Ireland. They were as much responsible for the terms of the contract as she was and nothing was inserted as to the place of payment. The inference is then, surely, that a communication of some kind was intended.

It is true there was difficulty in communicating with her. It is true the purchasers were misled by the misstatement of her residence in the agreement. But it is very apparent, and

this I think is the turning point of the case, that when they really wanted to find her they were quite able to do so. Although on December 7 they mailed a letter to her at Belfast yet on January 15 they issued against her a statement of claim in which they say: "The defendant formerly resided at Belfast, Ireland, and now resides at 16 Kevins Park, Upper Rathmines, Dublin, Ireland." This does not indicate that there ever was at any time any very grave difficulty in locating the defendant. When they wanted to sue her they found out where she was quickly enough and she was served there on February 1. If they had taken as much trouble long before to locate her and had served a reasonable notice upon her the transfer would undoubtedly have been forthcoming promptly.

In reality the only excuse the plaintiffs had for their course of action was that they thought they were entitled to continue to deal with Wilkinson only. The fact that their notice of repudiation was ultimately addressed to the defendant personally would indicate that some doubt upon that point eventually occurred even to them. I think this doubt was well founded and that they were bound in the circumstances to make reasonable efforts to communicate with her personally and to give her a reasonable notice. The sequel shewed that very reasonable efforts would have been successful and that they could have got their transfer long before they began their action if they had taken as much trouble to find her for the purpose of carrying out the contract as they did for securing its rescission by the Court.

On the other hand, if it had been the vendor who was seeking to enforce a right to rescind there is no doubt that she could not have merely rested on non-receipt of the money. In such a case she would have been bound to communicate and to have a place in Alberta where they could deposit the money on receipt of a transfer before she could take advantage of any default on their part.

What the position would have been if the vendor had resided or been in Alberta when the contract was made, and no indication had been given at the time of the making of the contract that she would at the date of completion be living in Ireland somewhere it is not necessary to consider. Perhaps very much less effort at discovery of her whereabouts would have been held

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sufficient. But the plaintiffs entered into a contract with a person residing in Ireland with their eyes open and made no stipulation as to a local place of payment. In these circumstances I think they were bound to make a reasonable effort to communicate with her before attempting to rescind.

Stuart, J.

For these reasons I think the appeal should be allowed with costs, the judgment below set aside, the plaintiff's action dismissed with costs and judgment given for the defendant upon her counterclaim for specific performance, with costs.

Scott, J. Beck, J.

SCOTT and BECK, JJ., concurred.

IVES, J., being absent, took no part in the judgment.

Appeal allowed.

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MAHAFFY v. BASTEDO.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Middleton and Masten, JJ. November 17, 1916.

EXECUTION (§ I—10)—ABATEMENT BY DEATH—REVIVOR—RENEWAL.

A writ of *fi. fa.* does not become inoperative, nor a sale thereunder invalid, because the executors of the execution creditor have not revived the action, nor obtained leave to renew the writ.

Statement.

APPEAL by the defendant Bastedo from the judgment of the District Court of the District of Muskoka in favour of the plaintiff in an action to set aside a sale of land by the appellant, a sheriff acting under a writ of *fieri facias*, to the defendant Freeman. Reversed.

W. H. Kennedy, for appellant.

R. U. McPherson, for respondent, the plaintiff.

Riddell, J.

RIDDELL, J.:—The facts of this case are very simple and none of them is in dispute.

1910, June 4. Judgment was obtained by A., now deceased, against B. June 7. A writ of execution was put in the sheriff's hands. October 24. B. sold his land to the plaintiff, Mahaffy, who, on Nov. 15, caused a mortgage thereon to be discharged. 1911, Oct. 11. A. died; and Nov. 8, probate was granted of his will. 1913, June 5. The writ of execution was renewed; and 1914, Dec. 12, the sheriff sold the land of B. to the defendant.

The District Court Judge has held that the plaintiff has title, on the ground that there was no revivor of the action by the executors of A. The defendant appeals.

In *Thoroughgood's* Case (1597), Noy 73, it was held that "if after execution awarded the plaintiff dies: yet . . . the

sheriff may levy the money." So also, in cases of execution by *capias*, "When a prisoner is charged in execution . . . and the plaintiff afterwards die, his executors are not bound to revive the judgment by *scire facias* or even to charge the defendant in execution *de novo*:" Tomlin's Law Dictionary, vol. 2, "Scire Facias," III., citing Tidd's Prac. B.R. 211 (370), *King* v. *Millet*, *Hill. Term*, 22 Geo. III. Churchill on Sheriffs, 2nd ed., p. 216, may also be looked at.

The theory was that the issuing of a writ of *fi. fa.* etc. was a judicial act: *Wright* v. *Mills* (1859), 4 H. & N. 488, at p. 492; and that the writ was an order of the Court to make the money, etc., etc.: in other words, the authority of the sheriff came from the Court, not from the plaintiff.

This doctrine has never been questioned, and cannot now be successfully attacked. While it is quite true that the *fi. fa.* lands in Ontario has, by virtue of the Imperial Act 5 Geo. II. ch. 7, and subsequent legislation, an effect unknown to the Common Law of England, there is no reason why it should be treated in a different way from a *fi. fa.* goods. None of the Rules affects or modifies this principle. The renewal was simply an extension of the effect of the writ, and I cannot see that this required a revivor: *Doel* v. *Kerr* (1915), 25 D.L.R. 577, 34 O.L.R. 251, and cases cited.

I think the appeal should be allowed with costs throughout.

As to the effect of the discharge of the mortgage, etc., I think we should not here dispose of such matters. If the parties cannot agree, they may be determined in an action for that purpose, in which all the facts can be brought out.

Middleton, J.

MIDDLETON, J.:—The facts giving rise to the action are simple. A judgment was recovered in the action of *Leutzer* v. *Press* on the 4th June, 1910, and execution was issued thereon on the 7th June, 1910, and placed in the hands of the sheriff to be enforced. On the 14th October, 1911, the execution creditor died. His will was proved in November, 1911. The execution was renewed on the 5th June, 1913, and the interest of the execution debtor in the lands in question was sold by the sheriff to the defendant Freeman on the 12th December, 1914.

In the meantime, on the 24th October, 1910, while the execution was in the hands of the sheriff, the execution debtor

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conveyed his interest in the lands to the plaintiff. This action is brought against the sheriff and against the purchaser at the sheriff's sale, for the purpose of having it declared that the sale is void, and that the plaintiff is entitled to the lands free from any claim on the part of the purchaser. Put shortly, the contention of the plaintiff, which has been given effect to by the trial Judge, is that, because the action of *Leutzer* v. *Press* was not revived on the death of the execution creditor, the writ of *fieri facias* became inoperative, and the sheriff could no longer act thereunder.

In the days of Queen Elizabeth, *Thoroughgood's Case*, Noy 73, it was regarded as settled that "if after execution awarded the plaintiff dies: yet . . . the sheriff may levy the money. And if he makes no executors or administrators as yet made, the money shall be brought into Court, and there deposited until, etc."

The question was again discussed in *Cleve* v. *Veer* (1637), Cro. Car. 457, where it is said (p. 459): "There is a difference betwixt a judicial writ after judgment to do execution and a writ original; for the writ judicial to make execution shall not abate, nor is abateable by the death of him who sues it. . . . The sheriff shall execute it although the party who sued it died before the return of the writ: and although the death be before or after the execution, if it be after the teste of the writ, it is well enough. . . . If . . . the plaintiff dies before the day of the return of the writ, yet the executor or his administrator shall have the benefit, and is to have the money; and it is no return for the sheriff to say that the plaintiff is dead; and therefore he did not execute it."

In *Clerk* v. *Withers* (1704), 1 Salk. 322, 323, it is said that "the plaintiff's death did not abate the execution; and that the sheriff, notwithstanding that, might proceed in it, because the sheriff has nothing more to do with the plaintiff, for the writ commands him to levy and bring the money into court, which the plaintiff's death does no way hinder; besides, an execution is an entire thing, and cannot be superseded after it is begun."

Much later, in the palmy days of Meeson and Welsby, when accuracy of practice was worshipped alike by Bench and Bar, it was sought to reopen this question; but in *Ellis* v. *Griffith*

(1846), 16 M. & W. 106, the Exchequer Chamber declined to interfere with that which had been regarded as established practice ever since the time of Charles I. and even earlier. Alderson, B., discourages any attempt to seek for the reason for the rule; saying: "I think it much better to stand on a general rule, which we find laid down so far back as the reign of Charles I., than to attempt, after this lapse of time, to find out the reason for it. The consequence of attempting to find out reasons for such old rules is, that the reason is constantly mistaken for the rule itself, and persons argue on the reason, as if it were the rule."

I might add that it more often is dangerous to seek the reason for a rule lest no reason at all be found.

Here, we are not embarrassed by any argument based either upon the rule or the reason, for a generation hath arisen which knows not Tidd and his delightful volumes, and to whom Archbold's Common Law Practice is a sealed book.

At common law, on the death of a party either before a judgment, or after judgment and before execution, it was necessary to sue out a *sci. fa.* before anything further could be done in the action. This writ has long been abolished, and a simplified procedure, now found in Rule 300, applicable where the action is yet current, and in Rule 566, applicable where it is desired to issue execution, has been the outcome of attempts at legislative reform. It cannot be supposed that it was the intention of these Rules to make anything in the nature of revivor necessary where it was unnecessary in the strictest and most technical days of common law practice.

The only serious question is, whether the execution should have been renewed, without leave. The renewal is a mere ministerial act on the part of the officer of the Court renewing the writ—*Poucher* v. *Wilkins* (1915), 21 D.L.R. 444, 33 O.L.R. 125; *Doel* v. *Kerr*, 25 D.L.R. 577, 34 O.L.R. 251—and, even if irregular, the irregularity would not vitiate the execution so as to enable the plaintiff, a stranger to the record, to attack the sale.

I can see no reason why, upon the death of the execution creditor, his executors, who would be entitled to receive the money, if made under the execution, should not be entitled to

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have the writ renewed without revivor or the leave of the Court. This is not any proceeding in the name of the deceased man; the renewal would be at the instance of the executors. For the like reason, when, after execution, the judgment is assigned, the assignee would, without any proceedings, be entitled to demand the money, if levied, without the leave of the Court. I can see no reason why he may not have the execution renewed without leave. The request for renewal would be by him, not by the assignor.

Chambers v. *Kitchen*, 16 P.R. 219, 17 P.R. 3, is quite beside the present controversy. It merely held that where under the present practice proceedings may be had in the original action, although after judgment, an order to continue, in the nature of a revivor, may be issued under the Rule corresponding to the present Rule 300; the simpler and more summary procedure provided by Rule 566 being applicable only where leave is sought to issue execution upon a judgment already pronounced.

Upon the facts disclosed, it appears that the plaintiff paid off a mortgage upon the property in question in 1910, but the discharge of the mortgage was not registered until 1915. It may be and probably is the case that the plaintiff is entitled to stand in the position of the mortgagee and claim a lien upon the lands for the amount paid to discharge the mortgage as against the purchaser at sheriff's sale; but this case was not presented for determination. The sale, which purports to be a sale of the interest of the execution debtor in the lands, and which could convey to the purchaser no greater right than the debtor himself had, is the subject of the attack; and this attack fails.

The appeal should therefore be allowed, and the action should be dismissed, both with costs.

Masten, J.

MASTEN, J.:—I agree, and have nothing to add.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—The substantial question involved in this case is: whether the defendant Freeman acquired title to the land in question under the sheriff's deed—by virtue of which alone he claims title—against the plaintiff claiming title, and having possession, under a deed of the land made to him by the judgment debtor.

Hitherto the plaintiff has contended that the sheriff's sale was invalid because the sale was made more than three years

after the *fi. fa.*, upon which the sheriff acted, was issued, and without a renewal of the writ: and the defendants have contended that the sale was valid because the writ was renewed, and the land was sold during the currency of such renewed writ. No other question was raised, nor any other point made on either side.

But during the argument here the question was asked: whether anything had been done by the sheriff, before the renewal of the writ, which would give him authority to sell without any renewal of it; all parties, however, were agreed that nothing had been done; and that the sale could not be sustained on that ground; and in that all were right.

Though it is true that, speaking generally, a *fi. fa.* binds the "lands against which it is issued from the time of the delivery thereof to the sheriff for execution:" The Execution Act, R.S.O. 1914, ch. 80, sec. 10: yet there must be something more than that; something tantamount to an actual seizure; something, as it has been said, "amounting in law and fact to an incipient step in the execution of the writ:" see *Doe d. Miller* v. *Tiffany* (1848), 5 U.C.Q.B. 79, at 90; and *Doe d. Greenshields* v. *Garrow* (1848), *ib.* 237; to warrant a sale by the sheriff after the expiration of the writ.

The fact that at common law a sheriff might go on and sell under a *fi. fa.* against the goods of a judgment debtor, if the debtor died after the teste of the writ, seems to me to have no direct bearing on this case. At common law the writ bound the goods from its teste, and so had some effect before the debtor's death: but whether that effect was considered a sufficient warrant for continuing to completion the levy, or whether it was based upon the common sense ground that the ordinary method of revivor by *scire facias* would be inapplicable to such a case, is not very material: the fact existed, but existed under a practice very different from that now in force here; and, as I have said, has no direct bearing upon the questions involved in this case.

By the practice in force here, a *fi. fa.* remains in force "for three years from its issue," and, "unless renewed" within that time, then expires: Rule 571: at the common law, there was no such limitation; the writ might be executed at any time after its teste, however remote the period might be, if it were returnable

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in the usual form immediately after the execution thereof; and might, at any time, be placed in the hands of the sheriff for execution. The uncertainty and inconvenience of this practice, and the injustice which it sometimes caused, called for legislative intervention, and by legislation a remedy was applied, a remedy which, apparently, was eventually thought to have gone too far, for in later years the remedy was remedied by extending the life of the *fi. fa.* from one to three years without renewal.

In this Province, under the Common Law Procedure Act, 1856, the subject was dealt with in this way (sec. 189): "Except writs of *capias ad satisfaciendum* every writ of execution shall bear date and be tested on the day on which it is issued, and shall remain in force for one year from the teste, and no longer if unexecuted, unless renewed, . . ." So that in one stroke the two evils, retrospective effect and unlimited duration, were cured.

When the Common Law Procedure Act was superseded by the Judicature Act, as in nearly all things else, the provisions and words of the Judicature Act of England were substituted for those of our Common Law Procedure Act, and so the provision which I have quoted came to be the words now in force here: "A writ of *fieri facias* shall remain in force for three years from its issue, unless renewed before its expiration, when it shall be in force for a further period of three years from the date of such renewal, and so on from time to time:" but the change in the words has not altered the practice: a writ of *fi. fa.* is still in force for the stated period and no longer, although the words "and no longer" are not in the Rule of Court, confirmed by legislation, now covering the practice in this respect: Rule 571: and a seizure made during the currency of the writ may be carried on to levy under it after the writ has expired, although the words, "if unexecuted," contained in the Common Law Procedure Act, are not in the Rule now in force.

At the time of the attempted renewal of the writ in question it was, as all parties admit, wholly unexecuted, and so expired, unless the death of the judgment creditor before the end of the three years, or a renewal of the writ, prevented it.

It seems to me, in view of the provisions of the Common Law Procedure Act, and of the Rule now in force, and which was in

force when the attempted renewal was made, to be out of the question to consider that the death had any effect upon the necessity for the renewal. Neither makes any such exception; the one exception made in the Common Law Procedure Act is admittedly and obviously inapplicable; nothing of any kind had been done by the sheriff in the way of execution of the writ. At common law there was no need to renew; the writ was in full force, except as affected by the death, when it was subsequently executed: so such cases as *Ellis* v. *Griffith*, 16 M. & W. 106; *Cleve* v. *Veer*, Cro. Car. 457, and *Thoroughgood's Case*, Noy 73, are wholly inapplicable upon this question: they would be applicable if this sale took place during the currency of the writ only.

So that, as the parties have conducted this case hitherto, the sole question upon which their rights depend is: whether the *fi. fa.* in question was renewed.

No leave of the Court was obtained or sought in the matter in any way, but, notwithstanding the death of the judgment creditor, nearly 20 months before, the writ was, in form, renewed upon *præcipe* in the name of the dead man, in the same manner only as it might have been renewed had he been alive.

That I cannot but deem an entirely unwarranted and ineffectual proceeding: it was done entirely without authority, for the dead man could give none, and if he had given any before his death—of which there is no evidence and which is extremely improbable—his death would have put an end to it, not to speak of the assignment of the judgment made by his executors after his death and before the form of renewal took place.

There is no evidence of any authority given by the executors of the dead plaintiff's will; and it is quite improbable that they gave any, or concerned themselves further in the matter after the 11th November, 1912, when they assigned the judgment to "Ida Jane Press, as part of her legacy under the will."

Had they given authority, it could have been authority to carry on the proceedings for them as executors only: it could not have authorised active proceedings in the name of one who was dead. The case is quite different from that of an assignment of a judgment by a judgment creditor, still living, and so one who could act and may have authorised further proceedings in his name, though altogether for the benefit of the assignee.

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All this shews the purpose and effect of Rule 566: you cannot proceed in a dead man's name; or, without his authority, in the name of a living person: you cannot carry on legal proceedings to which you are not a party in any way; but, if you have acquired a right in the action, Rule 566 gives you a simple means by which you can enforce it: without obtaining such means you are powerless to act for a dead party. If that were not so, the Rule would be senseless; you could go on as well without as with the leave of the Court for which it provides, and whether in truth having or not having any such right. Whether having or not is to be judicially determined on an application under the Rule—otherwise any one might misuse the process of the Court in an action to which he was in no way a party.

The act of renewal of the execution was in no sense a judicial act; on the part of the clerk of the Court, it was purely a ministerial act, done, as I have said, upon *præcipe* only, and was substantially the act of the person who signed the *præcipe* as solicitor in the name of and for one who was dead, and the use of whose name, whether used knowingly or in ignorance—though it could not have been in ignorance, for the act was done for the sole benefit of a legatee under the man's will—was improper and ineffectual.

The solicitor's proper course was a plain and a simple one; and I can find no excuse for a departure from it; for the doing of that which any one must have known was unwarrantable, making use of a dead man's name to do that which only a living man could do.

Rule 566 afforded a simple and plain way of removal of all difficulties that the judgment creditor's death caused: it clearly provides that in just such a case as this, among others, the party alleging himself to be entitled to execution may apply for leave to issue it, or to amend any execution already issued. Had such an application been made, and had the judicial act of giving leave, which it provides for, been exercised, in giving leave, a renewal in accordance with such leave would have been valid, and valid for the purposes now in question, though there might have been some irregularity in the manner in which the application for leave was made.

It would be a misuse of words to speak of an unwarranted

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ministerial act as a mere irregularity. If the officer had no power to renew the writ except upon order made under Rule 566, there could be, and was, no renewal: if he had such power, the renewal is valid: no question of irregularity arises: and it is out of the question to make any difference between the issue of a writ and its renewal, each is alike a ministerial act done upon the request, by *præcipe*, of a party: the writ dies if it be not renewed: the renewal gives another life to it just as much as if it were a new writ, signed and sealed anew. A sheriff has no power to renew a writ, nor has any stranger to the action, except upon an order of the Court under Rule 566: and the clerk of the Court is absolutely without power to permit any stranger, whether claiming to be executor or assignee or otherwise entitled, to intermeddle, until he has proved his right by the production of an order of the Court, under Rule 566, according him the right.

An order made under Rule 566, in such a case as this, should not give leave to proceed in the dead man's name—to sign the *præcipe* and so on in his name or as his solicitor—but should give leave to the executors, or, with their consent, their assignee, in their name, or without their consent in her own name, to carry on the proceedings: see Rule 301: and to renew the execution, or, if in force, to amend it by a proper substituting of names, for that of the dead judgment creditor.

In my opinion, the learned District Court Judge was right in considering the alleged renewal of the *fi. fa.* invalid; and, as the cases under the common law cannot affect the question of the renewal of a writ, I would dismiss this appeal.

Appeal allowed; MEREDITH, C.J.C.P., *dissenting.*

LEAMY v. THE KING.

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Anglin and Brodeur, JJ. November 7, 1916.

1. WATERS (§ I A—5)—FLOATABLE AND NAVIGABLE—BED—CROWN DOMAIN.
A river navigable from its mouth upwards until obstructions are reached which make the remainder only capable of floating loose timber is subject in its navigable part to the rules of law applicable to navigable waters.
[See also *Bouillon* v. *The King*, 31 D.L.R. 1.]

2. PUBLIC LANDS (§ I C—15)—PATENTS—TITLE TO BED OF NAVIGABLE RIVER.
In the absence of express terms to that effect, a Crown grant of township lands will not pass title to the bed of a navigable river within the area described in the letters patent.

APPEAL from the judgment of the Exchequer Court of Canada, Statement.

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15 Can. Ex. 189, 23 D.L.R. 249, dismissing the suppliants' petition of right with costs. Affirmed.

Aylen, K.C., for appellants.

Chrysler, K.C., for respondent.

Belcourt, K.C., for the intervenant, the Att'y-Gen'l for Quebec.

FITZPATRICK, C.J.:—This is a petition of right brought by the appellants to have it declared that they are the owners, and as such entitled to the possession of the bed of the River Gatineau within the boundary lines of lots 2 and 3 in the 5th range of the Tp. of Hull, P.Q.

The petition was dismissed by Audette, J., on two grounds (*a*) that the River Gatineau at the point in question is navigable and was so at the time the grant relied on by the appellants was made; (*b*) that the bed of the river was not included in the grant.

A river must surely be navigable if it is in fact navigated and I do not understand how it could be successfully contended that the River Gatineau is not, as it crosses the lots in question, "navigable and floatable." The appellants do not seriously dispute the finding of the trial Judge to that effect. In their factum here they boldly take this position: "Whether the Gatineau River, in the locality of the lots in question, is navigable or unnavigable, floatable or unfloatable," the ownership of the bed passed by the grant to their "auteur," Philemon Wright, and *McBean* v. *Carlisle*, 19 L.C. Jur. 276, is referred to. No one disputes or puts in question the point decided in that case. In Quebec a right of servitude in favour of the public undoubtedly exists for certain purposes over all streams, whether navigable or not. The question we have to decide, however, relates not to the use of the water, but to the ownership of the bed of the stream, and at once the distinction must be made between rivers which are navigable and those which are not. The beds of non-navigable and non-floatable streams are the property of the riparian owner *ad filum aquæ* (*Maclaren* v. *Att'y-Gen'l for Quebec*, [1914] A.C. 258; 15 D.L.R. 855; 46 Can. S.C.R. 656; 8 D.L.R. 800), and pass with the grant of the *ripa*. On the other hand, from the very earliest days the Courts of Quebec have held, and it is by the law of that province that this case must be decided, that the title to land which forms the bed of a navigable river can only be acquired by an express grant.

By French law the beds of all navigable rivers were deemed to be vested in the King as a public trust to subserve and protect the public right to use them as common highways for commerce. (Art 400 C.C.) In France the King by virtue of his proprietary interests could grant the soil so that it should become private property, but his grant must be express (*In re Provincial Fisheries*, 26 Can. S.C.R. 444, at p. 527, and, in all cases, made subject to the paramount right of public use of the navigable waters which he could neither destroy nor abridge (Proudhon Traité du Domaine Public, vol. 3, No. 734). As under the French law the beds of navigable streams were vested in the King of France *Fisheries Case*, 26 Can. S.C.R. 444), tha title passed to the King of England by right of conquest. The laws of a conquered country remain in force unless and until they are altered and therefore the Crown now holds those lands upon the same trus s as before.

Since Confederation the title to beds of navigable rivers has been vested in the Crown in right of the province, but the authority to legislate regarding the public right of navigation is, by the B.N.A. Act, 1867, assigned to the Dominion Parliament as coming within the subjects of trade and commerce and navigation which are among those enumerated in sec. 91 as within its exclusive authority.

In the U.S. Courts it has been held that the power conferred upon the Federal Congress to regulate commerce, extends not only to the control of the navigable waters of the country and the lands forming the beds thereof for the purposes of navigation, but also to authorising the use of the beds of the streams for the purpose of erecting thereon piers, bridges and all other instrumentalities of commerce which, in the judgment of Congress, may be deemed necessary or convenient. The doctrine is very clearly stated in *Stockton* v. *Baltimore and N.Y. Railroad Co.*, 32 Fed. Rep. 9 at p. 11.

It follows, therefore, that any legal title which might have become vested in a private individual must be subject to the same public trust and, therefore, subordinate to the rights of navigation and to the power of parliament to control and use the soil in such navigable rivers, whenever the necessities of commerce and navigation demand. Th right of parliament

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to regulate trade and commerce and navigation remains unaffected by the question as to whether the soil of the shore submerged, is in the Crown in the right of the province or in the owner of the shore.

Brodeur, J., refers to the opinion of Sir L. H. Lafontaine in the "Seigniorial Case" to the effect that the grant by the Crown of the bed of a navigable river must be made in express terms. It is not to my knowledge that the opinion so expressed has ever been doubted.

The letters patent in this case make no reference to a river, and the diagram attached to the grant has nothing to indicate that the Crown or the grantee had any knowledge of the fact that the River Gatineau crossed the lots in question. In these circumstances, the petition of right must fail on the short ground that the River Gatineau, being a navigable stream at the locus in question, was not included in the grant which is silent with respect to it. The appeal should be dismissed with costs and there will be no costs on the intervention.

See Pothier and Troplong as to *defaut de contenance*.

Davies, J.

DAVIES, J.:—In my judgment, the evidence shews conclusively that the river was a navigable one as far back as the memory of living witnesses went and was largely used as such by the great lumbering firm of Gilmour & Co. for about 50 or 60 years or more. The distance from its mouth to Ironsides is some 4 or 5 miles. The evidence places that fact of navigability beyond reasonable doubt.

Then comes the question—if that portion of the river in question, which embraces the locus in dispute, was navigable when the grant passed, did or could the grant operate to convey a title to the grantee in the river bed? The boundaries of the Crown grant are general but no doubt cover and embrace this river bed and if such a grant could legally convey that part of the navigable 4 or 5 miles of the river to the grantee, as claimed, it no doubt did so.

Finding, as I do, however, the river from its mouth up to the rapids to have been a navigable one, I reach the conclusion that such navigable portion of it was not and could not be conveyed by the grant.

If the bed of such portion of the river as was navigable was

intended to be conveyed express words to that effect would be necessary to be used, assuming the bed of a navigable river could be conveyed at all by the Crown without legislative authority.

In the case of the grant before us no such express words are used nor is the river referred to at all in the grant or shewn at all upon the plan to which the description refers. It is conceded that no legislative authority for the grant existed. The contention of the suppliant is, however, that without express words and in the absence of legislative authority the Crown could by such general words as are used in the grant pass the title in the bed of a navigable river flowing through the lands granted.

It is the civil law and not the common law which governs in this case and the test of navigability is not a tidal but a practical one, namely—as a fact, is the river at the locus in dispute a navigable one? And, as I have held, its navigability for all practical purposes is unquestionable for 4 or 5 miles up from its mouth.

I cannot but think that this action was brought by the suppliants on a misunderstanding of the decision of the Privy Council in the case of *Maclaren* v. *The Att'y-Gen'l of Quebec*, 15 D.L.R. 855, [1914] A.C. 258.

That case merely decided that the general descriptions of the townships there in question, being bounded by the river, were not varied by the references to the posts and stone boundaries in the detailed descriptions and that the River Gatineau being one down which only loose logs could be floated was not a part of the Crown domain within art. 400 of the Civil Code and that the appellant's lands on either side of the river extended *ad medium filum aquæ*.

Mr. Aylen attempted to apply the second finding of the Judicial Committee not only to the locus there in dispute but to the entire length of the river including the navigable part of it below Ironsides which embraces the locus in dispute in this appeal.

The river beyond Ironsides, in its upper reaches, may not be navigable but one down which loose logs alone could be floated but, in my opinion, that fact and the legal consequences which flow from it cannot affect the 4 or 5 miles from its mouth to Ironsides the evidence with respect to which shewed conclusively that it was navigable for loaded barges, steamers and other kinds

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of river craft and was, as a fact, while the Gilmour Lumbering Co. carried on their operations for a period covering 50 or 60 years, so navigated.

That portion of the river between its mouth and Ironsides is crossed by two bridges—one is a draw-bridge to pass vessels through, and the other a bridge of the C.P.R. Co. 40 ft. high and under which vessels passed. The booms and river improvements, which consist of piers, 1 to 12, running up the river from its west to its east side in a slanting direction, passed to the Dominion Government under sec. 108 of the B.N.A. Act, 1867.

In the case of the *Att'y-Gen'l of Quebec* v. *Fraser*, 37 Can. S.C.R. 577, this Court, of which I was a member, held that the River Moisie, P.Q., for 4 or 5 miles up from its mouth till it reached the "falls," was a navigable river and, for that reason, a grant of lands bounded by the banks of that river did not convey to the grantee the bed of the river *ad medium filum aquæ*. In a summary of our holdings in that case formulated at the end of the reasons for the judgment of the Court, delivered by Girouard, J., we say:—

> That the legal effect of the language of the patent with respect to the bed of the river, and the fishing rights therein, depends upon the determination of the question whether the Moisie at and in the four or five of its miles covered by the patent is navigable or floatable within the meaning of the law of Quebec, and that, adopting the test of navigability laid down by the Privy Council and hereinbefore quoted, we concur with the findings of the trial Judge, and which findings are not questioned in the judgment of the Court of Appeal, that such river at such locality and from thence to its mouth, is so navigable and floatable.

That judgment was subsequently appealed to the Judicial Committee, *sub nomine Wyatt* v. *Att'y-Gen'l of Que.*, [1911] A.C. 489.

In their judgment, which affirmed the decision of this Court, their Lordships approved of and incorporated in their reasons the summary of the judgment of this Court including the part above quoted. The facts with respect to the navigability of the rivers Moisie and Gatineau a few miles up from their mouths and their non-navigability beyond that for nearly 200 miles are very similar and, in my opinion, the judgment of the Privy Council in *Wyatt* v. *Att'y-Gen'l of Que.*, *supra*, is very much in point on the disputed question in this case if it is not conclusive.

The result of that is to hold that the navigability of some

miles of a river from its mouth, which is found and held, and the legal consequences which flow from that finding cannot be affected by the fact that, higher up, the river becomes, by reason of falls and rapids, unnavigable and capable only of carrying floating logs.

In the reasons for the judgment of their Lordships of the Privy Council in the *Maclaren* case, 15 D.L.R. 855, [1914] A.C. 258, delivered by Lord Moulton, his Lordship was most careful to define exactly what was being decided. He says, at pp. 863-4:—

> But this is not all. The rights of the public in the River Gatineau are not in any way put in issue in this case. The parties to this appeal are substantially at one on the question of the private ownership of the bed of the River Gatineau. The only difference between them is as to which of two private owners possesses it. The appellants contend that the portion of the bed of the river which is in question passed to their predecessors in title, by the grants to Caleb Brooks in 1860 and 1865, and that to William Brooks in 1891. The respondent contends that it passed to the defendants under the grant to them in 1899. Neither party, therefore, sets up a title in the public. So far as the River Gatineau is concerned, the decision of this case will do no more than decide whether or not the language of certain existing grants was sufficient to pass particular portions of that bed, or whether, after such grants were made, they still remained in the hands of the Crown so that it had power to grant them by a later grant.

Now it is attempted to apply some general observations made as to the River Gatineau being a navigable river or not to the entire river, including the locus near its mouth.

It does not seem to me that there was any intention on the part of the Judicial Committee to lay down any such rule as that contended for or to overrule or in any way call in question the previous decision of their Lordships with respect to the Moisie River being navigable for 4 or 5 miles from its mouth while above that, for nearly 180 miles, navigation was stopped by the falls and rapids of the river.

Lord Moulton, after saying that speaking generally no substantial help is obtained by the decided cases in Quebec as to navigable and floatable rivers until the appointment of the Seigniorial Commissioners under the Act of 1854 to settle the value of the Seigniorial rights which were then about to be abolished, says that the decisions of those Commissioners were of the highest authority as to the law then prevailing in Lower Canada to which an almost authoritative sanction has been given by statute. He further says:—

> Turning to these seigniorial decisions and the judgments of the indi-

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vidual Judges which accompany them, one cannot find any specific reference to the status of the beds of rivers which were only "*flottables à bûches perdues.*" But, on the other hand, one finds clear statements that the seigniors became by their grant proprietors of the non-navigable rivers which passed through the fief subject to legal servitudes and to the *ad medium filum* rule.

His Lordship held that these decisions and the subsequent case of *Boswell* v. *Denis*, 10 L.C.R. 294,

justified their Lordships in regarding the answers to the seigniorial questions as meaning that rivers were not floatable in the legal sense of that term if they were only so *à bûches perdues*,

and that their Lordships approved of the decision of this Court, in *Tanguay* v. *Canadian Electric Light Co.*, 40 Can. S.C.R. 1, where the precise point was so decided.

For the purposes of this case I conclude that the decisions on the seigniorial questions referred to by Lord Moulton with commendation and approval decided the law in Quebec to be that grants from the Crown did not without express words in them pass the beds of navigable rivers to grantees. In such a case as the grant before us purporting to convey certain lots of the township of Hull through which the River Gatineau flowed and in which grant no reference at all was made to the river, the bed of the river for the 4 or 5 miles from its mouth where the river was navigable did not in my judgment pass to the grantee.

A third question was raised whether the possession of the Crown for so long a period as that proved, evidenced by the construction and maintenance of the 12 blocks or piers built upon the bed of the river and connected together by logs or booms, did not bar the plaintiffs' claim. In my opinion it did.

Re-stated shortly, my opinion is that a river such as the Gatineau, nearly 180 miles in length, may be in fact and in law navigable for miles from its mouth and until the falls or rapids are reached which prevent further navigation while it may not be navigable above those obstructions.

That in the case of *Att'y-Gen'l of Quebec* v. *Fraser*, 37 Can. S.C.R. 577, the point was so decided, and on appeal to the Privy Council was affirmed, and that by virtue of the civil law of Quebec in order to pass the bed of a navigable river from the Crown to the grantee express words and statutory authority must be shewn.

Lastly, the plaintiffs' claim in this case is barred by the Crown's possession of the bed of the river as proved by the evidence.

The appeal, therefore, should be dismissed with costs but no costs on the intervention.

IDINGTON, J. (dissenting):—The trial Judge suggested that the title to relief should be first tried and if any legal damages suffered, then a reference should be directed to determine the measure thereof.

He found the appellants had in fact acquired whatever title the original grantee had in said lots, but in law he held that the grant in question did not pass any title to the bed of the stream.

The correctness of this latter holding must turn first upon the power of the Crown to make the grant and next upon whether in law the terms used therein are sufficiently clear to carry in them the intention to convey the bed of the stream free from any public right such as of navigation.

The power of the Crown so to grant must turn upon the nature of its title to such waste domains which it became seised of by statute or otherwise as result of the cession of 1759, and be subject to such restrictions, if any, as existed at the time in question.

I should feel reluctant to cast a possible doubt upon titles dependent upon the grants of the Crown by holding that the prerogative had been so limited in the scope of its authority by reason of what French law or custom may be found to have imposed upon the prerogative of the French Crown.

In so far as anything in question herein may depend upon the royal prerogative, the measure thereof I take it must be that recognised by English law as determining the same and, in the language of Lord Watson in the case of *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick*, [1892] A.C. 437, a 441,

> the prerogative of the Queen, when it has not been expressly limited by local law or statute, is as extensive in Her Majesty's colonial possessions as in Great Britain.

I may in adopting this opinion be permitted to add that I incline to think there are cases in which the prerogative may extend further in some colonies than it now may in England.

In some colonies the limitations imposed by statute, applicable to England or Great Britain only, may not be suitable to local colonial conditions even if English law so far as suitable thereto may have been introduced.

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In measuring the rights acquired in Quebec before the cession from the French Crown, art. 400 of the Code may be of value so far as respects the law of that earlier period.

In such cases whatever impliedly failed by French law to pass to the grantee must be presumed to have been preserved to the Crown and to have passed to the English Crown. In that sense the opinion of the learned Judges of the Seigniorial Court must be always held of great value relative thereto.

What, however, we now have to deal with is of an entirely different nature. It arises out of the grant by the English Crown of part of the waste lands of the Crown, in Quebec, in 1806—60 y ars before the Civil Code was enacted.

The result may or may not differ from a fair consideration of what might have been the effect of a similar grant if made by the French Crown before the cession. It conduces, however, to a clear conception of what we have to deal with herein to bear in mind that it is English and not French law which we have to consider and that art. 400 C.C., so much relied upon, cannot help us herein.

To prevent misapprehension it may be observed that from the time art. 400 C.C. came into force, in 1866, as part of the Civil Code, the Crown having assented thereto may be possibly bound thereby as to subsequent grants unless so far as expressly or impliedly modified by later legislation. I express no opinion upon that. All I am concerned with just now is to eliminate what to my mind is obvious error leading to confusion on a subject where there is so much apt to confuse, even when we have eliminated all that we possibly can which tends to mislead. And I may here observe that in the numerous cases I have referred to in the course of this inquiry, the only formally expressed reason I have found advanced for applying the test of French law in this regard is that assigned by the late Gwynne, J., in the case of *Dixson* v. *Snetsinger*, 23 U.C.C.P. 235, at 242, when he quotes and relied upon 14 Geo. III. whereby it was enacted—

> that in all matters of controversy relative to property and civil rights resort shall be had to the laws of Canada as the rule for the decision of the same.

I fail to see how that provision for the decision of rights in controversy between subject and subject relative to questions touching their property and civil rights can touch or measure the prerogative rights of the Crown relative to the Crown domain.

It is elementary that unless the Crown is reached by express words or necessary implication in any statute its rights or prerogatives are not affected thereby.

There is no such expression in the statute in question. Indeed, there is much in the statute forbidding such implication, to say nothing of sec. 9 which provides that sec. 8 which confers said right shall not be extended to any lands that had been granted or should thereafter be granted by His Majesty to be held in free and common soccage.

I am not concerned with the outcome thereof. It might well be that where lands were granted and any dispute arose relative to them between subjects of the Crown, their rights might be determined by French or other law, yet the rights of the Crown to deal with that ungranted would not be affected by any such rule.

I do not quarrel with the result of the decision in *Dixson* v. *Snetsinger*, 23 U.C.C.P. 235, which seems to have been rightly decided. The rebuttable presumption of law which gives the riparian grantee of lands *ad filum aquæ* as his boundary might well be held in reason and common sense rebutted when such a claim is confronted by the facts involved when attempted to be applied to such a river as the St. Lawrence. Fortunately we need not pursue that inquiry. The exigencies of this case are not such as to call therefor.

It is the range of possible activity of the English Crown in law over the waste lands thereof in an English colony which we have to deal with and whether or not the limits thereof are to be taken from what we find in relation thereto governing its action in England in regard to inland rivers, does not seem to me to make any practical difference for the purposes of this case.

The Gatineau River is far from tidal waters. The limitations upon the powers of the Crown in regard to tidal waters may therefore at once be eliminated from our consideration.

I think the law upon the subject may be accepted as expressed in Coulson & Forbes on the Law of Waters, 3rd ed. at p. 515, as follows:—

> The public right of navigation may exist in non-tidal as well as in tidal waters; and, where it does so exist, the principles of law which have been stated with regard to tidal waters will equally apply.
>
> But, in the case of non-tidal rivers, the right of passage does not exist

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as a public franchise paramount to all rights of property in the bed, but can only be acquired by prescription, founded on a presumed grant from the owners of the soil over which the water passes. It would not, therefore, appear to extend *primâ facie* to a right of passage over the whole of the navigable channel, as in the case of tidal rivers, but to be strictly limited to the extent of the right granted or user proved.

I assume that the law is thus correctly stated and hence a grant of the soil as well as right to fish might have been made by the Crown if possessed thereof in an inland river though navigable. Such I take it are the implications in the foregoing statement just quoted.

The doctrine laid down in the cases of *Malcomson* v. *O'Dea*, 10 H.L. Cas. 591 and *Gann* v. *The Three Fishers of Whitstable*, 11 H.L. Cas. 192, and many other cases seem to indicate that the Crown before Magna Charta had the power even in the case of tidal navigable waters to make a grant of the soil, but since the development of what is contained therein rather than what is expressed, the Crown cannot now in England make such a grant of soil in such river as will exclude the public or create a several fishery.

This suggests the inquiry of whether or not the like limitations bind the Crown in the colonies. If the prerogative of the Crown in such cases is to be measured by that existent anterior to Magna Charta, assuredly there could be no doubt of the power to make a grant of the soil in any tidal navigable river and thereby exclude the public and hence much more so relative to inland navigable riv rs or other waters.

It may well be observed that the historical sid of the question as exemplified in the grants made in the ear y history of the Engl sh colonies in America may warrant us in saying that much wider powers than migh be tolerated in England, if conceivable of exerc:s there, have been presumably duly exercised in colonies.

Though this case has been argued twice I have been unable to tempt counsel to help us in relation to the line of inquiry I thus suggest.

I presume counsel in so refraining have been well advised for the two-fold reasons, first that royal prerogative in these later and degenerate days, cannot be imagined to have possessed, even a long time ago, such powers (so repugnant to modern thought) as to render the resting of a claim thereon advisable; and next, that in any case it is the sand and gravel which would go with a

rightful grant of the soil that appellants claim and possibly they attach little importance to the right thereto being subject to the public's reasonable rights of navigation. I therefore express no definite opinion on that aspect of the case.

The Crown certainly owned this soil in question and this river 110 years ago, and could within the law as laid down in the cases of *Murphy* v. *Ryan*, Ir. Rep. 2 C. L. 143, followed by *Pearce* v. *Scotcher*, 9 Q.B.D. 162; *Tilbury* v. *Silva*, 45 Ch. D. 98, without any great stretch of its prerogative grant both soil and river and let the public find its own way of reclaiming any uses thereon or thereof as they best might.

The case of *Hurdman* v. *Thompson*, Q.R. 4 Q.B. 409, and other like cases also support the appellants' contention relative to the power of the Crown to convey the soil in the bed of a navigable river. As they do not bind us I have tried to test the question by the application of general principles which should prevail.

The process adopted for disposing of this part of the wilderness to induce settlement thereof is outlined in the recitals in the grant. And in the instructions to Lord Dorchester, an Governor-General in 1791, some 15 years before the grant in question, both the trial Judge and counsel arguing here seem to find the only guide to the meaning of said recitals.

I should much have preferred to have seen the instructions to Bouchette, the Surveyor-General, and the reports of the surveyors to him, accompanied as they doubtless were with their field notes, and default those illuminating records should have been glad to have had some reasonable explanation for their non-production.

Had such and the like information relative to the instructions to the Governor-General and Lieutenant-Governor, for the time being, been forthcoming or accounted for, we could probably approach the use of the 15 year old instructions to Lord Dorchester and use same with more confidence than we can in the absence thereof, that the inferences to be drawn therefrom are resting upon a sure foundation.

With such doubt and hesitation as must exist under such circumstances I assume that the instruction to Lord Dorchester and the terms of his commission give us at least a fair indication of the policy of the advisors of the Crown at that time and in all

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probability it continued for some years unchanged especially as the appointment of Lord Dorchester was coeval with the new departure in the Government of Canada.

The commission to Lord Dorchester contained direct authority for making grants of such kind as in question herein in the following terms:—

And we do likewise give and grant to you full power and authority with the advice of our Executive Councils for the affairs of our said Provinces of Upper Canada and Lower Canada to grant lands within the said Provinces respectively which said grants are to pass and be sealed with our Seal of such Province and being entered upon record by such officer or officers as shall be appointed thereunto shall be good and effectual in law against us Our Heirs and Successors: Provided nevertheless that no grants or leases of any of the trading ports in our said Provinces shall under colour of this authority be made to any person or persons whatsoever until our pleasure therein shall be signified to you.

This was accompanied by instructions relative to the execution of this power as follows:—

It is therefore Our Will and Pleasure, that all and every person and persons, who shall apply for any grant or grants of land, shall, previous to their obtaining the same, make it appear that they are in a condition to cultivate and improve the same, and in case you shall, upon a consideration of the circumstances of the person or persons applying for such grants, think it advisable to pass the same, you are in such case to cause a warrant to be drawn up directed to the Surveyor-General or other officers empowering him or them to make a faithful and exact survey of the lands so petitioned for, and to return the said warrant within six months at farthest from the date thereof, with a plot or description of the lands so surveyed thereunto annexed, and when the warrant shall be so returned by the said surveyor, or other proper officer, the grant shall be made out in due form, and the terms and conditions required by these Our Instructions be particularly and expressly mentioned therein—and it is Our Will and Pleasure that the said grants shall be registered within six months from the date thereof in the Registrar's office, and a docket thereof be also entered in Our Auditor's Office, copies of all of which entries shall be returned regularly by the proper officer to Our Commissioners of Our Treasury.

32. And for the further encouragement of Our Subjects, It is Our Will and Pleasure that the lands to be granted by you as aforesaid, shall be laid out in townships, and that each inland township shall, as nearly as circumstances shall admit, consist of ten miles square; and such as shall be situated upon a navigable river or water shall have a front of nine miles, and be twelve miles in depth, and shall be subdivided in such manner as may be found most advisable for the accommodation of the settlers, and for making the several reservations for public uses and particularly for the support of the protestant clergy agreeably to the above recited Act passed in the present Year of our Reign.

That no farm lot shall be granted to any one person being master or mistress of a family in any township so to be laid out, which shall contain more than 200 acres.

It is our Will and Pleasure, and you are hereby allowed or permitted to grant unto every such person or persons such further quantity of land as they may desire, not exceeding one thousand acres over and above what may have heretofore been granted to them, and in all grants of land to be made by you as aforesaid, you are to take care that due regard be had to the quality and comparative value of the different parts of land comprised within any township, so that each grantee may have as nearly as may be a proportionable quantity of lands of such different quality and comparative value, as likewise that the breadth of each tract of land to be hereafter granted be one-third of the length of such tract, and that the length of such tract do not extend along the banks of any river, but into the main land, that thereby the said grantees may have each a convenient share of what accommodation the said river may afford for navigation or otherwise.

And illustrative of the spirit in which these instructions were conceived we find item 61 thereof deals with the Bay of Chaleurs, as follows:—

61. Whereas it will be for the general benefit of our subjects carrying on the fishery in the Bay of Chaleurs in Our Province of Lower Canada, that such part of the beach and shore of the said bay as is ungranted, should be reserved to Us, Our Heirs, and Successors, it is therefore Our Will and Pleasure that you do not in future direct any survey to be made or grant to be passed for any part of the ungranted beach or shore of the said Bay of Chaleurs, except such parts thereof as by Our Orders in Council dated the 29th of June and 21st of July, 1786, are directed to be granted to John Shoolbred of London, merchant, and to Mess'rs. Robin, Pipon and Company of the Island of Jersey, merchants, but that the same be reserved to Us, Our Heirs and Successors, together with a sufficient quantity of wood land adjoining thereto, necessary for the purpose of carrying on the fishery.

It certainly never was supposed then that the parts of unexplored and unknown rivers or margins of the sea should be put beyond the power of the local executive to grant same when deemed advisable.

Let us now apply the terms of the said commission and instructions to the dealing with the lands in question.

The survey made the lots in question run somewhat obliquely across the Gatineau River. So much so does this appear that whilst the instructions are followed literally by making the lots in the survey run at right angles to the Ottawa River, known to be navigable, no such attempt was made in that regard relative to the lands through which the Gatineau River ran.

What is the correct inference to be drawn from such a mode of treatment thereof? Is it not as plain as if we saw the surveyors doing the work that they, no doubt well instructed on the point, had arrived at the conclusion that the Gatineau River, as they

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found it, was not a navigable river and hence could not be treated as such.

Moreover, we must recall to mind what the conditions were relative to navigation 110 years ago when the powers of steam were unknown and nothing but the uses of the oar, or the pole, or the wind were available to navigate any river. When we see tugs operated by the use of steam or gasoline hauling vast loads of timber, or anything else floatable, we are apt to forget that this was not always so; and jump to the conclusion that streams which thereby can be made available for navigation and might now make valuable navigable waters, could not, so long ago, be looked upon, or held to be, absolutely worthless for any such purpose; as they in fact were according to the means of navigation then known.

Again we must realise that the condition of the Gatineau at its mouth and for some miles back therefrom over the plain through which it runs may have been entirely different when the township of Hull was surveyed, from what it seems now, or may have seemed 60 years ago, when steps were taken to improve and render it navigable, for even the limited navigable uses it has been put to.

We must, so far as we can, with the very limited information given us, try to realise what those engaged in the survey found confronting them; and I think we must attribute to them at least an honest purpose to discharge their duty.

That discharge of duty we find portrayed in the plans before us which assuredly indicate an intention to measure out in rectangular lots of the dimensions indicated in the instructions that space in the wilderness occupied by either land or water or both, regardless of the possibilities of the developments of the waters for purposes of navigation.

To quote the language of the Judicial Committee in the recent case of *Maclaren* v. *The Att'y-Gen'l of Quebec*, [1914] A.C. 258, 15 D.L.R. 855, at p. 864, when dealing with this river and having to consider the title as to the bed thereof at a point where the townships and land on either side of the river had been bounded by iron posts placed in the bank thereof; the judgment stated:—

> The plots in those townships (meaning the townships of Hull and Wakefield) are rectangular, so that in the case of river lots the bed of the river is included within the metes and bounds of the lots in question without any appeal to the doctrine of *ad medium filum aquæ*.

That is not a decision of the Court on the point involved herein but it is of great value as indicating how this survey and these plans thereof as presented to the minds of their Lordships led them to view the matter and conclude what was the nature thereof.

It is, I submit, reasonable to presume that the Governor-General of the time, or his Lieutenant-Governor, did not discard their instructions and that the Surveyor-General for the province properly instructed his deputy surveyors and duly received reports from them of their work duly accompanied by their field notes, and duly considered same; and acted properly in adopting the survey and directing the patents to issue upon which appellants now rely.

It requires more assurance than I possess to overrule their judgment reached upon a knowledge of the facts no one can now ever possess, and condemn their conduct of the business they had in hand.

With great respect I submit the language of the patent read in light of the plans and instructions can convey no other meaning than the plain reading thereof.

There is nothing that can be found in the history of the prerogative of the Crown which would render it either necessary or proper to read into such a language a condition relative to future possible uses of the waters in question for purposes of navigation.

We might almost as well try to read into the patents of those holding grants of land from the Crown a reservation in favour of railways to be constructed by the Crown because we now find such might have been a prudent exercise of the power of the Crown in making such a grant.

Although we are far from having presented to us all that might have been so, relative to the condition of the Gatineau River before it was touched by the improving hands of those acting for the respondent, there is enough presented in the evidence to suggest that it may have shifted more than once its banks at the places in question long before any such improvements were made.

The accumulation of banks of sand and gravel which are in question and all that is implied therein ought to make one pause

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before positively reaching any conclusion in favour of navigability of the parts in question 110 years ago.

We have in truth nothing to guide us accurately unless we adopt the conclusion reached by those concerned in the survey and the outcome of the labour as exemplified in the patent and plans descriptive of the lots.

The respondent, interested only in seeing justice done, should have been able to enlighten us as to how the 2 ft. of navigable water was obtained and whether or not it was the result of improvements to navigation? Or was the entrance only a few inches in depth before these changes?

It should be held to be impossible by the evidence, unless clearly demonstrating that the improvements had nothing to do with producing even that degree of navigability, to establish that the Crown had originally been improvident in its grant and thereby escape the consequences thereof.

The reservations of the minerals and of the right to use the waters on the lands in question for operating mines is indicative of what was thought of the waters at the time of the grant. No doubt that was a usual provision in every like grant. Yet it brought always home, to the minds of those acting, the nature of the waters referred to in each grant.

I conclude from all the foregoing considerations not only that the grant of the lands in question was intended and properly intended to convey all that the Crown could grant by a conveyance of lots 2 and 3 in range 5 as it purports to, and that is all proprietory interests possible therein. Hence the respondent had no right without expropriation to interfere with the enjoyment of anything thereby presumably granted, any more than with the rights of grantees of low and marshy spots of land through which in the interests of navigation a canal might be projected and constructed.

In any event I am unable to understand in light of the authorities I have referred to, how it can be contended that the Crown had not by so plain a description comprehending the lands covered by the waters of the Gatineau as well as everything else within the assigned limits conveyed the soil over which the river runs even if subject to the right of the public for purposes of navigation.

The legislation of the last session of the Quebec Legislature

would seem, if applicable to a pending suit, to have put an end to controversy on this head, but, holding the views I have expressed, I prefer resting thereon to seeking refuge in this legislation which may not have been intended to affect the present litigants.

Then the assertion of such public right does not require or justify the uses of the river for purposes of storage of lumber or encumbering the soil with such timber as stranded there when the waters have subsided.

Whether the soil under the piers erected by the respondent has by reason of such possession of the soil whereon they rest become by prescription that of respondent and that respondent is entitled to maintain that title thereto is by no means easy of a satisfactory solution.

The uses to which the piers were put from time to time could not establish at law any prescriptive title to maintain such an easement or servitude as needed to maintain the right to so use and enjoy them.

And with the failure to assert such a right of user I think must fall the possible claims to the soil on which the piers rest.

I see no good ground for questioning the title of appellants found as fact by the learned trial Judge.

The appellants are entitled to the declarations prayed for and the other relief prayed for save in so far as the measure of the damages to determine which there must, if the parties cannot agree as to same, be a reference to find what may be due within the times not answered by the plea of prescription relative thereto so far as same be found on the facts applicable.

The appeal should therefore be allowed with costs throughout.

ANGLIN, J.:—Whatever may be their position in other provinces of Canada (see *Keewatin Power Co.* v. *Town of Kenora*, 13 O.L.R. 237; 16 O.L.R. 184), in the Province of Quebec the beds of non-tidal rivers navigable or floatable in fact form part of the public domain (art. 400 C.C.; *Att'y-Gen'l of Quebec* v. *Fraser*, 37 Can. S.C.R. 577, at 593, 599), and do not pass to the grantee of lands bordering upon them, at all events unless expressly included in the grant in terms specific and unmistakable (Seigniorial Questions, vol. A., pp. 68a, 130a, 374a; vol. B., 50 (*c*); *Maclaren* v. *Att'y-Gen'l for Quebec*, [1914] A.C. 258, 15 D.L.R. 855. As to the effect of decisions of the Seigniorial Court and

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their applicability to other than seigniorial lands, see the "Seigniorial Act," 18 Vict. ch. 3, sec. 16, and *Tanguay* v. *Canadian Electric Light Co.*, 40 Can. S.C.R. 1, at pp. 12-13, 19; *Maclaren* v. *Att'y-Gen'l of Quebec*, *supra*, at 868-9). Although non-floatable in some of its upper reaches and indeed throughout the greater part of its length (*Maclaren* v. *Att'y-Gen'l for Quebec*, *supra*, at pp. 867-871), the Gatineau is admittedly navigable for several miles from the point at which it debouches into the River Ottawa. Notwithstanding that its general character is that of non-navigability, and however its navigable reaches above the first obstruction to navigation should be regarded (see *Hurdman* v. *Thompson*, Q.R. 4 Q.B. 409, at 437, 450, the converse case), the incidents of a navigable river attach to it up to that obstruction. *The Queen* v. *Robertson*, 6 Can. S.C.R. 52. The lands in question are within this navigable stretch of the river.

Having regard to the royal instructions referred to by Audette, J. (23 D.L.R. 249, 15 Can. Ex. 189), to which it was expressly made subject and to the rule of construction "in favour of the Crown *pro bono publico* and against grantees" (Coulson and Forbes on Waters (3rd ed.), p. 28), the grant to the appellants' predecessor in title of lots by number, although, as surveyed for the purpose of the erection of the township of Hull, they extend across the river, was not, in my opinion, such an express grant of the river bed as would be necessary to carry title to it, assuming that it was alienable.

I also incline to the view that, if it were necessary to invoke it, the Crown could maintain the title by prescription alternatively asserted on its behalf.

Brodeur, J.

BRODEUR, J.:—Before Confederation the Canadian Government had placed near the mouth of the River Gatineau booms to collect the logs which came down that river. Since 1867 the Federal Government has continued to maintain these booms and an action has now been taken against it by the appellants who allege that the bed of the Gatineau River at this place is their property.

They claim to be subrogated to the rights of Philemon Wright and allege that by virtue of a grant from the Crown to the latter on January 14, 1806, he became owner of certain lots of land covered by the river.

In a case of *Maclaren* v. *Att'y-Gen'l of Quebec*, [1914] A.C. 258, 15 D.L.R. 855, the River Gatineau was the subject of litigation carried to the Privy Council.

In that case of *Maclaren* the question was whether the bed of the river, at a place where it was not navigable, was the property of the riparian owners or of the provincial government. The Privy Council decided that at this particular place it was evident that the river was not navigable and that, consequently, the riparian owners, by their grant, had become owners of the bed of the river.

At the place with which we are concerned in the present case it is not to be disputed that the river is navigable.

Then the first question which presents itself is whether or not a river can be navigable in part and be considered a portion of the public domain for such part when in other places it is not navigable, and is therefore subject to private ownership.

I do not hesitate to say, with the authors I am about to refer to, that a river may be of the public domain for a part.

Daviel, Cours d'Eau, p. 40, says:—

When a river is navigable or floatable for cribs in certain parts only, all such parts exclusively should be considered dependances of the public domain.

Duranton, No. 203, says:—

Navigable or floatable rivers are such only in the parts in which navigation or floatation can be exercised. It follows that they form part of the public domain only in those places, and in the others the riparian owners can use them for irrigation of their property.

Garnier, Régime des Eaux, vol. 1, p. 56:—

The navigable and floatable portions form part of the public domain, and those which are not belong to the individuals without regard to their situation over the extent of the watercourse.

This Court, moreover, has consecrated the same principle in the case of *Att'y-Gen'l of Quebec* v. *Fraser*, 37 Can. S.C.R. 577. The judgment in that case was eventually affirmed by the Privy Council, [1911] A.C. 489.

Had the Crown the right, in 1806, to make grants of land in a form which would include beds of navigable rivers?

The solution of this question would have called for considerable study and labour, but while the case has been pending before us a provincial statute has been passed (6 Geo. V., ch. 17) which positively declares that the Crown has the right to grant and alienate the beds of navigable and floatable rivers.

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Can the grant of the land which was made, be interpreted as including the river itself?

The township of Hull had been divided into lots by a surveyor; but this division appears to have been made upon the plan rather than on the land itself. The surveyor appears to have taken the extent of the township and to have traced upon the plan various lots of land without indicating the watercourses nor even the rivers. Is it to be presumed that when the grant was made to Philemon Wright the Crown at the same time granted to him the Gatineau River which covers several of the lots and especially those in litigation in the present cause?

Chitty, on Prerogatives of the Crown, p. 391, says:—

In ordinary cases between subject and subject the principle is that the grant shall be construed, if the meaning be doubtful, most strongly against the grantor, who is presumed to use the most cautious words for his own advantage and security. But in the case of the King, whose grants chiefly flow from his royal bounty and grace, the rule is otherwise; and the Crown grants have at all times been construed most favourably to the King, where a fair doubt exists as to the real meaning of the instrument.

It appears to me that in a grant such as this if it had been desired that navigable rivers should be included they would certainly have been mentioned.

The Seigniorial Court when called upon to examine grants of the same nature declared that these contracts by grant could not be interpreted as comprising navigable rivers. (Decisions of the Seigniorial Court, vol. A., p. 68, on the 26th question). Sir Louis Hypolite La Fontaine, President of said Court, said, p. 358:—

From all the foregoing, we conclude that the seigniors, like all other individuals, could acquire rights in navigable rivers, but not, *de plano jure*, as seigniors of fiefs adjacent to these rivers with the exception of rivers not navigable nor floatable the property in which devolves upon them by this title alone.

To acquire these rights in a navigable river *an express grant from the Crown is necessary.*

I consider that in the circumstances the grant upon which the appellants base their demand does not authorise them to claim ownership in the bed of the river where the Federal Government maintains its booms.

For these reasons the appeal should be dismissed with costs.

Appeal dismissed.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Kelly and Masten, JJ. December 30, 1916.

INFANTS (§ I E—25)—PURCHASE OF LAND—PREJUDICE—FORFEITURE—VOID CONTRACT.

A contract for the purchase of land entered into by an infant, with a forfeiture clause as to the land and payments prejudicial to the infants' interests, is wholly void, not merely voidable, and the infant is entitled to recover the payments made thereunder.

Statement.

APPEAL by the plaintiff from the judgment of the Judge of the County Court of the County of Carleton dismissing an action brought in that Court for a declaration that certain agreements entered into by the plaintiff (when an infant) with the defendants, for the purchase of lands, were void, and for repayment of $303.84 paid thereunder. Reversed.

Taylor McVeity, for appellant.

H. S. White, for respondents, defendants.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—If the contract in question were one that was voidable only, by the plaintiff, I should not feel disposed to find fault with the judgment in appeal, as there seems to me to have been sufficient evidence adduced at the trial upon which it could be found circumstantially that there was a ratification of the transaction by the plaintiff after he attained his majority; though, if the finding had been the other way, there would also have been much difficulty in the way of reversing it here.

But that is really not the point in the case; the real main question is, whether this contract is void; and that is a question which was not considered by the learned County Court Judge: perhaps the point was not plainly made before him; and assuredly such cases as *Beam* v. *Beatty*, 4 O.L.R. 554, could not have been brought to his attention.

Such cases compel us, as a matter of law, to consider that contracts "such as the Courts can pronounce to be to their prejudice" are void when made by infants; that their obligations "with a penalty, even for necessaries, are absolutely void." So that the real question, as I have said, is, first, whether the contract in question was a void or only a voidable one: to be followed, if void, by the second and concluding question, whether anything has taken place which prevents the plaintiff from recovering the money paid by him under such void contract.

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That the Court should consider the contract a void and not voidable one, I have no doubt; and I should be very sorry if any kind of encouragement were given to land speculators, or any other class of speculator, in looking to 18-year old youths as in the eyes of the law fair subjects upon whom to unload, at a large profit to themselves, their lands, in small or large parcels.

The plaintiff was but a lad of 18 years when Greater Ottawa Development Company induced him to buy the land in question and to sign a contract for the purchase of it and payment of the purchase-money (all during minority), with a forfeiture clause, under which, though he might have paid all but the last mite, he might lose the land and all that he had paid upon it.

The land speculators—Greater Ottawa Development Company—must have known that the lad was legally incompetent to contract. They must have known: that he could not resell, however rapid might be the decline or the rise in value of his purchase; that his hands were tied by his infancy so that he could not borrow to pay the purchase-money or otherwise save his purchase if, even at the last moment, he had not the means to pay, no matter how much had been paid before: they knew his position in life, and that, if sickness or anything else prevented him from earning enough to make the payments, they were binding him to permit them to retake the land and retain all the payments he had made upon it. In these circumstances, how is it possible for any one to contend that the contract was not one prejudicial to the infant? I should be inclined to hold that land speculating contracts, generally speaking, are.

And, being void, the plaintiff may recover the money paid under the contract, unless he has received valuable consideration for it; or unless it has been shewn that, after the plaintiff attained his majority, a new contract, binding in law or equity, was made by him, and the paid money applied upon it; but no consideration was received, and complete substantial restitution can be made: and there is no contention that any such new contract was made, and, if there were, there is no evidence that could support it.

I would allow the appeal: and direct that judgment be entered for the plaintiff in the action and damages in the amount paid by the plaintiff to the defendants under the contract, with costs of the action and of this appeal.

KELLY, J.:—I agree in the conclusion reached by his Lordship the Chief Justice and my brother Masten. Kelly, J.

The case, in my opinion, comes within the decision in *Beam* v. *Beatty*, 4 O.L.R. 554, in which the late Mr. Justice Garrow, who delivered the judgment of the Court, after reviewing a number of authorities dealing with contracts of infants of the nature of a bond with a penalty and other contracts such as the Court can pronounce to be to their prejudice, declared it to be "the law of the land" that certain contracts of an infant, such as a bond with a penalty, are not merely voidable but void.

Here, the plaintiff derived no benefit from the contracts in question, and the forfeiture penalty was such as to make the whole contract an unfair one. Under such circumstances, the contracts should be declared void.

The question of ratification need not, in that view, be considered.

MASTEN, J.:—The facts are stated in the judgment of my brother Riddell, and need not be here repeated. The dominating question raised on this appeal is whether the agreements in question are voidable or wholly void. Masten, J.

A similar question was considered by the Court of Appeal in the case of *Beam* v. *Beatty*, 4 O.L.R. 554. After reviewing the cases, Mr. Justice Garrow says (p. 559): "The rule itself may, perhaps, be expressed thus: that, generally, all contracts of an infant are voidable, not void, but to this rule there are exceptions in which the contract is not merely voidable but void, and among these exceptions is the case of a bond with a penalty, and again another class of exceptions in which the contract is neither voidable nor void, but valid and binding on the infant, such as simple contracts respecting necessaries. The exception before stated in the case of bonds with a penalty may not be logical, but the question is, is it the law of the land? And, after giving the matter most careful consideration, I am clearly of the opinion that it is."

The question in the present case is, whether the provision in the agreement in question for forfeiture of all claim on the lands and of all instalments of purchase-money theretofore paid, in case default is made in payment of any monthly instalment of purchase-price, brings this agreement within the category of

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exceptional cases where the contract is not merely voidable, but is wholly void.

I therefore proceed to examine the cases. In *Corpe* v. *Overton*, 10 Bing. 252, the Court of Common Pleas—Tindal, C.J., Gaselee, J., Bosanquet, J., and Alderson, J.—unanimously held that the plaintiff might recover back, in an action for money had and received, a sum which, while an infant, he had paid in advance towards the purchase of a share in the defendant's trade; to be retained by the defendant as a forfeiture if the plaintiff failed to fulfil an agreement to enter into partnership with the defendant. The case was distinguished from *Holmes* v. *Blogg* (1818), 8 Taunt. 508, on the ground that in the latter case the sum of money sought to be recovered back as having been paid without consideration appeared to have been paid for something available, that is, for three months' enjoyment of the premises let to him and his partner, and the infant had received something of value for the money he had paid, and he could not put the defendant in the same position as before.

In the course of his judgment in *Corpe* v. *Overton*, Tindal, C.J., after discussing the above point, says (p. 257): "But there is another ground on which the plaintiff is entitled to recover in this action. According to the old law, as laid down in Coke Littleton, 172. *a.*, an infant is not bound by any forfeiture annexed to a contract, and his obligation with a penalty, even for necessaries, is absolutely void. What is this payment, in effect, but a sum handed over by way of a penalty? The principle which exempts an infant from a penalty must extend as well to a penalty enforced by handing over money in advance, as to penalties accruing on the breach of a condition; and the rule which has been obtained in this case must therefore be discharged."

Corpe v. *Overton* was discussed and followed in *Everett* v. *Wilkins* (1874), 29 L.T.R. 846, by the full Court of Exchequer, and the infant plaintiff recovered back the moneys he had paid as upon a total failure of consideration.

The next case is *Hamilton* v. *Vaughan-Sherrin Electrical Engineering Co.*, [1894] 3 Ch. 589. In that case the plaintiff, while an infant, applied for shares in a company, and paid the amount due on application. The shares were duly allotted to her, and she paid the amount due on allotment. No dividends

were received by her, nor did she attend any meetings of the company. Six weeks after allotment, while still under age, she repudiated the contract, and asked for repayment of the money paid by her to the company. She subsequently brought an action to recover the money. The company went into liquidation, and the liquidator removed her name from the register of shareholders:—*Held*, that, having derived no advantage under the contract, the consideration had wholly failed, and she was entitled to prove in the winding-up for the amount paid by her in respect of the shares. After discussing the case of *Corpe* v. *Overton*, above mentioned, Stirling, J., says (p. 594): "It is to be observed that all the learned Judges who dealt with the case (*Corpe* v. *Overton*) distinguished it from *Holmes* v. *Blogg* on the ground that in that case there had been actual enjoyment of the demised premises. They did not say that the mere demise itself, in the absence of occupation, would have been enough, and it seems to me that the true rule to be drawn from the cases is to consider whether the infant has derived any real advantage under the contract. In the present case there was no advantage to the infant. Certainly there was no pecuniary advantage to her. She took no part in the management of the company and did not attend any meetings. No doubt there was an allotment of shares, and her name was placed on the register. It seems to me that that is not an advantage within the rule of *Corpe* v. *Overton*. The consideration has totally failed and the plaintiff is entitled to recover, i.e., to prove for the amount in the winding-up."

In *Short* v. *Field*, 32 O.L.R. 395, the plaintiff (an infant) failed in an action to recover back the amount of a deposit of $200 paid on account of the purchase of a house and land—but the basis of the refusal was that the infant had received the rents of the property, had re-let it, and had generally taken possession of and controlled the property.

The rule to be derived from the cases may perhaps be stated thus: that, if an infant pays a sum of money under a contract, in consideration of which the contract is wholly or partly performed by the other party, he has no right to recover the money back. But, if the infant has received no consideration at all, he can recover.

The case of *Beam* v. *Beatty*, 4 O.L.R. 554, settles the juris-

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prudence of the Province of Ontario that a bond with a penalty is void, and the case of *Corpe* v. *Overton*, which I have quoted above, determines that the rule applies equally to the case of the deposit by an infant of a sum which is to be forfeited on default. I refer also to the earlier cases cited and reviewed in *Beam* v. *Beatty*, and which I need not here repeat.

The facts of the present case, I think, entitle the plaintiff to recover under the rules so laid down.

At the time of payment by the plaintiff of the instalment last paid by him, (1) the contract was wholly executory. The title to the lands remained in the defendants. All that was done under the agreement was that the plaintiff paid monthly instalments to the amount claimed in this action and paid certain taxes. He got no estate in the lands nor any advantage, pecuniary or otherwise, from the agreement.

(2) All the payments made by the plaintiff were made during infancy, and, after the last of these payments had been made, he had nothing. He could not have sued for specific performance, nor could he have effectively transferred any claim enforceable in equity to another, because he had none himself.

(3) The land was vacant land, and no possession of it was taken or rents received.

The result is that the contract was, in my opinion, void, because it provided as a penalty for the forfeiture of the infant's payments in case of default, and the infant is entitled to recover back the sums paid, because he never received or enjoyed any consideration for the sums paid.

Riddell, J.

RIDDELL, J.:—The plaintiff, an infant almost 18 years of age, in August, 1910, entered into two contracts for the purchase of certain lots from the defendants, a "subdivision land company." The contracts are in writing, under seal, and provide for a payment down and thereafter payment by instalments, possession to be in the purchaser till default in payment of the instalments. There was also a clause which has caused all the difficulty—this reads as follows: "It is further agreed that if the purchaser shall make default for three months in payment of the purchase-money or of any instalment thereof . . . then this agreement shall not be binding on the vendors. . . . And it is further agreed that the purchaser shall forfeit all payments made on

account of purchase-money and interest in case of any such default and the purchaser shall have no claim against the vendors for the same nor for any buildings or other improvements erected on the said lands and the vendors may enter and take possession of and hold the said lands as of their former estate in the land unaffected by any claim by the said purchaser."

The plaintiff made his down-payments, and for a time kept up his instalments, paying altogether $303.84. He also paid the taxes.

The plaintiff came of age in September, 1913, and after that time paid no instalments or interest to the defendants, but he paid the taxes for 1914 and 1915, and, as he swears, considered himself the owner of the lots.

In March, 1914, the defendants wrote him stating that he was some months in arrears, and demanded an immediate settlement —no answer was received, and a similar letter was written in July.

To this letter the plaintiff's mother replied saying that her son had met with a railway accident and was therefore unable to pay, but "I hope you will be able to carry him on a little longer"—it is sought to bind the plaintiff by this letter, as he says in his examination for discovery that his mother was not doing anything contrary to his knowledge or instructions. If the case were to turn on this as a ratification of the contracts, I should require further consideration before holding that the agency of the mother to ratify in this way was established—but I do not think it is material in view of the other facts of the case.

Further demands were made in September, 1914, and May, 1915, and at length, November, 1915, the mother wrote that her son had not been able to pay owing to ill-health, adding, "Also at time of buying he was under age and he has not made any payment since he became of age," and demanding the repayment of what had been paid. The defendants refused; and on the 7th February, 1916, this action was begun for the recovery of the amounts paid, with interest. The learned County Judge of Carleton dismissed the action with costs, and the plaintiff appeals.

It is thoroughly established that if an infant enter into a voidable contract he may upon attaining full age ratify it by conduct, and that if he does not repudiate the contract within a

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reasonable time after his majority he is taken to have ratified it. The latest case in our Courts is *Re Sovereign Bank of Canada, Clark's Case* (1916), 27 D.L.R. 253, 35 O.L.R. 448—see *per* Maclaren and Hodgins, JJ.A., at pp. 261-2; an early case in England is *Holmes* v. *Blogg* (1817), 1 J.B. Moore 466, see *per* Dallas, J., at pp. 472, 473.

Here there was no repudiation by the plaintiff till the issue of the writ in February, 1916, two years and five months after majority: or by any one till November, 1915, three months before—and, according to the plaintiff himself, he considered that he was the owner of the property till January, 1915, four months after attaining full age. It will not do to excuse non-repudiation by the alleged fact that the plaintiff did not know his rights—it would seem he did at least as early as January, 1915, and he gives no evidence that he did not know them all along—in any event it is not the ignorance of a general law, *ignorantia legis*, but of personal rights, *ignorantia juris*, which excuses: *Beauchamp* v *Winn* (1873), L.R. 6 H.L. 223.

For the disposal of this case, however, I do not think we need inquire whether the contract can be enforced against him—he is suing for the recovery of money paid during infancy, and in that he cannot succeed without shewing fraud: *Wilson* v. *Kearse* (1800), Peake Add. Cas. 196, followed by this Court in *Short* v. *Field*, 32 O.L.R. 395; *cf. Robinson* v. *Moffatt*, 25 D.L.R. 462, 35 O.L.R. 9.

Accordingly, the plaintiff cannot succeed on the special ground of infancy, but, if at all, on the rule which applies to adults as well as to infants, viz., that money paid on a void contract is recoverable back. And that is the real point of the case—are these contracts void or only voidable?

It was urged that *Corpe* v. *Overton*, 10 Bing. 252, 3 Moo. & Sc. 738, 3 L.J. N. S. C.P. 24, compelled us to hold that these contracts were void *ab initio*; but I think that is not the case.

In *Corpe* v. *Overton*, the plaintiff, while under age, signed an agreement to enter into a partnership, to pay down therefor £100, and on the 1st January, 1833, to execute a partnership deed with the usual covenants, "and as a deposit for the due fulfilment of the same . . . the sum of £100 is now paid. . . . In default of the said intended purchase not being duly completed . . . the said sum of £100 shall be forfeited

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. . ." The plaintiff, after paying the £100, found he had been imposed on, and, as soon as he came of age, repudiated the contract and sued for the £100. He had not received any benefit at all from his contract—"he has not received the slightest consideration" (p. 256)—and the Court considered the contract as voidable, and that the plaintiff had the right to rescind it. The Court went further and declared the payment in advance to be "in the light of a penalty or forfeiture," and therefore his contract to pay it absolutely void. But, in that case, the payment was nothing but a deposit, giving no immediate rights at all. In the present case, the payments entitle the plaintiff to possession and control of the property. It was said by the plaintiff's counsel at the trial that he did not take possession; that was not admitted by the opposing counsel, and it was not proved. It cannot be said that payments which give a right to immediate and continued possession and control are nothing "but a sum handed over by way of a penalty," as Tindal, C.J., says, 10 Bing. at p. 257.

So in *Everett* v. *Wilkins*, 29 L.T.R. 846, the infant rescinded the agreement—he had agreed to buy half the public-house business of the defendant, paying an instalment down, the balance to be paid at a future time—and he was to receive no benefit until the balance was paid. The Court held that there was a total failure of consideration, and that he might recover the money back. It was not explicitly held that the contract was void *ab initio*—but, if that were the finding, it was quite justified by the fact that the down-payment was, as in *Corpe* v. *Overton*, "but a sum handed over by way of a penalty." It may be noted that it was not even argued that the contract was void.

In *Beam* v. *Beatty*, 4 O.L.R. 554, many cases are cited declaring the law that a bond with a penalty made by an infant is void: and the Court of Appeal approved that statement of the law, but these cases have no bearing here—nor have any of the very many cases in which the infant repudiated the contract and thereby became entitled to a return of his money: *Hamilton* v. *Vaughan-Sherrin Electrica' Engineering Co.*, [1894] 3 Ch. 589, is an example much quoted.

Having got rid of the penalty idea, there is no reason why an infant cannot buy real estate or enter into a partnership: *Goode*

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v. *Harrison* (1821), 5 B. & Ald. 147; or buy shares in a company: *North Western R.W. Co.* v. *McMichael* (1850), 5 Ex. 114; *Whittingham* v. *Murdy* (1889), 60 L.T.R. 956. The case of an infant buying real estate is thus put by Parke, B., in *North Western R.W. Co.* v. *McMichael*, *supra*, at p. 125: "An infant acquiring real estate . . . is not deprived of the right which the law gives every infant, of waiving and disagreeing to a purchase which he has made; and if he waives it, the estate acquired by the purchase is at an end, and with it his liability to pay . . ." That I adopt as an accurate statement of the law.

We have not to do here with a class of contracts (whether void or voidable, we need not consider) which are so unreasonable that they cannot be enforced against the infant. Such were the contracts considered in *Regina* v. *Lord*, 12 Q.B. 757; *Corn* v. *Mathews*, [1893] 1 Q.B. 310; *Flower* v. *London and North Western R.W. Co.*, [1894] 2 Q.B. 65 (*cf. Clements* v. *London and North Western R.W. Co.*, [1894] 2 Q.B. 482; *Green* v. *Thompson*, [1899] 2 Q.B. 1); *MacGregor* v. *Sully* (1900), 31 O.R. 535, &c., &c.

I think the appeal should be dismissed with costs.

In *Robinson* v. *Moffatt*, *supra*, the contract contained the following clause: "Provided that in default of payment of the said money and interest or any part thereof on the days and times aforesaid, the vendor may determine and put an end to this agreement and retain any sums hereunder as and by way of liquidated damages . . ." It will be seen that this is much the same as in the present case: the decision in *Robinson* v. *Moffatt* must be wrong if the contention of the appellant in the present case is to prevail. But the point argued here was not raised in the former case—and I have considered the present independently and upon principle and other authority.

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

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McKILLOP & CO. v. ROYAL BANK OF CANADA.

Alberta Supreme Court, Appellate Division, Scott, Stuart, Beck, and McCarthy, JJ. January 13, 1917.

FRAUDULENT CONVEYANCES (§ III—10)—ASSIGNMENT—FUTURE CROPS—SECURITY FOR ADVANCES—EXECUTIONS.

An assignment of future crops by an insolvent as security for advances to put in and harvest the crops, and to pay off a debt due the assignee, is not fraudulent or preferential, and will prevail against executions in the hands of the sheriff prior to the assignment.

[The Assignment Act, Alta. 1907, ch. 6, secs. 38, etc.; *High River Meat Market* v. *Routledge*, 1 A.L.R. 405; *Blakely* v. *Gould*, 24 A.R. (Ont.) 153, 27 Can. S.C.R. 682, referred to.]

APPEAL by defendants from the judgment of Ives, J. Reversed.

R. A. Smith, for appellant; *Gray*, for respondent.

The judgment of the Court was delivered by

BECK, J.:—This is an issue directed to be tried between the plaintiffs in this issue who are execution creditors of J. F. C. Gwillim and the defendants who are claimants of the property seized by the sheriff.

The issue was tried before Ives, J., who gave judgment in the plaintiff's favour and the defendant, the Royal Bank, appeals. The facts are as follows:—

J. F. C. Gwillim owned a farm which was his homestead. He had lived on it and worked it for some years. He had several sons who lived with him; the eldest Wilfred was 18 years of age.

The father had suffered from failures of his crops and had got into debt to a considerable amount and no doubt was in insolvent circumstances—at all events unless he sold his homestead and applied the proceeds in payment of his debts.

In view no doubt of these conditions the father gave a lease of his homestead to his son Wilfred. The lease is dated and was presumably made on or about March 12, 1915. The term is 1 year from that date; the rent for the year was $1 and one-half of the crop.

Wilfred also on April 8, 1915, took a lease from one Oliver of another farm of 250 acres for the residue of the year 1915 on the terms that he should supply the seed grain and return to Oliver one-third of the crop, Oliver paying one-third of the threshing bill.

On April 10, 1915, J. F. C. Gwillim executed a charge on the homestead for $110 for seed grain; and on May 7 Wilfred Gwillim and J. F. C. Gwillim executed a charge on the Oliver (also called the McClure) farm for $301.50 for seed grain and for any further sums which might be advanced for seed grain, fodder or other relief.

J. F. C. Gwillim had been a customer of the bank and was indebted to the bank at this time in the sum of $2,500 odd.

The father and son went to the Royal Bank and had several interviews with Mr. Aitken the manager at Lethbridge. It does not seem material whether these interviews took place before or

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after the son had taken the leases of the two farms. These interviews resulted in an arrangement being made to the following effect:

The father and son signed jointly a note to the bank for $2,513 being the amount then owing by the father to the bank. The son assigned to the bank (19th and 10th May, 1915), the two leases and his term and his share of the crops. The assignment declared that they were given as security for the payment of the $2,513. The arrangement was that the bank should advance whatever moneys would be necessary to put in and harvest the crops, that out of the proceeds of the crop there should be repaid, first, the advances, then the $2,513. The account in connection with the transaction was arranged to be and was in fact kept under the title of "J. F. C. Gwillim in trust." As advances were required the joint notes of father and son were taken; the proceeds credited to the trust account and a cheque issued and signed by the father against the trust account.

The crops were put in, moneys being advanced for the purpose as arranged. On September 15, the crops being severed, bills of sale expressly declared to be by way of further assurance in pursuance of covenants in the assignment of the cases were made to the bank of the severed crops.

The plaintiffs in the issue had executions in the hands of the sheriff long before the arrangement with the bank, which continued in force and under which the crops were seized by the sheriff and the question in the issue is in effect whether the claim of the bank under the arrangement is good as against the execution creditors.

The trial Judge came to these conclusions:—

That Wilfred Gwillim entered into the lease of the McClure (Oliver) land purely in the interests and for the benefit of his father, J. F. C. Gwillim; the whole evidence discloses that Wilfred Gwillim had no reason to expect or derive any benefit. He worked there, doing what he was told to do; he had nothing to do with the payment of any moneys, the payment of any amount; there is no evidence that he received anything himself or was to receive anything himself. It was purely for his father, and I am quite satisfied that the reason was for the purpose of defeating the creditors of J. F. C. Gwillim existing at that time, that the lease was taken in Wilfred's name and also that the lease for the homestead was executed from J. F. C. Gwillim to Wilfred, his son. I am equally satisfied of his insolvent condition, and I hold that Gwillim was insolvent at the time the assignments of the leases were made and prior to that time. I say that, after reading Mr. Aitken's

evidence, that I am quite satisfied he was perfectly aware of the insolvency, and, in fact, proposed to endeavour to pull out of the mire with a new crop. It was necessary that that new crop should be in some way applied entirely, first to the indebtedness of the bank, hence the assignments of the leases. I think the leases were assigned by the Gwillims to the bank with intent to defeat and prejudice execution creditors, and I think Mr. Aitken was privy to that intent. The assignments, for that reason, I think, are of no effect as against the execution creditors.

In my opinion this is not the proper view of the case. Here was Gwillim, the father, in a very embarrassed financial position; his homestead mortgaged; many executions against goods and lands in the sheriff's hands. He was undoubtedly insolvent. He might have abandoned everything, taking his exempted personal property; selling if he could his equity in his homestead and putting the little proceeds in his pocket and leaving his creditors practically nothing. But he does not do this. Assuming for the moment that in all the transactions with the bank Wilfred was merely his *alter ego* and the transaction ought to be treated as that of the father alone made merely in the name of the son, I see no fraud whatever, but a means taken to bring into being additional property out of which one at least of his numerous creditors would be paid and possibly some of the others. It would be a case similar to that of *High River Meat Market* v. *Routledge*, 1 A.L.R. 405, where I found that the result of the transaction there attached was to create the fund in question, and where I laid down the proposition that in determining whether a transaction is void as fraudulent, the substance, the substantial effect, of the transaction must be looked at.

In my opinion, therefore, the transaction, even though it were held to have been ineffective to operate as it was intended to operate, was not fraudulent.

The question whether it was either constructively fraudulent or unlawfully preferential by reason of statutory enactments, can, in my opinion, be answered in the negative without any special reference to our statutory law upon the subject (Assignment Act, ch. 6 of 1907, secs. 38, etc.) on virtually the same ground as already stated.

In *Blakely* v. *Gould*, 24 A.R. (Ont.) 153, affirmed on the grounds stated by the Court below, 27 Can. S.C.R. 682, it was held that an assignment by way of security of the profit expected to be made out of a contract to do work did not come within such provisions as

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those relating to fraudulent and preferential assignment inasmuch as the subject-matter of the assignment did not consist of assets which could be reached by the creditors at the time it was made.

As I have already pointed out the effect of the transaction, even assuming that we may eliminate the son from it, resulted in the creation of property not then in existence; and this covers the portion of the crop which under the lease of the homestead would but for the arrangement have gone to the execution debtor.

A fortiori must we hold the transaction not to be void if the transaction is to be given effect to according to its form and its terms, which, the objection of actual or constructive fraud or unlawful preference being eliminated, must, in my opinion, be done. The transaction thus being binding at its inception, there is nothing in any view raised by the plaintiffs in the issue to prevent its having effect throughout and therefore nothing to prevent the bank from being entitled to the crops on both farms by way of security for their advances made in accordance with the initial arrangement for their past due debt. No question was raised as I understand as to the correctness of the account.

In the result, therefore, I would allow the appeal with costs and direct the issue to be answered in favour of the appellant bank and give it the costs of the issue. *Appeal allowed.*

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GIRARDOT v. CURRY.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Hodgins, J.A., and Lennox and Masten, JJ. January 4, 1917.

ADVERSE POSSESSION (§ I E—30)—MORTGAGE—REDEMPTION—DOWER—LIMITATIONS ACT—EVIDENCE.

The validity of a mortgage sale cannot be attacked by the mortgagor, and his wife, as dowress, after the purchaser and those claiming under him have been in undisputed adverse possession of the land as of right sufficiently long to bar the relief claimed, under the Limitations Act.

Statement.

APPEAL by plaintiff from judgment of Kelly, J., dismissing an action for redemption or in the alternative for damages. Affirmed. The judgment appealed from is as follows:—

KELLY, J.:—The plaintiffs set up the right to redeem two parcels of land, which for convenience may be referred to as the "Noyes" and the "Newman" parcels respectively, and ask in the alternative for damages against the defendants the executors of John Curry, deceased, for alleged wrongful acts in disposing of these properties.

The defendants Woollatt and the Essex County Golf and

Country Club Limited, subsequent to such disposal, became owners of parts of these properties, and the club is now in possession of a very considerable part of what is now sought to be redeemed.

The history of the transactions between the plaintiff Ernest Girardot and the late John Curry, so far as it is pertinent here, carries us back to the year 1902. In that year, Mr. Girardot was indebted to Mr. Curry and to the firm of Cameron & Curry, of which Mr. Curry was a member, for advances made on promissory notes. On the 3rd November, 1902, the plaintiffs executed to Mr. Curry a mortgage upon several parcels of land, including one of the parcels now sought to be redeemed. The mortgage, the consideration expressed in which was "one dollar and other valuable consideration," contained a recital that the mortgagor (the plaintiff Ernest Girardot) was in the habit of borrowing money from the mortgagee and from Cameron & Curry, in various sums, on his promissory notes and on notes of his with other persons as makers, endorsers or otherwise; and that the mortgage "is given as collateral security for the payment of any and all such sums now owing to the said party of the third part or to the said firm of Cameron & Curry and for the due payment of any and all such sums now owing to the said party of the third part or to the said firm of Cameron & Curry and for the due payment of any and all such notes or any renewals in whole or part now held or that may hereafter come into the possession of the said party of the third part or of the said firm of Cameron & Curry or any notes or bills or acceptances or other indebtedness on which the said party of the first part may now be or may hereafter become liable for the payment thereof as maker or endorser or otherwise;" and it is then provided that the mortgage shall be void on payment of all such notes and renewals, bills or acceptances, and other indebtedness of every kind, with interest as may be agreed upon, "on the several notes, bills, etc."

Another mortgage, bearing date the 7th January, 1903, was executed between the same parties on other lands not here involved. The consideration and recitals in it are similar to those in the mortgage of the 3rd November, 1902, with a proviso that the mortgage should be void on payment of all such notes and renewals, bills or acceptances, and other indebtedness of every

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kind, with interest as may be agreed upon on the several notes, bills, etc., as well as any and all costs and expenses that may be incurred in connection therewith by the party of the third part (the mortgagee).

There was then existing on the Noyes property a first mortgage made by the plaintiffs to Frederick S. Noyes and John G. S. Noyes, and there was also a mortgage existing on the other block of land now sought to be redeemed, which was made by the plaintiffs to one Marentette, and assigned to Bessie M. Newman. It is now set up that when the mortgages of the 3rd November, 1902, and the 7th January, 1903, were given, a verbal agreement was entered into between Mr. Girardot and Mr. Curry to the effect that the latter would protect the lands covered by the Noyes mortgage, pay to Bessie M. Newman the amounts due upon the mortgage so assigned to her, and protect the lands covered thereby by taking an assignment of that mortgage, and holding the mortgage as security, not only for payment of the amount due thereon, but also as collateral security for the indebtedness above mentioned; and that Curry thereby became trustee for the plaintiffs in any dealings he might have had with these properties. Sale proceedings were soon afterwards instituted on both the mortgage held by Noyes and that held by Mrs. Newman, and in each case Curry became the purchaser.

The plaintiffs' position is that, even if the sale proceedings were regular, Curry could not, under the circumstances, have become a purchaser; that any such attempt was in breach of trust toward them; and that the property which he so acquired must be held in trust for the mortgagor, subject to payment of the advances for which he was liable or became liable.

It is also contended that the sales were irregular. Of this, more later on.

The sale of the Noyes property to Curry was on the 25th July, 1903; that of the Newman property on the 11th December, 1903. Sales to others were made by Curry of parts of the land so purchased, the purchasers taking possession of the parcels they so acquired.

Mr. Curry died in March, 1912.

The plaintiffs have assumed the burden of proving the verbal agreement on which they now rely—a burden rendered more

onerous by the necessity of corroboration such as the statute (the Evidence Act, R.S.O. 1914, ch. 76, sec. 12) requires against the estate of a deceased person.

The plaintiff Ernest Girardot gives as a reason for the agreement he so sets up, that he was about to be absent from Sandwich on business for extended periods, and there was necessity for making some arrangement for the protection of his indebtedness; and that the alleged agreement had that in view, as well as the securing Mr. Curry for advances he would be required to make to protect Mr. Girardot's property. His wife (the plaintiff Julia Girardot) and members of his family were then residing on the homestead property, in close proximity to the two parcels now in question, and remained there until about the middle of 1904; afterwards they continued to reside in Sandwich. Mr. Giarardot himself, though absent a very considerable part of his time, made periodical visits to his family and to Sandwich.

While there are circumstances in connection with the manner in which Mr. Curry seems to have conducted his affairs that excite surprise at his extraordinary laxity in keeping records of his business transactions which indicate a remarkable degree of looseness of method as well as reticence on his business affairs towards even his bookkeeper and office assistants, these are not, in the light of other important circumstances, sufficient to supply the necessary corroboration.

On the other hand, the attitude of Mr. Girardot towards these transactions, extending over many years following the making of the mortgages to Curry, is not consistent with the position he now takes. Take, for instance, his letter to Cameron & Curry bearing date the 1st January, 1902 (obviously intended for 1903). For some reason it was thought necessary or advisable to put in writing some declaration of the intention of the parties in making the mortgages of the 3rd November, 1902, and the 7th January, 1903. One would have thought, if there was then existing the agreement on which the plaintiffs now rely, that specific reference would have been made to it in that letter, when it was considered important that the real intention of the parties should be put in writing. The letter sets forth in clear terms the object of the mortgages—that of the 3rd November, 1902, as security and in consideration of the notes therein specifically mentioned which

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Cameron & Curry were pressing to have reduced, and which Mr. Girardot had agreed to reduce by paying $40 a month, which however he was unable to do, and after payment of the notes the mortgage to continue as security for any indebtedness he might owe Cameron & Curry or John Curry "as maker or endorser or otherwise;" and that of the 7th January, 1903, being given for a further advance of $400, and as additional security for any notes then held by them and made by Mr. Girardot alone or jointly with others or as endorser or otherwise, or any renewals thereof. Not a word to indicate an agreement such as is now advanced, unless an inference can be drawn from the language of the letter that such was intended. By no stretch of that language can I come to the conclusion that any such agreement was in mind. Had the parties meant what the plaintiffs now insist upon, there can be little doubt that their meaning in so important a matter would not have been left to rest on the language there used.

The main part of this property was resold within the year to Scott and Moore—Scott says about the end of 1903. The purchasers immediately went into possession, and in that year and in 1904 took sand and gravel from it, and in 1904 took the crops. Successive purchasers remained in possession and openly cultivated and otherwise made use of the land. The taxes from the time of Curry's purchase have been paid either by him or those claiming under him.

Mr. Curry sold part of the Newman property to two purchasers, one of whom has given it in evidence that he purchased from the plaintiff Ernest Girardot a barn which he moved on to this property; this purchaser went into possession and cultivated and took the crops. During all this time and down to 1915, the plaintiffs made no protest and no objection, and expressed no surprise or dissent at the acts of ownership exercised by Mr. Curry and the purchasers from him and those who claimed under him, though it is beyond doubt that the plaintiffs must have seen and known what was taking place.

It is not reasonable to suppose that, with this knowledge of the acts of Curry, which are now alleged to have constituted a breach of trust, Mr. Girardot would during all these years have remained silent and not offered one word in protest. If he believed that the relationship of the former to him was that of

trustee, his explanation that he was waiting for Mr. Curry to account to him, is not sufficient. He admits that he did not ask for a statement or for an accounting. It may be that the looseness of Mr. Curry's business methods, indicated by the incomplete records now in the possession of his executors, and some circumstances grasped at as corroborative of Mr. Girardot's evidence, may have suggested to him the position he now takes, when, after the lapse of so many years, recollection of the occurrences of 1902 and 1903 may have passed from him.

But, if anything further was wanting, it is to be found in Mr. Girardot's letter to Mr. Curry of the 9th October, 1903, written from Montreal soon after the sale to Curry of the Noyes property. That throws light upon the whole transaction and shews that Mr. Girardot's understanding, when matters were fresh in his memory, was not that Mr. Curry's position was that of trustee for him, but that he was a mortgagee buying in property at a sale under a first mortgage in an endeavour to protect himself from a loss which the writer clearly intimated was beyond his power to make up, owing to his straitened financial circumstances.

Every word of the evidence is confirmatory of Mr. Girardot's understanding of Mr. Curry's position as mortgagee and not trustee; and Mr. Girardot's attempted explanation at the trial is far from satisfying me that the relationship between them was otherwise than as indicated by that letter.

The validity of the mortgage sales is attacked.

In the case of the Noyes mortgage, notice was served in January, 1903; that Mr. Girardot admits. The objection is not on the ground of want of notice, but mainly to what is characterised as Mr. Curry's neglect of duty in not protecting the property for the mortgagor. That aspect of Mr. Curry's relationship to these transactions has already been disposed of; and I cannot find on the evidence that there was irregularity in these sale proceedings.

It is urged that the sale under the Newman mortgage was abortive for want of notice required by the mortgage. It seems not to have been thought of importance to have before the Court the terms of the power of sale, for neither the mortgage itself nor a copy of it nor a copy of the power of sale has been put in in evidence. Both the evidence and the argument proceeded as if

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the power of sale was one requiring that notice should be personally given: and I am considering the case on that assumption.

A power of sale given by a mortgage is a remedy over and above and in addition to the remedies incident to the mortgage, and it can be exercised only in strict compliance with the terms it imposes. If it require notice to be given, it must be given in the manner directed by the power. Mr. Girardot says that notice of sale in this case was not served upon him. The evidence submitted by those seeking to uphold the sale falls short of proof of actual service, it only going to the extent of shewing—and this is largely from the docket entries of the solicitor in charge of the sale proceedings—that a notice of sale was sent to the solicitor's Montreal agents, where Mr. Girardot was then thought to be, and that the solicitor paid the account of these agents for effecting service. That cannot be taken as sufficient proof of the service; the want of service is fatal to the validity of the sale. The certificate of the County Court Judge, obtained *ex parte* so far as Mr. Girardot is concerned, does not remove the difficulty.

The plaintiffs, however, are confronted with another difficulty. The sale to Mr. Curry was in December, 1903, and he entered into possession, and he and those claiming under him continued in possession, adverse to the plaintiffs' title, from that time until 1915, without objection from the plaintiffs, and without having given any acknowledgment or doing any act which would have the effect of preventing time running in their favour and against the former owner.

The manner of Mr. Curry's dealing with the property subsequent to December, 1903, has been pointed to as evidence that a sale was not made at that time, or if made that it was afterwards abandoned. It is difficult to understand Mr. Curry's remarkable manner of conducting and recording his affairs, but I am of opinion that what he put on record is not inconsistent with a sale having been made. Nor can there be attached to the circumstance of the executors having sought to realise upon the securities the importance the plaintiffs seek to give it. The lack of information obtainable from Mr. Curry's books and records made it difficult for the executors to understand t e condition of his affairs, and explains why they took the course they adopted. The fact, however, remains that there has been undisputed possession of

the premises adverse to the plaintiffs' title for such time as to debar the plaintiffs, and unless it can be found that Mr. Curry's relationship to Mr. Girardot with respect to the property was that of trustee for him, the plaintiffs are without a remedy in these proceedings. I have already stated my conclusions against such relationship.

The action must be dismissed with costs.

J. H. Rodd and *F. D. Davis*, for appellants.

A. R. Bartlet, for defendants, executors.

J. H. Coburn, for defendant Woollatt, respondent.

MEREDITH, C.J.C.P.:—This action was brought by the plaintiffs, who are husband and wife, against a mortgagee of the lands of the husband, and against purchasers of such lands from him; and its major purpose was to have the mortgagee dealt with as if a trustee for the husband of such lands; but also, failing in that and the redemption of the lands which might follow from it, to recover damages from the estate of the mortgagee for breach of trust, or for parting with the land so as to defeat a right to redeem which otherwise would still exist. Meredith, C.J.C.P.

The answer to the action was a denial of any such trusteeship, and an assertion that the mortgagee, before action, became entitled to the lands in question, absolutely, by purchases and conveyances from prior mortgagees under powers of sale contained in their mortgages: and that in any case the plaintiffs' claims are barred by the Statute of Limitations.

There was no evidence in writing of any such trusteeship; all that the male plaintiff could rely upon was his own testimony, and some circumstances which it was contended supported to some extent that testimony.

Upon this question of fact the learned trial Judge found against the plaintiffs; a finding which, whatever it might have been otherwise, the male plaintiff made conclusive against himself in the evidence which his letter, of the 9th October, 1903, contains—a letter which it is said did not come to the light until some time during the trial. It quite takes from under his feet any kind of substantial ground for any contention in support of the major purpose of this action.

Then, as mortgagor only, it is contended that the male plaintiff

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has a right to redeem, or else his wife has a right to redeem, a part of the mortgaged lands, because the sale of them, under the prior mortgage, was invalid against the plaintiffs for want of notice to either of them, of the mortgagee's intention to sell.

Upon this question the learned trial Judge found in favour of the male plaintiff; that is, as I understand the finding, the Judge considered that the proof of service upon this plaintiff was insufficient, not that as a fact he never had been served. And as to the female plaintiff the question of her right to redeem does not seem to have been thought of until the case came here upon this appeal.

The evidence of actual service of the notice of sale was altogether circumstantial; but, as it seems to me, was quite sufficient to uphold the sale, under all the circumstances of the case. Shortly stated, it was as to the male plaintiff: that the mortgagee employed capable solicitors, in Windsor, to sell the land under her mortgage; these solicitors prepared the notice of sale and sent it, with an affidavit of service attached, to capable advocates in Montreal, which was then the mortgagor's place of residence; and in due course the papers were returned and the charges for service paid. And, as to the female plaintiff: that the same solicitors gave the notice to a bailiff to be served upon her; that it was returned served by him; and an affidavit of service made. Subsequently, when the mortgagee's solicitors desired to register the notice of sale and affidavit of service, under the provisions of the Registry Act, R.S.O. 1914, ch. 124, the papers could not be found; and thereupon they applied for, and obtained from the Judge of the County Court of the county in which the land is situated, under the provisions of sec. 58 of that Act, a certificate that he was satisfied of the due service of the notice, on the mortgagor and his wife, and that the same could not be produced for registration; and they thereupon registered such certificate; the effect of which, under that section, is that it "shall be *primâ facie* evidence of the facts therein stated."

Against all this there is but the mortgagor's qualified denial based upon faulty memory—very faulty as the letter of the 9th October, 1903, proves—of things of thirteen years ago; denial that he was served with notice of intention to exercise the power of sale, in these words: "I have no recollection;" "I will say that

I was not served with any notice in Montreal, or any place, that I remember;" "When I don't remember a thing I can't say any more." There is no denial by his wife of service upon her.

And during all those years, in which the purchaser was dealing with the land as his own, including the selling of it more than once, not a word was said regarding redemption or any kind of right to the land remaining in the mortgagor, or respecting the exercise of the power of sale. The mortgagor's excuse for all this, namely, that he was all along depending upon the trusteeship, however lame it might be in the absence of his letter to which I have twice referred, fails completely in the light of his statements contained in it.

Capable solicitors must have known that the notice should be served either "personally" or at the "usual or last place of residence in this Province," if the mortgage were in the statutory short form; and the County Court Judge was satisfied of "the due service of the notice."

In all these circumstances, the finding should have been, and should now be, that due service of the notice was effected on the mortgagor: see *Tanham* v. *Nicholson* (1872), L.R. 5 H.L. 561; *Doe d. Murphy* v. *Mulholland* (1832), 2 O.S. 115; and *Berard* v. *Bruneau* (1915), 22 D.L.R. 83, 25 Man. L.R. 400.

That being so, it is not necessary, in order to uphold the judgment appealed against, that the question of the Statute of Limitations should be considered; but upon that question my opinion and finding are in accord with those of the trial Judge; if the male plaintiff's testimony be accepted as accurate in so far as it affects this question, no other conclusion could reasonably be come to. These are extracts from his testimony upon one or other of his examinations: "Did you do anything in connection with it? Yes, sir, I gave possession of the property to Mr. Curry. Yes? When I left, to handle for me. I vacated the premises at his request and lived in another house. What year was that, Mr. Girardot? This was in 1904, I guess: 1903 or 1904. You say you handed it over to him? I handed it over to him."

Statements to the same effect appear in half a dozen places throughout his several examinations, with nothing anywhere to the contrary.

Apart from the testimony of this witness and party, the evidence of title by length of possession might not be considered

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strong in the case of a stranger to the title; but his testimony removed all doubt upon the question, however looked at: see *Kay* v. *Wilson* (1877), 2 A.R. 133.

There can, therefore, I think, be no doubt that the action was rightly dismissed as to the male plaintiff: and I cannot perceive any good reason for thinking that it was not also rightly dismissed as to his co-plaintiff.

A copy of the Marentette mortgage has now been produced; and it proves to be in the statutory short form: and under it service of notice of sale on the wife of the mortgagor is not required. The wife was a party to the mortgage, and barred her dower under its provisions, which gave the mortgagee power to sell after notice to "the mortgagor, his heirs, executors, administrators, or assigns" only. No provision was made for notice to the wife.

Section 10 of the Dower Act, R.S.O. 1914, ch. 70, does not extend the wife's rights in that respect. Under it, the mortgagee's rights are to have full effect.

But, as I have said, the finding should be that she had due notice of the mortgagee's intention to exercise the power of sale contained in her mortgage.

It is not necessary to consider what rights the female plaintiff might have, or when they should arise, if the defendants had to rely upon length of possession only to defeat her co-plaintiff's action.

The appeal must be dismissed.

Hodgins, J.A.

HODGINS, J.A.:—I concur in dismissing the appeal. I am not able to agree that service of notice of exercising the power of sale as to the Newman property was properly proved by the evidence given. But, as the terms of the power of sale were not shewn, it is unnecessary to speculate as to whether notice was necessary, and, if necessary, whether it was given. I think the Statute of Limitations is a sufficient defence on this branch of the case.

Lennox, J.

LENNOX, J.:—I agree. I think the plaintiffs failed to establish a trust in fact or in law. Service of the notice has to my mind been established. It would be most dangerous and unwise to open this matter after this lapse of time.

Masten, J.

MASTEN, J.:—I think that the appeal should be dismissed.

Appeal dismissed.

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Nova Scotia Supreme Court, Russell, and Drysdale, JJ., Ritchie, E.J., and Harris and Chisholm, JJ. January 27, 1917.

TAXES (§III D—135)—CERTIORARI—AFFIDAVIT—"MERITS OF PROCEEDINGS."

Irregularities in notices of assessment, and in the service thereof are technical objections not within the meaning of the words "merits of the assessment" in sec. 59 of the Assessment Act (R.S.N.S. ch. 73), permitting a *certiorari* to remove the proceedings when such merits are at issue.

Statement.

APPEAL from the judgment of Graham, C.J., allowing the application of the company for a writ of *certiorari* to remove into the Supreme Court a record of the Court of Revision and Appeal for the county of Annapolis by the decision of which the assessment of the company was increased from $33,500 to $233,500. Reversed.

W. E. Roscoe, K.C. for appellant.

V. J. Paton, K.C., for respondent.

Russell, J.

RUSSELL, J.:—The statute provides (R.S.N.S. ch. 73, sec. 59) that no *certiorari* shall issue in such a case unless it is made to appear by affidavit that the merits of the assessment rate, order or proceeding will, by such removal, come properly in judgment.

The affidavit by which it is sought to make this appear is that of the applicant's counsel, who has sworn to his belief that "the merits of the validity of the proceedings" before the Board of Revision and Appeal will come properly in judgment. I incline to the opinion that this affidavit, instead of being a compliance with the provision of the statute, is an evasion of that requirement. The proceeding in question here is the action of the Board of Revision and Appeal in raising the assessment by adding $200,000 to the valuation of the property. The merits of that proceeding turn upon the question whether the additional assessment is justified by the fact of the corporation appealed against having the stated amount of property assessable in the district. The validity of the proceedings may not depend upon the merits of the proceedings at all. In this case, so far as the argument indicated, the validity depends upon a number of technical questions as to the proper form and effective service of the notices. The affidavit of McDormand, the treasurer of the company, does not go to the merits of the proceeding any more than that of the company's counsel. It, also, refers merely to the want of form or the defective service of the notices on which

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the Board proceeded. I can well imagine the conflict in the interior counsels of the solicitor who had to swear to the affidavit in question. He would ask himself whether his client was proposing to question the merit of the increased assessment and the answer would come to his consciousness that no such question was proposed. Possibly the assessment was entirely fair and just, and he had no expectation of quashing the proceedings on the ground of any substantial wrong. He expected to be able to establish that the proceeding of the Court was invalid for want of the requisite notices and for that cause alone. See also in his connection *Ayres* v. *Polsdorper*, 187 U.S. 585, where it was held that the expression as to the determination of a case "upon its merits," as referred to in the Federal Judiciary Act of 1891, was used in distinction to the review of a question of jurisdiction. In other words, that a question as to the jurisdiction of the Court was contradistinguished to a question as to the propriety of a judgment "upon its merits."

I do not think it can be said that an affidavit such as the statute calls for is not necessary even if the Board had no jurisdiction to enter upon the inquiry. If the Board had jurisdiction there could be no *certiorari* at all for want of or informality in the notices required because the statute expressly enacts (ch. 73, sec. 61), that the assessment roll as finally passed by the Court, that is, I assume, the same thing as the Board, shall bind all persons notwithstanding any error or irregularity in the notices required to be given or omission to deliver or transmit such notices. It may be a question to be considered at a later stage whether this provision does not cure the defects on which the applicant for *certiorari* is relying, but I am not at present concerned with that question. For the purposes of a ruling on the point now under consideration, I am assuming the possibility that this provision does not cure the want of any notice that may be a prerequisite to the jurisdiction of the Board. But granting all this and assuming that for want of jurisdiction there can be a *certiorari* in the present case, it seems to me to be the clear intention of the statute to prevent such process from issuing unless the substantial merits of the assessment, or in this case, of the addition by the Board of $200,000 to the amount of the original assessment, will properly come in judgment. One cannot read the provisions of the chapter without being impressed with

the evident intention of the legislature to discourage merely technical objections and make it possible for the farmers, fishermen and business man, to whose hands the administration of the Act is necessarily committed, to proceed in safety without incurring the expense of professional advice at every turn.

The ground for ordering the issue of the *certiorari* in this case is that notices were not given such as the statute requires. The appeal which came before the Board of Revision was that of a complainant who attacked the assessment of the company as being too low. It was his duty to give notice to the company and to the clerk of the municipality 8 days before the meeting of the Board of Revision, which would take place on January 25. What he did was to send to the clerk of the municipality a notice of the fact of his appealing from the assessment of the company, and also a notice addressed to the company that he was so appealing. No objection is made to the form of these notices, but neither of them reached the company at Bridgewater until after the Court had dealt with the assessment, for the reason that they had been addressed to Springfield where, although the company had been engaged in lumbering operations, the letter was not delivered to or received by any official of the company. A notice was, however, duly served on the company 6 days before the meeting of the Court that the appeal against their assessment would be heard. This notice was in time, but the Chief Justice has held that such notice, not mentioning the name of the appellant or indicating the nature of the appeal, did not cure the want of service of the notices that should have been given by the appellant 8 days before the meeting of the Court. The appellant, therefore, had no *locus standi* in the Court of Revision and Appeal and the Court could have refused to deal with this appeal. But it does not follow from this that they could not deal as they did with the assessment of the lumber company. The statute provides that the Court shall have power of its own motion to add to the roll the name of any person improperly left off and also to add to the amount of the assessment of any person, provided that in such cases notice shall forthwith be given by the clerk to the person whose name is added or whose assessment is increased, in which case an appeal is given to the County Court. The Court, under this section, had undoubted power to deal as they did with this assessment of their own motion. But I think

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it is clear that they did not deal with it in that way. If it were not thus clear I should have been inclined to hold that we must assume they had dealt with it in the way in which they had the power to deal with it. I cannot agree with the Chief Justice if, as I understand him, he is of the opinion that notice to the ratepayer was necessary in order to enable the Board to deal with the assessment of its own motion. I do not think that any such notice was necessary. But this difference of opinion is of no consequence here because it is quite manifest from the record of the proceedings that the Court did not act in the matter of its own motion but dealt with it as an appeal. I think that by this proceeding great injustice could be done to a taxpayer. Dealing with such an assessment of their own motion the Board would satisfy its conscience as to the propriety of the increased assessment before making the change. They would act on their own knowledge of the facts or on evidence which they considered reliable. They would certainly have felt bound to satisfy their own conscience in some way of the propriety of the increase. Dealing with the case as a matter coming before them by way of an appeal, they might very well decide it on the statement of an appellant, considering that the taxpayer, if he had anything to urge against the appellant's contention, should have taken the trouble to present his evidence. We have no knowledge as to what took place at the meeting of the Court beyond the fact that the appeal was heard and the assessment was increased by $200,000.

If the Court had no jurisdiction to hear the appeal, I should think that this proceeding could properly be removed by *certiorari* and quashed at the hearing unless the defect is cured by sec. 61 which, as I have already stated in another connection, enacts that the assessment roll as finally passed by the Court shall bind all persons assessed in such roll notwithstanding any defect or error therein or any irregularity on the part of the assessors or in respect to the making up of the roll or in the proceedings of the Court or any error or irregularity in the notices required to be given or the neglect or omission to deliver or transmit such notices.

These words seem at first reading large enough to cure any possible omission of any kind of notice, and if they are to be read in this large and comprehensive sense it will be possible at any future meeting of a Board of Revision for any ratepayer

to attack any assessment without notice of any kind to anybody at all, whereupon the Board, on an *ex parte* hearing, will have the power to increase any assessment to any amount that it may see fit and put the aggrieved ratepayer to the trouble and cost of an appeal to the County Court. It would only be a slightly further extension of the sense of the provision to say that no notice need be given to the ratepayer of the action of the Board in so increasing his assessment in order to put him in a position to appeal to the County Court. I fancy that even the counsel for the appellant would draw the line at this point. But I think it must be drawn a little more closely. There are many notices required to be given in the course of a general assessment to which it is comparatively harmless that the provision should apply. For example, the notice that should be posted up in the office of the clerk of the meeting of the Court might be omitted without any essential mischief happening, as every ratepayer is supposed to know the law and the law appoints a meeting of the Board on the fourth Tuesday in January. Moreover, everybody interested in the proceedings of the Court has already received individual notice of the meeting. I should be sorry to say that such a notice could be safely dispensed with, and it is not necessary to decide whether the want of it would or would not invalidate the assessment. However that may be, I do not think that the general terms by which the want of notice is intended to be cured should be extended to the notice by which the proceedings on appeal are launched and which seem to me to be requisite to the jurisdiction of the Board to hear the appeal. The subject-matter of the appeal, as I have already said, could have been dealt with by the Board without any appeal at all; but it was not so dealt with, and I need not repeat what I have said as to the essential difference between the two methods of procedure.

I think that the appeal should be allowed solely on the ground that the condition precedent to the issue of the order for the *certiorari* was not complied with.

DRYSDALE, J.:—I think it was a condition precedent to the granting of any *certiorari* herein that it be established that the merits of the assessment would come properly in judgment by the removal of the rate or assessment. This, I think, was not made to appear and under sec. 59 of the Assessment Act the writ should, in my opinion, have been refused.

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Again, the company had full knowledge that the question of dealing with the company's assessment was to come before the Board of Revision and Appeal and elected not to appear at the hearing, relying upon what was said to be short notice, well knowing, as they must have known, that the statute enabled such Board of Revision to increase the assessment of its own motion if they saw fit, and to deal with it notwithstanding defective notice. They had a right of appeal on the merits and did not exercise it and under the circumstances I do not think it can be reasonably said the merits can now come in judgment. I would allow the appeal.

Ritchie, E.J.

RITCHIE, E. J. (dissenting):—The point in this case as to which I have had difficulty and doubt is as to whether or not there was a compliance with sec 59 of the Assessment Act; but after prolonged consideration I have come to the conclusion that the point is properly disposed of in the judgment of my brother Harris. As to the other points involved I see no reason to differ from the judgment appealed from.

As to the point that the action of the Board could be justified under sec. 47, I have examined the authorities cited by Roscoe, K.C., and I am of opinion that they are not applicable to this case. If the action of the Board could be justified in this way it would, I think, mean that when a Court such as this Board was, has expressly dealt with a case by way of appeal and as a matter of fact in no other way, it can afterwards be successfully urged in justification of its action: "It is true that there was no jurisdiction to do what the board did, namely, heard the appeal, but it had jurisdiction which it did not exercise to adjudicate on its own motion; therefore the proceedings must be sustained." I think this is not an unfair way of stating it, because there was no jurisdiction to hear the appeal for lack of notice. That the Board acted as an Appeal Court only is shewn by ex. "E" to the affidavit of Mr. Fitch. Nothing short of clear authority from a Court whose decisions were binding upon me would drive me to supporting such a position as I have indicated.

I would dismiss the appeal with costs.

Harris, J.

HARRIS, J. (dissenting):—Elias Rawding, a ratepayer in the municipality of Annapolis, sought to appeal against the assessment of the Davison Lumber Co. Ltd., which I will hereafter

designate the company, upon its property in the municipality of Annapolis, upon the ground that the same was undervalued. Under the provisions of the Assessment Act such an appeal can be asserted and secs. 35 to 46 of the Act deal with the procedure in such a case. Certain notices required to be served on the company were not served in accordance with the Act, and the Board of Revision and Appeal notwithstanding proceeded to hear the appeal and increased the assessment of the company from $33,500 to $233,500. An application was made to the Chief Justice for a writ of *certiorari* to remove into the Supreme Court the record of proceedings of the Board of Revision and Appeal, whereby the assessment of the company was increased and that Judge granted the application on the ground that the Board of Revision and Appeal had no jurisdiction to proceed—the proper notices not having been given. This is an appeal from the order allowing the writ of *certiorari*.

Sec. 59 of the Assessment Act provides as follow :—

No *certiorari* to remove any assessment, rate or order, or any proceedings of the council or Court touching any assessment, rate or order, shall be granted except upon motion in the first week of the next sittings of the Supreme Court in the county after the time for appealing has expired, and unless it is made to appear by affidavit that the merits of the assessment, rate, order, or proceeding will, by such removal, come properly in judgment; nor shall any assessment, rate, order or proceedings be quashed for matter of form only, nor any general assessment or rate for any illegality in the assessment or rate of any individual except as to such individual.

One ground alleged in support of the appeal is that this section has not been complied with and for that reason the *certiorari* should not have been granted.

There was an affidavit of the treasurer and registered agent of the company setting out among other things that the proper notices of appeal had not been served and giving in detail the dates when certain letters were received which were intended to be the notices required by the Act. There was also an affidavit of Mr. Paton, K.C., the counsel of the company that the "merits of the validity of the proceedings before the Board of Revision and Appeal will come properly in judgment."

It is argued that these affidavits are not a compliance with sec. 59. It is therefore necessary to consider the provisions of this section. It is important to note that in sec. 37 the Board of Revision and Appeal is referred to as "the Court for the hearing and determination of appeals."

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Sec. 59 in its application to the point under consideration may be stated or paraphrased thus: "No *certiorari* to remove any proceedings of the Board of Revision and Appeal shall be granted unless it is made to appear by affidavit that the *merits of such proceedings* will by such removal come properly in judgment and no such proceedings shall be quashed for matter of form only."

One can quite easily understand what is meant by the "merits of the assessment" or the "merits of the rate," but the "merits of the proceeding" is a more difficult phrase to interpret. It is to be noted that sec. 59 does not say, and cannot be read as meaning, that if you are attacking proceedings of the Board of Revision and Appeal, you must make it appear by affidavit that the merits of the assessment will come in judgment. It cannot be so read without making meaningless the words "rate, order or proceeding" which follow the words "merits of the assessment." What it does say and what it obviously does mean I think, is that if an assessment is complained of you must make it appear that the merits of the assessment will come in judgment. And if the attack is on the proceedings of the Board then it must appear that the merits of the proceedings are to come in judgment. I do not see how the section can be read in any other way. It must be admitted that the phrase "merits of the proceeding" is not a happy one, but the legislature has used it and it is our duty to interpret t.

It was argued by Mr. Paton, K.C , for the respondent that the question was whether the proceedings were right or wrong. That may be so, but I am not prepared to so decide on this application. It is sufficient to say that the objection to the proceedings in this case going to the jurisdiction of the Board is a matter of substance and not a mere matter of form and is within the phrase "merits of the proceeding."

If we take the whole of sec. 59 it may very well be argued that the main legislative intent is that proceedings are not to be set aside for mere matters of form, but only for matters of substance, or, in other words, that mere technicalities are not to prevail, and, as a preliminary to getting a *certiorari*, you must make it appear that your objection to the proceedings is one of substance. There are objections to proceedings which are

substantial and involve the rights of the parties and there are objections which are mere technicalities or matters of form and I do not see why the former cannot be properly designated meritorious and such objections are, I think, covered by sec. 59.

27 Cyc., p. 483; *Bolin* v. *Southern R. Co.*, 65 S.C. 222. In *Hinsbach* v. *Ketcham*, 79 N.Y. App. Div. R. at p. 564, Patterson, J., quoted what Seldon, J., had said in *St. John* v. *West*, 4 How., p. 329:—

> The word "merits," as a legal term, has acquired no precise technical meaning and admits of some latitude of interpretation, but it is to be regarded as referred to the strict legal rights of the parties as contradistinguished from those mere questions of practice which every Court regulates for itself and from all matters which depend upon the discretion or favour of the Court.

Here the company had a legal right to have its assessment maintained at $33,500 unless it was properly increased by the Board of Revision and Appeal. That Board could only get jurisdiction to increase the assessment if certain notices were given, and the question as to whether the Board has acquired jurisdiction or not was one which would come up in judgment if the proceedings were removed into the Supreme Court by *certiorari*. I think this question was one of substance and not mere form; it involved the whole question of jurisdiction and the validity of the whole increase in the assessment. I think the affidavits do make it appear that the merits of the proceedings were to come in judgment. There may be something in the argument that Mr. Paton's affidavit standing by itself is not a compliance with the section but it is unnecessary to determine this in view of the fact that the treasurer's affidavit alone is sufficient. I think this objection fails.

But it is said that sec. 61 makes the assessment roll as finally passed by the Court binding on the company and that the question as to the jurisdiction of the Board of Revision and Appeal cannot be raised. Sec. 61 provides as follows:—

> The assessment roll, as finally passed by the Court, shall be certified by the clerk as so passed, and shall, subject to the provisions of this chapter as to appeals to the council or County Court, bind all persons assessed in such roll, notwithstanding any defect or error therein, or any irregularity on the part of the assessors, or in respect to the making up of the roll, or in the proceedings of the Court, or any error or irregularity in the notices required to be given, or the neglect or omission to deliver or transmit such notices.

Before proceeding to discuss the meaning of this section

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I would point out that if the construction contended for has to be given to this section it will be in my opinion most unfortunate. If the Court is obliged to say that an appeal against an assessment can be heard upon an insufficient or short notice and an assessment increased under such circumstances in the absence of the person interested, and, because of sec. 61, the party has no remedy, I do not see why an appeal, heard without any notice at all to the person interested, should not be equally protected by this section.

Perhaps that is not a final and conclusive answer, but, as Sir Henry Strong, C.J., Canada (then Strong, J.), said in *O'Brien* v. *Cogswell*, 17 Can. S.C.R. 420, at 433 and 434:—

> These considerations do, however, constitute grounds for very carefully and strictly construing an enactment relied upon as warranting such a harsh and unreasonable conclusion and for so restricting its operation as to avoid injustice if the language will possibly admit of such a construction.
>
> The general principles applicable to the construction of statutes imposing and regulating the enforcement of taxes for general and municipal purposes are well settled. Enactments of this class are to be construed strictly, and in all cases of ambiguity which may arise that construction is to be adopted which is most favourable to the subject.

I refer also to what Graham, E.J. (as he then was), said in *Re Gillies Assessment*, 42 N.S.R. 44:—

> It requires strong and drastic language to take away a man's right to be heard before he is deprived of his property.

In reading sec. 61 we are to have in mind that sec. 59 has recognised the right to *certiorari* where the merits of the proceedings of the Board of Revision and Appeal can come properly in judgment, and that it has also declared that proceedings shall not be quashed for mere matters of form only. Then we find sec. 61 providing that the assessment roll shall bind all persons "notwithstanding any defect or error therein or any irregularity on the part of the assessors or in respect to the making up of the roll or in the proceedings of the Court" The words "defect," "error" and "irregularity" all point to matters of form and should not, I think, be construed to cover any objections of a jurisdictional nature.

There are, however, the concluding words of the section "or any error or irregularity in the notices required to be given or the neglect or omission to deliver or transmit such notices."

There are various notices required to be given by the assessors and other officials under the various provisions of the Act to

which those words could apply. I do not think they should be interpreted as covering notices the failure to give which deprives the Board of Revision and Appeal of jurisdiction to deal with the subject-matter, but should be restricted to other notices of a less formal nature. Considering the obvious intent of the legislature in secs. 59 and 61 to be to do away with objections to matters of form only and not to deprive a party of his right to have a matter of substance reviewed, I think we are bound so to interpret the Act. I have therefore reached the conclusion that sec. 61 does not apply to an objection which is jurisdictional in its nature and is no answer to the present application for a writ of *certiorari*.

Another argument made by counsel for the municipality was that the sections requiring notice of the appeal to be given to the company in this case were only directory and therefore their omission did not invalidate the proceedings.

In *O'Brien* v. *Cogswell, supra*, Sir Henry Strong points out, at p. 425, that the provisions requiring such notices to be given are to be construed as imperative and not as merely directory unless the contrary is explicitly declared.

There is no reason whatever, so far as I can see, for holding such notices as those in question to be merely directory. They are just as important as the writ in an action; they are the basis and foundation of the jurisdiction of the Board of Revision and Appeal to deal with the appeal and to decide that the provisions requiring notice to be given to a person whose assessment is being appealed against are merely directory would be tantamount to saying that without any notice whatever the assessment of a person could be increased on an appeal. It is clear, I think, that the legislature never intended anything of the kind. On the contrary, it has expressly provided for service of specific notices upon the persons interested a certain time before the matter is to be heard which certainly was intended to give the party interested an opportunity of opposing the increase in his assessment.

What Sir Henry Strong said in *O'Brien* v. *Cogswell*, 17 Can. S.C.R. 420, in dealing with the omission to give a notice of assessment applies with equal force to the want of notice of appeal in this case. He said:—

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As regards the latter, the omission to give all notices, such as that called for by sec. 37, renders all the proceedings *ex parte*, and is equivalent to an omission to serve any process in the case of an ordinary action at law. The very first principles of justice, such as that embodied in the maxim *audi alteram partem*, require a most rigorous performance by the city officers of the duty to give this notice of sec. 37.

Then it is sought to justify the decision of the Board of Revision and Appeal by sec. 47 of the Act. That section provides that the Board shall have power of its own motion to add to the amount of the assessment of any person provided that notice shall forthwith be given by the clerk to the person whose assessment is increased, and it is further provided that in such a case the party has an appeal to the County Court. The case shews that a notice was sent to the company of the increase in the assessment by the clerk.

The answer to this contention, I think, is that the Board did not, of its own motion, add to the assessment. The record of its proceedings shews that what it did was to hear an appeal asserted by E. Rawding and on that hearing it decided to increase the assessment. It cannot now set up that the Board acted of its own motion because it is not the fact: it might have done so, but it did not. The cases cited do not, in my opinion, have any bearing on this question.

I think the judgment of the Chief Justice is right and should be affirmed. I would dismiss the appeal with costs.

Chisholm, J.

CHISHOLM, J.:—The contention of the company is that the proceedings of the Board are wholly invalid and there can be no dispute that the only question that can arise—the only matter that can come in judgment—on the allowance of the *certiorari*, if the writ is held to have been properly granted, is whether the proceedings of the Board are or are not valid. No other matter can come in judgment.

The first point taken by Roscoe, K.C., in opposing the application is that the company has not produced the affidavit required by sec. 59 of the Assessment Act.

On this preliminary point I have arrived at the same conclusion as my brothers Russell and Drysdale. I think that what sec. 59 requires is an affidavit shewing that the merits of what was before the Board of Revision and Appeal and what the Board adjudicated upon, namely, the value for purposes of assessment of the property of the company within the district

mentioned, should come properly in judgment by the removal into this Court of the record of the Board's proceedings.

It is urged that it has been shewn by affidavit that the "merits" of the "proceeding" will come properly in judgment by the granting of the writ of *certiorari*. To give any effect to that argument the "validity" of the proceedings—for it is the validity only that is attacked—must be assumed to be the same as the "merits" of the proceedings. One would suppose that each of these words has a meaning distinct from that of the other. But assuming them to have the same meaning, the argument leads to a construction of the statute which, to me, does not seem to be what the legislature intended. Bearing in mind that the validity of the proceeding of the Board is the only matter that can come in judgment, the legislature, according to the construction urged by the company, would be imposing an idle condition in requiring of a person who attacks a proceeding by means which, of necessity, test the validity of such proceeding and do nothing else, that he should make an affidavit that the validity of the proceedings will thereby be tested. In other words, he is required to swear that he shall do what he is actually doing. If the granting of the writ can have no other result than to bring in judgment the validity of the Board's proceedings, what useful purpose can be served by an affidavit shewing that the validity of the Board's proceedings will by the allowance of the writ come in judgment? It may be said that we must give some meaning to the phrase "the merits of the proceeding." Our duty, I take it, in construing a section which has obscure or inept words is not so much to give such words some meaning as to give them a reasonable meaning; and I do not think we would be discharging our duty in that regard by attaching to the phrase mentioned the meaning contended for, when, as I endeavoured to shew, it leads to so impotent a conclusion.

On the question of jurisdiction, Mr. Roscoe calls attention to sec. 47 of the Act, the material words of which are as follows:—

> The Court shall . . . have power . . . also of its own motion to add to the amount of the assessment of any person, provided that in such cases notice shall forthwith be given by the clerk to the person . . . whose assessment is increased.

He urged that by reason of this power to act of its own motion, the want of notice to the company became immaterial. But

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it was said that the Board purported to act on the notice of appeal, not of its own motion. I am unable to regard that as a sufficient answer. It is not a question of what power the Board supposed it might act under, but the power it actually had. Without any notice whatever to the company, the Board could have made the increase in the assessment; and provided notice of the increase were forthwith given by the clerk (as was in fact done in this case), that increase could not be impeached except by appeal to the County Court. Whether purporting to act in hearing a formal appeal respecting the company's assessment, or acting in the matter solely and avowedly of its own motion, the Board has the same duties to perform; it must perform its duties with the same zeal and care; and it must be as particular in the one case as in the other to do justice to both the company and the municipality. It has power, acting of its own motion solely, after hearing the statement of Oliver McNayr or that of anybody else, to increase the company's assessment; and I cannot see how its powers in that regard were in anywise contracted because it purported to act on a notice of appeal.

I think the appeal should be allowed. *Appeal allowed.*

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DIEBEL v. STRATFORD IMPROVEMENT CO.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Hodgins, JJ.A. January 12, 1917.

1. CORPORATIONS AND COMPANIES (§ IV D—79)—POWERS—GUARANTY.
A guaranty by a corporation for the payment of work performed under a building contract is within the powers conferred upon it by sec. 23 of the Companies Act, Ont., 1912, 2 Geo. V., ch. 31.

2. CONTRACTS (§ IV C—340)—SUBSTANTIAL PERFORMANCE—BUILDING CONTRACT—DEFECTS.
Substantial performance of a building contract entitles the builder to recover the contract price subject to deduction for so much as ought to be allowed for defects.

Statement.

APPEAL by the defendant company from the judgment of Boyd, C., 37 O.L.R. 492. Varied.

Glyn Osler, for appellant company,.

R. S. Robertson, for plaintiff, respondent,,

R. T. Harding, for the defendant Johnston.

Hodgins, J.A.

HODGINS, J.A.:—Appeal by the defendant company from the judgment of Sir John Boyd, late Chancellor of Ontario, reversing the decision of His Honour John A. Barron, County Court Judge, to whom the action had been referred for

trial, pursuant to sec. 65 of the Judicature Act. The learned County Court Judge had dismissed the action, which was on a guaranty, on the ground that the company had no power to become surety. The learned Chancellor held the view that the liability was practically a direct one, as Tolton, the debtor, was a shadow, and the company the real and substantial contractor. He also decided that, if the contract were strictly one of guaranty, the company was liable under the Companies Act, 1912, 2 Geo. V. ch. 31, sec. 23 (1) (*k*), and possibly under the legislation of 1916, 6 Geo. V. ch. 35, sec. 6.

The appeal is upon two grounds: one that the guaranty was not within the company's powers; and the other, that the respondent Diebel, not having finished the factory, could not recover.

The County Court Judge deals with the agreement of the 19th October, 1914, as a complete "clean-up" of the situation to that date, and takes its terms as evidencing the true relationship of the various parties. The learned Chancellor viewed it as a device to hide the real transaction. I am not sure that it is necessary to go that far to reach a solution of the matter. Having regard to all that had occurred previously between those who signed that agreement, it is hard to imagine that the parties did not understand exactly the position of each of them, under that agreement. Chickens are not the only birds that come home to roost. Stool-pigeons sometimes do the same, and those who use them must not complain if their rights are tested by what they say and do when setting them up.

Section 23 (1) (*d*) enables a company to "enter into . . . any arrangement for . . . co-operation (or) joint adventure . . . with any person . . . engaged in . . . (1) any . . . transaction which the company is authorised to . . . engage in or (2) any . . . transaction capable of being conducted so as directly or indirectly to benefit the company; and to . . . guarantee the contracts of or otherwise assist any such person."

Section 23 (1) (*k*) enables a company to "lend money to customers and others having dealings with the company and to guarantee the performance of contracts by any such persons."

Taking Tolton as a person engaged in a transaction as he

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undoubtedly was, with Diebel, then, if it was one which the company was authorised to engage in, or if it was capable of being conducted so as "to directly or indirectly benefit the company," the company might enter into any arrangement for co-operation or joint adventure with Tolton, and guarantee his contract or otherwise assist him.

The agreement of the 19th October, 1914, recites that the appellant company is owner of lands in the city of Stratford, and has subdivided them, and that "arrangements were entered into for the erection of a factory building upon a portion of these lands." This refers to the agreement between Tolton and the respondent Diebel.

It then mentions the making or the procuring to be made of certain advances, amounting to $2,532, used in connection with the erection of this factory These were to be provided by Tolton, but came in fact from the appellant company.

The agreement further recites that material has been supplied, but the payment therefor has not been provided, "and, difficulties having arisen in prosecuting the said work," then, "for the purpose of carrying out to a completion the aforesaid plans, this agreement has been entered into."

The contract of the 19th October, 1914, is therefore based upon a transaction entered into by Tolton with the respondent Diebel in respect of which the appellant had in fact advanced moneys and had guaranteed the payment of certain materials, and proceeds to devise means to carry out the undertaking. Shortly stated, the plan evolved was, that Tolton should advance moneys in instalments partly fixed and partly based on Diebel's expenditure, and that Diebel should, with that amount of financial aid, complete the building and pay certain liens and claims.

I fail to see why there should be any difficulty in holding that the agreement means what it says, and that it recognises that Tolton was engaged in a transaction the carrying out of which would in many ways benefit the appellant company, which had over $2,500 at stake in it, which might be lost if completion of the building were endangered. If so, the guaranty would be within its statutory powers under clause (*d*) of sec. 23 (1) of the Act of 1912, as being made pursuant to an arrangement for co-operation or joint adventure with Tolton.

It should be pointed out that in the charter of the company, while it may acquire and dispose of lands and buildings and take mortgages for unpaid purchase-money, there is the following provision: "Provided however that except as to taking and holding mortgages as aforesaid nothing herein contained shall be deemed to empower the company to make loans, whether for building purposes or not, upon lands not the property of the company or upon lands which, though once the property of the company, have by any deed, conveyance, transfer, or alienation, become the property of another."

This lack of power in the company is not a withholding, under the proviso at the end of sec. 17 of (1907) 7 Edw. VII. ch. 34, of the powers conferred by the Act of 1907, but rather a closer definition of the actual scope of the company's operations. What was thus wanting is made up under the statute by means of the added provisions. Clause (*k*) enables the company to lend to and to guarantee contracts of customers and others having dealings with the company, probably only to those to whom money has been lent.

Considering the nature of the transaction, I think it may well be held that the company was lending money to Tolton to be paid by him under the contract to assist the respondent in finishing the building upon lands then owned by the company, but in which he had, or might by the grace of the company have, an interest. Tolton was certainly one having dealings with the company, so that the guaranty of his contract comes literally within this clause.

It was argued that the legislation of 1916, 6 Geo. V. ch. 35, sec. 6, was in itself sufficient to validate any guaranty, the company having always had, by virtue thereof, the general capacity which the common law ordinarily attaches to corporations created by charter. This, according to Palmer, "Company Precedents," 11th ed., p. 30, and *British South Africa Co.* v *Beers Consolidated Mines Limited*, [1910] 1 Ch. 354, involves power to bind itself by contracts and to do all such acts as an ordinary person can do, and this notwithstanding that there may be a direction contained in the creating charter in limitation of the corporate powers. It is, I think, unnecessary to express any opinion upon this somewhat novel legislation, especially as its effect was not fully argued, and that it is considered, but not pronounced upon, in what is practically a foot-note to the judgment of the late learned Chancellor.

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The next point is that the respondent cannot recover against the company because the building was not fully completed. This objection is not dealt with in the judgment appealed from.

The learned County Court Judge, after dealing with alleged defects in the floor and roof, says as to these: "I therefore hold that there was a substantial compliance sufficient for the purpose with the agreement of the 19th October, 1914, and the specifications (exhibit 48). The concrete floor on the ground floor undoubtedly heaved in places; but that was due to no drainage, followed by frost; and the evidence is clear that there was no outlet available for drainage for the buildings, and the conditions were unavoidable. But the floor above sloped and slanted. To remedy this it would cost about $300, and to repair the roof too would cost about $300 to $400—in all the sum of $700 at the outside. Now, if I could take that view of the case, I would say that, upon the plaintiff correcting the floor in question and repairing the roof, judgment should go against the defendant company for the sum of $4,274."

I think the County Court Judge came to a proper conclusion in holding that there was a substantial compliance with the contract of the 19th October, 1914. It is to be noted that the building was completed sufficiently to be operated; that it was in fact in operation; and that the City of Stratford paid the bonus of $3,500, which, under the terms of the by-law, was to be handed over on its completion and equipment.

The terms of the contract in question include an agreement with Tolton, that the respondent will "proceed with the completion and equipment" of the factory "so that the same may be finished and completed in a workmanlike manner . . . and properly equipped for the purposes of the business intended to be carried on therein."

The right of the respondent to recover from Tolton the sums to be advanced weekly and monthly is in no way dependent on the completion and equipment of the factory, as is pointed out in *Deldo* v. *Gough Sellers Investments*, 25 D.L.R. 602, 34 O.L.R. 274. The covenants are clearly independent, and there is no provision that any part is to become payable when the building is completed. Indeed the payments only amount to $8,468, while the building and equipment cost $18,000.

The question of substantial compliance has been put upon a reasonable basis by the decision of the Court of Appeal in England in *H. Dakin & Co. Limited* v. *Lee*, [1916] 1 K.B. 566. There, as here, the concrete was in question. The Court held that, where the evidence shewed that the work had been done, though negligently, inefficiently, or improperly, yet the builder could recover the contract price, less so much as ought to be allowed for the defects. This is subject to conditions there stated, none of which are applicable here.

The company guarantees Tolton's payments, and if, because he does not pay, the company is called on to make them good, equity would require that it should be allowed to set off that which the debtor himself could set off. For, upon Tolton making the payments, he was entitled to a building finished in terms of the contract, and the creditor cannot expect to give less to the surety. If substantial compliance is enough to warrant judgment under the contract, that judgment cannot be for more than that to which substantial compliance would entitle him. Nor can payment of the stipulated amounts be enforced except after the deduction of the value of the defects. So that from the $4,328.61 should be deducted $700, as found by the County Court Judge.

This course in favour of the guarantor is warranted by the cases of *Murphy* v. *Glass* (1869), L.R. 2 P.C. 408; *Bechervaise* v. *Lewis* (1872), L.R. 7 C.P. 372; and by the statement of the law in Halsbury's Laws of England, under the title "Guarantee," vol. 15, p. 508, para. 960.

In the written reasons of the learned Chancellor there is mention of certain claims, no reference to which appears in the formal judgment. Except as to the first, nothing regarding them was said on the argument of the appeal, but it would seem just that interest should be allowed on the balance due.

As to the claim adverted to of the respondent Johnston, that the judgment should provide for his claim of $250, there is no formal appeal before this Court. The learned Chancellor says that "before getting it" (that is, the deed of the land on which the factory was erected), "the plaintiff was compelled to pay $250 which Johnston claimed." The fact is that, when Johnston gave the deed, he got an undertaking from the respondent and one Forsberg to pay $250, and he has sued them upon it and got judgment. The property in question was vested in Johnston

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pursuant to the agreement of the 19th October, 1914, in trust, to convey to the respondent or his nominee, when the roofing of the factory was completed according to the plans and specifications, to the satisfaction of Johnston. The guaranty sued on in this case is only for payments to be made by Tolton to the respondent; and, however fair it may be for all parties to join in paying the trustee's claim, it cannot, nor can any part of it, be recovered in this action.

The appeal should be allowed to the extent of cutting down the respondent's judgment by $700 and by adding interest on the balance from the date of the writ, and otherwise dismissed.

No costs of appeal.

Meredith, C.J.O. Maclaren, J.A. Magee, J.A.

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

MAGEE, J.A., agreed in the result.

Appeal allowed in part.

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CHANDLER v. PORTLAND EDMONTON CEMENT CO.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Ives, JJ. January 31, 1917.

BILLS AND NOTES (§ I D—30)—NEGOTIABILITY—RESTRICTIVE ENDORSEMENT—ASSIGNABILITY.

A promissory note payable to "C. only" is not negotiable, but the debt represented by it is assignable.

[The Bills of Exchange Act, R.S.C. 1906, ch. 119, secs. 60, 68, considered.]

Statement.

APPEAL by defendant from the judgment of Walsh, J., 28 D.L.R. 732. Affirmed.

S. W. Field, for appellant.

G. H. Van Allen, for respondent.

The judgment of the Court was delivered by

Harvey, C.J.

HARVEY, C.J.:—One Patriquin promised to pay A. E. Chandler by fourteen different promissory notes a total sum of $1,567.62.

The notes are on an ordinary printed form with the name of a bank at which they are payable printed, but the words "or order" on the form are deleted and they are made payable to "A. E. Chandler only." The defendant brought an action against A. E. Chandler and issued a garnishee summons against Patriquin who entered an appearance alleging that the debts due in respect of the said notes had been assigned to the plaintiff, and that he had been notified of the assignment. An issue was directed to determine the validity of the assignment. The question as stated

in the order directing the issue is "whether or not a promissory note payable to A. E. Chandler only can by him be transferred to the plaintiff."

The case was argued on the pleadings which state the facts above set out before Walsh, J., who decided in favour of the plaintiff and this is an appeal from his decision.

The question as dealt with by him and as argued before us was whether the debt represented by the note could be assigned by the payee of the note, and I take it therefore that that is what was meant by the form of words used in the order directing the issue, and counsel now informs us that that is what is intended. No question before us is raised as to the form of the assignment, or as to its sufficiency if the debt is capable of assignment. I agree with the conclusion reached by Walsh, J., and with his reasons therefor, but there are one or two other observations I desire to make.

Some of the text writers state that a note payable to "A. only" is not negotiable and sec. 68 of the Bills of Exchange Act indicates that an endorsement in the words "Pay D. only" is a restrictive endorsement which prohibits further negotiations. I therefore take it or granted that the notes in question are not negotiable though the Court of Appeal in England in *Decroix* v. *Meyer* (1890), 25 Q.B.D. 343, held that a bill drawn payable to the order of a person which was accepted by striking out the word "order" and writing "accepted payable at etc., in favour of— only" was a negotiable bill. Lord Esher, at p. 348, says: "It seems to me that the meaning is merely that the acceptance is of a bill of which Flipo is the only drawer. The words have no mercantile effect upon the bill as drawn." Bowen, L.J., who agrees, says, however, that if the words had been "payable to Flipo only" it would have been different but I am unable to appreciate the distinction he makes. However, taking it for granted that the note in question is not negotiable because in the words of sec. 21 it contains words indicating an intention that it should not be transferable, the question is, is the debt assignable?

Several of the text writers seem to have doubts as to the assignability, Chalmers for one, referring to *Brice* v. *Bannister* (1878), 3 Q.B.D. 569, at 580-1, where Brett, L.J., says, "suppose a man writes upon paper, 'I promise to pay A. B. the sum of

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£100 on demand,' the document not being payable to bearer or to order is not a promissory note assignable or negotiable by statute or the law merchant."

Appellant also refers to the statement of Bramwell, L.J., in the same case, at p. 581, where he says:—

> Any one who enters into a contract with A. must do so with the understanding that B. may be the person with whom he will have to reckon. Whether this can be avoided, I know not; may be if, in the contract with A., it was expressly stipulated that an assignment to B. should give no rights to him, such a stipulation would be binding. I hope it would be.

I can see no reason why these statements should cast any doubt on the right of a creditor to assign his debt in accordance with the well established principle of law simply because that debt is evidenced by a promissory note which is expressed in terms which make it non-negotiable. Even assuming that a debtor could bind his creditor so that he could not deal with the debt which, however, may be open to grave doubt, it is clear that any contract, to have that effect, must have the intention clearly expressed. An ordinary assignment cannot prejudice the debtor's rights as between himself and his creditor but the negotiation of a note is quite a different matter and may give the transferee rights which the original payee did not possess and deprive the debtor of defences which would have been available against his original creditor.

It is true that the words of the statute are "indicating an intention that it should not be transferable" not "that it should not be negotiable" but it must not be forgotten that the statute is dealing with mercantile instruments not debts, and the rights arising by the law merchant not by the general law. The word "transferable" indeed rather imports a physical delivery which could apply only to some tangible object such as a document and not to an inchoate right such as a chose in action.

Chalmers' Bills of Exchange points out (7th ed., p. 143) that:—

> A bill may be transferred by assignment or sale, subject to the same conditions that would be requisite in the case of an ordinary chose in action.
>
> A bill is a chattel: therefore it may be sold as a chattel. A bill is a chose in action, therefore it may be assigned as a chose in action.

Russell, J., in his work on our Act, at p. 94, speaking of a bill non-negotiable under sec. 21, says:—

> It does not even with such words cease to be a bill of exchange or promissory note. It has all the qualities of a bill of exchange except negotiability,

or, to speak more accurately, it has all the qualities of a non-negotiable bill of exchange. It can be declared on as a specialty and not merely as a simple contract—that is to say, as being itself the cause of action rather than as being merely the evidence of a contract. It imports consideration, and the burden of proof of want of consideration is on the defendant.

The Bills of Exchange Act is a code of the law merchant relating to mercantile instruments known as bills of exchange, etc. The Canadian parliament has no power to deal with the civil rights of persons under contracts in a general way but only so far as affected by the law merchant. It is not to be assumed therefore that when it speaks of a bill as being not transferable it is dealing with anything but its transferability as a bill, and sec. 60 indicates that the words "negotiate" and "transfer" have practically identical meanings, and, as Russell, J., points out (p. 250), "Bills whether negotiable or non-negotiable may pass by death, by assignment, . . . or by any method recognized by the laws of the provinces." Prior to 1890, when our Bills of Exchange Act was passed, a note payable to "A" with nothing more was payable to "A" only. Therefore a promise to pay "A" only means now exactly what a promise to pay "A" meant a few years ago, and I can find no ground whatever for thinking that the obligation created by such a promise was not assignable like any other chose in action.

It is to be kept in mind that a promise to pay is only one part of a contract, but if it is in the form of a promissory note the consideration is assumed. In the ordinary use of the words a promise to pay A would be a promise to pay A and no one else, or in other words a promise to pay A only. Sec. 22, however, says that in a bill of exchange a promise to pay A will be treated in the absence of evidence of a contrary intention as a promise to pay A or order. The use of the word "only" is some evidence of a contrary intention. The result is that any one who acquires the note or the payee's interest in the debt represented by it can do so only subject to the equities existing between the original parties as in the case of any ordinary chose in action. I can see no ground whatever for concluding that it shews an intention between the parties that the debt was not to be assignable. The fact is that the payee did assign the notes in question here and that the debtor has defended the claim of the defendant by setting up that assignment, and surely he would be the only person who could

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rightly object to the existence of the right of assignment, because, if the restriction of the creditor's ordinary right of assignment existed, it would be for the benefit of the creditor only.

I would dismiss the appeal with costs. *Appeal dismissed.*

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LANCASTER v. HALIFAX ELECTRIC TRAM CO.

Nova Scotia Supreme Court, Russell and Drysdale, JJ., Ritchie, E.J., and Harris and Chisholm, JJ. January 9, 1917.

TRIAL (§ V E—300)—VERDICT—SETTING ASIDE—REASONABLENESS.
An Appellate Court will not set aside a verdict which reasonable men could have given on the evidence adduced.

Statement.

MOTION by defendant to set aside the verdict for plaintiff in an action for injuries received through being thrown from their carriage by collision with one of the defendant company's tram cars.

H. Mellish, K.C., for appellant; *Jas. Terrell*, for respondent.

Russell, J.

RUSSELL, J.:—The plaintiff and another woman, Mrs. Kline, were driving along the north side of Spring Garden Road at 9.30 o'clock in the evening of a July day. Their carriage had turned into Spring Garden Road from Grafton St., according to the evidence of the women, from Hastings St. according to another witness. Hastings St. is parallel to Grafton St., and is the next street westwardly. A tram car was coming down eastwardly along Spring Garden Road and collided with the carriage at a point about 20 ft. west of Grafton St. The evidence is extremely conflicting as to the manner in which this accident occurred. There is evidence that the carriage was going eastwardly, and also that it was going westwardly; that the car was an open car; also that it was a closed car; that the left hind wheel of the carriage was struck by the car; also, that the forewheel, and not either of the hind wheels was struck; that there was only one vehicle in the vicinity on the occasion and that there were two. Probably I have not exhausted the list of contradictions, but the statement of one of the witnesses that the horse was heading east and west seems to cap the climax and possibly resolves some of the other contradictions in the case by the hypothesis of a two-headed horse. A reasonable jury could, if it chose, assume an agnostic attitude towards every alleged event that occurred in connection with the accident beyond the fact that the car and the carriage collided, that the women were thrown out and that the plaintiff suffered serious injury.

But I think a reasonable jury could also come to the conclusion that the carriage was being driven from Grafton St. turning into Spring Garden Road and about to proceed westwardly; that a car was approaching and was near enough to render it not unreasonable that the driver should not attempt to cross to the southern side of Spring Garden Road until the car had passed; that for this reason the driver was proceeding along the northern side; that a wagon was approaching from the opposite direction quite near to if not beside the car, which would make it impossible to attempt with safety to pass between the wagon and the car, or between the former and the sidewalk; that the driver therefore tightened the rein to stop the horse and the horse backed, locking the fore wheel and throwing the hind wheel across the track, or near enough to it to be struck by any car that hould pass along the track; that the car did strike the left hind wheel of the carriage and throw the occupants to the ground.

The crucial point of the case is whether there was any evidence on which a jury could reasonably find that the motorman on the car saw, or, had he not been negligent in the performance of his duty, would have seen the carriage sufficiently early to enable him to stop the car before it struck the carriage. If it were necessary to answer this question one way or the other the task would be one of great difficulty, but it is a commonplace to say that the duty of this Court is not to answer that question one way or the other, but to ascertain and determine whether there was evidence upon which the jury could reasonably give the answer to it that they have given.

McGrath, to whom the trial Judge refers with obvious justice as an independent witness, gave it as his opinion that the car could have stopped before it struck the carriage. It is true that he did not himself place much reliance on his opinion, and the reason he gives for it has been criticised, but the jury probably attached importance to it and I cannot say that his reasons were unsound. The car, he says, went the whole length of itself before stopping. It was going at a slow rate before the accident, or there was evidence to that effect which a reasonable jury could believe. Mrs. Kline, who drove the carriage, had already said there was "plenty of room to stop." The marks on the car were such that the jury could reasonably infer that the carriage must have been hit by the front portion of the car, in which case

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it is difficult to come to the conclusion that it was not seen by the motorman without attributing to him some negligence in failing to see it. The conductor of the car, who was called for the defence, admits that the car could have been stopped "within the length of itself" and the jury, I think, came to a conclusion which was not one that a reasonable jury could not have arrived at, if they concluded that the motorman either did see or should have seen the carriage and stopped his car before he struck it; that his failure to do so must have been due either to the negligent manner of his outlook or to something wrong in the lighting of the car for which the company would be properly held responsible. I do not myself see how it would be possible, without negligence somewhere, to fail to observe a horse and wagon backing across the track at a car's length ahead of the observer. The jury would not, I think, have been drawing an unreasonable conclusion had they considered that it ought to have been seen 3 or 4 car length's ahead.

There are many things in the evidence that present tempting subjects for discussion. If the Court had to come to a decision as to what actually occurred, an analysis of the evidence would be necessary. When the only question before us is whether the jury could reasonably come to a conclusion favourable to the plaintiff, or, to put the question as it is sometimes stated, whether the conclusion arrived at by the jury is such that a reasonable jury could have reached it, an exhaustive analysis of the evidence would be a purposeless effort.

I think the appeal should be dismissed with costs.

Drysdale, J. Ritchie, E.J.

DRYSDALE, J., and RITCHIE, E.J., concurred.

Harris, J.

HARRIS, J.—I agree with the conclusion at which Russell, J., has arrived. I think a jury could reasonably find that the carriage was backed up onto or across the track and was struck by the front of the car. That is the conclusion which I think I would have reached and, according to the evidence of the motorman, he did not attempt to stop the car until after the collision happened. He gave the speed of the car at the time as not over 4 or 5 miles per hour and says that, by reversing, a car going at the rate of 4 or 5 miles per hour could be stopped in about half its length. I think a jury could reasonably reach the conclusion that under the circumstances the motorman was negligent

in not having seen the carriage on the track in front of the car, and in not stopping the car in time to avert the collision. N. S. S. C.

I would dismiss the application with costs. Harris, J.

CHISHOLM, J.:—I think the motion for a new trial should be dismissed with costs. Chisholm, J.

Motion dismissed.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Kelly and Masten, JJ. December 30, 1916.

MECHANICS' LIENS (§ VIII—60)—ENFORCEMENT—JOINDER OF "LIEN HOLDERS."

"Lienholder," in sec. 2, ch. 40 R.S.O. 1914, includes a person who files a claim but fails to establish it at the trial, and a lien duly registered but upon which no action has been brought, within the stipulated time, may be enforced in an action brought within that time by the plaintiff who failed.

[Mechanics and Wage Earners Lien Act, R.S.O. 1914, ch. 140, secs. 24, 31, 32, 37, considered.]

APPEAL by the defendants Curley and Mosher from the judgment of the Assistant Master in Ordinary, in an action brought to enforce a lien under the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, in favour of claimants of a lien, who did not bring an action to enforce their claim, but relied upon the proceedings taken by the plaintiffs. Statement.

The principal question upon the appeal was whether the Assistant Master was right in holding that these claimants were entitled to succeed as "lien-holders," although they had not brought an action, and although the plaintiffs, who did bring an action, had failed to establish their lien, because it was registered too late.

J. J. Gray, for appellants,.

J. H. Fraser, for respondents, claimants of liens.

MEREDITH, C.J.C.P.:—The objection to the appellants' right to appeal, and the objection to the respondents' lien on the ground that it was not registered within the time limited by the Act, are each answered, adversely to the objector, in the recent case of *Benson* v. *Smith*, 31 D.L.R. 416, 37 O.L.R. 257. Meredith, C.J.C.P.

If regard be had mainly to some particular words of the enactment, if one's attention be too much rivetted upon them, Mr. Gray's contention: that all liens involved in this action are lost because it turns out that the plaintiffs had none, and no other action to enforce liens was brought within the time limited by the

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Act; might seem a somewhat formidable one, as well as a somewhat startling one.

But, if regard be had to the purposes of the enactment and all its provisions and words, the formidableness of the objection may fade, and no difficulty be experienced in avoiding its startling and disturbing effects.

That which the Act aims at in regard to the enforcement of its provisions is simple, inexpensive, and speedy methods. As put by Wilson, C.J., in the case of *McPherson* v. *Gedge* (1883), 4 O.R. 246, at p. 257: "The purpose of the statute is to prevent multiplicity of actions for small claims, in which the costs would be enormously out of proportion to and in excess of the sums claimed; and these provisions, and the whole purpose of the Act, and the proceedings of and in the action, are so widely different from the ordinary creditor's action that the rules which are applicable to such latter actions cannot be held to govern this peculiar statutory remedy of these lien-holders." That a class action maintained at the will of a litigant, and a class action made such by legislation, are very different things, should be obvious.

A narrow examination and interpretation of secs. 31 and 32 of the Mechanics and Wage-Earners Lien Act would, doubtless, lead to the conclusion that the plaintiff n the action of which other lien-holders may have the benefit must be himself a lien-holder.

But sec. 37 is by no words so restricted, and, under it, not only are all questions which arise in any action tried under its provisions, to be determined, but also "the rights and liabilities of the persons appearing before" the Judge or officer who tries the action "or upon whom the notice of trial has been served" are to be adjusted; and, among other wide provisions, "all necessary relief to all parties to the action and all persons who have been served with the notice of trial" is to be given.

The respondents were served with notice of trial before there was any adjudication upon the plaintiffs' claim; and they are entitled to the benefit of these provisions of sec. 37, upon even a narrow and literal interpretation of its words; because an action in which their lien may be realised—that is, this action—was brought within the time limited by sec. 24.

Giving the Act that liberal interpretation which we are re-

quired to give it, it may be that secs. 31 and 32 should be held to cover any action brought in good faith to enforce a lien, whether it should eventually turn out to be enforceable or not; but the respondents are not driven to that contention; they can safely take cover under sec. 37.

The appeal should be dismissed.

RIDDELL, J.:—A mechanics lien action. The plaintiffs began their action on the 20th February, 1915. The claimants, who delivered the last of their material on the 5th January, 1915, registered their lien on the 8th January, 1915, but did not take action, relying, to keep their lien alive, upon the proceedings taken by the plaintiffs.

Notice of trial was served upon the claimants on the 8th December, 1915; at the trial the plaintiffs failed to establish a case, it being held that they had registered their lien too late.

It was contended that the claimants had lost their lien and could not have judgment—the words of secs. 24 and 32 of the Act being relied upon. Section 32 provides: "Any number of lien-holders claiming liens on the same land may join in an action, and an action brought by a lien-holder shall be taken to be brought on behalf of the other lien-holders."

It is argued that where an action is brought by one who claims to be but is not a "lien-holder"—and it is contended that one who has no lien cannot be a lien-holder—it is not to be taken as brought on behalf of any others. Then sec. 24 is called in aid: "Every lien for which a claim has been registered shall absolutely cease to exist on the expiration of ninety days . . . unless in the meantime an action is commenced to realise the claim or in which the claim may be realised under the provisions of this Act . . ." No action was commenced to realise this claim, and it is argued that the present action is not one in which the claim may be realised because the claimants cannot come in under sec. 32.

To put the matter in a nut-shell—the question to be decided is, "Do the words 'a lien-holder,' in line 3 of sec. 32, include one who claims to be a lien-holder but who fails at the trial?"

There is no definition in the Act of "lien-holder". In secs. 5, 14(3), we have the expression "person entitled to a lien;" 26 has "a lien-holder," so also have 28(2), 29, 30(1), 30(2), 31(4), 32, 36, 37(6), (7), 39, 42 ("successful lien-holders"), 48.

Section 17(1): "A claim for a lien . . . may be registered"

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by a "person claiming the lien"—17(2) uses the same terminology, as does 18 in substance; 30(1) has "the person claiming the lien;" 40(1), 43.

It is, I think, plain that "lien-holder" *primâ facie* means one who actually has a lien, but there is nothong to prevent the words being employed in the sense of "person claiming a lien" —they are so employed in sec. 37(6): "A lien-holder who has not proved his claim at the trial . . . may be let in to prove his claim," etc. This does not mean that a person must, to be allowed in to prove his claim, prove in advance that he has a lien; it is sufficient if he claims to have a lien. In sec. 42, it is made plain, or at least indicated, that, as there are "successful lien-holders," there may be unsuccessful lien-holders, and they can only be those who claim liens but fail to establish them, just like the plaintiffs in the present case.

It seems to me that an examination of the provisions of the Act itself will shew that the contention of the appellants cannot succeed.

The proceedings prescribed are as follows:—

(1) "The person claiming the lien" registers a "claim for a lien" in the proper registry office: sec. 17.

(2) Within 30 days thereafter, or within 90 days from the last material supplied (sec. 24), the same person commences an action by filing a statement of claim (sec. 31(2)), and serves it within the proper time (sec. 31(3)).

(3) That person does not necessarily make the other "lien-holders" parties in the first instance, but he serves them with the notice of trial, and thereupon they are for all purposes parties to the action. (Of course "lien-holders" in this section means "persons claiming a lien.")

(4) The officer trying the action must "do all . . . things necessary . . . to adjust the rights and liabilities of and give all necessary relief to all parties to the action and all persons who have been served with the notice of trial:" sec. 37 (3).

It seems to me quite clear: (a) that any person claiming a lien can commence the action; (b) that he is to serve all persons whose claims of lien are of record; and (c), when that is done, those persons are as much parties to the action for all purposes as though they had been parties in the beginning.

This is opposed to the view upon the law as it then stood

expressed by Armour, C.J., giving the judgment of the Court (Armour, C.J., and Falconbridge, J.) in *In re Sear and Woods*, 23 O.R. 474, at p. 488. But this was an *obiter dictum*, and in any case there was in the R.S.O. 1887, ch. 126, no such provision as is found in the present sec. 31(4)—this was introduced in the re-enactment of 1896, 59 Vict. ch. 35, sec. 29(4), and came forward as R.S.O. 1897, ch. 153, sec. 31(4). Nor were there any provisions at that time corresponding to those of the present sec. 37(3).

The language of the learned Chief Justice, "As he" (i.e., the plaintiff) "was not a lien-holder, as I think is clear from the case of *Goddard* v. *Coulson*, his action could not enure for the benefit of the wage-earners," has been misunderstood—he does not cite *Goddard* v. *Coulson*, 10 A.R. 1, for the proposition that if the plaintiff were not a lien-holder his action would not enure for the benefit of the wage-earners—nor could he—*Goddard* v. *Coulson* says nothing on that point—but for the proposition that the plaintiff was not a lien-holder.

The cases cited for the former proposition—*Burt* v. *British Nation Life Assurance Association* (1859), 4 DeG. & J. 158; *Dillon* v. *Township of Raleigh* (1886), 13 A.R. 53; *S.C.* (1887), 14 S.C.R. 739; *Smith* v. *Doyle* (1879), 4 A.R. 471—are all cases on the familiar principle that where a plaintiff who sues for himself and all others of a class fails, the action is not saved by the fact that some of the same class might have succeeded had they been parties to the action. As has been seen, the other "lien-holders" are now for all purposes parties to the action, and that well-known rule cannot apply

McPherson v. *Gedge*, 4 O.R. 246, shews that those represented by a plaintiff who does not press his claim, real or supposed, will be allowed to intervene and prosecute the action.

The conclusion at which I have arrived is not perhaps necessitated by, but is on a line with, *Kendler* v. *Bernstock* (1915), 22 D.L.R. 475, 33 O.L.R. 351. There the plaintiff failed to establish a lien, but the Referee gave him a personal judgment—the Appellate Division dismissed an appeal from the Referee's decision.

I would dismiss the appeal with costs.

KELLY, J.:—I agree that the appeal should be dismissed with costs. Kelly, J.

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MASTEN, J.:—I concur in the conclusions reached by my Lord and by my brother Riddell—and will only add one word.

I think that the practice under the Mechanics and Wage-Earners Lien Act is *sui generis*, and is not to be governed by the established practice respecting class actions. Not only is the issue of a writ of summons in such cases abolished by the statute, but all the proceedings are shortened and simplified. Among other provisions made by the statute for this purpose, it is provided by sec. 37 that the Master or Referee shall, after the delivery of the statement of defence and after service of notice of trial on all lien-holders other than the plaintiff, have jurisdiction "to completely dispose of the action and to adjust the rights and liabilities of the persons appearing before him or upon whom the notice of trial has been served, and shall take all accounts, make all inquiries, give all directions, and do all other things necessary to finally dispose of the action and of all matters, questions, and accounts arising therein or at the trial, and to adjust the rights and liabilities of and give all necessary relief to all parties to the action and all persons who have been served with the notice of trial . . ."

It seems to me that, by the terms of the statute itself, the Master is placed in the same position which he would hold under the ordinary practice after an ordinary trial and judgment of reference.

There is, as it were, a statutory judgment which comes into existence immediately the defence is delivered and notice of trial served. After such statutory judgment has come into existence, any adjudication that the plaintiff's claim fails cannot prejudice the rights of other parties to the action. By sec. 31, sub-sec. 4, all lien-holders served with the notice of trial shall for all purposes be deemed parties to the action; and, by sec. 36, the Judge or officer may give to any lien-holder other than the plaintiff the carriage of the proceedings.

For these reasons, as well as for the reasons assigned by my learned brothers, I think that at the moment when the plaintiffs' claim was declared invalid the action had reached a stage where that failure did not cause the action to abate, but the action was then in the same position as though under the ordinary practice a judgment of reference had been entered, and the respondent had been made a party in the Master's office.

The appeal should be dismissed with costs. *Appeal dismissed.*

HOLFORD v. McDONALD.

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Alberta Supreme Court, Appellate Division, Stuart, Beck, Walsh and Ives, JJ. January 24, 1917.

LEVY AND SEIZURE (§ I—18)—CROPS—LANDLORD AND TENANT—VOID LEASE.

The crops of a lessee, in which the lessor had no interest, cannot be seized under execution against the lessor, even if the tenant held possession under a lease void under sec. 31 of the Dominion Lands Act.

Statement.

APPEAL by execution creditor from the judgment of Harvey, C.J. Affirmed.

I. B. Howatt, for appellant; *K. C. Mackenzie*, for respondent.

The judgment of the Court was delivered by

Walsh, J.

WALSH, J.:—An order has been made by the Master-in-Chambers at Edmonton for the trial of an issue between the execution creditor, Holford, and the claimant, Davis, as to whether the crops seized by the sheriff upon certain lands were at the time of seizure the property of the claimant as against the execution creditor. The order contains the following paragraph:—

And it is further ordered that the question whether, under the provisions of the Dominion Lands Act, 1908, and amendments thereto, a certain lease made between the above-named execution debtor of the one part as landlord, and the above-named claimant of the other part as tenant, bearing date April 20, 1916, in respect of the lands therein mentioned and more particularly set forth in the claimant's material filed in these proceedings, is valid, and what effect, if any, the validity or invalidity of the aforesaid lease has on the determination of the aforesaid issue, be referred to a Judge for determination.

An application was made to the Chief Justice to determine the question thus referred. He held that:—

The question as to the validity or invalidity of the said lease, in view of the provisions of the Dominion Lands Act, 1908, and amendments thereto, is not material in determining whether the crops in question in these proceedings were or were not the property of the claimant as against the execution creditors at the time of the seizure by the sheriff of the said crops,

and so he did not determine it. From this judgment the execution creditor appeals.

The crops in question were grown partly upon a quarter section for which McDonald, the execution debtor, had made a homestead entry and partly upon another quarter section upon which he had filed as a pre-emption. No patent for either of these parcels has as yet issued to him nor has a patent for either of them as yet been recommended. The lease of these lands to the claimant was for the term of 3 years from its date. The crops were planted and harvested in the year 1916 at the sole cost of the claimant who ploughed and sowed the land and harvested

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and threshed the grain at his own expense and without any assistance, financial or otherwise, from the execution debtor, and they were in his possession when the sheriff made the seizure.

The contention of the execution creditor in short is that the lease from McDonald to the claimant is in contravention of sec. 31 of the Dominion Lands Act, it being, in fact, an assignment or transfer of his homestead and pre-emption, which this section makes null and void unless the Minister otherwise declares, which in this case he has not done, and that the lease thus being null and void it follows that the crops grown on this land are the property of the execution debtor and are seizable under execution against him. If this result must follow, a decision that the lease is void under sec. 31, it is of course very essential to have the question of its validity decided, but I do not think that such is the case.

Assuming that this lease comes within the prohibition of the section and not only that but that the claimant knew when he entered into it, of which there is absolutely no evidence before us, that the demised premises consisted of the unpatented and unrecommended homestead and pre-emption, and that the grain grown by him upon this land came, as is the case, into his possession, what would be the rights of the parties in this grain between themselves? I think it quite plain that the Court would not lend its assistance to the lessor to get the grain for him out of the possession of the lessee if his claim to it was based upon the illegality of the lease any more than it would help him to assert any of his rights under it. Conversely, if the grain had got into the possession of the lessor and the lessee could only prove his right to it under this illegal lease he would not be heard to assert that right in Court. In such a case the Court would not extend a helping hand to either party but would leave each of them to work out his own salvation as best he might. Assuming therefore in favour of the execution creditor everything that could be helpful to him, he position of the matter as between the parties to this lease is that the lessee, the claimant, by virtue of his possession of this grain had a right to it and the lessor, the execution debtor, has not and never had any interest in it and there is therefore nothing upon which the appellant's execution ever did or can now attach. There is, of course, a class of cases in which while as between an execution debtor and a claimant the for-

mer has, by reason of his transfer of them to the latter, no further interest in goods which he once owned his execution creditor can have recourse to them to satisfy his judgment, but that is because these things once were the property of the debtor and he has fraudulently attempted to put them beyond the reach of his creditor and but for his fraudulent transfer they might still be available to the creditor under his execution. But that is not this case, for here the debtor never had any interest in this grain and no right to it can accrue to him by a declaration of the illegality of the lease under which its production was made possible. Under these circumstances it seems to me to be idle to determine the question of the illegality of this lease for it surely cannot be that an execution will bind property in which the execution debtor has not and never had any interest and against which it has always been quite impossible for him to assert a claim. See 12 Cyc. p. 977.

In my opinion the refusal of the Chief Justice to determine the validity or invalidity of this lease was quite justified and the remaining part of the question submitted, namely, what effect, if any, the validity or invalidity of the lease has on the determination of this issue he properly answered by saying that it was not material and I would therefore dismiss the appeal with costs.

Appeal dismissed

HEWSON v. BLACK.

Nova Scotia Supreme Court, Graham, C.J. December 6, 1916.

WILLS (§ III G—140)—CONTINGENT REMAINDER—PERPETUITY.

A bequest of a fund in trust for a daughter for life, and thenceforth in trust for "the child . . . or children . . . who being a son or sons attain the age of 21 years, or being a daughter or daughters attain the age of 25 years" is a contingent gift, and void for remoteness.

Statement.

This was an originating summons to obtain the opinion of the Court upon the true construction of the will. The provision in the will complained of is set out in the judgment.

F. L. Milner, K.C., for plaintiff.

L. A. Lovett, K.C., and *G. H. Sterne*, for defendants.

Graham, C.J.

GRAHAM, C.J.:—A provision in the will of Charles W. Hewson, deceased, is attacked as violating the rule against perpetuities.

The testator was married twice. By his first wife he left one child only, a daughter named Florence, who is now the wife of Garnet K. Chapman. By his second wife he had no children.

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The daughter Florence has an only child, a daughter about 12 years old, named Madeline.

The testator called his residuary estate "the said Trust Fund," and gave it to his trustees upon trust during the life of his daughter, to pay two-thirds of the income to her and one-third of the income to his granddaughter.

The words following are those which plaintiff contends violate the rule against perpetuities:—

And immediately after the death of my said daughter Florence R. Chapman as to, as well the capital of the said Trust Fund as the income thereof to accrue due thenceforth in trust for the child if only one, or all the children if more than one of my said daughter, Florence R. Chapman, who either before or after her death shall being a son or sons attain the age of twenty-one years, or being a daughter or daughters attain the age of twenty-five years. Provided, however, that the child or children of any deceased child or children of the said Florence R. Chapman is or are to take the share to which his, her or their parent would have been entitled if said parent had lived and attained said required age.

Mr. Lovett for defendants contends, however, that there should be a construction of the words to this effect, that on the death of Mrs. Chapman the estate vests in her children or in the issue of children who have died but subject to being divested if they do not attain the age of 25 years, that the estate is vested but not to be effective or enjoyed until the age of 25 is attained. The difficulty about that contention is that there are not words which will bear that construction as there are in the cases he cites. Only one kind of word is used and that implies vesting (not to be paid or to be divided) on attaining 25 years. In the proviso there is a plain intimation that the testator intended the attainment of the age of 25 as a condition precedent to the daughters being "entitled." Take the words, and the words of like cases. The words, "being a daughter or daughters attain the age of 25 years," are in my opinion part of the description of the devisee.

In *Festing* v. *Allen*, 12 M. & W. 279, at 300, Rolfe, B., said:

The gift is not to the children of Mrs. Festing, but to the children who shall attain 21, and no one who has not attained his age of 21 years is an object of the testator's bounty any more than a person who is not a child of Mrs. Festing.

In *Bull* v. *Pritchard*, 5 Hare 567 (67 E.R. 1036), where the words after giving the life estate to Mrs. Bull were:—

And from and after the decease of my said daughter . . . among all and every the child and children of my said daughter, Mary Bull, who shall live to attain the age of 23 years.

Wigram, V.C., said:—

Now, there are two classes of cases, under one or the other of which the present case must fall. One class is, where the devise is to a party at a given age, and the property is given over if the devisee dies under that age. The other is, where the description of the devisee is such as to make the given age part of that description. In cases of the former class, the Court had discovered an intention expressed in the will, that the first devisee shall take all that the testator has to give, except what he has given to the devisee over; and, in order to give effect to that intention, has held, by force of the language of the will, that the first devise was not contingent, but vested, subject to be divested upon the happening of the event upon which the property is given over;

In the second class the Court has held the devise contingent, upon the ground that no one could claim who could not predicate of himself that he was of the age required, that otherwise he did not answer the entire description: *Festing* v. *Allen*, 5 Hare 573 (67 E.R. 1038). The question is, under which of these two classes does the present case fall? I think clearly under the second class. . . . The question is, whether I can allow that clause to have any effect upon the description of the devisee, which description, without that provision, includes, as a part of it, the age of 23 years. I think not. The devise is not to the children, at, or when, or if, but, in effect, to such only as attain the age of 23 years; and the interim gift has no legitimate bearing on the question.

And it was held that the limitation to the children of the daughter was void for remoteness.

I refer also to *Bull* v. *Pritchard*, 1 Russ. 213 (38 E.R. 83).

In *Pearks* v. *Moseley*, 5 App. Cas. 714, similar words, namely, "Who shall attain the age of 21 years," were held to be words of description.

Lord Selborne, L.C., says, p. 722:—

Therefore, in point of construction, I come to the conclusion that these words which raise the question are words of description, that they describe the issue who are to take and that there is no gift to any issue who do not fulfil those descriptions.

Lord Penzance says:—

My Lords, that being so, the only question that remains (and indeed that seems to me the only question that exists in the case) is whether you can possibly so twist (I might almost say) the language the testator has used as to consider that the first part of that bequest contained a description of the class, and that the words which follow, "Which issue shall afterwards attain the age of 21," were words of condition subsequent or of defeasance. That seems to me to be the only practical question, and the only way in which any question could be raised upon this will, consistently with the decisions that have gone before. Now, it was very ably argued by Mr. Chitty, that cases had existed in which words of this character have received a construction of that kind, but as my noble and learned friend on the woolsack has pointed out, those cases were cases of a peculiar description. They were not cases applicable to personal property; they were not cases in any

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degree *in pari materia* or of similar character with the present; and, above all, they were not cases in which this law of perpetuities came in question, in respect of which it has been laid down and taken as an axion of interpretation, that you should construe the will first according to its natural meaning, without any regard to the effect which that meaning might have according to the law of perpetuities, and afterwards apply that law. Therefore, I do not think those cases are cases which your Lordships should adopt as a rule for construing this will (p. 730).

In *Festing* v. *Allen* the word was "who," and there was a most distinct decision, after some consideration, pronounced by Baron Rolfe, in the Court of Exchequer, in that case, that the words, "Who shall afterwards attain the age of 21 years," formed part of the description (p. 731).

For these reasons I think the limitation is void for remoteness.

Judgment accordingly.

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MYERS v. CITY OF MONTREAL.

Quebec Court of Review, Fortin, Guerin and Archer, JJ. March 30, 1916.

JURY (§ III—75)—NUMBER—DISQUALIFICATION—SETTING ASIDE VERDICT —NEW TRIAL.

Art. 490 of the Code of Civil Procedure (Que.), assumes that a full jury has been legally impanelled, and provides for the illness or withdrawal of a juror for a cause arising during a trial; it does not apply to a vacancy caused by the discovery that an unqualified juror has been part of the original jury; the verdict in such event must be annulled and a new trial ordered.

Statement.

MOTION by plaintiff under art. 491 C.C.P. (Que.) for judgment.

Trihey & Bercovitch, for plaintiff.

Laurendeau & Archambeault, for defendant.

Fortin, J.

FORTIN, J.:—Laws settling matters of jurisdiction are of public order: *Rauter*, Proc. Civ. No. 21; *Garsonnet*, vol. 1, Nos. 5 and 6; *Fuzier-Herman*, art. 6, and authorities cited; *Carré*, Compétence Civile, Nos. 72 et seq.; and *Cass*, S. 39-1-180. This principle should clearly be applied to the tribunal organized by law to hear trials by jury. The jury must be composed of 12 jurors. (Art. 452, C.C.P.)

Each of the parties can recuse, for cause, any person summoned to form part of the jury, before he has been sworn. (Art. 454, C.P.). The agreement of 9 of the 12 jurors is sufficient for a verdict. (Art. 480). According to art 3407, par 26 of R.S.Q., 1909 (Organic Law, under title VI., called "Le Pouvoir Judiciaire"), those who are not 21 years of age are ineligible or incompetent to act as jurors.

Does the failure to challenge cover this incompetency? We do not think so.

The failure to recuse could at most only constitute a tacit

consent, if the incompetency were known; now, this consent could not give a jurisdiction which a law of public order, alone, can confer. If the defendant was ignorant of the minority of the juror sworn, there was not even consent on its part.

Art. 490 does not apply to this case. It contains an exceptional provision for impediments, hindrances, etc., which occur "at any time before verdict," which implies that a trial has been begun before a competent jury, that is, a jury composed of 12 competent jurors.

Fortin, J.

For these reasons, I am of opinion that the trial was irregular, and that this Court must order a new trial.

Guerin, J.

GUERIN, J.:—In order to intelligently appreciate the contentions of the parties, it will be useful to consider what would have happened, had the minor remained on the jury to the end, and exception to his presence thereon only been taken after the verdict had been rendered.

There are four leading cases dealing with the question. 1. *Hill* v. *Yates* (1810), 12 East 229 (104 E.R. 89), wherein the son of a juryman summoned and returned having answered to his father's name when called on the panel, served as one of the jury on the trial and the plaintiff obtained a verdict.

The Court held that this was not of itself sufficient ground for setting aside the verdict. A motion was made for a new trial by the defendant; and after consideration by twelve Judges, Lord Ellenborough, C.J., in refusing the rule, expressed the opinion that if Judges were to listen to such an objection, they might set aside half the verdicts given at every assizes where the same thing might happen from accident and inadvertence, and possibly from design, especially in criminal cases.

2. *The King* v. *Tremaine* (1826), 7 Dowling & Rylands, 684, wherein a minor not qualified by property, nor having been in fact summoned, personated his father as a juror, and joined in a verdict of guilty against a person indicted for perjury. A motion was made for a new trial by the defendant against whom was cited *Hill* v. *Yates*, *supra*. The Court held that this was a mistrial, and in the absence of all fraud on the part of the defendant, granted a new trial.

Abbott, C.J., rendering judgment, referred to the danger mentioned by Lord Ellenborough, C.J., in *Hill* v. *Yates*, and stated:—

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I think we must not suffer ourselves to be influenced on the present occasion by an apprehension of ill consequences that may arise in other cases hereafter. Indeed it is not likely that such practices can be of frequent occurrence, or that many persons would be likely to interpose and serve on a jury, to whom such an objection as this would arise.

Three other judges who spoke concurred.

3. *Reg.* v. *Meller* (1858), 7 Cox C.C. 454. The panel of petit jurors returned by the sheriff contained the names of Joseph Henry Thorne and William Thorniley. Thorne was called as one of the jury to try the case, and Thorne as supposed was sworn without objection. The next day after the prisoner had been convicted of murder, it was discovered that Thorniley had by mistake answered the name of Thorne. The execution was respited until the opinion of the Court of Criminal Appeal could be taken. The Crown case reserved was heard before 14 Judges and barons with the result that 6 held that there had been a mistrial, an equal number held that there had not, and two expressed no opinion on the point. The conviction was thus affirmed.

4. *Wells* v. *Cooper* (1874), 30 L.T. 721. This was a civil action tried before a common jury. The name of Thomas Fox being called from the common jury panel, one Thomas Cox of a special jury panel, went into the box by mistake, served upon the jury and joined in the verdict rendered. Exception for this reason was taken after verdict, but the rule for a new trial was discharged. In deciding this case, it was regarded as settled that the Court will not in its discretion grant a new trial in a case where a person not of the panel has served upon the jury, unless substantial injustice has been done by a wrong juror having served. An overwhelming array of authority recognizes the same rule in the United States. Thompson and Merriam on on Juries, 1st ed., 338.

Two other decisions help to determine our cases.

1. *Wassum* v. *Feeny* (1876), 121 Mass. 93, where important English and American cases are discussed. A verdict was rendered for the plaintiff, and the defendant moved to set aside the verdict on the ground that one of the jurors who tried the case was but 19 years of age.

Gray, C.J., dismissing the motion, stated that the juror being under 21 years of age was not qualified as the statutes require.

But his name being on the list of jurors returned and empanelled, the defendant had the opportunity, by proper inquiry, to ascertain any grounds of objection to him, and might have challenged him before the trial began; when a party had had an opportunity of challenge, no disqualification of a juror entitles him to a new trial after verdict.

2. *Dovey* v. *Hobson* (1816), 2 Marsh. 154 (128 E.R. 1113). This was a civil action tried before Lord Gibbs, C.J. All the evidence was taken, and the jury retired to consider their verdict, which the report says they found for the plaintiff, somewhat against his Lordship's direction. On their return into Court, and before the verdict was recorded, it was discovered that one of them, William Maynard, had been sworn by the name of Thomas Russell. It appeared that Maynard had succeeded to Russell's house, and having received a summons directed to "Russell or the inhabitant of the house," he considered it his duty to attend and answered to the name of Russell. The Chief Justice expressed his doubts whether the verdict could stand, and proposed that the jury should be discharged, and the cause tried again. At the instance of the plaintiff's counsel, however, the verdict was taken with liberty to the defendant to move to set it aside. The full Bench concurred in granting the motion, and a new trial.

In rendering the judgment, the Chief Justice referring to *Hill* v. *Yates*, *supra*, stated:—

> To that decision, I shall always subscribe; but that decision must have been founded, in a great measure, on the circumstance that the objection came too late, and that the party should have availed himself of it at the trial. Here it was mentioned at the trial and the plaintiff took the verdict, subject to the peril of not being able to hold it.

Our system of securing a panel, known as the "struck jury," gives ample opportunity for interposing objections to the legality of the selection and drawing of the jurors before they are summoned, arts. 439, 439*a*, 439*b*, C.P. Likewise after the jurors are summoned, but before they are sworn, either party may challenge the array for such causes of nullity as may be found in the summoning of the jurors or in the making up of the lists or panel, art 448 C.P.; the juror is sworn only, if he is not challenged or if the challenge has been dismissed, art. 461 C.P.

From the foregoing it would appear probable that if the disqualification of the minor Henri P. Labelle had not become

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apparent till after the verdict had been recorded, it could not now be set aside. If such an objection had been taken by either party before he had been sworn, it would certainly have been fatal in view of art. 3407, R.S.Q.:

the following persons are disqualified from serving as grand or petit jurors respectively . . (2) persons under twenty-one years of age.

There is no evidence that otherwise the young man did not possess the qualifications to act as a juror; but neither party demurred to the evidence that he was disqualified by reason of his minority. It does not appear that the juror was sworn as to his age, but both parties, in answer to the trial Judge's question, agreed by their respective answers and suggestions that the juror was disqualified on account of his minority, and he was excluded from the jury. After his exclusion, the trial could not be resumed by the substitution of another competent juror in his place, except by the consent of the parties, for the reason that a part of the evidence had already been heard. Abbotts' Civil Jury Trials, 3rd ed., 102. A contrary view would mean that the new juror would render a verdict without hearing all the evidence. It does not seem possible that art. 490 C.P. may reasonably receive such an interpretation.

A final difficulty arises. Under our law, the agreement of nine of the twelve jurors is sufficient to return a verdict, art. 480 C.P.

This rule differs from most jurisdictions, where the agreement of twelve is necessary. In the present case there was an agreement in favour of the plaintiff of nine out of the eleven who tried the case. It is pointed out by the plaintiff's counsel that under art. 490 C.P. if at any time before verdict a juror becomes, through illness or any other cause, unable to perform his duty, the Judge may order him to be discharged, and the trial may proceed with the remaining jurors, which was done in this case. The answer to this objection is that for the juror to become unable to perform his duty, he must have been at some time able so to do. The effect of his exclusion from the jury by the Court's order, was in effect to decide that from his birth he was unable to perform the duty of a juror; he was by law always disqualified.

In effect then it means, that there was a stranger on the jury, who was disqualified by law from taking part in the deliberative and judicial activities of the jury, and who sat in judgment in

the council. This fact must nullify the verdict. In order to protect the parties from any outside influence which might influence the verdict, the law provides that if the jury are permitted to separate, they must be admonished by the Judge not to converse with, or suffer themselves to be addressed by any person in reference to the case, art. 478 C.P. It has even been held that a juror with whom a party has conversed as to the merits of the case is disqualified. Abbots' Civil Jury Trials, 3rd ed., 88. In the present case all the jurors have been associated during part of the trial with a party whom the Court excluded as disqualified to be a juror.

Under the circumstances I do not believe that the verdict should be maintained; I would favor a judgment quashing the verdict, ordering a new trial, and making the costs of both Courts abide the event.

Archer, J.

ARCHER, J.—This case is before us in virtue of art 491 C.C.P., which reads:—

> The trial Judge must, either at once or after a delay for further consideration, render judgment for the party in whose favour the verdict has been given, unless for special causes stated in a certificate filed of record, he reserves the case for consideration of the Court of Review.

The plaintiff moved for judgment according to the verdict.

The defendant asks for a new trial, or for a judgment differing from the verdict, or alternatively each of these reasons, and relies on the grounds provided by law. It asks for a new trial, because the case was heard by eleven jurors, in place of twelve, and it was on this point especially that the case was reserved. That is the question which I intend to examine.

First, it is necessary to speak of trial by jury, in general.

Among the tribunals in this province, which have jurisdiction in civil matters, is the Superior Court. The Superior Court is presided over by a Judge.

We see by arts. 421, 422, 423, *et seq.*, of our Code of Procedure, that a trial by jury does not take place *de plein droit*, but only in the cases provided for in art. 421 of this Code. The demand for it must be made either by the declaration, or in the plea; or by special application presented to the Judge within 3 days after issue is joined. The trial is not fixed until the Judge has decided all issues raised respecting the right to trial by jury, and, upon the motion of either party, has assigned the fact or

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facts to be inquired into by the jury. The jury find the facts, but must follow the direction of the Judge upon all questions of law. The list of jurors is prepared by the prothonotary, and on the day and hour fixed for the striking of the panel, the parties must appear before the clerk for this purpose. A certain number of names are struck from the list according to the formalities mentioned in the Code of Civil Procedure. As soon as the panel is formed, the prothonotary delivers to the party who applies for it a writ of *venire facias*, in the name of the Sovereign, ordering the sheriff to summon the persons whose names compose the panel. As soon as the case is called on the appointed day, the sheriff must return before the Court the writ of *venire facias*, to which is annexed a copy of the panel of jurors. On the day fixed for the trial, the persons summoned as jurors must appear. After the jurors summoned have been called, and a sufficient number to form a jury are in attendance, either party may challenge the array, for certain reasons. If there is no challenge to the array, the prothonotary, in order to form the jury, proceeds to call and swear in 12 of the persons summoned, following the order in which they appear on the panel, saving the cases in which the selection is to be made with reference to special qualifications. Either of the parties may challenge for cause any person called to form part of the jury, before such party is sworn. The grounds of challenge, in such case, are: 1. That the juror is subject to any of the disqualifications or disabilities provided by law; 2. That the juror is related to, or connected by affinity with any party to the suit, within the degree of cousin-germain, inclusively; 3. That the jury is interested in the suit, or is not indifferent between the parties.

The law requires that the jury be composed of 12 jurors.

In the case where several of the jurors summoned are challenged or fail to attend, or are exempt or incapable, so that the number of 12 duly qualified jurors cannot be completed, the Court or sitting Judge may, with the consent of the parties, but not otherwise, order in writing the sheriff, or the officer acting in his stead, to make up the number by taking forthwith from among the persons present in Court the requisite number of individuals qualified to serve as jurors; but the jury cannot be wholly composed of *tales*, and if all the jurors summoned fail to attend, or are lawfully challenged, the trial cannot then proceed.

We see by art. 460 that the jury cannot be composed wholly of *tales;* that it can only be so completed with the consent of the parties, and of persons qualified to serve as jurors. The trial must commence before a jury composed of 12 jurors qualified to serve.

The law which determines the powers, and jurisdiction of Courts, and their composition is a law of public order.

This trial between the plaintiff and defendant had to take place before the tribunal of the Superior Court, presided over by a Judge of that Court, and assisted by a jury composed of 12 jurors, unless exceptions were provided by law.

Art. 430 C.C.P. indicates who are the persons who may be inscribed on the list of jurors, and art. 3407 of the R.S.Q. 1909, declares who are not capable of being jurors: 1. Those who do not possess the qualifications required by arts. 3405, 3406, and 3407, par. 1, R.S.Q. 1909; 2. Those who have not reached the age of 21 years, R.S.Q. 1888, art. 2620; 3. Those who are afflicted with deafness or blindness, or other mental or physical infirmity incompatible with the fulfilment of the duties of a juror, R.S.Q. 1888, art. 2620, par. 3; 4. Those who have been arrested, or are out on bail, on a charge of treason, or of crimes punishable by more than two years' imprisonment, or by capital punishment, or who have been found guilty of any of these crimes, R.S.Q. 1888, 2620, par. 4; 56 Vict. ch. 31, sec. 6; 5. Aliens, R.S.Q. 1888, 2620, par. 5.

Although no proof was made of the age of the juror Labelle, it has been taken for granted that he is a minor, being a minor, he was not qualified to form part of the jury called to give a verdict in the present case.

The plaintiff tells us, in her factum, that according to art. 438 C.C.P., the "prothonotary, before forming the panel, summons the parties, in order that each may make their objections, if any, and on the day fixed, the prothonotary strikes from the list the names of the persons indicated by the parties (arts. 440 and 441 C.C.P.), and for further security, the parties have, on the day of the trial, the right to challenge each juror, for any cause, when the name of the juror is called. The City of Montreal not having used the right which it had, either at the formation of the panel of jurors, or when the jurors were called on the day fixed for the trial, has no right, after the trial has begun, to com-

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plain that the first juror, Labelle, is not of the age required for jurors." It is true that the parties in the case could have challenged Labelle, but does the failure to challenge render the verdict legal?

There were not, at any time during the trial, in the jury-box more than 11 jurors recognized by law, and the fact that the juror Labelle was not challenged, certainly does not render the verdict legal.

This question of the presence of an incompetent juror in the jury, or of a qualified juror who has taken, by error, the place of another qualified juror, has been the subject of many discussions, especial in criminal cases. The following are some of the cases reported:—*Brisebois* v. *The Queen*, 15 Can. S.C.R. 421 and specially remarks of Strong, J., at p. 426; *The King* v. *McCraw*, 12 Can. Cr. Cas. 253; *Lloyd* v. *Adams*, 37 N.B.R. 590; *Tuck* v. *Harding*, Stevens Digest, N.B.R. 3rd ed. p. 560, Trin. T. 1867; *Stephenson* v. *Fraser*, 24 N.B.R. 482; *Mellor's* case, 1 Dearsly & Bell's Crown Cases, 468, specially remarks of Lord Campbell, C.J.

In this last case the Court divided equally. On a trial for murder the panel of the petit jury returned by the sheriff contained the names of Joseph Henry Thorne and Wm. Thorniley. The name of Joseph Henry Thorne was called for the panel as one of the jurors, and Joseph Henry Thorne as was supposed went into the box and was duly sworn as John Henry Thorne, without challenge or objection. The prisoner was convicted.

The following day it was discovered that William Thorniley had by mistake answered to the name of Joseph Henry Thorne, and that William Thorniley was really the person who served on the jury.

It was held by Lord Campbell, C.J., Cockburn, C.J., Coleridge, J., Martin, B., and Watson, B., that there had been a mistrial, and that the Court ought to order a *venire de novo* to issue.

And held by Erle, J., Crompton, J., Crowder, J., Willes, J., Channel, B., and Byles, J., that there was no mistrial.

In his remarks, Campbell, C.J., says that in the jury box there were never more than 11 jurymen whom the law could recognize.

Further on he says:—

I presume that to constitute a valid trial it is quite as essential that the

jury should be clothed with legal authority as the Judge. But if it should be discovered in a capital case (after sentence of death had been passed) that by some mistake the name of the Judge who presided had not been inserted in the commission, would not this be a mistrial, without any proof that the prisoner had been prejudiced by the mistake?

Campbell, C.J., also refers to the case of *Dovey* v. *Hobson*, *supra*, and *Rex* v. *Tremearne*, and in this case I find in (1826) 5 B. & C. 256, C. J. Abbott's remarks, in which reference is made to the case of *Hill* v. *Yates* (104 E.R. 89) 12 East Rep. 229, held contrary to the above decision.

See *Doe d. Lord Asburnham* v. *Michael*, 16 Q.B. 320, 20 L.J. Q.B. 276; *Brewer* v. *Jacobs*, 22 Fed. R. 217; *Wassum* v. *Feeney*, 121 Mass. Rep. 93, and *Jones* v. *Hodges*, 45 Amer. R. 722.

The proper objection that a juror was not of proper age comes too late after verdict.

A. & E. Enc. of Law, Jury Trial, vol. 17, 1163, 1164.

In France, so far as I know, there is no jury in civil matters, but only in criminal matters. See the Pandectes Françaises, "Jury criminel, Nos. 75, 76".

A great number of decisions have been cited in support of the principle just enunciated. It is seen by these decisions that in certain cases verdicts have been maintained, although there was an alien on the jury, or a minor, but in these cases, no objection had been made before the verdict. Generally, when objection has been made before verdict, the contention of the party who attacked the verdict has been maintained.

Personally, I am of opinion that even if the question had not been raised before the verdict was rendered, it could be effectively raised after verdict rendered, and I am further of opinion that the parties are entitled to the presence of 12 jurors, except in the case of art. 490 C.C.P., which we shall examine. We have not, in my opinion, to consider the question of prejudice, since it is an absolute right of the parties to have a jury composed of 12 persons, except in the cases provided for under art. 490.

Basing herself on art. 490, the plaintiff alleges that the verdict is legal, and that the juror Labelle could be discharged, and the trial continued before the remaining jurors. Art. 490 is new law and appears to replace the two last sections of art. 420 of the old Code of Procedure, which read:—

If the verdict cannot be rendered on account of the death, sickness, or withdrawal of any one of the jurors, the jury must be discharged, saving the

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right of the parties to demand a new jury. The Judge can, nevertheless, in case of the illness or withdrawal of any one of the jurors, adjourn the case, in order to give the jurors the opportunity to assemble and to render their verdict.

The commissioners, in their report, tell us that art. 490 consists of a new provision, very clear, relative to sick jurors, or jurors incapable of fulfilling their duties, which is drawn to a great extent from the Code of California, art. 615. The French criminal law, they say, contains a provision permitting of swearing the jurors in any case which is of a nature to be lengthy. The French authorities to which the commissioners refer are found in Dalloz, under Numbers 1846, 1804, 1805, 1806, *et seq.* (Jurisp. gén. vo. Instruction criminelle).

Art. 615 of the Code of Procedure of California reads as follows:—

> If, after the impanelling of the jury, and before the verdict, a juror become sick, so as to be unable to perform his duty, the Court may order him to be discharged. In that case the trial may proceed with the other jurors, or another juror may be sworn and the trial begin anew; or the jury may be discharged and a new jury then or afterward impanelled.

Art. 490 of our Code of Procedure is borrowed from art. 615 of the Code of Procedure of California, and from the French authorities as to the right of swearing additional jurors. By thus going to the source of art. 490, we see what remedy the legislators wished to establish. They wished to provide for the case where a juror dies, becomes ill, or is obliged to withdraw from the jury for some cause arising during the course of the trial. According to art. 420 of the old Code of Procedure, in the case of death, illness or withdrawal of any one of the jurors, there was no means of obtaining a verdict with that jury, except that in the case of illness or withdrawal, the case could be adjourned to give an opportunity to the jurors to come together and render their verdict. It was then that art. 490 of the Code of Procedure was adopted.

I do not see how we could be expected to apply art. 490 to the present case. The juror Labelle did not become incapable during the trial; he was incapable of acting as juror at the very time when he was sworn as such. Here, we have an exceptional provision of law, since on general principles the jury must be composed of 12 jurors.

If there were the least doubt about the interpretation to be given to art. 490, this article should be strictly interpreted,

for the reason that it contains a derogation from the general rule. It is evident to me that art. 490 cannot be invoked in the present case, and that the verdict must be set aside.

It has been argued that there is no interest in modifying the verdict, since 9 of the jurors have rendered a favourable verdict, and that even if the twelfth juror had given a decision, the verdict would not have been different.

I do not think we need discuss the question of prejudice. The jury must be composed of 12 jurors, unless one of the exceptions mentioned in the Code occurs. As none of these exceptional cases have arisen, the question of prejudice cannot be raised.

Furthermore, it is impossible to say that if there had been a twelfth juror, he would have rendered the same verdict. The jurors sworn are not there simply to give a vote as jurors, but they discuss together, and the influence of the arguments advanced by one juror may be considerable.

I am therefore of opinion that the verdict must be annulled, and a new trial ordered; the motion of the plaintiff for judgment according to the verdict must be rejected, with costs, and the motion of the defendant is granted, in part, with costs. The other costs are reserved. *Judgments accordingly.*

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Alberta Supreme Court, Appellate Division, Scott, Stuart and Beck, JJ.
January 13, 1917.

CORPORATIONS AND COMPANIES (§ VI C—330)—DISSOLUTION—EFFECT ON PROPERTY RIGHTS—BONA VACANTIA.

Shareholders of a defunct corporation have a right to bring in their own name a representative action to recover assets belonging to a company which has been dissolved and struck off the register; these assets do not vest in the Crown as *bona vacantia*.

[American doctrine, 10 Cyc. 1320, adopted.]

Statement.

APPEAL from a judgment in favour of plaintiff in an action by the plaintiff on behalf of himself and all other shareholders of the Gull Lake Ranching Co., Ltd. Affirmed.

W. A. Begg, K.C., for plaintiff, respondent.

W. J. O'Neail, and *W. P. Dundon*, for defendant, appellant.

The judgment of the Court was delivered by

Beck, J.

BECK, J.:—Briefly, the facts are that the defendant being manager of the company retained the sum of $10,000 moneys coming to his hands from the sale of some of the assets of the company, claiming this amount to be owing him for salary; that

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all the company's assets had been realized and all the debts of the company satisfied; that the name of the company had been struck off the register of joint stock companies. There were some other items involved in the action which need not be specially mentioned. Subject to a consideration of the question of the plaintiffs' *locus standi* we were agreed at the argument that the judgment appealed from should be varied; that there should be judgment for the plaintiffs for $10,000 with interest at the rate of 5% per annum from June 4, 1912, together with the amount of a default judgment for $2,400 and costs taxed together with interest at 5%; these two sums to be added together and judgment to be entered for the total amount; that the plaintiffs should have the costs of the action and the costs of the appeal; furthermore, the judgment being in favour of a class, the moneys to be recovered should be ordered to be paid into Court and directions should follow, according to the practice in such classes of cases, for a Judge or the Master ascertaining the members of the class and their respective interests in the fund.

As to the question of the plaintiffs' right to bring the action it was contended that the action ought according to the settled practice be brought in the name of the company. It seems to me that a case such as the present does not fall within that class of case.

Here, by reason of having been struck off the register, the company was dissolved by virtue of the provisions of sec. 24 of the Companies Ordinance.

Under the circumstances, one would naturally suppose that the assets of the company vested in the individual members of the defunct corporation as a body: companies, as my brother Stuart reminded us on the argument, originally being merely partnerships with a large number of members and the Companies Acts being passed for the purpose of doing away with obvious inconveniences.

I have no doubt at all that this is the correct view and that there being, as there was here, a fund held, it matters not by whom, to which the shareholders as a class were entitled, one or more might bring a representative action to recover the fund or their interest in it.

I find, however, some decisions of the English Courts which

call for some consideration. *Re Higginson & Dean; Ex parte the Attorney-General*, [1899] 1 Q.B. 325, a Divisional Court composed of Wright and Darling, JJ., held that where a corporation has been dissolved by order of the Court, having theretofore proved a claim in bankruptcy, and afterwards the proceeds of some shares became distributed in bankruptcy which would in the ordinary course of things have been payable *pro rata* to the corporation, the Crown, the corporation being defunct, was entitled to the corporation's share of the dividends, as *bona vacantia*. The Court gave leave to appeal which, however, was not pursued: *Re Bond: Panes* v. *Attorney-General*, [1901] 1 Ch. 15.

In Williams on Executors, 10th ed., p. 341, it is said:—

> If a bastard, who as *nullius filius*, has no kindred, or any other person having no kindred, die intestate and without wife or child, it has formerly been holden that the ordinary could seize his goods, and dispose of them to pious uses, but it is now settled that the King is entitled to them as *ultimus haeres*, not in a fiduciary character but beneficially, *subject, nevertheless, to the debts of the intestate*.

For this is cited *Jones* v. *Goodchild*, 3 P. Wms. 33 (24 E.R. 958); *Rutherford* v. *Maule*, 4 Hagg. 213; *Dyke* v. *Walford*, 5 Moore 433 (13 E.R. 557); *Kane* v. *Reynolds*, 4 DeG. M. & G. 565, at 571 (43 E.R. 628, 630); *Megit* v. *Johnson*, 2 Dougl. 548 (99 E.R. 344).

It appears, however, that there is necessity for the issue of letters of administration to a nominee of the Crown. Whether this liability of the administrator to pay debts (and therefore the right of the beneficiary—the Crown or subject—being subject to the payment of the debts) was by common law or by reason of the burden on the conscience of the ordinary or by statute and, if by statute, the statute was merely declaratory, seems a little obscure, but it would seem that, not only in such a case but in any like case, the infallible justice of the Crown would recognize the right of the creditors to be satisfied out of the assets of the estate. The foregoing is an application of a wider law relating to *bona vacantia*.

In *Re Higginson & Dean*, *supra*, Darling, J., says:—

> Nor, I think, is there any authority for holding that the Crown is in any worse position in relation to chattels held in trust for a corporation, which has become dissolved, than in relation to chattels held in trust for a natural person deceased. The same principle seems applicable to both cases.

He then refers to the contention that, on the dissolution of a

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corporation, debts due to or from the corporation are extinguished. He refers to 1 Blackstone, p. 484, where it is said:—

> The body politic may also itself be dissolved in several ways, which dissolution is the civil death of the corporation; and in this case their lands and tenements shall revert to the person or his heirs, who granted them to the corporation . . The debts of a corporation, either to or from it, are totally extinguished by its dissolution, so that the members thereof cannot recover or be charged with them in their natural capacities; agreeable to the maxim of the civil law: "*Si quid universitati debetur, singulis non debetur nec, quod debet universitas singuli debent.*"

With reference to the debts, Darling, J., is of opinion that no more is meant than that, after the dissolution, the individuals, who were members or officers of the corporation, cannot sue or be sued in respect of its rights or obligations; and that this is all that is established by the cases there cited.

Darling, J., then proceeds to point out that the American decisions hold that dissolution does not destroy the obligations. He holds the same thing. Then he comes to the aspect of the question, at which I venture to disagree with him. He says:—

> It might be reasonable to enact that, in analogy to the immemorial law of executors and administrators and the statute of 31 Edw. III., st. 1, c. 11, on the dissolution of a corporation aggregate, all its rights, including its rights of action on executed contracts, such as those evidenced by bank notes or bonds, or on claims in debt, devolve upon the Crown subject to the payment of the corporation's own debts. It would, however, I think, in the present state of the authorities, be judicial legislation to declare the Crown entitled to maintain actions in such cases, except where it can allege a trust. Such a declaration may have to be made or advisedly refused, in the case of some of the rapidly increasing numbers of companies, which are being dissolved under the Companies Acts. But in the present case it is not necessary to decide this question.

It seems to me that this is not a case for the Crown to sue as alleging *a trust;* but for the Crown to sue for the ultimate surplus of assets of the defunct company remaining after all obligations of the company are satisfied, just as in the case of a deceased person without next of kin, the Crown would be entitled to the residue after all obligations were discharged, the *residue* only, in either case, being the *bona vacantia*.

There is no direct English authority against this view that I know of—the case cited leaves it open; and in the United States the law is stated to be as follows:—

> The (alleged) doctrine of the ancient common law that the debts of a corporation, and the remedies furnished by that law for the collection of the same, die and abate with the corporation, has been repudiated by modern

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American Courts as odious to justice; and the sound and just doctrine now is that the death of a corporation no more impairs the obligation of its contracts than does the death of a natural person, but that its assets remain a trust fund or pledge for the payment of its creditors and shareholders, and that a Court of equity will lay hold of those assets by its receiver or otherwise and see that they are duly collected and justly applied; 10 Cyc., p. 1320.

Shareholders are creditors of the corporation on its winding-up or dissolution after the payment of all its other obligations.

I adopt this view of the law and hold that the plaintiffs might properly bring the action.

If this opinion is accepted the judgment of this Court will go as already stated. *Appeal dismissed.*

Re EADES ESTATE.

MAN.

K. B.

Manitoba King's Bench, Mathers, C.J.K.B. February 23, 1917.

CONFLICT OF LAWS (§ I F—20)—BANKRUPTCY ACT—LEX DOMICILII.

The real and personal property, situated in Canada, of a person domiciled in England, when adjudicated a bankrupt under the English Bankruptcy Act, as well as the property acquired by him after the adjudication and prior to his discharge, but not properly acquired after the loss of his English domicile, vests in the English trustee in bankruptcy. (Critical review of authorities.)

ACTION by official receiver acting under the English Bankruptcy Act to recover assets from the administrator of an undischarged bankrupt.

Pitblado, K.C., for official receiver in bankruptcy; *H. J. Symington*, K.C., for Canadian creditors; *C. S. A. Rogers*, for Jane James *et al.*; *F. Kent Hamilton*, for National Trust Co.

Mathers, C.J.K.B.

MATHERS, C.J.K.B.:—Prior to March 22, 1890, the testator W. S. Eades was a merchant carrying on business at Bristol, England. On that date a receiving order in bankruptcy was made against him, and on the 31st of that same month he was adjudicated a bankrupt.

Eades was a married man, but in 1891 he left his wife, and thereafter until his death lived with one Jane James, first in England and afterwards in Manitoba.

In 1894 the testator and Jane James left England and came to Canada, and neither of them ever returned. About that time he commenced business as a merchant at Garson in this province, and was moderately prosperous. In this province Jane James was introduced as, and was always known as, his wife. I do not regard that fact as at all material, but as she seems to think it important, I see no objection to stating it.

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K. B.

RE EADES ESTATE.

Mathers, C.J.K.B.

In 1906 he made a will by which he divided his estate equally between his lawful wife, Jane James, and his brother.

On August 14, 1912, he made another will. By this last will he left $2,000 to Jane James, $2,000 to his wife, who, apparently unknown to him, was then dead, and the residue of his estate to the official receiver in bankruptcy. He died about the end of August, 1912. This last will was admitted to probate, and the National Trust Co. was appointed administrator with the will annexed.

The estate consists of real estate in Manitoba, valued at $10,215, and personal estate, also in this province, to the value of $7,817.

At the time of his death the testator owed debts contracted in Manitoba to the amount of $3,508, not including the claim of Jane James.

The testator's English liabilities at the time of his bankruptcy amounted to £9,905, and his estate paid only £1,437. The English liabilities still unpaid are largely in excess of the total value of his Canadian estate. Eades never obtained a discharge in bankruptcy, and he was at the time of his death an undischarged bankrupt. The official receiver in bankruptcy claims the estate. The claim is contested by the Canadian creditors and by Jane James.

By consent of all parties the matter was dealt with as though a statement of claim had been issued by the official receiver against the administrator, Jane James, and the Canadian creditors, claiming that the assets of the testator be handed over to him, on the ground that Eades was an undischarged bankrupt, and a defence had been filed by all parties denying the official receiver's right to the assets either under the Bankruptcy Act of 1883, or in any other way. All the facts were expressly admitted, except the Canadian domicile of Eades; but I assume that was intended to be admitted.

It was stated by counsel that an answer was required to 3 questions, namely: 1. Does the English Bankruptcy Act, 1883, which was in force when Eades became a bankrupt, and which remained in force until after his death, apply to Manitoba so as to vest in his trustee: (1) real estate; (2) personal estate, acquired in Manitoba? 2. If either the real or personal property, or both,

did vest in the trustee, what, if any, are the rights of the Canadian creditors? 3. If the trustee is not entitled to the Manitoba estate, what are the rights of the English creditors as to proving against the estate here?

The case was ably argued by counsel for the official receiver, and for the Canadian creditors, and for the administrator and Jane James.

The first question really involves 3 others, and for the sake of convenience, I shall discuss these in their logical sequence. They are (1), assuming that Eades had had property, both real and personal, in Canada at the time of his bankruptcy, would such property have vested in the trustee? Assuming that after his bankruptcy and (2 before) (3 after) he lost his English domicile he acquired both real and personal property in Canada, and assuming also that no such question arose as was involved in *Cohen* v. *Mitchell*, 25 Q.B.D. 262, hereafter referred to, would such property have vested in the trustee?

Dealing then with subdivision 1 of the first question, I propose to inquire whether colonial property in existence at the time a debtor is declared a bankrupt under the Act of 1883 vests in the trustee.

In the first place, it is conceded that the Imperial Parliament has power to legislate for all the British Dominions, including Canada. The idea was at one time entertained by some Judges that the provisions of the B.N.A. Act of 1867, which reserved to the Dominion and the several provinces, respectively, power to exclusively make laws in relation to certain named subjects, were equivalent to a renunciation by the Imperial Parliament of the right to legislate concerning these subjects: *Per* Draper, C.J., *Reg.* v. *Taylor*, 36 U.C.Q.B. 183, at 220; *Holmes* v. *Temple*, 8 Que. L.R. 351; *Nicholson* v. *Baird*, N.B. Eq. Cases (Trueman) 195. It was not denied that the right still remained, but it was contended that subsequent Imperial legislation should be construed as not intended to interfere with the powers so granted. It has, however, long since been settled that the exclusive legislative powers granted to the Dominion and the several provinces by the Act of 1867 relates only to the exercise of these powers, as between the Dominion and the several provinces, and was not intended as a surrender of power by the Imperial House: *Reg.*

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v. *College of Physicians and Surgeons*, 44 U.C.Q.B. 564; *Smiles* v. *Bedford*, 1 A.R. (Ont.) 436; *Maritime Bank* v. *Stewart*, 13 P.R. (Ont.) 86, 262, 491, 20 Can. S.C.R. 105; *Ford* v. *Stewart*, 35 N.B.R. 568; Lefroy's Legislative Powers in Canada, 210 *et seq.*; Clement's Canadian Constitution, 62 *et seq.*

It was also conceded that, according to English jurisprudence, the *lex loci rei sitæ* governs exclusively as to the tenure, the title and the descent of real estate, and that the Imperial Parliament cannot by legislation transfer the title to real estate in a foreign jurisdiction: *Cockerell* v. *Dickens*, 3 Moo. P.C. 98; and neither can a foreign country by such legislation pass the title to land situate in British Dominions: *Macdonald* v. *Georgian Bay Lumber Co.*, 2 Can. S.C.R. 364 at 367. Nor does land in one British colony pass under a bankruptcy in another: *Ex parte Bettle*, 14 N.Z.R. 129.

It is an equally clear proposition, not only by the law of England but of every country in the world where law has the semblance of science, that personal property has no visible locality, but that it is subject to that law which governs the person of the owner: *per* Lord Loughborough, *Sill* v. *Worswick*, 1 H. Bl. 665 at 690 (1791). By a fiction common to the jurisprudence of most countries, personal property is supposed to be located in, and subject to the jurisdiction of, the country where its owner is domiciled. This general proposition is subject to certain exceptions, one of which is that a nation within whose territory any personal property is actually situate has an entire dominion over it while therein in point of sovereignty and jurisdiction as it has over immovable property: Story's Conflict of Laws, par. 550, cited in *Dulaney* v. *Merry*, L.R. [1901] 1 K.B. 536 at 540. See also remarks in *Re Hermanos*, 24 Q.B.D. 640.

The principle of international law is perfectly clear and simple when rightly understood. No legislature can directly affect the title to property situate beyond the boundary of the territory which it represents. In the case of land, whose locality is always fixed and immovable, its title can only be affected by laws enacted by the legislative body having jurisdiction over that locality; neither can the title to personal property be directly changed or affected by extra-territorial legislation; but, by a benevolent fiction, moveable property is in law supposed to follow the domi-

cile of its owner, and to be situate in the country of his domicile, whatever its actual *situs* may be.

Under an English Bankruptcy Act, the property in a foreign country of a bankrupt domiciled there would not pass to the trustee because the Imperial Parliament cannot by legislation affect the title to property beyond the limits of the Empire. If a foreigner had an English domicile and became bankrupt in England, his personal property situate in a foreign country would pass to the trustee, not because of any English law, but by the law of the comity of nations, but not so his foreign real estate. That was the principle upon which were decided such cases as *Cockerell* v. *Dickens*, 3 Moo. P.C. 98 (13 E.R. 45); *Macdonald* v. *Georgian Bay Lumber Co.*, 2 Can. S.C.R. 364, and *Ex parte Bettle*, 14 N.Z.R. 129.

During the argument, it was assumed by all parties that Eades had acquired a Canadian domicile. As a person can have but one domicile at the same time it necessarily follows that he had lost his English domicile. As the argument proceeded upon this assumption, I propose to assume it to be the fact without further inquiry. In any event I think the circumstances of Eades' residence here made a *primâ facie* case in favour of a Canadian domicile: *Bruce* v. *Bruce*, 2 Bos. & Pul. 229.

While it is perfectly clear that the Imperial Parliament has power to legislate for the colonies, it is also clear that an Act of the Imperial Parliament should not be held applicable to a colony having legislative powers of its own, unless it is made so either by express language or by necessary intendment.

The circumstances from which it may be implied that an Imperial Act, not expressly made applicable to the colonies, was nevertheless intended to embrace them, were stated by the Privy Council in *Callender* v. *Colonial Secretary*, [1891] A.C. 460. Lord Hobhouse there laid it down (p. 466) that,

> If a consideration of the scope and object of a statute leads to the conclusion that the legislature intended to affect a colony, and the words used are calculated to have that effect, they should be so construed.

In *Callender* v. *Colonial Secretary*, *supra*, hereinafter referred to, as the *Lagos* case, it was held that the Bankruptcy Act of 1869 applied to the Colony of Lagos, so as to vest the bankrupt's real estate situate in that colony in the English Bankruptcy Trustee. There was nothing in the Act of 1869 which expressly

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stated that property out of England was intended to be affected. It did, however, provide that all property belonging to or vested in the bankrupt at the commencement of the bankruptcy should be divisible amongst his creditors. Other sections (73, 74 & 76), however, shewed that it was to have operation in the whole British Empire. It was pointed out that the previous Act of 1849 in express terms vested in the bankrupt's assignees, his lands "in England, Scotland, Ireland, or in any of the Dominions, plantations or colonies belonging to Her Majesty," and that by the subsequent Act of 1883, the property which is passed to the trustee includes property "whether situate in England or elsewhere." It was also pointed out that the Scotch and Irish Acts were by their express language Empire wide in their operation. No reason, it was said, could be assigned why the English Act of 1869 should be governed by a different policy from that which was directly expressed in the Scottish and Irish Acts, and in the English Acts immediately preceding and immediately succeeding. Lord Hobhouse said:—

> It is a much more reasonable conclusion that the framers of the Act considered that in using general terms they were applying their law wherever the Imperial Parliament had power to apply it; and their Lordships hold that there is no good reason why the literal construction of the words should be cut down so as to make them inapplicable to a colony: p. 467.

All the reasons given by the Privy Council for holding that the Act of 1869 applied to the colonies are applicable to the 1883 Act, and besides there is the additional reason that by the latter Act the property which is to be divisible amongst the bankrupt's creditors includes "every description of property, whether real or personal, *and whether situate in England or elsewhere.*" In fact, the Privy Council in the *Lagos* case appeared to think that there was no doubt about the application to the colonies of the 1883 Act, and Lord Hobhouse assuming that it does so extend uses that fact as indicating the general policy to be to make bankruptcy Acts applicable wherever the Imperial Parliament had power to apply them. Lagos, however, was a Crown Colony, with very limited, if any, legislative powers of its own; and while the *Lagos* case conclusively establishes that the Bankruptcy Act of 1883 does apply to such a colony so as to vest in the English trustee appointed under the Act, all the property therein, both real and personal, which belonged to, or was vested in, the bankrupt at the commencement of the bankruptcy,

it cannot be regarded as a binding authority that the Act has equal operation as to property situate in the self-governing dominions. Indeed, Westlake, in his book on Private International Law, 5th ed., 182, gives it as his opinion that immovable property situate in one of the British self-governing overseas dominions, cannot be deemed to pass by an English bankruptcy through the mere force of the British legislation. Other text-writers, however, do not share Mr. Westlake's opinion, but adopt the view that the English bankruptcy legislation applies indifferently to all the colonies: Williams, Bankruptcy (1914), 1; 2 Hals. 6, 8, 153. The views of the latter are, I think, borne out by the decided cases, as well as by numerous dicta of very distinguished Judges.

The first case I shall refer to is *Ellis* v. *McHenry* (1871), L.R. 6 C.P. 228. Two actions were brought in England by the plaintiff, whose domicile was Upper Canada. One action was upon a judgment recovered in the Court of Queen's Bench for Upper Canada, upon a contract made and wholly to be performed there. The other action was founded upon the original cause of action upon which the Canadian judgment had been recovered. After the original cause of action arose, and before the judgment recovered in Canada, a composition deed was entered into in England between the defendant and his creditors pursuant to the English Bankruptcy Act, 1861. The deed was duly executed, so as to be binding upon the creditors, who had not executed it, and it thereupon operated under the Act as a discharge in bankruptcy. The plaintiff, who had not executed the deed, sued the defendant in Upper Canada. The defendant did not, as he might have done, plead to such action the composition deed referred to, and the plaintiff recovered judgment. The plaintiff then sued in England, both upon the Canadian judgment, and upon the original cause of action. To each of these actions the defendant pleaded the composition deed referred to. The plaintiff replied in each case that when the contract was made and ever after the plaintiff had been domiciled in Canada, and that the contract was made and wholly to be performed in Canada, and the works executed and the money paid there. The question was argued upon demurrers to these replications. The Court said that the discharge was created by an Act of the Imperial Legislature, which, like the previous Bankruptcy Acts, was of general

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application, and operated as a general discharge of all debts, including those contracted in Canada. It was therefore a good answer to the second action, and would have been a good answer to the first had it been pleaded. Not having been pleaded in Canada it could not be pleaded to the judgment recovered there.

This case does not deal with the vesting of property, but one of the reasons given for holding the discharge effectual in Canada was that it was "only consistent with justice to do so in the case of bankruptcy, as the debtor is thereby deprived of the whole of his property wherever it may be situate, subject to the special laws of any particular country, which may be able to assert a jurisdiction over it." This can only mean that the understanding of the Court was that Canadian property vested in the trustee under the English bankruptcy.

In *New Zealand Loan Co.* v. *Morrison*, [1898] A.C. 349, the question in dispute was as to whether or not the English Joint Stock Companies Arrangement Act, 1870, applied to Victoria. Lord Davey, in delivering the judgment of the Judicial Committee holding that the Act did not apply to Victoria, used this language:—

> Nor do their Lordships think that any assistance is to be derived from what has been held with regard to the application of the Bankruptcy Acts to the Colonies. It has been decided that by the express words of the Bankruptcy Acts, all the property, real and personal, of an English bankrupt in the colonies, as well as in the United Kingdom, is vested in the assignees or trustees. Their title must, therefore, receive recognition in the Colonial Courts, from which it has been considered to follow that the bankrupt, being denuded of his property by the English law, is also entitled to plead the discharge given him by the same law (p. 358).

Then comes the *Lagos* case, *supra*. Lord Hobhouse there referred to the self-governing dominions and suggested that a question might arise with respect to such dominions as not only had been given power to enact bankruptcy legislation, but which had actually exercised the power. He apparently saw no difficulty in applying the Act to a self-governing dominion in which such legislation had not been adopted.

Counsel for the local creditors contended that the principle of the *Lagos* case should be strictly limited to property located in a Crown colony such as Lagos was, and should be treated as inapplicable to other dominions whose circumstances were not exactly parallel, because the Privy Council had, he said, in two

previous cases, decided that the English Bankruptcy Acts did not extend to the colonies.

The two cases to which counsel referred are *Cockerell* v. *Dickens*, 3 Moo. P.C. 98 (1840); 13 E.R. 45, and *Bunny* v. *Hart*, 11 Moo. P.C. 189 (1857); 14 E.R. 667.

I have read both these cases with some care, and have failed to discover in either of them anything at all in conflict with the general principles enunciated in the *Lagos* case.

Cockerell v. *Dickens* decides that real estate situate in Java, which is not a British colony, but one of the dependencies of the Kingdom of Holland, belonging to a man domiciled in Bengal, did not pass to the assignee by his bankruptcy in Bengal. It also decided that personal estate of the bankrupt, situate in Sumatra, also belonging to Holland, did pass to the assignee. Parke, B., who delivered the judgment, made some observations to indicate his opinion to be that if Java had been British territory, the real estate there situate would have passed. He said, at p. 133:—

> Under the general assignment made by Palmer & Co. (the bankrupts) of all their property which would operate wherever, but not elsewhere, the Imperial Parliament could give the law, it certainly would not pass unless the law of Java made such conveyance, being in the English form, operative.

It was not disputed that the personal estate situate in Sumatra did pass, as it followed the law of the domicile of the bankrupt.

All this case then decides is, that real estate, situate in a foreign country, of a bankrupt whose domicile is in India, does not pass to the assignee under the Indian Insolvent Act; *a fortiori*, it would not pass to the assignee if his domicile was foreign.

In *Clark* v. *Mullick*, 3 Moo. P.C. 252, Lord Brougham said, at p. 279:—

> It is not denied that an assignment validly made under a commission here has the effect of carrying to the assignee a right to sue in India for debts due to the bankrupt. This follows from all the rights of the bankrupt being vested in the assignees—vested in him by operation of the bankrupt laws as effectually as if he had himself made a voluntary transfer of them good by the law of the country where it was executed.

The converse case to *Cockerell* v. *Dickens* was decided in *Macdonald* v. *Georgian Bay Lumber Co.*, 2 Can. S.C.R. 364, where it was held that land in Canada did not pass to the trustee under a United States bankruptcy.

In the report of the other case *Bunny* v. *Hart*, 11 Moo. P.C. 189, the headnote is entirely misleading. It says: "The English

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Bankruptcy Consolidation Act, 12 and 13 Vict. ch. 106, doe not extend to the Colony of New Zealand," whereas the decision in effect was that that Act did extend to New Zealand. The facts were briefly these, the appellant Bunny who had been carrying on business in England. became financially involved and in 1853 left England and went to New Zealand, where he settled and acquired both real and personal estate. In 1855 he was adjudged a bankrupt in England. The respondent Hart, acting under the warrant of the bankruptcy commission, later in that same year took possession of the appellant's real and personal property in New Zealand. The appellant then brought an action of trespass against the respondent in the New Zealand Supreme Court. The respondent pleaded the English bankruptcy of the appellant, and justified under the commission's warrant. The appellant by way of replication denied the bankruptcy, disputed the petitioner's debt, his trading and act of bankruptcy. The appellant made profert of the proceedings in bankruptcy, and submitted that the same were conclusive and must be so held by the Supreme Court of the colony unless and until the adjudication in bankruptcy was annulled by proceedings for that purpose taken in England. The Supreme Court adopted this view but gave leave to appeal to the Privy Council. On the appeal coming on there, the Board suggested that the appeal stand over until the appellant should present a petition to annul the adjudication in bankruptcy. This course was adopted. Upon the petition coming on the Lord Justices intimated an opinion against granting it. The appellant then asked leave to test the adjudication by an action. This leave was granted, but the action was not brought. Later the appellant was permitted to withdraw his appeal. If the English Bankruptcy Act did not apply to New Zealand so as to vest in the trustee or assignee the New Zealand property, the adjudication would have afforded no defence to the action of trespass brought in the Courts of New Zealand for seizing the New Zealand property under the bankruptcy commission's warrant. It was, however, treated by all the Courts as a good defence which could only be got rid of by annulling the adjudication in England. *Bunny* v. *Hart*, *supra*, was decided under the Bankruptcy Act of 1849, which in express terms extended to the "Dominions, Plantations and Colonies belonging to Her Majesty," and it would have been surprising indeed to find that any Court

had decided that an Imperial Act so worded did not apply to one of the colonies.

Mr. Symington also cited two Canadian cases in support of his contention, that the Canadian property of an English bankrupt does not upon the adjudication there vest in the trustee or assignee. The earliest of these cases in point of date is *Fraser* v. *Morrow*, 3 Thom., Nova Scotia, 232 (1858). As in the case of *Bunny* v. *Hart*, this case was a decision upon the Act of 1849, and if it was to the effect that that Act did not apply to Nova Scotia, as the headnote indicates, it would pre-suppose a lack of appreciation of the express language of that Act. The headnote of the report is to the effect that "A party can attach debts of an English bankrupt after the fiat of bankruptcy is issued." A reading of the case as reported, however, shews that the decision of the Court was the very reverse of what the headnote says it was. The decision of the Court really was that a debt due to an English bankrupt after the fiat of bankruptcy had been issued can *not* be attached by a creditor of the bankrupt. The report sets out that on November 17, 1857, the defendant had been adjudged a bankrupt in England. On the 23rd of the same month, 6 days after the adjudication in bankruptcy, the plaintiff obtained an order attaching a debt alleged to be due from one Purvis to the defendant. If the Bankruptcy Act applied to Nova Scotia the debt was then due to the trustee and not to the defendant. A rule *nisi* was moved to set the attaching order aside. The motion was opposed upon the ground that the Bankruptcy Act did not apply to the colonies. Bliss, J., who delivered the judgment, said that there was a decision on the very point on an appeal to the Privy Council: *Hill* v. *Goodall*, 3 Murd. Epit. 149. He added: "The case is so clear that there cannot be a question upon it." Then follows this note: "The rule must be made absolute." That is to say the attaching order was set aside upon the ground, because no other was argued, that the adjudication in bankruptcy had vested the debt due from Purvis in the trustee, and there was nothing upon which the attaching order could operate. This case as well as *Hill* v. *Goodall* referred to in the judgment are digested in Congdon's Nova Scotia Digest, 1890, 1364, under a note that a party cannot attach a debt due to an English bankrupt after fiat of bankruptcy is issued.

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The next case upon which counsel for the local creditors relies is *Nicholson* v. *Baird*, N.B. Eq. Cas. 195. This is a case decided upon the Bankruptcy Act of 1869, and in it Palmer, J., in an elaborate opinion, arrives at the conclusion that neither th real nor the personal property in Canada of a domiciled Canadian who has not resided in England vests in the bankruptcy trustee, upon his being adjudicated a bankrupt in England. The essential facts of this case were these: Three brothers, Gilbert, James and Gorham Steeves carried on business in partnership at St. John in New Brunswick, and at Liverpool, England. The Liverpool business was conducted under the name of Steeves Bros. & Co. by Gilbert, who resided in England, and the St. John business under the name of Steeves Brothers, by James and Gorham, neither of whom had ever been in England. The Liverpool house became insolvent in 1882, and James and Gorham cabled Gilbert to file a petition in bankruptcy, which he did, and they were adjudicated bankrupts on July 4, 1882, and the plaintiff was appointed trustee. The St. John house had local creditors, and subsequent to the adjudication in England, James and Gorham executed an assignment of their real and personal property to the defendant for the benefit of such creditors. The plaintiff brought this action for a declaration that he was entitled to both the real and personal property of the members of the firm in New Brunswick. The case was tried before Palmer, J., with the result stated. The Judge based his conclusion upon the wording of the Act itself, backed by the improbability that the Imperial Parliament would enact bankruptcy legislation applicable to Canada after the enactment of the B.N.A. Act of 1867, by which it had delegated to the Dominion Parliament exclusive authority to make laws relating to that subject. At that time it had not been decided, as it afterwards was in the *Lagos* case, that the language of the Act of 1869 read in the light of the policy of parliament with respect to the subject of bankruptcy was sufficiently comprehensive to include the colonies. Lagos was, however, a Crown colony, to which the power of self-government had not been delegated, and consequently, the argument of Palmer, J., founded upon the fact that Canada had been given full powers of self-government, including the enactment of bankruptcy laws, was not dealt with by the Privy Council in that case. I take it there would be nothing anomalous in holding that an Imperial

Act which applied to Lagos did not apply to Canada, which was so differently circumstanced at the time it was passed. In fact, their Lordships in the *Lagos* case anticipated the possibility of such a question arising with respect to the self-governing Dominions. Having arrived at the conclusion that the Act of 1869 was confined in its operation to England, Palmer, J., held that in so far as the real estate of James and Gorham was concerned, it could only pass by the law of its locality, and as to their personal estate, it followed their domicile which was Canadian, and did not pass upon their bankruptcy in England. As to Gilbert's New Brunswick personalty, which would include his interest in the partnership real estate, *Re Kent County Gas Co.*, [1909] 2 Ch. 195, it would pass to the trustee as his domicile was English, but his individual real estate, situate in Canada, would not so pass. According to *Nicholson* v. *Baird*, N.B. Eq. Cas. 195, if Eades had had at the time of his bankruptcy both real and personal estate in Canada, the personal estate would have gone to the trustee, because Eades' domicile was then English, but the real estate would have remained vested in the bankrupt. Even if Mr. Justice Palmer's conclusion were correct that the personal property in Canada of the debtor whose domicile was Canadian, did not pass by direct operation of the statute, it would now probably be held to have passed by the rule of National Comity, *Re Davidson's Settlement Trusts*, L.R. 15 Eq. Cas. 383, and *Re Anderson*, [1911] 1 K.B. 896.

As already pointed out, *Nicholson* v. *Baird* must be treated as overruled by the *Lagos* case unless the fact that Canada is a self-governing Dominion with the power to pass bankruptcy legislation makes the *Lagos* case inapplicable to Canada. In the first place, it is to be observed that by the judgment in that case it is not suggested that the existence in the colony of a jurisdiction over the subject of bankruptcy, which had not been used, would be any reason for holding the Imperial Act inapplicable. What is said is that:—

> If the laws of a colony are such as would not admit of a transfer of land by mere vesting order or mere appointment of a trustee, questions may arise which must be settled according to the circumstances of each case. Such questions are specially likely to arise in those colonies to which the Imperial legislature has delegated the power of making laws for themselves, *and in which laws have been made with reference to bankruptcy* (p. 466).

In the next place it has uniformly been held in cases decided

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under the various Imperial Bankruptcy Acts that they applied to Canada to the extent at least of making a discharge thereunder in England a good discharge of a debt contracted in and payable in Canada. I have already referred at some length to the case of *Ellis* v. *McHenry*, L.R. 6 C.P. 228, in which it was held that a composition deed executed in England under the 1861 Act was a bar to an action brought in Canada by a domiciled Canadian for a debt contracted in Canada prior to the execution of the composition deed and payable in Canada. The same thing had been held by the Supreme Court of New Brunswick under earlier Acts. *Jouett* v. *Lockwood*, 2 Kerr N.B. 674 (1844). Then we have the case of *Maritime Bank* v. *Stewart*, 13 P.R. (Ont.) 86, 262, 491 (1889). They had carried on business both in England and Canada. The defendants had been adjudicated bankrupts in England under the 1883 Act. The plaintiffs, a Canadian corporation, also in process of being wound up by its liquidator, filed its claim in the bankruptcy, and afterwards brought this action in Ontario for a claim which was included in the one filed with the assignee. The debt sued upon had been incurred in Canada. The acting Judge in Bankruptcy granted an injunction restraining the liquidator from proceeding with this action, and subsequently an order was made in this action by the Master in Chambers to stay proceedings perpetually. Upon appeal, Rose, J., afterwards Sir John Rose, sustained the order. In his judgment he points out out at p. 89 that it was conceded that by the effect of the assignment

> All the property of the debtor whether in England or in the colonies is vested in the assignee in bankruptcy in England.

The case was then argued before a Divisional Court composed of Falconbridge and Street, JJ., reported in the same volume at p. 262, and again the order was sustained. I quote from the headnote which correctly summarizes what was said in the judgment:—

> An English bankruptcy carries all the real and personal property of the bankrupt in any part of the British Dominions, the theory of the English Bankruptcy Acts being that when once a forum has been established for the winding-up of an estate it is expedient that the whole property of the bankrupt should be brought there in order that it may be ratably divided amongst all his creditors and the assets of the bankrupt having been thus taken away from him creditors will not be allowed to harass him with unnecessary litigation.

Next the case was taken to the Court of Appeal, p. 491, with the same result. I would infer from the judgments there

delivered that all the Judges agreed that the Canadian property had vested in the bankruptcy trustee but only two of them, Hagarty, C.J., and Burton, J.A., discussed the question. The former, after referring to the various sections of the Act, says, at p. 494:

It appears to me that the Imperial Act necessarily must extend to all the Queen's Dominions in its dealings with a bankruptcy properly within and finally determined under its powers. I draw this conclusion from a careful perusal of its numerous provisions. It discharges the debtor from all claims provable under it, and it is clear that the plaintiff's claim was so provable. I have quoted the clauses which bear most directly on this conclusion. All the defendant's property in Canada and elsewhere in the Queen's Dominions will pass to the trustee for the benefit of creditors. Sec. 54, with its sub-sections, shows this.

Burton, J.A., at p. 497, says:—

It is true that so far as one can judge the proceedings in these actions do not seem to promise any profitable results, in as much as the property of the bankrupt is vested in the trustee, and out of the reach of an execution, and as at present advised, a discharge if granted by the Bankrupt Court in England would be a bar to the recovery or the enforcement of a judgment here.

Finally, the case came before the Supreme Court, 20 Can. S.C.R. 105, but unfortunately it went off there on a preliminary objection to the right of appeal to that Court.

The latest Canadian case to which I have been referred is *Ford* v. *Stewart* (1901), 35 N.B.R. 568. In that case the full Court of New Brunswick, consisting of 6 Judges, unanimously held that the discharge of the defendant under the 1883 Act in England was a bar to an action in New Brunswick upon a promissory note made by the defendant in that province before the adjudication in bankruptcy and payable there to the plaintiff who was a domiciled subject of the United States. Although not called upon to overrule *Nicholson* v. *Baird*, N.B. Eq. Cas. 195, both of the Judges who took part in the judgment expressed opinions unfavourable to the decision in that case, and there is no doubt they would have overruled it had it been necessary to do so. Tuck, C.J., said:—

I do not agree with Judge Palmer's reasons nor with his conclusions, which are entirely contrary to the judgment of Lord Davey in the case of the *New Zealand Loan and Mercantile Co.* v. *Morrison*, [1898] A.C. 349,

and Barker, J., observed that it was "at variance with the Judicial Committee of the Privy Council in *Callender* v. *Colonial Secretary of Lagos, supra.*" In none of these cases was the Court called upon to pronounce upon the precise point as to whether or not the

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Imperial Bankruptcy Acts operated so as to vest property of the bankrupt situate in a colony in a trustee under the Act, but all of them were decided upon the ground that by the adjudication in bankruptcy, the bankrupt had been denuded of his property, real and personal, whether in Canada or elsewhere, and it would be highly unjust to take from him his colonial property, and still leave him liable for his colonial debts. The fact that Canada had power to legislate on the subject of bankruptcy was urged upon the Court in *Ford* v. *Stewart*, *supra*, and also in *Maritime Bank* v. *Stewart*, *supra*, as a reason why it should be held that the 1883 Act did not operate in Canada. Rose, J., pointed out that there was no Bankruptcy Act in Canada, and Barker, J., referring to that argument (35 N.B.R., at 580), says:—

> I can not see that the Act of 1883 either interfered with any existing legislation in Canada or any right to pass any in regard to bankruptcy. It simply contains provisions common to all English bankruptcy legislation, the effect of which is to vest in the bankrupt's trustee for distribution amongst his creditors all his real and personal property in England or elsewhere, within the jurisdiction of the Imperial Parliament, and in return to discharge him from liability for all debts provable in the bankruptcy, so that in all Courts subject to the same jurisdiction such discharge can be pleaded as an answer to any action for the recovery of any such debt.

There is nothing in the 1883 Act itself to indicate that it was to operate only in those overseas Dominions upon which powers of self-government had not been conferred, and with the exception of *Nicholson* v. *Baird*, I have been referred to no case in which such a distinction has been drawn. *Ford* v. *Stewart*, and *Maritime Bank* v. *Stewart*, are to the effect that such a distinction does not exist, and Lord Davey was also evidently of the same opinion judging from his statement in *New Zealand Loan Co.* v. *Morrison*, [1898] A.C. 349. In addition to the above I desire to refer to two cases decided by the full Court of Victoria, at a time when that colony had not only achieved self-government, but had actually enacted bankruptcy legislation of its own. The cases to which I refer are *Federal Bank* v. *White*, 21 V.L.R. 451 (1895), and *Niven* v. *Grant*, 29 V.L.R. 102 (1903). In both of these cases it was held that both real and personal property in Victoria of a person adjudicated a bankrupt in England under the Act of 1883, vested in the trustee. In *Federal Bank* v. *White*, that much was conceded, but it was argued that every part of the Act was not in force. The Court agreed that only property which was the

bankrupt's own vested and that sub-sec. (39) sec. 44 was not in force.

It was conceded that all the personal property of a bankrupt with an English domicile would pass to the trustee upon his adjudication in England, but it was argued that the title to real estate of the bankrupt in Canada being subject only to the law of the locality where it is situate would not so vest; the term locality in the maxim includes any place within the confines of the British Empire. The matter, however, is concluded by the judgment in the *Lagos* case. I, therefore, am of the opinion that if Eades had had either real or personal estate in Canada at the time of his bankruptcy, all such property would have vested in his trustee.

The next question is as to after-acquired property, the property of an undischarged bankrupt acquired after his bankruptcy and while he still retained his English domicile, or remained subject to the jurisdiction of the English Bankruptcy Courts. Sec. 44 of the Act provides that the property of the bankrupt divisible amongst his creditors "and in this Act referred to as the property of the bankrupt," shall comprise "all such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge." Sec. 54 provides that "the property of the bankrupt" shall immediately vest in the official receiver until a trustee is appointed, and on the appointment of a trustee shall forthwith pass to and vest in the trustee. What is to vest, therefore, is "the property of the bankrupt," and sec. 44 says that "the property of the bankrupt divisible amongst his creditors" and in this Act referred to as the "property of the bankrupt" is to consist amongst other things of "all such property as may belong or to be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him after his discharge." It was argued that sec. 54 vests in the trustee only the property of the bankrupt at the time of the adjudication, but it will be noticed that sec. 44 defines "the property of the bankrupt divisible amongst his creditors" and expressly inserts the words "and in this Act referred to as the property of the bankrupt." There is no room for doubt that the phrase "property of the bankrupt" as used in secs. 44 and 54 means the same thing. The latter section says the "property of the bank-

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rupt" vests in the trustee upon his appointment, and sec. 44 makes it clear that the "property of the bankrupt" which by sec. 54 vests in the trustee includes after-acquired property. This reading of the statute is fully borne out by the cases, *Re Clark*, [1894] 2 Q.B. 393, *New Land Development Co. and Gray*, [1892] 2 Ch. 138, *Bird* v. *Philpot* (1900), 1 Ch. 822, *Official Receiver* v. *Cooke*, [1906] 2 Ch. 661.

The words of the statute were interpreted as meaning something less than a literal interpretation of its language would imply by the Court of Appeal in *Cohen* v. *Mitchell*, 25 Q.B.D. 262, and the rule was there laid down "until the trustee intervenes, all transactions by a bankrupt after his bankruptcy with any person dealing with him *bonâ fide* and for value in respect of his after-acquired property, whether with or without knowledge of the bankruptcy are valid as against the trustee." In *Hunt* v. *Fripp*, [1898] 1 Ch. 675, the rule was applied to a *bonâ fide* equitable assignment for value of an interest which the bankrupt had acquired under his father's will after his bankruptcy; in *Re Behrend's Trust*, [1911] 1 Ch. 687, it was applied to a settlement made on marriage by an undischarged bankrupt of after-acquired property. Although the rule as given in *Cohen* v. *Mitchell*, *supra*, is wide enough to include all kinds of after-acquired property, both real and personal, it was subsequently held in *New Land Development Co. and Gray*, [1892] 2 Ch. 138, *Bird* v. *Philpot*, [1900] 1 Ch. 822, and *Official Receiver* v. *Cooke*, [1906] 2 Ch. 661, that it had no application to after-acquired real estate, and that an undischarged bankrupt could not even before intervention by the trustee convey real estate acquired after the bankruptcy to a *bonâ fide* purchaser for value so as to give a good title to such purchaser as against the trustee.

The question of what "transactions" with an undischarged bankrupt could be regarded as "dealing with him *bonâ fide*, and for value in respect of his after-acquired property" within the meaning of the rule in *Cohen* v. *Mitchell*, 25 Q.B.D. 262, was dealt with in *Re Clark*, [1894] 2 Q.B. 393. That was the case of an adjudication in bankruptcy, and a subsequent trading while still undischarged, and a second adjudication. The contest was as to whether the after-acquired property should be administered in the first bankruptcy for the benefit of the earlier creditors, or in the

second bankruptcy for the benefit of the 2nd set of creditors. The Divisional Court composed of Vaughan Williams and Wright, JJ., decided in favour of the 2nd bankruptcy, but that decision was reversed by the Court of Appeal composed of Esher, M.R., Smith and Davey, L.JJ., who held that the case did not come within the rule in *Cohen* v. *Mitchell*, *supra*, because there had been no dealing with the bankrupt for valuable consideration with respect to the after-acquired property. The personal representative of a deceased bankrupt is in no better position except that he is protected in so far as he has administered the estate before the intervention of the trustee. The beneficiaries, however, are not protected, and must return any portion of the estate paid to them. *Re Bennett*, [1906] 1 K.B. 149.

Of course if the trustee or the original creditors stand by and allow the bankrupt to trade, knowing as they must be presumed to know, that in order to trade, he must necessarily take as well as give credit, they will not be allowed to claim the property acquired by such trading to the prejudice of the subsequent creditors: *Troughton* v. *Gitley*, Ambl. 630, *Tucker* v. *Hernaman*, 4 DeG. M. & G. 395, (43 E.R. 561), 22 L.J. Ch. 791; *Engelback* v. *Nixon*, 44 L.J.C.P. 396, L.R. 10 C.P. 645 (1875); *Butler* v. *Hobson*, 4 Bing. N.C. 290 (1838); *Ex parte Tinker* (1874), L.R. 9 Ch. 716; *Shaw* v. *Hyett*, 17 V.L.R. 612 (1891). These cases turned, however, not upon the construction of the Bankruptcy Act but solely and only upon the principle of estoppel. The trustee or the original creditors stood by and knowingly allowed the bankrupt to contract debts and it would be unjust and inequitable to permit them now to take the after-acquired property without first paying the debts incurred in its creation. It was attempted to invoke this principle on behalf of the local creditors, but there is no evidence that either the trustee or any of the original creditors had any knowledge that Eades was carrying on business in Manitoba. The most that is suggested is that the trustee or his successor, the Official Receiver, or the original creditors might have ascertained Eades' whereabouts and what he was doing, had they exercised diligence to that end. That much, may, I think, be conceded, but *Ex parte Ford; Re Caughey* (1875), 1 Ch.D. 521, shows that the fact that the trustee made no inquiry if such was the fact raises no equity against him. In that case Jessel, M.R., said, p. 529:—

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It has never been decided that it is the duty of creditors or of the trustee to look after an undischarged debtor, or that if they do not look after him, though they may not be aware of what he is doing, they are guilty of laches, and their consent is equivalent to consenting to the debtor so dealing with the property.

I refer also to *Morris* v. *Ryman*, 13 N.S.W., L.R. Eq. 92 (1892). That the claim of he subsequent creditors was, according to the principles of abstract justice, exceedingly strong, particularly where they had extended credit to the bankrupt without any knowledge of the previous bankruptcy, was admitted by all the Judges in *Re Clark*, [1894] 2 Q.B. 393, but as the trustee had done nothing to raise an equity against him he was entitled to insist on his strict rights under the statute.

The foregoing cases put it beyond doubt th t as the law stood prior to the amendment o 1913, the after-acquired property of an undischarged bankrupt vested in the trustee, and he had a right to it unless, in the case of personal property, some third party had secured a claim upon it *bonâ fide* and for value before he intervened. They also establish that subsequent creditors had no legal claim to the property as against the trustee or to be paid their claims in preference to the original creditors, unless the subsequent trading was with the knowledge of the trustee —the onus of proving which was upon those who contested the trustee's right.

The next point is as to property acquired by the bankrupt after losing his English domicile, or being otherwise subject to the jurisdiction of the English bankruptcy laws. This is the real and at the same time the most difficult point involved in this case. Upon all other points some assistance could be derived from the decided cases, but I have found none with even a remote bearing upon this point.

As already pointed out, all the property of which Eades died possessed had been acquired by him after he had lost his English domicile, and after he had ceased to be amenable to the English Bankruptcy Act. The official receiver claims a title to this property by direct operation of the statute. The claims of the administrator or of the local creditors based upon the rule in *Cohen* v. *Mitchell*, 25 Q.B.D. 262, or on the ground of estoppel, have already been disposed of. What remains then to consider is the title of the official receiver founded upon the statute. The

official receiver asserts exactly the same claim to the Manitoba property as he would have to the property which existed at the time of the bankruptcy. He alleges that domicile has nothing whatever to do with the question. He argues that the statute vests in him all property acquired by or which devolves upon the bankrupt before his discharge wherever he or it may be located if within the British Dominions. On the other hand, it is pointed out that according to sub-sec. (*d*) of sec. 6 of the 1883 Act, a petition in bankruptcy can not be presented against a person unless he is (1) domiciled in England, or (2) within a year before the date of presentation he has ordinarily resided, or (3) had a dwelling house, or (4) place of business in England. It is plain that since the expiration of 1 year from the time when Eades took up his residence in Canada, or from the time he lost his English domicile, whichever of these events is of the most recent occurrence, a bankruptcy petition could not have been presented in England against him. From these premises it was argued that because Eades was not within the jurisdiction of the English Bankruptcy Court when the after-acquired property came into existence, it did not vest in the bankruptcy trustee. In this connection a number of cases were cited illustrating how the literal wording of the Act has been restricted by the Courts, and confined in its operation within much narrower limits than its language interpreted literally would give it. Taken in the order of their dates the cases cited were *Ex parte Crispin* (1873), L.R. 8 Ch. 374; *Ex parte Blain* (1879), L.R. 12 Ch.D. 522; *Ex parte Pearson*, [1892] 2 Q.B. 263, and *Cooke* v. *Vogeler*, [1901] A.C. 102. The first two cases named were decisions under the 1869 Act, which contained no definition of the term debtor, and the last two under the 1883 Act; in *Ex parte Crispin*, the debtor was a subject of and domiciled in Portugal, who had committed an act of bankruptcy in England. It was argued that the word debtor must be confined to debtors subject to the laws of England, and that as Crispin was a foreigner and had left before the petition was presented against him, as was the fact, he had ceased to be subject to the laws of England, and no petition could be presented against him. Mellish, L.J., said in answer:—

> We agree that the word "debtor" must be construed to mean "debtor properly subject to the laws of England;" but we are of opinion that it is the act of bankruptcy and not the petition which gives jurisdiction to the

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Court of Bankruptcy, and that if a foreigner comes to England and contracts debts in England, and commits an act of bankruptcy in England, he thereby gives the Court of Bankruptcy jurisdiction over him. (p. 379.)

In *Ex parte Blain, supra*, an attempt was made to extend the bankruptcy laws to two subjects of Chili domiciled and permanently resident there, who had never been in England, but who were members of a firm carrying on business in England. The case came within the Act, if it was to be literally construed, but the Court held that the Act only applies to British subjects, and to foreigners who have made themselves subject to English jurisdiction. It also held that an act of bankruptcy must be the personal act of the debtor, and not something done by a partner or an agent, unless specially authorized. As no such act had been committed by either of the alleged debtors, the Court had no jurisdiction to declare them bankrupts. In *Ex parte Pearson, supra*, the same doctrine was applied, and it was held that notice of a bankruptcy petition could not be served upon a subject of the United States, who had had a place of business in London. It was agreed by all the Judges that debtor in sec. 4 of the 1883 Act was not enlarged by the negative provisions in sec. 6, and that the word as used in sec. 4 does not mean a debtor all the world over, but means only a debtor who is subject to the law of England, by being either a subject of the King of England or by being resident temporarily or permanently within the allegiance of the British Crown.

The facts in *Cooke* v. *Vogeler, supra*, were these. The respondents were subjects of the United States, and resided and carried on business at Baltimore in that country. They also carried on business in London through a manager, and in England contracted debts and acquired assets. They executed at Baltimore, an assignment for the benefit of the creditors, and the London manager gave notice to the plaintiffs that they could not pay. Relying upon the assignment and notice as acts of bankruptcy, the petitioner presented a petition. The case finally got to the Lords where *Ex parte Crispin*, *Ex parte Blain*, and *Ex parte Pearson* were approved and followed, and the petition dismissed. These cases are useful as shewing that the Act cannot be interpreted literally, but in many cases must be given a considerably restricted meaning, otherwise they are distinguishable, as they turned upon the foreign nationality of the debtor.

None of them cover the precise point involved in this case, namely, does the Act of 1883 vest in the official receiver property acquired in Manitoba by the bankrupt after his bankruptcy, and after he had lost his English domicile? Neither the amending Act of 1913, ch. 34, nor the consolidating Act of 1914, ch. 59, throw any light on the matter. The former Act by sec. 11 and the latter by secs. 39 and 47 give legislative sanction to the rule laid down in *Cohen* v. *Mitchell*, *supra*, as applicable to real as well as to personal estate, thus overruling *New Land Development Assoc. and Gray*, [1892] 2 Ch. 138, and the cases which followed it. They also modify the rule in *Re Clark*, [1894] 2 Q.B. 393, and the case it followed in *Ex parte Ford*, 1 Ch.D. 521, by providing that in case of a second bankruptcy the after-acquired property should vest in the trustee in that bankruptcy, subject to any *bonâ fide* dealing of the bankrupt with such property, and also subject to any disposition which the trustee in the earlier bankruptcy may have made of such property before the second bankruptcy came to his knowledge. Both Acts have left untouched the disposition of after-acquired property of an undischarged bankrupt who has neither made a *bonâ fide* assignment for value of his after-acquired property, nor has been a second time adjudicated a bankrupt. There can be no reason why subsequent creditors in the case of a second bankruptcy should be protected and the subsequent creditors in the event of the liquidation of the after-acquired estate upon the death of the bankrupt should not. The Act construed literally is wide enough to include Eades' after-acquired property, but it clearly cannot receive a literal construction. For example, suppose Eades, instead of coming to Canada and acquiring a domicile and also an estate here had gone to the United States, or any other foreign country, and had become possessed of property thereafter having lost his English domicile, would it be contended that the Act was meant to vest such after-acquired property in the trustee? Of course not, because the property was, when it came into existence both in fact and in theory beyond the jurisdiction of the Imperial Parliament, and it will be presumed that the statute was not intended to operate where the Imperial Parliament could not give the law. I do not mention the fact because I want to intimate a doubt as to the right of the Imperial Parliament to pass legislation affecting the title to property in Canada, but merely to

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shew that some limitation must be put upon the literal meaning of the words of the Act respecting after-acquired property vesting in the trustee. Since a bankruptcy petition could not have been presented against Eades in England, it follows that if the English creditors are entitled to these assets, they will be getting the benefit of assets which they could not have availed themselves of under bankruptcy proceedings taken in England at any time during probably the past 20 years. I would be reluctant indeed to hold that the Imperial Parliament intended anything so anomalous. It is much more probable that it intended to vest in the trustee after-acquired property, which could be made available if necessary under a subsequent bankruptcy. I have therefore come to the conclusion that the Act of 1883 does not vest in the trustee property of the bankrupt acquired by him in Manitoba after he had lost his English domicile, and had ceased to be subject to the bankruptcy Courts there. The official receiver's statutory title in my opinion fails. Counsel for the official receiver made no claim to the property based upon comity of nations or the rule of private international law, by which judgments rendered in one part of the Empire by Courts of competent jurisdiction are recognized in another; but as the subject was discussed, I have examined the cases upon that subject with reference to the facts of this case.

Mr. Symington relied upon 2 English cases as shewing that as between England and the Colonies, the question of whether or not the trustee in bankruptcy became entitled to the personal property of the bankrupt, depended upon his domicile at the date of the bankruptcy. The cases relied upon were *Re Blithman*, 35 Bev. 219, L.R. 2 Eq. 23 (1865), and *In re Hayward*, [1897] 1 Ch. 905, which followed it. The facts in *Re Blithman*, were that an Englishman residing in England and being entitled to a reversionary interest n some stock went to South Australia. He engaged in business there, and afterwards became insolvent under the laws of South Australia. According to the South Australia Act, all property of the bankrupt present and future and wherever situate vested in the trustee. After his insolvency the reversionary interest fell in and shortly afterwards he died in Australia. The trustee of the reversionary interest paid the money into Court, and his widow and executrix applied to have it paid out to her. Lord Romilly, M.R., held that it depended upon domi-

cile alone whether the executrix or the trustee was entitled to the money. If the bankrupt's domicile was English, the executrix was entitled, if Australian, then the trustee was entitled. It was further argued that even if the domicile was not Australian, yet as bankruptcy was in the nature of a foreign judgment, and by reason of the comity of nations, the Court would give effect to it and give the parties the benefit of it as against the property in England. Lord Romilly said he was disposed to assent to that but did not think it would entitle the assignee to receive the money which should be paid to the executrix. He did not deny that the assignee might by appropriate proceedings against the executrix secure the money, but he left it to him to take such steps as he thought fit.

In the other case *Re Hayward, supra*, the real point was as to whether a life interest under a trust by will determinable upon bankruptcy was forfeited by an adjudication in bankruptcy in New Zealand. The *cestui que trust* was a domiciled Englishman, but had lived in New Zealand for a time, and then went to Australia where he remained. After his departure from New Zealand he was adjudicated a bankrupt there under a local Act, which provided that the property of the bankrupt whatsoever and wheresoever situate should vest in the assignee. By the terms of the will a forfeiture would not take place unless the alleged bankruptcy would have the effect, but for the forfeiture clause, of vesting the life estate in the bankruptcy trustee. The question thus directly presented for decision was whether personal property in England of a debtor whose domicile was also English would pass to the trustee under a New Zealand bankruptcy. Kekewich, J., before whom the matter was tried, accepted the decision in *Re Blithman, supra*, as binding, and held that the English property would not have vested in the New Zealand trustee, and therefore there was no forfeiture. Both *Re Blithman* and *Re Hayward* have been criticized by Phillimore, J., in the recent case of *Re Anderson*, [1911] 1 K.B. 896, as conflicting with *Re Davidson's Settlement Trusts* (1873), L.R. 15 Eq. 383, and *Re Lawson's Trusts*, [1896] 1 Ch. 175. Phillimore, J., says that if *Re Blithman*, and *Re Hayward*, conflict with *Re Davidson's Settlement Trusts* and *Re Lawson*, then he prefers the latter 2 cases and follows them. Even if Phillimore, J.'s criticism of *Re Blithman* and *Re Hayward* is not well founded, as to which I offer no opinion, they are both

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easily and satisfactorily distinguishable from the present case. Both of these cases had to deal with colonial bankruptcy statutes, which no matter how comprehensive the language used could not directly operate upon the title to property outside the colony, while an Imperial statute, with which I have to deal, may do so. Whether or not it does do so, depends entirely upon the intention of parliament as xpressed in the Act.

Neither *Davidson's Settlement Trusts*, *Re Lawson's Trusts*, nor *Re Anderson*, as I read these decisions, went upon the ground that the title to English property of a bankrupt whose domicile was also English actually vested in the trustee under a colonial bankruptcy, because of any extra territorial operation of the colonial statutes. The decisions in these 3 cases were, as I understand them based not upon the domicile of the debtor but upon the comity of nations. There were valid colonial judgments under Acts which declared that upon recovery of such a judgment, the property of the debtor wherever situate should vest in the trustee appointed. These judgments could have no direct effect upon the title to property in England but by comity, English Courts recognize them as valid and binding and carry them into effect, by handing over the property to the trustee. That is what these cases decide. For the application of this principle of private international law it makes no difference where the debtor is domiciled.

None of these 3 cases except *Lawson's Trusts* had to deal with after-acquired property. In *Re Davidson's Settlement Trusts* and *Re Anderson*, the property was in existence at the date of the colonial bankruptcy. In *Re Lawson's Trusts* the property consisted of a fund in Court in England which became a part of the bankrupt's estate under his father's will subsequent to his bankruptcy in Bombay. The judgment of North, J., consists of but a few lines and seems to have been delivered at the conclusion of the argument. The payment out to the trustee in bankruptcy was not opposed by those who would otherwise have been entitled to the fund, and the only point considered was whether administration should not be taken out in England. *Re Davidson's Settlement Trusts* had decided that it was not necessary to take out administration in England, and North, J., followed that decision. There were 2 grounds upon which the judgment in

favour of the trustee might have been supported, other than that of international comity. In the first place the Act under which the adjudication in insolvency took place was an Imperial statute, and in the second place upon the facts as stated in the report it would appear that the bankrupt's domicile was not in England but in Bombay. For these reasons I think *Re Lawson's Trusts* can not be treated as a decision that the rule of private international law under which upon a binding adjudication in bankruptcy in any of the King's Dominion which has jurisdiction over the person of the debtor will operate as an assignment of the moveables of the bankrupt wherever locally situated, extends to property acquired in another part of the Empire after he had acquired a new domicile there. The point comes squarely before the High Court of Australia in *Hall* v. *Woolf*, 7 C.L.R. 207 (1908). A debtor domiciled in Queensland became bankrupt there under the local law, by which present as well as after-acquired property vested in the trustee. While still an undischarged bankrupt the debtor removed to and acquired a new domicile in Western Australia. In the latter province he acquired property and again became a bankrupt. The Queensland trustee claimed the after-acquired property, upon the ground that not only should the original assignment to the Queensland trustee be recognized in Western Australia, but also the provision of the Queensland insolvency law, which enacted that all property acquired by the insolvent after his insolvency, and before discharge, should pass to the trustee. The Court conceded the applicability of the rule to moveable property existing at the date of the Queensland insolvency wherever locally situated, but denied that it extended to property acquired in Western Australia, after the debtor had lost his Queensland domicile. Griffith, C.J., who delivered the judgment, said that in their opinion it was

> Quite clear that as soon as the debtor ceases to be domiciled in the country of adjudication, the law of that country ceases to have any application to his after acquired movables situate elsewhere.

The Queensland statute could, of course, have no direct operation in Western Australia, so that the decision turned entirely upon the application of the rule of private international law. The same was apparently held in *Strike* v. *Gleitch*, noted New Zealand Digest, 1861 to 1902, at 59. For these reasons I am of opinion that had the official receiver made an alternative claim based upon the

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rule of private international law, it also would have failed. If a claim based upon mere comity were allowed it would probably be subject to the claim of the local creditors. In none of the cases mentioned except *Hall* v. *Woolf*, *supra*, did the rights of subsequent creditors come in question, and consequently that phase of the subject had not to be considered. It may well be that if the official receiver's right to the property depended upon comity alone it would be held that the demands of international courtesy do not require that property created upon the credit of local creditors should be taken from them without allowing them even a *pro rata* share in its distribution, and that the rule would be applied with a due regard to the rights of our own citizens, *per* Griffith, C.J., *Hall* v. *Woolf*, at 211. Storey, Conflict of Laws, 575

The next question is, what, under the circumstances, are the rights, if any, of the English creditors or the official receiver apart from the interest of the latter as residuary legatee under the testator's will? Are they, or is he, a creditor entitled to rank upon the estate in the hands of the administrator? By sec. 9 of the Bankruptcy Act of 1883, all creditors to whom the debtor was indebted when the receiving order was made in respect of a debt provable in the bankruptcy are deprived of all remedy against the property or person of the bankrupt. After a receiving order is made their only remedies are those provided by the Act for provable debts, and their right is to receive their distributive share of the property which under the Act vests in the trustee. Clearly none of such creditors could have sued Eades in England for any provable debt after he was there adjudicated a bankrupt, and neither could they have sued him since he came to Canada. *Spalding* v. *Bailey*, 17 V.L.R. 478. Eades' English creditors, existing at the time of his bankruptcy there, are not, therefore, creditors entitled to rank in their own right upon his estate in the hands of the administrator. If they have any claim at all, it must come through the official receiver. But he is not a creditor of the bankrupt, either in his own right, of as trustee for the creditors. Their claims against the debtor are not vested in him. All the property of the bankrupt, including choses in action, passed to him, and he may "bring, institute or defend any action or other legal proceeding relating to the property of the bankrupt," sec. 57 (2), but he can bring no suit or action, make no

claim upon the bankrupt, except in respect of property, which by the terms of the Act is vested in him. He has no other right of action or suit against the debtor either in his own right or in his official capacity, and is not a creditor entitled to rank on the estate in the hands of the administrator either *pari passu* with or after the claims of the local creditors have been satisfied. In my opinion, he is only entitled to what the will gives him. A question might arise as to the disposition of the surplus had there been no will disposing of it, but I am not called upon to go into that question. I have already discussed the question of international comity, and have held, adopting the reasoning in *Hall* v. *Woolf, supra*, that the rule does not apply to property acquired in another part of the Empire after a change of domicile, and while the debtor is no longer subject to the bankruptcy laws of the place where he was made a bankrupt.

The net result is, in my opinion, that the administrator should administer the estate according to the terms of the will paying the local creditors first, then the legacies, and handing the surplus over to the official receiver.

The costs of all parties should be paid out of the estate as between solicitor and client. *Judgment ac ordingly.*

HARMER v. MACDONALD CO., Ltd.

Saskatchewan Supreme Court, Sir Frederick Haultain, C.J., and Newlands, Lamont, Brown and McKay, JJ. March 10, 1917.

CONSTITUTIONAL LAW (§II A—194)—REGULATION OF FOREIGN COMPANIES—"DOING BUSINESS"—DOMINION COMPANY.

The provisions of the Companies Act 1915 (Sask.), requiring all companies to register and take out an annual license, do not affect the status or powers of companies, are *intra vires* of the legislature, and are applicable to companies incorporated under Dominion legislation.

[*John Deere Plow Co.* v. *Wharton*, 18 D.L.R. 353, [1915] A.C. 330, *The Companies Case*, 15 D.L.R. 332, 48 Can. S.C.R. 331, 26 D.L.R. 293, [1916] A.C. 598, considered; see also annotations, 18 D.L.R. 364, 26 D.L.R. 295.]

Statement.

APPEAL by defendant, a Dominion company, from the judgment of Elwood, J., 30 D.L.R. 640, ordering it to take out a license under the Sask. Companies Act, 1915. Affirmed.

E. L. Bastedo, for appellant.

H. E. Sampson, for Att'y-Gen'l.

The judgment of the Court was delivered by

Newlands, J.

NEWLANDS, J.:—The defendant company was incorporated by letters patent issued by the Secretary of State for Canada

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under the Companies Act, R.S.C. 1906, ch. 79. The company is a wholesale and retail merchant and is doing business in Saskatchewan. It was registered under the Foreign Companies Act of Saskatchewan, R.S.S. (1909) ch. 73, but refused to pay the annual license fee prescribed by that Act and was struck off the register of joint stock companies and thereby became liable to a penalty of $25 per day for each day it did business without such license.

This action was brought by a shareholder of said company to compel it to take out such license and was for the purpose of testing the validity of the Companies Act of Saskatchewan.

Following the decision of the Privy Council in *John Deere Plow Co.* v. *Wharton*, 18 D.L.R. 353, [1915] A.C. 330, the Foreign Companies Act above mentioned was repealed and the Companies Act of 1915 was passed. This Act applies to all companies both provincial and foreign.

By sec. 25, every company upon complying with the provisions of that Act, may receive a license to carry on its business and exercise its powers in Saskatchewan. This license is to expire on December 31 in each year and is renewable on payment of a prescribed fee.

Sub-sec. (5) of sec. 25 provides that every company that carries on business in Saskatchewan without a license, and certain officers of the company, shall be guilty of an offence and be liable on summary conviction to a penalty not exceeding $25 for every day the default continues.

On behalf of the defendant company it is contended that these provisions are *ultra vires* of the legislature of Saskatchewan, in that they prevent the company from doing business in Saskatchewan, that being one of the powers conferred on the company by its charter. *John Deere Plow Co.* v. *Wharton*, 18 D.L.R. 353, is cited as the authority for this proposition.

It is quite obvious that the legislature, in passing the Companies Act in 1915, intended to remove from the laws of the province as applicable to companies incorporated under an Act of the Dominion Parliament, the provisions, that the Privy Council held in the case of the *John Deere Plow Co.* v. *Wharton*, to be *ultra vires* of the legislature of B.C.

Prior to the 1915 legislation there was a special Act applying

to all companies not incorporated under an Act of the legislature of Saskatchewan, called the Foreign Companies Act. This Act provided amongst other things that any company required to be registered should not while unregistered be capable of maintaining any action in any Court in respect of any contract made in whole or part in Saskatchewan. This provision having by the above mentioned case been held to be *ultra vires* is dropped from the 1915 Act, and in further compliance with what is suggested by that decision, the law of the province, as relating to incorporated companies, is made generally applicable to all companies.

We therefore start out with the proposition that the legislature in passing the Companies Act in 1915 intended to keep within its powers as interpreted by the Privy Council in *John Deere Plow Co.* v. *Wharton*, *supra*. The principle decided in that case is contained in the following quotation, p. 360:—

> It is enough for the present purposes 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.

Therefore I take it that the legislature intended to refrain from anything that would "destroy the status and powers of a Dominion company" and to make their legislation applicable to companies, of general application to all companies wherever incorporated.

I am aware, however, that the intention of the legislature can only be obtained from the language they have used, and therefore if the intention which I have suggested is quite obvious in the passing of the 1915 legislation, is not borne out by the language used, then we cannot give that meaning to the Act.

Counsel for the defendant argued that the provision that every company which carries on business in Saskatchewan without a license would be guilty of an offence, and liable on summary conviction to a penalty of $25 for every day the default continues, was a prohibition against carrying on its business in the province while unregistered or unlicensed. That because the legislature imposed a penalty for doing business such acts would be unlawful, and all contracts entered into by the company would be void, the legislation, therefore, acting as a direct prohibition to doing business. In support of this proposition he cited a

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number of cases, amongst them, the following:—*Bensley* v. *Bignold*, 5 B. & Ald. 335; 106 E.R. 1214; *Little* v. *Poole* (1829), 9 B. & C. 192; 109 E.R. 71; *Haug Bros.* v. *Murdock*, 26 D.L.R. 200.

In all these cases a penalty was imposed for doing a certain act unless the requirements of the statute in that behalf were complied with. I refer to only one case, that of *Haug Bros.* v. *Murdock*, decided in our own Courts. There a statute provided that all engines sold in the province should comply with certain regulations of the Department of Public Works. A penalty was imposed for a breach of this provision. The plaintiff sold an engine to defendant which did not comply with the regulations, and the Court held that the legislature had impliedly forbidden the sale of an engine in the province unless the regulations were complied with, and that therefore the contract was illegal and plaintiff could not recover. The prohibition of a particular act under a penalty is altogether different from requiring a general regulation to be complied with under a penalty. In the one instance the specific act is forbidden, in the other case no specific act is forbidden, but the party is required to comply with some regulation if he intends to do business, in this case, as in the case of *Smith* v. *Mawhood*, 14 M. & W. 450, for the purposes of the revenue.

The expression "carries on business" in this Act should be construed as that expression was by Duff, J., in *Re Companies*, 48 Can. S.C.R. 331 at 416, 15 D.L.R. 332, (26 D.L.R. 293, [1916] A.C. 598):

> That is to say, so that the company as a company is present at some place within the province.

What I mean by this is, that it was not the intention of the legislature to prohibit any company from "doing business." This expression is used to designate what companies are to become registered and are to pay an annual license fee, that is, companies that are actually in the province. A Dominion or foreign company, not having a physical existence like a natural person, can only show that it is in the province by "doing business" there.

This legislation does not, therefore, deprive the company of its status or its powers. It comes under the principle laid down in *John Deere Plow Co.* v. *Wharton*, by Haldane, L.C., p. 362:—

> It is true that even when a company has been incorporated by the Dominion Government with powers to trade, it is not the less subject to pro-

vincial laws of general application enacted under the powers conferred by sec. 92 (B.N.A. Act, 1867). Thus notwithstanding that a Dominion company has capacity to hold land, it cannot refuse to obey the statutes of the province as to mortmain (*Colonial Building and Invest. Assn.* v. *Att'y.-Gen'l. of Quebec*, 9 App. Cas. 157); or escape the payment of taxes, even though they may assume the form of requiring, as the method of raising a revenue, a license to trade which affects a Dominion company in common with other companies (*Bank of Toronto* v. *Lambe*, 12 A.C. 575).

And further on he says, p. 363:—

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.

The legislation in this case does not go so far as it was suggested by the Lord Chancellor they might go. The law in question is a general law, and requires all companies to register, not simply foreign companies, and as they are subject to laws of general application, which in this instance means of general application to corporations, because the Mortmain Acts which were in *Colonial Building & Invest. Assn.* v. *Att'y-Gen'l, supra*, held to be general law which foreign companies must observe, applies only to corporations.

The provisions of the Act requiring all companies to register and to take out an annual license being general law of the province, applicable to all companies, and not in any way affecting the status or powers of the company, because as I have said it does not prevent the company from exercising its functions and doing business within the province, was therefore *intra vires* of the legislature and must be obeyed by the defendant company.

It is unnecessary for me to discuss the question as to whether the fees payable are direct taxation as this is clearly decided in *Bank of Toronto* v. *Lambe*.

The appeal should therefore be dismissed with costs.

Appeal dismissed.

NORTHERN CROWN BANK v. WOODCRAFTS LTD.

Alberta Supreme Court, Appellate Division, Scott, Stuart and Beck, JJ. January 13, 1917.

1. GUARANTY (§ II—11)—DISCHARGE—CHANGE OF CONTRACT—INTEREST—EXTENSIONS—DEATH.

An illegal increase in the rate of interest charged the principal debtor will not render a guarantee null and void, nor will the renewal made, after revocation of the guarantee, of notes made before the revocation, discharge the guarantor from liability therefor.

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2. EVIDENCE (§ IV J—435)—CONCLUSIVENESS OF ACCOUNTS—PRINCIPAL AND SURETY.

A provision in a guaranty, that the stating, settling or admission of an account between the principal debtor and creditor shall be conclusive evidence against the sureties, will not prevent the sureties from objecting to illegal charges, nor to charges not illegal but improper to the knowledge of the creditor.

Statement.

APPEAL by defendants, except McCrystle and Davis, from the judgment of Walsh, J. 28 D.L.R. 728. Varied.

A. H. Clarke, K.C., for respondents.

M. B. Peacock, and *P. W. McLean*, for Breckenridge estate; *O. M. Biggar*, K.C., and *L. H. Miller*, for other defendants.

The judgment of the Court was delivered by

Beck, J.

BECK, J.:—Woodcrafts, Ltd., were doing business with the plaintiff bank. To enable the company to carry on its business it needed "a line of credit" with the bank. The bank granted a line of credit May 8, 1911, for $20,000, increased December 14, 1911, to $50,000 and further increased April 8, 1912, to $75,000, taking on each of these occasions a guaranty from the directors all on the same printed form. The last one was in substitution for the earlier ones and is the only one calling for consideration. The material terms of this guaranty are as follows:—

In consideration of the Northern Crown Bank agreeing and continuing to deal with Woodcrafts Ltd., Calgary, Alta., herein referred to as the "customer" in the way of its business as a bank the undersigned hereby jointly and severally guarantee payment to the bank of the liabilities which the customer has incurred or is under or may incur or be under to the bank whether arising from dealings between the bank and the customer or from other dealings by which the bank may become in any manner whatsoever a creditor of the customer, including in such liabilities all interest, computed with quarterly or other rests according to the bank's usual custom, charges for commission and other expenses and all costs, charges and expenses which the bank may incur in enforcing or obtaining payment of any such liabilities (the joint and several liability of the undersigned hereunder being limited to the sum of $75,000 with interest at the rate of 7% per annum from the date of demand for payment of the same, which it is agreed the same shall bear).

And the undersigned agree that the bank may refuse credit, grant extensions, take and give up securities, accept compositions, grant releases and discharges and otherwise deal with the customer and with other parties and securities as the bank may see fit and may apply all moneys received from the customer or others or from any securities upon such part of the customer's indebtedness as it may think fit, without prejudice to or in any way limiting or lessening the liability of the undersigned under this guarantee. . . .

And this shall be a continuing guarantee and shall cover all liability which the customer may incur or come under until the undersigned or the

executor or administrators of the undersigned shall have given the bank notice in writing to make no further advances on the security of this guarantee.

And it is agreed that this guarantee shall not be affected by the death of the undersigned. . . .

Any account settled or stated by or between the bank and its customer or admitted by the customer may be adduced by the bank and received as conclusive evidence against the undersigned of the balance or amount thereby appearing due from the customer to the bank and shall not be disputed or questioned by the undersigned.

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The arrangement whereby it was agreed that the bank should give the company a line of credit to a stated amount did not in my opinion create any contract between the bank and the company; it amounted, I think, to nothing more than the local manager obtaining at the instance of the company, the authority of the head office of the bank to make to the company from time to time advances not exceeding in the aggregate the amount stated. The contract or contracts between the bank and the company, when we come to consider the rights of the defendant guarantors, were not this arrangement, but the notes taken by the bank from the company from time to time representing various actual advances.

Up to January 22, 1913, these advances were made by way of discounting notes at the rate of 7% per annum.

Then the head office of the bank notified their local manager to inform the company that in future the rate charged would be 8% instead of 7.

The company was so informed and these instructions were carried out in respect of further advances or renewals of notes already given.

Breckenridge, one of the guarantors, died on May 28, 1913, and in August, 1913, the bank was notified by his executors to that effect and that his estate would not be liable to the bank with respect to any indebtedness incurred by the company after the date of Breckenridge's death and the notice went on to say that—

The said guarantee is hereby revoked and discontinued and that the estate of the said Breckenridge deceased will not be liable for any indebtedness or liability which may be incurred by the said Woodcrafts Limited, hereafter.

On March 13, 1915, the bank gave the individual defendants as guarantors and the defendants, executors of Breckenridge, formal notice that the company had made default in payment of

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7 designated items and demanded payment of them by these defendants.

The items designated in this notice were as follows:—1. Note Woodcrafte Ltd. to the bank for $49,325.54 together with interest at 7% from January 22, 1915. 2. Advance (overdraft of current account) of $1,267.71 with interest at 7% from February 27, 1915. 3. Note McCrystle to the company endorsed to the bank for $655 with interest at 7% from February 1, 1915. 4. Note Davis to the company endorsed to the bank for $2,805.35 with interest at 7% from February 25, 1915. 5. Note Spence to the company endorsed to the bank for $1,675 dated February 22, 1915, with interest at 7%. 6. Note Alberta Financial Brokers, Ltd., to the company endorsed to the bank for $500 dated February 15, 1915, with interest at 7%. 7. Note Edwards & Neugebauer to the company endorsed to the bank for $230 dated February 26, 1915, with interest. These are the claims sued for in the action.

One of the grounds of defence put forward by the guarantor defendants is that they are discharged because the bank increased the rate of interest charged to the company from 7 (lawful under the Bank Act) to 8 (unlawful), and did not notify the guarantors of this change.

In my opinion the increasing of the rate of interest ought not to be looked upon as a change in the terms of the contract or contracts between the principal debtor and the creditor. As I have pointed out there was not one initial contract, but each advance by the bank was a contract, and what the indemnity covered was the various advances so made up to the amount of $75,000.

If, on the company applying to the bank for an advance, the bank deducted from the amount by way of discount an amount, which represented more than interest at the rate of 7% per annum in advance, the excess would be illegally deducted by reason of the provision of sec. 91 of the Bank Act. The result would be that the advance asserted to be made was not in fact made to the full amount, and the sureties would be liable in respect only of the actual advance, less only such interest as, in view of the section, could then be legally retained, although by reason of the debtor itself voluntarily paying the illegal surplus it could not recover it.

If, on the company appyling for an advance, the bank, instead of deducting interest by way of discount, took a note bearing interest at a greater rate of interest than 7% per annum, then similarly, when the bank charged the company with the amount of the note and interest at maturity, the bank would be charging to the company more than it legally was entitled to charge, by the amount by which the increased rate of interest exceeded 5% per annum, thereby increasing improperly, as against the sureties, the company's indebtedness, although the company, itself, if it subsequently recognised the propriety of the charge, could not itself recover it back. Again, if, in the latter case, a renewal were taken, the sureties would not be liable except to the extent of the actual advance then made, that is to say, the amount then necessary to meet the amount legally recoverable upon the matured note then charged which the renewal was intended to replace. See *Swan* v. *Bank of Scotland*, 10 Bligh N.S. 627; 6 E.R. 231.

The law as to interest is settled by *McHugh* v. *Union Bank*, 10 D.L.R. 562 at 573, [1913] A.C. 299 at 315.

That the state of the account as settled between the debtor and the creditor whether sought to be established by agreement or admission is not binding upon the surety in such a case as this is also settled. The cases are collected in de Colyar on Guarantees (3rd ed.), pp. 207, 225; and see *Jordan School District* v. *Gaetz*, 23 D.L.R. 739, 8 A.L.R. 433.

The express provision in the guarantee to the effect that the stating, settling or admission of an account between the company and the bank shall be conclusive evidence against the sureties cannot be effective to prevent the sureties from objecting to illegal charges, nor I think to charges which, though not illegal, were improper to the knowledge of the bank. *Re Chatham Banner Co., Bank of Montreal's Claim*, 2 O.L.R. 672, and cases there cited.

There are some special contentions of the executors of Breckenridge, and contentions arising out of them made by the other sureties. Of course, no notice of revocation, assuming it to be effective in such cases as the present, could affect a liability arising prior to the revocation. There were, however, renewals of notes taken in respect of past liabilities, and it is contended that each

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such renewal was a giving of time to the company which discharged the sureties or at all events the executors. I think they had not this effect. The guaranty, as has been stated, contains a provision authorising in anticipation the giving of time and also a provision that the guaranty shall not be affected by the death of the guarantors (which must be read distributively).

In view of these two provisions it is in my opinion not open to contend that the executors were discharged by reason of renewals of notes taken after notice of the death of Breckenridge in respect of advances already made.

It was asserted I understand as a fact that the notes of McCrystle and some others represented advances made after notice of the death of Breckenridge (August 7, 1913). This seems to be the case with regard to the McCrystle note. It may possibly be the case with regard also to those of Davis, Spence, Alberta Financial Brokers and Edwards & Neugebauer or with regard to part of the amount included in their present outstanding notes and these questions, so far as either party desires it, may be made part of the subject-matter of a reference which I think it will in any case be necessary to direct.

If the executors of Breckenridge are not satisfied that there were no further advances made after August 7, 1913 (for this purpose mere renewals must not be considered new advances), they should be entitled to have an enquiry upon this question.

I think that neither the death of Breckenridge nor notice thereof to the bank—no notice being given by his co-sureties—affected their liability to the bank as sureties, their liability being several as well as joint and the contingency of death being provided for. See *Beckett* v. *Addyman*, 9 Q.B.D. 783.

A question was raised by the executors of Breckenridge as to appropriation of payments—they contending that whatever deposits were made by the company to its current account should, as against them, be applied in satisfaction of the company's indebtedness for which the bank held the guaranty. To so hold would be contrary to the evident intention of all parties concerned. A contrary intention on the part of both the bank and the company was shewn by the moneys being not so applied and by the indebtedness being continued to be represented by renewal notes.

There is no artificial rule on which the contention can possibly be sustained.

In the result I think the judgment of Walsh, J., should be varied. I think there should be a reference to someone to be appointed by a Judge to ascertain for what amount the sureties on the guaranty are liable, distinguishing if necessary between the executors of Breckenridge and the others, having regard to the principles I have stated as limiting their liability. The direction to the referee should be to the effect that in taking the account (1) where a note of the company, whether it bore interest on its face or not, and, if it did, irrespective of whether the rate exceeded 7% per annum or not was discounted and discount deducted from the amount credited, if the amount deducted represented more than interest at 7% per annum the overcharge should be charged to the bank; (2) where a note of the company was discounted, which bore interest on its face at a rate exceeding 7% per annum and discount was not deducted, but the amount of the principal and interest of the note was charged at or after maturity, the surplus over the principal and interest at 5% per annum should be charged to the bank: (3) where a note not of the company was discounted any overcharge beyond a charge at the rate of 7% per annum should be charged to the bank; (4) when the amount of the company's indebtedness has been reduced as against the sureties by the deduction of all such overcharges, interest on the balance should be allowed to the bank only at the rate of 5% per annum up to the date of the demand by the bank upon the sureties (March 13, 1915), and thereafter at 7% per annum. In the order of reference the other inquiries referred to should be included if desired.

The plaintiff bank should probably bear the costs of the reference in any event, but I would reserve them to be dealt with by a Judge. If this judgment is accepted or affirmed, no doubt the amount can easily be calculated and agreed upon, without the necessity for a reference or subject to a reference to a very limited extent.

The appellants succeed only to a very limited extent and so I would give no costs of the appeal.

Appeal allowed in part.

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HENDERSON v. INVERNESS RAILWAY & COAL CO.

Nova Scotia Supreme Court, Graham, C.J., and Drysdale, J., Ritchie, E.J., and Harris and Chisholm, JJ. January 27, 1917.

CARRIERS (§ III D—395)—PROOF OF DELIVERY—RECEIPT—ONUS.

A receipt for goods by the consignee's agent is not necessarily conclusive as to their actual delivery; the burden of proof is upon the carrier to shew that the goods were in fact delivered.

[See 16 D.L.R. 420.]

Statement. APPEAL from the judgment of Meagher, J., in favour of the defendant company in an action claiming damages for the non-delivery of a package of goods shipped by the defendant's railway to be delivered to the plaintiff at Inverness, C.B. (A previous appeal in the same action is reported in 16 D.L.R. 420, 47 N.S.R. 530). Reversed.

T. W. Murphy, K.C., for appellant; *H. Mellish*, K.C., for respondent.

Graham, C.J. GRAHAM, C.J.:—The sole question in dispute in this case is whether the defendant company, which received a case of clothing at Point Tupper, to be delivered at Inverness, delivered it at Inverness station to one Hugh McQuarrie, the carter generally employed by the plaintiff, a merchant at Inverness. The defendant's employee, one Tonnery, was the assistant station-master at Inverness, and he has died, but if it was delivered to McQuarrie, it was delivered by him.

The action was brought March 19, 1913; Tonnery died subsequently, namely April 1, without his evidence being taken. The plaintiff himself did not receive it, nor was it received into his shop. The judgment for the defendant involves the crime of theft and of perjury on the trial on the part of McQuarrie; while, on the other side, there is not a sentence of sworn testimony, direct or circumstantial nor an admission by him to the effect that he ever received the goods, much less that he stole them. What the course of business shews I shall deal with presently.

The action has been tried twice and by the same Judge. On the first occasion it was sent back for a new trial, the Judges standing two to one in their opinion. With great deference, of course, to the Judge who dissented, I wish to say that I agree with the opinion of the majority.

That the trial Judge did, in his first judgment, take into consideration the burden of proof is clear from an extract from his

decision quoted in one of the opinions on the appeal. It is as follows:—

> The burden of proving delivery was, of course, upon the defendants in the first instance; they had to shew as against the plaintiff's evidence that he never received it—I mean that it never came into his store—due performance of their contract to carry and deliver. The production of the truckman's receipt discharged that burden, and in turn cast it upon the plaintiff, and, in the view I take of the evidence, upon that branch, and to the extent to which I feel constrained to believe it, or otherwise. I do not think he has satisfied it—at any rate to such an extent as to oblige me to find, or justify me in finding, in his favour.

The trial Judge in his first judgment also says:—

> While I feel constrained upon the evidence as I regard it, to find for the defendants, I do so with reluctance, and not without some misgiving that my view may be erroneous.

The course of business, when a way bill arrived at the station was to take the carter's receipt upon it, and then for him and the assistant to go to the car that evening, but generally the next day, to get it, or to the freight shed if it had been removed thither. The station agent retained the waybill. If the goods had not arrived, it was customary to mark "short" on the way bill, and if it was an article short of a lot arriving, to tick off those delivered. But the station master retained the waybill. Indeed, as a witness called by the defendant shews, this procedure obtains with at least another company in this province, namely, the Dominion Atlantic R. Co. The receipt in this case, signed by McQuarrie, is thus fully explained. And when the trial Judge, at the previous trial, founded upon the receipt as changing the burden of proof, and casting it upon the plaintiff, that assumption as Ritchie, J., pointed out on the appeal, could not be depended upon, and the case went back for a new trial.

Now the trial Judge says in effect that he disbelieves McQuarrie and decides the case quite irrespective of the burden of proof and the receipt. That is another matter. I quote from the decision:—

> I have pursued the same course again and find myself unable (because of my inability to believe McQuarrie's evidence that he did not get the case, which was the controlling consideration with me before) to find for the plaintiff. I did not then, and do not now, decide upon the burden of proof merely, but upon a consideration of the whole facts and circumstances. I did not believe McQuarrie then and thought I had sufficiently indicated that conclusion. I deemed, and still deem, his version a wholly improbable one, and his conduct, and his demeanour as a witness, were not such as to impress me at all favourably.

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Of course, a Judge seeing the demeanour of a witness has an advantage. But when, in stenographic reporting, every word of a witness is taken and a rigid cross-examination takes place, the Court of Appeal has much greater advantages than formerly. As to the mere demeanour, or the appearance of a witness in the box, after a long experience at *Nisi Prius*, I must confess I have never been able on that alone to depend much and discover when a witness was telling an untruth, or whether he had committed a crime. One requires more.

In this case, from the reported evidence, I would have no reason to suspect McQuarrie of theft and then perjury. If he stole the goods it was while Tonnery was yet alive and he would be inevitably confronted with Tonnery in the witness box. He would expect Tonnery to meet him there and if the trial Judge's theory is correct to expose him by saying, "Why when we went to the freight shed on that occasion I delivered to you the case of clothing and you took it away." How could he expect a jury to believe him with Tonnery to confront him with the many details that Tonnery might have in reserve to overwhelm him. Then a man who steals has some motive of gain, and the witnesses would be forthcoming if McQuarrie had even attempted to dispose of Clayton and Sons' 37 suits of clothing in a place like that; it is not a city. I have noticed that a witness will seldom venture to swear falsely with witnesses about, who may confront him some day, for these trials are public.

Now let us look at the course of business, because, as I have already intimated, there is no sworn testimony that the case of clothing was ever delivered at that station, and, moreover, there is nothing by way of admission which implicates McQuarrie in receiving the case. The Judge has spoken very favourably of the plaintiff and has in effect found that the clothing was never received by him nor came to his shop. It was not at all admitted, nor common ground, that the case was ever left at the Inverness station.

It is common ground that the goods were received by the defendant company from the I.C.R. at Point Tupper. Two forms, counterparts, are in use by the defendants, attached to each other in the first instance—a receipt for the goods and a receipt for the freight. Now, in this case the freight was paid,

but the company, in dealing with this plaintiff, do not require the cash for each transaction, but a payment is made periodically and without reference to whether the articles have all come to hand or not; it, with other sums due, was paid over in a lump sum by the carter in the ordinary course from moneys received by him from the store. These goods have never come to the store, but the freight account for the period, including this item, was rendered, and it was paid some 10 days after the alleged delivery. But, I think, no point was attempted to be made against the plaintiff on that score.

As to the other document, the waybill, which, as I have already intimated, was receipted by McQuarrie, contains as to the receipt no admission against McQuarrie. The receipt on it, as I said, is explained. That is the course of business, and does not imply an actual receipt of the goods. The waybill is not marked "short," but that course was not always taken. The item is not ticked off, but that would be unusual when there would be but one item of goods. The plaintiff does not seem to have been apprised of the circumstances. As a fact, there was illness in his family; and the carter does not appear to have followed the matter up; and it was not until Clayton and Son drew for the price that the matter of the delivery came up. Then the station master fell back on his receipt. I do not think it points to guilt on the part of McQuarrie that he went to the station and asked to see his receipt and possibly anything which would help out his theory. The guilty man does not generally do that. He went as if he were innocent. On the other hand, because McBain, the station master, made inquiry as if the case had gone astray, that does not imply necessarily that it was not delivered. William McBain has an entry in his book of the arrival of that case on March 14, 1912. That entry is taken from the waybill which arrived at that station. But he, honestly enough, only speaks from the book; he never saw the case of goods or knows anything directly or indirectly of its actual arrival; that entry is from hearsay, and does not put the matter any further forward for the railway company.

I think there must be some affirmative evidence of a delivery of the goods to McQuarrie, that being the issue here, before there can be a judgment for defendant. Disbelieve his evidence if you like, there is nothing in it to support the defendant's theory.

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One word about his not being called again at this trial. The practice on a second trial here to put in by consent the printed evidence and supplement it by calling any witness on either side is so usual in this Court that I am surprised to see it mentioned. Of course, the plaintiff's counsel might have made the demonstration after McQuarrie's evidence was put in, "Now, I will put him up for cross-examination by the other side if they wish to do so." But, equally, the defendant's counsel had it in his power to say, I wish to cross-examine Mr. McQuarrie further, and, of course, he would have to be put in the box. Indeed, the defendant's counsel might have refused to allow his evidence in the printed book to be used at all, and thus have enforced his opportunity to cross-examine further. But because he, the plaintiff's counsel, did not make the demonstration, and the defendant's counsel did not mention the subject, I assume neither wished to have any further evidence, and so it passed. Nothing is to be gained by a point like that.

I am not at all satisfied that McQuarrie ever received this case of goods. And it is quite possible that it went astray, as sometimes happens. McQuarrie may be blameworthy that he did not keep this item of goods in his mind, the next day, independently of any inquiry from the store, but there is a great difference between that and the crimes which it is necessary to impute to him in order to have this judgment stand.

I think the appeal ought to be allowed with costs, and that the plaintiff should have judgment for damages mentioned in the opinion of Harris, J., with costs.

Drysdale, J.

DRYSDALE, J. (dissenting):—This case was tried twice, and with the same result, viz., a finding in favour of defendant company. It is common ground that the goods in question entrusted to defendant company duly arrived at the point of destination, the only question in controversy being as to whether or not they were delivered to plaintiff's agent, McQuarrie. The defendant company hold the latter's receipt therefor, and were duly paid the freight thereon. McQuarrie attempted an explanation of the receipt and a denial of receiving the goods. The trial Judge did not believe his explanation or denial, but expressly found he actually received the goods. He was admittedly the agent of plaintiff, and, in so receiving them, acted within the scope of his

authority. In view of this express finding of fact, I think the appeal must be dismissed with costs.

RITCHIE, E.J.:—In my judgment in this case, reported in 16 D.L.R. 420, 47 N.S.R. 534, I said: "If, without any reference to the burden of proof, the Judge had found against McQuarrie's evidence, that would have been an end of the case for the plaintiff." This remark was not necessary to the decision of the case, and consideration of the argument made by Mr. Murphy on the second hearing has convinced me that I was wrong in making it. I see no reason to change the view which I expressed as to the burden of proof. It rests upon the defendant company. I dealt with the effect of the receipt in my former judgment in this case. It is unnecessary to repeat what I said in regard to it. The case is in the same position as it was at the first argument, except that the trial Judge has said in terms that he does not believe McQuarrie. The burden of proof, as I have said, is on the defendant company. That means that there is an obligation resting upon the defendant company to establish by proof the delivery of the goods.

The defendant company ask the Court for judgment on the ground that the goods were delivered to McQuarrie. In Stephen's Digest of the Law of Evidence, 5th ed. (1899) p. 108, the rule is stated that:—

> Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence or non-existence of facts which he asserts or denies to exist must prove that those facts do or do not exist.

In my opinion, in this case, there is no evidence that the goods were delivered to McQuarrie. I cannot see any reason whatever for disbelieving him. Personally, I am not willing to brand him as a thief and perjurer upon anything in the evidence before me, but the Judge saw and heard him and was unfavourably impressed by him, and, consequently, did not believe him. Accepting the finding, I say it has not been established by proof that he received the goods. When a man denies absolutely that he committed a crime and there is no other testimony, I think you cannot say, "I don't like the look of him, or the way he gave his evidence, therefore I will convict him." In the same way you cannot prove a fact in a civil case by a man who denies it. The burden being upon the defendant company, I think there must be affirmative evidence of delivery. Of course, it may be circumstantial or direct. I put the receipt out of the case, as

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being, under the circumstances, of no effect. I look to see if, apart from the evidence of McQuarrie, there are any circumstances from which I can draw the inference of delivery. I can only say that I find none, and, as to this, the Court is in as good a position as the trial Judge to draw or decline to draw inferences of fact from undisputed evidence. Did this boy of 19 years of age steal the goods, or was it mere carelessness and forgetfulness that caused him not to make further enquiry? I draw the latter inference.

I am of opinion that the appeal should be allowed with costs and judgment entered for the plaintiff.

Harris, J.

HARRIS, J.:—This action was brought to recover the value of certain goods received by the defendant company to be carried to Inverness. The question was whether the goods were delivered. The case was first tried by Meagher, J., without a jury, and, in concluding his decision, the Judge said:—

> While I feel constrained upon the evidence, as I regard it, to find for the defendant, I do so with reluctance and not without some misgiving that my view may be erroneous.

There was an appeal from this decision and a new trial was ordered by this Court. The report will be found in 16 D.L.R. 420, 47 N.S.R. 530. The case went back for a new trial, and this trial also took place before Meagher, J. The evidence taken on the previous trial was read. Some of the witnesses were then recalled and asked a few questions, but their evidence does not differ from that given by them on the former trial. There was some new evidence, but it was of no importance so far as the real question in the case is concerned. McQuarrie, the chief witness for the plaintiff, was not recalled, and, so far as I am able to see, the case, so far as evidence is concerned, stands exactly as it did when the previous appeal was heard.

In delivering judgment on the previous appeal, Ritchie, J., said:—

> One thing is certain and that is that the plaintiff never received the goods. He swears very positively to this and the Judge states that he was a "careful conscientious witness."

And the Judge says in his written judgment on the second trial that he does not think the plaintiff ever actually received the goods. There is, I think, no doubt that the burden of proving delivery of the goods to the plaintiff or his agent was on the defendant company. Every carrier is under an obligation to

delivery the goods carried by him and this defendant company admits the receipt of the goods but alleges delivery. The only evidence that the goods were delivered is a receipt signed by McQuarrie, the plaintiff's truckman.

The admitted practice with regard to the signing of such receipts at this office of the company is that the truckman or person about to receive the goods goes to the office in the railway station and signs the receipt before he either sees or gets the goods. Then the agent of the company and the person who is to receive the goods go together to the freight shed and when they find the goods they are delivered and a check mark is put on the freight bill opposite the article mentioned. This check mark is not on the freight bill in question and the truckman's story is that when they went into the shed the goods in question were not there and Mr. Tonnery, the agent, said they must still be on the car and the truckman could get them in the morning. McQuarrie, the truckman, swears that he never did get the goods, and, apparently, he forgot all about them and about the receipt which he had signed until a question arose, months after, and then he went to the station and saw his receipt and recalled the circumstances detailed by him. This is McQuarrie's story and it is unfortunate that Mr. Tonnery, the agent of the company, died shortly after the action was brought and before his evidence was taken. A majority of the Judges who heard the previous appeal were of the opinion that the production of the receipt signed under the circumstances referred to, did not satisfy the burden imposed on the defendant company and shift it to the plaintiff, and, as Russell, J., put it, "the circumstances are all consistent with the carelessness or thoughtlessness of a truckman who was not very intent upon his master's business."

I should perhaps mention that, ordinarily, when the goods were not found in the freight shed, it would have been the duty of the station agent, when he returned to his office, to mark the receipt "short," but, according to McQuarrie's evidence, they expected to find the goods in the morning and that probably accounts for the entry not being made, and it also accounts for the bill not being ticked as it should have been if the goods had really been delivered.

There was evidence that the plaintiff paid the freight on

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the goods in question, but this circumstance was explained and is of no importance

On the second trial the trial Judge expressly states that he did not believe McQuarrie and he adds:—

If I am wrong in this injustice will be done the plaintiff. I do not think the plaintiff ever actually received the goods and for that reason one would naturally feel reluctant to decide against him. But on the other hand I am satisfied his agent received them for him. What became of them afterwards has not been shewn.

After reading and re-reading the evidence over most carefully I am absolutely unable to find any evidence whatever that the goods were ever delivered to McQuarrie and with the greatest deference to the Judge I am unable to concur in his conclusion. The burden upon the defendant to prove delivery has not in my opinion been satisfied.

The principle which governs this Court in reviewing the evidence of a trial Judge is so well settled that I hesitate to refer to a case which has been so often cited, but I desire to point out clearly why I think I am justified in reaching a different conclusion from that of the trial Judge and I therefore quote from the decision of the Court of Appeal in *Coghlan* v. *Cumberland*, [1898] 1 Ch. 704. Lindley, M.R., said:—

Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the Court must reconsider the materials before the Judge with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from ever-ruling it if, on full consideration the Court comes to the conclusion that the judgment is wrong. When, as often happens, much turns on the relative credibility of witnesses who have been examined and cross-examined before the Judge, the Court is sensible of the great advantage he has had in seeing and hearing them. It is often very difficult to estimate correctly the relative credibility of witnesses from written depositions; and when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the Judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may shew whether a statement is credible or not; and these circumstances may warrant the Court in differing from the Judge, even on a question of fact turning on the credibility of witnesses whom the Court has not seen.

This case is not one in which the trial Judge has considered the "relative credibility of witnesses" and disbelieved one and believed the other. What he has done is to disbelieve the only

witness. Assuming that he was justified in so doing it does not, in my opinion, settle the case because we are then thrown back upon the receipt which, under the circumstances, the Court, on the previous appeal, expressly held was insufficient to discharge the burden cast on the defendant company of proving delivery. I agree with what was said by the majority of the Court that the receipt signed under the circumstances is insufficient.

There is this too to be said as to the finding of the trial Judge, that it is tantamount to a finding that McQuarrie was guilty of a crime. If he received the goods and did not deliver them to his master, as he was bound to do, he would be guilty of a crime and if the judgment is upheld McQuarrie is both a thief and a perjurer.

What Lord Ellenborough said in *Williams* v. *East India Co.*, 3 East 192, at 199, is still the law on this subject.

I am absolutely unable to see anything in the evidence to warrant the finding to which I have referred. I think the defendant has not satisfied the burden of proving delivery of the goods and that the decision of the trial Judge should be reversed. The case has been twice tried and, so far as evidence goes, it stands just where it did on the first trial. There is no reason to suppose that a third trial will bring out any new facts upon the issue involved.

The appeal should, I think, be allowed and judgment entered for the plaintiff for $514.79, together with the costs of the action, the two trials and the two appeals.

CHISHOLM, J.:—I am of opinion that the defendant company has not given sufficient proof that the goods mentioned in the statement of claim were delivered to the plaintiff; and, in the absence of such proof, the plaintiff is entitled to judgment for damages for the non-delivery of the goods. *Appeal allowed.*

BUNTZEN v. HILL-TOUT.

British Columbia Supreme Court, Hunter, C.J. March 1, 1917.

MORTGAGE (§ VI E—90)—*Foreclosure — Enlistment and discharge—Assignment for creditors—War Relief Act.*]—Application by plaintiff in foreclosure action for final order. The

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action was commenced on January 12, 1916, and the order *nisi* obtained on February 22, 1916. The defendant Hill-Tout, who was a purchaser under an agreement for sale subject to the plaintiff's mortgage, made an assignment to the Westminster Trust Co. for the benefit of his creditors on April 7, 1916. The said defendant enlisted in the Foresters Battalion for Overseas service in the month of October, 1916, and some weeks later received his discharge as being medically unfit. On January 16, 1917, the plaintiff obtained an order adding the said Westminster Trust Co. as defendants, and on February 10, 1917, the plaintiff filed a notice of motion for a final order of foreclosure. The defendant Westminster Trust Co. opposed the said application on behalf of defendant Hill-Tout and claimed protection under the War Relief Act.

A. R. Creagh, for plaintiff: The defendant Hill-Tout is not entitled to protection under the War Relief Act, as he has received his discharge and is not now a volunteer within the meaning of the Act. See sec. 10. In any event, he has made an assignment for the benefit of his creditors and has, therefore, no interest in the lands in question at the present time. See *Lloyd* v. *Lander*, 5 Madd. 282 (56 E.R. 903); *Campbell* v. *Holyland*, 7 Ch. D. 166.

W. A. Cantelon, for defendants, Westminster Trust Co.: The defendant Hill-Tout having enlisted continues to be entitled to protection under the War Relief Act, notwithstanding the fact that he has received his discharge, as the Act protects anyone who "has enlisted." And he still has an interest in the lands as the estate will probably shew a large surplus.

HUNTER, C.J.:—Sec. 10 of the War Relief Act must, I think, be read with secs. 2 and 3, and "such volunteer" means a volunteer who has enlisted, as referred to in said secs. 2 and 3, and a person who enlists continues to be entitled to protection under the Act, even though he has received his discharge. The defendant Hill-Tout, however, having made an assignment for the benefit of his creditors divested himself of all interest, legal and beneficial, in the said lands, and I hold there is no infringement of the War Relief Act.

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Alberta Supreme Court, Appellate Division, Harvey, C.J., Scott, Stuart and Beck, JJ. December 15, 1916.

MUNICIPAL CORPORATIONS (§ II F—174)—GAS FRANCHISES—EXCLUSIVE GRANT—TERRITORIAL LIMIT.

A grant of rights and privileges by a city to lay gas mains in the streets thereof does not exclude the city from exercising as a municipal enterprise rights similar to those granted, even though certain clauses in the grant refer to the rights as "exclusive."

[*City of Calgary v. Canadian Western Natural Gas Co.*, 25 D.L.R., 807, varied.]

Statement.

Appeal from the judgment of Ives, J., 25 D.L.R. 807, in an action brought for a declaration whether or not:

(1) The franchises, rights, etc., granted to one Dingman (who was the assignor to the defendant company) under contract made between him and the city council of Calgary in 1905, to bore and dig for natural gas, to lay mains and pipes in the streets of the city, were limited to and do not extend beyond the area of the city as shewn on plans of record in 1905, or whether such franchise and rights extended so as to apply to new streets in newly acquired areas, subsequent to 1905.

(2) Whether or not the said franchise, rights and privileges granted to said Dingman (and assigned by him to defendant company) are exclusive as against the plaintiff city.

E. Lafleur, K.C., *J. Muir*, K.C., and *C. J. Ford*, for plaintiff.

W. H. McLaws, *A. M. Sinclair*, for the Can. W. Natural Gas Co.

Harvey, C.J.

HARVEY, C.J.:—The action was tried by Ives, J., who decided that the defendants' rights under the agreements are limited in their exercise to the area of the city as it existed at the time of the agreement, and that such rights are not exclusive of the rights of the plaintiff to supply gas within the same area.

The defendants advance several grounds for the contention that their rights extend to the area of the city as it may be from time to time, and the first is based on the terms of the original agreement.

That agreement commences with an interpretation of the three words "council," "engineer," and "street" as used in the agreement which are declared to mean respectively "the council of the said city within the terms and provisions of Ord. No. 33 of the N.W. Territories and any amendments thereto," "the city engineer or proper official appointed by the said city for the pur-

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pose of carrying out the terms and provisions of this agreement subject to the approval of the council," and "any street, avenue, or lane shewn as such on the plans of the said city registered in the Land Titles office for the S. Alberta Land Registration Dist."

The agreement then provides that Dingman shall proceed to drill for gas, and that if he finds it in paying quantities within 3 years, he is granted full power and authority, subject to any rights theretofore granted, to lay mains along the streets of the said city, make connections with houses and other buildings and supply gas, a plan of the works being first approved by the city engineer.

The rights were to continue for 11 years from the date of the agreement with provision for an extension of 5 years which has since been acted on.

The agreement fixes maximum prices which may be charged consumers, and provides for payment to the city of a small percentage of the profits.

Provision is made for certain operations to be supervised or approved by the engineer, and the council is also empowered to exercise control in respect of certain matters.

Much force is laid by the plaintiff on the definition of the word "street," it being contended that the streets being defined by reference to registered plans, they are limited to the plans registered at the time of the agreement. But if the word "registered" is to be construed as if it were preceded by the word "now" or followed by the words "at the date of this agreement," then it seems to me there is no reason why similar words should not be required for the definition of "council" and "engineer." It is quite apparent, of course, that after any extension of boundaries the only "council" or "engineer" that can possibly exist must be the "council" and "engineer" of the city so extended, and therefore as far as these terms are concerned the agreement must be deemed to be speaking as of the time it is being considered during the period of its 16 years' existence. If so, surely the same rule should apply to the word "street." At the time the agreement was executed, as well as now, a place was not a "street" within the meaning of the agreement though used as a highway unless shewn on a registered plan, but I can see nothing in the definition which fixes the "streets" as of the date of the agreement any more than the "council" or "engineer."

If the construction urged were to be put on the term it would not necessarily, and, almost certainly, would not actually, fix the streets to which the agreement applies as all the streets of the original area, for any new subdivision of any portion of the plans then registered or any alteration of any such plans shewing new or other streets would leave such new or substituted streets entirely out of the agreement through being within the original area of the city. I fail, therefore, to see that any support for the plaintiff's contention can be obtained from the definition. Without considering any authority it would appear to me that when, as in this case, certain privileges are granted to certain persons for the benefit of the inhabitants of a city, which privilege and benefits are to continue for a period of years, it would naturally be within the contemplation of the parties, particularly in a new and growing country, that the area of the city would probably change and that equally naturally they would intend that the privileges would attach and the benefits extend to the added area and increased population of the added as well as the original area. They certainly would anticipate a possible if not a probable or almost certain increase of population, and it appears to me as reasonable that that increase should be contemplated as arising from added territory as from growth within the original area. The undertaking involved, in the first instance, expenditure, which might be very considerable. It would be some time before that expenditure could be offset by the returns, and it would be by increased returns from the increasing consumers that profits would naturally be expected to be derived in which profits both parties to the agreement would share. If the agreement were not intended to apply in respect of added territory, we would find the inhabitants of a portion of the city sharing in benefits of which the inhabitants of other portions would be deprived, and in order to give these excluded inhabitants similar advantages, a new franchise would have to be granted and a new agreement made with some one which would necessarily be limited to the added territory owing to the rights which had been granted by the agreement under consideration.

Apart from authority, therefore, I would have no difficulty in coming to the conclusion that the agreement applied to the city of Calgary as it might exist from time to time during the life of the franchise.

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I have, however, found great difficulty in reconciling the decisions of the Supreme Court of Canada and the Judicial Committee of the Privy Council in respect to an agreement which appears to me to be very similar in principle to the one under consideration.

The trial Judge felt himself bound by a judgment of the Privy Council in a case between the *City of Toronto* v. *Toronto Railway Co.*, [1907] A.C. 315. The agreement in that case was one by which a franchise was granted to the company to use the streets for the benefit of the inhabitants in the furnishing of a street railway service, and under which the rates to be charged were fixed and the city was to share in the profits.

In principle the agreements seem to be of the same character. In that case transportation, in this case gas, is what is to be furnished inhabitants. That agreement provides for the laying of tracks on the streets to be designated by the city authorities, and they required the company to lay tracks on the streets in territory added to the city subsequent to the terms of the agreement. The company contested the city's right to compel it to do so. In the judgment of the Privy Council, delivered by Lord Collins, the other members of the Board, sitting, being Lord Macnaghten, Lord Atkinson and Sir Arthur Wilson, are these words:—

> Their Lordships will therefore humbly advise His Majesty that an order should be made declaring and ordering: That neither the city nor the company have any street railway powers under the said agreement over streets within new territorial additions to the city during the time therein mentioned.

If there were no other decision of the Privy Council bearing on the case and no special considerations, I would think this case concluded by that declaration, because the contracts are so similar in general character that it appears to me that the same rule should be applied to each. It is necessary, therefore, to examine the case itself somewhat carefully as well as to consider some other decisions.

The Toronto agreement which is set out in full as a schedule to ch. 99 of the statutes of Ontario for 1892, confers upon the company the exclusive right to the use of the streets of the city for street railway purposes during the term of the contract with the exception of portions of Queen St. and Yonge St., in respect to which other rights were then in existence for which portion the

exclusive right is given, subject to those existing rights. Subsequent to the date of the contract an extension of Queen St. was added to the city upon which portion there had existed rights in another company similar to that on the portion within the city specified in the contract. Those rights having become forfeited by non-user the Toronto Street R. Co. built tracks on the added portions of Queen St. but did not pay the city the annual rental called for by the contract. An action was brought to enforce this payment and the railway company set up the defence that it was not liable because the right to build on that street was acquired from the former company and not under the contract with the city. It was held by the Master in Ordinary, to whom it was referred, that the defence failed, that the railway company had acquired no right from the former company and that its rights to build the tracks were therefore derived from the contract, and that it was liable therefore according to the terms of the contract.

While this was immediately a question of the company's liability for rental, it was in reality a determination of the company's right under the contract to build tracks on streets added to the city subsequent to the date of the contract.

The decision of the Master was affirmed in successive appeals from the Divisional Court, the Court of Appeal, and the Privy Council.

In delivering the judgment of the Court of Appeal (5 O.W.R. 130). Moss, C.J.O., at 132, says:—

> Now, in this agreement, we find in the first place, a grant in very wide terms, the exclusive right for a period of 30 years to operate surface street railways in the City of Toronto. Standing alone without the exceptions this embraces every part of the territorial area comprising the City of Toronto, not only at the date of the agreement, but during the period of 30 years over which the right is to extend. The grant extends to every portion of territory acquired or made to form part of the municipality during the 30 years.

Lord Macnaghten delivering the judgment of the Judicial Committee, the other members being Lord Davey and Sir Arthur Wilson, stated that the conclusion arrived at by the Courts below was "plainly right." It is apparent that the decision could not be right unless the terms of the agreement covered this added territory. By the terms of that contract it was provided in one clause that the company should lay down new lines as directed by by-law of the city, and by another clause that if it failed to do this

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the right to lay down lines on such streets might be granted by the city to another person or company.

The city passed a by-law requiring the company to lay down new lines on the streets added subsequent to the date of the contract which it declined to do. The dispute on this point and several other points came before the Courts, and it was in the ultimate decision by the Judicial Committee upon this litigation that the declaration first above quoted was made. Other decisions at the trial and Court of Appeal which were also dealt with on the appeal to the Privy Council are to be found in 11 O.L.R. 103; and 12 O.L.R. 534.

In the *Queen St.* case the judgments of the Court of Appeal and Privy Council were delivered on January 23, 1905, and November 8, 1905, respectively. In the second series of cases the first decision, which was upon a special case, was that of Anglin, J., and was given on November 10, 1904, or before the decision of the Court of Appeal in the earlier case.

The two questions which relate to the present matter that were submitted for decision were (9 O.L.R. 334, 37 Can. S.C.R. 430 at 432):—

1. What new lines shall be established and laid down, and tracks and service extended thereon by the company, whether on streets in the city as existing at the date of the agreement or as afterwards extended?

6. Is the privilege to the city to grant to another person or company for failure of the company to establish and lay down new lines and to open same for traffic, or to extend the tracks and services upon any street or streets as provided by the agreement, the only remedy the city can claim?

Anglin, J., in delivering judgment, says (9 O.L.R. at 336):—

The company, desirous of preserving its monopoly against competition, in new territory as well as old: the city anxious to secure the advantages of a single system—both dealing not with the conditions of the moment, but with privileges to be enjoyed and services to be rendered for a period of 30 years, must be taken to have intended by the words "in the City of Toronto" whatever that phrase might describe at any time during such 30-year period. I have no doubt that the provisions of this agreement, onerous as well as advantageous, were meant to apply, and do apply, to extensions of the city during the term of the agreement.

He also gives reasons for answering Q. 6 in the negative.

The judgment of the Court of Appeal which was delivered on November 13, 1905, a few days after the Privy Council had affirmed its decision in the *Queen St.* case, affirmed the judgment of Anglin, J., on both these questions, the first one not being argued, it being conceded by all parties that it was covered by the decision in the *Queen St.* case.

In the meantime another action had been begun by the city against the company to compel it to lay tracks on a street which had not been within the city at the date of the contract. This was tried before Street, J., on November 23, 1905. It was objected that the contract did not apply. Street, J., however, held against the company that this point was settled by the decision of the Court of Appeal in the *Queen St.* case. An appeal was taken from the last mentioned decision of the Court of Appeal to the Supreme Court of Canada, and from the judgment of Street, J., to the Court of Appeal.

On May 1, 1906, the Supreme Court of Canada gave judgment reversing, by a majority of 3 to 1, the judgment of the Court of Appeal on both points, and on June 29 following, the Court of Appeal gave judgment reversing Street, J., by reason of the judgment of the Supreme Court of Canada. From these two judgments, an appeal was taken to the Privy Council upon which the judgment first mentioned was given on May 1, 1906, affirming the decision of the Supreme Court of Canada on both these points.

From the statement of facts it is apparent that the dispute between the parties was whether the city could compel the company to lay down new lines on streets to be designated by it. If the contract gave the city no power to do this, naturally it was of no consequence whether the streets designated were within the original boundaries of the city or not. The decision, therefore, that the contract gave no such right, made any other decision unnecessary for the purpose of determining the questions involved. Nevertheless this point is determined in both the Supreme Court and the Privy Council before the determination of the other point, and in the reasons for the final judgment it is stated ([1907] A.C. at 320):—

> The question on the main appeal is: Has the corporation street railway powers under the agreement over streets within new territorial additions to the city during the term therein mentioned? The Supreme Court, overruling in this respect the decision of the Courts below, has decided by a majority of three to one that it has not. The reasons given in the judgments of Sedgewick, and Idington, JJ., with whom Davies, J., concurred, seem to their Lordships so full and satisfactory as to make it unnecessary to say more than that they adopt and agree with them. The injustice involved in the contrary view, which would enable the corporation to compel the railway company to extend their lines at an indefinite expense, and for indefinite distances, where the maximum fare chargeable for any distance is five cents, seems to their Lordships insuperable.

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In the Supreme Court the reasons given by Sedgewick, J., seem based mainly upon the provisions of the Act incorporating the company and ratifying the agreement, and not on what the parties had previously agreed upon. Having referred to certain powers given by the Act to which no reference is made in the agreement, he concludes:—

It appears to me plain that by the special reference contained in sec. 19, sub-sec. 4 of the Act, the parties did not intend to provide for territory subsequently annexed and as to which the city at the time had no right to give any franchise or give any contract.

The reasons of Idington, J., are more exhaustive, and are based rather on what the parties said than on what the legislature enacted. His conclusions, moreover, are limited to the stated case as it came before Anglin, J. He nowhere expressly states the opinion that the agreement in no respect applies to added territory though some of the reasons may seem to suggest that conclusion. He refers to a section of the Act which authorizes the company to make arrangements with adjoining municipalities providing that in the event of any portion of such municipality being annexed, it shall be subject to the terms of the agreement, and adds:—

I cannot see how these provisions may be so enlarged as to imply that all the rest of this contract must necessarily be held as intended to become operative in any new territory annexed to the city, whenever and wherever such additions might happen to be made.

He points out that adjoining municipalities that might be annexed might have made contracts which would prevent the company from exercising its exclusive rights in respect to such annexed territory and therefore it would be unreasonable to think that it would have intended to assume the burdens of the contract within such added area.

The only reference made either in the Supreme Court or Privy Council judgments to the Privy Council decision on the *Queen St.* case is contained in the reasons of Idington, J., who says:—

I do not read the judgment of the Privy Council as deciding this question at all. The Court was dealing with one of those very extensions of a line which the contract expressly provided for as far as they could provide for it.

I find myself quite unable to appreciate the distinction made. I have examined the terms of the contract again and again and cannot satisfy myself what provision is being referred to. There is provision for the company acquiring the exclusive right in so

far as the city can grant it in respect to the portion of Queen St. affected by the prior contract which would give it the exclusive right upon the prior rights being determined. There is also provision in the Act for the company to make arrangements with companies having rights in adjoining municipalities, but in the *Queen St.* case the street in question was not within the city when the contract was made, and therefore did not come within the provisions of the contract to which I have referred unless these provisions extended to added territory, and the express finding was that no arrangements were made with another company so that it did not come within the provisions of the Act mentioned. It is true that all it necessarily held was that the annexed portion of Queen St. was subject to the terms of the agreement, and all that the later case necessarily decided, since that was all that was involved, was that the burden of building tracks on streets in annexed territory was not imposed by the contract upon the company and even that might have been avoided as a separate holding since it was held at the same time that no such burden was imposed in respect of the streets of the city as of the date of the contract. Many of the reasons given for the conclusion of the later case have no application to the case at bar. The argument of injustice cannot be applied, certainly not against the company which is simply seeking to establish a right, nor so far as I can see against the city. The argument founded on the complications arising out of annexation of adjoining municipalities likewise has no bearing. At the time of the contract there were no adjoining municipalities and under the law then in force and conditions of the province, no prospect of such coming into existence. Any added territory would almost necessarily be unorganized. There was an adjoining village but it was not a municipality in the usual sense and had no power to make contracts giving franchises such as the one in question. Under the circumstances, while I feel quite unable to reconcile the declaration of the later case with the *ratio decidendi* of the earlier one, I should even, without more, hesitate to conclude that the former decision was overruled by the later, but unfortunately there is more, for only last June since the delivery of the judgment herein, the Judicial Committee, though differently constituted, expressly reaffirmed its approval of the decision of the Court of Appeal in the *Queen St.* case in a con-

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test between the same parties: *City of Toronto* v. *Toronto R. Co.*, 29 D.L.R. 1.

On the principle of that case, I think it should be held that the intention of the parties to the contract in question was that the franchise should apply to the city as it existed from time to time during the period of the existence of the franchise, and on that branch of the case I would allow the appeal.

On Q. 2 I agree with the conclusion of the trial Judge.

If the contract purported to grant the exclusive right to lay pipes or supply gas, it would be necessary to determine what that meant, but it does not purport to do anything of the kind, and the only ground for the argument that no one but the company had any right to lay pipes or supply gas is because the rights which are conferred by the contract are described in two or three places as "exclusive" rights. If that is a correct description, as no doubt should be assumed, it is necessary to ascertain what they are exclusive of. The place to look to ascertain what rights are granted is in the words of grant, or to any restriction imposed. The words of grant are to be found in clause 4 of the contract which provides that if the company within three years finds gas, etc., "the council doth hereby grant to the said company full power, license and authority, subject to any rights and privileges that may at any time heretofore have been legally granted by the said city to any other person or corporation to open up, dig trenches, and lay mains under or along the streets of the said city," etc.

I can see no suggestion in this of an intention to exclude anyone from exercising similar rights.

In clause 9 for the first time the word "exclusive" is used and the same clause explains the extent of the exclusion. The clause is as follows:—

> 9. That the exclusive rights and privileges hereby granted to the said company shall continue, subject to the terms and conditions herein expressed, for a period of 11 years from August 14, 1905, and may thereafter be extended for a period of 5 years by an agreement at the option of the said city and the said city shall not (it being determined that the said city has such power) during the said period of 11 years or the extension thereof as aforesaid, grant to any person, firm or corporation the right to construct or lay mains, etc., unless the privileges hereby granted to the said company are forfeited, etc.

In clauses 10 and 15 again the word "exclusive" is used in provisions for the loss or revival of the rights in so far as they are exclusive.

The word "exclusive" suggests that something is excluded. When a person is spoken of as belonging to an exclusive club or set, it does not mean that all but he are excluded but that some are excluded. Similarly the term "exclusive rights or privileges" would be a perfectly correct expression to designate rights which exclude other rights though not necessarily all other rights. The use of this word cannot, therefore, in my opinion, extend the meaning of the plain words of grant and exclusion.

It is suggested that at the time of the contract the city had not the right itself to supply gas, and that therefore the exclusion is an exclusion of all rights other than those of the company. It appears to me that this is a double-edged argument. If the city had no power itself to exercise such rights it would seem clear that there was no intention to exclude such non-existent rights, and if it subsequently acquired power to exercise such rights from the legislature, that right would be superior to the contract. If it did have the power it seems to me equally clear that it did not intend to exclude its rights because the intention must be found in the words used and the words clearly limit the exclusion to rights which might be acquired by a grant from the city which naturally would not include rights exercised by the city itself.

For the reasons stated, I see no ground for considering that the contract was intended to exclude the city from exercising as a municipal enterprise rights similar to those granted to the company. On this branch, therefore, I would dismiss the appeal.

As in the result each party has a measure of substantial success, both in the action and in the appeal, I would allow no costs of either to either party.

SCOTT, J., concurred with STUART, J. Scott, J.

STUART, J.:—The original action is a declaratory one, but by counterclaim the first two defendants seek to recover damages from the plaintiff. By arrangement the disposition of the counterclaim was left in abeyance until the final conclusion of the original action. Stuart, J.

On and prior to August 14, 1905, the territorial limits of the city of Calgary comprised a much narrower area than, by subsequent statutory extensions, they now contain. On that date the city council, by an agreement, ratified by a by-law which was

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submitted to and carried by the ratepayers, granted to one Dingman, his associates and assigns

full power and license and authority subject to any rights and privileges that may at any time heretofore have been legally granted by the said city to any other person or corporation, to open up, dig trenches, and lay mains under or along the streets of the said city, and to make all necessary connections between the system of mains, pipes or other works hereby authorized and any dwelling, shop, factory building or other place within the said city, and to renew, alter or repair all or any of the works so laid down or constructed, and to pump or otherwise force through the said pipes natural gas, provided that a plan shewing the proposed location of the said mains and pipes and building connections as aforesaid shall first be submitted to and approved by the said engineer.

Sec. 9 provided:—

that the exclusive rights and privileges hereby granted to the said company shall continue subject to the terms and conditions herein expressed for a period of 11 years from August 14, 1905, and may thereafter be extended for a period of 5 years by an agreement at the option of the said city, and the said city shall not (it being determined that the said city has such power) during the said period of 11 years or the existence thereof as aforesaid grant to any person, firm or corporation the right to construct or lay mains or pipes or connections on, in or through the streets of the said city for the supply of natural gas unless the privileges hereby granted to the said company are forfeited and determined as herein provided or unless the said company's supply shall fail to meet the demand therefor, and it is determined by arbitration under the terms and provisions of the Arbitration Ordinance of the N.W. Territories or otherwise as may be mutually agreed that the said company is not with proper speed and diligence taking the necessary means to increase the said supply.

Sec. 16 provided that:—

if the said company avails itself of the privileges hereby granted and obtains a sufficient quantity of natural gas capable of being commercially and economically utilized for light, heat and power or fuel, and proposes they shall supply the same throughout the said city at a price not greater than that charged by the said company for supplying the same outside the said city.

Sec. 17 fixed a maximum rate of 25 cts. per thousand c.f. for domestic purposes and 15 cts. for power purposes, at which the company bound itself to supply "natural gas to the inhabitants of the said city."

Sec. 18 provided that:—

when the buildings or other places to be supplied with said gas are situated on land lying along the line of any main or supply pipe of the said company the cost of the necessary connections from the main to the property line shall be borne by the said company, and when the buildings or other places supplied are not so situated, the said company shall construct such mains or pipes as are necessary to give such supply upon a reasonable return upon the outlay of the said company in constructing such mains or pipes being assured to the said company, and in the event of a difference arising between the said com-

pany and the owner or occupant of the said building or other places as to the reasonableness or otherwise of such return, the same shall be referred to the council, and their determination thereof shall be final and conclusive between all the parties.

By sec. 26 the city was to receive 2% of the net annual profits of the company and also after allowance for a dividend of 10% to the shareholders of the company the city was to receive all the profits above that until its share reached 5% of the net annual profits.

Then there were of course other clauses in the agreement but I pass them by for the present.

Subsequently to the date of the agreement and at various times up to and including December 16, 1910, successive statutes were passed by the Legislature of Alberta extending the territorial boundaries or limits of the city.

On September 6, 1905, Dingman assigned his rights under the agreement to the Calgary Natural Gas Co. Limited.

Between September 6, 1905, and August 1, 1911, various agreements were entered into between the city and the Calgary Natural Gas Co. Ltd., and various by-laws were passed whereby the terms of the agreement of August 14, 1905, were altered and amended chiefly with regard to limitations of time and the price to be charged for gas. No reference was made in any of these agreements or by-laws to the various extensions of the territorial limits of the city.

On August 1, 1911, the Calgary Natural Gas Co. Ltd., assigned its franchise to the defendant the Canadian Western Natural Gas, Heat, Light and Power Co. Limited, and this assignment was agreed to by the city. Subsequently the assignee transferred its franchise to another company of similar name which in turn assigned it to the defendants the Calgary Gas Co. Ltd.

The first question upon which the Court is asked to make a declaration as to the rights of the parties is whether the rights acquired by Dingman under the agreement of the 11th August, 1905, which have now become vested in the defendants, extend beyond the territorial limits of the city of Calgary as these stood under the then existing legislation and cover the whole present area of the city, or are restricted in their operation to the original area.

As it is put in the statement of claim the question (*a*) is whether or not

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the said franchise rights and privileges are limited to and do not extend beyond the area of the said city as shewn on the plans filed in the said Land Titles office on August 14, 1905.

Or, as the defendants' amended defence asserts, we are asked by the defendants to declare and by the plaintiffs to deny that "upon the true construction of said by-law 500 the said rights, privileges and franchises were intended to extend and did extend to the whole territorial area of the city of Calgary as the same existed from time to time during the life of the franchise;" and that upon the true construction of the agreements in question and, in view of all the surrounding circumstances as they then existed, said franchises were intended to extend and do extend in their geographical application to all the lands and territories which from time to time might, during the life of the franchise, be included within the boundaries of the city.

By-law 500, referred to in this pleading, dealt with another original agreement between the city and one Morris relating to the supply of artificial gas and of which the defendants are the assignees, but I do not deem it necessary to make further reference to that question.

It will be observed that in these pleadings reference is made to the "rights" "privileges" and "franchise" originally granted to Dingman. Nothing is said about the obligations and liabilities assumed by him under the agreement of August 14, 1905. These, however, for reasons which will appear, ought not to be lost sight of.

For the sake of clearness, I think the questions presented to us should be considered under 3 or 4 distinct aspects, viz.: (1) the proper interpretation of the meaning of the agreement as it stood when it was executed or rather as it stood at the very first extension of the city limits subsequent to its execution; (2) the effect of any suggested estoppel; (3) perhaps the same, the effect of any suggested acquiescence; and (4) the effect of certain of the subsequent agreements as amounting impliedly to a direct new grant of the rights and privileges claimed with regard to the extended areas.

In dealing with the first of these aspects, the first enquiry to be made seems to me to be—was Dingman, or his assignee the Calgary Natural Gas Co. Ltd., entitled to say on the very next day after the first Act was assented to extending the territorial limits of the city, to the corporation of the city, "my or our rights, privileges, and franchise are now by virtue of the Act of the legislature forthwith extended throughout the new area?"

In my opinion, we are necessarily asking the same question when we ask whether on the next day after the first extension the city was entitled to say to Dingman or to the company—"your duty to supply gas to the inhabitants of the city at the prices fixed in the agreement and at no higher price than you are supplying it outside, your duty to make extensions of mains upon request of an owner whenever our council in their wisdom, not you yourselves, decide that you will receive a reasonable return upon your outlay, and to supply gas therefrom, provided you discover a sufficient and paying supply of natural gas within the time limited, now extends through the new area which the legislature has seen fit to add to the territorial limits of the city."

Certainly to give a negative answer to the question in its first form and to say that on the morrow of the first extension of limits Dingman or his assignee could not claim that their rights operated in the new area would not be open to the objection that "the manifest injustice of it would seem to be insuperable." Leaving aside all questions of estoppel and acquiescence and subsequent agreement, there could, it seems to me, be no possibility of a suggestion that there would be manifest injustice in confining the area within which the rights were to operate to the territorial limits described in the instrument granting the rights. If, by a legislative Act, the meaning of the words used in the contract to define the limits of their operation was extended, surely, unless there was direct and specific evidence that such an extension was in the contemplation of the parties, that it was relied upon by the grantee as an inducing consideration in the making of the contract—and there is no evidence of that kind here at all—then there can, to say the least, be no injustice in confining the grantee of the rights to the area within which he expected them to, and it was agreed that they should, operate when he made his bargain.

It is when obligations and liabilities are to be imposed upon the grantee by forcing upon him the acceptance of his rights with their concurrent duties, possibly burdensome within the extended area, that, no doubt, some danger of injustice arises.

But it would appear to be very clear that the area of the operation of the grantee's rights and the area of the operation of his obligations must necessarily be coincident and identical. This indeed was, I think, taken to be so fundamental and obvious upon the argument that little reference was made to it.

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For the purpose of applying this principle it is necessary to look at what the contract reveals as to the true situation. Dingman and his associates agreed to begin boring for gas within or in the vicinity of Calgary within a period of 6 months (which was subsequently extended). It was agreed that "if the said company (*i.e.*, Dingman and his prospective associates) succeeded within 3 years in finding a sufficient and paying supply of natural gas which could be utilized in the said city," then the council granted him the franchise already defined in the quotation above. And the council agreed not to grant the right to use the streets for a similar purpose to any other person, firm or corporation.

Now, surely the meaning of this was that the grant was conditional upon Dingman's finding gas in sufficient quantities to supply the inhabitants of the city with all the gas they required. It could not be supposed that although Dingman might not have enough gas to supply the demand, still his exclusive privilege remained. Indeed section 15 of the contract specifically provided for this contingency and stipulated that on a partial failure, *i.e.*, a failure to supply the full demand, the exclusiveness of the privileges should cease for the time being.

What, then, was the situation? Less than a year after the contract the legislature extended the area of the city. On May 9, 1906, the first extension was made by ch. 55 of the statutes of that year, and by a proviso the Lieutenant-Governor was given power to add other areas, whether a village or otherwise, by order-in-council upon terms. Nothing is shewn to have been done by order-in-council and the next year the provisions were repealed and a much wider extension was made by statute. On December 16, 1910, a still wider extension was made which brought a whole township, *i.e.*, 36 square miles, within the limits of the city.

The original term of 3 years from August 14, 1905, within which Dingman, his associates or assignees were to find "a sufficient and paying supply of natural gas" as a condition of receiving a grant of the franchise was extended to 5 years from that date by an agreement made in June, 1908, *i.e.*, just shortly before the expiration of the original term of 3 years. Dingman had spent nearly 2 years boring for gas out on the Sarcee Reserve. Then he came nearer to the city and began boring at what is called in

the evidence, "Col. Walker's place." It is not very clear whether this was within or without the then city limits, but I gather that it was outside. Certainly it was outside the original limits. They got "about equal to 5 or 600,000 c.f. per day," but as the evidence shews, it was not a good well; "it was limited," as Dingman said.

In the consideration of this first aspect of the case we ought not, I think, to look back upon the contract at all from the point of view of our present knowledge, but should exclude from our minds all thought of the enormous quantity of gas discovered by the present defendants at a long distance from the city, over 100 miles away to Bow Island, and their vast expenditures and bond issues. These things give no help in construing the original contract aside from the possible question of construction by subsequent conduct or agreement. They only obscure the question. We should rather stand back at the period, 1905, and look forward only with the knowledge that the parties then had.

What would have been the situation if Dingman had, even within the original term of 3 years, found a supply of gas sufficient for the purposes of the city as it stood when he made his bargain, but not sufficient for the area as extended either by the Act of 1906 or under its authority by order in council or by the Act of 1907, or by the Act of 1910? Was not the prospective number of consumers a very material consideration in deciding whether a "sufficient supply of" gas had been found, and therefore whether the grant of the franchise had come into operation. Is it not conceivable that Dingman might before August 14, 1908, have found a supply sufficient for the needs of the city as it originally stood, but not sufficient in view of the extension that took place in 1907? Could the city have then said to him in 1908: "True, you have found sufficient for the original city, but you have not found sufficient for the city as it now stands and therefore your right to the franchise has not arisen even with respect to the original limits?" And could they, after December 16, 1910, have emphasized the argument by reference to the much larger extension which was then made?

It was suggested that the parties should be held to have had possible future extensions of the city in contemplation but these considerations seem to me to point in exactly the opposite direction. When the very acquisition of any franchise at all

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depended upon the discovery of a sufficient supply of gas it seems to me impossible to adopt any other view than that the parties were thinking of "sufficiency of gas" only with relation to the existing territorial limits and to the requirements of the population within that area.

Then passing from the question of the condition precedent to the creation of the franchise to the question of its operation, we come to the provisions of clause 18 in reference to the extension of main pipes. It would appear to me to be quite possible that Dingman and his associates may have been quite prepared to submit, in case of disagreement between themselves and the owner or occupant of premises desiring a gas supply, to the final decision of the city council as to the assurance of a reasonable return upon the necessary outlay in so far as the then existing limits of the city were concerned. But would they not have been entitled to say, when a question of extension of main pipes and of a supply of gas through them, throughout a very much more widely extended area came up: "This new area which the legislature has added to the city is more sparsely settled, we cannot agree that the city council should have absolute and final authority to make a decision which will bind us under our contract to construct new main pipes and supply new customers throughout this new area. We did not agree to that. We were speaking and agreeing about the city limits as they stood when we made our bargain?"

For these reasons I think that even without precedent or authority I should have come to the conclusion that Dingman, his associates and assignees did not, by virtue of their original contract, enter into any obligation to supply gas outside of the original limits of the city, and that therefore, as a necessary corollary, they acquired no right to do so by virtue of the mere original contract itself.

But we are not, as the trial Judge pointed out, without precedent. The case of *Toronto R. Co.* v. *City of Toronto*, 37 Can. S.C.R. 430, and [1907] A.C. 315, seems to me to be indistinguishable and conclusive on this point. The main question there was whether under a grant of an exclusive franchise to operate street railways on the streets of the city of Toronto for 30 years made by a contract of September 1, 1891, and ratified by the

Legislature of Ontario by 55 Vict. ch. 99 (Ont.), the obligations of the railway company under the contract extended to territory annexed to the city subsequently to its execution and ratification. Both the Supreme Court of Canada and the Judicial Committee held that those obligations did not so extend. The Judicial Committee said:—

The reasons given in the judgment of Sedgewick, and Idington, JJ., with whom Davies, J., concurred, seem to their Lordships so full and satisfactory as to make it unnecessary to say more than they adopt and agree with them.

It is therefore well to quote in full the language and reasons thus approved. Sedgewick, J., said (p. 434):—

In construing an instrument in writing, the Court is to consider what the facts were in respect to which the instrument was framed, and the object as appearing from the instrument, and taking all these together it is to see what is the intention appearing from the language when used with reference to such facts and with such an object, and the function of the Court is limited to construing the words employed; it is not justified in forcing into them a meaning which they cannot reasonably admit of. Its duty is to interpret, not to enact. It may be that those who are acting in the matter, or who either framed or assented to the wording of the instrument, were under the impression that its scope was wider and that it afforded protection greater than the Court holds to be the case. But such considerations cannot properly influence the judgment of those who have judicially to interpret an instrument. The question is not what may be supposed to have been intended, but what has been said. More complete effect might, in some cases, be given to the intentions of the parties if violence were done to the language in which the instrument has taken shape; but such a course would, on the whole, be quite as likely to defeat as to further the object which was in view.

And again he said (p. 436):—

In my opinion, the city clearly only purported to deal with streets within its jurisdiction. Outside municipalities into whose area the company might desire to extend its operations, had independent powers in these respects, and the Act provides that with them the company could make separate arrangements, and without going in detail through the various provisions in the conditions, agreement and statute, it appears to me plain that by the special reference contained in sec. 19, sub-sec. 4 of the Act, the parties did not intend to provide for territory subsequently annexed, and as to which the city, at the time, had no right to give any franchise or make any contract.

Idington, J., in his judgment, said (pp. 448-9):—

I am unable to see anything in the contract binding the railway company in respect of future extensions of the city, save so far as is expressed in clause 16 of the conditions of sale incorporated with the agreement, and sec. 19 of the Act whereby the appellants became incorporated and bound to execute the agreement entered into by the purchasers.

I cannot see how these provisions may be so enlarged as to imply that all the rest of the contract must necessarily be held as intended to become operative in any new territory annexed to the city, whenever and wherever such additions might happen to be made.

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To provide in express terms for such a contract, as operative and binding from the execution thereof, would have been beyond the powers of the municipal corporation.

It is said, however, that it was unnecessary to have made any provision anticipating such extensions because the contracting parties well knew that the City of Toronto was likely to expand within 30 years from the date of the contract, during which the franchise created thereby was to exist, and must be taken to have contracted in light of that anticipation and in light of the provisions of the Municipal Act to continue the corporate existence, in such cases of addition to a municipality, so as to give the municipality the same powers over the new territory as it had over the old.

I am, after fully considering all these things, still unable to apprehend how any such implication must necessarily exist, in a contract such as we have to pass upon as would make all the covenants between the parties that bound them in relation to the old territory operative upon the new.

The provisions for continuous existence of the city and all its corporate powers when its territorial limits have been extended are merely relative to jurisdiction. It would seem as if the necessity for expressly providing, as the Municipal Act does, that in the case of annexation of new territory the by-laws of the city shall be held to apply to the new territory, suggests that contracts of this nature, if to operate upon the new territory, must do so by express provision made therefor. There is none shewn in the Municipal Act or any other Act. There is none in this contract.

Statutes and jurisdiction are not in any way the same thing as a contract, which either may enable to be made. The contract may, and generally must, remain valid even if the status be lost or the jurisdiction be increased or diminished. But can its operative field be, of necessity, affected by any such change and especially in a contract of this nature?

There seems to me to be a confusion of ideas in contending that this jurisdiction over a defined area and the inhabitants thereof must, of necessity, give such legal effect to a contract with a municipal corporation to do something to or in relation to its property as existent before extension as to bind the contracting parties to do or submit to have the things contracted for done to the new extension of property or domain.

And again he said, p. 451:—

When we look at the thing they are contracting about, the nature of the enterprise involved, the many uncertain factors in the operation of such a contract, even within a well-known and defined area, and we reflect how much more complicated the contract must be if projected into the future, possibilities that might arise in relation to any added territory, we seem to be forbidden to entertain the thought that any such contracting parties could have intended to apply the terms agreed upon for 30 years to territory over which neither party had any domain or any security for the future condition thereof in any regard, and especially in regard to the value thereof for the purpose of constructing therein or extending therein a system of street railway.

We must bear in mind that the keynote of this contract is an exclusive right for 30 years. We must also bear in mind that whilst the city could assure the company in regard to the exclusive right within the then existing boundaries that there was no power that could exclude any other railway system from existing or coming into existence in what was likely to become part of the territory to be added in course of time to this city.

It seems to me that these views, confirmed as they were by the Judicial Committee, are entirely applicable to the view of the case which I am for the moment dealing with. I can find nothing in the circumstances of the *Toronto* case which can distinguish it.

There were, no doubt, municipalities existing outside of Toronto, and the possibility of the railway company making contracts with them and then of their subsequent annexation to the city was mentioned in the confirming statute. Sub-sec. 4 of sec. 19 of the statute declared that where the company had constructed lines therein under the terms of contracts with those municipalities prior to annexation, then, after annexation, the terms of the Toronto agreement should bind the company with regard thereto. Idington, J., did indeed found an argument upon this circumstance by an application of the "*expressio unius*" rule. But that was not the sole argument that he used. His remaining reasons as well as those of Sedgewick, J., had nothing to do with that principle and are entirely applicable here.

In the present case there was in fact one municipality adjoining Calgary as it originally stood which is mentioned in the evidences as "Ruralville," but which, no doubt, should be "Rouleauville," and the statute of 1906, by its reference to annexation of such municipalities by order-in-council also suggests their existence. And, at any rate, even if there were no adjoining municipalities, there was not a pure absence of authority. Either the Legislative Assembly of the Territories or the Federal Government had control over road allowances. What would the situation have been if Dingman had found gas immediately and obtained franchise from such exterior authorities or if other persons had obtained franchises therein? Would the extension of the limits of the city simply without any reference to such rights have made the franchise given by the city applicable to the new territory? It will be answered, no doubt, that, in such a case, everything would have been subject to rights already existing within the added territory. But we are not dealing with that question. We are endeavouring to construe the contract. There is at least no evidence that there were no franchises existing in the surrounding territory before any extension was made. How can we merely assume that there were none and then assume that the parties contemplated the extension of the boundaries of the city and the extension of the franchise throughout the new

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and unoccupied area. For all that appears the defendants may have bought out such external franchise holders and preferred to stand on the rights assumed to be given them by the city franchise rather than those given to their vendors, as being more favourable. True, there is no mention of this subject in the evidence at all, and if we are entitled to make an inference from absence of reference to the subject to the effect that there were no such external franchises, then what I have said is of no importance. But I doubt the propriety of such an inference, judicially, we know nothing about it at all.

I think no assistance upon the aspect of the case which I am now dealing with is to be derived from the two cases of *Toronto R. Co.* v. *City of Toronto*, [1906] A.C. 117, and *Toronto R. Co.*, 29 D.L.R. 1, [1916] 2 A.C. 542. The latter case dealt with the proper construction of a clause in the Toronto contract dealing with a portion of the street which has been within the limits of the city for four years prior to the date of the contract; while the former, though it did indeed have to do with a street brought in by a subsequent annexation, was a case where the railway company had refused to pay to the city the $800 per mile of track stipulated in the contract in reference to a piece of track built after the city was extended, and for the building of which the company had sought and obtained permission from the city on the assumption that the contract governed. The case is relevant only upon the question of estoppel or acquiescence or interpretation by subsequent conduct. I do not read the words of Lord Macnaghten at p. 119, as meaning that by the extension of the city limits a *general* right throughout the new area had arisen. I think it obvious from the expressions used at p. 120, that all that was decided was that in the particular circumstances relating to the one piece of track in question, the railway company had precluded itself from denying that the piece of track was subject to the agreement because they had applied to the corporation for permission to build it upon the assumption that it was covered by the agreement.

Nevertheless, though I have taken so many words to express my opinion on the first axpect of the case to the effect that the aspect is unfavourable to the defendants, I am, with some hesitation, inclined to the view that upon another aspect, which needs only a brief discussion, the appellants are entitled to succeed.

The Calgary Natural Gas Co. in 1911, that is after all extensions of the territorial limits had been made sought for and obtained from the city an agreement amending the terms of the original contract relating to the price at which gas should be supplied. One recital to this agreement, which is dated January 23, 1911, is as follows:—

> And whereas it is provided by par. 17 of the said agreement that the company shall supply natural gas *to the inhabitants* of the city for domestic purposes at a price not exceeding 25 cents per 1,000 c.f., and for power purposes at a price not exceeding 15 cents per 1,000 c.f.

And the further operative clause reads:—

> Now, therefore, it is hereby mutually agreed by and between the parties hereto that notwithstanding anything in the said agreement between the said Archibald Wayne Dingman and the city contained, the company shall be permitted to charge for all natural gas *supplied to the inhabitants of the city* for domestic purposes at a price not exceeding, etc., etc.

In all the agreements and by-laws referring to amendments I can only find this one place where the words: "the city" or "the city of Calgary" are used in their territorial significance as describing an area as distinguished from their significance as the name of a corporation. I am unable to attach any importance at all to the use of those words in the latter sense as suggesting a possible agreement to extend the territorial area within which it was originally agreed that the rights of Dingman, his associates and assigns should operate. Wherever the words are so used they are descriptive only of the contracting party, and as there could not be and were not two distinct corporate entities, one consisting of the inhabitants of the original area and the other of the inhabitants of the enlarged area, but there was only one corporate entity capable of contracting with reference even to the original area, I do not see how the continued use of that corporate name could be held to bring about an amendment of the terms of the original contract. Nor could the voting of all the ratepayers of the wider area be of any significance because ratepayers often vote on questions referring merely to a single locality within the territorial limits of the municipality. I can see no reason why any of the agreements or by-laws which contain no hint of a reference to territorial area should be treated as having in any way affected the meaning of the first contract.

But when we come to the agreement of January 23, 1911, and the by-law affirming it which was voted upon and passed by the ratepayers there is a different situation. The passages above

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quoted from the agreement do refer to territorial area. They do speak of "the city" in the territorial sense, and in the absence of anything to shew the contrary, I think it must be taken that the parties were then using the phrase in its then existing meaning. If the parties had intended to deal merely with the original area I think they would have so specified by speaking of "the inhabitants of the area constituting the city in 1905." They did not say that, but used the simple expression "the city," meaning, of course, "the city of Calgary," and that expression at that time clearly meant the whole area. In my opinion, this constituted an agreement—an implied one no doubt, but none the less potent—that in the original contract with which they were dealing and which they were amending, those words should thereafter be given a new and wider meaning. And, thereupon, the original grant of the franchise was given a wide operation.

I think where two parties to a contract have made an agreement about a certain subject-matter which is described by a certain expression, another by legislative enactment, that expression is given a wider meaning, and then the parties by another agreement, purporting to amend the first, have used the expression, obviously in its new and wider meaning, in such a way as to shew that they assumed that the contract extended to the wider subject-matter, then the original contract itself should thereafter be given the wider interpretation. To take an example. If the owner of a patent granted the exclusive right to manufacture the patented article within Province of Ontario prior to the recent extension of boundaries, to A. and then the legislation extending the boundaries of the province came, certainly, whatever may have been the position if nothing more occurred between them, if they thereafter entered into a new agreement referring to and amending the first and still speaking of the rights as extending to "the Province of Ontario" without limiting it to the old area the rights of the grantee would extend to the new area.

Upon this narrow ground, and as I have said with some hesitation on account of the extreme narrowness of it, I think the first question should be answered in favour of the defendants.

With regard to the other grounds raised in respect of this first question it becomes unnecessary to deal with them, but perhaps I may say this much, that I do not think that the action

of officials of the city can be held to bind the corporation on any ground of estoppel or acquiescence where the result is to be a grant of a franchise over the city's streets, a thing which can, as I apprehend, under the statute be given only by a vote of the ratepayers. If the defendants were refusing to pay the 2% of the profits referable to the extended area after getting their plans approved by the city or engineer and exercising in fact the right of using the streets for supplying gas within that area, then I think the case of *Toronto* v. *Toronto Railway*, [1906] A.C. 117, would apply. But that is not the case here. All that case decided was that in such circumstances the company should, with reference to a particular piece of a street, pay to the city what it agreed to pay where it apparently had been assumed by both parties that the extended right existed. Here the city is not demanding its 2%. It is submitting for decision the wider and anterior question whether the pure right did extend to the wider area. Nor do I think the question whether the city, after what has occurred, could tear up the mains actually laid or could be prevented by injunction from so doing, now comes up for decision. It is the general right, not the rights as affecting what has been actually done that, as I understand it, we are asked to decide.

With regard to the second question I agree with the views expressed by the Chief Justice. The only point which has made me hesitate to accept his conclusion is one with which he has not dealt, viz.: the effect of the stipulation as to payment of 2% of the net profits. It was contended that this constituted a partnership between the city and the company and that the law of partnership applied with the result that the city would be prevented from itself competing. Whatever the law of partnership on such a point may be I think it is rather founded on equitable rules and it is not a matter of contract. Possibly we might be justified in applying such rules in the present case if it were really a case of partnership. But, however that may be, it seems to me to be clear that there was no partnership. If a man rents a shop to a tenant to carry on a grocery business and as part of the rental is to receive 2% of the net profits without in any way taking part in the business or its obligations, I can see no reason why he should not open a grocery store of his own down the street somewhere. That, I think, is the true analogy. He certainly does not become a partner.

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I therefore agree with the trial Judge in his answer to the second question. I agree on the matter of costs with the Chief Justice.

BECK, J.:—By-law No. 500 of the City of Calgary, entitled "A by-law respecting the establishment of Gas Works in the City of Calgary," was passed provisionally in June, 1903, and after having been submitted to the vote of the qualified ratepayers, was subsequently finally passed, to take effect on August 1, 1903. It gave one Morris and his associates a franchise to establish gas works for the distribution of artificial gas. It authorized the making of an agreement in the terms of the by-law between the city and Morris and his associates. No such agreement was in fact ever executed. Both sides seem to have considered that the by-law alone was sufficient; that an agreement in accordance with its terms was unnecessary. The city, however, proposed an additional provision having in view the *discovery of natural gas*—artificial gas only being contemplated by the by-law—but Morris and his associates declined to agree to the proposal.

The rights acquired by Morris under by-law No. 500 were ultimately assigned to a company formed of himself and his associates and called the Calgary Gas Co. Ltd.

Then one Dingman procured an agreement with the city dated August 14, 1905, authorized by by-law No. 610 dated August 21, 1905, assented to by the qualified ratepayers.

This agreement contemplated that Dingman and his associates should:—

> undertake boring or drilling operations in, or in the vicinity of, the said City of Calgary, for the purpose of ascertaining whether natural gas or other natural fuel products can be obtained in paying quantities.

This agreement was assigned by Dingman to the Calgary Natural Gas Company Ltd. on September 6, 1905.

By-law No. 646 dated January 11, 1905, and an agreement made in pursuance thereof dated January 12, 1906, gave the Calgary Natural Gas Co. an extension of 3 months to commence their operations.

By-law No. 863 dated June 1, 1908, authorized certain alterations in the terms of the Dingman agreement which were embodied in an agreement dated June 2, 1908. This by-law was submitted to the ratepayers.

By-law No. 1097 dated August 11, 1910, authorized an agreement for the further extension of time for commencement of

operations until February 14, 1911, and an agreement to this effect was executed on August 11, 1910. On October 21, 1910, the Calgary Natural Gas Co. Ltd. entered into a special agreement with the city for the furnishing of street lights for a portion of the city, and this agreement having been assigned to the Prairie Fuel Gas. Co. Ltd., the latter company and the city entered into a further agreement dated August 1, 1910, and the benefits of these agreements were assigned to the Can. Western Natural Gas, Light, Heat and Power Co. Ltd.

By-law No. 1114 dated January 23, 1911, authorized an agreement varying the prices at which the company should "supply gas to the inhabitants of the city for domestic purposes," and an agreement to this effect was executed dated January 23, 1911. This by-law was submitted to the ratepayers.

By instrument dated August 1, 1911, the Calgary Natural Gas Co. Ltd. assigned all its rights under these by-laws and agreements with the city to the Canadian Western Natural Gas, Light, Heat and Power Co. Ltd.

By by-law No. 1212 dated November 2, 1911, an agreement already executed on October 11, 1911, was authorized, acknowledging the latter company to be entitled as assignee expressly granting to the latter company all the powers and privileges given by the foregoing by-laws and agreements.

All the foregoing by-laws and agreements, including by-law No. 500 in favor of Morris, were confirmed by the legislature, ch. 64 of 1911-12 assented to December 20, 1911.

By instrument dated July 6, 1912, the Calgary Gas Co. assigned the Morris franchise (by-law No. 500) to the Can. Western Natural Gas, Light, Heat and Power Co. By two instruments dated August 1, 1911, this latter company assigned all the foregoing franchises to the Canadian Western Natural Gas, Light, Heat and Power Co. of Calgary Limited and the latter company on February 13, 1915, changed its name to "Calgary Gas Co. Ltd."

The title to the franchises being established in the Calgary Gas Co. Ltd. and the right of this company or of its assignor-company to sue in respect of these franchises, it will be convenient generally to refer henceforth indifferently to "the company" except occasionally to distinguish the Calgary Gas Co., Ltd.,

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which for some time held and operated under the Morris franchise in distributing and selling artificial gas.

The principal dispute between the company and the city arises over extensions of the limits of the city.

The city was created by ch. 33 of Ordinance of the N.W.T. 1893. Its limits were extended by ch. 40 of the Ordinances of 1901; again by ch. 27 of the Ordinances of 1903 (1st sess.) assented to April 25; again by ch. 55 of the Statutes of Alberta 1906 assented to on May 9; again by ch. 32 of 1907 assented to on March 1; again by ch. 36 of 1908 assented to on March 5; again by ch. 28 of 1910 (2nd sess.) assented to on December 16.

I think it will be found to be an assistance to make a list of the important dates in the order of time.

At the date of the first transaction the boundaries stood as they had been altered by way of extension on April 25, 1903.

By-law No. 500 (Morris franchise) August 1, 1903; by-law No. 610 and agreement (Dingman franchise) August 14-21, 1905; by-law No. 646 an agreement (Nat. Gas. Co., Dingman franchise) January 12, 1906; extension of boundaries, May 9, 1906; March 15, 1907; March 5, 1908; by-law No. 863 (referred) and agreement varying terms of agreement under by-law 610 (Dingman franchise), June 2, 1908; by-law No. 1097 and agreement extending time under agreements made under by-laws 646 and 863 (Dingman franchise), August 11, 1910; street lighting agreement (Nat. Gas Co.), October 21, 1910; extension of boundaries, December 16, 1910; by-law No. 1114 (referred) and agreement under by-law 610 (Dingman franchise), January 23, 1911; further street lighting agreement varying agreement of October 21, 1910, August 1, 1911; by-law No. 1212 and agreement (covering Dingman franchise agreements and street lighting agreements), November 2, 1911; statutory confirmation of all the foregoing, December 20, 1911.

The Calgary Gas Co., the artificial gas company—whose rights originated under the Morris franchise—carried on business from apparently some time in 1904 until it assigned to the Canadian Western Natural Gas, Light, Heat and Power Co. on July 5, 1912. In the interval there had been four extensions of the city limits, 1906, 1907, 1908, 1910. At the latter date the company had about 30 miles of gas mains laid within the present

city limits of which about 4 miles lay beyond the limits as they existed at the date of the granting of the Morris franchise, August 1, 1903. No suggestion was made by either the company or the city during any part of this period that the privileges of the company were confined to the limits of the city as they existed on August 1, 1903. Some of the provisions of this, the Morris franchise, seem to call for special notice.

Par. 13 provides that the company's franchise shall continue for 35 years; and "exclusively for a period of 15 years." Par. 12 provides for the city taking over the company's works at any time after the expiry of 10 years. Par. 11 provides that if *at any time* in the opinion of the city council the profits are excessive, the matter shall be referred to arbitration. Par. 2 required the company to expend within 2 years $50,000. Pars. 4 and 5 made it obligatory upon the company to supply gas to any premises within 50 ft. of its mains at a fixed cost and within a greater distance at an increased fixed cost. Pars. 3 and 3A fixed maximum rates per thousand c.f. of gas, provided for a reduction having regard to quantity of gas consumed. Par. 1 made the company's operations "subject to any Ordinance of the N. W. T. granting powers to other companies" (Ord. 21 of 1901) "and to any by-laws of the city respecting the same." In practice the company gave notice to the city of the streets along which they proposed to lay its mains and make its connections and no difficulty or question ever arose between them. (p. 179).

The Dingman natural gas franchise—agreement of August 14, 1905—in substance provided that he and his associates, called the company, should commence boring for natural gas on or in the vicinity of Calgary; that if the company succeeded within 3 years in finding a sufficient and paying supply of natural gas, which could be utilized by the city they should be entitled to lay mains, etc.; "provided that a plan showing the proposed location of the said mains and pipes and building connections should be first submitted to and approved of by the city engineer;" that before commencing work the company was to furnish to the city council plans showing the character and extent thereof for the council's approval and that the time and manner of carrying out the work should at all times be under the supervision and control of the engineer; and it contained a number of other provisions which it will be more convenient to refer to specifically later on.

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The questions we have to decide in the present case are two: (1) Whether the contract between the city and the company with respect to the supply of natural gas extends beyond the limits of the city as those limits existed at the date of the initial contract in such sense that the rights and privileges granted to the company can be exercised in the parts of the city lying beyond these limits and, incidentally, whether there is the reciprocal obligation upon the company to extend its mains and supply the inhabitants of the city in the area of the extension under the conditions expressed in the contract, and (2) whether the rights and privileges granted to the company exclude the city from itself setting up a similar system.

It is commonplace to say that in order to interpret the contract the whole of the contract and the bearing of every one of its provisions upon the rest must be considered and that it must be interpreted in the light of the surrounding circumstances existing at the time of the making of the contract. Nevertheless, when all this is done, the contract may still remain open to more than one reasonable construction. In such an event the Court shall go one step further, as in my opinion it is correctly put in Hals'. Laws of England, vol. VII., tit. Contract, s. 1043.

See 8 Cyc., tit. Contract, pp. 587-8. Furthermore, as is I think correctly said in Pollock on Contract, 8th ed., p. 477:—

> Where both parties have acted on a particular construction of an ambiguous document, that construction, if in itself admissible, will be adopted by the Court. (*Forbes* v. *Watt* (1872), L.R. 2 Sc. & D. 214). To this extent its original effect, though it cannot be *altered* (unless it amount to a variation by mutual consent) may be *explained* by the conduct of the parties.

There is a great mass of American authority for this latter proposition, 8 Cyc., tit. "Contract," pp. 588 *et seq.*

The contract which we have to interpret is that between Dingman and the city dated August 14, 1905, with such amendments thereto as were subsequently made.

Part of the surrounding circumstances at the date of that contract is the state of the law with regard to the powers of the city.

The city charter seems to have conferred no authority upon the city to enter into such a contract; and it excludes the application to the city of the municipal ordinance. Such power as the city possessed in this respect was, apparently, contained only

in ch. 21 of 1901 intituled "An Ordinance respecting Water, Gas, Electric and Telephone Company." This ordinance by sec 13 implies that a municipality may grant an exclusive privilege to a company operating under that ordinance. Sec. 16 lays a limited obligation upon the company to supply buildings on the lines of its mains.

With respect to the provision of the contract (par. 9), it seems to be unquestionable that the city then had no legislative authority itself to undertake the supply of gas; for the charter (ch. 33 of 1893) sec. 117 clause 56 which formerly read:

Building, erecting or buying or leasing, controlling and operating grist mills, elevators, telephone plant, electric and power plant, gas and water *works* plant, was amended only in 1911 (ch. 63 of 1911–12, sec. 8) by inserting after "telephone plant" the words "brick works, coal mines, gravel pits, abattoirs and gas *wells* or for dealing in coal, and it was only in 1910 (ch. 28, sec. 3, 2nd sess.) that the city was authorized to exercise any of the powers enumerated in clause 56 outside of the city limits.

In considering the meaning and intent of this contract, it seems to me that it is of the first importance to keep in constant view the thing the contract was about, viz.: the supplying to the inhabitants of the city of natural gas for the purposes of light, heat and power from a point *in fact contemplated* as being beyond the city limits and referred to in the contract as in or *in the vicinity* of the city. Such a contract without regard to its special provisions, it seems to me, suggests at once a different *primâ facie* view from that which would strike one with regard to numbers of other contracts for municipal works, for instance to a contract for the improvement of streets—laying sidewalks, making boulevards, paving, etc. In the one case we get the idea of the benefit to persons changing and increasing in number; in the other of property with its locality; in the one of continuity of service; in the other of completion once for all; in the one of the contractor desiring to increase his operations and consequently his profits indefinitely, thus calling for a permanent plant; in the other of a contractor requiring an "outfit" with regard to which he must contemplate that it must not be so great and expensive but that he can look forward to using it in connection with probable future contracts.

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When we come to examine the contract we find that the company was given a franchise, which, so far as the express terms go, was exclusive as against a like grant to any person, firm or corporation for and in the event of an extension limited to 5 years, for that further period and after the termination of the period of exclusiveness the franchise was by implication (pars. 9, 10, and 15) to be in perpetuity, subject to determination in certain events. Provision is also made imposing the obligation upon the company of indefinitely extending its mains, etc., and supplying gas, if the city council deems it reasonable that the company should do so, having regard to the return to the outlay (par. 18).

Provision is also made for the payment to the city by the company of 2% of the net profits of the company derived from the sale of gas within the city; to be increased in certain events to 5% (pars. 26, 27).

Regard is to be had as already said to the circumstances under which the contract was made, *e. g.*, the comparatively small area of the city, the comparatively small number of its inhabitants, the information as to which appears in the evidence; the fact that it was contemplated that the source of supply would be beyond the city limits and that therefore probably the principal main in the event of an extension of the limits would for some considerable portion of its length lying beyond the original limits, be of necessity brought within the extended limits, naturally suggesting the right and obligation of the company to supply the inhabitants in its vicinity. Having regard to all these things the provisions of the contract and especially the character of perpetuity attached to the rights and obligations of the company and the city's compulsory powers to enforce extensions, it seems to me that the contract ought, even without reference to the subsequent conduct of the parties, to be construed as being effective in any territory subsequently added to the city's limits; at least as against the city upon whose application to the legislature these extensions of boundaries were made.

Even if the contract alone, with the circumstances surrounding its making, leave the question in doubt, there are formal acts of the council and of the ratepayers inhabiting indifferently the original and increased area of the city, actively joined in and acted upon by the company, which in my opinion must be taken as an effective and irrevocable construction of the contract.

In addition to these formal acts there were very numerous acts, and a long course of conduct consistent only with this interpretation of the contract between the company on the one hand and the council, commissioners, engineer and other officers and officials of the city on the other; and in this connection it is perhaps worth suggesting that the authority of the commissioners elected under the provisions of the city charter is of a much higher character than of any individual officer or official of the city and that consequently their acts and acquiescence are of greater effect.

I have not thought it useful to discuss any of the decisions upon cases more or less analogous to the present, because apart from principles of interpretation, about which there is no need for dispute, they seem to me to afford little assistance.

The question of the exclusiveness of the franchise remains. If the exclusiveness exists it will expire on August 14, 1923 (p. 249).

It appears, as already stated, that at the making of the contract the city had no power to undertake itself the establishment of a natural gas system. This seems to be recognized by the contract itself in par. 15, which provides that in the event of a failure to pump gas for 30 days the city may enter into a temporary contract with any other company, firm or person for supplying natural gas within the city limits during the period of 6 months and may utilize such part of the company's system of mains as it needs.

In view of the law being as I have said there is no reason to look for, in the contract, a provision excluding the city from interfering with the franchise it was then granting otherwise than in the only way in which it could do so, namely; by similar grant to another person, firm or corporation.

The increase of authority in the city was obtained at the request of the city as appears in the recital to the Act and as should, I think, in any case be presumed. And it would seem to me that, if the franchise was originally exclusive as agent against the city by reason of its want of authority to engage directly in a like undertaking, it could not derogate from its own grant by obtaining merely general powers in that respect, at all events

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when its own grant was by special legislative Act, viz.: its own by-law.

It seems to me, too, that looking at the object and nature of the contract and its various provisions there is an implied term that the city will not interfere. The contract necessitates large expenditures in the creation of a permanent plant depending for its profitable operation upon the number of its customers; it was calculated for the benefit of all the inhabitants of the city whose representatives the city council were, it provides for the compelling of the company to make all reasonably required extensions, and finally made the city itself a participator in the net profit resulting from the operation of the system. A contract upon similar lines between two individuals would, it seems to me, clearly, by implication, exclude the party granting rights in consideration of improvements upon his property (the remuneration being dependent upon the making of the improvements and from their extent) himself undertaking the same improvements contemporaneously with the person to whom he had given a contract to do it.

For the reasons which I have tried to express I think that there should be a declaration that the franchise rights and privileges held by the defendants, the Canadian Western Natural Gas, Light, Heat & Power Co. Ltd., of the Calgary Gas Co. Ltd. extend throughout the present limits of the City of Calgary and that the same are exclusive as against the city for the period and subject to the conditions expressed in the contract embodying the same.

The defendant, the British Empire Trust Co., was added as representing bondholders and as therefore being parties interested in the matter in question.

In the result I would allow the appeal with costs and make the declaration outlined above and give the defendants, including the trust company, their costs in the action.

Judgment accordingly.

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Saskatchewan Supreme Court, Elwood, J. March 31, 1917.

RAILWAYS (§ II D—70)—INJURY TO ANIMALS AT LARGE—OWNER'S NEGLIGENCE—WILFUL ACT OR OMISSION.

It is a wilful act within the meaning of sec. 294(1) of the Railway Act, 1906, to turn animals at large upon a highway within half a mile of an intersection at rail level despite a provincial Act permitting animals

to run at large, and if the animals so at large get from the highway to railway property and are killed or injured there, the railway company is not liable.

[*Koch* v. *G.T.P. Branch Lines* (Sask. 1917), 32 D.L.R. 393 (annotated) considered; see also annotation following.]

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ACTION to recover damages for injury to animals under the Railway Act. Dismissed.

G. E. Taylor, K.C., for plaintiffs.

J. N. Fish, K.C., for defendant.

ELWOOD, J.:—In the month of January, 1916, certain Shetland ponies belonging to the plaintiffs were killed upon the right-of-way of the defendant company. This right-of-way was fenced on either side, but the cattle guards at the highway crossing, from which the ponies got upon the right-of-way, had been removed apparently by the defendant company.

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The evidence shews that in the month of November, 1915, these ponies were turned out to let run with other stock; that for the most part they grazed upon a section of land about a mile from the land of the plaintiffs, and between 1 and 2 miles from the crossing where they got upon the railway; that they were in the habit of coming home for water, and were looked up by the plaintiffs every day or two; and that, so far as the plaintiffs know, they had never before the accident strayed from the section on which they were pasturing.

At the time of the accident, the municipality in which the accident occurred had not passed any by-law prohibiting the animals from running at large, pursuant to ch. 32 of the statutes of Saskatchewan of 1915. Sec. 4 of that statute is as follows:—

4. Subject to the provisions of this Act it shall be lawful to allow animals to run at large in Saskatchewan.

(2) Nothing in this Act contained shall derogate from, destroy, or in any wise affect the rights or remedies which a proprietor or other person has, or but for this Act would have, at common law or otherwise, for the recovery of damages for trespass committed on, or injury done to, his property by any animal whether lawfully running at large or not.

In the case of *Early* v. *C.N.R. Co.*, 21 D.L.R. 413, 19 Can. Ry. Cas. 316, 8 S.L.R. 27, it was held by the Court *en banc* of this province that the failure of the railway company to provide cattle guards did not render the company liable if the animal injured was at large through the negligence or wilful act or omission of the owner, etc. And, so far as the question of the failure of the defendant company to maintain cattle guards is concerned, that question is concluded by the above decision.

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It was contended, however, on behalf of the plaintiff, that the fact that these animals were lawfully at large by virtue of the above statute prevented what would otherwise be negligence or a wilful act from being negligence or a wilful act.

Sub-sec. 4 of sec. 294 of the Railway Act is as follows:—

(4) When any horses, sheep, swine or other cattle at large, whether upon the highway or not, get upon the property of the company, and by reason thereof damage is caused to or by such animal, the party suffering such damage shall, except in the cases otherwise provided for by the next following section, be entitled to recover the amount of such damage against the company in any action in any Court of competent jurisdiction, unless the company establishes that such animal got at large through the negligence or wilful act or omission of the owner or his agent, or of the custodian of such animal or his agent: Provided, however, that nothing herein shall be taken or construed as relieving any person from the penalties imposed by sec. 407 of this Act. (As amended, 9 & 10 Edw. VII. ch. 50, sec. 8.)

In *Greenlaw* v. *C.N.R. Co.*, 12 D.L.R. 402, the Court of Appeal of the Province of Manitoba held that

cattle turned out to graze on the highways, as authorized by a municipal by-law, are not at large through the negligence or wilful act or omission of the owner so as to relieve the railway company under the above section from liability for running down animals that came upon its right-of-way at a place other than a highway crossing, by reason of defects in the fencing, which the railway company was under a statutory obligation to maintain.

In *McLeod* v. *C.N.R. Co.*, 18 O.L.R. 616, at p. 624, Boyd, C., says as follows: "Cattle on the lands of the owner are not 'at large' but 'at home.'" Similarly, I apprehend that cattle other than those of the owner of the land which are on that land by permission of the owner are not at large, and so, when cattle other than those of the owner of the land are upon that land by virtue of a statute or municipal by-law, they are not at large but at home.

The owner of land adjoining the railway whose cattle get upon the railway through a defect in the fence between the right-of-way and such land, could recover, although his land were not fenced, and so could any person else whose cattle were rightfully on the land, whether by permission of the owner or by virtue of a statute or municipal by-law, and that is really all that is decided in *Greenlaw* v. *C.N.R. Co.*, *supra*.

There are observations in the judgments which have a wider effect than was necessary for the purposes of the judgment; I do not, however, concur in some of those observations.

Sec. 294 (1) of the Railway Act is as follows:—

No horses, sheep, swine or other cattle shall be permitted to be at large upon any highway, within half a mile of the intersection of such highway with any railway at rail level, unless they are in charge of some competent person or persons, to prevent their loitering or stopping on such highway at such intersection, or straying upon the railway.

In *Early* v. *C.N.R. Co.*, *ante*, at p. 30, Bowen, L.J., in *Re Young and Harston's Contract*, 31 Ch.D. 168 at 174, was quoted with approval, namely:—

The other word which it is sought to define is "wilful." That is a word of familiar use in every branch of law and, although in some branches of the law it may have a special meaning, it generally, as used in Courts of law, implies nothing blameable, but merely that the person of whose action or default the expression is used, is a free agent, and that what has been done arises from the spontaneous action of his will. It amounts to nothing more than this, that he knows what he is doing and intends to do what he is doing and is a free agent.

And in *Becker* v. *C.P.R. Co.*, 7 Can. Ry. Cas. 29, at 33, Harvey, J., says:—

But, even if it were not negligence, it was the wilful or deliberate act of the plaintiff in putting the animals where he did that was the cause of their getting at large, if indeed they were not at large even in that pasture, and, therefore, they were at large through the negligence or wilful act or omission of the plaintiff, and thus come within the exception which excuses the railway company.

The mere fact that the animals had not, prior to the accident, to the knowledge of the plaintiffs been accustomed to stray from the land where they were pasturing, does not make it any less negligence on the part of the plaintiffs when they did, in fact, stray. See *Murray* v. *C.P.R. Co.*, 1 S.L.R. 283, 287, and *Becker* v. *C.P.R. Co.*, *supra*.

In *Koch* v. *G.T.P. R. Co.*, 32 D.L.R. 393, there is a dictum of three of the Judges of this Court that, where there is a by-law permitting animals to run at large in the municipality, the owner cannot be guilty of negligence in allowing his animals to so run, even if in consequence they get upon the railway at its intersection with the highway. That dictum was clearly *obiter*, and while I have the very highest respect for the opinions of the Judges who concurred in that dictum, still, it was *obiter*, and, as I have a very strong contrary opinion, I feel that I cannot follow what is there stated.

There is the express statutory enactment in sec. 294(1) of the Railway Act, forbidding certain animals from being permitted to be at large upon the highway (which intersects a railway) within half-a-mile of such intersection. For ordinary purposes

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Elwood, J.

the animals had, except as mentioned in sec. 4(2) of ch. 32 of 1915, the right to be on the highway, but so far as the rights and liabilities under the Railway Act are concerned, they had no right to be there. I apprehend that no mere consent of the municipality or of the province could give them the right to be there as against the provisions of the Railway Act. If they got upon the highway within half-a-mile of an intersection with the railway through the negligence of the owner or his wilful act, and from such highway got upon the railway and were injured, then the company is not liable.

The definition of "wilful" approved of in *Early* v. *C.N.R. Co.*, *supra*, to my mind, makes it clear that what is intended by sec. 294(4) of the Railway Act is, that the owner of the animals who intentionally permits his animals to be at large is deprived of his right of action if they are injured in consequence of their so being at large. The mere fact that there is a by-law or a statute permitting them to be at large cannot affect his position and his responsibility with respect to the railway company. It is none the less intentional that it is permitted. Sub-sec. 1 of sec. 294 says that they shall not be *permitted* to be at large.

Having come to this conclusion, the result must be that the plaintiffs' action must be dismissed with costs.

There was a counterclaim of the defendants claiming damages which the defendant company sustained in consequence of the cattle being upon the track.

Sec. 294(4) of the Railway Act is a section which, *inter alia*, deprives the owner of animals injured of his right of action if the animals get injured through being at large through his negligence or wilful act, etc. That section, however, does not give the railway company a right of action if any such animals get upon the railway through the default of the railway. It was through the default of the railway company that the animals got upon the right-of-way, or, at any rate, there being no cattle guards, the animals had nothing to prevent them getting upon the right-of-way to the place where the accident took place, and I am of the opinion and hold that this negligence of the railway company prevents its recovering on a counterclaim.

The result is that the counterclaim will be dismissed with costs.

Action dismissed.

ANNOTATION. Annotation.

BY ALFRED B. MORINE, K.C.
Consulting Editor, D.L.R.

In the above case the animals were turned out by the owner, to graze with other stock, where they would, upon unenclosed land; they got upon a highway, and thence upon the railway, at an intersection at rail level, where the cattle guards had been removed.

A provincial Act says that "it shall be lawful to allow animals to run at large." The only question of law really raised by these facts is this, is the intentional act of the owner in turning his cattle at large a "wilful" act, within the meaning of sec. 294(4) of the Railway Act, R.S.C. 1906, in view of the fact that it is legalized by the provincial Act, so far as such an Act can legalize it? Elwood, J., said: "The mere fact that there is a (provincial) statute permitting them to be at large cannot affect the owner's position and responsibility with respect to the railway company. It (the owner's act) is none the less intentional (that is, wilful) that it is permitted.

Elwood, J., seemed to see some significance in the word "permitted" where it occurs in sec. 294(1) "No horse, etc., shall be permitted to be at large." In face of that word he thought a provincial Act could not grant permission, but manifestly, provincial power, if it existed under the B.N.A. Act 1867, could not be limited by any such prohibition. "Permitted" is mere surplusage in sec. 294(1) which should be read as if it ran: No horse, etc., shall be at large.

The offence is not in permitting, but in being at large; it is not the owner who is at fault, by permitting, but the animal in being at large.

In arriving at this conclusion, Elwood, J., considered himself at liberty to disregard certain opinions upon this point expressed by the Saskatchewan Court of Appeal in *Early* v. *C.N.R. Co.*, 21 D.L.R. 413, and *Koch* v. *G.T.P. Branch Lines Co.*, 32 D.L.R. 393, upon the ground that those opinions were not necessary to the findings in the cases, and, therefore, were *obiter*. It is true that in the *Koch* case it was found as a fact that the owner had not been guilty of negligence, and therefore was entitled to damages, but it is also true that a by-law permitting animals to be at large was proven, and relied on, and that the Court based its judgment on this point as well as on the other. The opinion, therefore, cannot properly be considered as *obiter*, and the decision of Elwood, J., must be attributed to the very strong conviction he evidently felt that the Court of Appeal was wrong. Those who have read the annotation in 32 D.L.R., at p. 397, will notice that this is the opinion there expressed.

The remarks made by Elwood, J., himself in relation to injuries to animals which get upon a railway through a defective railway fence are clearly *obiter*, as the point was not in issue before him. They are based upon what appears to us a misapprehension of a remark made by Boyd, C., in *McLeod* v. *C.N.R. Co.*, 18 O.L.R., at 624, and are apparently intended to suggest a ground upon which *Greenlaw* v. *C.N.R. Co.*, 12 D.L.R. 402, could have been decided, but was not; a suggestion made, apparently, in order that the grounds given by the Manitoba Court of Appeal for its decision might also be treated by Elwood, J., as *obiter*, because he did not agree with them. In that case, the animals which were running at large got upon the railway from unenclosed lands, not by using a highway, but through a defective railway fence; but a municipal by-law permitted cattle to run at large, and the Manitoba Court held that because of the by-law the intentional act of the owner in turning his cattle at

Annotation. large was not "wilful," within the meaning of the Railway Act. Elwood, J., now comments that these animals were not "at large" within the meaning of sec. 294(4), and this rather amazing conclusion he deduces from the remark made by Boyd, C., that "cattle on the lands of the owners are not at large, but at home." So also, says Elwood, J., are cattle of other persons permitted by an owner to be on his land, or cattle there "by virtue of a statute or municipal by-law." In passing, it may be remarked that while it is possible that the rights of an owner of land against an adjoining railway may be attributed to the owner's licensee, it is difficult to conceive how they could be attributed to a trespasser who had no other defence than that a municipal by-law said that his cattle might run at large. It may also be pointed out that if the cattle in *Greenlaw* case were not "at large" within the meaning of sec. 294(4), their owner had no remedy under that section, and as the land was unenclosed, the railway was not bound to fence it (sec. 254), so that the railway would not be liable under sec. 427. The Manitoba Court saw this difficulty, and avoided it by finding that the municipal by-law had the effect of making an intentional action of the owner neither negligent nor wilful. The plaintiff was given damages under sec. 294(4), which could not have been done if the animals were not "at large."

But a perusal of *McLeod* v. *C.N.R. Co.* (*supra*), will shew that the remark of Boyd, C., has been torn from its setting, and does not, in fact, warrant the deductions Elwood, J., has drawn from it. In that case the animals had got upon the railway from an enclosed field, through a gap in the railway fence, and all that Boyd, C., meant was this, "animals on the (enclosed) lands of the owner are not at large, and therefore sec. 294 does not apply." The defendant company was found liable because it had not kept in good repair the fence it was bound to keep up between the enclosed land and the railway track. In other words, *McLeod* v. *C.N.R. Co.* was decided on the meaning of the words "at large," the *Greenlaw* case on the meaning of the words "negligence or wilful act or omission."

To say of unenclosed land that the owner whose cattle got from it to the railway could recover for injury to them if they got there "through a defect in the railway fence" is to leave out of sight the fact that unless the land is both enclosed and settled or improved (sec. 254(4)), the company is not bound to fence, and consequently is not liable under sec. 427(2).

"At large," in the Railway Act, manifestly means "not enclosed or under physical restraint," for sec. 294(1) speaks of animals at large upon a highway in charge of a competent person, shewing that the mere fact of a caretaker being with them, while a defence, does not alter the fact that they are at large. Sub-sec. 4 speaks of animals at large, whether upon the highway or not, and as the words "at large" should be given the same meaning in all parts of the section, they can only mean in sub-sec. 4, as in sub-sec. 2, "Animals not enclosed or under physical restraint." Sec. 254 provides that the railway company shall fence where the track runs through fenced land which is settled or improved, and sec. 427 renders the company liable in damages resulting from failure to so fence. For injury to animals not at large, sec. 294 provides no remedy; that is to say, for animals under physical restraint, or upon enclosed land, which not being either improved or settled, the company was not bound to fence, and mere inclosure is not improvement within the meaning of sec. 254. For damages to such animals, an action for negligence on common law grounds would probably lie; for animals at large, sec. 294 is a code, and

sub-sec. 4 makes the company liable without proof of negligence on its part, for animals killed on its property, but allows it to be a good defence that the animals got at large through the negligence or wilful act of the owner. Thus the Railway Act is seen to have three principles as to animals: (1) If not at large, liability is dependent upon negligence; (2) If at large upon a highway, without competent oversight, the company is not liable; if with such oversight, liability as in the former case is a question of negligence; (3) If at large anywhere, and injured upon railway property, the company is liable unless it can prove that the animals got at large by the negligence or wilful act of the owner. At large or not at large is a question of fact, and negligence or wilful act or omission are also questions of fact. If the law is not satisfactory, parliament, not the Courts, should do the necessary legislation. Annotation.

DOMINION IRON AND STEEL CO. v. BURT. IMP. P. C.

Judicial Committee of the Privy Council, Lord Buckmaster, L.C., Viscount Haldane, Lord Dunedin, Lord Parker of Waddington, and Sir Arthur Channell. January 25, 1917.

EMINENT DOMAIN (§ III E—186)—RAILWAYS—ALTERATION OF HIGHWAY—VIOLATION OF STATUTE—NUISANCE—REMEDY.

One who suffers special damage by reason of a nuisance created in a highway, by the execution of certain works under statutory powers, has a right of action at common law, if conditions precedent to such execution prescribed by statute have not been observed.

APPEAL from the judgment of the Supreme Court of Nova Scotia, 25 D.L.R. 252, 49 N.S.R. 339, 19 Can. Ry. Cas. 187. Affirmed. Statement.

The judgment of the Board was delivered by

LORD PARKER:—The question arising for decision on this appeal is whether the appellant railway company in carrying out certain works in Victoria Road in the City of Sydney, N.S., acted illegally so as to be liable to a common law action of nuisance at the suit of the respondents, who have admittedly suffered special damage, or whether it acted legally under its statutory powers, so that the respondents' remedy is by way of compensation under the provisions of the N.S. Railways Act (ch. 99 of the R.S.N.S. 1900). The question for determination depends entirely on the construction to be placed on the Act to which their Lordships have referred. This Act confers certain general powers on railway companies in Nova Scotia. In the construction of railways it is almost invariably necessary not only to take land, but to do acts which may injuriously affect land not actually taken for the purpose of the railway. The Act accordingly defines the mode in which and the conditions subject to which lands may be so taken or injuriously affected. The scheme of the Act in this connection is reasonably clear. The expression "rail- Lord Parker.

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way" is by sec. 2 (*q*) defined to include not only the actual line but all works connected therewith, and by sec. 117 a map or plan and profile of the railway and of its course and direction has to be prepared and (sec. 118) deposited with the commissioner. By sec. 159 it is only on payment or legal tender of compensation in respect of lands to be taken or injuriously affected by the company that the company can take any land it requires for the works, or exercise any power which must injuriously affect other land. The method by which the compensation payable can be ascertained is provided for by the Act, the proceedings to ascertain the compensation being originated by a notice from the company to the parties interested, served not less than 10 days after the deposit of the map or plan. It is obviously contemplated that the lands which will be injuriously affected by the construction of the works, as well as the lands which will be required for such construction, will be apparent from the map or plan itself. The result of these provisions is that the deposit of the map or plan and the payment or tender of compensation become conditions precedent not only to the taking of land but to the exercise of any power which must necessarily injuriously affect land.

By sec. 124, if any alterations from the original plan are intended to be made, a map or plan and profile of such alteration is to be made and deposited in the same manner as the original map or plan and profile, and the alterations are not to be carried out until such map or plan and profile have been deposited, nor until the compensation payable in respect of lands which have to be taken for or, must be injuriously affected by, such alterations, has been actually paid or tendered.

It was argued that sec. 88 is inconsistent with the provisions of the Act being construed as above suggested, but in their Lordships' opinion, this is not really so. Sec. 88 provides that the company shall, in the exercise of its powers, do as little damage as possible, and make full compensation to all persons interested for all damage by them sustained by reason of the exercise of such powers. It contemplates cases in which a company may, if it act reasonably, avoid altogether, or at any rate minimize, any damage. If, for example, the works include the making of a sunken way in the neighbourhood of houses, the company must, if it can, avoid causing subsidence in such houses, and if, in spite

of proper care and caution, subsidence takes place, it must compensate all parties injured thereby.

It would, however, be quite impossible, from a practical standpoint, to make the tender of such compensation a condition precedent to the execution of the works. Until such execution it would be impossible to ascertain whether there would be any damage for which compensation could be awarded. Such a case is not *in pari materia* with cases in which it appears from the deposited map or plan that land not taken for the purposes of the works must nevertheless be injuriously affected, for example, where the map or plan shews that some landowner will be deprived of access to a public highway.

The works which the appellant company have carried out in the present case consist of alterations in Victoria Road, designed with the object of carrying such road under the railway and getting rid of the dangerous level crossing which had previously existed. They were carried out pursuant to a direction of the Governor-in-Council under the provisions of sec. 178. Such a direction cannot of itself confer on the company any power to interfere with the rights of others, but there can be no question that the company had, under sec. 85, general powers wide enough to enable them to carry out the works. Nevertheless these works, in their Lordships' opinion, constituted an alteration from the original map or plan within the meaning of sec. 124, and it follows that a new map or plan thereof ought to have been made and deposited in manner by that section provided before the company commenced the work. This was not done. It further appears that if such map or plan had been deposited it could not have failed to shew that the access of the respondents to Victoria Road from the adjoining lands must necessarily be interfered with, so that the alterations could not be properly commenced until compensation for such interference had been paid or tendered under sec. 159. No such compensation was, in fact, paid or tendered. The result is that, in executing the works directed by the Governor-in-Council, the company acted illegally, not because they had no power to carry out the alterations, but because they did not trouble to observe the conditions precedent upon which alone their powers could be exercised. What they have done in Victoria Road constitutes, therefore, a

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nuisance in the highway, for which the respondents, who undoubtedly suffered special damage, had their common law remedy.

Their Lordships have arrived at the above conclusion quite independently of what was said by Lord Macnaghten in the case of the *Corporation of Parkdale* v. *West*, 12 App. Cas. 602. Nevertheless, if sec. 88 of the Act be construed as above suggested, there is much to be said for the Board being bound by that decision, so far as it bears upon the true construction to be placed on the concluding paragraph of sec. 178. Their Lordships, however, do not rely on such concluding paragraph, and it is therefore unnecessary to deal further with this point.

For the reasons above mentioned, their Lordships are of opinion that the orders appealed from were right in so far as they recognized that the appellant company had acted illegally, and that the respondents were entitled to damages. Indeed, the respondents might, strictly speaking, also claim a mandatory order for the restoration of Victoria Road to its former condition. It is suggested that, inasmuch as this Act contains what is sometimes known as a betterment clause, the measure of damage in an action of nuisance is not necessarily the same as the measure of compensation payable under the Act. It is, however, difficult to see how the amount of damages to which the respondents are entitled can in any event exceed the amount which would have been payable to them by way of compensation if the appellant company had proceeded lawfully. The fact that it could have proceeded lawfully and that had it done so the betterment clause of the Act would have applied, is not without materiality in assessing the damage.

Moreover, it is, in their Lordships' opinion, still open to the appellant company to deposit a map or plan of the works and to take the necessary proceedings for ascertaining the compensation payable under the Act, and, if they do so, the Court in its discretion would be entitled to refuse to make or to postpone the making of any mandatory order. Further, though it is a matter of indifference to the respondents whether what they will receive in respect of any injury to their land be by way of damage or by way of compensation, this is not necessarily so with regard to the appellant company, for in the one case it may have, and in the other it may not have, some remedy over

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against the Corporation of Sydney under the order of the Governor-in-Council. Under these circumstances it appears to their Lordships that while the orders below ought to be affirmed, any proceedings thereunder for ascertaining the amount of the damage sustained by the respondents ought to be stayed so as to give the appellant company an opportunity of doing what they ought to have done in the first instance. For this purpose a reasonable interval, say, two months, ought to be allowed. If within these two months the company deposit a proper map or plan and proceed, with due diligence, to have the compensation payable to the respondents ascertained in accordance with the provisions of the Act the stay will become absolute. If within the two months the company do not deposit a proper map or plan and take the necessary proceedings to ascertain the compensation, the stay will be removed. Subject to the above, their Lordships will humbly advise His Majesty to dismiss the appeal with costs.

Appeal dismissed.

CHICOUTIMI PULP CO. v. JONQUIÈRE PULP CO.

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Judicial Committee of the Privy Council, Lord Buckmaster, L.C., Viscount Haldane, Lord Dunedin, Lord Parker of Waddington, and Sir Arthur Channell. January 23, 1917.

WATERS (§ II J—160)—CONTRACT AS TO DISTRIBUTION—OPERATION OF MILLS.

An agreement between mill owners as to the distribution of lake water for the operation of their mills makes it necessary to hold the lake level at a proper elevation in order to ensure the proportionate distribution under the contract.

APPEAL from the judgment of the Quebec Court of King's Bench, appeal side. Affirmed. Statement.

The judgment of the Board was delivered by

LORD DUNEDIN:—The appellants and respondents are owners of mills driven by water power situated on the Chicoutimi and Sables rivers respectively. These two rivers issue from Lake Kenogami at opposite ends. For many years Lake Kenogami has been used as a reservoir of water. To effect a proper storage, dams were constructed on the two rivers at Portage des Roches on the Chicoutimi river, and Pibrec on the Sables river. Quarrels arose between the mill owners, and various litigations ensued, but the whole matter was eventually settled by an agreement and contract of August 23, 1904, which contract it is common ground is binding, and regulates according to its terms the rights Lord Dunedin.

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of the parties. The contract provides (art. 1) for the rebuilding of the existing dams, and then follows art. 2 in the following terms:—

The said dams shall be built according to plans to be settled and approved by Mr. Alexander McDougall, C.E., engineer for the Jonquière Company, and an engineer to be chosen by the Chicoutimi Company, and shall be so constructed as to make an effective watertight reservoir, to hold not less than 8 feet of water above lowest level of Lake Kenogami, and the said dams shall be provided with gates which will enable the water in Lake Kenogami to be distributed at all times in the following proportions, to wit: one-third of the said water through the gates at the Rivière aux Sables dam, to the Jonquière Company, and two-thirds of the said water through the gates at the Portage des Roches dam, to the Chicoutimi Company. As far as possible, the surplus water flowing, when the reservoir is full, shall be distributed in the same proportions.

Art. 8 is in the following terms:—

The waters in Lake Kenogami, from and after the construction of the new dams provided by the present agreement, shall be under the control of an independent person, who shall be named by the two companies, and whose salary and expenses shall be paid in the proportion of one-third by the Jonquière Company and two-thirds by the Chicoutimi Company. Such person shall distribute the waters to the two companies in accordance with the present contract.

The other articles of the contract provide for various matters which may arise, but are not of importance in the present case, except art. 18, which is of importance. It is in the following terms:—

The Jonquière Company shall have the right at any time to enter upon the Rivière aux Sables between the dam on such river and Lake Kenogami, including the outlet of Lake Kenogami at the Rivière aux Sables, for the purpose of blasting ice or removing it, or any trees, logs, or other obstruction which may interfere with the natural flow of the river, and may impede their receiving a third of the water stored and flowing from Lake Kenogami at any time; but they shall give reasonable notice to the Chicoutimi Company of their intention so to do: provided the power hereby given shall not confer any right to mine any part of the natural bed of the river.

The dams were duly constructed. Levels were settled in the following manner: A benchmark was placed near the lake and marked conventionally as 100 ft. in height. A sufficiency of storage, as stipulated in the contract, was secured by making the crest of the dam at Portage des Roches at 87 ft. and at Pibrec at 84 ft. The difference of height was necessary for equalization, in view of the fact that the breadth of the dam at Portage des Roches was not exactly twice the breadth of the dam at Pibrec. The dams were furnished with sluices, whose sills were at the bottom of the dam, the sluices being 6 ft. sq., 6 of them at Portage des

Roches and 3 at Pibrec. There were also crest gates arranged at the top of the dams to deal with the surplus water, and the tops of these crests were at 92 ft. each. The distributor appointed under the contract was, at the date of the raising of the action, a certain Mr. Vézina. Among other duties he kept charts, which tabulated from time to time the level of the lake and the amount of water discharged at each dam. Vézina manipulated the discharge by opening or shutting the sluices, and he based his action on various calculations which had been made as to the amount of water which would pass from the sluices at each dam.

Some time in 1909 the respondents, seeing the charts, perceived that they were getting less than their stipulated one-third of the total water discharged, while the appellants were getting more than two-thirds. They wished Vézina to alter the sluices, but the appellants, taking the matter into their own hands, prevented Vézina from altering what he was doing. They alleged that the deficit in the respondents' supply was not due to an improper regulation at the sluices, but was due to obstruction in the River Sables, which the respondents had neglected to remove, as they might have done, under art. 18 of the contract. After much correspondence the respondents raised the present action in May, 1910. Their declaration set forth in greater detail the facts above summarized, and also asserted that a just distribution, as provided for by the contract, could not be effected if the level of the lake were allowed to fall below the point 82 ft. upon the scale above mentioned. The declaration was subsequently amended to the effect of substituting 83.5 for 82. The relief claimed was clearly expressed, and consisted in three declarations, (1) that the respondents were at all times of the year entitled to have one-third of the water in Lake Kenogami from the sluices, and that the sluices should be so regulated as to effect this; (2) that the appellants were not entitled to interfere with the action of the distributor; and (3) that a just distribution could not be effected by the sluices if the lake were allowed to fall below the 83.5 level. The appellants in their answer did not object to declaration 1, which is a mere echo of the contract, but, as regards 2 and 3, they simply denied the facts upon which these declarations were based.

The action came to depend before Letellier, J., at Chicoutimi, who heard evidence and pronounced judgment in favour of the

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respondents, giving them a declaration under all the heads above specified. Appeal was taken to the appellate side of the King's Bench in Quebec. The Appeal Court maintained the appeal and ordered a remit to experts, *i.e.*, engineers, called an "expertise." They framed a set of questions to be put to the experts and remitted to the Court at Chicoutimi to get the report and pronounce judgment. The experts, after personal inspection, taking of reports and consideration, made a report. This report came to the same conclusions as Letellier, J., had come to, with the sole exception that they considered the minimum level of Lake Kenogami should be 83 in lieu of 83.5. Letellier, J., not being quite satisfied with some of the answers, remitted the matter to the experts to give him some further details and answer some specific questions. The experts presented a supplementary report, and Letellier, J., then repeated his former judgment, merely substituting the figure of 83 for 83.5. The appellants then went again to the Court of Appeal, who, after discussion, confirmed the judgment of Letellier, J., except as to a matter of costs. The appellants now appeal to this Board against this judgment.

Before their Lordships the appellants, through their counsel, admitted they were wrong in interfering with the distributor, and were wrong in attributing the unequal distribution—which they admitted occurred—to any failure of the respondents to clean the River Sables. They further did not resist the declaration granted under heads 1 and 2. Their whole argument was directed to the declaration under head 3, which ordained the maintenance of the lake at a level of 83.

It may now be well to explain shortly how the trouble really arose. When the level of Lake Kenogami is above 83, the effective head of water at each dam is practically the same, and consequently no difficulty is met with in so adjusting the sluices as to distribute the water in the agreed proportions. This state of affairs would continue at lower levels if the Rivers Sables and Chicoutimi respectively issued at the same level from the lake, but in fact what may be called the lower sill of the outlet of the River Sables is considerably higher than the lower sill of the Chicoutimi. This is so much the case that at a level of 80.3 the water of Lake Kenogami no longer enters the River Sables, while it will still freely enter the Chicoutimi. As the lake in falling approaches this level, it is evident that the effective head at the

dams, so far from being equal, is quite dissimilar, the amount of dissimilarity being a varying quantity as the water descends towards the level of 80.3. Now, inasmuch as in such circumstances no water can pass the dams except as allowed to escape from the sluices, it is obvious that it is theoretically possible to measure what is the exact escaping flow at Pibrec on the Sables, and then so regulate the sluice at Portages des Roches, on the Chicoutimi, as to allow exactly double that amount to pass. The appellants' whole argument, when stripped of accessories, was reduced to this: that inasmuch as there was no mention made of any lake level in the contract, but only provision for a two-thirds to a one-third distribution, there was no reason to put a limit which would stop water being divided which was in the lake and available for supply, and which could, with proper appliances, be justly divided. Their Lordships are bound to say that this point was made anything but clear in the appellants' pleadings as defendants to the action. The point was clearly made in the respondents' complaint. It was answered, as above stated, by a mere denial without explanation. In the evidence the respondents clearly put the point to their witnesses, who, admitting that a distribution under the level of 83 and down to 80.3—when all distribution must cease—was theoretically possible, and could be actually done with the provision of gauges, etc., said that practically it was not to be done, and could not be effected by the mere manipulation of the sluices. The appellants put the point to their own expert witness, who said he was not prepared to go into the question, and there the matter was left. Their Lordships have no doubt that on a just consideration of the contract the whole machinery of the dams and sluices was intended to be what may be styled self-contained. Art. 2 seems conclusive on this point: "The said dams shall be provided with gates which will enable the water of Lake Kenogami to be distributed at all times in the following proportions." Accordingly, if the condition of affairs is such that the agreed on distribution cannot be practically effected by the manipulation of the gates without bringing into aid other appliances than those stipulated, then in their Lordships' opinion there cannot be that distribution for which the contract intended to provide. This view seems to their Lordships to be the hypothesis of the import of the contract,

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upon which the experts proceeded. Their report, and not the evidence, is, as to the facts, the real basis on which judgment proceeds. The experts clearly had the point before them, because question 2, as settled by the Court of Appeal to be put to them, was as follows:—

2. At what level does the water of Lake Kenogami require to be kept in order to distribute the water in proportion of two-thirds to the defendant and one-third to the plaintiff, and does the level of the lake, for this purpose, differ in winter and summer, or at different times or seasons, or under varying conditions of wind, and state the extent of this difference, if any?

In their original answer to this question the experts point out that some water will flow down the Sables river at any height of Lake Kenogami above 80.3, and that it is physically possible to measure whatever water flows; but they proceed to say that the effect of winds in summer and ice in winter will disturb the river's action, and that accordingly, though water would pass in still conditions at 82, so as to allow operation of the mills, yet, to meet contingencies, a level of 83 should be maintained. This answer was deemed ambiguous, as, indeed, it was, owing to the introduction of the words "operation of the mills," and consequently in the supplementary reports all reference to the mills is omitted. They say:—

Our decision was that the level of the lake be held at elevation 83.0, and we never at any time suggested that elevation 82.0 was the level at which the contract could be fulfilled.

No doubt the water may at times be divided when the lake is at a lower level, in favourable seasons, but in order to ensure compliace with the requirements of the contract, the elevation of 83.0 is, in our opinion, necessary.

Our decision was reached after a careful study of the whole of the evidence in the case, and we analysed this in conjunction with the plans and various exhibits, including the contract. We also examined the site under summer and winter conditions.

This view commended itself to both the trial Judge and the Court of Appeal. Their Lordships are of opinion that, on the materials before them, both Courts took a correct view, and rightly construed the contract, and that the appeal falls to be dismissed.

They will humbly advise His Majesty accordingly. The appellants will pay the costs of the appeal.

Appeal dismissed.

UNION BANK OF CANADA v. ENGEN.

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Saskatchewan Supreme Court, Newlands, Lamont, Brown and McKay, JJ. March 10, 1917.

RECEIVERS (§ I B—12)—EQUITABLE MORTGAGE—ENFORCEMENT.

An equitable mortgagee is entitled to the appointment of a receiver of the rents and profits of the mortgaged property for the purpose of enforcing his security.

[*Union Bank of Canada* v. *Engen*, 31 D.L.R. 575, affirmed.]

Statement.

APPEAL from the judgment of Elwood, J., 31 D.L.R. 575, granting an application for the appointment of a receiver. Affirmed.

T. A. Lynd, for appellant; *F. L. Bastedo*, for respondent.

Newlands, J.

NEWLANDS, J.:—This action is to declare that plaintiffs have an equitable mortgage on s-w¼-21-36-4-w3rd., and, amongst other things, to enforce the same by the sale of the land.

By a motion in Chambers a receiver was appointed to collect the rents and profits on the land until the disposition of the action. The Chambers Judge amended the plaintiffs' prayer for relief by adding thereto a prayer that a receiver be appointed.

By sec. 31(8) of the Judicature Act, a receiver may be appointed in all cases in which it shall appear to the Court to be just or convenient.

In Kerr on Receivers, p. 7, it is stated that an equitable mortgagee may have a receiver appointed if the payment of interest on his mortgage be in arrear, and, on p. 37, he says a receiver may be appointed on the application of an equitable mortgagee in a foreclosure suit or other suit for enforcing his security against the mortgagor in possession, having the legal estate.

It is necessary, therefore, for the plaintiff to shew, (1) that he has an equitable mortgage; (2) that at least his interest is in arrear; and (3) that his action is to enforce his security.

The action is for a declaration that plaintiffs have an equitable mortgage and defendant denies that plaintiffs have one. In such a case it is necessary for plaintiffs to make out a *primâ facie* case: *John* v. *John*, [1898] 2 Ch. 573, at p. 581.

Although we have no right to decide the question, I am of the opinion that the evidence put in on the application for a receiver shews that plaintiffs have an equitable mortgage.

The next question is: Is the mortgage in arrears? In the statement of claim plaintiffs say that on or about December 21, 1912, the defendant Fred Engen, the mortgagor, was and has ever

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since continued indebted to them in large sums of money, and the said indebtedness has never been repaid or discharged and now amounts to a sum exceeding $118,059.

As "indebted" means the same as "due," that is "presently payable" (Stroud's Judicial Dictionary, p. 955), the statement of claim alleges that at the time the action was commenced there was due plaintiffs on the equitable mortgage a very large sum of money. This fact is proved by the affidavits of Hiam and Swaisland and is not denied by defendant.

The statement of claim asks that the land be sold to realize the amount due, which is the proper way to realize on an equitable mortgage.

The plaintiffs have therefore complied with the 3 conditions required in order to have a receiver appointed on the application of an equitable mortgagee. (1) They have made out a *primâ facie* case that they have an equitable mortgage. (2) They have proved that there is due on this equitable mortgage a large sum of money, and (3) They bring action, amongst other things, to enforce their security. In addition to this they have shewn that the holder of the legal title, as well as the mortgagor, is in a poor financial condition.

It is therefore a case where it is just and convenient to appoint a receiver, unless the grounds advanced by the defendant's counsel that a mortgagee is not entitled to take possession of the mortgaged property unless he proceeds as set out in sub-sec. (2) of sec. 93 of the Land Titles Act, and is therefore not entitled to the rents and profits, is to prevail.

Sec. 93 of the Land Titles Act provides 2 modes of foreclosing or otherwise realizing upon mortgages. Sub-sec. 1 provides that the mortgage may be foreclosed or the land sold under the practice and procedure of the Supreme Court, and the following subsections provide for the foreclosure or sale by proceedings before the registrar.

The 2 methods of procedure are entirely distinct, and subsec. 2 has no application when the mortgagee elects to proceed under the first sub-section under the practice and procedure of the Supreme Court. The provisions of sub-sec. 2 are therefore no bar to these proceedings.

Defendant's counsel also objected to the receipt of the evi-

dence of Campbell taken *de bene esse*. As I view the proceedings, this evidence was not put in as Campbell's evidence but as exhibits to the evidence of Hiam and Swaisland, both of whom swear that they have read the same over, that they have a personal knowledge of the facts and that it is true in every particular. They have, therefore, both sworn to all the facts set out in Campbell's evidence and there is, therefore, other evidence than his of all the facts he swears to.

The objection therefore that if this evidence taken *de bene esse* was rejected there would be no evidence, fails.

The appeal should be dismissed with costs.

LAMONT, and MCKAY, JJ., concurred with NEWLANDS, J.

Lamont, J.
McKay, J.

BROWN, J.:—The plaintiffs claim that the defendant Fred Engen, being indebted to them in a large sum of money, deposited as security for said indebtedness his duplicate certificate of title to a certain section of land of which he was the registered owner. That subsequently he executed in their favour a statutory mortgage on three-quarters of the said section, to better secure a portion of the said indebtedness. They further allege that while the duplicate certificate of title to the said section was in the Land Titles Office, for the purpose of enabling them to have their mortgage registered, the defendants Fred Engen, his wife Laura Engen, and Walter Crozier conspired together and, in fraud of the plaintiffs, the defendant Fred Engen executed in favour of his said wife, Laura Engen, a transfer of the remaining quarter of said section, which said transfer was duly registered and a new certificate of title issued in favour of the said Laura Engen for said quarter section. The plaintiffs bring this action to have it declared that they have an equitable mortgage on said quarter section; for the appointment of a receiver of the rents and profits and for a sale of the land.

Brown, J.

The right of the plaintiffs, under the circumstances of this case, to have a receiver appointed is the question that we are asked to decide. The material on which the application to the Judge in Chambers was based makes out the following *primâ facie* case:—

That the title deed was deposited with the plaintiffs and held by them as security for the indebtedness of Fred Engen as alleged; that a transfer was issued by Fred Engen to his wife, Laura Engen,

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during the deposit of the duplicate certificate of title in the Land Titles office, as alleged; and a new certificate of title issued in her favour; that the land was subsequently leased by the defendant Laura Engen to one A. E. Clarkson; that there is rent owing from the said Clarkson under the said lease; that the defendant Fred Engen is in default in payment of his indebtedness to the plaintiffs; that he is in insolvent circumstances, and that, unless the plaintiffs have a receiver appointed, they are likely to permanently lose the rents and profits from the land.

Assuming that the plaintiffs' allegations are true, they are, by virtue of the deposit of the title deed as security for the indebtedness, equitable mortgagees.

The law seems clear that an equitable mortgagee is entitled to the appointment of a receiver of the rents and profits. Fisher on Mortgages, Can. ed., at p. 429, makes the following statement of the law:—

> 838. A receiver may be appointed in a foreclosure suit against the mortgagor in possession, having the legal title, on the application of an equitable mortgagee; and over the rents and profits, where there are several mortgagors, tenants in common, though one of them be absent, if the other be in possession of the rents.

This statement of the law appears to be amply supported by the following authorities: *Holmes* v. *Bell*, 2 Beav. 298; *Pease* v. *Fletcher*, L.R. (1875), 1 Ch.D. 273; *Meaden* v. *Sealey* (1849), 6 Hare 620 (67 E.R. 1310); Kerr on Receivers, 3rd ed., p. 37; 21 Hals. 261.

The fact that the mortgagee is not in possession appears to simply emphasize the need of and the right to a receiver: *Ackland* v. *Gravener*, 31 Beav. 482, 54 E.R. 1225.

The provisions of sec. 93(2) of the Land Titles Act which were referred to by the counsel for the defendants, have not, in my opinion, any application to the case at bar.

In view of the authorities to which I have above referred, I am of opinion that, under the circumstances of this case, the order appealed from was properly made and that, therefore, the appeal should be dismissed with costs.

Appeal dismissed.

COUNTY OF WENTWORTH v. HAMILTON RADIAL ELECTRIC R. CO. AND CITY OF HAMILTON.

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Idington, Duff, Anglin and Brodeur, JJ. December 30, 1916.

MUNICIPAL CORPORATIONS (§ I B—11)—ANNEXING COUNTY TO CITY—EFFECT ON FRANCHISES—POWER OF BOARD.

The annexation of county territory to a city does not affect a railway franchise granted by the county and the income the county is entitled to thereunder; nor does the city thereupon become "successor" under the agreement between the county and the railway company. The Ontario Railway and Municipal Board, in making the annexation order, has no power to provide that such rights should pass to the city in whole or in part.

Statement.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario, 28 D.L.R. 110, 35 O.L.R. 434, reversing the judgment at the trial (31 O.L.R. 659), in favour of the plaintiff. Reversed.

Lynch-Staunton, K.C., and *Counsell*, for appellant.

Rose, K.C., and *Waddell*, K.C., for respondent the City of Hamilton.

Leighton McCarthy, K.C., and *Gibson*, for respondents Hamilton Radial Electric R. Co.

Fitzpatrick, C.J.
Idington, J.

FITZPATRICK, C.J.:—I agree with Idington, J.

IDINGTON, J.:—What had been a toll road constructed by a private company was by it surrendered to appellant. Thereafter, pursuant to such jurisdiction as appellant had, it bargained with the railway company respondent to confer upon it the franchise of using part of said road, for constructing and running thereon a railway, of the kind its name implies.

The franchise was given by sec. 1 of the by-law which reads as follows:—

> The consent, permission and authority of the Corporation of the County of Wentworth is hereby granted to the Hamilton Radial Electric R. Co. (subject to and upon the terms, conditions and provisions hereinafter contained) to construct, maintain, complete and operate an electric railway along the Main St. Road, from Sherman Avenue to Delta, and on the King St. Road from the Delta easterly through the unincorporated Village of Bartonville to the Saltfleet Town Line.

For this franchise the said company agreed to comply with some 24 several terms and conditions specified in the appellant's by-law.

To hold many of these abrogated by reason of the events the city now herein relies upon in its present attitude relative to the 24th, would be rather embarrassing for it. Yet such would in

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many instances be the logical result of maintaining what it contends for.

The 24th is in these words:—

For the privileges hereby granted the company shall pay to the Corporation of the County of Wentworth yearly at the commencement of each year, at the rate of $50 per mile or *pro ratâ* for portion of a mile per year for the first 3 years, and after the expiration of the first 3 years at the rate of $100 per mile, or *pro ratâ* for portion of a mile per year for the next 5 years, and at the rate of $200 per mile, per year thereafter for every mile or *pro ratâ* for portion of a mile of railway operated on the said county roads under this by-law. First payment to be made on January 1, 1907.

Whatever else appears in the agreement made by the parties these two clauses (1) and (24) furnish the keynote for the construction of the document.

And surely there could not be clearer or more explicit terms used as to the basis upon or by which the compensation was to be measured. It is "for every mile or *pro rata* for portion of a mile of railway operated on the said county roads under this by-law."

It mattered not whether the roads lost their character of county roads or not, or passed under some other jurisdiction the legislature chose to put them under, so long as the company continued to enjoy the franch se thus acquired and conferred.

However questionable from an economic point of view I might feel inclined to think the bargaining between municipalities and railway companies whereby profits are to be reaped, I have no reason to doubt the now generally accepted legislative authority to make such bargains as falling within the power given municipalities in control of a highway, to consent to the use of highways by a railway.

Indeed no argument was presented contesting this exercise of the power and there remains nothing in this case but the construction of a tolerably clear contract.

It seems to me a novelty to import into the consideration of the construction of the contract that which transpired later between third parties by reason of which some one else migh have a right to pass by-laws or direct operations or means for he public safety relative to the maintenance of a part of the road.

It was quite competent for the parties to the contract to have included as their basis of the computation of the compensation to be given for the franchise the entire mileage over the part they were bargaining about or over the entire road if they saw fit.

They might have made the number of passengers carried from any place outside the city to the market place of the city or any other agreed point or in short any other mode of computation they saw fit.

As Hodgins, J., has well pointed out it is as a whole the subject-matter of the bargain was dealt with by those immediately concerned.

Then what right has the respondent city to interfere? It knew, or ought to have known before bargaining for the annexation of part of a township all about the franchise in question, the terms upon which it was granted and the history leading up to the acquisition of those rights the county had acquired entitling it to so bargain.

And I venture to submit that the city was quite as much interested as the county in the abolition of tolls and knew what it cost and that it had no more right to try to take away from another corporation without its consent part of the incidental advantages which had flowed to it from the promotion of free travel and good roads designed for their common benefit.

Of course these considerations cannot answer the law if it has given respondent what appellant had acquired, but I submit they do answer much we have heard and read of the city's alleged burdensome duties relative to this part of its acquisition.

There is no pretence made that the appellants' by-law has been either expressly or impliedly repealed.

There is, by a curious confusion of thought, claimed to enure to the city a share in the compensation because it is based on mileage and the city has acquired jurisdiction over some of that mileage.

The argument confounds the rights flowing from a contract in relation to property and perhaps prope ty itself, with those rights flowing from mere acquisition of jurisdiction over it for certain limited purposes and within certain relations only.

Let us see what the city did acquire. It obtained from the Ontario Railway and Municipal Board only that which the Lieutenant-Governor in Council was vested with relative to municipal annexations up to 1906, when 6 Edw. VII. ch. 31, by sec. 53 transferred same to the Board, and amending Acts.

The Municipal Amendment Act (1908), 7 Edw. VII. ch. 48,

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sec. 1, is, I assume, correctly presented in the city's factum as containing the said powers as existent at the time in question.

That section reads as follows:—

In case the council of any city or town by resolution declare that it is expedient that any portion of an adjacent township should be annexed to the city or town, and in case the majority of the ratepayers in any such portion of such township petition the Lieutenant-Governor in Council to add such portion to such city or town, and after due notice of such resolution and petition has been given by such city or town to such adjacent township, the Lieutenant-Governor may, by proclamation to take effect upon some day to be named therein, annex to the city or town such portion of the adjacent township upon such terms and conditions as to taxation, assessment, improvements or otherwise as may have been agreed upon, or shall be determined by the Lieutenant-Governor in Council.

It is to be observed that the only terms or conditions of such changes of boundaries as agreed on with which the Lieutenant-Governor in Council or Board ever became entitled to meddle, were "as to taxation, assessment, improvements or otherwise."

I fail to see how anything in question herein falls within such terms.

The Board clearly exceeded its authority unless we ignore the *ejusdem generis* rule of construction and attribute to the word "otherwise" a meaning that might enable it to transfer the ownership of the courthouse, jail, and registry office (though presumably county property) to the city, because they happen to be within the city.

The suggestion that the city is the "successor or assign" of the county within the meaning of these usual words of contract between contracting corporations in the operative part of the contract between the railway company and the county, seems to me rather far fetched.

We are not referred to any express legislative enactment which would be effectively applicable to such a contract and constitute the city the successor of the county.

The Board had no power to confer any such right or meddle with anything relative to that or anything but that expressly given it by the language I have quoted.

I have heard no answer made, or that can be made, by the railway company to its contract; or that either bound or entitled it to deal with any one else than the party it in fact contracted with.

Whether or not there is anything in the usual arbitration claim relative to the consequences of annexation now standing we are told as in the Consolidated Municipal Act, 1903, sec. 58, need not concern us.

The railway company as I understand its attitude is only a proper party to this appeal by virtue of the unfounded contention of the city and should get its costs of this appeal from the latter.

The appeal should be allowed with costs of the appellant and the railway company of this appeal and the appeal to the Appellate Division and the judgment of the learned trial Judge be restored.

Idington, J.

DUFF, J.:—The by-law provided that it should not take effect unless formally accepted by the company within ten days after the passing of it by an agreement binding the company to "perform, observe and comply with all the agreements, obligations, terms and conditions" therein contained. Accordingly on June 19, 1905, an agreement was entered into between the respondent company and the appellant county corporation by which the company contracted to observe all the obligations imposed upon it by the terms of the by-law.

Duff, J.

Subsequently, *i.e.*, in 1909, an order was made by the Ontario Railway and Municipal Board extending the boundaries of the City of Hamilton in such a way as to embrace within the territorial limits of the city certain parts of the county roads named in the first section of the by-law, in which the respondent company was given the right to construct and operate its railway. After the passing of this order and down to and including the year 1912, it appears to have been assumed by the parties that the effect of the order of the board was to vest in the respondent city corporation the right to take and to impose upon the respondent company the obligation to pay to the city for the use of that part of the roads so named within the annexed territory occupied by the company's railway, a sum equivalent to $50 for each mile of railway within that territory. It was assumed, in other words, that the order extending the boundaries of the city did by its provisions transfer to that municipality and divest the county of the benefit of the moneys payable under section 24 to a degree proportionate to the number of miles of the railway which, by virtue of the order, came within the territory of the city. In the

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year 1913 the county for the first time disputed the validity of this assumption and called upon the company for the payment of the whole of the moneys payable under section 24, as if no change in boundaries had taken place.

The whole question in the action out of which the appeal arises is whether the county is or is not right in that contention. I am unable myself to entertain any doubt that the phrase "the said county roads" in section 24 is descriptive of the roads in which by the by-law the county gave its consent to the company constructing and operating its railway; neither have I any doubt that the railway is now "operated on the said county roads under this by-law." The county is therefore entitled to require payment of the whole of the sums made payable *ex facie* by sec. 24 of the by-law unless in some way their right to do so has been transferred to the city.

There are three ways, and three ways only, by which such a transfer could be legally effected; by agreement, by statute, or by the operation of some rule of law not resting on statute. Admittedly there is no agreement. For the reasons given by my brother Idington I think the powers of the board (where such an extension of the boundaries takes place) in respect of terms and conditions—limited as those powers were to imposing terms and conditions relating to "taxation, assessment, improvements or otherwise"—are not sufficient to authorize a provision transferring to the city any of the rights created by sec. 24; and needless to say what the board could not do expressly it could not do by implication.

Then is there any rule of law having the effect of vesting in the city corporation the right to which it now lays claim? The first contention is that the city corporation is the "successor" of the county corporation within the meaning of the words of the contract; but although it may be there is a sense in which the city corporation can be said to be the successor of the county corporation with respect to the county roads affected by the extension of boundaries, still it is sufficiently evident that the word "successor" (if it is not to be treated, as it probably should be, as mere surplusage) is used *alio intuitu* pointing to something in the nature of universal successor; and that the presence of it cannot help, as the absence of it would not in anywise impair, the city corporation's claim.

It is suggested that the rule governing the case is one derived by analogy to that which determines the apportionment of rent when title to the reversion in part of land held by a tenant is severed from that to the reversion in the residue. I do not think Mr. Rose meant us to understand him as arguing that the sums payable under the by-law could be treated as being rent service in contemplation of law. Self-evidently there is here no tenure of land and no reversion.

To attempt to describe the railway company's rights *simpliciter* by reference to any of the well-known categories of common law rights *in alieno solo* would probably be misleading. The company's rights are statutory and it is perhaps better, if one desires to avoid deceptive analogies, to treat them frankly as *sui generis*. If one must search for some general analogy, the analogy of easement or license is nearer the mark than that of tenancy; "railway easement," though not in any sense, of course, a phrase of art, could mislead few lawyers in this country.

But with reference to the argument under consideration the characteristic of the railway company's rights to be noted and emphasized is that they are not rights created or capable of being created by the municipality as the owner of some sort of property in the soil of a highway. The highway as highway is a strip of soil in which His Majesty's subjects, as such, have rights of going and coming. The municipality is the public authority, speaking broadly, invested with the management of the highway and with certain powers in regulation of the exercise of the public right. The municipality does not derive its authority over the highway as such from any property in the soil; on the contrary, such property was vested in or could be acquired by the municipality precisely because the municipality is the public authority endowed with jurisdic ion over the highway and charged with certain duties in relation to it; and it must be assumed that it was as public authority and not as proprietor that such power as it possessed to pass the by-law consenting to the construction and operation of the railway was entrusted to the municipality; and that it had such rights as it had to exact the consideration provided for in sec. 24 of the by-law. The parallel seems to fail.

It might, no doubt, be argued that as incidental to the transfer of jurisdiction the right to a proportionate part of the mileage

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toll should justly and reasonably pass to the city; but that argument should be addressed to the legislature.

Finding, therefore, neither contract, nor statute nor principle of common law upon which the city's claim can rest, it follows that effect must be given to the contract in accordance with the view already expressed. The appeal ought to be allowed and the judgment of the Chief Justice of the Common Pleas restored. I think the city corporation should pay all the costs incurred in consequence of the appeals since the date of that judgment.

ANGLIN, J.:—With deference, it seems to me that immaterial features of this case have unduly absorbed the attention of the Courts below. For instance, we are not concerned with the past history of the roads in question as toll roads. The only relevant facts in that connection—that upon the removal of the tolls from these roads by the County of Wentworth they became county roads under sec. 15 of the Toll Roads Expropriation Act, 1901, as enacted by sec. 6 of ch. 35 of the Ontario Statutes of 1902, and that when the contract sued upon was made they we e under the jurisdiction of the county, so that it could validly and effectively grant the privileges or franchise over them which that contract purported to confer upon the Hamilton Radial Electric R. Co. are not contested. Neither does it seem to be of the least importance that the annexation order of the Municipal Board contained a provision—probably as held in the Ontario Courts, in excess of its authority—which purported to vest in the City of Hamilton the portions of those roads lying within the annexed territory. It is unnecessary either to pass upon the question of the Board's jurisdiction to make his provision or to determine whether the title to the portions of the road in question became vested in the City of Hamilton immediately upon the annexation or remained vested in the County of Wentworth until the enactment of sec. 433 of the Municipal Act of 1913. The only material matter in connection with the action of the Board is its jurisdiction to order the annexation itself, which is uncontroverted and incontrovertible. Whether the order for annexation does full justice to the county in the matter of burdens which it had assumed in connection with the roads in question, or to the city in regard to the responsibilities imposed upon it for their future maintenance, is likewise beside the question with which we have

to deal. There may, as Garrow, J., has suggested, be claims on the part either of the city or of the county, which would be proper subjects for arbitration under sec. 58 of the Consolidated Municipal Act of 1903—now sec. 38 of ch. 192, R.S.O., 1914—but these claims do not form part of the subject of this action. The introduction of all these matters merely tends to be-cloud and obscure the real issue presented, which is whether anything has transpired which has the legal effect of depriving the County of Wentworth of the contractual right that it formerly had, and would otherwise continue to possess, to collect from the Hamilton Radial Electric R. Co. the entire annual payments which that company bound itself to make to the county when it acquired the rights or franchise under which it maintains and operates its railway.

By a by-law passed in June, 1905, to fulfilment of the terms and conditions of which the railway company duly bound itself by contract, the county authorized the construction, maintenance and operation by the railway company of an electric tramway on certain streets or roads then under the jurisdiction of the county. For the privilege thus granted to it the company undertook and agreed to pay to the county a money consideration or compensation, in some of the American cases called a bonus. Booth on Street Railways, 2nd ed., secs. 284 and 287. Instead of a gross sum payable on the execution of the contract, as of course it might have been, this compensation took the form of annual instalments of fixed sums payable for each mile of the railway to be constructed, and *pro rata* for any portion of a mile. The question now presented is whether the annexation, in November, 1909, to the City of Hamilton of territory which includes protions of the roads or streets covered by the agreement between the county and the company, has affected the obligation of the latter to pay the stipulated compensation, in respect of such portions of the roads or streets, or has deprived the county of its right to recover the same or vested that right in the city.

The obligation of the company to pay is not contested. Rightly insisting upon the continuation of its franchise to maintain and operate its railway on the portions of the highways in question, the railway company could not consistently contest its correlative obligation to fulfil the condition as to payment of the compensation upon which the existence of that right depends. The

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substantial dispute is as to the body entitled to receive the moneys —whether they belong to the county or to the city—and for the present that dispute is confined to the instalment for the year 1914, the provincial Courts having held that the county had acquiesced in the payments for 1911, 1912 and 1913 being made to the city and was thereby estopped from claiming them—and from that part of the judgment there has been no appeal.

Under the terms of the contract the annual instalments are payable for the privilege granted to use the highways for the purpose, in the manner and on the terms stipulated in the county by-law. That right is conferred by the by-law. Its existence depends upon it and is in nowise affected by the annexation to the city, which took the highways subject to it. The jurisdiction acquired by the city upon the annexation over certain portions of the roads on which the railway is constructed does not enable it to interfere with the franchise of the company, which is its property: *Woodhaven Gas Co.* v. *Deehan*, 153 N.Y. 528 at 532; *Chicago General R. Co.* v. *City of Chicago*, 176 Ill. 253 at 259; *City of Grand Rapids* v. *Grand Rapids Hydraulic Co.*, 66 Mich. 606 at 613. The description in the agreement of the roads dealt with as "county roads," if not geographical, as Hodgins, J., thinks it was meant to be, at all events has not the effect of confining the operation of the agreement to such portions of those roads as remain county roads in the legal sense throughout the term of the franchise. They were county roads in the legal sense when the agreement was made. That the portions of them in the annexed territory have ceased to be county roads within the meaning of tha term in the Municipal Act is quite as immaterial as is the question whether the title to the freehold or soil of them passed to the city immediately upon the annexation. What is material is that the franchise or right to maintain and operate the tramway of the respondent company upon these portions of the highways was conferred by the county when they were, as portions of "county roads," under its jurisdiction and when it had unquestioned power and authority to subject them to that right or franchise for whatever term it deemed proper and whatever the legal character of the roads might become, or however the ownership of the freehold or soil thereof might change during the term for which such right or franchise should be conferred.

Those rights still subsist and they are now enjoyed and exercised by the company solely by virtue of their contract with the county and the county by-law. That by-law, because it affected roads, unlike other by-laws of the county, remained in force within the annexed territory (3 Edw. VII. ch. 19, sec. 56), and, so far as it authorized the conferring of property rights on the Hamilton Radial Electric R. Co., cannot, notwithstanding the annexation, be repealed, altered or affected by the city to the prejudice of that company. If the consideration for the privilege granted to the company by the county had been a sum in gross paid on the execution of the contract, it is difficult to conceive on what basis the city could formulate a claim against the county for any part of the money so paid. It is from the county that the company has received its entire right or franchise over the roads in question. It takes nothing in that connection from the city. The annual instalments which it has bound itself to pay are just as much and just as truly the consideration for what it has obtained from the county, and from the county alone, as their total amount would have been if paid when the contract was made.

On behalf of the respondent, the City of Hamilton, it was sought to treat these payments as rental, incident to and intended to follow a supposed reversion, and, as such, apportionable upon the severance or division of that reversion; and reliance was placed in this connection on sec. 433 of the Municipal Act of 1913, which declares the freehold and soil of every highway to be vested in the corporation of the municipality, the council of which exercises jurisdiction over it. This idea, though not in terms expressed, would appear to underlie the judgment of the late Garrow, J., concurred in by Maclaren and Magee, JJ.A., which proceeds on the assumption that because the annexation shortened the mileage in the county and transferred portions of the roads from the county to the city the right to collect the mileage payable in respect of the portions so transferred passed with the transfer. The order of the Court is not confined to disaffirming the right of the county to the money in question: it directs the payment of it to the city. But the County of Wentworth was not a lessor and the railway company in no sense became its tenant. It acquired no right to exclusive possession of any part of the highway: *City of St. Louis* v. *Western Telegraph Co.*, 148 U.S.R. 92 at 97-9. The

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annual instalments are not charged upon and do not issue out of any land. Neither is there any reversion to which the right to receive them is incident or which it can follow. The transfer from the county to the city of jurisdiction over the parts of the highways in question, even though it carried with it the property in the soil or freehold, did not transfer to the city any interest in the moneys payable under the contract in question, for which the railway company had already received from the county the full and entire consideration.

There is no statute which takes from the county its contractual right to these moneys. There is no rule of law applicable to the circumstances which deprives it of that right or vests it in another. It has neither relinquished nor transferred it by contract. I know of no other means by which its title to the moneys can have been divested.

While I express no opinion on the merits in this respect of the case at bar, I can conceive that it may be desirable that some body such as the Ontario Railway and Municipal Board, should be endowed with authority to control contracts such as that now before us, which confer franchises exercisable in territory in which changes of municipal boundaries may occur, and thereupon to revise and readjust their terms. Such authority does not exist, however, and it can be created only by legislation.

I would, for these reasons, with respect, allow this appeal with costs of the appellant and of the Hamilton Radial Electric R. Co. in this Court and in the Appellate Division to be paid by the respondents, the Municipal Corporation of the City of Hamilton, and would restore the judgment of the trial Judge.

Brodeur, J.

BRODEUR, J. (dissenting):—This is an action instituted by the County of Wentworth to claim from the railway company, respondent, a sum of money due for the year 1914 by virtue of an agreement made on June 19, 1905.

By that agreement the respondent railway company was authorized to run its street cars on some county roads which were under the jurisdiction of the appellant corporation and one of the clauses o' that agreement was to the effect that the company should pay a yearly sum "for every mile or *pro rata* for portion of a mile of railway operated on the said county roads."

In 1909 a certain portion of the township of Barton in the

County of Wentworth was annexed to the City of Hamilton by order of the Ontario Railway and Municipal Board and a portion of those county roads came, as a result of that annexation, under the jurisdiction of the City of Hamilton. The street railway respondent then apportioned its rental and paid to the County of Wentworth the portion of rent for the road which was under the jurisdiction of the County of Wentworth and paid the other portion to the City of Hamilton.

By its action the County of Wentworth claims that the whole amount should be paid to the county. The money was deposited in Court by the railway company and the City of Hamilton claims that the portion of rent which they received from the railway company had been properly paid.

There may be some question as to the extent of the rights of the county corporation over the roads in question; but this question has been solved by an Act passed in 1913 (3 & 4 Geo. V. ch. 43), which declared that the soil of every highway shall be vested in the corporation of the municipality the council for which for the time being have jurisdiction over it.

It is not disputed that the Municipal Board had the right to annex a portion of the Township of Barton to the City of Hamilton. It is common ground also that as a result of that annexation the council of Hamilton had jurisdiction over all the highways which were in the portion so annexed. As a result of that legislation of 1913 the City of Hamilton became also the owner of the soil over which those highways were built.

Then what is the result of that jurisdiction and that ownership with regard to the payment of money which was stipulated for in the deed of June 19, 1905, between the street railway company and the County of Wentworth?

If the sum which had been stipulated for the rent or for the easement in question were a lump sum, the question might be differently solved; but, in the case where it has been stipulated, as in this one, that the amount to be paid is so much per mile, it seems to me that the only conclusion which might be reached is that if a portion of the highway on which the street railway runs is transferred to the jurisdiction of another body and ceases to be a county road then the rights and obligations in connection with that portion of highway become vested in the new body.

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Nobody will dispute hat the City of Hamilton is now bound to look after the maintenance of that highway. But it is also entitled to receive all the rents which might be due in connection with the use of that highway. The rent, according to the law, is apportionable where the lessee ceases to have possession of the demised premises, provided this is not due to unlawful eviction by the lessor; thus it is apportionable where the lessee is evicted from part by a person lawfully claiming under title paramount: Hals. Laws of England, vol. 18, p. 484.

It seems to me that the action by the County of Wentworth for the recovery of the rent and for the use of the road in question is not well founded and the judgment of the Court of Appeal which dismissed that action should be confirmed with costs.

The appellant has contended and argued that the Municipal Board had illegally and unjustly, in their order, dealt with regard to the payment of a portion of the good roads debentures issued by the County of Wentworth. I did not deal with that question because I consider that it had no bearing on the issues raised by the plaintiffs. *Appeal allowed.*

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Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Kelly, and Masten, JJ. December 14, 1916.

HIGHWAYS (§ I—7)—DEDICATION AND ACCEPTANCE—RESOLUTION—QUASHING.

The question whether a dedicated highway has been accepted by a municipality cannot be determined upon a motion to quash the resolution relative to the highway for illegality.

[The Municipal Act, R.S.O. 1914, ch. 192, secs. 282, 283, 432, considered.]

Statement.

APPEAL from the judgment of Middleton, J., dismissing with costs a motion by James N. Sanderson to quash a resolution of the Municipal Council of the Township of Sophiasburgh directing the removal of obstructions from what was said to be a public road in the village of Northport. Varied.

The judgment appealed from is as follows:—

MIDDLETON, J.:—These proceedings began as an originating notice for the purpose of quashing a resolution of the Municipal Council of the Township of Sophiasburgh directing the removal of certain obstructions from what is said to be a public road connecting Division street and DeMill street, along the water front in the village of Northport.

Upon the motion coming on in the ordinary course for hearing,

it was suggested that, in view of the conflicting statements appearing in the affidavits filed, the case was a proper one for trial upon oral evidence; and I, therefore, availed myself of the provisions of Rule 606(1),* and directed that the questions arising upon the motion should be tried before me upon oral evidence at Picton. The hearing has accordingly been had.

The sole question raised is whether there had been any dedication of the way in question.

Northport is a small village in the county of Prince Edward, on the south shore of the Bay of Quinté. Many years ago, a large quantity of barley used to be shipped at this point, but now comparatively little shipping business is conducted from the port. Morden street is the main road through the village. It is some six chains from the bay front. Running north from it to the bay are two parallel streets, DeMill street on the west and Division street on the east. These are about 150 feet apart. Both of these streets are exceedingly narrow, and consist of little more than a waggon track leading from the main road to the water's edge. For very many years a passage has existed along the bay front, so that vehicles driving down one street cross over and pass up the other, this being far easier than turning.

The land fronting upon the lake consists of lots 4 and 6, according to a registered plan dated October, 1866. These lots are described as running to the water's edge. The title to both is now vested in Mr. Sanderson, the applicant. He acquired lot number 6 in 1901 and lot number 4 in 1903.

Opposite lot number 4 for a great many years there was erected a dock, extending some little way into the waters of the bay. This consisted of cribwork filled in with earth and stone, and afforded a landing place for boats plying upon the bay. The dock has since been extended and improved, and upon it are now erected a freight-shed, coal-shed, warehouse, and store, all owned by Mr. Sanderson.

It is not easy to determine with accuracy where the original shore-line was, as no doubt some filling-in has taken place in front of the land as it originally was. This was done long since.

*606.—(1) The Judge may summarily dispose of the questions arising on an originating notice and give such judgment as the nature of the case may require, or may give such directions as he may think proper for the trial of any questions arising upon the application.

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A plan, exhibit 8, purports to shew the situation. It was drawn at a time when the water was low. A pencil-mark has been placed upon it shewing the approximate high water level, but I think that this does not indicate any normal high water level, but the point which may have been reached when the water was abnormally high.

According to this plan it appears, and I think is rightly shewn, that the warehouse partly overlapped DeMill street. Weigh-scales have been erected on the applicant's land, and teams reaching the wharf or departing from it pass through the narrow space between the scales and the water's edge. I had a view of the premises, and the situation is very well shewn in a photograph, exhibit 10, which shews the arch over the weigh-scales and the building designated upon the plan as "the store" at the end of the warehouse. The other photographs are not of any great assistance.

Twenty-four years ago, the warehouse was 52 feet south of where it is now situated. It was then moved north, and a store erected at its southern end. Before this, the travelled road between DeMill and Division streets passed south of that building. Since then, the travelled road has passed through the place formerly occupied by the southern end of the building.

For half a century or more this road has been freely used by the public. Nearly all the business calling for travel down Division street or DeMill street was connected with the shipping at the wharf. The wharf was always the private property of the applicant and his predecessors in title. For the purposes of their business they encouraged and facilitated traffic, and interposed no objection to the user of the road in question. I do not mean that there were not isolated periods of time in which there were obstructions on the road. Timber was piled there about the time the warehouse was being altered and extended. A portable saw-mill was operated, and during this temporary occupation the belting probably extended across the place where the road now is, but any one who desired travelled across the unoccupied land and circumvented these obstructions as best he could. The travel naturally followed a more or less defined trail across the land, south of the buildings, till they were moved north, and then in part across the former occupied site.

Quite recently the applicant erected a framing for a shed, obstructing the use of this road. The municipality, contending that there had been dedication, removed this framing, on the authority of the resolution in question, which, being under seal, is equivalent to a by-law. The applicant, denying the right of the municipality, refused to participate in any way in the removal, and the timbers placed upon the way were drawn to an adjacent lot, where they are now. The applicant's right to them is undisputed.

There is some evidence that statute-labour was performed upon the way in question. As usual in cases of this kind, it is not easy to determine from conflicting statements exactly where this work was done; but I think the fair presumption from the evidence is that it was not confined, as suggested by the applicant, to that small portion of land forming part of DeMill street.

Nevertheless I do not think that the statute-labour performed upon the lands in question was sufficient to bring the case within sec. 432 of the Municipal Act, R.S.O. 1914, ch. 192, for it cannot be said that statute-labour was usually performed upon the road. I, however, think that the conduct of the owners from time to time amounted to a dedication, or intention to dedicate, as it might more accurately be called, within the definition of Lord Ellenborough in *Rex* v. *Lloyd* (1808), 1 Camp. 260, 262: "If the owner of the soil throws open a passage, and neither marks by any visible distinction, that he means to preserve all his rights over it, nor excludes persons from passing through it by positive prohibition, he shall be presumed to have dedicated it to the public."

In Ontario, as the highway is vested in the municipality, it is necessary to find an assent on the part of the municipality to the dedication. This assent may be presumed from the expenditure of public money upon the road, but it may be shewn in other ways; and I think the resolution now in question, which, being under seal, is, as already said, equivalent to a by-law, amounts to such an assent on the part of the municipality; and that, no matter what the status of the road might have been before the passing of that resolution, the resolution amounts to an unqualified acceptance by the municipality of the road as a highway, with all its consequent obligations as to maintenance and repair.

I am not troubled by the uncertainty as to the location of the

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road. Originally it ran south of the building; but, when the building was moved north 25 years ago, travel followed the more convenient route, crossing what had been originally partly covered by the building, and this use for 25 years has been reasonably constant and well-defined.

Some pretence has now been made of grading the road by the municipality, and this appears to me sufficiently to indicate the situs of the way.

The motion therefore fails, and must be dismissed; and I suppose costs should follow the event, unless the municipality can see their way to waive them, which they may well do if the applicant accepts this judgment.

E. G. Porter, K.C., for appellant.

E. M. Young, for the township corporation, the respondents.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—It is difficult for me to understand how the appellant could have thought, in this case, that the question whether the place in question is or is not a highway could be well-settled, or indeed determined in any manner, upon an application made under the provisions of the Municipal Act respecting the quashing of by-laws "for illegality;" and that was, and is, the only substantial question involved in these proceedings, so taken.

The resolution in question in no sense purported to create a new highway, or any new rights of any character; it in no sense affected the appellant's title or rights; and was in no way illegal. It was no more than any one claiming a right might do.

The increased rights in, and powers and duties respecting, highways, which the municipalities have, may tend to make many persons forgetful of the fact that the highest right in highways is the right of the public to travel over them, and that the rights conferred and duties imposed upon municipalities respecting them, are so conferred and imposed mainly in such public interests; and that, accordingly, indictment for obstructing, or indictment for failure to keep in repair, a highway, is the most effectual, as it was at one time the common, way of determining the rights of those concerned in such cases as this.

The appellant's motion to quash ought to have been dismissed on these grounds; but it was not, and the parties, apparently without objection by any one, went through a long investigation

of the question of highway or no highway; and eventually the motion was dismissed, on the ground that the way in question is a highway.

All that was, in my opinion, wrong and ineffectual: but it might prejudicially affect the appellant when, if ever, the question of highway or no highway may come up for determination in an effectual manner; and so it is but fair, to him, for me to say that I am unable to agree in the finding that the place in question is a highway.

All that the respondents rely upon, as making it a highway, is dedication of it as such by the owners, or an owner, of the land upon which the way is, land which was admittedly at one time private property. No question arises as to acceptance of the dedication; if there were a dedication, there was plainly acceptance in the use which the public have made of the way for many years.

If it were a case of such use simply, there might be little difficulty in reaching the conclusion that that use was sufficient circumstantial evidence of a dedication. But this case is not at all like that. In this case it was practically necessary that the owners of the dock and warehouse, at the one end, and the owners of the blacksmith-shop, at the other end, of this way should have, for their own private uses, such a way; so that there is at least as much reason for finding, upon this circumstance alone, that the way was a private one, as for finding that it was a public one: and these additional circumstances seem to me to make it impossible to find that the respondents have proved the dedication upon which alone they now rely: until quite recently the respondents made no claim to jurisdiction over the way, nor ever performed their statute-imposed duty to keep all highways within the municipality in repair, in any manner, upon it, through all these years it has been, according to their present contention, a highway; logs were put upon it and other uses made of it by the owners of land, which would have been indictable offences if it were a public way; for years a warehouse stood at one end of it, and was removed only to bring it nearer to the dock; from time to time the owners of the land have been erecting a breakwater and filling in the land behind it, over which this way passed, a work which the respondents should have done if the way were a high-

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way, and a work which the land-owners would hardly have done if the way were not a private way; although the land changed hands several times, during all these years no deed that was made of it contains any exception of, or reference to, the way in question, although they contain covenants for title which would have been broken, and would have made the grantors answerable in damages for the breach, if the way had been dedicated by them; and there is no contention that there is any kind of evidence of any expressed dedication, written or verbal, or of any kind of expressed intention to dedicate.

I feel obliged to say this much, although it binds no one, in order to set off the prejudicial effect of the judgment appealed against, although it can have no binding effect upon any one: and I feel obliged to add too: that it seems to me to be pitiable that so much money should be wasted in law costs, over this way, when the same money would, perhaps, buy the way in question or one near to it, and put an excellent coat of "metal" upon it.

The order dismissing the motion to quash must stand, but stand upon different grounds: and without costs here or in the High Court Division.

Riddell, J.

RIDDELL, J.:—The appellant is owner of adjoining lots 4 and 6 (in part) in the village of Northport, bordering on the Bay of Quinté and situated in the ancient township of Sophiasburgh. Along the north end of these lots, near the waters of the bay, was a road frequently used for passing from the street on one side of these lots to the street on the other. The township asserted that this road, or at all events a strip of land close thereto, was a public highway—the township council passed a resolution on the 13th October, 1915, "that the overseer be instructed to notify James N. Sanderson to remove at once all obstructions from what has been used as a public road connecting Division street and DeMill street along the water front in the village of Northport. After proper notice, if the obstruction be not removed, the overseer to move the same." On the 16th October, the road overseer served a notice on the appellant "to remove at once all obstructions from what has been used as a public road connecting Division street and DeMill street along the water front in the village of Northport."

The appellant served a notice of motion to quash the resolu-

tion, on the grounds: (1) that the land affected by the resolution was his private property; (2) that the resolution was void, as the exercise of such powers required a by-law; and (3) that it was void as dealing with "what has been used as a highway," and not with a "highway." This notice was served supposedly under Rule 605: the disposition of the motion appears from the judgment appealed from. [The learned Judge then quoted the first three paragraphs of the reasons for judgment of MIDDLETON, J., *supra*.]

An order was made, after a trial, dismissing the motion with costs: the owner Sanderson now appeals.

I think the appeal cannot succeed, but am unable to agree in the reasons.

The sole power given to the Courts to quash a by-law (including therein a resolution) is found in the provisions of the Municipal Act, R.S.O. 1914, ch. 192, secs. 282, 283:—

"282. In this Part 'by-law' shall include an order or resolution.

"283. The Supreme Court . . . may quash the by-law, in whole or in part, for illegality."

This resolution is not illegal—there is nothing illegal in any one asserting a claim, however ill-founded—nothing illegal in serving a notice asserting an ill-founded claim: *Ball* v. *Carlin* (1908), 11 O.W.R. 814, at pp. 816, 817, and cases cited. (*Ball* v. *Carlin* was approved by the former Common Pleas Division in a case in which I sat, the name of which escapes me.)

The obvious course for Sanderson to pursue was to wait until something was actually attempted to interfere with his rights (for the resolution might be a mere *brutum fulmen*), or, if he really feared interference, to bring an action for a declaration etc. I think the motion should have been dismissed in the first instance.

Moreover, the motion is said to be under Rule 605. I cannot see how it could be fairly thought to come under that Rule—there is no contract or agreement to construe, and the rights of the parties could not be considered as depending "upon undisputed facts and the proper inference from such facts." There was therefore no power in the Court to determine these rights under Rule 605 in a summary way: I think that my learned brother should have dismissed the application on that ground, so soon as it appeared that there were facts in dispute.

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Riddell, J.

The provisions of former Con. Rule 941, now Rule 606 (1), are not intended to substitute another form of trial for the regular form in order to determine the rights of the parties and give a judgment thereon, but only to determine some question "arising upon the application" in order to dispose of the application. For example, an inquiry might possibly be made under this Rule to determine whether there were really any facts in dispute and the like. But, it being plain, as it was, that there were facts *bonâ fide* in dispute, this Rule does not permit an investigation to determine what the facts are. The investigation, I think, was not justified by the Rules, and the result of the investigation was to shew that Rule 605 had no application, and the Court had therefore no power to adjudicate upon the rights of the parties in this way.

The conclusion having been reached that the motion to quash should have been dismissed, any decision on the merits would be *obiter*. I may say, however, that I have come to a different conclusion from my learned brother Middleton, and am of opinion that dedication has not been proved.

I would dismiss the appeal, but would award no costs either here or below.

Kelly, J.

KELLY, J.:—Without expressing any opinion on the question of whether these proceedings were properly instituted by originating notice, I rest what, in my opinion, should be the result of this appeal on one ground only. Whether they were properly brought or not, there remains the other question—was it open to the appellant to attack the resolution of the township council, which merely directed that he be notified to remove obstructions from the land which the council said had been used as a public road, under pain of consequences set forth in the resolution? Merely passing a resolution declaring that the land has been used as a public road or on the assumption that it is a public road, does not make it such, and I know no reason why the resolution should be declared illegal (a ground which would justify its being quashed) simply because it is insufficient to accomplish what it aims at accomplishing. I think it aimed at establishing the lands referred to as a public road. In that view the order appealed from—an order dismissing the motion to quash—is not improperly made, and so an appeal against it should not succeed.

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But that, to my mind, does not determine the question as to whether the lands referred to are a public road, and it is not before us for determination. If it were necessary for us to dispose of that question, I would have difficulty, on the evidence, in arriving at a conclusion favourable to the respondents.

The circumstances warrant the refusal of costs to either party, either of the appeal or of the proceedings in which the order appealed against was made.

Kelly, J.

MASTEN, J.:—I agree that this appeal should be dismissed; but I desire to guard myself against expressing any view that such a resolution as that in question cannot properly be attacked by originating notice (see Rule 10 (2)). Neither do I desire to express any opinion on the question as to whether a determination pro or con respecting the validity of the resolution in question would operate as a final and conclusive judgment on the issue as to whether the lands in question had become a public highway by dedication.

Masten, J.

MEREDITH, C.J.C.P.:—Appeal allowed; but motion to quash by-law dismissed on other grounds.

Meredith, C.J.C.P.

No costs in either Court. *Judgment accordingly.*

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MORAN v. NORTH EMPIRE FIRE INS. CO.

Alberta Supreme Court, Appellate Division, Scott, Stuart, Beck, and Walsh, JJ. January 18, 1917.

1. INSURANCE (§ III E—85)—CONDITIONS—"JUST AND REASONABLE"—OCCUPANCY.
A condition in a policy vitiating it if the insured premises becomes vacant or unoccupied, contemplates vacancy or desertion of the building in its ordinary undestroyed condition, and not after it had been rendered untenantable and unfit for occupation by fire; otherwise the condition is neither just nor reasonable under sec. 72 of the Alberta Insurance Act.

2. INSURANCE (§ III E—100)—CONDITIONS—OTHER INSURANCE—ASSENT.
The insurer's assent to subsequent insurance may be inferred from knowledge and a course of conduct.

Statement.

APPEAL by plaintiff from a judgment of Hyndman, J., dismissing an action upon a fire insurance policy. Reversed.

I. C. Rand, for appellant.

A. H. Clarke, K.C., for respondent.

Stuart, J.

STUART, J.:—The plaintiff was the owner of a rooming and boarding house in Redcliff. On June 10, 1914, the defendant company issued to the plaintiff an insurance policy on the building to the amount of $2,000. The defendants had already issued a prior policy on the same building for $2,000 and the Western

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Insurance Co. had also, but subsequently to the 10th June, issued one for $2,000. The total insurance carried was thus $6,000. The building had cost about $11,000.

On August 24, 1914, while all these policies were in force the building was damaged by fire to the extent of about $1,300. The adjustment of this loss was placed in the hands of the Lily Adjustment Agency. This firm sent one Harrison to examine the building. Harrison told the plaintiff not to "move a thing" and that he did not "like to leave the building alone." The plaintiff told him that he was living in a little building at the back about 10 ft. off but that he would sleep in one of the back rooms of the damaged building for a time. Harrison said that would be all right and also "that the two buildings were close together and they would be practically occupied." The plaintiff slept in the damaged building until about October 20, when a very bad storm of snow and rain came. The building leaked and it was so cold that the plaintiff had to leave it. He went then and slept in the "shanty" 10 ft. off. The plaintiff stated that although Harrison had warned him "don't let it go," he had gone out of it without notifying the defendant company.

While the building was in this condition and negotiations were pending about the loss by the fire of August 24, the building was totally destroyed by fire on November 25, 1914. It is with respect to this second loss that the present action is brought.

In respect of the first loss the plaintiff on June 17, 1915, brought an action against the present defendant and the Western Insurance Co. for the sum of $1,310. On September 8, 1915, the Western Insurance Co. paid into Court the sum of $446.67, being one-third of the claim in that action and interest, and admitted liability on the first loss for that amount only. The present defendants filed a defence to that action on September 8, 1915. On October 1, 1915, the plaintiff began the present action in respect of the second fire. On December 1, 1915, the company settled the first action by paying the balance of the $1,310 and costs, but in the letter of settlement the defendant's solicitors stated that it was not to be understood that the settlement was to be treated in any way as an admission of liability or as waiving any rights of the defendant in case of a claim being made respecting the second fire. The solicitors writing this letter had

up to that time no instructions in regard to the second, *i.e.*, the present action.

The earlier policy for $2,000 issued by the defendant company had expired on September 15, 1914, and was therefore not in force when the second fire occurred. The present claim is therefore only upon the policy of June 10, 1914. The loss was stated to amount to $7,500. The prior payment made by the defendants for claim and interest exclusive of costs was $894.33. This was upon both policies. One-half of it having been treated as paid upon the policy in force at the time of the second fire, the claim made in the present action is therefore for $2,000 less one-half of $894.33 or $1,552.84, or, allowing for some variation in calculation, $1,563.34 as stated in the claim.

The defences relied upon are, first, that at the time of the fire in question the premises were vacant without the consent of the defendant, and second, that the policy was voided by the subsequent insurance effected in the Western Assurance Co. The trial Judge dismissed the action upon the first ground and therefore did not consider it necessary to deal with the second.

In variation of the 3rd statutory condition the following condition was added thereto by the policy under the provisions of sec. 5 of the Fire Insurance Policy Ordinance which was the Ordinance in force at the time the policy was issued in June, 1914:—

> This policy will not cover vacant or unoccupied buildings (unless insured as such) and if the premises insured shall become vacant or remain unoccupied for more than ten days this policy shall cease and be void unless the company shall by endoresement on the policy allow the insurance to be continued.

It was contended by the plaintiff that this addition to statutory condition No. 3 should be held to be null and void because it cannot be said to be just and reasonable. I do not feel prepared to go that far. I do not think that it is necessary in the present case to deal with that general question. It would be quite sufficient in order to determine the matter in dispute to say that the application of the words of the added condition to the circumstances of the present case is not just and reasonable. In other words, if, in order to cover the present case, the words must be given a certain extended meaning it would be sufficient to say that in that extended meaning the condition is not just and reasonable. In applying sec. 72 of the Alberta Insurance Act I

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do not think the Court is confined to a consideration of the question: "Are the added words just and reasonable generally?" The Court, it seems to me, may say that a specific interpretation of the words, which they, on their face, might properly bear, produces an unjust and unreasonable addition to the statutory conditions. This does not destroy the added condition entirely. It leaves it applicable in a certain meaning where the facts of the particular case come within that meaning.

Now, what were the facts here? The building was insured as being "occupied as hotel only." A serious fire occurred which, I think it can clearly be inferred from the evidence, rendered the building untenantable and unfit for occupation. It may first, indeed, be asked: Was that such a vacancy or lack of occupation as was really intended by the added clause? In my opinion, it was not. I think what is meant by the added clause is a vacancy or desertion of the building in its ordinary undestroyed condition. It seems to me that the fact that the plaintiff slept in the building for a time has nothing to do with the matter one way or the other. I doubt whether that was occupancy within the meaning of the clause, nor if he had never slept there at all was there a vacancy within that meaning.

The contingency that a fire would occur rendering the building unfit for occupation was, I think, the farthest from the thought of the parties when the added condition was inserted.

But if the words should be held to be wide enough, as no doubt on the face of them they are, to cover such a lack of occupation as existed in the present case then I think that in that extended meaning the added condition is not just and reasonable. The effect of giving it such a meaning is that when a fire occurred rendering the building really unfit for occupation nevertheless the insured must occupy it to preserve his insurance or get the company to endorse on the policy its consent to its continuance. In the ordinary case the insured has a perfect option. He may continue to occupy and so preserve his insurance or he may secure if he can the company's assent to the vacancy and continuation of the insurance notwithstanding. But in the present circumstances there was no such option. He was unable to occupy the premises owing to their condition and his only means of preserving his insurance was to obtain the consent of the company.

The company had its own course open to it. Statutory

condition 3 protected it completely. The change of condition caused by the first fire was certainly material to the risk. It was not within the "control" but it was within the "knowledge" of the insured. The insured notified the company "promptly" of that first fire. The company was at liberty to cancel the policy and return a proportionate part of the premium. Yet although its officers knew exactly what the condition of the building was, although they were, as the correspondence shews, mediating a refusal to pay in regard to that first fire because of their suspicion of incendiarism, they allowed the policy to continue. It may be said that they thought that it continued to be occupied owing to the arrangement between the plaintiff and Harrison. But it was objected to at the trial by counsel for the company, and I think on good grounds, that Harrison had no right to make any arrangement. He was an adjuster of the past loss, not an agent to make any agreement about the conditions under which the policy would be continued in the future. Moreover, it does not appear that the defendant company was ever told of the fact that the plaintiff was sleeping in the building until after the second fire. Certainly no reference is made to it in any part of the correspondence produced. In its letter of November 26 to Lily's Adjustment Agency the company says that it was an error, that the policy in question had not been cancelled, which seems to shew very clearly that the company was not relying upon any supposed occupancy, and deliberately continuing the policy on that account.

Indeed, even if the second fire had occurred before the plaintiff ceased to sleep on the premises the defence of want of occupancy would probably still have been raised on the authority of cases like *Spahr* v. *North Waterloo Ins. Co.*, 31 O.R. 525.

Let us suppose that there had been no difficulty about the payment for the first loss, that the insured had got his money promptly and was proceeding to repair and put the building in fit state for occupation as quickly as possible and a fire had occurred. The company might no doubt have escaped liability owing to the absence of a carpenter's risk or, of course, if it had cancelled the policy, but surely if it allowed the policy to continue with full knowledge of the temporary lack of occupancy and of the impossibility of it and the reasons therefor, it could

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not reasonably seek to rely merely upon the vacancy as a defence. The additional conditions and variations are preceded by the statutory clause to the effect that they are to be in force only in so far as the Court thinks they are just and reasonable *to be exacted* by the company. Really, therefore, the true question seems to be, is it just and reasonable that, in the circumstances of this case, this condition, even if wide enough and intended to cover such a case, should be *exacted* by the company? It may be said that the Court has to decide upon the justice and reasonableness of the added condition not *ex post facto* but *a priori*, that is, theoretically; but the Court, even if this were true, could easily imagine such a state of affairs as has arisen here and say that in such a case the exaction of the condition would be unreasonable.

It is true that we cannot assume, as against the defendants, that the delay in settlement of the first claim was improper because the final settlement was made without prejudice to any defence that might be made in this action, but certainly the company knew the condition in which the building was, they knew from their adjuster's report how absolutely impecunious the plaintiff was, and therefore how unlikely it was that he could render the building habitable by his own means. Yet they say the plaintiff should have continued to occupy the building or else have secured an endorsement of the continuation of the policy upon the policy itself when it was clearly at all times open to them to cancel the policy at once and return a proportion of the premium as they admit they should have done.

For these reasons I think the exaction of the added condition by the company in the circumstances of the present case is neither just nor reasonable, and that this defence fails.

I think also that the defence on the ground of subsequent insurance, not assented to by the company, must also fail.

There is, of course, no evidence that the defendant knew of the insurance in the Western before the first fire. But it, at least, knew of it upon the receipt of the adjuster's letter of September 3, 1914. There was then a suspicion of arson. The defendant communicated with the Western and apparently endeavoured to secure common action in regard to a defence and made no intimation to the plaintiff that it objected to the insurance in the Western. The adjusters were acting for the Western

as well as for the defendant. All parties knew this, as is shewn by the correspondence. On November 12, the adjusters wrote the plaintiff's solicitors a letter in which they said:—

> After the visit of our appraiser to Redcliff we reported the facts to the *companies interested* and the whole matter was left in abeyance as none of the interested parties made any move in connection with it. In view of your letter, however, we are to-day writing the companies and we will advise you of their decision as soon as we hear from them.

There never was any suggestion of an objection on the ground of subsequent insurance in regard to either loss until the defendants put in their defence to the first action. The first action began on June 17, 1915, and in it the plaintiff claimed $1,310 from both companies. As stated above the Western paid into Court one-third of the loss. *i.e.*, $446.67. On September 8, 1915, for the first time the defendant raised the question of subsequent insurance. Adjustment and proofs of loss had all been made on the basis that the Western were to be considered as liable only for a portion of the first loss. The settlement, although without prejudice, was made on that basis. Even if this latter cannot in the circumstances be considered an estoppel, it seems to me clear that the company had by its course of action in regard to the first fire and prior to the second "assented" to the subsequent insurance within the meaning of the 8th statutory condition. This case is distinguishable from *Western Assur. Co.* v. *Doull*, 12 Can. S.C.R. 446, because there notice had to be given to the company of the subsequent insurance. In the present case it is sufficient if the company assents thereto. Mere absence of dissent is sufficient only if notice has been given. But in the case of positive assent, of course, no formal notice is required. Here there was plainly knowledge and then a course of conduct which, in my opinion, must be held to amount to a positive assent. The form in which the assent is to be given is not specified in the condition. The facts are not perhaps quite as strong against the company as in *Mutchmor* v. *Waterloo Mutual Fire Ins. Co.*, 4 O.L.R. 606 at 612, but I think they are sufficient to bring the case within the principle of assent which is there laid down.

The adjusters no doubt had no authority to "assent" and I make nothing of this action except to the extent to which it was known to the defendant company and concurred in by them. The defendant's letter shews that they communicated with the Western as joint insurers. The assent provided for in condition

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8 does not necessarily have to be directly communicated to the insured. There is not here perhaps enough to create an estoppel but there is abundant evidence of "assent."

I would therefore allow the appeal with costs and direct judgment to be entered for the plaintiff's claim with interest thereon at 5 per cent. since September 10, 1915, which is the date of the writ, and costs of the action.

SCOTT, and WALSH, JJ., concurred.

BECK, J.:—I would allow the appeal with costs and direct judgment to be entered for the plaintiff as indicated by Stuart, J.

In answer to the defence based upon the condition as to vacancy I am of opinion that, under the circumstances resulting from the first fire—obviously all known to the insurance company—this condition was wholly inapplicable to the property insured. See *Dodge* v. *Western Canada Fire Ins. Co.*, 6 D.L.R. 355, 5 A.L.R. 294 at pp. 360-1.

In answer to the defence based upon the subsequent insurance in Western Co.—the date of that company's policy being July 15, 1914—there is evidence that the company had notice of it. The plaintiff, in his evidence, refers to a written memorandum, attached to the defendant company's policy of September 3, 1913, correcting the rate and signed by the company's assistant secretary and bearing date September 17, 1913. He says that this rebate was made after he had made complaints of the difference in the rates of the two companies—the two companies being the defendant company and the Western. This obviously cannot refer to the policy of July, 1914, but his examination on discovery shews that there was an earlier policy in the Western to which doubtless it did refer. This, of course, is not notice with regard to the Western policy in question but it gives a little additional value to the plaintiff's statement as to the later policy; when asked if he gave any notice to the defendant company of his intention to put on further insurance he said that he did give notice to the defendant company's agent. This statement was not questioned and there is no evidence of objection on the part of the company.

The condition so far as it relates to *subsequent* insurance is as follows:—

> The company is not liable for loss if . . . any subsequent insurance is effected in any other companies unless and until the company assents or unless

the company does not dissent in writing within 2 weeks after notice of the intention or desire to effect the subsequent insurance has been mailed to it, addressed, etc., or does not dissent in writing after that time and before the subsequent or further insurance is effected.

So that the company is liable notwithstanding subsequent insurance: (*a*) If the company assents to the further insurance in any way; or (*b*) If, having received notice in writing of the assured's intention or desire to effect further insurance, the company does not within 2 weeks dissent in writing; or (*c*) If, having received such notice the company does not dissent in writing before the further insurance is effected though the notice be given after the lapse of 2 weeks.

No notice in writing of intention to effect further insurance was given by the insured, so that the only question is did the company assent? and there is no restriction on the character or proof of assent.

What I have already extracted from the evidence is, I think, sufficient proof by way of inference of assent. I think, too, that the adjuster was so far the representative of the defendant company that he might assent for the company or at least that, he having informed the company of the existence of the subsequent insurance and they refraining from raising the objection promptly, is evidence of the company's assent.

Furthermore it appears to me that it is apparent on the face of the policy that this condition, which applies not only to subsequent but to prior insurance, expressly and by almost necessary inference to concurrent insurance, and which therefore is intended to cover the whole field of further, in the sense of other, insurance, was not intended to be applicable at all, and in this connection it is important to read condition 9 in conjunction with condition 8 and variation (*k*) referring to co-insurance. My reason for coming to this conclusion is, that on the face of the policy are the words: "Further concurrent insurance" followed by a space in which to state any other policy. Although other blanks were filled in by the word "nil" this space was left blank; although at the time there was in force another policy of the defendant company upon the same property intended to continue as concurrent insurance. The only proper inference to my mind is that the company was indifferent whether there was or was not further insurance, inasmuch as by virtue of condition

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9 and variation (*k*), the company became entitled to the benefit of any other insurance as sources of contribution and possible reduction, of the amount they might be called upon to pay.

Appeal allowed.

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ROSENBLOOM v. LAVUT.

Quebec Court of Review, Demers, Guerin and Bruneau, JJ. February 26, 1916.

MASTER AND SERVANT (§ V—340)—WORKMEN'S COMPENSATION—COURSE OF EMPLOYMENT—"TRANSPORTATION"—"LOADING OR UNLOADING."

A driver of a delivery wagon employed by a mercantile house is not engaged in the work of "transportation business," or in that of "loading or unloading," within the meaning of the Quebec Workmen's Compensation Act (R.S.Q. 1909, art. 7321), and he is not entitled to compensation under the Act for injuries sustained in the course of delivering goods for his employer.

Statement.

APPEAL from a judgment dismissing an action under the Workmen's Compensation Act. Affirmed.

Pélissier, Wilson & St. Pierre, for plaintiff.

Ross & Angers, for defendants.

Bruneau, J.

BRUNEAU, J.:—The defendants are wholesale grocers, who deliver, themselves, the goods which they sell to their customers. They use, not motors, but horses, which is important, as we shall see later. They do not charge their clients anything for carriage of the goods.

The plaintiff, who is one of the delivery-drivers employed by the defendants, was the victim of an accident on September 28, 1914, in the course of his work. He was on the way, that day, with a companion, to deliver to a customer on Ontario St., goods sold by his employers, when an automobile struck him, breaking both his legs, bruising him in many parts of the body, and making it impossible for him to work again for about 2 years. His salary had been $12 per week. He claims, in consequence, an annual pension of $312. The parties themselves have fixed the amount, should the Court decide that the defendants come under the Act respecting the responsibility for accidents suffered by workmen in the course of their work, and the compensation for injuries resulting therefrom. (9 Edw. VII. 1909, ch. 66; R.S.Q. 1909, art. 7321.)

The defendants repudiate all responsibility, alleging that the Act invoked by the plaintiff is not applicable to them, and it is for us to declare, once more, the application of this Act.

The first section establishes what persons can benefit by it,

and the professions to which it applies. It corresponds with the first article of the French law of April 9, 1898. The latter has been amended many times, and widened, particularly on June 30, 1899, extending it to accidents caused in agricultural industries by the use of machines operated by stationary motors, and, on April 12, 1906, to all commercial enterprises.

Our law, on the contrary, although adopted in 1909, or 11 years after the coming into force of the French law, was amended only in 1914, by ch. 57, of the statutes 4 Geo. V., without affecting the provisions of the first section. It is therefore necessary to bear in mind, in citing the French doctrine and jurisprudence on this subject, the successive amendments to the original law of April 9, 1898. This law did not, in effect, apply to agriculture, commerce, and the liberal professions. Since the amendment of June 30, 1899, and that of April 12, 1906, there remain, in France, outside the jurisdiction of the law of April 9, 1898, only the liberal professions, and agricultural industries in which machines operated by stationary motors are not employed. All other enterprises, industrial or commercial, are covered by this law. (D. p. 1906, 4, 116, note 9, No. 1). But even under the provisions of the first article of the original law, of April 9, 1898, commercial enterprises were submitted to the professional risk, in so far as they employed explosive materials, or used machines operated by any force other than that of men or of animals. The Court of Appeal, of Paris, has held on many occasions that traders were not responsible for accidents caused by machines and motors employed by them, or at least that only workmen who work near the machines are protected by the law.

The defendants, as traders, would not have been responsible, in France, for the accident to plaintiff, before the amendment of April 12, 1906. With much greater reason, then, they would not be responsible, in our province, since, according to the text of our law, the distinction is not made which was made in France by this amendment of 1906. The condition of the use of explosive materials, or of machines operated by some force other than that of men or of animals, to bring commercial enterprises, in France under the "*risque professionnel*," before the law of April 12, 1906, cannot apply to our province, in the face of the text of our law. This condition only applies to industrial enterprise. (Walton, Workmen's Compensation Act, p. 43; No. 31.)

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The plaintiff, seeing that he could not reach the defendants, in their quality of traders, contends that the delivery or carriage of the goods, which they made to their customers, must be considered as "transportation business by land," which is included in the first section of our Act. There is no doubt that the transportation business is subject to the "*risque professionnel.*" But note that the text of our Act, as well as that of the French law, uses the words "*entreprises de transport.*" Now, what is to be understood by these words? We must understand by them any business having for its object the transportation of persons or of things, by land or by water. In France, nevertheless, the Cour de Cassation, in numerous judgments, has declared that these words do not include "*Les transports maritimes*" (maritime transportation). That Court has explained clearly the system, based on the Code de Commerce, in a judgment of July 5, 1904 (D. 1904, 1. 553). The law of April 9, 1898, is restricted, in France, to "entreprises" of transportation by land, and transportation by rivers, canals, lakes or streams.

In this circumscribed domain all classes of transportation are not included, but only transportation undertaken by "*entrepreneurs*" (contractors). Transportation by persons carrying on businesses not subject to this Act (as are the defendants in this case), on their own account, and as an accessory of their principal business, cannot be assimilated to public carriers, or transportation contractors. The Cour de Cassation has declared that the business of contractor for the cleaning of streets, and the removal of refuse, is not subject to the law of April 9, 1898, as the transportation is done only for the purpose of removal of the objects. (24 Oct. 1904, D. 1904, 1. 559.) In the same class of ideas, the Cour de Cassation has exempted from the "*risque professionnel*" the wholesale wine merchant who carries and delivers his casks, and the dealer in coal and wood who delivers his coal. (Cass., 21 Décembre, and 28 Octobre, 1903, D. 1904, 1. 73.) Similarly, dealers in animals are not subject to the law of April 9, 1898, when they do not act as carriers of the animals for third parties. (24 Oct. 1899, D. 1. 1902, 5. 473.) Likewise the fact of a trader, such as a wood merchant, having a horse and carriage to bring the merchandise from his warehouse to the purchasers would not bring him into the class of "*entrepreneurs de transport*" (common carriers, or transportation contractors).

(15 Février, 1901, D. 1901, 3. 669.) In the same way, a baker is not subject to the law of April 9, 1898, although his goods are delivered by carriages, this delivery constituting, not a special enterprise or business, but an accessory of his principal business. (Trib. civil de Montauban 7 Déc. 1900, D. 1903, 2. 419; Poitiers, 21 Janvier 1901, D. p. ibid; Trib. civil de Saint-Calais, 23 Mai 1902, D. p. ibid.)

These decisions, in my opinion, are relevant to this case, and decide the claims of the plaintiff. In conformance with this interpretation, we could not include among the "entreprises" covered by the law of April 9, 1898, any except special industrial works carried on with a view to gain or profit. (15 Février, 1901, D. p. 1901, 3. 69; Chambéry, 17 Juin, 1903, D. p. 1904, 2. 71.)

It follows from all these authorities that a transportation contractor, or common carrier, is one who, for the purpose of profit, transports moveables or objects of any kind, on behalf of another, as Messrs. Baillargeon & Rochon do at Montreal. So, traders such as the defendants, whose business is not *de plano* subject to our Act, can, with the aid of their horses and carriages, and the assistance of their employees, effect the delivery of their goods and merchandise, without becoming, on that account, common carriers; the accidents arising under these conditions fall under the rules of the common law. That is the opinion expressed by Sachet, who is rightly regarded as one of the most faithful interpreters of the French law. (T. 1, No. 102, p. 24, 5th éd.)

W. Walton teaches the same doctrine, and cites, on this point, the case of the small store-keeper who sends his goods to his customers, and who is not subject to the Workmen's Compensation Law, according to a decision of the tribunal of Poitiers. (21 Janvier, 1903, D. 1903.)

Pouliot, J., has given a decision to the same effect in the case of *Vigneault* v. *Brouillard* (40 Que, S.C. 27). This judgment conforms to that of the Court of Appeal in the case of *Baie St. Paul Lumber Co.* v. *Tremblay*, 25 Que. K.B. 1, because transportation, in this latter case, constituted an accessory of the industry or business of the company-defendant.

But this principle is true only in so far as we find ourselves

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in the presence of a case of business not subject, as that of the defendants, to the "risque professionnel." If it is a question of a business subject to the Act, as that of a factory, a manufacturer, a workshop, etc., workmen who effect deliveries are protected, because the transportation is an accessory of that business.

The amendment of April 12, 1906, has overcome, in France, many difficulties, as would have been the case in our province, if our law had been amended in the same way. Commercial enterprises being to-day subject to the law of April 9, 1898, only transportation effected in agricultural pursuits remain, according to the authors, outside the "risque professionnel."

I must point out, however, that according to a "premier système" sanctioned in the first years of the application of the law, by the jurisprudence of some judgments cited and invoked by the plaintiff, it matters little that the transportation is only an accessory of the business. (Dijon, 20 Juin, 1902, D. p. 1903, 2. 439. Comité consultatif des assurances contre les accidents du travail des 21 Juin, et 12 Juillet, 1899, et 4 Avril, 1900, D. 1900, 4. 18, Nos. 8 & 9; D. 1900, 4, 72, No. 13.)

But this system has been completely abandoned, and a second system has been substituted, which the Court below adopted in this case, by which a carrier is not subject to the law of April 8, 1898, if he limits himself to the transportation, as do the defendants, of the things which form the object of his business.

The jurisprudence and the doctrine both sanction, in France, the following "third system:" whenever the transportation is effected by automobile trucks, or motor vehicles, the employment of a motor will render it subject to the law, whatever may be the business in which it is used.

But this system, according to the text of our statute, is not applicable in our province, in view of the fact that the use of machinery operated by a force other than that of man or of animals is only connected with industrial enterprise. Finally, the Cour de Cassation has held, on many occasions, the principle that it is the nature of the business in which the workman is employed, and not the nature of the work done by the workman which determines the question as to the applicability of the law of April 9, 1898. (Avis consultatif des assurances contre les

accidents du travail, du 13 déc. 1899, D.P. 1900, 4, 19, No. 12; du même sens, Sachet, t. 1, No. 105, p. 75.) Now, the defendants are not engaged in the transportation business, but in commerce. The transportation of their merchandise is only an accessory of their business. Commerce is outside the "*risque professionnel*" in this province, because it has not yet been extended to it, as was done in France by the law of April 12, 1906.

However, the plaintiff does not base his claim solely on the allegation that his employers were engaged in the transportation business; he contends, further, that the accident having happened at the moment when he was unloading his waggon, we must consider the defendants as engaged in the business of loading and unloading, of which the first section of our Act speaks.

In France, it is held that these terms only comprise loading and unloading of ships at the ports, according to the introductory provisions of the law, which we have not, in this country, unfortunately, to aid us in the interpretation of our statutes. It is not sufficient to have an operation of loading and unloading, in order to invoke our Workmen's Compensation Act. It is necessary that this operation should be, as in the case of transportation, in the nature of an "*entreprise*," a business, as we have defined it above. (Sachet, t. 1, No. 108, p. 75.) It follows then that the work of loading and unloading which a person makes on his own account are not covered by the special legislation dealing with workmen's compensation for injuries. Workmen engaged in that work cannot claim the benefit of our Act, if the loading took place as an accessory of a business not subject to that Act. But if they are working for an employer who is excluded from the scope of the Act, as a trader, in France, before the amendment of April 12, 1906, as well as in our province, where the first section of the Act of 1909 has not been amended, they cannot invoke the benefit of the theory of "*risque professionnel*." The Cour de Cassation has so held, principally in two judgments, one dated July 5, 1904 (D. 1904, 1. 553), and the other under date December 12, 1906 (Le Droit, du 29 Décembre, 1906).

If there are businesses having for object the loading and unloading of vessels, there are scarcely any having for object other forms of loading and unloading. The businesses of moving of household effects, furniture, etc., for example, are chiefly

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transportation enterprises, and we may consider that the loading of wagons is only an accessory of these businesses. As to railways, the loading and unloading is often done by the shippers and the consignees. These persons, working on their own account, are not subject to the "*risque professionnel*," unless their principal business comes under the Workmen's Compensation Act. As to the loading and unloading done by a railway, these are the accessory of a transportation business, and the employees working at it are certainly protected by our statutory legislation of 1909.

We can therefore lay down the principle that the rules which govern transportation businesses are equally applicable to the businesses of loading and unloading. The plaintiff invokes them in vain, since the defendants, in delivering, themselves, for their own account, their goods and merchandise, are not carrying on a transportation business, and still less a business of loading and unloading. It is not necessary to examine as to whether the enumeration made by the first section of our Act on labour accidents is explanatory or limitative. This cannot be raised, in view of the authorities cited, with regard to the definition of the words "*entreprise de transport*," or the words "*chargement et déchargement.*" The meaning which the doctrine and the jurisprudence have given to these words is directly contrary to that which the plaintiff wishes us to accept.

I am therefore of opinion that the judgment of the Court below must be confirmed, and the inscription in Review dismissed, with costs, saving the plaintiff's recourse, if any there be, under the common law, against the person responsible for the accident of which he was the victim. *Appeal dismissed.*

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CITY OF TORONTO v. LAMBERT.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Duff, Anglin and Brodeur, JJ. December 30, 1916.

1. MASTER AND SERVANT (§ II A—50)—NEGLIGENCE OF THIRD PARTY—JOINT LIABILITY—ELECTRICITY.

An electric company, as employer, and a municipal corporation operating a hydro-electric system, may both be held liable for the death of a lineman electrocuted while at work, where the negligence of each was a real cause of the accident.

[*Algoma Steel Co.* v. *Dubé*, 31 D.L.R. 178, 53 Can. S.C.R. 481, referred to.]

2. CONTRACTS (§ II D—152)—AS TO LIABILITY FOR NEGLIGENCE—INDEMNITY.

An agreement by an electric company to indemnify a municipal corporation against all damages which the city may have to pay "by reason

of any act, default or omission of the company or otherwise howsoever," does not include damages which the city must pay as a consequence of its own negligence.

Statement.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario, 29 D.L.R. 56, 36 O.L.R. 269, affirming the judgment at the trial (9 O.W.N. 452), against both defendants. Affirmed.

C. M. Colquhoun, for appellant.

B. N. Davis, for respondent, Ada Lambert.

D. Inglis Grant, for respondent The Interurban Electric Co.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—I agree with Anglin, J.

Davies, J.

DAVIES, J.:—I think the agreement between the two defendant companies cannot be invoked by the defendant appellant, the City of Toronto, against its co-defendant, the Interurban Electric Co., to relieve the city from its liability for the death of the deceased. That agreement does not extend, as I construe it, to cases where the accident causing the injury sued for was caused "partly directly," to use Lord Esher's own phrase many times repeated in the case of *The Bernina*, 12 P.D. 58, by the defendant corporation's own negligence as is found to be the case here.

In this case the jury have found on evidence which I think sufficient, that the deceased was not guilty of contributory negligence and I think that finding applies as well to the corporation defendant, the present appellant, as to its co-defendant the Interurban Company which employed the deceased.

The jury have also found the appellant-defendant, the Corporation of the City of Toronto, guilty of negligence which caused the accident

by not having the strain insulators nearer the Hydro-Electric pole and by not insulating the point of contact between the guy wire and the ground wire or lightning arrester on the Hydro pole.

It is true they also found the other defendant, the Interurban Electric Co., guilty of negligence which caused the accident as follows:—

Before sending Lambert up the pole, the Interurban foreman should have noted that the strain insulators near his company's pole were in wrong position and that being so should have directed his attention to the possibility of the guy wire being in contact with the ground wire on Hydro pole.

But that finding of negligence on the part of the Interurban Company does not discharge the City of Toronto from the consequences following the finding of negligence against it.

Both companies have been found guilty of negligence which

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"partly directly" caused the accident and they are both and each liable for the consequences. To entitle the defendant, the City of Toronto, to shelter itself behind the negligence found against its co-defendant, the Interurban Electric Co., it must shew that this latter's negligence was "the conscious act of another volition" and was the real cause which brought the injury about and without which the accident could not have happened. The negligence of the electric company was that of one of its foremen, a mere case of negligence in overlooking the conditions existing when he ordered the deceased to climb the electric pole and do certain work. Such negligence does not come within the meaning of the words—"conscious act of another volition" which under certain circumstances will remove liability from one whose previous negligence has "partly directly" caused the injury complained of.

Construing the indemnity clauses of the agreement between the two defendants as I do, not to embrace or include a case of negligence on the part of both companies the negligence of each "partly directly" causing the accident, and holding the finding of the jury as to the absence of contributory negligence applicable to both corporation and company alike and that there was no "conscious act of another volition" intervening between the negligence found against the corporation and the happening of the accident, but merely an additional act of negligence on the part of its co-defendants, the electric company, I would dismiss the appeal with costs to both respondents.

Duff, J.

DUFF, J.:—The appellant municipality's (The Hydro El.) pole, near the N.W. corner of Bathurst St. and St. Clair Ave., was about 6 ft. west of the Interurban Company's pole, and was about 5 ft. higher. On the top of the appellant's pole was a lightning arrester connected with the ground by a wire running down the pole. One of the two guy-wires supporting this pole ran past the top of the Interurban pole touching, or almost touching it. This guy-wire where it was tied around the appellant's pole was in contact with the ground-wire of the lightning arrester. It had on it a porcelain insulator which was situated about 6 ft. east of the Interurban pole. The deceased Kenneth Lambert, a lineman in the employ of the Interurban, was killed by an electric shock received while working on the Interurban pole on March 13, 1914. The Interurban pole had two horizontal cross-bars, one

about nine inches and another about two feet three inches below the top. The lower arm ran east and west parallel with St. Clair Ave. and the other north and south parallel with Bathurst St. The lower cross-arm supported four high voltage wires coming up Bathurst St. from the south, two of which passed on along that street to the north, the remaining two turning here and running east along St. Clair Ave. To accomplish this turning these two wires were connected by wire connections, called "risers" or "jumpers," with the two wires fastened to the northern arm of the upper wire and carried thence to the company's pole to the east. This was the situation on March 13, 1914, when the deceased Lambert was sent by his foreman to the top of the pole to do some work; and this condition of affairs, it may be added, had existed since November 25, 1912, a year and a half before. On the occasion in question the foreman with a gang of men was engaged in removing the two westerly wires just referred to, and Lambert was sent up to cut them away. To do this it was necessary to cut the "jumpers" or "risers," which he did, leaving the live ends exposed, referred to in the evidence as "pig tails." Unhappily Lambert, standing with his right foot on the lower, east and west, cross-arm, his left leg thrown over the upper north and south cross-arm, his left foot which was dangling from the cross-arm was brought into contact with one of these live ends as he was reaching for a rope, while his right hand at the same time encountered the guy-wire of the appellant's pole, and a circuit being established through his body by way of the guy-wire and the ground-wire of the lightning arrester, he was instantly killed.

Two additional facts should be mentioned as introductory to the discussion of points in controversy. The first is that it was the practice in the Hydro-Electric system to attach guy-wires in contact with ground-wires to the Hydro Electric poles, the only protection being an insulation similar to that above described. The other point is that the Interurban poles and wires were erected under the provisions of an agreement with the appellant municipality one term of which is set out in par. 7 of it, and is in the following words:—

> The company shall save harmless and indemnify said corporation against any action, claim, suit or demand brought or made by the granting of any of the privileges hereinbefore mentioned to the company, and all costs and

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expenses incurred thereby, and also against all loss, damages, costs, charges and expenses of every nature and kind whatsoever, which the corporation may incur, be put to or have to pay, by reason of the improper or imperfect execution of their works or any of them, or by reason of the said works becoming unsafe or out of repair, or by reason of the neglect, failure or omission of the company to do or permit anything therein agreed to be done or permitted or by reason of any act, default or omission of the company or otherwise howsoever.

The jury found that the accident was attributable to the negligence of the appellant as well as the negligence of the Interurban Company, the deceased Lambert being acquitted of contributory negligence. The appellant corporation denies its responsibility on the ground that there is no evidence of actionable negligence, on the ground that the deceased Lambert is chargeable with contributory negligence and that their responsibility to him is precluded by the terms of the contract with the Interurban company above set out, and they further claim to be entitled to indemnity as against the Interurban under the same agreement.

First, as to contributory negligence. It was a question for the jury, I think, whether Lambert, going about the execution of manual work in which he was engaged, bent upon getting it done without waste of time, was acting reasonably in assuming that such sources of danger as might be created by the condition and situation of the poles and wires had been the object of attention on the part of his employers; I think it is impossible to say that the jury could not reasonably find affirmatively on that question and acquit Lambert, as they did, of contributory negligence.

As to the agreement. The point made against the respondent Ada Lambert, on the agreement is, as I understand it, that the Interurban pole was where it was and that Lambert, a servant of the Interurban company, was only entitled to be where he was by virtue of the agreement between the appellant and the Interurban company, and that consequently his rights, when there, must be such rights only as he could avail himself of against the appellant if he himself instead of the company were the contracting party. This argument seems to be largely based upon the construction of the judgment of the Privy Council in *Grand Trunk R. Co.* v. *Robinson*, 22 D.L.R. 1, [1915] A.C. 740, 113 L.T. 350. I think the contention requires for its support a much broader principle than anything established by *Robinson's* case, *supra*,

because their Lordships there, as I read the judgment, put their decision upon the specific conclusion at which they arrived that the person who contracted with the railway company was Robinson's agent empowered to bind himself by any terms he might make with reference to the company's responsibility for the carriage of Robinson. Here, there is of course no suggestion of agency, express or implied, and I think that on this ground the agreement must be rejected.

It is convenient at this point to dispose of the question of indemnity also. The stipulation relied upon has not, in my judgment, the effect of casting upon the appellant municipality responsibility for a condition of things primarily due to the negligence of the appellant itself. Where harm is caused and the appellant municipality is answerable by reason of the fact that its own negligence is a proximate cause of that harm, I do not think such responsibility is fairly within the contemplation of clause 7,

It is true that the phrase "otherwise however" is a very broad one; but the language of the clause shews that it was framed *alio intuitu* and we should violate a fundamental rule of construction if sweeping words placed at the end of a more specific enumeration were to be read as embracing cases which it is abundantly evident from the clause (when read as a whole) the parties never had in contemplation. It is not the "act, default or omission" of the Interurban company for which the appellant municipality is held responsible, it is the municipality's own wrongful act.

But is there evidence of wrongful act, or, in other words, is there evidence of actionable negligence for which the appellant municipality is responsible and to which as a proximate cause Lambert's death may be attributable?

Now it is quite true that to affirm this is to affirm, first, that the appellant company was guilty of a breach of duty to Lambert, and, secondly, that Lambert's death was a consequence of that breach. It is quite true also that but for the placing of the Interurban pole in the situation in which it was, and but for the negligent omission of the servants of the Interurban Company to observe and warn their employees against the dangerous situation created by the proximity of the uninsulated guy-wire to the Interurban pole, this accident would not have happened.

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The fact that the Interurban pole was brought into this position after the appellant municipality's pole had been placed where it was at the time of the accident, does not appear to me to be a circumstance of much importance. As I have already said, the situation created by the proximity of these poles and wires, the wires being in the condition in which they were, had been in existence unchanged for some 18 months preceding the accident.

In these circumstances the jury were entitled to find as a fact that the appellant municipality was concurrently responsible with the Interurban company for the existence of this dangerous state of things; and as to the neglect of the servant of the Interurban Company and particularly the neglect of the foreman to observe and give warning of this dangerous situation, the rule applies which is stated by Lord Sumner (then Hamilton, L.J.), in *Latham* v. *Johnson*, [1913] 1 K.B. 398, at p. 413:—

> A person who, in neglect of ordinary care, places or leaves his property in a condition which may be dangerous to another may be answerable for the resulting injury, even though but for the intervening act of a third person or of the plaintiff himself (*Bird* v. *Holbrook*, 4 Bing. 628; *Lynch* v. *Nurdin*, 1 Q.B. 29), that injury would not have occurred.

In such circumstances the duty not to neglect ordinary care incumbent upon both the appellant municipality and the Interurban company was a duty owing by the appellant company to the servants of the Interurban company. It follows that the appeal in both branches of it should be dismissed.

Anglin, J.

ANGLIN, J.:—In the appellants' factum four distinct objections taken to the judgment holding them liable to the plaintiff for the death of her son and not entitled to indemnity from their co-defendants are stated as follows:—

> (1) The deceased as an employee of the Interurban Electric Co. could claim no greater right than his employers who were on the street at their own risk and on condition that their presence should not result in loss or expense to the appellants. (2) The deceased was, as against the appellants, guilty of contributory negligence which caused the accident. (3) The negligence of the appellants as found by the jury was not the real or proximate cause of the accident. (4) By the provisions of the agreement between the appellants and the respondent, the Interurban Electric Co., the said respondent agreed to indemnify and save harmless the appellants against liability in this action.

For convenience I shall refer to the municipal corporation as the corporation, and to the Interurban Electric Co. as the company.

Apart from the question involved in the first ground of appeal—

whether the deceased as a servant of the company was so identified with his employers that his right of recovery must depend upon the existence of facts which would give them a right of action against their co-defendants, the corporation, for any damage they might sustain through fault of the latter (which I must not by any means be taken to regard as concluded in favour of the appellants)—see *Algoma Steel Co.* v. *Dubé*, 31 D.L.R. 178, 53 Can. S.C.R. 481—the first and fourth grounds of appeal rest upon the following clause of an agreement made between the two defendants:

> The company shall save harmless and indemnify said corporation against any action, claim, suit or demand brought or made by the granting (*sic*) of any of the privileges hereinbefore mentioned to the company and all costs and expenses incurred thereby, and also against all loss, damages, costs, charges and expenses of every nature and kind whatsoever, which the corporation may incur, be put to or have to pay by reason of the improper or imperfect execution of their works or any of them or by reason of the said works becoming unsafe or out of repair or by reason of the neglect, failure or omission of the company to do or permit anything herein agreed to be done or permitted, or by reason of any act, default or omission of the company *or otherwise howsoever*, and should the corporation incur, pay or be put to any such loss, damages, costs, charges or expenses, the company shall forthwith upon demand repay the same to the corporation.
>
> The company shall repair broken wires forthwith and make all other repairs on reasonable notice and shall keep same in good repair.

While it would, no doubt, have been quite possible for the corporation to have guarded against any liability to the company and to have provided for indemnification by it for any damages arising however indirectly out of the presence on its streets of the poles and lines of the company, even where such damages should be directly occasioned by the negligence of corporation employees, it would undoubtedly be necessary that such a provision should be expressed in clear and explicit language. Here there is nothing of the kind. There is nothing from which any implication of an intention to provide for such a right of indemnification can be inferred. The application of the words "or otherwise howsoever," invoked by counsel for the appellants, having regard to one of the most familiar rules of construction cannot extend to something so entirely foreign to the context as damages caused by negligence of the other party to the agreement.

Neither should the clause be read as relieving the corporation from liability for, or entitling it to indemnity against claims for injuries partly occasioned by its own negligence, though operating

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in conjunction with negligence of the company or its servants. Only an explicit provision couched in unmistakable terms could be given that effect. Here damages due to negligence of the corporation, either as a sole cause or as a contributing causative factor, are not even hinted at. To import such a case by implication as one of the things for which the company assumed entire responsibility would be quite unjustifiable. If under the agreement the company would itself be entitled to recover damages from the corporation for injuries to its property placed upon the streets in the exercise of the franchise thereby conferred, caused by negligence imputable to the corporation, as I think it would, an employee of the company, who has sustained such an injury, must *a fortiori* have a right of action against the corporation. Fault imputable to the company (such as the negligence of its foreman found by the jury in this case), which might under a plea of contributory negligence afford the corporation a defence in an action brought by the company for damages to its property caused by negligence of the corporation's servants, may not be ascribed to the plaintiff's son as an employee of the company so as to debar recovery for personal injury to him under such a plea. It follows that the first and fourth objections fail.

The second objection is conclusively disposed of by the adverse finding of the jury upon it, which is clearly made against both defendants. It is impossible to say that this finding, negativing personal contributory negligence on the part of the plaintiff's deceased son, affirmed in the Appellate Division, is so preposterous that no honest or reasonable jury could have made it.

The third ground of appeal involves the familiar question as the liability where negligence of two independent persons or bodies is found to have been the cause of the plaintiff's injuries. The first of Lord Esher's well-known propositions upon the law of negligence, stated in *The Bernina*, 12 P.D. 58 at 61, and the decisions in such cases as *Burrows* v. *March Gas and Coke Co.*, L.R. 5 Ex. 67, 7 Ex. 96, are conclusive against the appellant. The authorities upon this branch of the case are conveniently collected in Hals. Laws of England, vol. 21 "Negligence," par. 649. That a lineman of the company might be injured just as the plaintiff's son was, was a natural consequence of the appellants' negligence. That the injuries sustained by the plaintiff's

son were a direct consequence of that negligence is incontestible. There was no intervention of a conscious act of another volition operating as a real cause to interrupt the chain of causation between the appellants' negligence and the consequences complained of. They cannot invoke as an excuse the failure of their co-defendants' foreman to prevent that negligence becoming operative. Both it and the negligence of the company's foreman (assuming the correctness of the jury's finding as to the latter, which is now not open to question), were in fact operative at the moment when Lambert was killed. Both were truly active causes. Neither can be said to have been merely a condition *sine qua non* of that which occurred: *Algoma Steel Co.* v. *Dubé*, 31 D.L.R. 178, 53 Can. S.C.R. 481.

The appeal, in my opinion, fails and should be dismissed with costs to be paid by the appellants to both respondents.

Brodeur, J.

BRODEUR, J.:—This is an action instituted under Lord Campbell's Act.

The plaintiff's son was an employee of the defendant, the Interurban Electric Co., as lineman, and while working on the cross-arms of the electric poles of that company he met his death from an electric current.

The appellant, the City of Toronto, had a pole carrying light and power wires situated near the one on which the victim, Lambert, was working. The guy wire which assisted in the support of this city pole was fastened tightly around that pole and was coming in direct contact with a ground wire running down the city pole to the ground. That guy wire extended over the pole of the Interurban Electric Co. and the guy wire then in its direct contact with the ground wire on the city pole was loaded with electric current at high voltage and the victim, in working near by that guy wire, came in contact with it and was killed.

The action was instituted against the City of Toronto and against the company for which Lambert was working and by the verdict of the jury the City of Toronto was declared guilty of negligence for not having the strain insulators nearer their pole, and by not insulating the point of contact between the guy wire and the ground wire.

Nobody can find fault with that verdict. This guy wire was for the purpose of sustaining the pole belonging to the city.

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It was their duty to see that this guy wire should not come in contact with the loaded wires, and if it was exposed to come in contact they should also have put insulators at such a place where accidents could be avoided.

There is, in this case, an insulator; but the insulator, instead of being placed between the poles and so avoiding any accident to those who would have to work on the company's pole, was placed further away.

The verdict of the jury also stated that the company was liable because its foreman, before sending Lambert up the pole, should have noted that the insulator was in a wrong position. There is no appeal before us with regard to the verdict rendered against the company. The aggregate amount which was given by the verdict to the plaintiff was $2,700: 2-3 to be paid by the City of Toronto and $900 by the respondent company. This verdict should be sustained because there was, no doubt, negligence by the City of Toronto.

But the latter claims that under a contract existing between the company and itself it should be indemnified for that judgment.

When the company desired to erect poles in the place in question they applied to the municipal authorities then having jurisdiction and the council consented to grant such permission, subject to certain conditions. One of those conditions was that the company should indemnify the municipal corporation against any action in consequence of the granting of the privilege mentioned in the contract, and also against all damages which the corporation might incur by reason of the imperfect execution of their work "by reason of any act, default or omission of the company or otherwise howsoever."

The jury have found, it is true, that the foreman of the respondent company gave improper orders to the victim. But at the same time the jury stated that the City of Toronto was mostly responsible for the accident because it was due to defective connections or stringing of their wires.

It is not a case, in my opinion, covered by the indemnification clause above mentioned. It is clear that no injury would have been suffered by the deceased if the defendants had not fastened their guy wire in direct and immediate contact with their ground wire and if they had placed their insulator in the proper position.

The liability of the City of Toronto results because of its own negligence and the condition on which the City of Toronto relies does not go so far as to state that the company will be bound to indemnify it for the appellant's own negligence.

I come to the conclusion that the judgment rendered by the Appellate Division should be confirmed with costs.

Appeal dismissed.

Re OWEN SOUND LUMBER CO.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. January 12, 1917.

1. COMPANIES (§ V B—180)—ALLOTMENT OF SHARES—CONSIDERATION.
Shares in a company allotted to a promoter for profits, which in fact belonged to the company, are not "paid up" and nominees of the promoter in respect of these shares are liable as shareholders.

2. COMPANIES (§ V F—255)—LIABILITY FOR UNPAID SHARES—MEASURE OF DAMAGES.
Persons not duly elected directors, but who assume the office, are liable in all respects as if rightly such.

3. COMPANIES (§ IV G—130)—DIRECTORS — MISFEASANCE — DIVIDENDS — WILFUL NEGLECT.
Directors who are not wilfully blind or careless but who rely upon the statement of officials are not guilty of misfeasance for directing the payment of dividends which, in fact, decrease the capital.

4. COMPANIES (§ IV G—130)—LIABILITY OF DIRECTORS—CONTRACTS—MISFEASANCE.
Secs. 90 and 91 of 2 Geo. V. ch. 31 (R.S.O. the Companies Act) are not confined in their application to vendor and purchaser agreements, but prohibit a director from voting upon any contract whatever in which he is interested.

Statement.

APPEAL by J. M. Kilbourn, Wesley Sheriff, and W. H. Merritt, and cross-appeal by the liquidator, from the orders of Middleton, J., 25 D.L.R. 812, 34 O.L.R. 528, made upon appeals from the rulings of the Local Master at Owen Sound. Varied.

J. H. Moss, K.C., for appellant Kilbourn.

W. H. Wright, for appellants Sheriff and Merritt.

H. J. Scott, K.C., and *D. Robertson*, K.C., for the liquidator, respondent and cross-appellant

The judgment of the Court was delivered by—

Hodgins, J.A.

HODGINS, J.A.:—These appeals are from the orders of Middleton, J., of the 22nd September, 1915, and the 20th October, 1915, made upon appeals from the Local Master at Owen Sound.

The Master has discussed and analysed the evidence with great care and ability, in two memoranda dated the 23rd March, 1915, and the 30th April, 1915, and his findings upon the facts have not been disturbed by Middleton, J.; although that learned Judge takes a different view of the law applicable to the situation which

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is outlined in those memoranda. The appeals from his orders are now dealt with separately.

(1) *As to the $5,000 stock allotted or distributed 28th April, 1910.*

The Local Master held the four parties mentioned below liable as contributories for the amounts of stock distributed to them in respect to the $5,000, namely: H. E. Rowland, $2,500; W. H. Merritt, $1,300; J. M. Rowland, $500; W. Sheriff, $400. The Rowlands did not appeal; Sheriff and Merritt did.

Middleton, J., held Merritt liable for $1,300, but not Sheriff. Merritt now appeals; as does the liquidator, who seeks to make all four parties responsible for the whole $5,000.

The $5,000 of stock is said by H. E. Rowland, who has been the prime mover throughout, and to whom the company owes its disastrous end, to have been issued to him, or as he directed, to pay for part of the assets which he was to transfer to the company. This part he now asserts to consist of contracts secured by him between the 1st and 28th April, 1910, the latter date being that on which the company received its permit to begin business, and the former the date of the transfer of the other assets.

The Local Master thus deals with the matter: "The dispute arises in this way: Rowland now contends that he was to get $15,000 of stock for his assets and goodwill—that he divided 50 shares of the 150 he was entitled to among his associates in the proportion set opposite their names in the figures in brackets. Rowland and Sheriff swear positively that the sum to be paid for these assets was $15,000. I have come to the conclusion that Rowland is wholly unworthy of credence—that he is a clever and unscrupulous scoundrel. I don't think Sheriff is one likely to 'swear to his own hurt,' and that his association with Rowland was not conducive to business morality or truthfulness. I think that Merritt is perfectly honest and honourable, and, when he says the original amount to be paid for the assets etc. was $15,000, he thinks such was the fact, but I think he is mistaken, and that he has formed this idea from recent discussions of the matter."

After examining the books and the figures in them and shewing how they were treated so as to make up exactly $10,000, he proceeds: "Rowland now swears that this $5,000 is not goodwill, but consists of the values of contracts he secured between the 1st and 28th April. In view of the admitted facts, consisting

largely of documentary evidence in his own handwriting, this contention seems to me to be absurd. When the company began business, new books were opened by Rowland, and the entries therein were all made by him until 28th April, when Sheriff became secretary-treasurer of the company. This journal contains ten pages of entries made by Rowland of the companies" (*sic*, "company's) "business between these dates, and ten pages more of the same kind of entries made by Sheriff and entered up by him when he took hold of the books. No distinction is drawn between the entries made before and after 28th April—they are all carried into other new books that contain nothing but the company's business —all the correspondence etc. appears to have been in the name of the new company, the banking account of the old company is taken over as at 31st March, and not 28th April. If this is not sufficient, we have the fact that these two directors, one of them the president and the other the secretary-treasurer, paid themselves from the company's funds their salaries from the 1st day of April, and not the 28th. Apart from all other considerations, I take it that, being the paid agents of the company, they cannot avail themselves of contracts they secured while such agents to make a profit out of the company. At p. 21 of the journal will be found an entry, in the writing of Sheriff, distributing the $5,000 of extra stock with this explanation: 'Allowed to first subscribers of stock on account of important contracts secured *since incorporation*.' This is under date of 28th April. If this $5,000 required to make up the $15,000 was on important contracts secured since the incorporation, then Merritt and Sheriff must be mistaken when they speak of the larger sum being understood before incorporation."

The Local Master then points out that the $10,000 is the sum mentioned in the Government returns for 1910, 1911, and 1912, prepared by and sworn to by Rowland and Sheriff, and concludes from all the evidence that the fifty shares in question were never paid for, and that the parties to whom they were issued are liable as contributories.

The only question on the appeal is, whether Merritt is liable for the thirteen shares issued to him, or whether he and the other three are liable for the whole amount.

I agree with the Local Master and Middleton, J., that Merritt

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should be put on the list of contributories for thirteen shares, and thirteen shares only.

Whatever consideration existed for shares issued for the assets, it proceeded from Rowland alone, and he was the only contractor with the company. He was the person entitled to the benefit of the shares arising out of that contract. If he had not paid up these shares under the contract, then his nominees took them as he got them; no consideration having ever passed from these nominees to the company. The finding of the Master shews that in fact the bargain was limited to one hundred shares, and that none ever existed for these fifty shares. No question can therefore arise as to whether the company or the liquidator is estopped from treating them otherwise than as paid-up shares. The attempt to suggest as a consideration the benefits of the business contracts got between the 1st and 28th April, fully justifies the Master's estimate of H. E. Rowland.

As the company could not legally do business until it obtained the permit on the 28th April, 1910, Rowland, who was made a provisional director on the 2nd March, 1910, by the letters patent, and who transferred the bank account to the company on the 31st March, 1910, and whose salary was paid by the company from the 1st April, 1910, has the effrontery to claim that he was doing business on his own account with the assets sold to the company, and is entitled to put in his "estimated profits" during that period as payment for this stock. The provisions of sec. 108 of the Companies Act, 7 Edw. VII. ch. 34, if they apply to this company, would seem to render his position impossible. But without them it is clearly untenable.

I cannot see how the parties to whom Rowland distributed the shares can be made liable for more than they actually received. The liquidator has treated these various parties as contributories, and has succeeded in holding them, except in the case of Sheriff, who escapes on account of having transferred his shares. They made no bargain with the company, and, having accepted shares, are in the position of shareholders and liable as contributories.

It is, however, sought to make all jointly and severally liable as for misfeasance, under sec. 123 of the Dominion Winding-up Act. So far as the four parties are concerned, no loss is proved.

The value of these shares on the 28th April, 1910, has been, as part of the liquidator's case, shewn to be *nil*, $10,000 being the full agreed value of all the assets transferred, although the Master finds that their real value was under $4,000, and the subscribers for stock having paid in no cash, while the profits to the 28th April are shewn to be estimates only. If Merritt pays up his $1,300, it is so much to the good. The measure of liability in such circumstances is well set out and limited by the Court of Appeal in *Re Manes Tailoring Co.* (1909), 18 O.L.R. 572, to the market value of the shares.

As to Sheriff, he has been held not liable on his $400 worth of shares, because he sold them prior to the winding-up, and under circumstances not involving a violation of duty, as in *Re Peterborough Cold Storage Co.* (1907), 14 O.L.R. 475.

The two Rowlands admit liability by not appealing, and the amount lost upon the shares issued to them is not proved, but rather, as I have said, it is shewn that they were of no value.

The appeals of Merritt and of the liquidator on this branch are each dismissed with costs.

(2) *Dividends paid on 10th April, 1912, $6,300.*

The Local Master held that there was no liability for these dividends as regards any of the parties. Middleton, J., decided that the two Rowlands, Merritt, and Sheriff, were, as *de facto* directors, guilty of misfeasance under sec. 123. From this decision Merritt and Sheriff appeal. It was urged on their behalf: (1) that the Master had no jurisdiction to decide upon misfeasance under this section; (2) that these parties were only *de facto* directors, and as such are not amenable under that section; and (3) that these directors had the right to rely on the statements produced, and were not guilty of misfeasance if they did so.

Upon the first ground, good sense, as well as authority, seems to point to jurisdiction in the Local Master under the order of delegation. The matter arises directly in the winding-up, the amounts and the circumstances under which dividends were paid are easily ascertained, and the parties are directors and are before the Master. The reasons set out in the case of *In re Mercantile Trading Co., Stringer's Case*, L.R. 4 Ch. 475, are now accepted as the test of jurisdiction. Instances are rare in which the jurisdiction ought not to be exercised: Buckley's Companies Acts,

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9th ed., p. 498. It was under such a summons that the claim of the liquidator for dividends improperly paid was prosecuted in the case of *Dovey* v. *Cory*, [1901] A.C. 477.

As to the second point, I agree with the view of Middleton, J., that, when the directors assumed the fiduciary office of director, they became liable in all respects as though rightly appointed to that office. To hold otherwise would be to say that a man might do wrongful acts affecting the company's assets, and yet enjoy immunity if he could shew some defect in his appointment. If this were the case, it would become fashionable to usurp the office on these terms rather than to accept it in a legitimate but less favoured way.

Upon the narrower question of procedure, such authorities as there are tend to shew that the misfeasance section will cover cases such as this. See *Western Bank* v. *Baird's Trustees* (1872), 11 Ct. of Sess. Cas., 3rd series, 96.

Upon the third branch, the Local Master holds that the directors were honest. Middleton, J., takes this view (25 D.L.R. 812, 34 O.L.R. at pp. 529, 530): "But more than honesty is required; reasonable intelligence and diligent attention to business are also essential. No one, at any rate in view of the numerous decisions to the contrary, would expect a director of a company to be familiar with all its details; but, before paying the extraordinary dividends declared in the case of this company, the directors should at least have had proper and adequate balance-sheets; and they ought not to have divided profits not yet earned. The whole situation is most suggestive. The large sums paid to directors for becoming sureties for advances, contemporaneously with the earning of these extraordinary profits, indicates, if not wilful blindness, at least such an absence of the exercise of any care and discretion as, in my view, to render the directors personally liable."

I am not sure that what the learned Judge has expressed is not a counsel of perfection. But the facts of the case require careful scrutiny in deference to the views he has expressed. So far as it is necessary to detail them, they present the well-known situation of a plausible and successful man inducing others to join him, and then launching out into ventures which, when in process of realisation, were valued as if they had actually produced an enormous profit.

It may be pointed out that the dividends paid in 1912 and 1913, for which these directors have been held liable, are at the rate of 10 per cent., which cannot be considered extraordinary in the case of a trading company. The 90 per cent. stock dividend was declared in April, 1911, when the statement produced shewed an apparent profit of $40,090.36. I think that in that year it might well have struck any one that the profits were unduly large for such a short period. But it did not do so, and there is evidence that leads fairly to the conclusion that, under the management of an energetic and successful manager and in a business representing opportunities for very great profits, those interested might have thought the sum, though large, yet not so striking as to cause suspicion. Merritt admits that he thought it a large amount, but said he had experience in taking out lumber, and knew that there was a lot of money in it. The stock dividend is not a payment of money; if the profits were really $40,000, then the corporators practically owned these profits when undivided just in the same proportions as they did when $25,550 of them was divided up and called stock. This was Merritt's view, and it seems clear that the declaration of this stock dividend was made in order to comply with the law in regard to increased capital, by enabling them to shew that 90 per cent. of the subscribed stock was paid-up. This step, which might well have led to question, was therefore accepted as an incident in a progressive and expanding business.

But, be that as it may, it was declared early in 1911, and to my mind does not affect the propriety of the declaration of the dividends in 1912 or 1913, although these were paid on the capital increased by the amount of the stock dividend in the previous year. That stock dividend reduced the profits carried over into the 1912 statements to $14,590.36, and the amount said to be earned in that year, apart from what was carried over, was $6,-236.54. Mulholland, a member of the Institute of Chartered Accountants, employed and called by the liquidator, makes the profits for the year ending April, 1911, to be $7,624, enough in itself to justify the 10 per cent. dividend then paid out on the whole increased capital.

The company in 1912 was officered by the parties now held liable for the payment of the dividend of 10 per cent. in that year. H. E. Rowland has been spoken of; his brother was a nonentity. Sheriff had been an accountant in a pickle manufactory, earning

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$18 a week, and was made secretary-treasurer, and helped to prepare the 1912 statement. He shews in his examination knowledge of figures, with the usual indifference of bookkeepers to their practical effect in the statement. The business was not done with assets visible in Owen Sound, but in limits or lots with standing timber, or in logs in the bush or at mills elsewhere in Ontario. With regard to these, both he and Merritt naturally relied on the only man who professed acquaintance with that branch, except so far as the measurements, tally-cards, and contracts were in the office, where Sheriff says he checked them up. Merritt is manager and director of a company in Owen Sound, manufacturing tables, and took no part in the working of this company. Rowland had been in his employ, and about a year after he left he so impressed Merritt with the success of the business he had founded that he induced him to come in as a shareholder, paying down $500 and giving his note for $4,800, and later guaranteeing the advances from the bank to the extent of $20,000. Merritt says that he always asked questions about the statements, and understood that the auditor, if his report was not there, would complete his work, and on that understanding he acted.

Neville, J., in *In re Brazilian Rubber Plantations and Estates Limited*, [1911] 1 Ch. 425, at p. 438, makes a remark which it is fair to bear in mind: "Business men have very frequently to act on information derived from interested persons."

There is disclosed in the evidence of both Sheriff and Merritt, particularly in that of the latter, just the usual perfunctory and half-interested attention which the business of a company managed by some one else always gets. While it may strike one, as it did Middleton, J., as evincing neither "reasonable intelligence" nor "diligent attention," I cannot regard it as indicating either wilful blindness or that absence of any care or discretion which must render directors liable for misfeasance. Sheriff had more acquaintance with the transactions, and seems to have been satisfied with the way the company was progressing.

The best test, perhaps, is to consider the effect of these statements upon three men who were paid for examining and forming a judgment and opinion on them.

Kilbourn, who is a wealthy man, a director and shareholder in quite a number of companies, paid $10,000 in cash for his 100

shares of stock on the 9th May, 1911, and went on a guaranty to the bank for $20,000. He said that, previous to doing so, he sent an employee of his, Todd, a skilled accountant, to make an examination and a report of the company's affairs. He did so, and reported that "everything was in first-rate shape." At that date the first annual meeting had taken place, and its statement had been presented, shewing profits of over $40,000.

Armstrong, whom Kilbourn regards as a very careful auditor and as discharging his duties with care and great circumspection, was a witness before the Local Master. He audited the statements for 1910-11 and 1911-12 during the fall of 1913, and has certified them as correct. He is an accountant who has audited for various concerns in Ontario, and is also town treasurer. He says that what he did here did not differ from what he ordinarily did in auditing, and that he would have taken the inventories for the lumber throughout the Province. This, he says, is the normal way of doing things. He finds no fault with the bookkeeping, or with the records of the transactions, and says that what he found was customary and ordinary. He says that he would not usually take estimates of profits on lumber, but would put the lumber at cost; yet the former is exactly what he did here, and it is this very fault that is found with these statements which he has certified.

Mulholland, to whom I have referred, when called as a witness by the liquidator, is questioned as to the statements of 1910-11, 1911-12, and 1912-13. He examined only some of the contracts upon which estimated profits were based, and says it is difficult to verify the number of feet in each case—a difficulty which would of course prevent any accurate result. He made the profits for the first year, after all corrections had been made, to be $7,642.36, which would have justified the 10 per cent. dividend. He admits that in arriving at that figure he is depending on some one else's values for the lumber. In 1911-12, he first made the net profits $16,767.01; but afterwards, on getting some further information, turns this into a loss of $1,360.69. The cause of this reduction as first given is important. It is made only because the working out of the sales in the succeeding years shew overvaluation in the lumber account. But this is judging by after results, and not by the books or records at the time. On the second occasion, the

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witness deducts $18,127, because it appears to be a "memo.," and because it looked like an estimate.

In 1912-13, he makes the loss $27,312.99, but seems uncertain whether $22,000 of it should be charged to 1911-12 or not, and afterwards states it at $11,871.72. His evidence may readily be compressed into a few extracts:—

"Q. 128. You would say that a dividend of $7,624 should be declared? A. There are ways, by comparison between years. It would be almost impossible here because this is the first year of the company, but most years by comparison you are able to tell whether the inventory is fairly valued in most businesses. It would perhaps be difficult to do that in this business, and we usually make it a point to have the inventories certified by the persons responsible.

"Q. 129. That is what you have to depend on? A. Not altogether. If you see anything that stares you in the face and you don't think it is right then it is up to you to make investigations, but take the ordinary inventory and it is the proper thing to have it certified by the persons responsible, and then take it as being correct."

"Q. 137. You would have certified to profits for that year (1911-12) of $16,767.01? A. Yes, provided there was no change made in the inventory after further investigation.

"Q. 138. Would you have further investigated? A. I would, that year, because we had the percentage of the previous year to go by in order to verify whether the inventory was right."

"Q. 141. You don't know whether you could certify to $16,-767.01 or not? A. No.

"Q. 142. You mean to say that if the officers had certified to the inventory you would not then have accepted that? A. If they had certified the inventories, I would, provided there was nothing in there that I thought was absolutely wrong."

"Q. 149. I asked you how much you would shrink the profits, $16,767.01, which you have given, in view of what you know now? A. If I was able to go through that inventory, I might find something in that to assist me, but I can't say now."

"Q. 168. Look at this statement, 1913, produced at the annual meeting by the officers of the company, shewing, as this shews, a profit of $7,000 and a surplus of $14,590. In your opinion, the

directors did the natural thing and declared a dividend? A. Well, if they wanted to take it that way they could declare a dividend, but I think they ought to have taken care to have it properly audited.

"Q. 169. Without then going behind these figures, they ought to have declared a dividend? A. I think it should have been an audited statement. At least they would have been exercising more care to do it that way. I am not going to say whether they have to have it audited or not."

These three witnesses illustrate just how little use an examination by any of the directors would have been. One accountant is perfectly satisfied, and his employer invests $10,000 on the faith of his examination, only to lose it; the other certifies two of the statements, after having had access to everything; and the third, who investigates after the insolvency and with all the information before him, is unable to satisfy himself of the real results of the operations up to April, 1912, or April, 1913, the crucial dates.

It must be frankly recognised that balance-sheets to be illuminating must go much deeper than the usual audit requires. They must and should include the real value of the assets, a thing practically impossible to be got at in a business where its belongings are not near-by, tangible, and readily valued. This essential basis is usually omitted, its place being filled by items resting on second-hand information. The terminology used by accountants may be an aid to their business, but it is a barrier to understanding. I am quite convinced that these directors accepted and honestly believed the statements they saw; and that, had they been audited by Armstrong, who was appointed to that office, no further light would, under the circumstances of this particular business, have reached their brains or permeated their intelligence.

The payment of large sums to the directors for giving guaranties to the bank, contemporaneously with the earning of extraordinary profits, is mentioned as an indication of wilful blindness or want of care and discretion. Having regard to the fact that the directors were honest, there is an apparent difficulty in holding that their blindness or carelessness was wilful. As a matter of fact the arrangement with Merritt was made shortly after he joined the company, though not formally binding on the com-

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pany. He gave the guaranty, and remained liable upon it, not asking for the $2,500, but expecting and intending it to be credited upon his stock. So that it cannot be said that this payment had its inception at the time the only extraordinary dividend was paid or contemplated, or the earnings thought to justify it were declared. The money was not paid or credited until April, 1914.

The liquidator, however, contends that liability is established because these accounts were not audited as required by sec. 123 of 7 Edw. VII. ch. 34. A balance-sheet was in fact laid before the shareholders in 1911, 1912, and 1913, but not one which had been audited. At the shareholders' meeting on the 12th April, 1911, Armstrong was appointed auditor for 1910-11 and 1911-12. His rights and duties are prescribed by sec. 130 of 7 Edw. VII. ch. 34, and by by-law 1, sec. 25, of the company. This meeting in 1911 was the first annual general meeting of the company, at the end of their first year of business, and the balance-sheet presented then, pursuant to sec. 36 of 7 Edw. VII. ch. 34, could not have been certified by the auditor unless he had examined it before his appointment. Armstrong was notified by Sheriff, the secretary-treasurer, and asked to go through the books, but he did not then accept the office. Merritt says he brought the matter up, and at each meeting he was told that the work to be done by the auditor would be attended to. Kilbourn's recollection from his conversation with Armstrong in 1913 was that he had never finished his work, but had done a good deal of it. He, however, did nothing till the autumn of 1913, and then in the way previously mentioned. As I have pointed out, if he had duly reported, and his report had been laid before the shareholders, they would not have been any the wiser as to the details now said to be misleading.

The statutory provisions as to an auditor's report at the date of the shareholders' meeting on the 10th April, 1912, are to be found in 7 Edw. VII. ch. 34, secs. 36 and 123 to 130, and they are substantially repeated in 2 Geo. V. ch. 31, in secs. 43 and 125 to 133. Under them, the shareholders elect the auditor, the directors' right to do so ceasing at the first general meeting. The auditor has the right of access to the books, accounts, and vouchers, and may require explanations from the directors, and he is to make a report to the shareholders on the accounts examined by him and on every balance-sheet during his tenure of

office, and his report is to be read at the general meeting. He is also to sign a certificate stating whether his requirements have been complied with. Beyond the statutory enactment that the accounts shall be examined once at least in every year, and the correctness of the balance-sheet ascertained by the auditor, there is no direction as to the duties of the directors in relation to compelling an audit or report. They are bound under sec. 130 of ch. 34, 7 Edw. VII., to give such explanation and information as the auditor requires, and are also to lay before the annual meeting the report of the auditor. Under the company's by-law 1 (25) the duty of the auditor is to examine and audit all books, vouchers, accounts, and dockets of the company, and to make a report on the balance-sheet and abstract of the company's affairs "as soon after the close of the financial year as possible."

The balance-sheets of the company in 1911, 1912, and 1913, comprise within them the information required by sec. 36, except in not setting out the debts owing by the directors as such, although those debts on stock are now shewn to be part of the bills receivable. The proper books were kept, and properly kept.

Auditors were, as it appears, appointed for 1910-11, 1911-12, and 1912-13. One did not act at all, and the other only long after the date of his appointment. Hence, no auditors' report was laid before the shareholders, nor did the directors see that the accounts were examined and the correctness of the balance-sheet ascertained by the auditor appointed by the shareholders until the autumn of 1913, as to those for 1911 and 1912.

In view of the absence of any express power to compel an examination or report, the question arises: Does the absence of such an examination and report involve the necessary conclusion that there was wilful inattention to duty sufficient to amount to misfeasance?

I am unable to think that it does. The cases laying down the principles which this Court should follow are *Dovey* v. *Cory*, [1901] A.C. 477, and *Prefontaine* v. *Grenier*, [1907] A.C. 101. To them may be added, as dealing with the same subject, the following: *Bloom* v. *National United Benefit Savings and Loan Co.* (1897), 152 N.Y. 114; and *Stavert* v. *Lovitt* (1908), 42 N.B.R. 449.

In *Dovey* v. *Cory*, Lord Halsbury, L.C., prefaces his remarks

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by saying (pp. 481, 482) that "there is no doubt that there were balance-sheets laid before meetings of the shareholders which, to use the language of the articles of association, were not proper and which did not truly report as to the state and condition of the company, and did not comply with the requirements of the articles in question in respect of the particular sum which the directors recommended as dividend that it should be paid out of profits." Lord Davey (p. 490) refers specifically to the cases where the directors had not followed the directions of the articles of association.

In *Rance's Case* (1870), L.R. 6 Ch. 104, the Lords Justices were considering whether a balance-sheet submitted under number 112 of the articles of association shewed as accurately as circumstances would permit the financial position of the company up to that date. Lord Justice Mellish says (p. 122) that no profit and loss account up to a definite day was ever made out at all, and the directors did not profess to be dividing a profit which had been earned up to a particular day. He therefore holds that a declaration of bonus "without any profit or loss account having been made out is a *malâ fide* proceeding upon the part of the directors within the 165th (misfeasance) section." The other Lord Justice, Sir W. M. James, says of the directors (p. 118) that "they might as well have put before the meeting a sheet out of a newspaper."

In *Leeds Estate Building and Investment Co.* v. *Shepherd*, 36 Ch. D. 787, it is stated at p. 791 that, in the view of the Court, it must have been obvious to men of business that there was nowhere any such statement of income and expenditure as was required by the articles; and Mr. Justice Stirling remarks that the preparation of such statement was perfectly feasible.

Lord Davey in *Dovey* v. *Cory* sums up his view in this way, at p. 493: "The appellant has not made out to my satisfaction that the respondent wilfully (as that term is explained in the cases I have referred to) misappropriated the company's funds in payment of dividends."

The difficulty to my mind lies in endeavouring to extend the cases to which Lord Davey referred to the facts of this case. Here it cannot be said that the balance-sheets, which contained the statutory requirements, save in one item, not material to the

question, were in fact not balance-sheets at all. The dereliction from duty of these directors, if it existed at all, was in accepting incorrect and misleading statements without themselves investigating their accuracy, and it is at this point that the remarks of Lord Halsbury in *Dovey* v. *Cory* seem peculiarly applicable. He says at p. 485: "The charge of neglect appears to rest on the assertion that Mr. Cory, like the other directors, did not attend to any details of business not brought before them by the general manager or the chairman, and the argument raises a serious question as to the responsibility of all persons holding positions like that of directors, how far they are called upon to distrust and be on their guard against the possibility of fraud being committed by their subordinates of every degree. It is obvious if there is such a duty it must render anything like an intelligent devolution of labour impossible. Was Mr. Cory to turn himself into an auditor, a managing director, a chairman, and find out whether auditors, managing directors, and chairmen were all alike deceiving him? That the letters of the auditors were kept from him is clear. That he was assured that provision had been made for bad debts, and that he believed such assurances, is involved in the admission that he was guilty of no moral fraud; so that it comes to this, that he ought to have discovered a network of conspiracy and fraud by which he was surrounded, and found that his own brother and the managing director (who have since been made criminally responsible for frauds connected with their respective offices) were inducing him to make representations as to the prospects of the concern and the dividends properly payable which have turned out to be improper and false. I cannot think that it can be expected of a director that he should be watching either the inferior officers of the bank or verifying the calculations of the auditors himself. The business of life could not go on if people could not trust those who are put into a position of trust for the express purpose of attending to details of management."

Unless it can be asserted that it is the duty of an auditor, appointed under our statute, himself to investigate and become responsible for the correctness of the items of the balance-sheet, both in relation to the books and to the proper intrinsic or commercial value of the assets described, then the presence of the auditor's statements and report would not have helped matters.

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If so, its absence could not make the misapplication of the funds to dividends wilful.

In view of the decisions in England, a review of which will be found in *In re Republic of Bolivia Exploration Syndicate Limited*, [1914] 1 Ch. 139, by Astbury, J., at p. 172 *et seq.*, it cannot be said, having regard to what the auditor Armstrong actually did, that the circumstances disclosed in evidence in this case were such as would at the time have caused the directors to discredit the items in the books and statements.

I do not understand that cases such as *Leeds Estate Building and Investment Co.* v. *Shepherd* (*ante*) proceed upon the principle that, unless the articles of association, or under our law the statute, are followed as to the form and contents of the balance-sheet and as to the auditor's report, liability necessarily follows. The effect of the absence of these requirements has, no doubt, to be met by those who are charged with misfeasance. There is in our statute no requirement that an auditor shall be skilled nor that he shall value the assets. It would be, I think, most unwise to hold that the mere absence of an auditor's report, without regard to its value or its relevancy to the matters in issue, is to be regarded as finally settling the question of responsibility. The duties of an auditor are nowhere better expressed than by Lindley, L.J., in *In re London and General Bank* (*No. 2*), [1895] 2 Ch. 673, at p. 683: "He must be honest—i.e., he must not certify what he does not believe to be true, and he must take reasonable care and skill before he believes what he certifies is true. What is reasonable care in any particular case must depend upon the circumstances of that case. . . . An auditor is not bound to exercise more than reasonable care and skill, even in a case of suspicion, and he is perfectly justified in acting on the opinion of an expert where special knowledge is required."

The absence of the auditor's report provided for by the statute is one of the circumstances to be weighed in determining whether, in the words of Lord Davey, the directors "wilfully misappropriated the company's funds in payment of dividends."

If the Legislature had provided that the auditor should be skilled in figures, and that he should report not merely book values but actual values, or had made some provision for ensuring that the auditor's report should be a document of known value,

and had enacted that, unless presented to the shareholders, the directors should be liable for such dividends as were paid out of capital, there would be eliminated many of the elements that have now to be considered. There are, I know, great objections of a most practical kind against the making of such a provision. But, unless it be done, there is no escape from the necessity of considering how far the absence of the report of an auditor, who is not required to know anything about either figures or values, has, in fact, contributed to the shareholders' loss.

In this case I am unable to come to the conclusion that Sheriff and Merritt can be properly described as having exercised no judgment as mercantile men upon the materials which were put before them. I think they did so, and that, had an auditor's report such as Armstrong would prepare been at hand, it would not have disclosed to them either the fraud or the undue optimism, of which Rowland was guilty.

Directors in Ontario are prohibited from paying dividends (1) when the company is insolvent (2) or which render the company insolvent or (3) which diminish the capital itself. The latter is the provision said to have been broken in this case. The evidence of the assignee is that the present assets amount to $15,214.50. No attempt has been made to shew what was the real capital of this company when these dividends were paid, and how much it was reduced by these payments, except by such evidence as I have outlined as coming from Mulholland. The amount of $10,000 was the agreed value of the assets taken over from Rowland, and was capital; $500 was paid by Merritt and $10,000 by Kilbourn; but how much of this or any additional payments on capital account were lost in trading, and when and how much by these dividend payments, is not shewn by any statement.

Mr. Justice Middleton felt this difficulty, and referred it back for proper ascertainment, and I am informed by him that the figures in his judgment are those agreed to by the parties. With all the mass of detail gone into and laboriously proved, it seems remarkable that the fact on which the liquidator depends should not have received some more attention. Reference to the statements proved, and to the Master's reasons, shews that all parties were dealing with the financial operations throughout without an attempt to distinguish capital from income. There

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never was a capital of $45,000 or of $60,300 except in the imagination of the parties. The Master says that the $10,000 paid in by Kilbourn was more than two-thirds of the actual money put into the concern, and he also says that the net assets originally taken over were under $4,000.

I mention these facts to shew how difficult it is to say just what was the real capital at the dates when the dividends were paid. Was it the real value of the assets taken over plus the cash afterwards paid, less trading losses, or is it the whole subscribed capital, or only that for which the company held notes? If I had been inclined to hold the parties liable, it would have been necessary to refer the matter back to the Master to ascertain the capital from time to time and by how much these dividends had depleted it. The difficulties surrounding this question are very fully discussed in Buckley's Companies Acts, 9th ed., p. 652, and are forcibly pointed out in *Dovey* v. *Cory*, [1901] A.C. at p. 487. I think the appeal of Sheriff and Merritt should be allowed with costs.

(3) *Dividends paid 18th April, 1913, $6,300.*

The Local Master held that the two Rowlands, Merritt, and Kilbourn were not liable. Middleton, J., reversed this. Merritt and Kilbourn appeal. For the reasons I have already given, which apply to Kilbourn and Merritt in this year, and even more strongly to Kilbourn than to Merritt, I think their appeal should be allowed with costs.

(4) *$6,000, being moneys voted on 14th April, 1914—$2,500 to W. H. Merritt, $3,000 to H. E. Rowland, $500 to J. M. Rowland—for guaranteeing indebtedness to bank.*

These have been disallowed by the Master and Middleton, J.; the liquidator appeals.

As to Merritt, the learned Master holds that this payment to him was reasonable, that the bargain to pay was within Rowland's authority as manager; that a by-law was not necessary; but, if it was, then sec. 91 of 2 Geo. V. ch. 31, disabling a director from voting upon a contract in which he is interested, does not apply. Middleton, J., simply holds that the payment of this sum is not a misfeasance within the section.

The evidence is conflicting as to the bargain to pay Merritt for giving this guaranty. Rowland places it some time after the

bond was given. When, on the 14th April, 1914, the resolution was passed to pay Merritt $2,500, it would look more like an attempt to substitute something for the dividend which the directors had just decided to pass. If applied on Merritt's stock, it relieves him of liability to that extent, and he admits that he was discussing the sale of his stock to Rowland. The Master, however, finds that there was an agreement to pay him if he went on the bond, and he did so for one year, and then he says it ran on for two more.

I find myself unable to agree with the Master in his construction of secs. 90 and 91 of 2 Geo. V. ch. 31, formerly secs. 88 and 89 of 7 Edw. VII. ch. 34. He holds that they apply only to vendor and purchaser agreements.

The former provides that no by-law for the payment of a director shall be valid or acted upon unless passed at or confirmed by a general meeting. The latter (sub-sec. (1)) prohibits a director from voting "in respect of any contract or arrangement made or proposed to be entered into with the company in which he is interested either as a vendor, purchaser or otherwise." It also deals (sub. sec. (2)) with contracts or arrangements proposed to be made with the company, and provides that any director in any way interested therein shall disclose the nature of his interest at the meeting at which such contract or arrangement is determined on. If he discloses the nature of his interest and refrains from voting, he is not accountable, by reason of his fiduciary relationship existing, for any profit realised by such contract or arrangement.

In this case the original arrangement was made with Rowland as manager alone. The Master thinks that the making of this agreement was within the manager's powers, and so bound the company. But it seems to me that so to hold would nullify the statute. If it did bind the company, then it need not come before a meeting of directors at all, and so the prohibition would be ineffective. Nor is the statute limited, as the Master decides, to cases of vendor and purchaser, because the words "or otherwise" widen its scope to include any contract or arrangement.

When, therefore, the matter came up before the meeting of the 14th April, 1914, it did so for the purpose of binding the company to pay a certain sum, the amount of which had not been

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fixed, and it would be competent for the directors to agree or to disagree to the amount of the proposed payment, even if the manager had promised to pay something. The resolution then passed, and not the antecedent agreement with the manager, is admittedly the reason why the payment of this particular sum was in fact made, and I do not think it is competent for the three directors then present to attempt to ignore it or the result accomplished by its passage. Merritt was interested in respect of this contract, which was either made or was then proposed to be made with the company. The fact that he had gone on the bond, and therefore had performed his part of the contract, does not alter this position, at all events so far as the amount of the payment is concerned. In *Re Bolt and Iron Co., Livingstone's Case* (1887-9), 14 O.R. 211, 16 A.R. 397, the services had actually been rendered, and yet the statute was held to be a bar, and Livingstone was compelled to repay the amount wrongfully withdrawn by him as payment for such services. In Lindley on Companies, 6th ed., p. 517, it is stated that it is clearly settled that the directors of a company cannot, without its consent, make a profit in the course of business transacted with it or for it. In *Liquidators of the Imperial Mercantile Credit Association* v. *Coleman* (1873), L.R. 6 H.L. 189, a director was held to be accountable for any profit made by him, both when acting for the company, and, when acting for himself, when he proposes a contract from the execution of which he will derive a profit. I think this view is in conformity with what Street, J., in *Birney* v. *Toronto Milk Co.* (1902), 5 O.L.R. 1, called the "broad and wholesome interpretation" of the statute which prevents recovery for any services rendered to the company by a director without the shareholders' sanction.

Merritt's vote was therefore something prohibited under sec. 91(1); and as, even if his disclosure was ample, he did not refrain from voting, he loses the benefit of the relief given by sec. 91(2).

The payment was a breach of trust so far as Merritt was concerned. It dealt with the funds of the company, which could not be lawfully applied to the purpose which the resolution contemplated. Any disclosure by Merritt may be said to be unnecessary, as the parties each knew all about the matter, but Merritt admits an interest which he did not state, i.e., the belief that Rowland would buy his stock if it were passed. He contends that that

made no difference, because, if the $2,500 was not applied on his stock, Rowland, if he bought, would have to pay it to the company. But I think this is more plausible than real, because there might have been a very considerable difficulty in his inducing Rowland, who knew the state of the company, to buy stock if the liability was speedily to be collected by a liquidator, instead of its amount being merged in the stock itself. If credit were given, it would have been easy for Merritt and Rowland to come to a compromise figure based on the real value of the stock, which would represent all that Rowland would have to finance.

I cannot, however, see how Merritt can be held liable for the amounts then voted for the Rowlands. His liability for the payment to him, however arrived at, is for an amount paid to and received by him in relief of his liability in stock. But he says he thought the company was then solvent, and the Master has believed him. This is no defence in his own case, but it is important as to the others. He had the right to vote on the motion as to the others, unless it can be held to be a concerted scheme. But the resolution became ineffective when not confirmed by the shareholders. The notice given was one day too short under the by-laws, and in any case it would be impossible to hold that the two brothers and the wife of one could as shareholders ratify these payments. If they took the money under a resolution which was of no legal force, they must repay it; but it would be going very far to hold that voting for a resolution which failed, as this one did, in having any binding effect because not confirmed, constitutes misfeasance under the statute.

I think that the appeal of the liquidator should succeed as to Merritt's $2,500, and as to the $3,000 to Rowland and $500 to his brother, the appeal as to them individually should be allowed.

(5) *$600 and $500, being increases in the salaries of the Rowlands for 1914, voted 14th April, 1914.*

The Master disallowed this claim; Middleton, J., affirmed this. The liquidator appeals. The Master has decided that the resolution purporting to be moved by Merritt relative to these payments was not in fact moved by him, but inserted in the minutes afterwards by Rowland. My conclusion from the evidence would have been different, but this is a question which clearly involves the value and truthfulness of the evidence given by the parties

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concerned. In such a case the rule is not to disturb the Master's finding. It is concurred in by Middleton, J., an additional reason in its favour. This branch of the appeal will be dismissed with costs. *Orders below varied.*

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Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck, and Walsh, JJ. February 9, 1917.

EXECUTION (§ I—8)—EQUITABLE INTEREST—VENDOR'S LIEN.

A vendor's lien for unpaid purchase money upon land the vendor has agreed to sell, but has not transferred, cannot be reached by *fi. fa.* against the lands of the vendor; some form of equitable execution is necessary for that purpose.

Statement.

APPEAL by defendant company from an order of Ives, J., ordering the removal of an execution filed by it. Affirmed.

A. H. Gibson, for appellant.

Bishop, Giroux & Co. for respondent.

Harvey, C.J.

HARVEY, C.J.:—I agree with the conclusion reached by my brother Stuart on this appeal and with his reasons in the first branch of the case.

On the second branch, as I pointed out in *Adanac Oil Co.* v. *Stocks*, 28 D.L.R. 215, it seems clear to me that the provisions of the Land Titles Act are such that a legal execution against land cannot bind an equitable interest in lands registered in the name of a person other than the execution debtor, some form of equitable execution being necessary for that purpose. It is unnecessary, therefore, to consider whether the execution debtor had any equitable interest in the lands after the transfer.

Stuart, J.

STUART, J.:—On and prior to August 4, 1916, one Joseph A. Stocking was the registered owner of N.W. quarter of 14-58-7 West 5th, and was residing thereon as his homestead. The land was therefore exempt from execution under the Exemption Ordinance. On June 13, 1916, a writ of execution against the lands of Stocking for the sum of $73 at the suit of the appellant, the Sommerville Hardware Co. Ltd., was filed in the Land Titles office. During the days from August 5 to August 8 a sale of the lands was negotiated by Stocking to the applicant and respondent Seay, and on August 8 a certificate of title was issued by the registrar in the name of Seay, but the registrar continued the writ of execution against Stocking by memorandum thereon.

On August 14, 1916, Stocking made an application to a District Judge for an order that the writ be removed from the register so far as it affected the lands in question, but this application was dismissed. Later on in November the purchaser, Seay, made an application in Chambers to Ives, J., by way of originating notice, for an order removing the writ. The order asked for was made and from this order the Sommerville Hardware Co. Ltd. has brought this appeal.

The appeal is rested upon two grounds. First, it is contended that there was a substantial period, though, of course, only a few days, during which the land had ceased to be the homestead of the debtor, but before the issue of the new certificate of title to Seay, and that therefore Stocking had lost his right of exemption and the execution attached. The evidence consists of affidavits only. On August 7 Stocking made a statutory declaration to be used upon the application before the District Court Judge. In this declaration Stocking swears that he had homesteaded the land, that it was (*i.e.*, on August 7) his home residence, and that he was actually residing on the land; that since he applied for his homestead he and his family had been continually residing thereon and that it was his intention to sell or borrow on the said property. He also made a further affidavit upon the second application in which he swears that he sold the land for $1,300 and that he received $1,000 in cash and a promissory note for $300. He also makes the following statement: "That I duly executed a transfer of the said lands to the said Hilary Sampson Seay and that after delivery of the said transfer I delivered and gave up possession of the lands to the purchaser." Mr. Gibson, the solicitor for the execution creditors, makes an affidavit in which he states that upon searching the title to the land he had found that the transfer of the land was dated August 5, 1916. He also states that Mr. Giroux, the solicitor for Seay, had shewn to him three cheques, one a cancelled cheque for $600 in favour of Bishop, Pratt & Giroux dated August 7, signed by Whyte & Co. and marked, "On a/c H. S. Seay to clear title N.W. 14-58-7-5," endorsed for deposit by Bishop, Pratt & Giroux; the second a cancelled cheque for $275 dated August 12, signed by Whyte & Co. in favour of Bishop, Pratt & Giroux and endorsed by them for deposit; and the third a cheque by Whyte & Co. to Stocking dated August 21, 1916, but not endorsed by Stocking. Mr. Gibson stated also

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that these cheques had been shewn to him by Giroux as vouchers for the payment of the $1,000 and that Giroux had told him, first, that out of the last of the three cheques he was to obtain payment of his own fees and also to pay certain seed grain indebtedness, and secondly, that Stocking had vacated the lands in question and ceased to reside thereon immediately following the transfer of the lands to Seay.

Giroux made an affidavit in which he states that in connection with the sale in question he had acted both for Seay and Stocking as well as for a mortgagee to whom Seay was mortgaging the property in order to raise the money to pay Stocking, and that he had instructions to pay the proceeds to Stocking.

An abstract of the title of the lands was produced which shews that one Heath was the mortgagee to whom Seay mortgaged, and that this mortgage, though dated August 4, was not registered until the 11th of that month.

It seems to be clear from these depositions that Stocking never intended to deliver possession of the homestead until the sale was completed. Giroux was acting for all parties. Of course, a transfer and a mortgage had to be prepared. Apparently the mortgage was prepared even before the transfer. There is nothing in the evidence to shew exactly when the transfer was signed, nor, which is more important, when it was delivered. With Giroux acting for all parties there would doubtless be a period during which all documents were in escrow. The proper inference, in my opinion, is that the documents were really made effective only when they were taken to the Land Titles office for registration.

I think, therefore, the attempt to discover a period prior to August 8, during which the exemption was lost, is a futile one. Stocking nowhere says that he gave up possession prior to the 8th, and any mere mental intention to do so was obviously conditional upon the sale being completed. This first ground of appeal, therefore, fails.

But it was also contended that inasmuch as Stocking still remained an unpaid vendor even after the registration of the transfer he had an equitable interest in the land which became subject to the execution as soon as his exemption was gone. This raises a very important point of law, but the first necessary observation to make is that it is not exactly the same question as was

before me in *Traunweiser* v. *Johnson*, 23 D.L.R. 70, and before the Chief Justice in *Adanac Oil Co.* v. *Stocks*, 28 D.L.R. 215. In each of those cases the fact was that the execution debtor who had agreed to sell the land upon an instalment agreement was the registered owner of the land at the time the execution was filed. In the present case the execution debtor's legal registered estate in the land ceased at exactly the same moment that his right of exemption ceased. We have here nothing to do with the legal estate as shewn on the certificate of title. That has passed to Seay and passed at a moment when it was exempt. See *North West Thresher Co.* v. *Fredericks*, 44 Can. S.C.R. 318. The divergence of opinion expressed in the two cases need not therefore be a source of trouble here. Nor is it necessary for the present case to choose between the two views. It is clear that the view of the Chief Justice in *Adanac Oil Co.* v. *Stocks*, *supra*, was rested upon the fact that the vendor was at the time of the filing of the writ still the registered owner, and there was no question of exemption involved. In the present case the existence of the right of exemption up to the very moment of the passing of the title makes all the difference. There never was anything but a mere equitable interest unsupported by any legal estate upon which the execution could attach. This, of course, rests upon the rule that an unpaid vendor, who has conveyed before being paid in full, has an equitable interest in the form of a lien upon the land for the amount unpaid.

The question here is, does a writ of execution against lands bind such an interest?

I do not think it is necessary to repeat, though speaking of course only for myself personally, I certainly do not propose to retract, at present at least, what I said in *Traunweiser* v. *Johnson*, *supra*, as to the obscurity and meagreness of the basis upon which a writ of execution against "lands" now rests. I should certainly, if I were practising as a solicitor, have considerable hesitation in advising a client that he could with safety accept any title resting upon a sheriff's sale of lands under our present form of writ. Even with respect to the statute 5 Geo. II. ch. 7, to which I referred in *Traunweiser* v. *Johnson*, I find that it was repealed by 50 & 51 Vict. ch. 59, that is in 1887. This statute was not part of the "law of England" nor thus introduced in

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1870 because it was applicable to the plantations only and was not in force in England at all. Therefore its repeal in 1887 probably destroyed its effect here.

The mere rule of procedure contained in rule 584 saying that "every writ of *fieri facias* shall be issued against both goods and lands of the debtor," is, in my humble opinion, a very doubtful basis upon which to rest the legal right to seize a debtor's lands in satisfaction of a debt. Everywhere else a statute is considered necessary. The old r. 364 was of course a statute of the legislature. The two are inconsistent and whichever is treated as being effective it seems to me that there is room for grave trouble because the present rule, if effective, can only be procedure and not substantive law, and, as it seems to me, can of itself create no right to seize and sell lands. Assuming the existence of a right to do so the rule deals with the mere form of the writ.

Then, with regard to the Land Titles Act, I think that sec. 77 of the Act merely assumes the existence of valid writs of execution against lands, that is, of a right in a judgment creditor to have a writ against lands and then proceeds to say from what moment and how long and subject to what conditions and priorities such a writ, assuming it validly to exist, shall bind the land. It was passed at a time when the old statutory r. 364 was in force, and the legislature may be taken, I think, to have had that statute in contemplation. Supposing, while the old statutory rule 364 was in force, a writ against lands to recover only $40 had been issued; would it be said that the Land Titles Act itself gave a right to have such a writ and that it bound the land? Or could the solicitor of a judgment creditor have gone to the office of the clerk of the Court and insisted there upon his writ to a *fi. fa.* lands for any sum merely by virtue of the Land Titles Act? I think not.

However this may be, I think the present case may be decided upon the assumption, as I think a precarious one, that there is a statutory basis for the right to issue a writ of execution against lands.

Even taking the existence of such a right for granted, I am of opinion that there is nothing in any of the statutes or rules which makes a mere equitable interest in lands unsupported by any legal estate exigible under execution. Our writs are legal

writs, that is a form of procedure at law. They are not equitable remedies or forms of procedure in equity. R. 584 calls them writs of *fieri facias*. No merely equitable interest either in goods or lands could ever be reached by or seized under such a writ. As to lands, the writ was not applicable in England at all, though my brother Beck has referred me to a certain case which indicates that land in the plantations was always looked upon as mere chattels and that the statute 5 Geo. II. ch. 7, was merely declaratory. But surely any such old rule was obsolete in 1870.

In England itself, for *lands*, the writ of *elegit* was and still is used, but it is not a writ under which the lands can be *sold*. See Hals., vol. 14, p. 61, pars. 123 *et seq.* Under a *fieri facias*, which was applicable to goods, only a legal estate was bound. See Hals., vol. 14, p. 49, par. 49, and notes. See also notes to *Underhill* v. *Devereux*, 2 Wm. Saund. 68, 85 E.R. 698 *et seq.*, for an explanation of English writs of execution. Even if there were some possibility under English law of seizing an equitable interest in a chattel under a *fieri facias* it would be dangerous to apply by analogy any such principle to real estate simply because we have made, if indeed we have made, real estate exigible under a *fieri facias*. Our present r. 463 reads:—

> Where a judgment creditor alleges that the judgment debtor is entitled to or has an *interest* in land *which cannot be sold under legal process* but can be rendered available by proceedings for equitable execution by sale for satisfaction of the debt a motion may be made to a Judge by the judgment creditor calling upon the judgment debtor and the trustee or other person having the legal estate in the land in question to shew cause why the said lands or the interest therein of the judgment debtor or a competent part thereof should not be sold to realize the amount to be levied under the execution.

This rule surely implies that a mere equitable interest in land is not exigible under a writ of *fieri facias*.

Another argument, conclusive, in my opinion, is to be found in the provisions of sec. 79 of the Land Titles Act with regard to the transfer to be executed by a sheriff where his sale has been confirmed by the Court. The form is given in the schedule and is headed, "Transfer of land under process of law." In the form one of the parties, obviously the defendant, is referred to as being "registered as owner of the land hereinafter described." The registrar, moreover, is directed upon the production of this sheriff's transfer and the confirming order to cancel the existing certificate of title and to issue a new one: sec. 79. Then also sec. 84

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which gives the right to file a caveat to a judgment creditor who "seeks to affect land in which the execution debtor is interested beneficially but the title to which is registered in the name of some other person," surely shews that in the view of the legislature a mere filing of a writ of execution against lands does not of itself bind the merely beneficial interest of the judgment debtor of the lands in question.

This view was adopted by Lamont, J., of the Supreme Court of Saskatchewan, in *C.P.R. Co.* v. *Silzer*, 3 S.L.R. 162.

Our present r. 164 deals only with equitable interest in chattels and leasehold estates and assuming it to be *intra vires* does not affect the present case.

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

Beck, J.

BECK, J.:—This appeal brings us to a consideration of the question whether our Land Titles Act has the effect of enabling an execution creditor who has registered his execution in the Land Titles office to realize by way of a seizure and sale under the execution the interest—or whatever it may be called—of the debtor in lands standing in his name as registered owner, but which, before the registration of the execution, he has agreed to sell.

Our Rules of Court (609, *et seq.*) have numerous provisions relating to the effect of a writ of execution so far as it affects goods (one writ against both goods and lands now being issued).

The writ "binds" the goods of the judgment debtor from the time of the delivery thereof for execution to the sheriff, but not so as to prejudice the title to such goods acquired by any person in good faith and for valuable consideration unless such person had at the time when he acquired title, notice that such writ had been delivered to the sheriff and remained in his hands unexecuted: (sec. 609). Special provision is made for the seizure and sale of shares (610-12); of "any equitable or other right, property, interest or equity of redemption in or in respect of any goods or other personal property, including leasehold interests in land of the execution debtor, and the sale shall convey whatever equitable or other right, property, interest or equity of redemption the execution debtor had, etc." (p. 14); of money, bank-notes, cheques, bills of exchange, promissory notes, bonds, mortgages, or other

security for money (615). Rule 619 says that the sheriff may seize any registered mortgage or encumbrance in favour of the execution debtor, whether upon lands or goods, by delivering a notice in writing of such seizure to the registrar or clerk in whose office such mortgage or encumbrance is registered, but no such mortgage or encumbrance shall be affected or changed by any writ of execution until delivery of such notice.

The third form V., "Transfers of lease, mortgage or encumbrance under process of law" given in the schedule to the Land Titles Act is, I think, intended to be used in the event of a sale under execution against *goods*, of a lease, mortgage or encumbrance seized in accordance with the foregoing rules. The rules do not say a word as to the effect of a writ of execution so far as it affects lands. The reason, doubtless, is because the Land Titles Act deals with that subject.

The Territories Real Property Act (R.S. 1886, ch. 51), contained, and our own Land Titles Act contains, provisions for the delivery by the sheriff to the registrar of a certified copy of the execution and deals with its effect when so filed.

As these Acts relating to the registration of titles to land have stood for a long time past, executions are, in the first instance, recorded only in a general register, and the provisions of the Act directly dealing with the subject clearly contemplate the ordinary case of land standing in the name of the execution debtor.

Sec. 77 of the present Act says that the sheriff . . . shall . . . deliver or transmit to the registrar a certified copy of the writ; and that no land shall be bound by any such writ until the receipt by the registrar of a copy thereof; but that from and after the receipt by him of such copy no certificate of title shall be granted and no transfer, mortgage, encumbrance, lease or other instrument executed by the execution debtor of such land shall be effectual, except subject to the rights of the execution creditor under the writ while the same is legally in force; and that the registrar granting a certificate of title and registering any transfer, mortgage or other instrument executed by the debtor affecting such land, shall by memoranda upon the certificate of title in the register and on the duplicate issued by him express that such certificate, transfer, mortgage or other instrument is subject to such rights.

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So far then as these provisions extend, it seems to me clear that an execution deposited with the registrar "binds" only lands standing in the name of the execution debtor as registered owner.

That this is so is accentuated by the provisions of sec. 84 which says that any person claiming to be interested . . . under an execution where the execution creditor seeks to affect *land in which the execution debtor is interested beneficially but the title to which is registered in the name of some other person*, in any land, mortgage or encumbrance, may cause to be filed a *caveat*.

The directions of the statute to the registrar refer only to the case of executions against a registered owner. It would obviously have been unreasonable to have expected him to know of other interests. And we may further conclude that persons dealing with interests undisclosed by the register would likewise be entitled to deal with them—apart from fraud—in entire disregard of any execution against the owner of such undisclosed interest appearing in the general register, unless that interest has become "bound" by the combined effect of the execution and a caveat founded thereon.

But not only do the provisions of the Act, apart from those relating to the effect of a caveat founded on a writ of execution, contemplate only the case of a registered owner, but, in my opinion, they contemplate only the case of a registered owner whose beneficial and legal title correspond, that is, where the land or a defined part of it or a distinct legal estate capable of being the subject of a certificate of title, such as an estate for life, an estate as joint tenant or tenant in common, can be sold. The provisions of secs. 79, 80 and 81 and the form of transfer to be given by the sheriff provided for use in such cases, I think, make this clear.

Jellett v. *Wilkie*, 26 Can. S.C.R. 282, settled the law that a writ of execution could affect only the beneficial interest of the execution debtor. The seizure by a sheriff of property apparently belonging to the execution debtor, but which the sheriff is compelled to relinquish because, for instance, a third person has a mortgage upon it or a beneficial interest in it, is not an extraordinary case, and when such a case arises the execution creditor is not without remedy but is merely driven to adopt another form of remedy enabling him to attach by some method, which

may not be actual physical seizure, the residuary beneficial interest of the execution debtor. An instance of such a case is *Witt* v. *Stocks*, 33 D.L.R. 519, decided at the present sittings. *C.P.R.* v. *Silzer*, 3 S.L.R. 162, a decision of Lamont, J., holds that the equitable interest of a *purchaser* of lands under an agreement where the vendor remains the registered owner is not exigible under the writ of execution but by way of equitable execution. I follow his reasoning to a large extent, but the Saskatchewan Act, as well as ours, contains the provision which I have quoted under which an *execution* creditor may file a caveat so as to attach the interest of an *execution* debtor whose estate or interest does not stand in his own name and is therefore an equitable estate and interest. I think the effect of the provision is that the equitable estate or interest is bound to a limited extent by the filing of the writ with the registrar; as for instance in the event of the death and administration of the estate of the execution debtor, the execution creditor would have a preferred claim (ch. 11 of 1903, 2nd sess., the Trustees Act); but that to bind it as a registered interest would be bound, the filing of a caveat is made necessary. The fact that inasmuch as the estate or interest of the execution debtor is equitable the sheriff, in pursuance of the writ of execution, cannot proceed to a sale, but the execution creditor must take steps by way of equitable execution does not necessarily result in the conclusion that the execution, or the execution and the caveat founded on it combined, do not bind the estate or interest. Indeed at one time it was held that in order to found an action for equitable execution it was necessary to allege and prove that a writ of execution was in the hands of the sheriff at the date of the commencement of the action (see cases digested in Ont. Digest: tit. "Execution," cols. 2590-1).

Even since *Parke* v. *Riley* (1866), 3 E. & A. 215, until quite recently (*Adanac Oil Co* v. *Stocks* (1916), 28 D.L.R. 215, per Harvey, C.J.), declining to follow Walsh, J., in *Merchants Bank* v. *Price* (1914), 16 D.L.R. 104, 7 A.L.R. 344, and Stuart, J., in *Traunweiser* v. *Johnson* (1915), 23 D.L.R. 70; *Robinson* v. *Moffatt* (1916), 31 D.L.R. 490, 37 O.L.R. 52), the Courts of Canada, I think, have consistently and uniformly held that in such a case the vendor had no beneficial estate or interest remaining in the land, but merely a lien or charge thereon for the balance of his unpaid purchase money, which lien he could enforce by appropriate

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remedies and which moneys his judgment debtor could attach by way of equitable execution, namely, a receiver order.

That this is the character of the vendors' position is in England undoubted. The matter is explained at length in Pomeroy's Eq. Jur., 3rd ed., sec. 1260; and in Seton on Decrees, 3rd ed., pp. 2221 *et seq*, it is emphasized; the practice being to declare the vendor's lien in such a case in order to justify a sale of the land.

The purchaser's interest under an agreement for sale of land is then undoubtedly an equitable estate or interest in land. It was so before the introduction of the Torrens system of land registration. That interest would go to the heirs, not the next of kin, and to a devisee of residuary lands, not to the residuary legatee. On the other hand, the vendor's "interest" under the agreement, because it is personalty not realty, would go to his next of kin as personalty and to a residuary legatee of personalty. The equitable principle of conversion has been carried to its full logical conclusions which have become embodied in more than one branch of the law, and, in my opinion, it would be a dangerous thing to hold that substantial alterations in the law affecting substantial rights had been made by words or phrases by no means clear which are used not directly for the purpose of declaring the respective rights of the parties to the transaction, but of third parties.

In my opinion, therefore, what remains to the vendor, after an agreement for sale, is not an estate or interest but a right to money for the payment of which he has a lien upon the land and as security for which he holds the legal estate; in respect of which he is a trustee for the purchaser, subject to his own rights; and that, inasmuch as the Land Titles Act provides no means, as of course it might have done, of attaching that "interest" of the vendor, the execution creditor's only remedy is by some other method of execution; the usual and perhaps the only one being the appointment of a receiver.

In the present case the execution debtor entered into a contract for sale of his homestead while it was his homestead, and consequently at a time when the execution creditor's execution had not attached to it. Assuming that inasmuch as the sale was a voluntary one the proceeds of the sale would not be exempt from execution, it is, for the reasons that I have given, my opinion that

those proceeds, and not any equitable estate or interest in the land were thenceforth what the execution debtor was entitled to and they were not affected by the execution against lands and could be made available to the execution creditor, if at all, only by some other method of execution.

In my opinion, therefore, the order of my brother Ives, directing that the execution should be removed from the register of the land in question was right, and I would dismiss the appeal with costs.

WALSH, J., concurred in the result. *Appeal dismissed.*

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Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck, and Walsh, JJ. February 8, 1917.

1. PARTNERSHIP (§ III—10)—JOINT FARMING VENTURE—EXECUTION.
The relationship between persons engaged in a joint farming venture is that of partnership, the property whereof is not subject to execution for the individual debt of a partner, except as provided by sec. 25 of the Partnership Ordinance.
[*Re Reid* (Alta.) 29 D.L.R. 349, referred to.]

2. INTERPLEADER (§ I—10)—EXECUTION—TITLE TO PROPERTY—PARTNERSHIP.
In an interpleader issue as to goods seized under execution, it is not incumbent upon the claimant to prove that the goods are his absolute property, but he may shew that they are the joint or partnership property of himself and the judgment debtor, not exigible under the writ.
[*Veake* v. *Carter*, [1916] 1 K.B. 652, followed. See annotation on Interpleader in 32 D.L.R. 263.]

Statement.

APPEAL by defendant from the judgment of Ives, J., in favour of plaintiff, in an interpleader issue in which the claimant, the mother of the execution debtor, is the plaintiff, and the execution creditor is the defendant. Affirmed.

J. E. Buchanan, for plaintiff; *C. C. McCaul*, K.C., and *Alfred Grant*, for defendant.

The judgment of the Court was delivered by

Walsh, J.

WALSH, J.:—The plaintiff and her son, the execution debtor, lived together in Kansas. He came to Alberta in 1912 and entered into an agreement in his own name for the purchase of a farm. He returned to Kansas that fall and a payment of $900 on account of the purchase money of this land was shortly afterwards made, and another payment, this time of $600, was made in January, 1913. In the spring of that year the plaintiff and her son came to Alberta and settled on this farm bringing with them some live stock and other chattel property. They say that the payments thus made were made out of the plaintiff's money, and that

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the personal property which they brought to Alberta was hers. The trial Judge, inferentially, at least, accepted their evidence upon this point as being true and I do not think that we would be justified in doing otherwise. There is nothing which shews very clearly the origin of this property. Something was said by Mr. McCaul in argument indicating the view that ownership of it or of that from which it was derived could be traced to the plaintiff's husband who died some 23 years ago when the execution debtor was a child of 3, and a suggestion to that effect appears in his factum, and the argument was advanced from this that the son as one of his father's next of kin had an interest in it. I have been unable, however, to find anything in the evidence to bear out this view. There is nothing to indicate that the plaintiff got either this money or these goods from the husband's estate or whether he died, testate or intestate. There is in fact an entire lack of evidence on the question of the origin of this property. The farm that the plaintiff and her son lived on in Kansas was a rented farm. Apart from this there is simply evidence of a bank account in the mother's name but operated by the son under a power of attorney and of chattel property which they both say was hers, though not asked to describe the method or source of her acquisition of it. The goods were shipped to this country, and so far as there is any written evidence of it in her name at a time when there was no need to so ship them unless they were in fact hers. The only things suggestive of ownership in the son are the fact that he lived with his mother and managed her Kansas rented farm for her and the fact that when here on his prospecting tour which resulted in his purchase of the farm he spoke to a chance acquaintance as if he were the owner of these things. I see nothing in either of these circumstances to justify a finding that he owned them in the face of the positive evidence pointing to his mother's ownership of them.

The plaintiff and her son say that there was a written agreement between them before the farm was bought on the strength of which she agreed to put her money into the purchase of it. That agreement has been destroyed and the evidence as to its exact terms is not very clear. Her son says of it, "I made an agreement if she would put her money into this farm I would stay with her until it was paid for and I would take the stock that was left there after it was paid for for my work." And

then, being asked to describe the arrangement under which the farming of the place was actually carried on, he says, "The first 2 years was carried on that I was to run the farm and pay for it and she would give me all the stock there was. She was to give me the use of the stock to run the land that I rented and I was to have this rented land for my own," and he continued that the crops on his mother's farm "were to go on and pay for the land." The plaintiff's version of the arrangement is, "He asked me if I would put my money in a farm and buy a place, and he promised me to stay with me till the farm was paid," and that when "the farm would be paid and the debts were paid, well then, I would live on the interest and what would be left on the farm would go to him." The son says that they worked under the terms of this written agreement until some trouble arose between them, the date of which is not fixed, when they tore this contract up, and verbally agreed, as he puts it, that "I will take the money that I have made and I will take my ranch place and any money that you get off this place to pay up the expenses that has accumulated on both places and make a division of the stock and the ten brood sows was to be kept on the place for her, and 12 head of cattle was to be kept on the place by her, and what came over the 12 head—I did not have to leave over the 12 head—I was allowed to sell them off and pay for the farm and half of what was in the farm was to be mine and half hers. . . I was to work the farm for her just the same as I had before." The property to which he refers as "my ranch place" was a farm which he rented in that locality. The plaintiff's version of the new arrangement is, "We did not keep by what we promised in the first time but when everything is paid and the debts is paid and the farm is paid he is allowed what is left and he can start for himself."

There is a great deal in all of this which is vague and unsatisfactory. A much better understanding of the arrangement between them can be reached by considering what they did after coming to Alberta than by what they say they agreed to do, and as to that there is not any room for doubt.

They came to this farm in the spring of 1913 and have ever since lived upon it. The farming operations have been carried on exclusively by the son. The plaintiff took absolutely no part in them. She is old and crippled, and as she said, "I cannot

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do any farming, I cannot take care of my chickens even." A subsequent payment of $400 was made on the principal of the purchase money and various payments of interest were made on the mortgage, which they had agreed to assume, and on the purchase money. This money came from the proceeds of the farming operations and was treated by them as being paid by them in equal shares. Title to the land was taken when this $400 payment was made and the second mortgage given to the vendor for the unpaid purchase money. The transfer was made to the plaintiff and her son who have ever since been the registered owners of it, presumably as tenants in common, subject to two mortgages. The son rented another farm in his own name. Although at one time it seems that the profits from it were kept separate from those of the other farm, I understand the son's evidence to be that eventually they were pooled and the profits from the rented farm went into the running of the other farm. Additional live stock was accumulated. No cattle or hogs were brought from Kansas, but at one time since their arrival here there were 15 head of cattle and about 50 hogs on the place, and there are now under seizure 9 head of cattle and 28 pigs. The plaintiff says, "The cattle was bought here from our income here," which I suppose means from the result of their farming operations, which appear to have been their only source of income. Some of the grain that was grown on the son's rented farm was fed to the live stock and he was not paid for it. Cattle were sold from time to time "to pay running expenses of the two farms and to pay interest." At least one new piece of farm machinery was bought, the gang plough which is under seizure, and it was paid for partly by an exchange of an old plough of the plaintiff which came over with the rest of the stuff from Kansas, and partly by a cheque of the son on the bank account which stood in his name in trust. The live stock which was brought over from Kansas was used by the son as though it were his own with the plaintiff's knowledge and consent. He mortgaged some of it in August, 1913, to secure the payment of $408 which was borrowed for the common use in meeting the household expenses and the cost of the farming operations. This debt was paid off from money earned on their farm. The plaintiff knew that her son was mortgaging this property. They account for it by saying that she gave it to him so that he might mortgage

it and that when the mortgage was paid off she became the owner of it again, but I cannot believe this. The money that was made from the farm was handled exclusively by the son and a bank account was kept in his own name and he says, "this money was supposed to be both our money." When he got into the trouble which resulted in the recovery of the present defendant's judgment against him he opened a new bank account in the name of "Henry Witt in trust" and the banking transactions of the farm were carried on through it. The son borrowed money from a bank to be used as he says for his mother and himself and he gave a written statement of his affairs to the manager in February, 1915, in which he represented himself as being the owner of the farm and live stock, implements and grain to a total value of over $10,000. The manager says, however, that the son told him that the land was in his mother's name as well as his own and that the stock was shipped up in her name. The son drew no wages for his work and rendered no account of his operations to his mother.

Upon the evidence of the plaintiff and her son it seems to me to be idle to contend that at the time of this seizure she was the absolute owner of this chattel property. The son would, I fancy, have been a very greatly surprised individual if, supposing that his trouble with the defendant had never arisen, his mother had claimed that he had no interest whatever in it. It was gained and preserved to them partly by the investment of her means and partly by his work on and management of their farm, and notwithstanding his present endeavour to make it appear that he has absolutely no interest in any of it, he would, I fancy, think it more than strange under ordinary circumstances that his four years of unremitting labour upon their joint property, admittedly for their joint benefit, should be entirely without benefit to him and that everything that had been made from the combination of his mother's means and his industry were hers alone. To me it is exceedingly plain that he has a substantial interest in this property. The difficulty is to say just what it is. The contention of the defendant is that his acts of ostensible ownership to which I have referred and the statements made by him to witnesses called for the defence alleging ownership in himself shew that he really is the sole owner, but I do not think we can give effect to it in the light of what I think are the indis-

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putable facts as to the plaintiff having a real and substantial interest in it. These things do not raise any estoppel as against the plaintiff; they simply affect the value of the son's evidence.

The trial Judge gave no reasons for his judgment at the close of the trial, but he plainly intimated his opinion during its progress that the property in question is partnership property which could not be taken in execution under a judgment against one member of the partnership, and I assume therefore that it was because of this that he gave judgment for the plaintiff. In this I think that he was perfectly right. The whole history of this transaction satisfies me that the land was bought and the farming operations undertaken upon it on the understanding that mother and son were to be equally interested in the property and in the results of its working, the contributions of the mother in money and in kind being met on the son's part by his work, which alone made the investment a profitable one. The most cogent evidence of this is to be found, I think, in the fact that notwithstanding that he contributed only $200 of the $1,900 paid on account of the purchase money of the land, the title to it was taken by them both, and, as I have said, presumably as tenants in common. His pledging of what was at one time her own property can only be satisfactorily accounted for, in my opinion, by the fact that he had in truth some interest in it. I think that in effect what took place between them was that the mother put her money and her stock into this farming venture on the understanding that the son would take hold of it and manage it, that they would live together on the farm with the plaintiff looking after the household end of it, that all the expenses of their operations, including the payments due on the land, should be met out of the proceeds and that they should be equally interested in the outcome. The relation which subsisted between them was that of persons carrying on a business in common with a view of profit which is our statutory definition of a partnership.

Sec. 25 of the Partnership Ordinance enacts that a writ of execution shall not issue against any partnership property except on a judgment against the firm. Sub-sec. 2 of this section provides that a judgment creditor of a partner may apply in Chambers for an order charging that partner's interest in the partnership property with payment of the judgment debt and for a receiver. It was held by this Court in *Re Reid*, a lunatic, 29 D.L.R. 349,

that in view of this enactment, which is not affected by r. 614, that:—

> The only method by which an execution creditor of a partner can now reach a partnership interest . . . is not by virtue of his execution but by a charging order founded on his judgment . . . without the necessity for an execution being issued thereon,

and that a seizure of the lunatic's partnership interest by the sheriff under an execution against him was not an effective seizure. In *Flude* v. *Goldberg*, [1916] 1 K.B. 662, the Court of Appeal held that where the claim of the claimant was that he was the sole owner of the goods and he denied that the execution debtor had any interest in them and it was found that the goods were the property of a partnership in which the claimant and the execution debtor were the partners in these circumstances, the issue should be determined in favour of the execution creditors. If we were to follow that decision judgment should go here for the defendant. But in the subsequent case of *Peake* v. *Carter*, reported in the same volume, [1916] 1 K.B. 652, the Court of Appeal held that it is not incumbent upon the claimant to prove that the goods are his absolute property, but only that he has such a title to or interest in them that the sheriff ought not to have seized them, and the claimant will shew such an interest by proving that the goods are the joint or partnership property of himself and the judgment debtor. The judgment distinguishes that case from *Flude* v. *Goldberg*, *supra*, upon the facts, although at first sight they would seem to be indistinguishable. I think that we should follow *Peake* v. *Carter*. A judgment in favour of the defendant would in practice mean that the sheriff could go on and sell these goods under the defendant's execution, which would be quite inconsistent with the opinion expressed that he has no right to do so because they are partnership property. I think, therefore, that the appeal should be dismissed with costs, but that the defendant will be entitled to treat this as an adjudication upon the question of the property in these goods and in the other assets of the partnership which will entitle him without further proof of the partnership and of the execution debtor's interest in it as a member of the partnership to a proper charging order under sec. 25 of the Partnership Ordinance and that a declaration accordingly should be embodied in the formal judgment.

Speaking for myself I would venture to suggest that the execution debtor for his own sake should satisfy the judgment

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against him without adding to his burden by the incurring of the heavy costs which the further proceedings which I have suggested will impose upon him. I should say that his interest in the partnership assets is quite substantial enough to make it possible for the judgment creditor to realize the amount of his comparatively small judgment out of it in full, and it would therefore seem to be the part of wisdom for him to submit to the inevitable and make his peace with this creditor at a minimum of cost to himself. *Appeal dismissed.*

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HOFFMAN v. McCLOY.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Kelly, and Masten, JJ. January 19, 1917.

JUDGMENT (§ VI—255)—DECLARATION OF RIGHT—ENFORCEMENT—MOTION AND ORDER.

After judgment declaring the plaintiff entitled as of right to a share of such royalties as might thereafter be received by defendant, an order for a receiver and an account as to such receipts will not be granted in the same action; a new proceeding must be taken.

[*Stewart* v. *Henderson*, 19 D.L.R. 387, 30 O.L.R. 447, applied.]

Statement.

APPEAL by the defendant from an order made by BOYD, C., sitting in the Weekly Court at Toronto, on the 19th October, 1916, directing a reference to the Local Master at Stratford to take certain accounts. Reversed.

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

The plaintiff brought his action in February, 1915, alleging that he and the defendant had entered into an agreement whereby they were to sell a certain United States patent for part cash, part on time, or as royalty—the plaintiff to receive one-fifth of the money as it was paid in until the defendant received $1,500, and then the remainder of the receipts—that a sale was made whereby the defendant received $1,000 and was to receive a royalty of $1.50 for each machine manufactured.

At the trial before the Chancellor in May, 1915, judgment went for the plaintiff: (1) for $150 and costs on the County Court scale; and (2) declaring him entitled to 20 per cent. of all royalties thereafter received by the defendant from the purchasing company, after that company should be recouped for the advance payment of $1,000. There was no appeal—the judgment was properly entered, &c., and is in full force.

In October, 1916, the plaintiff served a notice of motion for a

receiver, for an order to take accounts, &c., &c., and the Chancellor, on the 19th October, 1916, made the following order:—

"1. This Court doth order that an account be taken by the Master of this Court at Stratford pursuant to the judgment of this honourable Court, dated the 5th day of May, A.D. 1915, of the royalties received by the defendant since the date of the said judgment from the Cummer Manufacturing Company, or from any other person, firm, or corporation, for the manufacture and sale of the Seed Grain Pickler referred to in the pleadings in this action and of the moneys (if any) paid by the defendant to the plaintiff since the date of the said judgment out of such royalties, pursuant to said judgment.

"2. And this Court doth reserve further directions and the question of costs until after the said Master shall have made his report."

F. C. Richardson, for appellant.

R. T. Harding, for plaintiff, respondent.

Riddell, J.

RIDDELL, J. (after stating the facts as above):—It is not contended that the order appealed against is a correction of the judgment by the Chancellor as trial Judge, nor on the facts can it be—but it is said that the order was made under Rule 65 by the Chancellor, sitting, as any other Judge might, in Court.

I do not at all question the power of the Court in a proper case to make an order under this Rule at any stage of the action—many cases will be found in England under the corresponding Rule, Order xxxiii., r. 2, referred to in the books of practice, Muir MacKenzie Wills Chitty (Red Book, 1916), p. 474; Matthews White and Stringer (White Book, 1917), pp. 560 *et seq.*

But an order such as this, as to matters subsequent to the trial, should, I think, not have been made.

In *Witham* v. *Vane*, [1884] W.N. 98, Pearson, J., was asked to give liberty to apply for a similar order in an action upon a covenant by the defendant to pay a certain fixed sum as royalty for every chaldron of coal gotten out and shipped for sale. The learned Judge said it might be very convenient if he could give the plaintiffs liberty to apply in case the royalty was not paid in future, but he knew of no practice of the Court which would allow him to do so—"he knew of no instance in which in a case of this kind the Court, after ascertaining the amount due on the covenant,

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had gone on to order an account to be taken prospectively. There would be this objection to so doing, that nothing ever might become due. . . ."

Much the same view was taken by the Appellate Division in *Stewart* v. *Henderson*, 19 D. L. R. 387, 30 O. L. R. 447 — see especially p. 460. The Court disapproved and set aside so much of a judgment as sent "to the Master for inquiry and report questions that may hereafter arise as to whether the appellant has received money or shares or other consideration in respect of which the respondent is entitled to commission." For, it was said, "the appellant has the right to have such questions, as they arise, tried according to the ordinary course of the Court."

The case of *Meyers* v. *Hamilton Provident and Loan Society*, 15 P.R. 39, was relied upon, but that is quite a different case—if and so far as it conflicts with the present decision, it is not to be followed.

I would allow the appeal with costs here and below.

Masten, J.

MASTEN, J.:—The facts relevant to this appeal are set forth in the judgment of my brother Riddell, with whose conclusion I agree, and I will content myself with stating concisely how the case presents itself to my mind and the conclusion at which I have arrived.

It is a general rule, for which no authority need be cited, that at the trial of any action judgment can be granted only in respect to such causes of action as had arisen at the date of the issue of the writ of summons initiating the proceedings. On this principle the Ontario Judicature Act and the practice Rules made thereunder have grafted two exceptions.

By sec. 16, clause (*b*), of the Judicature Act, R.S.O. 1914, ch. 56, it is provided that "no action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right, whether any consequential relief could be claimed or not."

Under the practice which preceded this rule, no declaration would be granted unless the plaintiff was entitled to claim relief consequent upon the declaration; but the statute above quoted did away with this limitation.

None the less, a declaratory judgment or order can only be granted in respect to a right which existed at the date when the action was initiated.

The second exception to the general principle is covered by Rule 260: "Damages in respect of any continuing cause of action shall be assessed down to the time of the assessment."

This Rule is merely declaratory of what was the practice in Equity prior to the Judicature Act, but under it damages cannot be given in anticipation: *West Leigh Colliery Co. Limited* v. *Tunnicliffe & Hampson Limited*, [1908] A.C. 27.

It is therefore plain that at the trial of this action no judgment then enforceable could have passed against the defendant in respect of the claims now put forward by him and in respect to which a reference has been directed by the Chancellor, because no right had then arisen in respect to them. Further, the authorities cited by my learned brother make it clear that an anticipatory judgment for an account is something unknown in our practice. If at the trial a reference had been directed to the Master to ascertain the amount due to the plaintiff, it is possible that the Master in taking the account might have brought it down to the date of the making of his report: *Read* v. *Wotton*, [1893] 2 Ch. 171. It is not necessary to determine whether he could have done so or not. No such judgment was pronounced; but, judgment having issued on the 5th May, 1915, without any reference being directed, the order now in appeal is pronounced on the 19th October, 1916, in the terms set forth in the judgment of my brother Riddell.

The claims now sought to be enforced are new claims which have arisen since the judgment. To enforce them the plaintiff must commence some action or proceeding in the Court. Rules 5 and 10 make it plain that there are only two ways in which any action or any proceeding can be commenced in the Courts of Ontario: first, by a writ of summons; (2) by an originating notice. The plaintiff has begun a proceeding to enforce these new claims by a third and different method, not recognised by the Judicature Act or by our Rules of practice, namely, by a notice of motion for an account, following the declaratory judgment pronounced in 1915. I have already pointed out why he cannot rely upon the writ of summons originally issued in this

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action as the foundation for a judgment on these new claims, and the attempt to enforce them by a proceeding begun by a notice of motion in the old action does not, it seems to me, accord with anything known to our practice.

It is suggested that under the concluding words of Rule 523 jurisdiction is conferred upon the Court to make the order now in appeal. The words referred to are as follows: "A party entitled to . . . any further or other relief than that originally awarded may move in the action for the relief claimed." The words quoted were added to the Rule on the last consolidation, and appear to have been so added for the purpose of conferring jurisdiction on the Court to add to the provisions of a judgment any clause or direction which ought to have been inserted in it or which might have been inserted in it when it was originally drawn, but which, by mistake, inadvertence, or other cause, were omitted from the judgment. But I do not think that the words are intended to provide for the granting of relief in respect to a new cause of action which has arisen subsequently to the issue of the judgment.

It might however be urged in the present case that when the original judgment was issued it might have contained a clause referring it to the Master to inquire and report from time to time in respect to royalties alleged by the plaintiff to have become payable to him in pursuance of the declaration contained in the judgment, and reserving further directions to the Court in respect thereof, and that such a clause can therefore now be added to the judgment, in pursuance of Rule 523. But such a course appears to me to be contrary to the judgment of the Appellate Division in a recent case to which I now refer.

In *Stewart* v. *Henderson*, 19 D.L.R. 387, 30 O.L.R. 447, the claim put forward was for commission alleged to be due to the plaintiff, some of which had already accrued due and some of which might have become payable from time to time as the instalments became payable under the agreement which the plaintiff had negotiated. Chief Justice Meredith in dealing with that question, at p. 398, says: "What the judgment in effect does is to send to the Master for inquiry and report questions that may hereafter arise as to whether the appellant has received money or shares or other considerations in respect of which the respondent is entitled to

commission. The appellant has the right to have such questions, as they arise, tried according to the ordinary course of the Court, and I know of no precedent for such a judgment as has been pronounced, and it cannot surely be that, if a question hereafter arises as to whether Sir William Mackenzie has exercised the option which has been given to him, it is proper to direct that it shall be tried before the Master. I would, therefore, vary the judgment by confining it to a recovery of $300, and the delivery of 10 per cent. of the $50,000 of the capital stock of the company referred to in the agreements of the 26th and 27th April, 1913, which has been issued to the appellant, and directing that the appellant pay the costs of the action. The respondent will not be prejudiced by eliminating the other provisions of the judgment, because the question as to his right to commission on the Mackenzie purchase is established, and that matter would be *res adjudicata* in any action which the respondent may hereafter bring for the recovery of any commission which may become payable to him." I have examined the formal judgment as issued, and it conforms to the above statement.

It is of the first importance that the formal judgments in actions should be in all respects final, particularly in these days of extensive international business, where it may be necessary to enforce a judgment of the Courts of Ontario within some foreign jurisdiction; in such case anything which might afford the basis for an argument that the judgment pronounced in our Courts was not absolutely final might be fatal to its enforcement in a foreign jurisdiction.

For these reasons, I think that the appeal should be allowed and the original motion dismissed, both with costs.

KELLY, J.:—I agree in the result arrived at by my brother Masten, and for the reasons he has given. Kelly, J.

MEREDITH, C.J.C.P.:—That the learned Chancellor who made the order appealed against had power to make it, I have no kind of doubt: indeed, it seems to me to be needful only to point to the result of holding that he had not, to shew that he had, for it cannot be that the practice of this Court is such that such a result is unavoidable. Meredith, C.J.C.P.

It was adjudged at the trial of this action that the plaintiff is entitled to "twenty per cent." of all royalties received by the

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defendant, in respect of a certain patent right; and it is not denied that, since that judgment, the defendant has received a considerable sum of money for such royalties, of which the plaintiff is to have, under that judgment, "twenty per cent."

But it is said that, although all that is quite true, the plaintiff cannot have any relief in this action; that he must be delayed, and both parties be put to the expense of another action, before he can get the relief to which the judgment in this action adjudges him to be entitled; though it is obvious, and indeed admitted, that in that new action the plaintiff might have the very order now appealed against, as a matter of course almost, under Rule 63 or Rule 64.

If that e so, the sooner the practice in that respect is brought into line with common sense the better; for such enforced circumlocution could have no reasonable excuse.

Therefore one is not surprised to find authority for the view that no such crudity exists. More than twenty-five years ago, MacMahon, J., held that such a waste of time and money was unnecessary, that Rule 551, now Rule 65, expressly conferred power to make an order of reference, similar to that now appealed against; and that ruling was upheld by a Divisional Court composed of Galt, C.J., and Rose, J.: *Meyers* v. *Hamilton Provident and Loan Society*, 15 P.R. 39: and, notwithstanding many changes in, and some revisions of, the Rules, since, the practice has so continued down to the present day; and, after all that, there is added the weight of the judgment of the late Chancellor to that ruling, so that we have such a state of affairs so prevailing as assuredly should prevent this Court from disturbing it, and the more so when such disturbance is sought to displace a reasonable practice for one inexcusably unreasonable.

And, turning to the practice in England, under the like Rule, it is found that the Courts there refused to be driven to the unreasonable method of requiring a new action in order to give relief subsequent to judgment at the trial: see *Barber* v. *Mackrell* (1879), 12 Ch. D. 534, and *Taylor* v. *Mostyn* (1886), 33 Ch. D. 226: cases with which the long-continued practice in the Courts of this Province is entirely in accord: and see also the White Annual Practice, 1917, p. 422.

In the cases of *Stewart* v. *Henderson*, 19 D.L.R. 387, 30 O.L.R.

447, and *Witham* v. *Vane*, [1884] W.N. 98, this question was not even remotely involved, or even incidentally referred to; though the practice as it then was, and up to the present time has been, would go a long way to support the rulings in those cases, because there was no need to make an anticipatory, and possibly needless, order of reference, for, when the need arose, if ever it should arise, the order could be made under Rule 551 and the like Rule then in force in England. Nor can any point be made regarding the manner of trial of after-arising questions; if proper for trial by jury or by Judge, an issue could and would be directed to be tried accordingly; it need hardly be said that the Rules expressly provide for directing that any question arising upon such an application as was made to the Chancellor in this case may be so tried; or, in a proper case—such as this is—the applicant might be left to bring an action.

To suggest that anything said by any of the Judges who considered either of these last-mentioned cases meant that he knew of no practice that ever permitted the making of an anticipatory judgment would be absurd, because, for one instance, even the Courts of common law for upwards of 200 years have done so in actions upon bonds, a practice now expressed in the words of sec. 125 of the Judicature Act. The words used by the Chief Justice of Ontario in one of these cases, "The appellant has the right to have such questions, as they arise, tried according to the ordinary course of the Court," are in no sense inconsistent with a trial under sec. 125 of the Judicature Act or under Rule 523, or under Rule 65; each, in a proper case, would be a trial according to the ordinary practice of the Courts: that learned Judge was, however, dealing only with the facts of the case then before him; so that, even if those words had been different, had been, "tried in another action," they could not have affected the question involved in this appeal, in which the facts are so entirely different, so opposite, as I have already indicated.

But, quite apart from these considerations, another of the Rules of practice of this Court, now in force, plainly conferred upon the learned Chancellor the power which he exercised; a Rule which, if it had come to the knowledge of the appellant before launching this appeal, I should have thought must have prevented it. This Rule was not referred to on either side upon the argument of

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this appeal, and so must have escaped the attention of each party.

It is, in so far as applicable to this case, in these words: "523. A party entitled to maintain an action for . . . any further or other relief than that originally awarded may move in the action for the relief claimed."

It would be difficult to suggest any other general words that could better cover just such a case as this. It is not only contended for the appellant that the plaintiff might "maintain an action" "for the relief" which the order in appeal affords, but that he must maintain a new action for such relief or go without it: and that it is "further or other relief" than that originally "awarded" is obvious. Why then reject this obviously applicable means of avoiding circumlocution and needless delay and expense, even if one balk, at this late day, at awarding it by the means adopted by the four learned Judges I have referred to?

To those who were in practice in the days of bills of review and bills in the nature of bills of review, it is not difficult to understand and give effect to the provisions of this Rule, either as it formerly was—a Rule made in order to retain in a simplified form such bills and the useful practice generally of the Court of Chancery in affording means of obtaining after-judgment relief —or as it now is with the last clause added, a clause which must have been added so as to embrace in the Rule such cases as this; but, whatever its purpose, that is its manifest meaning and effect, and a very useful and proper one, if Rule 65 did not cover the ground with sufficient certainty. And it may be added that there is no such Rule in the English practice; and yet the cases there have gone as far as I have mentioned against dilatory and superfluous methods. So too, in passing, it may be observed that in regard to bonds the legislation giving prospective relief employed the word "further," which is also used in Rule 523 with the addition of the words "or other;" so as to give the Rule the widest possible effect.

I am quite unable to appreciate the contention that the power exercised by the learned Chancellor affects the finality of judgments. Is a judgment any the less, in substance, final because it is added to or taken from by proceedings begun by petition or notice of motion instead of by writ? No one suggests

that it can be any the more added to or taken from by the one process than the other. We must not forget that judgments have always been in proper cases subject to attack by bills of review, &c.; that that practice is expressly retained and added to in this Province; and that, though not so retained in England, still is to some extent in force there. The practice firmly established in the case of *Meyers* v. *Hamilton Provident and Loan Society*, 15 P.R. 39, a practice unquestioned ever since until now, and expressly confirmed in the addition of the last clause of Rule 523, has everything to commend it; whilst that which we are asked to adopt has nothing to commend it but everything to condemn it.

On the question of jurisdiction, I would have no hesitation in dismissing this appeal; but on the merits of the application it seems to me to be equally plain that the order ought not to have been made. I cannot believe that the facts of the case were brought fully to the attention of the learned Chancellor; for they afford no reason, nor any excuse, for a reference to ascertain and state what sum is due and payable to the plaintiff for royalties under the judgment in this action.

The plaintiff has had a full account from the company which pays these royalties to the defendant, of the amount of them. No one suggests that that account is inaccurate; there is no reason why it should be anything but accurate. No accounting by that company could be had, if it were necessary; and there is no reason why their statement as to the amount paid by them to the defendant should be untrue or even suspected of inaccuracy. An accounting then is out of the question; and, as the "twenty per cent." coming to the plaintiff when these proceedings were brought amounted to less than $100, and as the defendant asserts that he has a counterclaim against the plaintiff to that amount, the proper course to be taken leads plainly to the Division Court, where speedily and inexpensively the rights of the parties can be ascertained and enforced.

I would therefore allow this appeal and discharge the order appealed against, but on the merits of the application only.

Appeal allowed.

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S. C.

RUDLAND v. SMITH.

Nova Scotia Supreme Court, Sir Wallace Graham, C.J., Russell, and Drysdale, JJ., Ritchie, E.J., and Chisholm, J. January 9, 1917.

1. MASTER AND SERVANT (§ V—340)—WORKMEN'S COMPENSATION ACT—LIABILITY UNDER—ACTION.

The effect of sec. 5, sub-sec. 4 of the Workmen's Compensation Act, (N. S. Stat. 1910, ch. 3) is to give the Court power to assess compensation in the plaintiff's favour, where the action has been brought independently of the Act, provided the employers would have been liable if proceedings had been instituted under the Act.

2. MASTER AND SERVANT (§ V—340)—WORKMEN'S COMPENSATION—INJURY IN COURSE OF EMPLOYMENT—DISOBEDIENCE.

No action will lie under the Workmen's Compensation Act, (N.S. Stat. 1910, ch. 3), for the death of a workman who wilfully, and in violation of express orders, remains in a dangerous place while a blast is being fired, and is killed; the accident does not arise in the course of his employment, but is caused by his wilful misconduct.

Statement.

APPEAL from the judgment of Harris, J., dismissing the plaintiff's action on behalf of herself and children for damages for the death of her husband while in the employment of the defendants.

F. L. Davidson, for plaintiff, appellant; nem con.

The judgment of the Court was delivered by

Chisholm, J.

CHISHOLM, J.:—The plaintiff, the widow of one Harry Rudland, suing on behalf of herself and the children of their marriage, claims damages for his death, while in the employment of the defendant, the said death being the result of injuries caused by defendant's negligence, as plaintiff alleges, and sustained by the deceased while in said employment on January 16, 1915. In the alternative, the plaintiff makes a claim under the Workmen's Compensation Act (ch. 3 of the N.S. Acts of 1910).

With respect to the alternative claim, the defendant pleads that it cannot be prosecuted by an action in this Court. As to the principal claim he pleads that the negligence complained of was the negligence of a fellow servant of the deceased, and that the deceased was guilty of contributory negligence. The facts of the case are thus summarised by the trial Judge:—

Harry Rudland was employed by the defendant as fireman, and in looking after an engine operated in connection with a stone crusher. The stone crushed was blasted out of a quarry and the boiler and engine were in a small building in this quarry. No plan was produced of the property and apparently no accurate measurements were ever made, but in January, 1915, when the accident happened, the building referred to was only about 40 or 50 feet away from the place where the blasting was carried on.

Before firing a shot the practice was for the defendant, who was in charge of the operations himself, to warn all the men in the quarry, and the deceased

and any men working in the boiler house and the crusher, of the fact that a shot was about to be fired, and the engine and machinery were stopped and everybody went out of the quarry and the buildings to a safe distance until the explosion had taken place.

On the day of the accident Harry Rudland was duly notified by the defendant that a shot was about to be fired. He stopped the engine and machinery, and George Cherry, who was feeding the crusher, left his work for the purpose of seeking safety as usual, and he met Rudland at or near the boiler house; Cherry swears that Rudland said to him, "Come in here and take chances; we will stay here; Smith is too particular shutting down this machinery every little shot." Rudland and Cherry, thereupon, went into the boiler house, and remained there behind the boiler until the shot was fired. The man whose duty it was to fire the shot was an Italian and some little time elapsed between the time of the warning and the time when the shot was actually fired, and Cherry says that while they were waiting in the boiler house for the explosion, Rudland said, "I wish if that Dago is going to shoot us he would hurry up." Immediately after the shot exploded and some stone was hurled against the boiler house and the side or roof forced in and other damage done to the building. Rudland ran out of the door and was struck by a stone in the back of the head, and after being in an unconscious state for some weeks died.

With respect to any claim outside the Workmen's Compensation Act, the action must fail on account of the contributory negligence of the deceased, the evidence as to which is undisputed and need not now be discussed. The alternative claim, that under the Workmen's Compensation Act, is not defeated by the contributory negligence of the deceased; but with the exception of the cases provided for in sec. 5 (4) of the Act, all claims for compensation under the Act have to be litigated in another forum. Sec. 5 (4) of our Act is similar to sec. 1 (4) of the English Act, and is as follows:—

If, within the time hereinafter in this Act limited for taking proceedings, an action is brought to recover damages independently of this Act for injury caused by any accident, and it is determined in such action that the injury is one for which the employer is not liable in such action, but that he would have been liable to pay compensation under the provisions of the Act, the action shall be dismissed; but the Court in which the action is tried shall, if the plaintiff so chooses, proceed to assess such compensation and shall be at liberty to deduct from such compensation all the costs which, in its judgment, have been caused by the plaintiff bringing the action instead of proceeding under this Act.

This section is intended for the relief of a plaintiff who has taken proceedings independently of the Act, and fails. If the trial Judge is of opinion that the plaintiff has made a case under the Act he can deal with it in the manner set out in the section; and this is frequently done in England (Chartres on Judicial Interpretation of Workmen's Compensation Law, 556). The

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trial Judge has considered the claim for compensation under the Act and has come to the conclusion that the claim cannot prevail, first, because the injuries did not arise out of the employment; and, secondly, even if the injuries did so arise, the deceased was guilty of serious and wilful misconduct within the meaning of the Act.

The provisions of the Act which have to be considered in this connection are as follows:—

Sec. 5 (1). If in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the first schedule of this Act. . .

(2) Provided that . .

(c) If it is proved that the injury to a workman is attributable to the serious and wilful misconduct or drunkenness of that workman, any compensation claimed in respect of that injury shall be disallowed.

The plaintiff will be entitled to recover compensation under the Act: 1. If she shews that the injuries to the deceased arose out of and in the course of his employment, and, 2. If the defendant fails to prove that the injuries are attributable to the wilful and serious misconduct of the deceased.

As to the first requirement the case of *Barnes* v. *Nunnery Colliery Co. Ltd.*, [1912] A.C. 44, is important. The facts were as follows:—A boy employed at a colliery noticing that an endless rope having a number of empty tubs attached to it was about to start for a level where his work was, jumped into the front tub with 3 other boys in order to ride to his work, instead of walking as he ought to have done, and, in the course of his journey, his head came in contact with the roof of the mine and he was killed. It was a common practice for boys to ride to their work in the tubs, but it was expressly forbidden and the prohibition was enforced as far as possible. It was held in the House of Lords that the death was caused by an added peril to which the deceased by his own conduct exposed himself and not by any peril involved by his contract of service.

In the course of his opinion, Earl Loreburn, L.C., said:—

If the thing he does imprudently or disobediently is different in kind from anything he was required or expected to do, and also is put outside the range of his service by a genuine prohibition, then I should say that the accidental injury did not arise out of his employment.

Lord Atkinson observed:—

The unfortunate deceased in this case lost his life through the new and added peril to which by his own conduct he exposed himself, not through

any peril which his contract of service, directly or indirectly, involved or at all obliged him to encounter. It was not, therefore, reasonably incidental to his employment. That is the crucial test. It has been many times adopted.

And Lord Mersey distinguishes the case from some earlier ones:—

It is not as if the case had been one of emergency where the boy might have had a discretion to use the perhaps speedier, although the forbidden, means of reaching his destination. Nor is it as if the rule forbidding the act was notoriously disobeyed or not enforced. It was disobeyed, no doubt, but it was disobeyed surreptitiously and unknown to the employers.

In the case under consideration the deceased, at the time of the accident, remained in the place where he performed the ordinary duties of his service, but he remained there at a time when he should have been elsewhere; he remained there in violation of the express orders given a short time previously by his employer; and he remained there surreptitiously. I can see no difference in substance between that situation and the one considered in the *Barnes* case, where the deceased instead of remaining as in this case within the area of danger moved into that area.

The later cases of *Plumb* v. *Cobden Mills Co.*, [1914] A.C. 62, and *Herbert* v. *Fox*, [1916] A.C. 405, are in line with the *Barnes* case. See also *Palmer* v. *Harrods Ltd.*, (1916), 85 L.J.K.B. 1659.

On the authority of these cases, I think the trial Judge is right in holding that the plaintiff's action must fail because the accident did not arise out of the employment within the meaning of the Act.

Again, even if the accident arose out of and in the course of the employment, the action would fail by reason of the serious and wilful misconduct, within the meaning of the Act, of the deceased. The evidence of the defendant and of Cherry shews beyond a doubt that the deceased was ordered away from the boiler and shed while a blast was being shot; that he wilfully and wantonly remained in the shed, without the defendant's knowledge, and that the accident is attributable to his own conduct. Counsel for appellant argued that the shed was in a dangerous position because it was so near the face of the rock. This only aggravates the misconduct of the deceased in remaining there after the order was given to him to move out of the area of danger.

The appeal must be dismissed and without costs as the defendant did not appear on the argument. *Appeal dismissed.*

QUE.

C. R.

ASCH v. DUFRESNE.

Quebec Court of Review, Malouin, Cannon, and Belleau, JJ. March 31, 1916.

ALTERATION OF INSTRUMENTS (§ II B—14)—MATERIALITY—CHANGING NAME AFTER ACCEPTANCE.

Changing the name of the payee, after acceptance of a draft, without the acceptor's assent, is a material alteration under secs. 145, 146, of the Bills of Exchange Act, R.S.C. 1906, ch. 119, and voids the bill.

Statement.

APPEAL by defendant from the judgment of Letellier, J., in favour of the plaintiff, in an action on a bill of exchange. Reversed.

Désy & Langlois, for defendant, appellant; *Bureau, Bigué & Lajoie*, for plaintiff, respondent.

Cannon, J.

CANNON, J.:—Plaintiff claims from defendant $350.32, being the costs of protest and capital of a bill of exchange dated Montreal, June 29, 1914, drawn by the Frisco Soda Water Co., accepted by the defendant for $346.25, payable 3 months after date to the order of the Frisco Soda Water Co. and transferred by the latter to the plaintiff for value.

In defence, the defendant alleged: that on June 29, 1914, the Frisco Soda Water Co. drew on him by means of a draft at 3 months for $346.25 payable to the order of the Imperial Bank of Canada, St. Lawrence Boulevard branch; that on July 6, 1914, the defendant accepted this draft at the Three Rivers branch of the Bank of Hochelaga, the said draft being made payable to the order of the Imperial Bank of Canada, St. Lawrence Boulevard branch; that the draft had been drawn on the defendant by the Frisco Company; that the draft was not to be paid at maturity, but that the company was to credit the defendant on the amount of the draft with all the empty bottles returned to the company up to the maturity of the draft; that these conditions of acceptance were known to the Imperial Bank of Canada; that when the draft matured, defendant had returned to the Frisco Soda Water Co. bottles to a greater value than the amount thereof; that after the acceptance of the draft by the defendant the same was altered in one of its essential parts: the words "Imperial Bank of Canada" being replaced by the word "ourselves;" that the Frisco Soda Water Co., after having altered the draft in this way, transferred it in bad faith to the plaintiff who was aware of these alterations; that the Frisco Soda Water Co., in conjunction with the plaintiff, thus altered the draft materially without the authorization and

consent of the defendant; that the defendant suffers serious prejudice as a result of these actions and as a result of the conduct of the Frisco Soda Water Co. and the plaintiff.

The evidence discloses the fact that the draft on which the suit is taken was sent by the Imperial Bank of Canada, to the order of which it was made payable, to Three Rivers for acceptance by the defendant; that on July 6, 1914, defendant accepted the said draft, payable at the Bank of Hochelaga at Three Rivers; that after this acceptance, without the knowledge and without the consent of the defendant, the drawer of the draft, the Frisco Soda Water Co. altered it by striking out the words "Imperial Bank of Canada" and by writing over them the word "ourselves;" that after this alteration the Frisco Soda Water Co. endorsed the draft and transferred it for value to the plaintiff.

It is established of record that the draft had been given by the defendant as the price of certain bottles sold by the Frisco Soda Water Co. according to contract filed of record. This contract also establishes the fact that the defendant was entitled to be credited on the amount of the draft with the value of empties returned to the Frisco Soda Water Co., before maturity, and that the Imperial Bank of Canada knew this agreement.

Under the circumstances of the case we are of opinion that the alterations to the draft by the Frisco Soda Water Co. after acceptance, without the knowledge and without the consent of the defendant, by striking out the words "Imperial Bank of Canada," and replacing these by the word "ourselves," is a material alteration of this bill of exchange within the meaning of sec. 145 of the Bills of Exchange Act, R.S.C. 1906, ch. 119. The alterations enumerated in sec. 146 of the statute are not limitative; and in the present case the alteration made under these circumstances is a material alteration. This alteration according to the provisions of sec. 145 of the statute entails the nullity thereof in so far as the defendant is concerned.

The action cannot succeed. We are unanimously of opinion that the judgment of the Superior Court must be quashed and the action dismissed with costs.

Appeal allowed.

ALTA.

S. C.

STANDARD BANK OF CANADA v. ALBERTA ENGINEERING CO.

Alberta Supreme Court, Scott, Stuart and Beck, JJ. January 13, 1917.

1. BILLS AND NOTES (§ I C—15)—CONSIDERATION—CANCELLATION OF SURETYSHIP.
The cancellation of a suretyship contract forms a sufficient consideration for a promissory note.

2. CONTRACTS (§ I E—71)—STATUTE OF FRAUDS—GUARANTY NOTE.
A promissory note given as security for the debt of another is not within the fourth section of the Statute of Frauds.

3. GUARANTY (§ I—7)—CONTINUING GUARANTY—PROMISSORY NOTE.
A guaranty note executed concurrently with a suretyship contract covering future advances, and in substitution of a prior continuing guaranty, is intended up to its face amount as continuing security for past, present and future indebtedness.

4. EVIDENCE (§ IV J—435)—STATED ACCOUNT—PRINCIPAL AND SURETY.
An account stated between the principal debtor and creditor is not conclusive against nor binding upon the surety.

5. INTEREST (§ II B—65)—EXCESSIVE RATE—BANK ACT—INTEREST ACT.
An excessive charge of interest in violation of the Bank Act merely renders void the stipulation as to the prohibited rate, but does not affect the liability for the legal rate under the provisions of the Interest Act.
[*McHugh* v. *Union Bank*, 10 D.L.R. 562, [1913] A.C. 299, considered].

6. INTEREST (§ I B—20)—JUDICATURE ACT—JUST DEBT—SURETY.
The interest allowable upon any just debt under sec. 10(15) of the Judicature Act applies also as against sureties.

Statement.

APPEAL by defendants from the judgment of Simmons, J., 27 D.L.R. 707. Varied.

H. P. O. Savary, for defendant.

A. B. MacKay, for respondent.

The judgment of the Court was delivered by

Stuart, J.

STUART, J.:—The appealing defendants Faber and Heeney, who were directors of the defendant company, an insolvent and in liquidation, had signed on April 14, 1913, a note in favour of the bank at five months for the sum of $30,000. Practically at the same time they had executed a so-called "contract with sureties" which recited that the company was a customer of the bank, that the bank had already made or might thereafter make to the customer advances upon certain securities, that the bank had already taken or might thereafter take, collateral security from the customer in respect of its present or future indebtedness to the bank, and that the appellants then were or might thereafter by endorsement or otherwise become surety for the repayment of such advances or part thereof. It was by the contract agreed that the bank might from time to time make such agreements with the company respecting advances and securities as it might think best and might apply all moneys received from

the company or from such securities upon such part of the company's indebtedness to it as it might think best and the appellants also agreed that any liability that they were under or might thereafter be under as endorser or otherwise as surety for the customer should be unaffected by anything done by the bank within the scope of the agreement.

The defendant Heeney had given an individual note to the bank for $30,000 at 1 month on March 10, 1913, and had then signed the above contract. Faber was away and when he had returned, *i.e.*, on April 14, the two appellants signed the second note for $30,000 above mentioned and Faber then signed the above contract.

On March 10 the indebtedness of the company to the bank was $29,946.91 made up of $28,343.77 in the way of discounts of certain demand notes of the insolvent company to which invoices shewing the particular indebtedness of certain customers of the company for the respective amounts for which the notes were given were attached, and an overdraft of $1,603.14. The company had previously executed an assignemnt to the bank of book accounts and future debts.

The overdraft was subsequently increased to $4,845.40 and on June 23, 1913, the company went into liquidation though by that time the overdraft was again reduced. The liquidator who had been made acquainted with the bank's claim and the securities held by it, which included the general assignment of book debts and accounts, proceeded to collect the outstanding accounts of the company and to hand the money over to the bank. By this means the indebtedness with the bank was reduced to the sum of $14,024.14.

The bank sued the appealing defendants for this sum and were given judgment therefor by Simmons, J., subject to certain reductions on account of overcharges for interest which were to be settled by a reference if not agreed upon.

The appellants contend that there was no consideration for the promissory note. Aside from the circumstance which the evidence shews fairly clearly, that it was only because of the giving of the note that the company was allowed to issue cheques in payment of wages overdue and to have those cheques honoured by the bank, it would appear to be also fairly clear, taking the

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appellant's own statement to be true, that at the time of the giving of the note certain previous contracts of suretyship were cancelled—a statement apparently accepted by the trial Judge—that this cancellation in itself would constitute a sufficient consideration for the note.

The appellants advance the further contention that the note, having been given as security for the debt of another, did not comply with the fourth section of the Statute of Frauds. In my opinion this contention was sufficiently answered in the reasons given by the trial Judge. A promissory note is a special form of obligation to which a special law applies. It is true that the plaintiffs may have told too much in their statement of claim but even if they did I think it would have been enough for them to have proved the note, given evidence as to what was due upon it and unpaid and there rested, at least in so far as the mere question of consideration was concerned. But no doubt the view expressed in *Eedes* v. *Boys*, L.R. 10 Eq. 467, cited by the trial Judge is correct, viz: that it lay upon the plaintiffs to shew that the note was intended as a continuing security for a general balance varying from time to time and in the future instead of for a definite sum already fixed. I agree with the view of the trial Judge that the plaintiff did establish this. It is true that the amount inserted in the note was approximately the amount due and owing when Heeney signed the prior note on March 10th. But we must take everything that occurred at the time of the execution of the note sued upon as throwing light upon the intention of the parties. The circumstance that the prior note was drawn for a round sum exceeding by $53.09 the exact amount of the indebtedness at that time is in itself of some significance. The exact indebtedness at that time was known and could have been inserted in the first note. It was also no doubt easy to fix the exact indebtedness on April 14, when the note sued upon was signed if it was intended to cover that exactly and nothing else. At that time apparently the indebtedness exceeded the sum of $30,000 considerably and this would point to the conclusion that it was not a mere existing indebtedness that was intended to be covered.

But there is much more than that. Concurrently with the signing of the note the "contract of sureties" was signed. It refers distinctly to possible future advances and future indebted-

ness of the customer, the insolvent company, and also to the appellants becoming by endorsement or otherwise surety for the repayment of such advances or part thereof. According to the appellants' statement the note was given in substitution for a prior guarantee in writing which was itself a continuing security although not for so large an amount. For these reasons I think the trial Judge was right in holding that the note was intended as a continuing security up to its face amount for the indebtedness past, present and future of the company to the bank.

Upon the matter of interest, however, I am, with respect, unable to accept the view of the trial Judge It is true that the company, the primary debtor, on April 30, 1913, signed the usual receipt for cheques and pass book at the close of the month and certified that the statement of the condition of their account with the bank was correct. It may perhaps be a sound view that this constitutes an account stated between the bank and its customer, the primary debtor, so that the principle of *McHugh* v. *Union Bank*, 10 D.L.R. 562, [1913] A.C. 299 at 316, should apply. There might however be something to be said to the contrary even as to that. But it seems to me unnecessary to express an opinion upon that point because the present case is clearly distinguishable.

This is a case, not between the bank and its customer, but between the bank and the customers, *i.e.*, the primary debtor's, sureties.

It is well settled that even a judgment against the principal is not binding on the surety. *Re Kitchin; Ex parte Young*, 17 Ch. D. 668; de Colyar on Guarantees, 3rd ed., p. 225. This has also I think been quite recently decided in this Court though I am unable to refer at present to the case. I can see no reason why an account stated should be any more conclusive against the surety than a judgment. In Hals., vol. 15, at p. 479, it is said that the principal debtor's admissions of liability do not dispense with proof by the creditor of the facts admitted.

Even if we were to assume the correctness of the respondent's contention that the prior written guarantees given by the appellants were not rescinded by the taking of the note and that the general terms of these guarantees still continued there is nothing in them which can help the respondent on this point. There is

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indeed an agreement that an account stated and rendered to the customer shall be binding and conclusive but the provision is that such account stated must be signed as correct by some duly authorised officer of the bank. The document in question bears no signature of any officer of the bank at all.

The surety is only liable for such sums as the principal is legally liable to pay. In *Swan* v. *Bank of Scotland* 10 Bligh (N.S.) 627, 637 (6 E.R. 231), the facts were that the bank's claim against the principal rested upon certain drafts which in a certain respect were in a form which violated a statute. The statute rendered such drafts void. The House of Lords held that as there was no legal debt due by the principal the sureties for the principal were not bound. See pp. 636 and 637.

I think therefore that the appellants were not bound by the account stated, if it was such at all, and also were bound only for what the bank could, aside from such account stated, have collected from the company.

The bank had been charging 8% on its advances to the company. The Bank Act forbids this. This is a suitable place I think to express some surprise that the general managers and directors of our banks continue, as they seem to continue, to disobey the law of the land.

The exact situation in regard to interest is perhaps somewhat difficult to decide. The amount sued for was $14,024.14 and interest from July 31, 1914, at 8%. The principal sum is represented by a series of demand notes bearing on the face of them a stipulation for interest at 8% without adding the words "per annum" which no doubt should be implied and without indicating till what date the interest should be paid. One possible inference, in the absence of any express stipulation, is that it was agreed that the interest should be payable only up to the date of maturity. Now, it is the rule that a promissory note payable on demand is "at maturity" at once and without demand or notice. This was decided by Chitty, J., in *Francis* v. *Bruce*, 44 Ch. D. 631, quoting and following a judgment delivered for the Court by Parke, B., in *Norton* v. *Ellam*, 2 M. & W. 461 at 464. See also Cyc., vol. 7, p. 848.

The decision in *McHugh* v. *Union Bank*, *supra*, was that a stipulation to pay 8% was void. That decision, however, left

open the question whether it was merely the stipulation as to the rate alone which was void, or the whole stipulation to pay the interest, because their Lordships there had an admission by the appellant that he was bound to pay 5% and it was upon that admission that they acted. If the agreement to pay interest at all is void then there is no agreement to pay interest and it would be impossible to apply sec. 2 of the Interest Act which provides that where there is an agreement to pay interest but no rate is fixed the rate payable shall be 5%. My own view is that it is merely the stipulation as to the rate that is void and that there still remains an agreement to pay interest so as to make the provision of the Interest Act applicable.

But there is still the difficulty that i might, with some reason, be said that the agreement to pay interest was merely to pay it until the maturity of the note which, as we have seen, was at maturity forthwith. The cases above cited shew that an action could have been brought upon the notes forthwith after their execution even without demand or notice to pay. On the other hand, it seems to me that, although the notes were "at maturity" forthwith, a reasonable interpretation of the words of the note would be that interest would be paid until the note was paid, although, of course, this would not be the case where a definite period of some length was fixed for the maturity of the note. Upon this view the company would be liable to pay interest at 5% until judgment and the sureties would be similarly liable.

The same result, I think, should follow if the view just expressed as to the period during which interest was to be paid were wrong and if there was no agreement to pay interest for any period at all on account of the notes being at maturity, forthwith. We could then, in my opinion, fall back upon the provision contained in sec. 10, sub-sec. 15, of the Judicature Ordinance. That section reads:—

> In addition to the cases in which interest is by law payable or may be by law allowed, the Court may in all cases where in the opinion of the Court the payment of a just debt has been improperly withheld and it seems to the Court fair and equitable that the party in default should make compensation by the payment of interest, allow interest for such time and at such rate as the Court may think right. (Alta. Stats. 1908, ch. 20.)

At first blush it might appear that this provision could only be applied as against the principal and not as against the sureties

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but upon consideration it would seem fairly clear that it can be applied also as against sureties. Upon the moment of default by the principal the surety becomes indebted and may be sued forthwith. He is then indebted and it is a just debt. But in such a case I think no more then the legal rate of 5%, which is at most all that could have been by strict law collected, aside from the Ordinance, from the principal, should be allowed. There is the further reason for not allowing a higher rate, that the bank itself is to blame for the trouble owing to its open breach of the Bank Act.

With regard to the overdrafts the position I think is practically the same. I think the inference may be made from the evidence—and in such a case only slight evidence should I think be sufficient—that the company was to pay interest on its overdrafts until they were paid back. The rate of 5% will therefore be allowed on these as well.

Inasmuch as the larger rate of 8% seems to have been charged by the bank upon the indebtedness which the plaintiff treats as having been paid off I think the appellants are entitled upon the reference directed by the trial Judge to go into the whole account and to insist that only 5% be allowed throughout and that any overpayment of interest that may have been charged up should be applied upon the principal of the notes now sued upon. I do not think it possible to give any more specific ruling now as to the exact method of calculation and the proper appropriation of payments. It may be assumed for the present I think that the proper principles will be applied.

I think, therefore, the appeal should be allowed so far as the rate of interest payable and the scope of the reference is concerned but that in other respects the judgment should stand.

There is nothing in the objection to the allowance of the sum of $250 to liquidator as compensation for the collection of the book accounts. Even if he were acting merely for the bank I think the bank was entitled to deduct the amount as a reasonable charge for the cost of collection. But besides this I think it was in the interest of the company and the other creditors that these accounts should be collected and applied to the bank's claim and that the liquidator should be treated as having acted in his proper capacity, *quo liquidator*, and as being in that capacity entitled to the remuneration.

A complaint was also made that the contributories of the company had not been pursued with diligence. But that was surely the business of the liquidator and not of the bank. I do not see how the bank can be held responsbile for any supposed neglect in this regard of the liquidator.

As the appellants have succeeded only upon a minor point in the appeal which will involve only a comparatively small sum I think there should be no costs of the appeal. The costs of the reference should be in the discretion of a Judge.

Appeal allowed in part.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins, and Ferguson, JJ. January 9, 1917.

INSURANCE (§ III G—150)—REINSTATEMENT OF POLICY—"INSURABILITY." A condition in a life insurance policy that the risk shall cease if any premiums after the first shall not be paid, but that it may be re-instated upon payment of arrears and proof of insurability, entitles the insured to reinstatement at the original rate, not on changed terms.

Statement.

APPEAL by defendents from the judgment of Lennox J. in an action by James E. Sussex for a declaration of the validity of a life assurance policy issued by the defendants. Affirmed.

LENNOX, J.:—This action is brought to have it declared that a policy of life insurance issued by the defendants to the plaintiff on the 24th March, 1914, is a valid and subsisting security, or that the plaintiff is entitled to have the policy reinstated under the 14th condition thereof, and for an order directing the defendants to reinstate the policy.

The insurance is for $3,000, payable to the plaintiff's mother at his death. The plaintiff agreed to pay twenty consecutive annual premiums of $80.04 each, in advance, and he paid the first and second premiums. The third annual premium fell due on the 21st March, 1916, and was not paid, nor was it paid or tendered within the thirty-one days' grace allowed for payment of premiums upon the day stipulated for payment thereof. On the 25th April, 1916, the plaintiff mailed his cheque for $80.04 to the defendants' agents in Toronto. This was refused and returned.

Condition 5 of the policy provides: "This policy shall not take effect until the first premium hereon shall have been actually paid during the good health of the insured, a receipt for which payment shall be the delivery of the policy. If any subsequent pre-

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mium be not paid when due, then this policy shall cease, subject to the values and privileges hereinafter described, except that a grace of thirty-one days, during which time the policy remains in full force, will be allowed for the payment of any premium after the first, provided that with the payment of such premium interest at the rate of six per cent. per annum is also paid thereon for the days of grace taken; but for any reckoning herein named the time when a premium becomes due shall be the day stipulated therefor without grace."

It is evident that the plaintiff has not *a direct* right to have the policy continued or reinstated by reason of forwarding his cheque as above stated, under the provisions of this condition, for the double reason that the thirty-one days' grace had then expired, and that he did not add interest as provided for; but I shall have occasion later on to refer specifically to the precise wording of this condition, in discussing the defendants' contention that by default in payment the policy *ipso facto* became null and void to all intents and purposes—in fact ceased to exist.

There was evidence given with a view of excusing the plaintiff's default, and evidence to shew that he was without excuse, but I do not think it matters either way; the plaintiff failed to comply with the terms of his policy as to periodical payments, and the only question is, is the plaintiff entitled to have the policy reinstated by reason of condition 14 of the policy?

Condition 14 is as follows: "Within five years after default in payment of premium, unless a cash surrender value has been paid for the policy or the extension period has expired, or if this policy has not been surrendered, it may be reinstated upon evidence of insurability satisfactory to the company and by payment of arrears of premiums with interest at the rate of six per cent. per annum, and by reinstatement of whatever indebtedness to the company existed hereon at the date of default, with interest from that date."

At the time the insurance was effected, the plaintiff was a commercial traveller. He has since become a soldier, and liable to be called to active service in Europe in the present war, if in fact he has not already gone to the front.

Condition 6 provides that the policy, endorsements thereon, and the application, constitute the entire contract between the parties.

Condition 7 states: "This policy contains no restrictions regarding change of occupation, residence, travel, or service in the militia or army or navy in time of war or in time of peace; but, if the insured shall commit suicide within one year from the date hereof, while sane or insane, this policy shall be null and void."

The defendants are willing to continue the insurance, but only upon the condition "that, should the insured go into any military or naval service outside of the Dominion of Canada, he, or some one on his behalf, shall notify the company, and, within ninety days from so engaging, and annually thereafter, shall pay to the company an extra premium of $50 per thousand of insurance, and that otherwise the said policy *shall become and be null and void* except for the cash surrender value existing at the time of engaging in such service;" and contend that condition 14 is binding only as to a policy upon which at least three years' annual premiums have been paid. They rely upon conditions 9 and 12 and table A of the policy as modifying and limiting the generality of the language of condition 14, and particularly that there is no "cash surrender value" or "extended time insurance" for fourteen years and two hundred and eighty-six days.

It is quite clear from the company's proposal above set out, and is bluntly admitted by Mr. Parkinson, the company's manager for Western Ontario, that the real difficulty or cause of dispute is not the delay in payment, but the necessity of readjusting methods by reason of the unforeseen burdens imposed upon insurance companies by the daily casualty lists of the war. In consequence of this, this company adopted new rules—an altered interpretation of their contract in fact—after the making of this contract and after the war, to wit, on the 1st September, 1915. It is not shewn that notice of the change was given to the holders of current policies. I am not wedded to any general rule of interpretation, but all the same it is right to keep in mind that the language of the policy is the language of the company; that the plaintiff, like thousands of others similarly situated, entered the service of the country upon the faith of it; and, without saying that it is therefore to be construed unfavourably or favourably to its author, it is plainly right that the generality of the language of condition 14 should not be narrowed or cut down, or the express provisions of condition 7, in effect, abrogated, unless there is clear notice to the insured, somewhere upon the face of the policy,

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that the undertaking of the company by condition 14 is to be read in a more limited sense than the *primâ facie* meaning of its language would import.

Section 71 of the Insurance Act, R.S.C. 1906, ch. 34, enacts: "No condition, stipulation, or proviso modifying or impairing the effect of any policy or certificate of life insurance . . . shall be good or valid unless such condition, stipulation or proviso is set out in full on the face or back of the policy."

Evidence was given, subject to objection, of the practice of some other companies, adopted since the war, under somewhat similar policy conditions. I have not examined into whether the analogy is close or not. Upon consideration, I am of opinion that the statements of these witnesses are irrelevant and inadmissible, and that the issue here must be determined by interpretation of the policy alone, construed in the light of its own circumstances, of course, in so far as they afford any aid.

I entertain no doubt as to the meaning of the term "insurability." The letter of the defendants' solicitors to Mr. Flock and his reply, put in as exhibit 11, in no way affect the question; "proof of insurability," in condition 14, means that the insured, at the time of application for reinstatement, is a proper risk for insurance upon the basis of the original contract, and the condition of the health of the insured is the only matter to which I can think it could apply in this case; and, at all events, it is the only matter to which it did in fact apply, upon the circumstances here. If the policy had excepted the risks incident to warfare, the insured, having become a soldier, would not be eligible for insurance without the consent of the company, and so would lack the quality of "insurability" and the right to reinstatement, but the policy itself determines this point against the defendants.

I give no weight to the argument, somewhat faintly urged, that the evidence of insurability is to be "satisfactory to the company;" the provision is not a contract that the company is to be allowed to be arbitrary or unreasonable. The plaintiff furnished proof of good health by the certificate of the doctor who originally examined him—Dr. Drake says, "This is to certify that I have this day carefully examined the above J. E. Sussex and find him in perfect health and an A No. 1 risk for life insurance as in previous examination on 9th May, 1914"—tendered the overdue

premium with interest at six per cent., and offered to furnish any further proof of insurability required. The defendants did not at the time dispute the sufficiency of the proof or tender, nor since or at the trial claim that the tender or proof was insufficient or defective, if as a matter of contract the plaintiff comes within the provisions of condition 14. The clear-cut issue was and is the interpretation of this condition.

I cannot accede to the argument that by default the policy became null and void—"ceased to exist for any purpose"—as was strenuously urged by Mr. White, for the reason that the contract does not so provide, but plainly provides to the contrary. Payment of the first premium is expressly made a condition precedent to the policy taking effect. It is not so as to other premiums. Condition 5: "If *any subsequent premium* be not paid when due, then this policy shall cease, subject to the values *and privileges* hereinafter described . . . but for any reckoning herein named the time when a premium becomes due shall be the day herein stipulated therefor without grace."

It conduces to clearness to eliminate consideration of the exception as to days of grace, and this consideration should be eliminated, as the plaintiff did not avail himself of this exception; and, if he had, there would be no action.

I have it then that the policy ceased on the 21st March, 1916, "subject to . . . privileges hereinafter described," and "the reckoning" is from the 21st March, and not from the expiry of thirty-one days thereafter. The termination of the policy by failure to pay *any premium*, except the first, is subject to many "privileges," one of the most important of which is the one provided for by condition 14, and the one claimed in this action. It is entirely distinct from the right to a loan under condition 9, or temporary insurance, a paid-up policy, or cash surrender value, provided for by conditions 12 and 13 and Table A.; all providing for the doing of something by the company upon the basis of what the insured has already done—an executed contract *pro tanto* on the part of the insured, and totally excluding the application of condition 14 if the policy has been surrendered or exchanged for a paid-up policy, or a surrender value has been paid. These exceptions, and also if "the extension period has expired," are set out in condition 14. Why should I read into it something that is not there—that the extension period has expired where

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there is no extension period, albeit it might have been prudent or proper for the defendants to have worded this condition to meet such a contingency?

The argument founded upon an extended time insurance for four years and two hundred and eighty-six days, after three yearly regular payments, is fallacious—it is more than that that works against the defendants. If the plaintiff had made three annual payments and failed to pay the fourth, and delayed making application for four years and two hundred and eighty-seven days, "the extended period" would have been exceeded by a day; and, although there would yet be one year and seventy-eight days of the five years, after default, unexpired, he could not claim reinstatement. Why? Because, whether of purpose or by accident, this is provided for—it is then a case where there *is* an extension period and "the extension period has expired." A curious result perhaps—I am not concerned in results—but it is not without compensations, for in such case the plaintiff would have the privilege of conditions 9 and 12, not open to him in the circumstances of this case.

This all emphasises, as I said, that Mr. White's argument is not well supported and does not work out. It may be that the limitation claimed could very properly have been inserted, and I express no opinion as to this, but as a matter of interpretation the question is only: "Is it so nominated in the bond?" This need not necessarily be provided for in express terms. That the condition for reinstatement does contain limitations and exceptions is certainly some evidence that others not mentioned are not excluded from its provisions. Condition 5 and the privileges it secures apply to a default in payment of *any premium* except the first, and, by condition 14, within five years after default in payment of (a?) premium, unless a cash value has been paid for the policy or the extension period has expired, *or* if the policy has not been surrendered, it may be reinstated.

This again *primâ facie* means any premium except the first. Where in this condition or elsewhere is there a provision limiting this plaintiff's right of reinstatement to defaults in respect of the fourth or subsequent annual premiums only? "I cannot find it; 'tis not in the bond." The disjunctive "or" affords another weighty argument against the defendants' contention, but I will not pursue it.

I am of opinion that the plaintiff is entitled to have the policy reinstated. There will be judgment declaring that he is so entitled, and directing and ordering that the defendant company reinstate it upon payment or tender of $80.04, with interest thereon at six per cent. per annum from the 21st March last to the date of the tender already made and delivery of the certificate of Dr. Drake hereinbefore referred to, and for payment of costs by the defendants.

H. S. White, for appellants

E. W. M. Flock, for plaintiff, respondent,

The judgment of the Court was delivered by

MEREDITH, C. J. O.:—Mr. White has argued this case with his usual ability and fairness, and we think that nothing would be gained by further consideration of it. The sole question is as to the meaning of clause 14 of the policy. It provides that: "Within five years after default in payment of premium, unless a cash surrender value has been paid for the policy or the extension period has expired, or if this policy has not been surrendered, it may be reinstated upon evidence of insurability satisfactory to the company and by payment of arrears of premiums with interest at the rate of six per cent. per annum, and by reinstatement of whatever indebtedness to the company existed hereon at the date of default, with interest from that date." Meredith, C.J.O.

The insured failed to make payment of the premium of 1916 upon the due date or within the thirty-one days of grace that were allowed, but upon the 25th April he furnished the appellants with proof that he was in good health, to which proof they made no objection. As Mr. White has told us, he tendered the amount of the premium, and there was no indebtedness upon the policy, and, unless something more is required by the clause, the case is brought within it.

Now Mr. White argues that it would be unreasonable that a man who had been insured for only two years should be in a better position than a man who had been insured for three years, and was entitled to certain benefits under an earlier provision of the policy. That argument does not at all impress me; the language of the clause, apart from any obscurity as to the meaning of the word "insurability," is in plain English.

What does "insurability" mean? Mr. White conceded—at

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all events it is the case—that in any contract of this kind the language used is to be taken most strongly against the insurer. Now the argument is that "insurability" means not only that the insured must have an interest in the life, and that the life is a good life, but also that he shall shew that it is one that should be insured by the company at the rate at which the policy was effected. That seems to me to read into this condition something that is not there.

The provision is that the policy is to be reinstated. What would be done according to Mr. White's statement would be to issue an entirely new policy insuring the respondent at a different and higher rate. If that is what was intended to be provided, the intention should have been clearly expressed. Not only has that not been done, but it seems to us that the clause is susceptible only of the interpretation which the trial Judge has put upon it, and that all that was required to entitle the respondent to have his policy reinstated was to pay or tender the overdue premium with interest and furnish proof that he had an insurable interest in his life and was in good health; and that he has done.

The appeal fails and must be dismissed with costs.

Appeal dismissed.

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REX v. EMERY.

Alberta Supreme Court, Appellate Division, Scott, Stuart, Beck and Walsh, JJ., November 3, 1916.

1. CERTIORARI (§ I A—9)—POWER TO LOOK AT DEPOSITIONS TAKEN BY MAGISTRATE AND CERTIFIED UNDER THE CODE.

The general power of supervision of inferior Courts by *certiorari* process includes the right to look at the depositions taken before the convicting magistrate on a summary trial under Part XVI. of the Criminal Code and authenticated so as to become in effect a part of the record, to ascertain whether there is any evidence to support the conviction; and if there is none to order the conviction to be quashed.

[*R.* v. *Carter* (1916), 28 D.L.R. 606, 26 Can. Cr. Cas. 51, and *R.* v. *Walsh*, 29 N.S.R. 521, not followed; *King* v. *Mahony*, [1910] 2 Irish R. 695, *Reg.* v. *Bolton*, 1 Q.B. 66, and *Colonial Bank* v. *Willan*, L.R. 5 P.C. 417, distinguished.]

2. INDICTMENT, INFORMATION AND COMPLAINT (§ II G—60)—CHARGE OF OFFENCE AS BETWEEN CERTAIN DATES.

An information charging the keeping of a disorderly house between certain dates, the last which was the date of the information, excludes the latter date and, *semble*, also the first date mentioned.

[*Ex parte Wilson*, 14 Can. Cr. Cas. 32, referred to.]

3. COSTS (§ I—12)—AWARDING ON CONVICTION UPON SUMMARY TRIAL.

It is for the magistrate or other official holding a summary trial under Part XVI. of the Code to fix the costs imposed upon a conviction, the tariff of costs provided for summary conviction proceedings under Part XV. being excluded from operation under Part XVI. by virtue of

Code sec. 798; and the Court will not interfere on *certiorari* with the amount awarded if they are fixed within reason and are not shewn to include anything which ought not to have been included.

[See also *Ex parte Cronkhite* (1916), 26 Can. Cr. Cas. 224, 44 N.B.R. 70.]

4. DISORDERLY HOUSE (§ I—15)—OFFENCE OF KEEPING—EVIDENCE.

Evidence that the woman keeping the house and another woman living with her had together offered to have illicit sexual intercourse with two men for a consideration will support a magistrate's conviction against the former for keeping a bawdy house, although there was no other evidence of bad repute.

APPEAL from an order of Ives, J., dismissing a motion for *certiorari* to quash a conviction. Statement.

H. H. Parlee, K.C., for Crown.

J. McK. Cameron, for appellant.

SCOTT, J.:—I agree with Beck, J., in his conclusion that upon *certiorari* a Judge of this Court is entitled to look at the evidence given before the convicting justice in order to ascertain whether it is sufficient to sustain the conviction and that if it is not sufficient the conviction should be quashed. Scott, J.

Reg. v. *Bolton*, 1 Q.B. 66, and *Colonial Bank of Australasia* v. *Willan*, L.R. 5 P.C. 417, which followed it, are relied upon by counsel for the Crown as holding the contrary, but in my opinion the view expressed by Cockburn, C.J., and Mellor and Shee, JJ., in *Ex parte Vaughan*, L.R. 2 Q.B. 114, that *Reg.* v. *Bolton* was not intended to apply to cases where there was no evidence to support the conviction, is the correct view.

Rex v. *Smith*, 8 Term R. 588, and *Rex* v. *Chandler*, 14 East 267, are cases where convictions were quashed by the Court of King's Bench upon that ground. In *Rex* v. *Crisp*, 7 East 389, the Court refused to quash the conviction as the Court was of opinion that there was sufficient evidence to sustain, but Lord Ellenborough plainly intimated in his reasons for judgment that, if it had not been sufficient, the conviction would have been quashed. It is true that the reports of these cases do not shew that the convictions were brought before the Court by *certiorari* but I cannot find that at the time they were decided there was any other way of bringing convictions before the Court. It was not until 20 or 21 Vict. ch. 43 that provision was made for the stating of cases by justices.

In *Re Trepanier*, 12 Can. S.C.R. 111, at 128, Strong, J., expressed the view that Courts in Canada having the powers and jurisdiction of the Court of Queen's Bench in England are not exceeding their jurisdiction in looking at the evidence regularly

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before them to see if there is any evidence to support the conviction, and, in the absence of such evidence, to quash it and that, in doing so, the Courts undoubtedly exercise a well established jurisdiction.

The defendant was charged that she, between February 1st and 25th, 1916, at . . . Ave. E., Calgary, did keep a disorderly house, to wit: a common bawdy-house, contrary to sec. 228 of the Criminal Code, and was convicted of the offence charged.

One of the objections to the conviction is that as the information was laid on February 25, being the last day of the period therein named, the conviction is for an offence committed after the laying of the information.

In my opinion the charge does not include an offence committed either on the 1st or 25th day of February as one committed on either of those dates would not be committed between those dates (see *Reg.* v. *Fisher*, 8 Car. & P. 612, and Cyc., vol. 5, p. 684).

Another objection is that the conviction adjudges the payment of excessive and illegal costs.

I concur in the view expressed by Beck, J., that the costs imposed are not unreasonable or in excess of those authorized to be imposed.

The remaining objection relied upon is that there is not sufficient evidence to sustain the conviction.

The evidence implicating the defendant is set out by Beck, J., in his reasons for judgment, with the exception that while the two men, Jared and Flavo, the defendant and her servant, the white woman, were together in a room the two latter offered to go to bed with them for $15 each.

I cannot accept the conclusion reached by Beck, J., that this evidence is not sufficient to sustain the conviction. I cannot distinguish this case from that of *Rex* v. *James*, 25 Can. Cr. Cas. 23, 25 D.L.R. 476, 9 A.L.R. 66, referred to by him, which is a judgment of this Court. To my mind the evidence in this case is much stronger against the defendant than it was against the defendant in that case. That was a case where one woman only solicited a detective to have connection with her. In this case two women living in the same building, one of them being the owner of the premises, together invited men to come to the premises for the purpose of having illicit intercourse with them

and these offered to have such connection with them for money. The surrounding circumstances in each case are not unlike. It is true that in the *James* case there was evidence that other men were seen late at night being admitted into the tailor shop in the rear of which the defendant had her room but it was not shewn that they were resorting there for the purpose of having illicit intercourse with her.

I would dismiss the appeal.

Scott, J.

WALSH, J., concurred.

Walsh, J.

STUART, J.:—In my opinion both *Reg.* v. *Bolton*, 1 Q.B. 66, and the *Colonial Bank of Australasia* v. *Willan*, L.R. 5 P.C. 417, have been seriously misunderstood.

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It is a fully accepted rule laid down I think by Lord Halsbury in a recent case that no case is authority for anything but what it actually decides. Take the latter case first. There was established by statute in Victoria a Court of Mines. A Judge of that Court had under the authority of the statute made an order winding up a mining company. The Supreme Court of Victoria had brought the order up on a writ of *certiorari* and had quashed it. The petitioning creditors appealed to the Judicial Committee. In delivering the judgment of the Judicial Committee Sir James W. Colville said:—

"Their Lordships understand the final judgment of that Court (The Supreme Court of Victoria which had quashed the order) to state that the Judge of the Court of Mines who made it had acted without jurisdiction and that he had been misled into doing so by the fraud of the petitioning creditors. *The question upon this appeal is whether the materials before the Court justified either conclusion.* And as these two points, want of jurisdiction in the Judge and fraud in the party procuring the order, are essentially distinct it will be well to consider them separately."

Their Lordships then proceeded to deal with both questions and decided that the Judge of the Court of Mines had jurisdiction to make the winding-up order and that there had been no fraud established. At page 446 the judgment says:—

"The order then 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; ordering that which the Judge on proper grounds had power to order; and containing

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an express adjudication upon a fact which though essential to the order the Judge was both competent and bound to decide, namely, 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.* To do this and to quash the order upon a conclusion thus drawn is clearly contrary to the principles established by *Reg.* v. *Bolton*, 1 Q.B. 66, and that class of cases."

I am with much respect quite unable to understand how such a decision can be treated as deciding that upon *certiorari* a Court will not look at the evidence to see if there is any evidence at all to support a conviction by a magistrate for a crime. As a matter of fact the report of the case clearly shews that affidavits were presented to the Supreme Court of Victoria for the purpose of shewing that the debt did not legally exist and the whole question of the existence or non-existence of the debt was threshed out on affidavits before the Supreme Court which ventured to decide upon the strength of them that there really was no debt due and that *therefore* there was no jurisdiction in the Judge of the Court of Mines to make the order winding-up. What the Judicial Committee decided was that that sort of procedure was improper on *certiorari*, that the Judge of the Court of Mines had tried the question whether there was a debt or not and his decision was conclusive. There was no suggestion at all that there was no evidence before the Judge of the Court of Mines of the existence of a debt. On the contrary, as shewn by the judgment of the Judicial Committee, there was clear evidence by affidavit before the Judge of the Court of Mines that the company was indebted. What Mr. Benjamin, counsel for the respondents before the Judicial Committee, argued was this (at p. 433): "No Court of inferior jurisdiction can establish its jurisdiction by proceeding on an assumed fact which is not a fact," and that there was really no debt because the evidence of the affidavits before the Supreme Court shewed that there was none. The Judicial Committee following *Reg.* v. *Bolton*, *supra*, said such a course of inquiry

upon *certiorari* was not permissible but they pointed out, I repeat, that the Judge of the Court of Mines had evidence of the debt before him in the shape of an affidavit.

Reg. v. *Bolton*, 1 Q.B. 66, which was not a conviction for a crime, was a case where the defendant in order to quash an order of two justices that he give up possession of a parish house which he had occupied as a pauper, also filed affidavits setting forth evidence not adduced before the magistrates. Affidavits were filed in answer contradicting these allegations. The actual evidence however given before the magistrates was also returned but in what shape or with what authentication does not appear. Even the Crown, by Sir J. Campbell, A.G., merely took the ground that the case must stand upon the evidence given before the magistrates. He said "if there is a scintilla of evidence on which the justices could proceed the conclusion to which they in their discretion have come is binding." Lord Denman, C.J., said in his judgment:—

"Two points were made in support of the order; the first that the proceedings all being regular on the face of them and disclosing a case within the jurisdiction of the magistrates *the Court could not look at affidavits* for the purpose of impeaching their decision; the second that even if those affidavits were looked at the case would be found to be one of conflicting evidence in which there was much to support the conclusion to which the magistrates had arrived."

It seems clear to me from perusal of the whole judgment that the matter decided was that affidavits adducing new evidence on the merits could not be received. That was really what defendant tried to do. The evidence is set forth in the report and it is clear that there was sufficient evidence for the magistrates to act on. The Court did not really discuss that question at all. What they rejected was the affidavits giving new evidence on the merits, and it was just for this reason that the case was made so much of a precedent to follow in the *Willan* case, where the same thing was attempted. The defendant's counsel did indeed argue that there was not a scintilla of evidence but it is clear I think that that point was disregarded, not because it would not have been good if according to the real fact, but because there was in fact evidence upon which the magistrates were justified

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in acting. The struggle in the case was not over that point at all. It was over the admission of new evidence by affidavits before the Superior Court. I think Cockburn, C.J., in *Ex parte Vaughan*, L.R. 2 Q.B. 114, correctly states the result of *Reg.* v. *Bolton*, 1 Q.B. 66. He said at page 117:—

"It was there decided that where the question was one of fact for the justices and evidence was given on one side and on the other, the decision of the justices was final; and I think it is upon the principle upon which that case was decided that we ought to proceed when called upon to review the decision of justices."

That there was in fact sufficient evidence in *Reg.* v. *Bolton* is admitted by Gibson, J., in the Irish case of *King* v. *Mahony*, [1910] 2 Ir. R. 695, in a judgment where he takes the view that the Court cannot look at the evidence. In the argument in that case Lush, J., is stated to have said in *Osgood* v. *Nelson*, 10 B. & S. 119, 20 L.T. 958, 17 W.R. 895.*

"The decision in *Reg.* v. *Bolton* supposes that evidence was given to the Justices of the Peace which if true would support the charge."

The report referred to is 10 Best and Smith, not available here, and I cannot find the remark in any other report of the case of *Osgood* v. *Nelson*. The other reports do not disclose a *certiorari* case at all.

The case of *King* v. *Mahony*, *supra*, contains perhaps the most exhaustive and enlightening discussion of the matter that is to be found in the reports. The Court there again took what I am satisfied is an erroneous view of the actual decisions in *Reg.* v. *Bolton*, 1 Q.B. 66, and *Colonial Bank of Australasia* v. *Willan*, L.R. 5 P.C. 417. Besides, the whole argument of Lord O'Brien, C.J., is devoted to an attack upon the theory that where there is no evidence to support the conviction there is an absence of jurisdiction. I should have thought, but for the opinion of Palles, C.B., that less argument would have been necessary. But the idea that it does affect jurisdiction seems to have permeated a great deal of the discussion of the matter. There is no doubt in my mind that the idea is a completely erroneous one.

**Osgood* v. *Nelson*, 10 B. & S. 119, was affirmed on appeal, 41 L.J.Q.B. 329, L.R. 5 H.L. 636.

Lord O'Brien deals as follows with *Rex* v. *Smith*, apparently admitting, as I think must be the case, that the matter had been brought up on *certiorari*. He said: "No doubt in *R.* v. *Smith*, 8 Term. R. 588, a conviction was quashed because the evidence did not support a material part of the information. There was not one word said as to *jurisdiction* or the want of it either upon the argument or in Lord Kenyon's judgment. The evidence was embodied in the conviction; and the Court looking down at the conviction and seeing the evidence and perceiving that the evidence which they saw on the face of the conviction did not warrant that conviction detected *error* on the face of the proceedings and accordingly quashed the conviction not for want of jurisdiction on the part of the magistrate, to which the members of the Court made no reference whatever, but because the evidence which they saw did not warrant a conviction. That case was simply a miscarriage within the jurisdiction because there was error on the face of the proceedings, the evidence being set out and not warranting conviction."

One should compare with this the words of Lord Cairns in *Overseers of the Poor of Walsall* v. *London and N.W. R. Co.*, 4 App. Cas. 30 at 40. This case suggested the following passage in Lord O'Brien's judgment:—

"But to my mind it is plain that *independently of the question of jurisdiction*, convictions and orders were quashed under the wide supervising power of the Queen's Bench when error appeared on the face of the conviction or order by reason of the evidence that appeared there not warranting the conclusion arrived at. Proceeding by *certiorari* is not at all exclusively connected with cases of jurisdiction or its absence. It is simply a method of *bringing the proceedings* of inferior Courts into the Queen's Bench, and when the evidence was incorporated with the conviction they were of the nature of speaking orders that might be quashed by the Queen's Bench if there was no evidence to support the averments in the information."

The extent to which the question of jurisdiction or no jurisdiction has become involved in, and has, I think, obscured the matter can be seen from the two cases cited by Lord Denman in *Reg.* v. *Bolton*, and which Lord O'Brien in *King* v. *Mahony*, stated to be the cases upon which *Reg.* v. *Bolton* rested. These are *Brittain* v. *Kinnaird*, 1 B. & B. 432, and *Cave* v. *Mountain*, 1

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Man. & G. 257. The citations made by Lord Denman from those cases both refer to the question of jurisdiction.

At p. 717 Lord O'Brien said:—

"The conviction or order here does not expressly nor in my opinion impliedly incorporate, embody, the evidence; nor was there any obligation on the magistrate to embody it in his order."

That this circumstance was of controlling importance in the decision of *King* v. *Mahony*, [1910] 2 Irish R. 695, is, I think, clear from a careful perusal of the elaborate judgments delivered. Lord O'Brien quotes Lord Campbell in *Geswood's* case, 2 T.R. 285, as follows:—

"It was always common in Acts to deprive the person convicted of the opportunity of cavilling at the evidence by giving a form of conviction which did not require it to be set out."

And at p. 718 Lord O'Brien goes on to say:—

"What is the record here? Of what does it consist? Of a statement of the charge which *ex concessis, ex hypothesi*, is adequate and correct; of the adjudication of guilt and of the imposition of the penalty warranted by law. There is no error on the face of the record."

Palles, C.B., took the view that absence of any evidence to support the conviction constituted absence of jurisdiction but although there was admittedly such absence of evidence he sustained the conviction on the ground stated in the following words (p. 726):—

"I am therefore of opinion that where a statute authorizes a form of conviction which does not state or refer to the evidence upon which it is founded and does not impose an obligation upon the justice to record it such evidence is not examinable upon *certiorari;* that is the present case."

Gibson, J., delivered a very long and exhaustive judgment. He deals with the history of the matter and speaks, at p. 732, of the Court only examining the evidence if it was set out in the conviction and cites *Rex* v. *Smith*, 8 Term R. 588. At page 733 he said: "The reason the Court required the evidence to be stated was *by making it part of the record*, to bring it within the cognizance of the Court and enable the Court if the evidence was insufficient to quash the conviction as manifestly erroneous." See for an example of this, *Rex* v. *Killet*, 4 Barr. 2063.

Gibson, J., speaks of the struggle between the Parliament

and the Courts, the former trying to keep the Courts away from examining evidence, the latter ingeniously trying to discover defects because of their dislike of inferior jurisdictions. He refers to the prescribing of general forms of conviction without evidence as being found to be at last a successful remedy and he says:—

"There has been no case in England where such a form complying with the statutory requirements has been quashed for error lying behind it whether insufficiency of evidence or otherwise."

It is quite clear from these observations and from what Gibson, J., says on pages 736 and 737 that there was in *King* v. *Mahony*, [1910] 2 Irish R. 695, no statutory requirement that the evidence should either be set forth in the conviction or certified as a matter of record at all. He speaks of the Petty Sessions Act merely requiring a note of the evidence to be taken *if asked for*, and says: "The note cannot be incorporated in the record. It is not signed by the witness . . . it could be contradicted or corrected, which evidence expressly made part of the record under the old system could not have been, . . . Such note differs altogether from the evidence set out in such a case as *R.* v. *Smith*, 8 Term R. 588, where the conviction was signed and sealed by the Justices who collectively authenticated the evidence as part of the record."

The actual conviction in *King* v. *Mahony*, [1910] 2 Irish R. 695, was not under the Petty Sessions Act but under the Dublin Act, 5 & 6 Vict. ch. 24, which simply provides a general form of conviction and contains not the slightest reference to depositions or to the manner of taking them down or certifying them. Dodd, J., at page 750, said: "The principle I understand to be this—where the legislature prescribes a form of conviction which does not require the evidence to be stated, whether the statute takes away or does not take away *certiorari, and where there is nothing in the statutes which regulates the procedure, either by expressed provision or by necessary intendment to make depositions or a note of evidence part of the record, this Court cannot on certiorari inquire* whether the facts proved warranted the conviction."

He goes on, on page 751, to observe that a mere note, under the Petty Sessions Act, of the evidence to be made only on request, is not according to his view, though the question was not fully

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argued, by necessary intendment made part of the record so as to be examinable by the Court on *certiorari*.

Now, as I have said, I think *King* v. *Mahony*, [1910] 2 Irish R. 695, is the fullest and ablest discussion of the question involved here that I have been able to find. Nevertheless, I think a mistaken view both of *Reg.* v. *Bolton*, 1 Q.B. 66, and *Colonial Bank of Australasia* v. *Willan*, L.R. 5 P.C. 417, was there taken.

At the same time I think it must be obvious from the quotations I have made and from others scattered throughout the judgments that the Court would have reached a completely different conc usion if there had been such statutory requirements in regard to the depositions and their authentication as would amount to their being made a part of the record. Very clearly the Court there held the view that where the evidence is part of the record and there is a manifest absence of evidence to support the conviction then the Court will quash the conviction because in such a case there is error on the face of the record.

In my view this furnishes the real solution of this much debated question. It is easy to understand how the Court would refuse to take affidavits shewing what the evidence was or adducing new evidence on the merits and would refuse to look at evidence not properly authenticated as part of the record. But where the evidence is just as well authenticated as if it had been inserted in the conviction itself and is by the force of the statute clearly made a part of the record I can see no reason whatever why the Court should not treat total absence of evidence as an error on the face of the record as was done, according to Lord O'Brien, in *Rex* v. *Smith*, 8 Term R. 588.

Now, what is the position in regard to the authentication of the evidence under our statute, *i.e.* the Criminal Code? We begin with secs. 682 and 683 which prescribed very carefully how depositions are to be taken and authenticated by the Justice at a preliminary enquiry. If taken in longhand they must be signed by the witness and the justice after being read over to the witness. If taken in shorthand the stenographer must be under oath, the witness need not sign but the justice must sign and the stenographer must verify by affidavit or by certificate. Then as to summary convictions, sec. 721, sub-sec. 3, says: "For the purpose of such enquiry the justice shall take the evidence of witnesses both for the complainant and accused in the manner

provided by Part XIV. in the case of preliminary inquiry;" and though sub-sec. 5 dispenses with the signature by witnesses it does not dispense with the signature of the justice or with the stenographer's affidavit or certificate.

In my opinion, so far as summary convictions are concerned, these provisions would of themselves be quite sufficient to constitute the evidence a portion of the record. We can have now no question of recounting the evidence by hearsay by affidavit or by adding new evidence by affidavit such as was attempted both in *Reg.* v. *Bolton* and in *Willan's* case.

But there is more than this; sec. 1124 in my opinion settles the matter beyond doubt. That section deals with *certiorari* and provides "that no conviction or order made by any justice and no warrant for enforcing the same shall on being removed by *certiorari* be held invalid for any irregularity, informality or insufficiency therein, if the Court or Judge before which or whom the question is raised, *upon perusal of the depositions*, is satisfied that an offence of the nature described in the conviction, order or warrant has been committed over which such justice has jurisdiction."

I am unable to understand why the Court is to look at depositions *to support* a conviction if they are not to be treated as part of the record and cannot be looked at to impeach it. The inevitable inference from sec. 1124 is to my mind that the depositions are by necessary intendment made part of the record before the Court just as fully as they were in *Rex* v. *Smith*, 8 Term R. 588.

That there should be a distinction between having the evidence set out right in the conviction and set out and very formally verified by the justice *along with* the conviction is something which I am unable to understand and for which the cases furnish no warrant as far as I can see. Our statutes are very different from the various statutes in force in England at different periods when the long series of cases, one pointing one way and another pointing another, were decided.

The very rules of our Court, which the Criminal Code authorizes us to make, insist on the evidence being sent up to us.

For these reasons I think that in summary convictions the depositions are part of the record returned and that on the principle of *Rex* v. *Smith*, and according also to the view of all the Judges in *Rex* v. *Mahony*, they can in such a case be looked at

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on *certiorari* to see if there is any evidence to support the conviction and that if there is not this Court exercising the power of the Court of Queen's Bench in England will quash the conviction for manifest error on the face of the record.

The case before us was however a case, not of summary conviction, but of a summary trial of an indictable offence under Part XVI. of the Code. The sections above recited in regard to the manner of taking depositions and authenticating the same are not repeated or incorporated by reference in Part XVI. There is to be found in that Part no specific direction in so many words as to the taking of depositions. But I think the situation is the same in effect. Sec. 793 directs the magistrate to transmit the conviction, or a duplicate of the certificate of dismissal, with the written charge, the *depositions* of the witnesses 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 of any Court discharging the functions of a Court of general or quarter sessions of the peace.

The depositions are thus to be kept "among the records" of the Court referred to. It is to the proper officer of that Court indeed that the *certiorari*, or, according to our practice, the notice in lieu thereof, should be directed upon the assumption that the magistrate has obeyed this section.

A summary trial before a police magistrate of an indictable offence it is to be remembered stands in much the same position as a trial before the Supreme Court. A reserved case may be asked for under sections 1013-1019 of the Code. Sec. 1017 states that the evidence must be sent to the Court of Appeal if required. This also I think adds strength to the view that the evidence before the magistrate is to be properly authenticated and made part of the record. True, this only applies strictly to trials under sec. 777 and not to a trial under sec. 773. But I think the general view I present is strengthened by the circumstance I refer to, particularly when the jurisdiction of the magistrate is absolute and does not depend upon the consent of the accused though the offence is itself also indictable.

It seems clear, then, that the depositions are considered by necessary intendment as part of the record. And the argument

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from sec. 1124 again applies. In the result I think under our statutes we may on *certiorari* look at the evidence to see if there is any evidence which would support the conviction.

In *Rex* v. *Thornton*, 26 Can. Cr. Cas. 120, 30 D.L.R. 441, 9 A.L.R. 163, we took a wide view of the powers of the Court of Queen's Bench when these were to be exercised in favour of the Crown. I think these powers are not to be circumscribed where it would operate in favor of an accused.

With the most profound respect for the opinion of the Chief Justice in *Rex* v. *Carter*, 26 Can. Cr. Cas. 51, 28 D.L.R. 606, and of the other Judges who followed that decision, I think *Reg.* v. *Bolton* and the *Willan* case are not decisive of the point. There is no doubt that the interpretation there put upon those cases was also adopted by the Supreme Court of Nova Scotia in *Reg.* v. *Walsh*, 29 N.S.R. 521, and by the Irish Court in *Rex* v. *Mahony*, [1910] 2 Irish R. 695. This shews at any rate that there is certainly a goodly company of Judges who interpret the two cases differently from the interpretation I adopt. But I can only give my opinion as I have formed it and as this leads to the result that the *Willans* case is not in point I do not feel bound to apply it here.

Upon the other matters raised on the appeal I agree with Beck, J., except upon the merits.

I am unable to distinguish this case from *Rex* v. *James*, 25 D.L.R. 476, 25 Can. Cr. Cas. 23, 9 A.L.R. 66. There this Court held that there was evidence from which the magistrate could reasonably infer that the accused was keeping a bawdy house. While I think that case went perhaps as far as we ought to go, to say the least, and certainly much farther than the Court of Appeal went in *Rex* v. *Sands*, 25 Can. Cr. Cas. 116, 120, 28 D.L.R. 375, 25 Man. L.R. 690, it seems to me that we cannot consistently now say that there was not sufficient evidence in this case. I therefore think the appeal should be dismissed.

BECK, J. (dissenting):—The appellant was convicted on the 29th of February, 1916, for that she "between the 1st and 25th days of February, 1916" at etc., did keep a disorderly house, to wit: a common bawdy house, contrary to sec. 228 of the Criminal Code.

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The information was laid on the 25th of February, 1916. The conviction is attacked on these grounds:—

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(1) That the conviction is for an offence alleged to have been committed subsequently to the laying of the information.

(2) That it adjudges the payment of excessive and illegal costs.

(3) That there was no evidence before the magistrate of the offence charged or of any offence.

(1) The first ground was based on the contention that the expression "between the 1st and the 25th days of February" included both the dates named and, therefore, the day on which the information was laid; and that the presumption was that the proceedings were commenced at the beginning of that day. Putting aside the question of the presumption in such a case I think the proper interpretation of the expression, at all events having regard to the fact that the information was laid on the 25th, is that the last mentioned day, at least, must be excluded. It was so held, I think rightly, in *Ex parte Wilson* (1908), 14 Can. Cr. Cas. 32, by the Supreme Court of New Brunswick *en banc*.

(2) As to the costs:—

Sec. 228 makes the offence indictable. The conviction, therefore, was under the provisions of the Code relating to the Summary trial of indictable offences, Part XVI., and see that Part sec. 773 (*f*). Sec. 781 authorizes the imposition of costs in addition to fine or imprisonment or both.

Sec. 798 excludes the provisions of Part XV. (Summary trials of non-indictable offences) and therefore the tariff of costs provided by the latter Part.

Sec. 791 says that every conviction under this Part (XVI) shall have the same effect as a conviction upon indictment for the same offence; but reference to this section is unnecessary because sec. 1044 expressly provides that not only the Court on the trial of an indictable offence but a magistrate, under Part XVI., may order the payment of "costs or expenses incurred in and about the prosecution and conviction" and may include therein "such moderate allowance for loss of time as he ascertains to be reasonable."

There is no tariff. It is for the Court, Judge or magistrate to fix the costs. If they are so fixed within reason and are not shewn to include anything which ought not to have been included, I think the Judge or the Court cannot interfere on *certiorari*. No such ground exists in the present case.

(3) The question of there being evidence justifying the conviction.

This necessitates a consideration of the question whether on *certiorari* the Judge of the Court is entitled to look at the evidence to see whether it is sufficient to sustain the conviction or order, a question upon which there exists a divergence of opinion among the members of the Court.

I understand that in the present case Mr. Justice Ives held in the negative but we have been furnished with no reasons for his decision. The Chief Justice, however, has considered the question with great care in a reported decision of *Rex* v. *Carter* (1916), 26 Can. Cr. Cas. 51, 9 A.L.R. 481, 10 W.W.R. 602, and has also decided the question in the negative.

In the light of the decision of the Chief Justice and of the argument in the present case I have given the question very careful consideration and the conclusions I have come to are as follows: (1) The former Court of King's Bench, in the exercise of its inherent jurisdiction to supervise the proceedings of all tribunals of inferior jurisdiction, could and did—and this Court, as possessed of the like jurisdiction, can and should—unless the right to *certiorari* be taken away by statute, examine the evidence to ascertain, not whether the inferior tribunal had reached the proper conclusion on evidence which pointed both ways, but whether there was any evidence upon which the tribunal could properly find as it did. (2) Where *certiorari* has been taken away by statute the jurisdiction of the Court to consider the evidence even in this limited point of view is taken away.

It seems to me to be clear that the decision of the Judicial Committee of the Privy Council in *Colonial Bank of Australasia* v. *Wilan* (1874), L.R. 5 P.C. 417; 43 L.J.P.C. 39, distinctly recognizes this distinction.

In that case the judgment, after expressly stating that the right to *certiorari* had been expressly taken away, proceeds:—

"It is, however, scarcely necessary to observe that the effect of this is not absolutely to deprive the Supreme Court of its power to give a writ of *certiorari*, but to control and limit its action on such writ.

"There are numerous cases in the books which establish that, notwithstanding the privative clause in a statute, the Court of Queen's Bench will grant a *certiorari;* but some of those authori-

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ties establish, and none are inconsistent with, the proposition that, *in any such case*, that Court will not quash the order removed except upon the ground, either of a manifest defect of jurisdiction in the tribunal that made it or of manifest fraud in the party procuring it."

Then, having stated that the Court below had quashed the order on the two grounds (1) that the inferior tribunal had acted without jurisdiction, and (2) that it had been misled into making the order by fraud, the judgment proceeds:—

"In order to determine the first (point) it is necessary to have a clear apprehension of what is meant by the term 'want of jurisdiction'. There must of course be certain conditions on which the right of every tribunal of limited jurisdiction to exercise that jurisdiction depends. But these conditions may be founded either on the character and constitution of the tribunal, or upon the nature of the subject matter of the enquiry, or upon certain proceedings, which have been made essential preliminaries to the enquiry, or upon facts, or a fact to be adjudicated upon in the course of the enquiry. It is obvious that conditions of the last differ from those of the three other cases. Objections founded upon the personal incompetency of the Judge, or on the nature of the subject matter or on the absence of some essential preliminary, must obviously, in most cases, depend upon matters which, whether apparent on the face of the proceedings or brought before the Superior Court by affidavit, are extrinsic to the adjudication impeached. But an objection that the Judge has erroneously found a fact which, though essential to the validity of his order, he was competent to try, assumes that, having general jurisdiction over the subject matter he properly entered upon the enquiry, but miscarried in the course of it. . . .

"Accordingly the authorities of which *Reg* v. *Bolton*, 1 Q.B. 66, and *Rex* v. *St. Olave*, 8 E. & B. 528, may be taken as examples to establish that an adjudication by a Judge having jurisdiction over the subject matter is, if no defects appear on the ace of it, to be taken as conclusive of the facts stated therein; and that the Court of Queen's Bench will not on *certiorari* quash such an adjudication on the ground that such fact, however essential, has been erroneously found . . .

"There is a third class of cases, in which the Judge of the inferior Court, having legitimately commenced the enquiry, is

met by some fact which, if established, would oust his jurisdiction and place the subject matter of the enquiry beyond it. . . .

". . . The cases shew that the decision of the inferior Court on such a point is examinable either on formal proceedings in prohibition as in *Thompson* v. *Ingham*, 14 Q.B. 710, or in an action of trespass as in *Pease* v. *Clayton*, 3 B. & S. 620, or in *certiorari* as in *Reg.* v. *Stimpson*, 4 B. & S. 301. Whether the Court in the latter case would have exercised its summary jurisdiction by quashing the order if there had been evidence on which the magistrates might have reasonably concluded that the question of title was not raised *bonâ fide* may be doubtful."

The case from which I have quoted was one in which it was contended that the inferior Court improperly found the fact that there was a debt owing by the company to the petitioner. The Judicial Committee called attention to the evidence of the debt and then proceeded:—

"Nor can it be said that there was *no* evidence to support the 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 creditor's debt, and that upon evidence which was not before the inferior Court."

The Committee, it seems clear enough, went no further than to decide that there being some evidence on which the inferior Court could properly decide the question the Superior Court would not retry the question either on the same evidence or with the help of additional evidence; but the Committee at the same time seems to have purposely expressed itself so as to exclude from consideration the case of there being no evidence on which this particular kind of a tribunal dealing with the particular kind of an application could reasonably have found the existence of the debt.

Reg. v. *Bolton* (1841), 1 Q.B. 66, 4 P. & D. 679, 5 Jur. 1154, which is cited with approval in the *Colonial Bank* v. *Willan*, was a case of an application for a *certiorari*. The evidence was in fact discussed. Counsel for the Crown went no further in their argument on this point than to say: "The same strictness will be observed in this respect as on a motion to enter a nonsuit or

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to set aside a verdict as against evidence. . . . The depositions are set out; and if there was a scintilla of evidence on which the justices could proceed, the conclusion to which they, in their discretion, have come, is binding. 'The magistrate' who hears an information 'is the sole judge of the weight of the evidence;' *per* Lord Kenyon in *Rex* v. *J. Smith*, 8 T.R. 588. And in *Rex* v. *Reason*, 6 T.R. 375, when justices had dismissed an information, but on return to *certiorari*, stated evidence which appeared sufficient to convict, the Court said that the evidence given was entirely and exclusively for the consideration of the justices below, who were placed in the situation of a jury; and as they had asquitted the defendant, this Court could not substitute themselves in the place of the justices acting as jurymen, and convict him; that they could not judge of the credit due to the witnesses whom they did not hear examined. That they could only look to the form of the conviction and *see that the party, if convicted, had been convicted by legal evidence.*

Reg. v. *Bolton* had been approved in *Ex parte Vaughan* (1866), L.R. 2 Q.B. 114; and it was there interpreted:—

Cockburn, C.J., said: "Where a fact is to be proved which is of the very essence of the inquiry and there is evidence before the justices *on the one side and the other*, the Court will not, although they may think that upon the evidence the justices have come to a wrong conclusion, interfere to review their decision. Where the question is a material element in the consideration of the matter they have to determine, and they, exercising their judgment as judges *of fact*, have decided it *on a conflict of evidence*, it is contrary to our principle and practice to interfere. This is consistent with the judgment of the Court in the case of *Reg.* v. *Bolton*. It was there decided that, *where the question was one of fact* for the justices, and evidence was given on one side and the other, the decision of the justices was final."

Mellor, J., was of the same opinion. "There was evidence on which the Justices might come to a conclusion in the affirmative. I think we cannot interfere because the evidence preponderated on one side."

Shee, J., said: "I cannot distinguish this case from *Reg.* v. *Bolton*, in which it was decided, under this statute, that if there was evidence before the justices on which they might arrive at the

conclusion that a house was a parish house, the Court ought not, and would not, interfere with their decision although it might be wholly unsatisfactory. *If there was no evidence at all* upon which the justices could adjudicate, then they would be acting improperly."

Lush, J., was of the same opinion. He said: "The case is within the principle of *Reg.* v. *Bolton*, and quotes from the judgment in that case the words; "But in the course of the enquiry evidence being offered *for and against the charge*, etc."

Lovesay v. *Stallard* (1874), 30 L.T. 792, 38 J.P. 391, was a stated case. *Reg.* v. *Bolton* was discussed but no suggestion was made that that decision was inapplicable because that was a decision on *certiorari*.

Lord Coleridge, C.J., said: "The question of jurisdiction depends on the finding of fact and the finding of the fact depends on the evidence; and although the consideration of the *weight of evidence* is a question for the justices, yet that of the existence of evidence is for the Court. . . .

"I have already explained from the case of *Reg.* v. *Bolton*, the two principles by which the Court must be guided in respect of the jurisdiction of magistrates being dependant on the facts found by them. They are there admirably stated and there can be no question that those principles are indisputable.

"It is also indisputable that under certain circumstances the Court may inquire into facts with reference to jurisdiction."

Brett, J., said: "Whether there was any evidence is a question of law and is for us to decide."

Grove, J., was of the same opinion.

The following are a few of the older cases in which *certiorari* not having been taken away the Court considered the evidence:

Rex v. *Bass* (1753), 5 T.R. 251. The Court refused a *certiorari* after considering the evidence and coming to the conclusion that there was evidence to support the conviction.

Rex v. *Liston* (1793), 5 T.R. 338, was a similar case.

Rex v. *Glossop* (1821), 4 B. & Ald. 616. Abbott, C.J., "It is sufficient to say that it cannot prevail unless the evidence stated on the face of the conviction be such that no reasonable person could draw the conclusion that the defendant committed the offence charged."

Ex parte Ransley (1823), 3 Dowl & R. 572. The conviction was

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quashed, the Court, Abbott, C.J., and Bayley, J., holding that the evidence was not sufficient to support it.

It is important to distinguish between cases in which the decision of an inferior Court is attacked directly as on *certiorari* and in which it is attacked collaterally, *e.g.*, where a conviction is set up as a defence and it is sought to shew by reply that the conviction was void; in the latter case the principle is that if no defects appear on the face of the conviction and if the Magistrates had jurisdiction over the subject matter the conviction is conclusive evidence of the facts stated on it, until it is reversed or quashed. *Brittain* v. *Kinnaird* (1819), 1 Brod. & B. 432, is an instance of the latter class of case.

Paley on Convictions, 8th ed., p. 155, says: "The evidence on both sides was required to be specially stated in the conviction by 3 Geo. IV., ch. 23 . . . The general form of conviction and order" (now provided) "omits all statement of the evidence and at once proceeds to the adjudication. The Court, therefore, now can form a judgment upon the evidence only when the facts are brought before it by affidavit or in a case stated for its opinion."

The conclusion in Paley on Convictions, 8th ed., p. 155, may perhaps be correct under the English practice but it can hardly be so under the practice in this jurisdiction which requires the magistrate to return the evidence as well as the conviction, Rule 827.

Even under the older practice a mandamus lay to compel Justices to set out the evidence. *In re Rix*, 4 Dowl. & R. 352; *Rex* v. *Warnford*, 5 Dowl. & R. 489; *Rex* v. *Wilson* (1834), 1 Ad. & El. 627; 3 N. & M., 753, 3 L.J.M.C. 96.

In no case that I know of is the right of *certiorari* taken away in the case of any offence constituted or declared to be an offence by the Criminal Code.

In the present case for the reasons I have given I think it is open to this Court to consider the evidence for the purpose of deciding whether there was evidence which justified a conviction.

On a consideration of the evidence I am of opinion that it is insufficient to support the conviction. [The learned Judge here referred to the evidence.]

There was no evidence whatever of the ill repute either of the store or of the house nor of either of the women, nor of any act of prostitution ever having been done in either place.

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Taking the evidence for the prosecution at its face value, as I must for present purposes, it does not in my opinion shew more than that the white woman (Wells) who it appears was an employee of the colored woman (Emery) and as such attended to the store throughout the day agreed to prostitute herself after the store closed on one occasion with one particular person; that the colored woman (Emery) was willing to do the same; that each know the other's mind and took some steps towards carrying out the intention of themselves and of each other. There was nothing in the words of either of the women which, as in *Rex* v. *James*, can be taken as a confession that they or either of them were habitual prostitutes or that the store or the house was used for that purpose.

One act of illicit connection does not constitute a woman a prostitute. Several such acts with the same man or even permanently living with him in fornication or adultery does not constitute the woman a prostitute. Prostitution means promiscuous sexual intercourse. *Rex* v. *Cardell*, 19 D.L.R. 411, 7 A.L.R. 404, 23 Can. Cr. Cas. 271.

I think that the word retains the same meaning in sec. 225 of the Code (defining a bawdy house) as it now stands notwithstanding a recent amendment.

Having regard to the proper legal interpretation of words and a long line of decisions of which *Rex* v. *Sands*, No. 2, 28 D.L.R. 375, 25 Can. Cr. Cas. 120, 25 Man. L.R. 690, is an example, I think, as I have said, the evidence in this case was insufficient to justify a conviction. I would therefore on this ground quash the conviction. *Appeal dismissed, Beck, J., dissenting.*

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Quebec Court of Review, Fortin, Guerin, and Archer, JJ. March 30, 1916.

AUTOMOBILES (§ III A—160)—LIABILITY OF SELLER—STRUCTURAL DEFECTS.

An automobile manufacturer and his agent are liable for an accident resulting from latent structural defect of a car sold by them and guaranteed to be in perfect order when delivered; the liability is not only contractual, but also delictual.

APPEAL by defendant from the judgment of Hutchinson, J., in favour of plaintiff, in an action to recover for death caused by the breakdown of an automobile. Affirmed.

Statement.

Plaintiff, as tutrix to her minor children, brought suit for damages resulting from the death of their father in September,

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1912, in a motor car accident due to the breaking of the left wheel of the motor car, which was built, it was alleged, of rotten and weak wood, and also due to the bad operation of the motor and brakes.

This car had been purchased by J. P. Pothier, the deceased, from the defendant, the general agent in Montreal of the Jackson Car Co.

Defendant contested the action, alleging that at the time of the accident, Pothier was driving his car at an excessive speed in a dangerous road. The Superior Court for the District of St. Francis, Hutchinson, J., on February 2, 1915, maintained the action awarding $2,500 damages.

Desbois & Delage, for defendant, appellant; *J. Nicol*, K.C., for plaintiff, respondent.

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ARCHER, J.:—The accident is due to defective construction of the left wheel of the motor car. Is the defendant liable?

Defendant is general agent at Montreal of the Jackson Car Co., of Jackson, Michigan. In July, 1912, the Jackson car was extensively advertised in catalogues. On July 12, defendant found a buyer in the person of J. P. Pothier, the husband of the plaintiff herein. The contract contained the following guarantee clause:—

All goods under this agreement are guaranteed by the manufacturer as follows: The manufacturer guarantees all goods supplied by him during 90 days after the date of their shipment as evidenced by the invoice covering all goods; this guarantee shall consist in supplying to the factory all parts which, under normal or ordinary usage, appear defective either in material or workmanship.

If circumstances do not allow of the work being performed at the factory, this guarantee shall be restricted to the shipment without charge, saving carriage, to the buyer of all parts deemed necessary to replace those which the manufacturer has acknowledged to be defective.

The manufacturer, however, shall accept no responsibility in regard to any motor cars whenever these have been repaired elsewhere, than in his own factory. It is further understood that the manufacturer assumes no warranty whatsoever as regards the tires. The manufacturer is not responsible to any buyer of his goods for any undertaking or guarantee made by the vendor other than that stipulated. The manufacturer does not assume any other guarantee than that mentioned herein, but desires and expects clients to make a complete examination of the goods before buying.

This car is guaranteed to have been delivered at Sherbrooke in perfect order.

On July 22, delivery of the motor car was made at Sherbrooke. Pothier signed a receipt wherein he declared he was satisfied with the motor car, as delivered, with, however, certain restrictions;

thus it was declared on the receipt that the rear left wheel of the motor car was to be replaced as it did not belong to the automobile in question, but had been placed there in error. In August this wheel was replaced by a new one.

In regard to this new wheel, Pothier wrote to the defendant, amongst other things:—

Now the new wheel which you sent me makes exactly the same kind of noise as the old one when I got it.

Nothing was done to the wheel, and on September 13 the accident occurred. Both parties rely on arts. 1527 and 1528 C.C.

The defendant contends that he was ignorant of the defects, and that he cannot be held liable for the damages claimed.

Pothier (Sale, No. 213), says: There is one case where the vendor, even though he was in absolute ignorance of the defect of the thing sold, is nevertheless obliged to the reparation of the damage which this defect has caused to the buyer: this is the case where the vendor is a workman or a merchant who sells the handicraft of his trade or goods of the business which he carries on. This workman or this merchant is obliged to compensate the buyer for all damages suffered by him as a result of the defect in the thing sold whilst using it for its proper purpose, even though this merchant or workman were ignorant of the defect.

The doctrine of Pothier has been followed by Troplong (Sale 574), and Duvergier (vol. 1, No. 412). The Court of Appeal in *Wilson* v. *Vanchestein*, [1893] 6 Q.B. 217, held that manufacturers and merchants are, according to the terms of art. 1527, C.C., legally presumed to know the latent defects of the things sold by them and are liable for all damages suffered by the buyer.

Sirey (1873-2-179), says that the gunsmith who sells a defective weapon is responsible for the results of the explosion due to the defects of this weapon, without it being necessary to prove his knowledge of the defect, and he refers to arts. 1322 and 1641 *et seq.* of the Code Napoleon. At the bottom of note 3 under this last decision the following statement is made: "The merchant or workman who sells goods of his trade is presumed to know the defects of these things."

In *Pernet* v. *Clement & Monnier* (Sirey, 1889, 1st part, p. 271), the Court of Cassation held:—

A bicycle manufacturer and his agent who sold the vehicle are responsible for the results of the accident suffered by the buyer who falls from the machine, when the accident is due to the breaking of the direction tube, which was of exceptional weakness where the break occurred.

In a note at the foot of this decision it is further stated again:—

Defective construction of a steamship boiler arising from the absence of

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stays, and from lack of proper thickness of the sheet iron constitutes on the part of the builder who in selling the ship left the buyer in ignorance of this lack of thickness a fault and renders the builder responsible towards the buyer by virtue of art. 1382 C.C. of the results of an explosion due to this defective construction, and this quite independently of the warranty stipulated in the contract of sale.

The trial Judge also quoted the following authorities: Gazette des tribunaux—2e semestre 1900, p. 418—Pandectes Françaises, Vo. *Vices redhibitoires*, No. 278; Baudry-Lacantinerie, Vente, vol. 17, p. 37; Guillouard, Vente et Echange, sec. 1 de la Vente, p. 477.

There is no doubt but that if the motor car had been sold directly by the Jackson Company to Pothier, the company would be liable in damages. I am of opinion that as a general rule the automobile merchant must be put on the same footing as the builder or manufacturer.

In the present case, the vendor, although the sale was made by him, is not even in the position of an ordinary vendor. As stated by him in his deposition, he is the agent of the company. He gives demonstrations in order to shew to clients the superiority of the motor car in question. He must, says the defendant, make necessary tests before delivering a motor car in order to verify whether it is in good order, etc. The tests which the defendant makes are generally sufficiently thorough to allow him to verify whether the wheels are in good or bad order.

And it is because he is able to ascertain the quality of the materials entering into the construction of these automobiles that the defendant is able to give a guarantee, as he did in the present case, to the effect that the car was in perfect order.

Although he gave this guarantee it does not appear to me that he made the necessary tests justifying his giving such a guarantee.

American authorities give us the meaning of the word "agency" as follows (Law of Automobile, Berry, No. 231, p. 215):—

Generally an "agency," with the meaning of the automobile trade, consists in giving to the agent the right to purchase from the manufacturer machines at a discount from the list price, and to retail them to customers within specified territory at the full list price. In other words, no commission as such, is paid to an agent on the sale of an automobile but he has the exclusive right to certain territory and purchases on his own account at a discount from the retail or list price.

Huddy, on Automobiles, sec. 328, p. 351:—

Legally speaking, it is said "an agency," within the meaning of the automobile trade, consists in giving to the agent exclusive right to purchase for

cash from the manufacturer machines at a discount from the list price, and to retail them to customers within specified territory at the full list price. In other words, no commission, as such, is paid to an agent on the sale of a machine, but he has the exclusive right to certain territory and purchases on his own account for cash at an agreed upon discount from the retail list price.

I am of opinion that if there could be any doubt as to the responsibility of a general vendor, no such doubt could exist in the case of the merchant who is agent of the motor car factory, and who, as in the present case, must have special knowledge of the machines which he sells.

In the present case, not only is there a contractual responsibility; there is also delictual responsibility.

Certain authors contend that arts. 1382 and 1383 Code Napoleon, which correspond to arts. 1053 *et seq.* of our Civil Code, only deal with delictual responsibility and find no application where faults arise in the execution of obligations resulting from contracts or quasi contracts.

Other authors are of opinion that the existence of a contract does not exclude the responsibility that may result from a *quasi-delict*. (The trial Judge referred to Sirey, Annotated Code, arts. 1382 and 1383, Nos. 1 *et seq.*; Pandectes Françaises, vo. *Responsabilité Civile*, Nos. 68, 69 *et seq.*)

The Court of Appeal in France, on April 21, 1904, held that the existence of a contract does not exclude the responsibility which may result from a *quasi-delict* committed by one of the contracting parties. (Dalloz-P. 1908-2-102, see notes 2, 3 and 4, and decisions reported on pages 8 and 9 of the notes; see also Revue de législation et de jurisprudence, 1886, Lefebvre, pages 486 and 487; Planiol, Droit Civil, vol. 2, No. 883 *et seq.*)

In *Central Agency Ltd.* v. *Hotel Dieu of Montreal* (1904), 27 Que. S.C. 281, where an accident occurred to the lessee, it was held:—

> The lessor is liable for the damages sustained by the lessee by the collapse of the premises leased, caused by bad construction and defective materials, even though such defects were hidden and could not have been ascertained by any ordinary examination of the building.

On p. 291, Sir Melbourne Tait, C.J., said:—

> But others take the view that this article does not apply to lessees and that the compensation (*réparation*) due them results from the contract of lease and must be appreciated or estimated according to the principles which regulate that contract. The defendants wish to escape all responsibility for damage by claiming that they are not responsible as proprietors, because the fault, if any, is contractual, and not delictual, and they are not liable as lessees, because the defects, if any, were unknown to them.

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It would seem an extraordinary thing that the defendants as proprietors should be responsible for damages which might have been occasioned to the property of a neighbour or to a passer-by, and should not be responsible for that occasioned to the goods of the plaintiff in whose favour they specially contracted to deliver and keep the premises in a state of safety.

The difference that certain authors have sought to establish between the two kinds of fault has been dealt with in a very sensible way, to my mind, by a recent eminent writer, Mr. Planiol, in his Treatise on the Civil Law. (See No. 914, vol. 2.)

And he adds:—

For my part I think the law reaches the defendants in both qualities.

The same principle was upheld by Lafontaine, J., in *Granger* v. *Muir* (1909), 38 Que. S.C. 68.

I followed the same principle in the case of *Maryland Casualty Co.* v. *St. Lawrence Realty Co.*, in April, 1912. This judgment was subsequently confirmed in appeal, 12 D.L.R. 693, 22 Que. K.B. 451:—

Imbrecq et Périsse, *les Litiges de l'automobile*, Nos. 102-103.

In *MacPherson* v. *Buick Motor Co.* (153 App. Div. Rep., N.Y. 474), it was held:—

The manufacturer of an automobile may be held liable for injuries received by a purchaser thereof owing to the fact that a wheel, being constructed of inferior material, collapsed under ordinary use, although the vehicle was not purchased directly from the manufacturer, but from an agent to whom it was sold and although the wheel itself was purchased by the maker from other manufacturers.

It is established in the present case that the builder of the motor car used rotten wood. This fact could have been ascertained by a proper examination of the wheels. This ignorance on the part of the manufacturer is gross, not to say criminal, negligence.

A motor car in itself is not dangerous but it becomes so if it is not built of proper material or if it is handled by an inexperienced chauffeur. The builder should therefore take all possible precautions to see that only proper material of the required quality is used in order that the vehicle may be sufficiently strong and especially that the wheels may be capable of supporting the weight. . .

I am of opinion that the responsibility of the defendant, vendor of automobiles and agent of the company, is not quite the same. He is, however, guilty of fault, to say the least, of a *quasi-delict*. He guaranteed the automobile as being in perfect order. What examination did he make of it? He contends that he made what is known as a test.

It is quite evident that the test which he possibly made before delivering the machine could not reveal whether the wheel which caused the accident was sound or defective, inasmuch as it is established that when the motor car was delivered to Pothier on July 22, 1912, the wheel was not on the motor car. As stated before, at that period the wheel on the car was not the wheel which belonged to it, and it was subsequently replaced by the wheel which caused the accident.

I am of opinion that the defendant was negligent in delivering this wheel and not verifying whether it was sufficiently strong.

. . .

True, one witness states that a few days before the accident, after repairing the carburetter, he went out with Pothier and his family in the car with a new wheel and that although they travelled at a good rate of speed no accident occurred. This witness considers this a test.

I am of opinion that this does not constitute a test, and that there was no sufficient test.

Builders, vendors and agents of motor cars should take the greatest possible precautions to verify that the principal parts of the automobile, such as the wheels, the motor, steering gear, etc., are in perfect order and of such a quality that there can be no possibility of danger for those who will use the machine.

The defendant further contends in his factum, although the point was not raised in his plea, that there was no sale and that Pothier was only the lessee of the car in question.

It is unnecessary for me to discuss this question as I would arrive at the same conclusion whether the contract were one of lease or of sale.

As I find a quasi-delictual responsibility on the part of the defendant, art. 1056 C.C. must apply, and the plaintiff as tutrix to her minor children is entitled to recover from the defendant.

Were the question only one of contractual responsibility and not one of delictual responsibility, the question of damages to which the plaintiff is entitled might present itself under another aspect.

In the present case I am of opinion that the plaintiff is entitled to the sum of $2,500 which was awarded to her by the trial Judge. This amount does not appear excessive, and we confirm the judgment with costs. *Appeal dismissed.*

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GREAVES v. CADIEUX.

Quebec Court of Review, Charbonneau, Demers, and Weir, JJ. December 11, 1916.

RECORD AND REGISTRY LAWS (§ III A—10)—PROMISE OF SALE—LAPSING.

Under the Quebec Civil Code (arts. 1476, 1478), a promise of sale, unless accompanied by actual possession, is not equivalent to a sale, and conveys no ownership so as to permit of registration under arts. 2098, 2100; it will lapse altogether under a clause in favour of the vendor that it should cease to be binding in the event of title not being perfected within a certain time.

Statement.

APPEAL from the judgment of Lafontaine, J., Superior Court, rescinding the registration of a promise of sale. Affirmed.

Plaintiffs complained of the defendant who caused to be registered on their property at Longue Pointe a promise of sale from their predecessor in title to one Harris who transferred the same to the defendant. They alleged that this promise had lapsed and that the registration thereof was illegal and void and asked for its cancellation. The defendant contested the action alleging he had always been ready to purchase the property of plaintiffs but that they were unable to furnish a valid title on account of a servitude of passage on the immoveable. They further alleged that plaintiffs could not have the promise of sale declared lapsed and null without returning to defendant $5,000 paid on account of the purchase price. The plaintiffs denied the existence of the servitude, and alleged that, even if it existed, it would only give the defendant the right to obtain a diminution of the purchase price.

The judgment appealed from was as follows:—

LAFONTAINE, J.:—Considering that under our law a promise of sale is only equivalent to a sale when it is accompanied by tradition and actual possession (1478 C.C.), and that a simple promise of sale (1476 C.C.) is not equivalent to a sale—that is to say, not only the unilateral promise to buy and sell, but also the bilateral promise to buy and sell; and that in such a case the only recourse is an action to compel the execution of a deed of sale according to the conditions of the promise of sale, and is not the petitory action, so that this promise only confers a personal right, and does not operate so as to convey ownership and permit of registration according to arts. 2098 and 2100;

Considering, furthermore, that the promise of sale in this case contains a resolutory clause in favour of the promising vendor, it being stipulated in the said promise of sale that a deed of sale of

this property should be executed on or before May 1, before a notary, provided the title deeds were satisfactory, and that otherwise, in the event of any question arising concerning the title deeds, plaintiffs should have thirty days to complete them, and that in the event of this not happening, the promise of sale or option would become null without either party having any claim against the other party; so that the assertion of insufficiency or imperfection of the title deeds if correct and well-founded brought the said resolutory clause into operation, and therefore, caused the promise of sale to lapse, and would render necessary the radiation of the registration of the promise of sale as prayed for in the action;

Considering that plaintiffs furnished to the defendant title deeds which were found sufficient; that May 1 was fixed for the signature of the deed of sale prepared at the diligence of the defendant and by his notary, and for payment of the first instalment of $70,000; that although the plaintiffs appeared to sign the said deed the defendant abstained without giving any reason, and that it was only subsequently, in answer to a protest of the plaintiffs of December 16, calling upon him to sign, under pain of resiliation, the said promises of sale, that the plaintiffs learnt for the first time of the existence of the servitude alleged in the plea; and that on account of the silence of the defendant and his total inaction and his failure to avail himself of the said promises of sale these must be considered as having lapsed;

Considering that the present action is not one by the vendor to compel the purchaser to execute a deed of sale or to pay the price of sale or to obtain the fulfilment of a warranty of, *free and clear*, and that, therefore, the arguments and authorities of the defendant have no application;

Considering, moreover, that the defendant has not proven and there is nothing to shew that the right of passage mentioned in the registrar's certificate still exists as a matter of fact, or is claimed and exercised, or that this servitude has any importance within the meaning of art. 1519 C.C.; that it does not appear that this servitude, if it still exists, is non-apparent so as to compel the vendor to inform the purchaser of its existence, and that even if the servitude were a non-apparent servitude, then the defendant would be bound to bring suit and decide either for the execution of the sale or the cancellation thereof; that the de-

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fendant cannot assume the double position which he has taken in his protest and in his plea of wishing to buy the plaintiffs' property without, however, paying the price agreed upon and signing a deed therefor, and of not wishing to buy on account of the existence of a servitude, although at the same time retaining the benefits of the promises of sale so as to bind the vendors indefinitely;

Doth dismiss the plea, maintain the action, declare non-existent, lapsed and resiliated the promises of sale of February 10, 1912, and March 20, 1912, and doth order the defendant to have the registration of the said promises of sale radiated, the whole with costs.

Authorities cited by the Court: 19 *Baudry-Lacantinerie*, vo. Vente. No. 386; *Talbot* v. *Bernier* (1897), 13 Que. S.C. 410.

Smith, Markey, Skinner, Pugsley & Hyde, for defendant, appellant.

Geoffrion, Geoffrion & Cusson, for plaintiff, respondent.

The Court of Review unanimously confirmed the judgment of the Superior Court for the reasons given by Lafontaine, .

Appeal dismissed.

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CLAREY v. OTTAWA ELECTRIC R. CO.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Kelly and Masten, JJ. December 30, 1916.

STREET RAILWAYS (§ III C—40)—*Attempt to board crowded car —Contributory negligence.*]—Appeal by the defendants from the judgment of Middleton, J., in favour of the plaintiff, after trial of the action without a jury at Ottawa. Reversed.

The action was brought for damages for injuries sustained by the plaintiff by reason of the negligence of the defendants in the operation of one of their street railway cars, as the plaintiff alleged.

The plaintiff was standing with one foot on the lower step of the entrance-platform to a crowded car, which he had run to catch, and the other foot in the air, when the car started, his foot slipped off the step, he was thrown down, and his shoulder was dislocated.

The questions upon the appeal were, whether there was negligence on the part of the defendants, and, if so, whether the plaintiff was guilty of contributory negligence.

Taylor McVeity, for appellants.

W. J. Kidd, for plaintiff, respondent.

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MEREDITH, C.J.C.P.:—If the testimony of the plaintiff be accepted as an accurate statement of the manner in which his injury was caused, I am unable to perceive any sufficient ground upon which the judgment directed to be entered in his favour at the trial can be supported; whilst, if the testimony of the witness Mr. Nelson, an apparently disinterested person and a cautious witness, be accepted, then the plaintiff was plainly "the author of his own injury," in running to catch, and attempting to board, a moving car, when hampered in his movements by a heavy winter overcoat.

The plaintiff admits that he ran to catch the car, but asserts that it was not moving when he stepped upon it. His story is that he got upon the lower step of the entrance to the car, but could go no further because it was crowded in front of him, another man being on the next step up; that, when he was in this position, a woman came down these steps to leave, and in that way did leave, the car; that the man in front of him and he made way to let the woman pass; that, holding on with his right hand to a "handle-bar," he swung back, taking his left foot off the step, but keeping his right foot on it; and that, apparently after the woman had safely alighted and before he had got back to his former position, the bell was rung to start the car, "and the car gave a snap, what I would imagine about two notches, and my right foot that I stood on slipped off the steel, that is, off the step," and he was thrown down and his shoulder was dislocated.

His witness O'Neill testified that the car started, "I should think fast, fairly fast." Whilst the story of his witness Brooks was: "He was just in the act of going to step back on, when the car gave a lurch ahead, and he, in the act of trying to get on, either missed or slipped on the ground and he tripped himself and threw him alongside the car." This witness differs from the plaintiff in saying that it was the plaintiff's left foot that was on the step and left hand on the handle-bar.

There was no finding, of the trial Judge, that there was any negligence in the starting of the car; nor, in my opinion, could there well be such a finding. The signal to start was given by the conductor in the usual manner, and the giving of it was seen and it was heard by the plaintiff, and the whole evidence as to the way in which the car came into motion is not such as to indicate

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any unusual violence which would amount to actionable negligence if the proximate cause of any injury.

The ground on which the judgment in appeal is based, and upon which it was endeavoured to be supported here, is: that the conductor of the car was guilty of negligence in starting the car when the plaintiff was in the position of having one hand on the handle-bar, one foot on the step and the other off it. But why so?

The car was one of those in which passengers are required to pay their fares as they enter the car: there is an entrance and an exit on the back platform of the car, the exit being at the front and the entrance in the rear part of the platform, side by side, on the same side of the car; the entrance from the platform to the car is at the opposite side of the platform, that is, across the platform in the rear end of the body of the car, and the conductor is stationed at that entrance to collect the fares of all who enter; and where, as I gather from the whole evidence, he was, indeed must have been, to collect the fares; and nothing to the contrary was proved.

It is of course his duty to see that all persons who desire to, and can, board the car when it stops to take on passengers, are safely on board before giving the signal to start the car on its journey: but the plaintiff, having chosen to board a car that he knew was about to start, and so likely to start at once that he ran in order to catch it, and having chosen to board it when it was so crowded that he could get only a footing on the lower step, having chosen to do so and to take the ordinary chances of so doing rather than wait for the next car, seems to me to be quite unreasonable in contending that the conductor was in duty bound not only to see him so on board, but to watch his movements afterwards and not to start the car until he was in such a position that no backward movement on his part could put him in danger. Conductors have other duties to perform; and passengers too have duties, one of which I have no doubt is not to put themselves needlessly in a dangerous position, not to attempt to board a car known to be immediately about to be started, when the entrance to that car is so crowded that it cannot be safely boarded; and not, if he choose to make way for another passenger coming out the wrong way, when it is known that the car is immediately about to be started, instead of getting off the car and safely

make the way, to hang on and swing around into an awkward position likely to cause his dislodgment if the car moves.

Accidents do happen in which no one can be said to be actionably blamable, and this accident may be one of them; but, whether so or not, certain it seems to me to be that, if the plaintiff be not blamed, neither should the defendants, for this accident.

I would allow the appeal and dismiss the action.

RIDDELL, J.:—This is an appeal from the judgment of Middleton, J., at the trial. On Sparks street, a little west of Elgin street, in the city of Ottawa, on the 17th December, 1914, there was standing a car on the track of the defendant company, about to go westward. The plaintiff intended to take this car; he was on the south side of the street, but had to wait for a car then going east to pass; he, when that car had gone by, crossed in front of the west-bound car; as he was crossing he signalled to the motorman with his hand, and when he got to the north side of the car he ran along by the side of the car to the rear end to get on it. He got on the first step, but could get no further; there was a man in front of him on the second step. In this situation of affairs, a lady came out of the door and was for getting off—it should be said that the car was a "pay-as-you-enter" car, with two openings from the rear into the car, the south opening being the way to enter, the other connecting with the rear platform being sometimes used for exits. It was the south opening through which the lady came, and it was this opening at which the plaintiff was aiming. Both the man in front and the plaintiff made way for the lady; the plaintiff, instead of stepping off, kept his right foot on the first step, his left foot swinging in the air, his right hand holding the rail, his back to the front of the car. In that state of affairs the car started, and, as might be expected, the plaintiff's foot slipped off the steel step upon the road—he did not let go his hold but hung on and tried to regain his balance; he failed, and fell in the road, receiving rather severe injuries. When he was trying to get on, the entrance was full, "the lobby was full," and the car "seemingly pretty full," as he says.

When the car was about to start, immediately after the lady got out, he heard the gong sound to start the car; he did not cease his effort to get on, but, as he says: "I did not get any time to get up. I thought I would get in, but I had no time."

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When he was coming to the car he knew that it was loaded and about to start, and he "ran to get there before she would start." "I knew that when she was loaded she would go."

This is the plaintiff's own story, and it is not made stronger by any of his witnesses.

The learned trial Judge found for the plaintiff and gave him judgment for $1,200 damages; the defendants appeal.

Assuming that the defendants were negligent, I am of opinion that, on the plaintiff's own story, he contributed to the accident by his own want of reasonable care.

A car pretty full, with the lobby or corridor quite full, the plaintiff runs to mount, knowing that it was about to start; not waiting for a car in which he would find room, he tries to get upon this one—perhaps so far negligence cannot be charged. But there is a man in front of him, so that he cannot get beyond the lower step—and in that position, when he makes way for a lady who is trying to get off, instead of getting off entirely so that he may stand firmly on the ground, he hangs himself in the air in such a posture as that he would almost certainly suffer a disaster if the car started, as he knew it was about to do. I think the plaintiff has himself at least partly to blame, and would allow the appeal with costs here and below.

KELLY, J.:—I have read and re-read with care all the evidence at the trial. The learned trial Judge has found that the conductor of the car was negligent. That appears from the reporter's notes of the discussion between the Court and counsel just prior to the delivery of judgment. These notes afford the only record of the learned Judge's findings of fact except as they may be assumed from the decision in the plaintiff's favour.

But, accepting the finding of negligence against the defendants, I am not, after careful consideration, able to exonerate from negligence a person who, as did this plaintiff, hurried to get on to a car which "was loaded," "was full," and "the lobby was full," and which he expected was about to move off, and who stepped on to the lower step leading to the platform, and "could not get any further, for there was a gentleman in front of me on the next step," and because a lady was getting out of the door—not the door of exit—"and you could not go in there two abreast not with big coats like I have;" where both the other gentleman

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and the plaintiff "had to swing back a little bit to give her proper room to get out;" and where the plaintiff, when he stepped back, and, having thrown his left foot back, had his right foot on the lower step, his left foot hanging unsupported, he holding with his right hand the bar at his right hand side, thus being in a position, it may fairly be assumed, in which he would be inclined to face not in the direction in which the car would move if it started forward; and where, while in that position, the car having started, he slipped off the steel step on to the roadway, he holding on by his right hand in an endeavour to retain his balance, and was then thrown to the pavement. This, which is taken altogether from the plaintiff's own evidence, indicates to me that he knowingly took chances and placed himself in a position of danger, and that, but for his failure to take that reasonable care which he was bound to exercise, he would not have been injured.

MASTEN, J.:—This is an action of negligence against the Ottawa Electric Railway Company, tried at Ottawa on the 29th May, before Mr. Justice Middleton without a jury.

The accident which gave rise to the action occurred in connection with the attempt of the plaintiff to board the defendants' street car, and the relevant facts as they present themselves to me are as follows:—

(1) The car was what is known as a "pay-as-you-enter" car. This description of car has two doors at the rear, one for exit, next to the body of the car, the other for entry, to the rear of the former, by which entrance is gained to the platform, and so past the conductor into the body of the car. In such cars, I understand, the duty of the conductor is to remain on the rear platform attending to the entrance and exit of passengers and sounding the bell by which the driver is directed to stop or to go forward.

(2) The rear platform of the car was, at the time when the accident occurred, crowded with passengers.

(3) The plaintiff hurried to the car, knowing that it was about to start, but was unable to get upon the platform, because there was a man in front of him on the second step, and he took hold, with his right hand, of the rod which is between the two entrances, and stood upon the lower step. While he was in this

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position, a woman came out of the car by the wrong passage, namely, the passage by which passengers are supposed to enter the car, not that by which they leave the car. In order to permit this woman to alight, the plaintiff lifted his left foot from the step and swung out, holding on by his right hand, with his right foot on the step, thus leaving a passage for the lady to get down. At that moment, the car suddenly started, the plaintiff's foot slipped off the step, he ran for a few steps, and then fell and was hurt.

I think there is no doubt that the defendants were guilty of negligence which occasioned the accident. The conductor failed in his duty in allowing the woman to leave by the wrong entrance; it was his duty to see that that did not occur. If she had not gone out by the wrong entrance, the accident would not have happened. Further, the fact that the conductor knew nothing about the accident, and must have been somewhere else in the car at the moment it started, is, to my mind, an evidence of negligence. His place was on the rear platform, where he would have been able to see exactly the situation, and would not have given the signal for starting the car until his passengers were in a secure position. There may also be other elements of negligence, but these are sufficient to make it clear that the defendants, through their officers, were guilty of negligence which occasioned the accident.

But, with some doubt, on the best consideration that I can give the matter, I am of opinion that the plaintiff himself was guilty of contributory negligence. He hurried to the car knowing that it was about to start; he boarded it when he was unable to get upon the platform, holding on by his hands and standing on the lower step. In this situation, knowing that the car was about to start at any moment, he voluntarily made way for the woman who was getting off the car, as of course was quite proper; but in so doing he voluntarily placed himself in a position of great danger. I think that, if he were going to make way for the woman, he should have stepped down to the ground.

Upon the whole, I think that he was guilty of contributory negligence, and that the appeal must be allowed, and the action dismissed.

Appeal allowed.

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British Columbia Court of Appeal, Macdonald, C.J.A., and Galliher and McPhillips, JJ.A. April 3, 1917.

MORATORIUM—WAR RELIEF ACT—VOLUNTEERS AND THEIR DEPENDANTS.

The immunity from actions or proceedings conferred by the War Relief Act (B.C. 1916) upon the wife or dependants of a volunteer extends to and includes debts and obligations of the wife or dependants and is not confined to claims against the volunteer.

[*Shipman* v. *Imperial Can. Trust Co.*, 31 D.L.R. 137, reversing 29 D.L.R. 236, disapproved.]

Statement.

APPEAL by plaintiff from an order of Morrison, J., refusing an interim injunction on the ground that the action was barred by the War Relief Act. Affirmed.

Pollard Grant, for appellant; *Cassidy*, K.C., for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The principal question involved in this appeal is the construction of sec. 2 of the War Relief Act, ch. 74, B.C. Stats. 1916.

The defendant is the mother and a dependent member of the family of a person to whom the benefits of the said Act extend, and whom I shall hereinafter call the volunteer. She is the holder of a lease from the Crown for a term of years of tidal lands to be used for purposes of oyster culture.

The plaintiff brings this action against her alleging that she agreed to transfer the said lease to him, and he claims specific performance of the agreement, and an injunction restraining her from selling or transferring the same to another, which he alleges she threatens, and is about to do.

I think the subject-matter of the action is one to which the doctrine of specific performance is applicable, and hence if defendant is not within the protection of the said Act the injunction should be granted.

Said sec. 2 makes it unlawful to take legal proceedings against the volunteer or his wife or dependant to enforce payment of the debts, liabilities and obligations of "any such person," *viz.*: the volunteer. So far the section, on the construction of it the most favourable to the plaintiff, deals with the liabilities of the volunteer only, but protects also his wife or dependant from suit on account thereof, that is to say, the protection to the wife or dependant is merely incidental to that afforded the volunteer. In that view of it, it does not protect the wife or dependant from proceedings against either of them to enforce payment of debts of their own with which the volunteer is in no way connected. The

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appellant's contention is that the clauses following, dealing with the enforcement of liens and encumbrances and with possession by the wife or dependant of goods and lands, were intended to be restricted in the same way and must be so read.

But it is not permissible to read into the section such limitations if it can be avoided. In *R.* v. *Liverpool Justices* (1883), 11 Q.B.D. 638, at 649, Bowen, L.J., said:—

> One objection which to my mind is almost conclusive evidence against it is this—that so to construe the section is reading into it words which limit its *primâ facie* operation and make it something different from and smaller than the terms express.

The opposite consideration, quite consistent with the above, was stated by Lord Herschell in *Cox* v. *Hakes* (1890), 15 App. Cas. 506 at 529:—

> It cannot, I think, be denied that for the purpose of construing any enactment it is right to look not only at the provision immediately under construction, but at any others found in connection with it, which may throw light upon it, and afford an indication that general words employed in it were not intended to be applied without some limitation.

The second clause of the said section declares that it shall not be lawful to take legal proceedings against the volunteer or against his wife or dependant "for the enforcement of any lien, encumbrance or security." This is not in terms restricted to liens, etc., affecting "any such person," namely, the volunteer, that is to say, this clause is not restricted in terms in the same way as is the clause above referred to relating to debts. The same is true of the third clause relating to possession of goods and lands.

We are asked to read the second and third clauses as if they contained such restrictive words, because it is argued the context requires that we should do so in order to carry out the true intent, meaning and objects of the legislature.

Now the object of the Act is to protect the volunteer and to some extent at least his wife and dependant. On the one hand it is argued that that protection is intended to relate to the volunteer's debts and property only. The wife and dependant, it is true, on that construction are incidentally protected by immunity from suits against the volunteer and in their possession of the volunteer's goods and lands. On this construction the wife or the dependant is not protected in respect of her or his own property where the volunteer or his property is not concerned.

On the other hand it is contended on behalf of the respondent

that the protection to the wife and dependant extends to immunity from suits to enforce claims against their own property, and from disturbance of their possession of their own as well as of the property of the volunteer.

There is nothing unreasonable or absurd in attributing to the legislature an intention to effect either of said objects. It would be quite as reasonable to impute an intention that the wife, who might be the owner of the family home, should not be disturbed in her enjoyment of it as that she should not be so disturbed when the home is the property of the husband.

I must therefore look beyond the object of the Act for something which will justify reading restrictive words into it. On examining the whole Act instead of finding something which calls for a restrictive construction I find sec. 10, the effect of which is that in proceedings by a mortgagee or other encumbrancer against registered lands, he must satisfy the Court that no *volunteer* or *dependant* is interested in the land.

Now, according to the restrictive construction of the second clause of sec. 2, the dependant would be held to be not within its scope. If that construction be the right one, then sec. 10, as it applies to a dependant, requires the mortgagee to prove something which is entirely immaterial. If the lands of a dependant are not within sec. 2 why should he not be proceeded against?

By said sec. 10 the legislature has indicated that the restrictive words "any such person" were advisedly left out of the said second clause of sec. 2, and if this be so, I think they were advisedly left out of the 3rd clause also. It is enough, however, to say that sec. 10 furnishes a key to the proper construction of sec. 2 and destroys the contention of the appellant that the section must be restricted as above mentioned.

Sec. 10 was apparently not called to the attention of the Manitoba Court of Appeal in *Shipman* v. *Imperial Canadian Trust Co.*, 31 D.L.R. 137, nor was it referred to in the argument before us, but I am nevertheless not entitled to overlook it.

Apart from the assistance furnished by sec. 10, I should not feel at liberty to read sec. 2 in the restricted sense contended for. When the section says no action shall be brought against the wife or dependant to enforce *any* lien or to recover possession of *any* goods or lands, and a literal interpretation of these words

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leads to no inconsistency, contradiction or absurdity, then I ought not to cut down their meaning. They are already sufficiently limited to meet all requirements of legal construction by being confined to particular subject-matters.

The only remaining question is whether or not this action contravenes the prohibition contained in sec. 2 as herein interpreted. An action by a vendee for specific performance of an agreement of sale is an action which must, if successful, lead to a change in possession of the property, and I think this action is one of those prohibited by the section.

I think, therefore, the appeal must be dismissed.

Galliher, J.A.

GALLIHER, J.A. (dissenting):—The trial Judge refused the injunction on the ground that the plaintiff was debarred from bringing this action by virtue of the provisions of the War Relief Act, ch. 74 of statutes of B.C. 1916.

This Act has been differently construed by Judges in our own Courts, and in the case of *Shipman* v. *Imperial Canadian Trust Co.*, 31 D.L.R. 137, a Manitoba case, Mathers, C.J., who was the trial Judge, held that the Act applied so as to prevent any action being brought against the dependants of any soldier in respect of their personal contracts.

On appeal to the Court of Appeal, the majority (Richards, and Haggart, JJ.A., dissenting) overruled Mathers, C.J. (29 D.L.R. 236). Perdue, J.A., delivered the majority judgment and with that judgment I am in full accord and for the reasons given.

The Chief Justice has called my attention to sec. 10 of our Act, but, with respect, that section does not change my view.

Counsel for the respondents raised the further point that even outside the War Relief Act this is not a case for granting an injunction, citing *Fothergill* v. *Rowland*, L.R. 17 Eq. Cas. 132.

It appears that the respondents held a special lease under sec. 11 of the Fisheries Act, R.S.B.C. ch. 89, for the planting of oyster beds within certain specified limits with the exclusive right to all oysters found or produced on the beds within such limits.

The respondent Norris, on August 16, 1916, on behalf of herself, and purporting to act also as agent for the respondent Hovelague, entered into an agreement in writing with the appellant whereby she agreed to sell and the appellant agreed to purchase all the right, title and interest of the respondents in the tidal

lands or foreshore lots leased by the provincial government for oyster beds for a term of years.

The respondent Norris refuses to carry out the said agreement alleging that it was obtained from her by fraud and setting up the War Relief Act and, as the appellant alleges, threatens to dispose of the rights to another, hence the application for injunction.

In the *Fothergill* case, *supra*, it was the sale of a chattel pure and simple, *viz.*: the coal to be produced from certain veins and there the Court held that specific performance could not be decreed as there was no power to compel Rowland to raise or mine the coal, and this coal was not of any peculiar kind or quality, and damages was the proper remedy.

It seems to me that what is granted here by the lease is more than a mere chattel interest.

The lease carries with it the right to use the bed of the ocean and the soil thereon for the purpose of planting oyster beds and reaping the crop thereon produced, with rights as against trespassers, etc.

An agreement transferring those rights is something capable of being specifically performed.

It is true the lease or license cannot be assigned or transferred without the written consent of the commissioner, but this point has not been taken before us, nor below, and we must treat this case as though such consent had been procured.

In my view this was a proper case for an injunction, and I would allow the appeal.

McPHILLIPS, J.A.:—This is an appeal from an order of Morrison, J., refusing an interim injunction. The respondent Norris is a widow and is solely dependent upon her eldest son, a volunteer in Overseas Service, who enlisted in the 29th Battalion of the Canadian Expeditionary Forces. The endorsement on the writ of summons in commencement of action reads as follows:— McPhillips, J.A.

> The plaintiff's claim is against the defendants for the specific performance of a certain agreement, in writing, made and entered into on August 16, 1916, between the plaintiff and the defendant Minna C. E. Norris, whereby the defendant M. C. E. Norris agreed to sell and the plaintiff agreed to purchase all the right, title and interest of her the said M. C. E. Norris and of the defendant P. A. Hovelaque, for whom the defendant M. C. E. Norris purported to act as agent, in certain tidal lands or foreshore lots numbered 380, 381, 382, 384 and 385, being leased from the Government of the Province of British Columbia for a term of years, of certain oyster beds situate on Pipestone Inlet, Barclay Sound, in said province.

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And for an injunction restraining the said defendants and each of them and their respective agents or attorneys from leasing, selling, disposing of and dealing in any way whatsoever with the above-mentioned lots or any part thereof; save as on the terms of the above-mentioned agreement between the plaintiff and defendant M. C. E. Norris.

And in the alternative for damages for breach of contract of sale.

(Writ issued 18th August, 1916).

Following upon the issue of the writ an application was made by notice of motion for an interim injunction restraining the leasing, selling, disposing of or dealing in any way whatsoever with certain tidal lands or foreshore lots, Nos. 380, 381, 382, 384 and 385—being leases from the Government of the Province of British Columbia for a term of years, of certain oyster beds situate on Pipestone Inlet, Barclay Sound. The application having come on for hearing and the objection being made that the respondent Norris was a person entitled to the protection afforded by the War Relief Act (ch. 74, 6 Geo. V., B.C. 1916), and that objection being upheld the Judge dismissed the application with costs. The appeal is now to this Court and the contention is that the Judge was wrong in his interpretation of the relief afforded by the Act.

The question for consideration is whether the respondent Norris does come within the purview of the statute and whether the interim injunction applied for should have been granted. This of course really involves the question whether the action can be proceeded with at all until after the termination of the war.

The section of the War Relief Act which has to be in particular considered and construed is sec. 2 thereof.

Legislation of precisely similar nature and in the same terms was considered by the Manitoba Court of Appeal in *Shipman* v. *Imperial Canadian Trust Co.* (1916), 31 D.L.R. 137—the consideration of the point that arises is rendered more easy of solution. The Manitoba Court of Appeal by a majority opinion (Richards, and Haggart, JJ.A., dissenting), decided that the statute was not intended to protect property acquired in her own name by the wife of a volunteer or enlisted person serving in the war. I have given careful consideration to the reasons for judgment in that case and, with the greatest respect to the Court of Appeal of Manitoba, I am in entire agreement with the reasons contained in the dissenting opinion of Haggart, J.A., and I associate myself wholly with those reasons; Richards, J., was of a like opinion, being in

agreement with the judgment of the Chief Justice of King's Bench, whose judgment was under appeal. I do not consider it necessary, in view of the opinion referred to of Haggart, J.A., to add any further reasons in support of my view that Morrison, J., was right in refusing the injunction applied for, other than to say, that in the present case no such order as asked for can be made pending the hearing. A customary order and almost, of course, in accordance with the practice of the Court in other cases, *i.e.*, to keep matters *in statu quo* until the hearing or further order as the statute law interferes; and it is clear to me that the respondent Norris cannot be restrained nor can the proceedings in this action be further maintained against her during the continuance of the war and should be stayed until after the determination of the war.

The other questions so ably and elaborately argued by counsel for the appellant, in my opinion, do not require attention at the present time as the statute is an insuperable bar to the continuance of any proceedings as against the respondent Norris pending the termination of the war.

I would dismiss the appeal. *Appeal dismissed.*

HENDERSON v. RUR. MUN. OF PINTO CREEK.

Saskatchewan Supreme Court, Newlands, Brown and McKay, JJ. March 10, 1917.

PARTIES (§ I B—55)—JOINDER OF ASSIGNOR—ACTION FOR TORT BY ASSIGNEE. A mere right of litigation is not assignable; nor, in an action begun by an alleged assignee, will the assignor be added, unless it be necessary to terminate the real matter in dispute.

Statement.

APPEAL by plaintiff from the judgment of the District Court at Swift Current refusing leave to add an assignor as plaintiff and dismissing the action. Affirmed.

P. M. Anderson, for appellant; *D. Buckles*, for respondent.

Newlands, J.

NEWLANDS, J.:—On August 1, 1913, the Cockshutt Plow Co. Ltd. sold to Harry Burns an 8-ft. binder for $180, for which Burns agreed in writing to pay $60 on October 1, 1913, $60 on October 1, 1914 and $60 on October 1, 1915. The Cockshutt Plow Co. had a lien on this binder until paid for. On August 4, 1914, the defendants wrongfully and unlawfully seized and sold the binder. In December, 1915, the Cockshutt Plow Co. assigned to plaintiffs the above mentioned agreements in writing, together with all their right, title and interest thereunder and to the goods therein described.

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These facts appearing at the trial the trial Judge held that the plaintiff had no cause of action against defendants and he refused to amend by allowing the plaintiffs to join the Cockshutt Plow Co. as plaintiffs.

The cause of action set out in the statement of claim is for a tort. The plaintiff's claim is under an assignment thereof.

The tort in question is not assignable, it being a mere right of litigation. *Prosser* v. *Edmonds*, 1 Y. & C. Ex. 481. Approved in *Dawson* v. *Great Northern & City R. Co.*, [1905] 1 K.B. 260, and therefore the plaintiffs had no cause of action against defendants.

In order that another person be substituted or added as plaintiff there must be a *bonâ fide* mistake, and it must be necessary to add the party for the determination of the real matter in dispute, r. 32. Odgers on Pleading, p. 14—and there must be a consent in writing signed by the party to be added as plaintiff.

No evidence was produced before the trial Judge that there had been a *bonâ fide* mistake made, nor that the Cockshutt Plow Co. had consented in writing to be added as a plaintiff, nor in my opinion was there any evidence to shew that it was necessary to add them to determine the real matter in dispute.

Assuming that the matter in dispute was the damage caused to the Cockshutt Plow Co. by the wrongful seizure and sale of the binder by defendants, the Cockshutt Plow Co. would only have an action against defendants on account of their lien thereon if they had been damaged by such seizure and sale. They could only be damaged if Burns failed to pay them the amounts due on his lien notes. These notes are not now the property of the Cockshutt Plow Co., they have been assigned to plaintiffs for value, as is set out in the statement of claim.

If on this assignment the plaintiffs paid the Cockshutt Plow Co. the amount Burns owed them and took over this debt, then the Cockshutt Plow Co. have lost nothing by defendants' wrongful action and have therefore no cause of action against them.

I am, therefore, of the opinion that the trial Judge was right in refusing to add the Cockshutt Plow Co. as plaintiffs when he had no evidence that they had any cause of action against defendants and they had not given their consent in writing to be so added.

The appeal should be dismissed with costs.

Brown, J.

BROWN, J.:—The plaintiff's claim alleges that the Cockshutt Plow Co. Ltd. sold to one Harry Burns, under three certain

agreements in writing, an 8-ft. binder for the price of $180, and that it was a term of each agreement that the title, ownership and right to possession of the binder should remain in the company. It is further alleged that the said agreements, together with all right, title and interest thereunder and to the said binder were duly assigned by the Cockshutt Plow Co. to the plaintiffs by an assignment in writing. It is also alleged that the defendants wrongfully and unlawfully seized and sold the said binder and converted the proceeds to their own use. The plaintiffs claim against the defendants damages in the sum of $222.27, being the amount which the plaintiffs claim is owing on the said agreements.

The action having come on for trial before the acting District Court Judge at Swift Current, counsel for the plaintiffs admitted that the assignment was executed in December, 1915, and over a year after the alleged wrongful seizure. He asked that the Cockshutt Plow Co. be added as plaintiffs. The trial Judge refused to so add the Cockshutt Plow Co. as plaintiffs and dismissed the action. The plaintiffs appeal from that decision.

Counsel for the appellants admitted before us, and very properly so, that the plaintiffs have no right of action. If the Cockshutt Plow Co. had or have any right of action against the defendants for such wrongful seizure, such right of action is clearly not assignable.

The real question on appeal, therefore, is as to whether or not the trial Judge was right in refusing to add the Cockshutt Plow Co. as plaintiffs to the action.

Our Supreme Court rule No. 32, being the one applicable to the case, reads as follows:—

> Where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff, the Court or a Judge may, if satisfied that it has been so commenced, through a *bonâ fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff, upon such terms as may be just.

The issues on which the parties went down to trial seem to cover every conceivable defence except the one on which the action was dismissed.

In *Hughes* v. *Pump House Hotel Co.*, [1902] 2 K.B. 485, the assignor of a debt brought action for the recovery of same, and, it being found that the assignor had no right of action, the assignee

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was substituted as plaintiff, and, in view of this decision, I am of opinion that, had there been proper material before the trial Judge, the amendment should have been made. As a matter of fact there was absolutely no material on which to base the application, other than the notice of motion. In order to get such an amendment, there must be, under r. 32 aforesaid, some evidence of a *bonâ fide* mistake, and there must be, under r. 41, a consent in writing by the party sought to be added or substituted. There does not seem to have been any attempt whatever made to meet either of these requirements, and, under such circumstances, I am of opinion that we would not be justified in interfering with the judgment of the trial Judge, and that the appeal should be dismissed with costs.

Brown, J.

McKay, J.

McKAY, J., concurred with BROWN, J. *Appeal dismissed.*

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INNIS v. COSTELLO.

Alberta Supreme Court, Appellate Division, Scott, Stuart, Beck and Walsh, JJ. January 13, 1917.

VENDOR AND PURCHASER (§ I C—13)—DEFECTIVE TITLE—COAL RESERVATION—REPUDIATION.

An agreement of sale of land, subject only to conditions and reservations in the grant from the Crown, is not enforceable if the coal therein is at the mine without the purchaser's knowledge, the property of a third party, even though the vendor procures and tenders title to the coal with a transfer of the land.

Statement.

APPEAL from the judgment of Hyndman, J., 27 D.L.R. 711. Reversed.

I. C. Rand, for appellant.

Stuart, J.

STUART, J.:—We have here another example of the common case of the purchaser of real estate at a highly inflated price during the boom times becoming unable, owing to the collapse of the boom, to meet the enormous obligations which the vendor has, in the midst of the boom, secured from him, and then seeking to escape from them by means of a point of law which he would, no doubt, have overlooked if the boom had continued.

I regret that the Court has no power to do justice in this case. The vendor knew perfectly well, I think, that the defendants' ability to meet the enormous obligations which they undertook would depend upon a continuance of the then inflated real estate values and upon their ability to re-sell in lots to foolish purchasers. The parties were both in the same game—speculating in real estate and doing no useful service to the community.

The boom collapsed, and I greatly regret that the Court has no power to do what the federal government generally does when its purchasers fail to pay their balances, viz., direct a conveyance to the purchasers of such proportionate part of the land as the payments actually made would cover at the agreed price. That is what the defendants offered. They offered to let the $12,000, which they had paid, go, and practically to lose the most of it because of the enormous shrinkage in values, and to let the plaintiff have the benefit of that if he would release them from further obligation, and take back what land had not been paid for. In these aftermaths of the boom I think such a course is one of justice. But we cannot do justice; we must decide the law, and the plaintiff says that the law, to which he appeals, will give him judgment for the balance of the purchase money. Very well, then, the only thing to do is to decide the law.

It is well settled—too well settled in this Court to reopen the question now—that a purchaser who discovers that his vendor has not the title which he agreed to convey, and has no right to demand it from any third person, may, if he acts promptly, repudiate the contract, and demand back and recover in the Court the money he has paid. *Ewing* v. *McGill*, 22 D.L.R. 834, 8 A.L.R. 104; *Christie* v. *Taylor*, 15 D.L.R. 614; *Lee* v. *Sheer*, 19 D.L.R. 36, 8 A.L.R. 161. This is the undoubted rule in England and the cases are very numerous. *Forrer* v. *Nash*, 35 Beav. 167 (55 E.R. 858); *Brewer* v. *Broadwood*, 22 Ch. D. 105; *Bellamy* v. *Debenham*, [1891] 1 Ch. D. 412, are only a few examples.

The contract was made on January 28, 1913. The plaintiff vendor agreed "on payment of all sums due or to become due hereunder as aforesaid" "to convey the said lands to the purchasers by a transfer in fee simple free from encumbrances, and subject to the conditions and reservations contained in the original grant thereof from the Crown." The certificate of title which the vendor obtained for the land on April 25, 1913, certified that he was the owner of an estate in fee simple in possession of and in the lands included in the agreement, "excepting thereout all coal."

On December 22, 1913, the purchasers, having learned very shortly before that the coal was reserved, served a notice on the vendor in which, after referring to the agreement and the terms of it, they said:—

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We have just learned that you do not own all the mineral rights in the lots of land above described, and that the said lots of land are not free of conditions and reservations, although there were no reservations of the said mineral or minerals or mineral rights made in the original grant from the Crown. In view of the fact that you do not own all the minerals or mineral rights in the said lots or land, we hereby notify you that we refuse to be further bound by the said contract, and demand from you the repayment to us of the sum of $12,000 paid by us to you under the said contract, with interest thereon at the rate of 5% per annum from the respective dates such payments were made to you.

The statement therein impliedly made that there was no reservation of the coal in the original grant from the Crown was correct.

The vendor, shortly after the receipt of this notice, began negotiations with the C.P.R. Co. for the purchase of the coal rights under the whole quarter section of which the lands covered by the agreement formed a part. He paid $1,600 for the coal rights, and on December 14, 1914, secured a certificate of title therefor from the Land Titles Office. On February 10, 1915, the present action was begun.

The trial Judge gave the plaintiff judgment. He took the view that the absence of the coal rights was only an afterthought on the part of the defendants, put forward for the purpose of saving them from their contract; that the presence or absence of the coal rights had nothing to do with the decision of the defendants to purchase, and that the purchase of the subdivided lots was merely speculative. He, therefore, thought it was at most a matter for compensation, and that this was met by the fact that the plaintiff, before action was brought, had obtained the title to the coal.

I regret that I am unable to take that view of the matter, and I think the precedents I have quoted preclude me from doing so. We do not know what the extent of the coal under the property is. It might be very important—at any rate, the plaintiff paid $10 an acre for it. I do not think we are entitled to make the contract for the parties. The defendant was entitled to get what he contracted for. The plaintiff stands on his rights under the contract; why should not the defendant do the same? We have allowed repudiation and rescission in a number of cases like this, and I can see no reason why we should not apply the rule here. Unless we do, I think there will be absolutely no certainty in the law or consistency in our decisions.

At the trial the plaintiff produced a witness whose evidence, it was said, would shew that there was really no coal of any value under the land in question, and asked for leave to amend his reply so as to render such evidence admissible. This was refused by the trial Judge. There was a discussion at the trial as to where the burden of proof would lie, assuming that such a question, as to the existence in fact of any coal upon which the reservation could operate, was relevant and material. I have no doubt that upon the assumption mentioned the burden lay upon the plaintiff, because the title under which he held was subject to a reservation of all coal. *Primâ facie*, I think, the presumption in such a case would be that there was in fact coal in existence upon which the reservation could operate, and that it lay upon the plaintiff to shew, if he could, that the reservation really reserved nothing in fact.

I was, therefore, inclined at first to take the view that the proper thing to do would be to order a new trial to be confined to that one issue as to the existence or non-existence of any coal as the subject-matter of the reservation.

But that suggestion meets with a grave difficulty in my mind. When the defendant discovered that the plaintiff's title was subject to a reservation of all coal, what were his legal rights? Had he not a right to assume then that there really was coal in existence, which had been reserved, and to repudiate the contract because the plaintiff could not give him what he had contracted to give? I think he had a right to make that assumption and to act upon it, as he did, in serving the notice of December 22, 1913. I am afraid I cannot assent to the proposition that it was his duty to proceed to a physical examination of the land in order to discover the fact, and then to affirm or repudiate the contract according to the result.

If it were true, as suggested in *Halkett* v. *Earl Dudley*, [1907] 1 Ch. 590, that the right of repudiation is a mere equitable right, giving merely a defence to an action for specific performance, I think the equity of the case would be met perhaps by ordering a new trial for the purpose indicated. But the right of repudiation is more serious than that. It is a right, at law, to say that he will not go on with the contract, to declare it at an end, and to sue at law for the return of the money paid.

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In Hals., vol. 25, p. 404, it is said:—

Rightful repudiation by the purchaser is available as a defence to an action by the vendor for specific performance, and in this aspect it depends on the doctrine of mutuality in the contract; but it appears also to operate as a rescission of the contract at law, so as to entitle the purchaser to maintain an action for a declaration of rescission and the return of the deposit and to be available as a defence to the vendor's action for breach of contract on non-completion at the proper time.

Brewer v. *Broadwood*, 22 Ch. D. 105, is quoted as the authority for this, as well as *Lee* v. *Soames* (1888), 36 W.R. 884, and *Weston* v. *Savage*, 10 Ch. D. 736.

The footnote in Halsbury is:—

This point was left open in *Bellamy* v. *Debenham*, *supra*, and in *Halkett* v. *Earl Dudley*, *supra*, Parker, J., treated the purchaser's immediate right of repudiation for defect of title as an equitable right only, leaving him liable on the contract, if the vendor makes a good title at the time fixed for completion. But this overlooks the special obligation of a vendor of land to make out his title prior to completion *so as to enable the purchaser to rely on* and prepare for completion, and the better opinion seems to be that the right of repudiation is a legal as well as an equitable right.

The matter is discussed fully in Williams on Vendor and Purchaser, 2nd ed., p. 185, note (*l*).

I do not think our common practice of having agreements where the payment of the purchase price is extended over a long period by instalments, or the absence of the practice of requisitions on title here, really make any difference. The test is supplied in this way. An instalment of $19,000 was due under the agreement on January 28, 1914. Could the plaintiff have succeeded in an action at law if he had brought it on January 29, 1914, for recovery of that sum or for damages for non-payment? If his title had been good, he certainly could have recovered the amount. But, after the notice of December 22, 1913, would a Court of law have given him a judgment at all? I think a Court of law would have said, "The defendant finds and it so appears that you cannot give him what you agreed to give. There is nothing whatever to shew that you will be able to do so when the time comes. He was not bound to wait. He repudiated the contract, as at law he had a right to do, and it is at an end. You cannot recover, and you must pay back what he has paid you."

I do not think it is right to say that a Court of equity would have directed the defendant to pay the large sum of $19,000 into Court, and to go without it and wait upon a speculation as to whether the plaintiff would get in the coal rights whose

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conveyance he had no right to compel. A Court of equity would have recognized the repudiation, unless it thought right to order an enquiry by a new trial, as I have suggested here, as to the existence of the coal.

I think the defence would have been complete at law and that a Court of law would have treated the contract as ended.

The point of what I say lies on this question: Was the contract ended actually, by the notice of December 22, 1913, or merely hypothetically? I have suggested the possibility that in equity it might not be treated as legally ended then, but that the Court might still allow the suggested inquiry. But I think the real situation is that both at law and in equity the contract was then ended and determined. The notice was given at a time when the defendants had every right to assume that there was coal under the land in question, because their vendor's title shewed a reservation of it. I cannot think that the notice had a merely contingent operation conditional upon the result of a subsequent enquiry as to whether there was or was not in fact coal under the land. Its operation was, I think, definite and final both at law and in equity. Whatever rights the service of the notice gave the defendants then finally arose, *i.e.*, were created, and I do not think the mere delay in bringing the matter into Court, as a result of which the plaintiff has been able to get in the coal rights, can alter the rights which then arose. The defendant could have sued for the return of his money at once. Surely his delay in doing so did not destroy his right to do so aside from any statute of limitation.

For these reasons I think the appeal should be allowed with costs, the judgment below set aside, the plaintiff's action dismissed with costs, and judgment given on the defendant's counterclaim against the plaintiff for $12,000 and interest at 5% since December 22, 1913, and costs.

Scott and Beck, JJ., concurred.

Scott, J.
Beck, J.

WALSH, J.:—I concur in the judgment of Stuart, J., but, in doing so, I do not wish to be considered as in any degree qualifying the opinion to which I gave effect in *Springer* v. *Anderson*, 27 D.L.R. 709. The trial Judge, in the judgment under appeal, refers with approval to my judgment in that case, and founds his decision to some extent upon the analogy which he finds in

Walsh, J.

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principle between this case and it. With great respect I think there is no such analogy, and so I disagree with the application which he has made of my opinion in the *Springer* case to the facts of this case. *Appeal allowed.*

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Saskatchewan Supreme Court, Sir Frederick Haultain, C.J., Lamont, Brown, and McKay, JJ. March 10, 1917.

INTEREST (§ I C—25)—ON EXPROPRIATION AWARD—FROM WHEN CHARGEABLE.

In awarding compensation for lands compulsorily taken and others injuriously affected, in an expropriation under the Railway Act (R.S.C. 1906, ch. 37), interest is to be allowed on the whole amount awarded, and is chargeable from the time the notice of expropriation is served or possession taken.

Statement.

APPEAL by defendant from a judgment allowing plaintiff interest on an expropriation award. Affirmed.

J. N. Fish, K.C., for appellant.

G. E. Taylor, K.C., for respondent.

The judgment of the Court was delivered by

McKay, J.

McKAY, J.:—The material facts of this case are, shortly, as follows:—

On July, 20, 1911, the appellant entered into possession of its right-of-way and commenced construction of its road bed through the east half of section 20, in township 16, in range 26, west of the second meridian, in the province of Saskatchewan, and on September 21, 1912, the appellant entered into possession of its right-of -way and commenced construction of its road bed through the south-east quarter of section 29, in said township and range.

By notice of expropriation, dated September 5, 1912, the appellant began expropriation proceedings under the Railway Act of Canada for all its right-of-way through the said lands, and served said notice on the respondent on September 14, 1912.

Arbitrators were appointed, and the majority of them made their award on December 17, 1913, whereby they awarded certain sums to the respondent, and, on appeal, this Court, on January 9, 1915, allowed the following sums to the respondent:—

For land taken for right-of-way through the south-east quarter 29, $3,290; for land taken for right-of-way through the south-east quarter 20, $810; for land taken for right-of-way through the north-east quarter 20, $2,548; for damages to the S.E. ¼ 29 injuriously affected, $9,864.60; for damages to the S.E. ¼ 20

injuriously affected, $910; for damages to the N.E. ¼ 20 injuriously affected, $6,144; making a total of $23,566.60

Of the above amount awarded, $13,154.60 was in connection with the south-east quarter of 29 and $10,412 was in connection with the south-east quarter and north-east quarter of 20.

The trial Judge found that all the above sums were paid by the appellant to the respondent as follows, which was not questioned on the appeal:—On April 30, 1915, the sum of $10,412; on May 31, 1915, the sum of $13,154.60.

The respondent was liable for the costs of the appeal in the arbitration proceedings, which were taxed at $1,412 on April 1, 1915, and the respondent gives credit to the appellant for this amount in his statement of claim as of that date, and this the trial Judge allowed.

The respondent plaintiff, in his statement of claim, claims interest at 5% per annum on $10,412, the sum awarded with respect to the east half of section 20 from July 20, 1911, and on $13,154.60, the sum awarded with respect to the south-east quarter of section 29, from September 31, 1912, which I take to be intended from September 21, 1912, as likewise does the trial Judge.

The trial Judge found that the respondent was entitled to interest on $10,412 from September 14, 1912, the date of the service of the expropriation notice on respondent, and on $13,154.60 from September 21, 1912, the date appellant took possession of the right-of-way through the south-east quarter of 29.

From this judgment the appellant appeals, contending that: 1. The respondent is not entitled to any interest; 2. If entitled to any interest, it should be only on the amount allowed for lands taken, and not on the amount allowed for lands injuriously affected; 3. If interest is allowed, it should not be from any date earlier than January 9, 1915, the date of the judgment of this Court, on the arbitration appeal.

Dealing with the second contention first, the only case cited by counsel for appellant in support thereof was *Leak* v. *Toronto*, 30 Can. S.C.R. 321, where the Supreme Court held that interest could not be allowed by the arbitrator on the amount of damages awarded for lands injuriously affected. That was a case in which no land was taken, but only injuriously affected.

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It should be noted that towards the end of the judgment the following paragraph appears:—

The Judges of the Court of Appeal have gone very fully into this question, and *we agree with what they have said.*

And when we refer to the judgments of these Judges in 26 A.R. (Ont.) 351, we find Osler, J.A., when referring to the Land Clauses Consolidation Act (Imp.), reported as follows, at p. 355:—

Similarly under that Act where the claim is as well for land intended to be taken as for compensation for injuriously affecting other land held therewith, the injurious affection of the latter arises from the taking of the former, and the whole compensation, though assessed separately under each head, is regarded as purchase money, and interest on the whole is not dealt with otherwise than as in the case where land only is taken.

And, when referring to the Ontario Municipal Act, at p. 357:—

There is no express provision in the Act as to interest on the compensation in such case, but it has been rightly held, if I may say so, by analogy to the English rule, that the arbitrator may then properly award interest from the date of the by-law which authorized the taking and entry: *Re Macpherson and City of Toronto* (1895), 26 O.R. 558.

In that case the award was for damages for land taken and entered upon, and damages for injuriously affecting other lands by reason of severance from the lands taken.

To my mind *Leak* v. *Toronto, supra,* approves rather than disagrees with what was decided in *Macpherson and Toronto,* 26 O.R. 558. Namely, that where some land is taken and other land is injuriously affected, the whole sum allowed must be treated as purchase money. This was approved and followed in *Re Davies and James Bay R. Co.,* 20 O.L.R. 534, 10 Can. Ry. Cas. 225.

I am, therefore, of the opinion that if the respondent is entitled to interest, he is entitled to it in the whole amount awarded; that is, on the amount awarded for lands taken and lands injuriously affected.

As to the first and third contentions, that the respondent is not entitled to any interest, and, if held he is entitled, it can only be charged from January 9, 1915, the date of the judgment of the Court in the arbitration appeal. Mr. Fish, K.C., contends the decisions in England, in the case of purchases under the Lands Clauses Act, are based on the analogy of vendor and purchaser, and that the relation of vendor and purchaser does not arise until notice to treat has been served, or the land has been entered upon pursuant to the Act, and the price or compensation has been ascertained, and cites 6 Hals., pp. 106 and 107, for this proposi-

tion; and argues from this that interest cannot be charged in any event before the price has been fixed or ascertained.

With the first part of this proposition I entirely agree—namely, that the English decisions are based on the analogy of vendor and purchaser, and the ordinary rules in such cases apply unless void by the Act, but I cannot agree with the latter proposition that interest cannot be charged for any period before the price is ascertained.

It is to be noted that the heading of this paragraph in Halsbury is "Specific Performance," and the two cases cited by the author (*Regent's Canal Co.* v. *Ware* (1857), 23 Beav. 575, 53 E.R. 226; *Mason* v. *Stokes Bay Pier and R. Co.* (1862), 32 L.J. Ch. 110) are both cases for specific performance to enforce the purchase of the lands in question. Objection was taken in these two cases that there was not a completed contract which the Court could enforce by specific performance, but it was held there was, as the company had given notice to take the land, and the price had been fixed. The principal point decided in these cases, and what Halsbury, in above-cited paragraph, evidently refers to, is that there is a complete contract between the parties, enforceable by the Courts when the above conditions are satisfied. That is not until an action for specific performance may be brought, but apparently when these conditions are satisfied, all the ordinary rules of vendor and purchaser apply, unless the Act contains provisions to the contrary. For instance, in the case of *Rhys* v. *Dare Valley R. Co.*, 19 Eq. Cas. 93, these conditions had arisen at the time the action was brought claiming interest, and interest was allowed from the time the defendants took possession, which was before the ascertainment of the price.

In Cripps on Compensation, 5th ed., p. 128, the author states:—

> The ordinary rules as to payment of interest on purchase money apply when lands are acquired under statutory powers.

And Dart on Vendor and Purchaser, 7th ed., at p. 653, dealing with the rule as to interest on purchases under statutory powers, states: "The true principle was, it appears, laid down by Jessel, M.R., viz., that the ordinary rule as between vendor and purchaser applies to purchases by a railway company, and that, therefore, interest is to be calculated from the time when the

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company might prudently take possession," and cites *Pigott* v. *G.W.R. Co.* (1881), 18 Ch. D. 146.

It is to be noted that the concluding paragraph above quoted from Dart, *i.e.*, "and that, therefore, interest is to be calculated from the time when the company might prudently take possession," is practically an extract from the decision of Jessel, M.R., in the *Pigott* case, where the latter invoked that portion of the rule laid down by Dart in the earlier part of the above quotation, which applied to the case then under his consideration, where possession had not been taken by the railway company.

At p. 129, in Cripps, after the author deals with certain cases coming under sec. 85 of the Lands Clauses Act, 1845, he goes on to say: "In all other cases in which the promoters enter on lands before the payment of the purchase money, they are liable to pay interest at the rate of four per cent. from the time of entry, in accordance with the ordinary practice which regulates the liability of a purchaser to a vendor, and cites the following authorities:—*Rhys* v. *Dare Valley R. Co.* (1874), 19 Eq. Cas. 93; *Birch* v. *Joy* (1852), 3 H.L.C. 565 (10 E.R. 222); *Re Shaw and Corp. of Birmingham* (1884), 27 Ch. D. 614; *Re Baltimore Extension R. Co., Ex p. Daly*, [1895] 1 Ir. R. 169; *Fletcher* v. *Lancashire and Yorkshire R. Co.*, [1902] 1 Ch. 901. Also see Browne & Allan on Compensation, 2nd ed., pp. 14 and 15, under heading "Interest."

I take it, then, that where lands are acquired under statutory powers in England, it is established law that the ordinary rules of vendor and purchaser apply where not otherwise changed by the statute, and that interest will be allowed from the time of taking possession where possession has been taken before the ascertainment of the price, but action to enforce the payment of this interest cannot be brought until the price is fixed or ascertained. And this is the principle applied by Sir James Bacon, V.-C., in *Rhys* v. *Dare Valley R. Co.*, *supra*. The facts of this case were shortly as follows: The defendant company served notice to treat for lands on plaintiffs in August, 1864, and entered into possession in November, 1864, and the amount of compensation was fixed by a jury not until August 20, 1869. The Vice-Chancellor allowed interest upon the purchase or compensation money from the time the company took possession of the land,

and not from the subsequent period of ascertaining the price by the verdict of a jury.

In support of his contention that interest cannot be charged for any period before the price or compensation has been fixed or ascertained, Mr. Fish also cited the *Pigott* case, and 25 Hals. p. 375, and note (*v*) thereto. In my opinion, it is not so decided in the *Pigott* case. I can find nothing in this case that disagrees with the principle acted on in the *Rhys* case.

Of course, the facts were different in each case. In the *Rhys* case possession had been taken before the price was ascertained, as in the case at bar, and in the *Pigott* case possession had not been taken, and, as the Master of the Rolls was dealing with a case where possession had not been taken, he applied the rule applicable to the case under his consideration. Had it been a case where possession had been taken before the price was ascertained, there is nothing to indicate that he would not have applied the other rule laid down by Dart in the same paragraph he refers to, namely, that the purchaser pays interest from the time of his taking possession. It is also to be borne in mind that this case was approved of by Chitty in *Re Shaw and the Corp. of Birmingham*, 27 Ch. D. 614, at p. 619.

Then with regard to 25 Hals. 375 and note (*r*). The author, in my opinion, is dealing with cases where possession has not been taken. The cases he cites as his authority shew this, namely, *Catling* v. *G.N.R. Co.* (1869), 18 W.R. 121, and the *Pigott* case, in both of which cases possession had not been taken.

So far as title is concerned, the evidence shews that the respondent always had a registered title to a portion of the land, and had title under an agreement of sale for the balance, and could at any time give or procure registered title to the appellant for the lands in question on payment of the compensation.

I have come to the conclusion, then, that in England, in purchases under statutory powers, interest may be allowed from the time of taking possession after notice to treat has been served, even if such possession be taken before the price or compensation is ascertained, and this appears to be followed in the Canadian cases.

In *Re Clarke and Toronto Grey & Bruce R. Co.*, 18 O.L.R. 628, decided in 1908, possession of the lands was taken by the rail-

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GREEN v. CANADIAN NORTHERN R. CO.

McKay, J.

way company, under warrants of possession issued by a Judge, prior to the making of the awards, and Meredith, C.J.C.P., held that the owners were entitled to interest at five per cent. per annum from the date of the warrants of possession.

In *Re Davies and James Bay R. Co.*, already referred to, decided in 1910 by the Court of Appeal in Ontario, it was held that there was nothing in sec. 192 (2) of the Railway Act to interfere with the operation of the general law, which, as between vendor and purchaser, fixes the time at which interest commences as that at which the purchaser takes or may safely take possession.

In *Gauthier* v. *C.N.R. Co.*, 14 D.L.R. 490, 7 A.L.R. 229, 16 Can. Ry. Cas. 354, Beck, J., is reported as follows:—

> In the result, the only question left for me to decide, is whether the amount paid in in respect of the award is sufficient, and this involves the question, whether interest on the amount awarded runs from the time the company took possession or from the date of the award. . . . I see, however, no reason on this or on any other ground for declining to follow the decision of Meredith, C.J., in *Re Clarke and Toronto Grey & Bruce R. Co.*, 18 O.L.R. 628. Interest, it seems to me, is a compensation for possession, and it is on this ground it is allowed. (14 D.L.R. 491).

This case was appealed to the Appellate Division of the Alberta Supreme Court (17 D.L.R. 193), and this Court allowed the interest, although not exactly agreeing with the trial Judge on the reasons for allowing it.

The respondent contended that the decision appealed from herein should be varied by allowing interest on the compensation for the east half of section 20 from the date on which possession was taken of the same by the appellant, namely, July 20, 1911, but I do not think this contention is right. According to the authorities I have above quoted, the interest appears to be chargeable from the time notice is served or possession taken, whichever of these two is the later, but both have to take place before the interest is chargeable.

I am, therefore, of the opinion that the trial Judge was right in allowing interest as he did at the rate of 5% per annum on $10,412 from September 14, 1912, and on $13,154.60 from September 21, 1912, the costs, amounting to $1,412.82, to be credited as of April 1, 1915. The computation of the interest to be made as appears in the judgment roll.

For the reasons above given, I would dismiss the appeal with costs. *Appeal dismissed.*

LACHAUD v. GIGUÈRE.

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C. R.

Quebec Court of Review, Fortin, Guerin and Archer, JJ. February 29, 1916.

MALICIOUS PROSECUTION (§ II—5)—PROBABLE CAUSE—EMBEZZLEMENT—CASH REGISTER.

An employee in charge of a cash register who fails to register a sum, in order to reimburse himself for an equal amount he claimed to be due him, cannot maintain an action for malicious prosecution against his employer for procuring his arrest for theft, on which charge he was acquitted, since the latter, in the circumstances, has acted in good faith, and with reasonable and probable cause.

Statement.

APPEAL by plaintiff from the judgment of Loranger, J., Superior Court, dismissing an action for malicious arrest. Affirmed.

Monty & Duranleau, for appellant.

Lamarre & Brodeur, for respondent.

Archer, J.

ARCHER, J.:—Plaintiff inscribed from the judgment dismissing her action in damages to the amount of $500. The parties have stated that the case could not be submitted prior to this date as the record had been lost.

About September 25, 1904, defendant, as manager of the Boston Quick Lunch, brought complaint under oath against the plaintiff to the effect that he was credibly informed and had reasonable cause to believe that she had converted to her benefit the sum of 25 cents.

The Boston Quick Lunch was at that time operating temperance restaurants where the public was catered to and the plaintiff was employed in one of these restaurants, where her work consisted in waiting upon the clientele and receiving the money paid by them.

Some time before the arrest of the plaintiff, certain clients had advised the defendant that a person entrusted with receiving cash payments did not register the exact amount thereof in the cash register, and as these notices became more numerous, he resolved to lay a trap for the person thus designated (who was no other than the plaintiff), in order to verify whether these complaints were well grounded, and whether the company, of which he was the manager, was the victim of thefts. With this purpose in view a bank note of 25 cents was marked and on the morrow the assistant manager of the Boston Quick Lunch and an employee of another restaurant of this concern, who were not known to the plaintiff, were charged with the task of making a purchase at the restaurant where she was working.

This employee, one A. L., entered the restaurant about 7.30

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on September 26, 1904, whilst the assistant manager remained outside, and he purchased five sandwiches for which he was charged by the plaintiff the regular sum of 25 cents. A. L. handed the plaintiff the 25 cent note which had been marked, and verified that the cash register indicated 15 cents, which meant that a sale of this amount had been previously made. Plaintiff did not place the 25 cents in the register whilst A. L. was in the restaurant. As soon as he went out he notified the assistant manager that the register indicated 15 cents and the latter then entered the restaurant and noticed that the register still indicated the same amount.

After remaining in the restaurant a certain time, during which the plaintiff did not deposit the 25 cents in the cash register, and did not register the amount of A. L.'s purchase, the assistant manager made his report to the defendant and both went to the detective office at the City Hall, where they related the facts.

After consultation it was decided to lay a complaint in the Police Court. Plaintiff was arrested and she was found in possession of the 25 cents which A. L. had given for his purchase.

At the preliminary enquiry the plaintiff, testifying in her own behalf, stated that she had kept this money in order to reimburse herself of an equal amount which she had placed in the gas meter the night before for the benefit of the firm, and the enquiring magistrate gave her the benefit of the doubt and discharged her as another witness working with the plaintiff corroborated her statements.

The defendant pleaded that he acted in good faith, with reasonable and probable cause in the exercise of his functions as manager of the company which employed him.

In *Hétu* v. *Dixville Butter & Cheese Assoc.*, 40 Can. S.C.R. 128, it was held:—

An action for damages for malicious prosecution will not lie where it appears that the circumstances under which the information was laid were such that the party prosecuting entertained a reasonable *bonâ fide* belief, based upon full conviction, founded upon reasonable grounds, that the accused was guilty of the offence charged.

Semble, that in such cases the rule as to the burden of proof in the Province of Quebec is the same as that under the law of England, and the plaintiff is obliged to allege and prove that the prosecutor acted with malicious intentions or, at least, with indiscretion or reprehensible want of consideration.

In *Désaulniers* v. *Hird*, 15 Que. K.B. 394, it was also held:—

In an action for damages for malicious prosecution the onus of evidence

is on the plaintiff to prove not only that he was discharged from the prosecution, but that the defendant who prosecuted him acted maliciously and without reasonable or probable cause.

Under our law and under the jurisprudence firmly established in the province the plaintiff was bound not only to prove her discharge by the magistrate but furthermore that the defendant acted without reasonable and probable cause, maliciously or at least imprudently or recklessly.

The Judge found, on the facts, that the defendant had reasonable and probable cause to act as he did and that he acted in good faith. I am of opinion that the facts established are as found by the trial Judge. Plaintiff contends that she was entitled to retain the sum of 25 cents to reimburse herself for an advance of an equal amount made the night before. Evidence on this point is contradictory. It is not necessary for the decision of this case, to decide whether or not she was entitled to retain the amount of the sum which she may have lent. This question could have some importance before the magistrate.

Here we are only called upon to decide whether the defendant acted maliciously, without reasonable cause, or imprudently.

The reports made to the defendant by some of the witnesses and the conduct of the plaintiff on September 26, 1904, justified the defendant in his taking these criminal proceedings. I am, therefore, of opinion that the plaintiff has not proven the essential elements in her case; that the record discloses that the defendant had reasonable grounds upon which to act; that there was no malice on his part and that he did not act indiscreetly or injudiciously. The judgment is therefore confirmed.

Appeal dismissed.

WESTER v. JAGO.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Walsh, JJ. January 25, 1917.

MECHANICS' LIENS (§ V—30)—MINING COAL—OWNER'S REQUEST OR BENEFIT—LEASE.

No lien will attach under secs. 4, 11, of the Mechanics' Lien Act (Alta. 1913, ch. 21), to bind the owner of land, for work performed in mining coal under a lease, at the request of the lessee, not of the owner or for his benefit.

Statement.

APPEAL by defendants from the judgment of Crawford, D. C.J. Reversed.

H. H. Hyndman, for respondent; *G. E. Winkler*, for appellant.

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WESTER v. JAGO.

Harvey, C.J.

The judgment of the Court was delivered by

HARVEY, C.J.:—The five plaintiffs claim mechanics' liens against a quarter section of land alleged to be owned by defendant Kelly, in respect of work and labour done by them as miners in mining coal under a portion of the land.

The statement of claim alleges that the plaintiffs were employed by the defendant Jago who had a lease from the defendant Kelly of all the coal lying under a certain portion of the quarter section with the right "to search for, dig, work, mine, procure, haul, carry away and transfer all coal" within specified areas at a rental of 25c a ton and also a rental of $10 per month "for the use of the buildings, scales, scale house, tools and implements, of the said mine".

One of the plaintiffs includes in his claim a debt for wages due from a prior lessee which debt was assumed by defendant Jago. The only evidence at the trial was that of Jago who admitted all the claims and swore that the men were employed by him as miners.

The action was tried by Crawford, Dist. Ct. J., who gave judgment in favour of the plaintiffs declaring them entitled to a lien on the quarter section. The formal judgment directs a sale of the land in the event of the amount of the judgment not being paid. One objection which was taken at the trial which was not argued before us or even raised in the notice of appeal was that there was no evidence that the defendant Kelly was the owner of the land.

On examination of the pleadings I find that the fact is alleged and is not denied. Notwithstanding that fact I think the judgment is in error in adjudging a sale of the land without proof that no one else may be affected. This point is impressed upon me by the fact that not long ago, on an application before me to declare land alleged to have been fraudulently transferred liable to sale under a creditor's execution, no question being raised as to the ownership, I did direct a sale and when an attempt was made to enforce my order it was found that the title was not registered in the party's name and considerable difficulty was experienced in getting the matter properly adjusted.

This, however, I think should not be fatal to the plaintiff's claim if it could be shewn by a reference or in some other manner that the defendant Kelly is the owner of the land.

It is not necessary, however, to make any direction as to this because, in my opinion, the chief ground on which the appeal was taken and which was argued before us is fatal to the claim, viz.: that no right of lien exists in the present case. Sec. 4 of the Mechanics Lien Act (ch. 21 of 1906) gives a lien to different persons in respect of certain works constructed at the request of the owner of the land.

The work in the present case was not done at the request of the owner and to support the lien resort must be had to sec. 11, which provides that: "Every building or other improvement mentioned in the 4th section of the Act constructed upon any lands with the knowledge of the owner or his authorized agent . . . shall be held to have been constructed at the request of such owner . . ." unless notice shall have been given of repudiation of responsibility.

Now, it seems clear that whatever may be the lien that is given by sec. 4 the only lien which can attach to bind an owner not actually requesting the work must be in respect of a building or other improvement constructed on the land. It seems to follow that the section can have no application to the present case in which there was no improvement and nothing constructed. The work was done, not for the benefit of the owner, but for the benefit of the lessee. It was not improving the land but depreciating it, the owner being paid for such depreciation, at the rate of 25c for each ton removed. If the work done had been by way of improvement for which the owner would receive some benefit the case would, of course, be quite different, but the plaintiff's case is that this is a working mine from which the coal is being removed and such removal necessarily cannot be an improvement.

In *Scratch* v. *Anderson*, a case in which the liability of an owner under sec. 11 was being considered in giving the reasons for judgment, holding the owner liable, I pointed out what I considered the principle of the Act in this respect, viz.: "that the land which receives the benefit shall bear the burden". These reasons were concurred in by the other members of the Court *en banc* and were also approved by the Supreme Court of Canada in the appeal to that Court, reported under the name of *Limoges* v. *Scratch*, 44 Can. S.C.R. 86. The judgment in our own Court appears not to have been reported. (See case following.)

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For the reasons stated I think the judgment declaring a lien is wrong and I would allow the appeal with costs and dismiss the action with costs. *Appeal allowed.*

SCRATCH v. ANDERSON.

(Referred to in the judgment of Harvey, C.J., in *Wester* v. *Jago*, *ante*.)

Alberta Supreme Court, Sifton, C.J., and Harvey and Stuart, JJ.
December 15, 1909.

The judgment of the Court was delivered by

HARVEY, J.:—In July, 1907, the defendant Limoges leased certain hotel property of which he was the owner to defendants Skead and Anderson with an option to purchase. In the following month the lessees began some very substantial alterations in the buildings which continued for several months, and in the months of January and February, 1908, mechanics' liens aggregating more than $8,000 were registered. The defendant Limoges lived within 150 yards of the demised premises and was aware of the building operations. On February 26, after the last of the liens was registered, the lessor gave the lessees notice that he declared the lease forfeited and determined for breach of covenant, and he subsequently entered into a contract of sale with another purchaser.

The actions on the different liens were consolidated and tried before my brother Beck (2 A.L.R. 109), who gave judgment in favour of the plaintiffs, declaring that the interest of the defendant Limoges to the extent to which it was benefitted by the building was subject to their liens. From this judgment the defendant Limoges has appealed. Sec. 4 of the Mechanics' Lien Act provides that anyone doing work on or furnishing materials in the construction of, any building on any land at the request of the owner of the land, shall have a lien for the price of such work or materials. "Owner" is defined as including a person having any interest in the land, at whose request or with whose consent the work is done.

Sec. 11 provides that any building constructed with the knowledge of the owner shall be held to have been constructed at his request, unless he has given notice that he will not be responsible.

Appellant contends that he is not an owner within the meaning of secs. 4 and 11 and that the only interest to which the liens could attach is the interest of the lessees.

My brother Beck in his reasons for judgment, accepted the first portion of this contention, stating that from the cases cited it appeared that sec. 11 was intended to apply to the case of a building being constructed by a person having no estate or interest in the land. The authority for this contention which has been cited to us and no doubt was cited at the trial is *Anderson* v. *Godsal* (1900), 7 B.C.R. 404. In that case the defendant, the owner of a mine, gave an option. The prospective purchaser had some work done of which the owner was advised, but did not exercise his option to purchase. The owner gave no notice repudiating liability. Forin, Co. Ct. J., who tried the case, declared that there was a lien in respect of the work done as against the owner's interest, but on appeal to the Supreme Court the full Court reversed this decision, Irving, J., dissenting. Reasons for the judgment are given by McColl, C.J., and Drake, J., Martin, J., concurring with the

Chief Justice. The only difference between the British Columbia section and ours is that in the former the words are "at the instance" instead of "at the request" of the owner. The reasons for the judgments, however, gave no importance to the distinction. McColl, C.J., at p. 407, says: "It seems to me plain that section 7 only applies where the owner has not authorized the construction of the building or other improvement, and was intended to provide for the case of work done under an agreement with a supposed owner, and to place persons engaged in such work in the like position as regards a lien as if the supposed owner was the actual owner whenever the latter, knowing that an improvement was being made upon his land, not under any agreement with himself, but at the instance of some person assuming to act as owner, stands by saying nothing," and Drake, J., at p. 409 says: "To construe this section as meaning that any owner could avoid the Act altogether by giving notice would render the Act void. To construe it so that under any circumstances the work will be held to be done at the instance of the owner, whether he requested it or not, conflicts with sec. 4. I think the meaning of the section is limited to those cases where, when improvements are done upon land by mistake, the owner stands by in order to take advantage of the work done. In such cases the work shall be held to be constructed at the instance of the owner."

I think there can be no doubt of the correctness of the first conclusion, that sec. 11 applies only to cases that do not come within sec. 4 in which the owner has in fact requested the work to be done. If it were not plain otherwise it is quite clear from the terms of the second sub-section of sec. 11, which was not a part of the British Columbia section at the time the cause of action in the case cited arose, though it was at the time the judgments quoted were given. This sub-section speaks of "such owner, not having contracted for or agreed to such construction." I confess myself, however, quite unable to follow the learned Judges any further. The reading of the section seems to me perfectly plain and its meaning quite unambiguous, and I see no reason for crediting the legislature with intending something quite different from what it has said. If an apparent meaning leads to a manifest injustice there may be some ground for questioning whether that meaning conveys the intention of the legislature and for trying to find a meaning which will work no injustice, but I see no injustice in giving effect to the plain meaning of the words of the section, indeed, to my mind, that effect is entirely in harmony with what I conceive to be the general principle of the Act, viz.: that the land which receives the benefit shall bear the burden.

In the present case the building was constructed with the knowledge of the owner who gave no notice disclaiming responsibility, and by virtue of the provisions of sec. 11 the same result follows as if it had been constructed at his request under sec. 4, and unless there is some other ground of objection, the lien would bind his interest in the land.

Certain objections were made to the forms of some of the liens. As to this, it is only necessary to refer to sec. 14, by virtue of which effect is to be given to such an objection, even if valid, only to the extent to which the defendant has been prejudiced. There is no evidence of any prejudice on this ground and consequently no effect can be given to the objection and it is not necessary to consider the merits of the objections.

I agree also with the learned trial judge that the work of superintendence is work done in or for the construction of a building within the terms of

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the Act, so as to give the superintendent a lien. It is work without which no building could be constructed, though in many, perhaps the majority of cases, it does not stand by itself, but is included with other work, *e.g.*, in a contract price.

In the view I have expressed the plaintiffs would have been entitled to a lien against the interest of the owner generally instead of being limited to the increased value given by the building, but as the plaintiffs have not appealed or asked to have the judgment varied in their favour, this is not material.

The appeal should be dismissed, with costs. *Appeal dismissed*

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CHATTERSON v. DUTTON.

Saskatchewan Supreme Court, Newlands, Lamont, Brown and McKay, JJ. March 10, 1917.

ARBITRATION (§ III—15)—AWARD—COSTS—TAXATION.

On a reference to an arbitrator which included power to award the costs in an action which had been commenced, and of the arbitration there is power to award for counsel fees on the trial, and to postpone till a later date the actual taxation of the costs instead of including them in the award.

Statement.

APPEAL from the judgment of Haultain, C.J. on an application to enforce an award under the Arbitration Act. Reversed.

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

H. Y. McDonald, K.C., for respondent.

The judgment of the Court was delivered by

Newlands, J.

NEWLANDS, J.:—Amongst the matters referred to the arbitrator were the costs in an action, the subject matter of which had been referred to him, and the costs of the arbitration.

By his award he found that the applicant, Charles H. Chatterson, was entitled to the costs of the action and of the arbitration on the Supreme Court scale, and that D. J. Dutton was entitled to the costs of his counterclaim in the action on the District Court scale, with a set-off between them, such costs to be taxed before him. If not so taxed within twenty days he would fix the costs without taxation. He also provided that the costs of the award were to be paid one-quarter by Chatterson and three-quarters by Dutton.

On the application to enforce the award, it was objected that the award did not finally dispose of the costs of the arbitration and of certain litigation between the parties, which was one of the matters to be disposed of under the submission.

Upon this objection the Chief Justice held that, so far as the costs of the litigation were concerned, the arbitrator had no

authority to tax them, that the objection was fatal, and the award could not be enforced.

Upon the argument before this Court, particular stress was laid upon the fact that, under our rules, counsel fees on trial had to be fixed by the Judge, and that, therefore, the counsel fees at least should have been fixed by the award.

I can see no difference between counsel fees and any other costs. It is not a question of law how much a counsel shall be paid for his services, but a question of fact as to what those services are worth, and as the arbitrator in this case left the costs to be taxed by himself, the counsel fees are in no different position from the other costs.

That leaves the only question to be decided: Had he power to postpone the taxation of costs of both the action and the arbitration proceedings, or should these costs have been fixed by the award itself?

In *Sharpe* v. *Metropolitan District R. Co.*, 4 Q.B.D. 645, Brett, L.J., at p. 650, says:—

> Speaking of an ordinary award by arbitrators not within the Lands Clauses Consolidation Act, 1845, and not a statutory award, Erle, J., said: "When arbitrators award costs, it is meant to be judicially the costs of the litigation, the amount to be ascertained ministerially by the person whom they appoint." In this passage a contrast is drawn between a judicial decision and a ministerial function after that judicial decision; and it is to be observed that he does not use the word "ministerial" there as indicating an officer of the Court, for he applies it to an officer to be appointed by the arbitrators.

In the same case in the House of Lords (1880), 5 App. Cas. 425, Lord Hatherley, at pp. 439, 440, said:—

> If it is decided that that gentleman is bound to pay the solicitor's bill of another person for some litigation which he has entered into, when that is settled and he is once fixed with the liability to pay the bill incurred by another person, or whatever it may be, you have settled everything requiring to be settled judicially. The rest follows as a matter of course upon definite and fixed principles; and it has been well described by one of the Judges in one of the cases that were cited, as a "ministerial" act and not a judicial act which remains to be done. The judicial act was deciding upon the question of principle, and ascertaining whether the gentleman was liable to pay the costs at all.

Referring to what an arbitrator may do in matters merely ministerial, Parke, B., in *Thorp* v. *Cole*, 2 C.M. & R., 367, said at 380:—

> And it is said, that such complete and perfect valuation has not been made; for it appears by the award, that they have left the *quantity* of the

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lake *occupied* by the plaintiff, on which the amount of the rate in part depends unsettled.

But I think that the construction of this part of the award, which is set out in the plea, unexplained by any averment on the record, is, that the *whole lake* is occupied by the plaintiff, and the only matter deferred is its measurement, which is a mere ministerial act, and which, even where a matter is referred to be finally decided by arbitrators, and not simply a valuation to be made, may be delegated to another. *Winch and Saunders* case, 2 Roll's Rep. 214. The award, therefore, appears to me not to be void in this respect.

This case is the authority given by Russell on Arbitration, 9th ed., p. 203, for the statement that

> Though the arbitrator cannot reserve a further judicial act to be done, he may reserve a further ministerial act to be done either by himself or a stranger, at any time, even after the time limited for making the award has expired.

In this matter, the costs of the action were referred to the arbitrator; he has decided the judicial question that Chatterson was entitled to them, in and by his award; the ministerial act of taxation he reserved to himself at a subsequent date. From the authorities I have cited, I am of the opinion that he had power to do this and that, for that reason, the award is not bad.

As to the costs of the arbitration itself, not only do the above authorities apply, but the Arbitration Act in clause (*i*) of the schedule provides that

> The arbitrator may direct to and by whom and in what manner the costs or any part thereof shall be paid and may tax or settle the amount of costs so to be paid or any part thereof.

as he could only do this in and by the award, the taxation must be a subsequent act.

This section is similar to one in the English Act upon which the case of *Prebble* v. *Robinson*, [1892] 2 Q.B. 602, was decided, and which case was cited by Mr. McDonald as authority for the proposition that the costs must be fixed by the award itself. A reference to this case will shew, however, that the decision was, that if the costs were not fixed by the award, they were subject to taxation.

The other objections were disallowed by the Chief Justice, and, as they were not appealed against, I need not consider them.

I think that the application for leave to enforce the award as a judgment or order of the Court should be allowed with costs and that the appeal should be allowed with costs.

Appeal allowed.

ARMSTRONG v. BRADBURN.

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Alberta Supreme Court, Appellate Division, Stuart, Beck, Walsh and Ives, JJ. February 23, 1917.

LANDLORD AND TENANT (§ III E—115)—RE-ENTRY—VOLUNTEERS AND RESERVISTS ACT.

The mortgagee of a lease has the right to recover possession of the premises upon default of his lessee, notwithstanding the premises were occupied by the lessee together with a person in active service, entitled to the benefits of Volunteers and Reservists Relief Act, who was not a party to the action.

Statement.

APPEAL by plaintiff from the judgment of Harvey, C.J., [1917] 1 W.W.R. 854. Reversed.

S. B. Woods, K.C., for appellant; *H. H. Parlee*, K.C., for respondent.

Stuart, J.

STUART, J.:—There has been no case before this Court for some time, so far as I know, which presents a better example of the way in which rules of law may fade away into intangible mists than the present one. There is an estate in fee simple in persons not parties to the suit. They made a lease for 17 years to Thomson and Bradburn. These lessees mortgaged their term by way of under-lease for the original term less one day to Armstrong. So Armstrong was both their tenant and their mortgagee. He did not go into physical possession at first, but upon default of payments gave a notice which amounts to a taking of possession. Then the defendants, a joint stock company, a corporation without a physical body, took a lease from Armstrong from month to month at a certain rental. They fell into default and Armstrong gave a notice to quit. Not getting possession he brought this action to obtain it. The trial Judge made a declaration merely that he was entitled to possession as against the company. But as it appeared in evidence that Bradburn personally was in actual physical occupation of the premises the formal judgment as settled said that:—

> Whereas one W. C. Bradburn is in possession of the said premises with his goods and chattels *along with the said defendant* that the plaintiff is not entitled to possession of the said premises.

Bradburn had enlisted and was entitled to the benefit, whatever it was, of the Volunteer and Reservists Protection Act. But he was not a party to the suit. So the simple question is, where does the matter stand?

What we have to deal with here is the actual physical possession or occupation. Speaking of the possibility of there being two possessions of land, which arose as a serious question in the

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common law owing to the custom of making leases, Pollock and Wright on Possession in the Common Law, p. 47, say:—

> The fundamental maxim that there cannot be two possessions of the same thing at the same time is evaded, successfully or not, by treating the land itself and the reversion as different things.

And after a discussion of the mysteries or, as Maitland calls it the "beatitude" of seisin, the authors say, p. 49:—

> And accordingly we have a double terminology corresponding to a double set of rights, and (so long as the real actions were in practical use) also of remedies. An occupying freeholder is both seised and possessed. A freeholder who has let his land for years is seised or possessed of the freehold, but not possessed of the land. A lessee for years possesses the land even as against the freeholder.

It is, however, still the fundamental rule that there cannot be two possessions, in the old primitive physical sense, of the same thing at the same time. And here we have to do with possession only in this sense. In my opinion therefore the clause from the judgment which speaks of a double possession alleges a fact which really cannot in contemplation of the law exist at all. But the clause does say that the defendant company is in possession because it says that Bradburn is in possession "along with the said defendant."

If two persons are, so far as outward appearances go, in physical possession of land, the law, in my opinion, will treat that one as being in possession who has the greater right. (*Jones* v. *Chapman*, 2 Ex. 803, 821; Pollock and Wright p. 24.)

I can find nothing in the evidence which shews any assignment of the defendant's lease from month to month to Bradburn. The evidence shews the sale of goods and chattels but nothing more. Neither Bradburn nor the defendant company ever gave any intimation to Armstrong that the lease had been assigned, even supposing that were the case. The defendant company never gave any notice that they were going out. There is no evidence before the Court that Bradburn makes any claim of right to be in possession. As the evidence stands I think he has none. It is clear from the evidence that his agents who are representing him here knew about the commencement of this action, about it going on to trial and about it going on to appeal. They made no request on his behalf at any stage to be added as a defendant. For this reason I think little regard should be paid to his possible rights either at this stage, nor, I think it

quite proper to add, even if he should make a belated application when he finds a writ of possession being executed, or if he were in strict law entitled to a hearing then I should think something ought to be done, if possible, if he succeeds in regard to the costs which he has allowed to be incurred by standing by and making no claim.

Therefore I see no reason why the plaintiff should not have a judgment that he recover possession of the premises according to his claim. I would allow the appeal with costs and direct the judgment to be varied accordingly. All mention of Bradburn should, in my opinion, be omitted.

The cross appeal should be dismissed with costs.

WALSH, J., concurred. Walsh, J.

BECK, J.:—The statement of claim alleges in substance that the defendant company being in possession of certain premises of which the plaintiff was entitled to the possession, the defendant company in consideration of the plaintiff permitting it to continue in possession by memorandum dated March 30, 1916, agreed to become a tenant of the plaintiff from month to month at $175 a month payable in advance, etc., and that the plaintiff determined the tenancy and the plaintiff claims (1) possession and (2) judgment for the unpaid rent. Beck, J.

The only defence really relied upon will be best indicated after stating the facts.

Crafts, Lee & Gallinger owned a lot in Edmonton. They gave a ground lease of it to Thomson and Bradburn for 17 years from April 1, 1913, at a rental of $675.08 per month for 5 years with a provision for readjustment for the residue of the term. The lease called for the erection by the lessees of a building on the land of the value of not less than $40,000. The lessees built the building on June 6, 1913. Thomson and Bradburn entered into an agreement providing amongst other things that Thomson should have the "south store" and Bradburn the "north store" in the building. It is the north store that is in question. On May 9, 1914, Thomson and Bradburn gave a mortgage of the lease to Armstrong—the plaintiff; the mortgage being by way of a sub-lease for the unexpired term less one day. Some time, apparently towards the end of 1914, Bradburn formed a joint stock company under the name of the Bradburn Printing Co.

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Limited in which he held 97 out of 100 shares. On March 25, 1916, Armstrong gave notice to Thomson and Bradburn under sec. 62(*a*) of the Land Titles Act (ch. 3 of 1915) of his intention as mortgagee to enter into possession and take the rents, etc.

On April 19, 1916, the Act for relief of Volunteers and Reservists (ch. 6 of 1916) was passed. Bradburn was from some time in the autumn of 1915 and ever since has been a volunteer under that Act.

On June 17, 1916, the Bradburn Printing Co. Limited held a meeting of its shareholders and sold all its assets to Bradburn, he assuming all liabilities, and a bill of sale was given on the same day made from the company to Bradburn after which the business continued under the name of the Bradburn Printing Co., as a nominal firm, Bradburn, on July 12, 1916, filing a declaration to that effect under the Partnership Ordinance.

The same business was carried on in the north store either in the name of Bradburn, the Bradburn Printing Co. Limited or the Bradburn Printing Co. continuously from some time in 1913 to the present time.

This action was commenced on September 22, 1916. The rent under the memorandum of lease sued on was paid for the months of May, June, July, and August, 1916, and the rent sued for is that of the month of September and subsequent months. Armstrong supposed that these payments of rent were made by the limited company, and received the payments under that supposition. They were in fact made by the hands either of a firm of solicitors or of persons who had been officers of the limited company and who continued on the premises rendering like services after June 17, when the company sold all its assets to Bradburn and were made without doubt from the proceeds of the business thus carried on; the company, assuming the sale effective, having evidently no assets whatever.

Notwithstanding the contention to the contrary, I have no doubt at all that the lease of March 30, 1916, contained in the memorandum of that date signed "The Bradburn Company Ltd., per Riley Dixon (corporate seal)," was binding upon the company. It was evidently given by or with the approval of a person or persons who, having sole charge of the business, had of necessity authority to provide a place in which the business could be carried

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on. That lease was determined only by notice given by the plaintiff landlord terminating it on August 31. There was much evidence given with the view of showing that the defendant company was not in possession because Bradburn was in possession. Bradburn was not a party to the action and it is not the business nor within the power of this Court to determine what his rights are until he is before the Court. If he were a party he might possibly shew that the company's tenancy having expired he was in possession by reason of his prior ownership; but then I should think he might be met by the fact that he had mortgaged his interest to the plaintiff and that by virtue of sec. 8 of the Volunteers and Reservists Act the other provisions of the Act are very greatly restricted. That section says that:—

> This Act shall not deprive a mortgagee, or person having a charge or security on land of the right to collect and receive the rents or rentable value of such land.

The contention doubtless would then be that the Act preserving the plaintiff's right as mortgagee in this respect, must by necessary implication preserve his remedy; and one remedy at least would be surely that if he did not pay a fair rent he should go out. Broom's Legal Maxims: *ubi jus, ibi remedium*, a legal maxim more comprehensive than the maxim of Equity; Equity will not suffer a wrong without a remedy. Pomeroy, Eq. Jur. sec. 423.

Again he might possibly satisfy the Court that he had become tenant of the premises under the company and therefore had come into possession rightfully, though now, but for the Volunteers and Reservists Act, subject to ejectment, but against this it would doubtless be said that when the title upon which, his alleged title depended terminated his alleged title terminated also, and that thereafter his possession was unlawful and it would doubtless be contended that the Act in question was not intended to apply to the case of mere trespassers nor to the case of obligations arising since the passing of the Act and both of these contentions it seems to me have strong arguments in their favour.

Again if, as would no doubt be the case, both the views I have were put forward, Bradburn would be forced, it seems to me, as between a legal title, viz., that as original lessee and an unlawful occupancy to depend upon his lawful title; one which as I have intimated would, I think, give the plaintiff a remedy and obviate a manifest injustice.

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Dealing then with the relationship between the plaintiff and the defendant company, and leaving out of consideration what we have no power or authority to decide in the absence of Bradburn, the relationship between the defendant company and Bradburn, I think the trial Judge was right in giving judgment against the company for an occupation rent. I think, however, he ought to have given judgment for possession of the premises.

The present practice in actions for the recovery of land by landlord against tenant is summarized in Redman on Landlord and Tenant, 6th ed. pp. 744-745, and the case of *Munet* v. *Johnson*, (1890), 63 L.T.N.S. 507; *Synod of Toronto* v. *Fisken*, 29 O.R. 738; and *Geen* v. *Herring*, [1905] 1 K.B. 152.

These cases show that in the case of tenancy where there are persons in possession under the tenant, the tenant alone may be made defendant and that under an order for possession those claiming under the tenant will be ejected; and that if any of these other parties wish to intervene they may apply to the Court for leave to do so, even after judgment in pursuance of rules the effect of which is comprised in our r. 40. That rule entitles Bradburn to apply to be added as a party as being interested in the subject matter or result of the action. No doubt it would be at once said that it is preposterous to throw upon a person who is at the front fighting for his country any such obligation; but the justice and common sense of the thing is all the other way. Bradburn's business as a merchant is being carried on as if he were here with the necessary staff of employees with, of course, a manager in charge. R. 143 provides that if the defendant is out of the jurisdiction but has an agent, manager, managing clerk, or other representative resident and carrying on his business within the jurisdiction, service made upon such agent, manager, managing clerk, or other representative shall be deemed service upon the defendant. This is a rule based upon the plainest common sense. Indeed it is more in accordance with common sense that, in a case where the matter of the action or proceeding relates to the local business, the local manager should be served than that the owner of the business should be personally served out of the jurisdiction.

The material before us puts it beyond question that Bradburn's local representatives were fully aware of the proceedings in

the present action and that they needed no information or instructions from him to enable or justify them in doing whatever was necessary or proper to protect his interests in relation to the matters in question in this action or unless he has given distinct instructions to the contrary to carry on the business with such ordinary honesty, as would lead them to pay the rent for the premises in which the business is carried on or to vacate the premises, and as his services at the front do not dispense him from.

It may possibly be that the Act under discussion was really intended to have the result that a man or the wife and family of a man coming within the protection of the Act are at liberty to remain in possession of premises at the expense of their landlord although the public voluntary subscriptions provide them with ample means for the very purpose among others of enabling them to preserve a decent and suitable home; but it seems impossible to suppose that it was intended that such a man may carry on a lucrative business on rented premises and pocket his profits without paying any rent for the use of the premises which are a large source of those profits.

Those in whose hands is the management of Bradburn's business will have an opportunity, if they choose to avail themselves of it, of applying on his behalf, for which they need have no doubt of their authority, that he be added as a party defendant, in case the business is in any way attempted to be affected under process issued on the judgment in this action and to obtain the benefit of every remedy and every protection that the law entitles him to avail himself of.

In the result I would affirm the judgment appealed from, whereby it orders payment of a sum for occupation; I would make an order for possession eliminating the third paragraph of the judgment which declares that because Bradburn is in possession, the plaintiff is not entitled to possession; I would affirm the judgment that the plaintiff have the costs of the action. This disposes of the cross-appeal also. I would give the plaintiff the costs of the appeal and cross-appeal.

Ives, J.

IVES, J.:—The facts of the case would seem to be:—That in April, 1913, William A. Thomson and William C. Bradburn took a ground lease of lot 221 in block 1 Hudson's Bay Reserve

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in the city of Edmonton from the owners, Crafts, Lee and Gallinger. The term was 17 years.

Upon this land the lessees erected a building and agreed between themselves that Thomson should occupy the south store and Bradburn the north store.

On May 22, 1914, Thomson and Bradburn mortgaged their leasehold interests to the plaintiff to secure the sum of $10,000, and in the instrument of mortgage the "mortgagors demise to the mortgagee" lot 221 block 1 Hudson's Bay Reserve to hold for the term of the lease less the last day.

Meantime Bradburn has incorporated his business in a limited liability company (the defendant in this action) of which he owns 97% of the stock, and the defendant company occupies and does its business on the premises theretofore used by Bradburn.

On March 25, 1916, the payments under the mortgage being in arrears, the plaintiff gave Thomson and Bradburn a notice in writing of his intention to exercise the power of entry, sale and foreclosure provided for in his mortgage.

On March 30, 1916, Thomson executed and delivered to the plaintiff a quit claim deed of all his interest in the ground lease and land thereby demised, and in consideration the plaintiff undertook not to demand or seek to recover from Thomson any sum of money for which Thomson was or would become liable for under the mortgage to the plaintiff or under the ground lease.

On the same day, March 30, the defendant company wrote the plaintiff and gave the subject-matter of this letter the following heading: "Re premises *occupied* by us in Bradburn-Thomson Block, First Street, Edmonton." This letter says that in consideration of the plaintiff permitting defendant to remain in these premises until April 20, rent free, the defendant agrees to get out on that date or pay rent to plaintiff from that date at the rate of $175 per month, and remain as monthly tenants. No rent was paid under this undertaking, and the plaintiff distrained the goods on the premises on July 7, 1916.

On the same day a notice was given the sheriff on behalf of W. C. Bradburn claiming the goods distrained as the property of Bradburn, whom the notice alleged to be entitled to protection under the provisions of the Act for the relief of Volunteers and Reservists, ch. 6 of the statutes of 1916.

Bradburn's ownership of the distrained goods arises through a purchase by him from the defendant company on June 17, 1916, and he continues the same business on the premises under the name of Bradburn Printing Co. as was theretofore carried on by the defendant.

On July 18, leave to sell under the distress was granted by Chamber order. This brought the following letter from the solicitors for Bradburn to plaintiff's solicitors on July 22: "Re *Armstrong* v. *Bradburn*. We beg to enclose our cheque for $365 in payment of the rent due by Bradburn Printing Co. to Armstrong."

The receipt for this rent acknowledges it as rent owing by the defendant.

The rent for August was paid by a cheque of the Bradburn Printing Co., and again receipted for as rent owing by the defendant company, and it might be noted that while the payments were made as of rent owing by Bradburn he was satisfied to fix the amount under the defendant's arrangement of March 30, which was $75 per month less than Bradburn was obliged for under the ground lease.

The formal judgment appealed from declares the plaintiff entitled to possession as against the defendant, and for the recovery of $600 as occupation rent from September 1 from the defendant, but not to possession as against Bradburn, who is in actual possession.

It seems not to have occurred to anyone at the trial to apply to have Bradburn added as a defendant in this action, though the evidence is largely directed to ascertaining his rights of possession and the judgment in effect declares them. This is an action for the recovery of land, an action in *rem*, and all parties interested in the possession of the premises should have been made defendants when the action was commenced or added as soon as knowledge of their interest arose. Here I think counsel for defendant should have applied to have Bradburn added, in view of the facts disclosed by the evidence and the judgment contended for, but as he was not added and is therefore a stranger to the action any declaration of the plaintiff's rights as against him or of his rights against the plaintiff cannot be effective. If, however, Bradburn had been made a party I think his rights

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would be determined as from March 25 when the plaintiff's notice terminated his tenancy. The only tenancy created thereafter by the plaintiff, who alone had the right to grant any, was the one in favour of the defendant under the arrangement of March 30.

Any possession by Bradburn after March 25 is without any right. The defendant did not assign its lease to Bradburn or purport to sublet to him. He cannot claim the benefit of the Act to protect a right which is not his. He is no more than a trespasser.

As to defendant's contention that occupation rent is not owing on the ground that from the first of September they were not in occupancy, there is nothing in the evidence to support this except that they sold their business, effects and good-will to Bradburn on June 17. But they did not assign their lease of March 30; they gave no notice to their landlord, the plaintiff, that they were giving up possession. If they did terminate their occupancy there was no means of the plaintiff learning of it, and the notice given on July 7, by Bradburn's solicitors on his behalf would not avail the defendant.

I think the appeal should be allowed and the judgment below varied giving plaintiff judgment as claimed.

The cross-appeal as to the occupation rent should be dismissed. As the plaintiff has substantially succeeded in his appeal he should have his costs of the appeal. *Appeal allowed.*

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Re NEILLY AND LESSARD.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Sutherland and Rose, JJ. January 17, 1917.

MINES AND MINERALS (§ I A—5)—CLAIMS—STAKING OUT—BOUNDARIES—ONT. MINING ACT.

That which a discoverer is entitled to under the Mining Act (R.S.O. 1914, ch. 32) is 20 acres laid out in the manner imperatively and minutely prescribed, with diagrams, by the Act; if a claim has been inaccurately laid out, it is not thereby invalidated, but the claim may be laid out as the Act prescribes.

Statement.

APPEAL by Felix Lessard and others from a decision and order of the Mining Commissioner in the matter of mining claim C-1009, being the south-west quarter of the east half of the south-west quarter of block 2, Gillies limit, in the Temiskaming mining division, and in the matter of a confliction between the said claim

and claim C-940, being the north-east quarter of the east half of the south-west quarter of block 2, Gillies limit.

The Mining Commissioner's decision was in favour of Balmer Neilly, the disputant.

The Commissioner gave written reasons for his decision, as follows:—

The holders of mining claims C-940 and C-1009 have applied for patents, which have not issued, owing to confliction of boundary-lines. The matter is now before me on the application of Balmer Neilly, holder of mining claim C-940.

Both claims are parts of block 2, situate in the Gillies timber limit, in the Coleman special mining division.

Neilly, in his application to record claim C-940, applied for the north-east quarter of the east half of the south-west quarter of block 2, with his eastern and western boundaries 20 chains and his northern and southern boundaries 10 chains each, and stated that a discovery had been made upon the said lands at one second after 12 o'clock on the 20th day of August, 1912.

Felix Lessard staked and applied for what is now known as C-1009 on the 20th August, 1912, and made a discovery at five minutes past 12 a.m. on the same day. In his application to record he described the lands staked as being the south-west quarter of the east half of the south-west quarter of block 2, the outlines of the claim being 10 x 20 chains. Upon a survey of the two claims being made, it appeared that part of the northern boundary of C-1009 extended over and above C-940 at the south-east quarter thereof, to the extent of half an acre or thereabouts.

On the 2nd August, 1912, by an order in council, approved by His Honour the Lieutenant-Governor, this and other portions of the Gillies timber limit on the Montreal river, in the Cobalt special mining division, were ordered to be reopened for prospecting and staking out for sale or lease under the Mining Act of Ontario, on and after Tuesday the 20th August, 1912; and secs. 21 and 51 of the Mining Act were ordered to apply thereto. On the 3rd August, 1912, by instructions appended to the said order in council, the Minister of Lands Forests and Mines directed that claims in blocks which had not been subdivided should in no case overlap the boundaries of the block—that is, a claim should be staked wholly within a particular block, and not include any portion of an adjoining block or blocks—and that claims were

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not to exceed 20 chains long from north to south or 10 chains wide from east to west. The blocks in the Gillies timber limit were divided into areas of a mile square, having stakes placed on the north and south boundaries thereof, at intervals of 10 chains, and on the east and west boundaries of 20 chains, apart, but the blocks were not subdivided into quarter sections or subdivisions. Section 51 states the area of a mining claim in unsurveyed territory, but clauses (*c*) and (*d*) of sec. 51 do not apply, as the claims were not subdivided into quarter sections or subdivisions; consequently the land staked was in unsurveyed territory.

The Government Surveys Department in Toronto does not recognise such quarter sections or subdivisions as applied for herein as existing in the Gillies timber limit. When a survey of a mining claim within the limit is received by that department, it is placed on their office map in such a position as the survey indicates, regardless of the quarter section mentioned in the application. It seems to have been the impression amongst licensed prospectors that a mining claim staked in the Gillies limit must be applied for as a particular quarter section; and the difficulty experienced by them in definitely locating the particular quarter sections they thought they had staked, has led to many disputes.

Section 51 of the Mining Act of Ontario states that a claim in unsurveyed territory shall be a rectangle of 20 acres, having a length from north to south of 20 chains and a width from east to west of 10 chains, and the regulation attached to the order in council of the 2nd August, 1912, when the Gillies limit was opened for staking, required a licensee to conform to sec. 51 when staking a claim.

Both Neilly and Lessard applied for claims 20 x 10 chains, containing 20 acres, but Neilly's claim, as staked, had a length from north to south of 23.651 chains on the east and 22.095 chains on the west boundaries and 10.084 and 7.05 chains on the north and south boundaries respectively, embracing an area of 19.5 acres. The outlines of the Lessard claim, as staked, were on the east 21.18 chains, on the west 22.26 chains, and on the north and south 10.38 and 12.37 chains respectively, with a total acreage of 24.13 acres; so that both Neilly and Lessard contravened the regulations issued by the Department, and sec. 51 of the Mining Act, with respect to the length of outlines of their claims, and

Lessard also offended with respect to the total acreage staked, he having exceeded the acreage allowed to be staked by 4.13 acres.

The lands being in unsurveyed territory, it was not necessary for either applicant to apply for a particular section; and, although they did so, and their stakings were not wholly within the lands applied for, their respective discoveries were within the lands as staked, and their claims are not invalid in that respect.

Neilly had a surveyed line as the northern boundary of his claim, from which he could have accurately run a north and south line of 20 chains; and Lessard had a southern surveyed line, from which he could have run an accurate north and south boundary of 20 chains, taking his southern line as his starting-point and running north a distance of 20 chains; but the fact that the limit was thrown open for staking by the Department at midnight on the 20th August, 1912, and the territory therein embraced being supposed to contain valuable mineral in place, necessarily induced a rush, and more or less confusion arose in fixing the exact dimensions of the boundary-lines; and the case now before me is one of the many confusions that have arisen with respect to the land staked in the Gillies timber limit.

Lessard contends that, even though Neilly staked at one second past 12 o'clock a.m., and had a priority of a little more than 4 minutes over his own staking, yet, inasmuch as the Neilly discovery was situate 1,250 feet from the number 1 post, by the time he had blazed a sufficient line and erected his discovery and number 1 posts he would have completed the staking of his claim, as his discovery was only 200 feet from his number 1 post, and consequently he had completed his staking first, and was entitled to the small piece of land in dispute. The contention cannot be allowed, as there is no reliable evidence that he completed his staking before Neilly; and, even if he had done so, the fact remains that Neilly had priority, if I am to accept the time of his staking as being accurate; and, by sec. 55 of the Mining Act, he had a reasonable time in which to complete the staking out of the claim. All that either Neilly or Lessard was entitled to, after placing their discovery posts, was a claim of 20 x 10 chains, containing 20 acres; and, while Neilly had priority of staking, he was only entitled to extend his lines from north to

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south 20 chains, and the same remark applies to Lessard. I find that both have exceeded the limits allowed by the regulation and Mining Act. It is also to be noted that, in the result, Neilly staked less than 20 acres, and Lessard more; so that, in arriving at a decision as to who should be entitled to the land in dispute, I have to look at the equities of the case, as they are both offenders. In other words, if Lessard had run an accurate line from the fixed survey-line at the south of his claim 20 chains north, and kept within the quarter section he applied for, he would not have conflicted with Neilly; and the same remark applies to the Neilly staking. If there had been an accurate staking by both licensees, then the southern boundary of the Neilly claim would have met or been in the immediate vicinity of the northern boundary of the Lessard claim.

If I were to order the east and west lines of the Neilly claim to be shortened so as to meet the requirements of the Act, I should be in duty bound also to require the Lessard claim to conform with the Act before a patent issued.

Sub-section (5) of sec. 59, in respect of the number of acres staked, and the failure to set out, in the application, sketch, or plan filed, the actual area staked, applies both to the Lessard and Neilly stakings, as in one case there is an inclusion of more and in the other of less, and both applicants wrongly described the land staked; and, had it not been for that provision, both claims might have been declared invalid, as the foundation of the right which a staker acquires or may acquire is the claim which he files with the Recorder, and the claims filed by both applicants included 20 acres with the dimensions of 20 chains on the east and west and 10 chains on the north and south: *Re Olmstead and Exploration Syndicate* (1913), 13 D.L.R. 750, 5 O.W.N. 8.

I am required to give my decision upon the real merits and substantial justice of the case; and, in view of the fact that both parties before me have not strictly complied with the requirements of the Mining Act, or staked their claims in conformance with the regulation of the 3rd August, 1912, I cannot equitably nor can I strictly apply the Mining Act as against Neilly and allow the fraction in dispute to be included in the Lessard claim. Rather than order that the lines of the claims staked should be cut down to comply with the requirements of sec. 51 of the Mining Act, I prefer, as between Neilly and Lessard, to uphold the staking

of Neilly, as shewn in the plan of survey made by G. F. Summers, O.L.S., on the 8th July, 1913, and filed as exhibit 1 herein.

I have had recourse to the plan, on file in the Department, of the Gillies timber limit, shewing the claims staked and their situation on the plan; and I find that in nearly every case the lines have exceeded the allotted lengths, but patents have issued, as no adverse interests had appeared. In this case there is an adverse interest to the Neilly staking, and the lands were practically staked simultaneously; but the adversely interested party was in as much default as Neilly, and "he who comes into a court of equity must come with clean hands."

I order that mining claim C-940, as shewn on the plan of survey prepared by C. F. Summers, dated the 8th July, 1913, stand as recorded, and that a patent issue therefor upon application. I make no order as to costs.

A. G. Slaght, for appellants; *J. M. Ferguson*, for Neilly, respondent.

The judgment of the Appellate Division was delivered by

MEREDITH, C.J.C.P.:—We all think that this appeal should succeed upon a ground which seems to have been little, if at all, discussed before the learned Commissioner; nor was it likely to be raised by either party, as it is fatal to the claim of each alike. It is this: that that which a discoverer is entitled to is 20 acres laid out in the manner imperatively and minutely, with diagrams, prescribed by the Act.*

Meredith, C.J.C.P.

The provision† upon which Mr. Ferguson relies so much means only this: that, notwithstanding the fact that the discoverer has not laid out his claim in the way which the Act requires, he may, in the circumstances there provided for, have that which the Act so gives to him, not that which he has inaccurately laid out. And, that being so, the ruling of the Commissioner was wrong; the

*See secs. 51 *et seq.* of the Mining Act of Ontario, R.S.O. 1914, ch. 32.

† Section 59 (5) of the Act. Sub-section (5) was added by 4 Geo. V. ch. 14, sec. 2, and is as follows: "Where it appears that there has been an attempt made in good faith to comply with the provisions of this Act, the inclusion of more or less than the prescribed area in a mining claim, or the failure of the licensee to describe or set out in the application, sketch or plan furnished to the Recorder the actual area or parcel of land staked out shall not invalidate the claim."

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claims of both parties should be laid out as the Act prescribes, imperatively prescribes; and, that being done, there is no conflict; the boundaries of the one do not come in contact anywhere with those of the other. The Commissioner had power, and was bound, to decide according to the real merits and substantial justice of the case*: but that did not confer on him, in a conflict between two claimants, as to the rights of each, the power to award to either land to which neither had any right.

The appellants are entitled to their costs.

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REX v. BERNIER.

Quebec Court of Sessions of the Peace, Choquette, J. March 11, 1916.

1. GAMING (§I—6)—AUTOMATIC SLOT MACHINE—PROVINCIAL LICENSE.

The fact that slot machines are licensed in Quebec Province, under the authority of the Act 5 Geo. V. (1915), ch. 23, (Que.) has not the effect of making the use of them legal if operated for gambling prohibited by criminal law.

[See Annotation on "Use of automatic vending machines for gambling," at end of this case.]

Statement.

TRIAL on charge of keeping a common gaming house.

A. Lachance, K.C., attorney for the prosecution.

H. Cimon, K.C., attorney for the accused.

Choquette, J.

CHOQUETTE, J.:—Bernier, who keeps a saloon on St. John Street, at Quebec, is charged with having on the 20th December last and since then kept a disorderly house for purposes of gain, *i.e.*, a common gaming house, that other persons frequent to play games of chance or mixed games of chance and skill, such as are mentioned in arts. 226 and 228 of the Criminal Code of 1906 and the amendments thereof.

Bernier pleaded not guilty and produced licences from the Provincial Government issued by virtue of the Act 5 Geo. V. (1915), ch. 23, entitled: "Act respecting automatic distributors" authorising him, he claims, to use at his place the machines which have been seized there.

It was proved at the hearing that on December 20th and 21st ultimo, the accused had in his saloon two automatic machines, one called "Silver Cup", and another wooden machine, that the public could use and did in fact use for gambling. At that date, witnesses Brunette and Pelletier gambled to the amount of about one dollar without obtaining anything in return; they state,

*See sec. 140 of the Act.

moreover, that they saw another person, whose name they did not know, also gambling and losing his money.

The question as to whether or not those machines, and especially the one called "Silver Cup" which is mainly in question, are within the category of gambling devices prohibited by law is a question of fact and not of law. The Cr. Code forbids a person to keep on his premises, in his house, or in his room, any gambling device for gain or for games of chance and skill, and if the evidence is to the effect that an accused has some of those machines in his possession, article 985 of the Cr. Code says that that raises a presumption that he uses them for the above mentioned purpose and he must be condemned.

In the present case, the defendant, producing his license from the provincial Government, claims that the presumption disappears; but he is mistaken, for his license, and the law which permits its issue, article 7, positively says that such license must not be considered as an indication that the local Government or some of its officers are of opinion that that mechanical device is not one of those prohibited by law as gambling devices or otherwise; and that, if the person who has obtained that license is found guilty before criminal Courts of an offence in connection with said devices, his license becomes null and void.

Consequently, that license does not take away the presumption that one who has such a machine in his possession is using it illegally. His good faith may be proved, as in the present case, and a mitigation in the penalty be brought about.

Now the jurisdiction of the Court is established by section 773 Criminal Code and the punishment must be meted out according to article 781, amended as to penalty by 3 and 4 Geo. V., ch. 13, sec. 27.

Numerous authorities have been quoted both by the Crown and by the defendant, to determine whether or not the machines in question fall under section 226 Criminal Code. There have been, in fact, numerous more or less contradictory judgments in nearly all the Provinces of the Confederation. Many Judges claim that those slot machines which, in return for the putting of a few cents in the openings for the purpose, give gum or chips for the purchase of cigars, etc., do not fall under the law, because, they say, the gambler knows what he is going to get. In a case

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of *Rex* v. *Langlois*, 23 Can. Cr. Cas. 43, Langelier, J., says that those slot machines return gum for a cent; that they cannot be the cause of gross immorality; that the sum that the gambler may lose can be only insignificant and cannot be an inducement for him to become a professional gambler. I have the greatest respect for the opinion of Judge Langelier and in the case which he was called upon to decide I am not ready to say that his decision is not absolutely in conformity with the law; but this case is different and the mechanism of the devices is clearly not the same.

[The learned Judge here stated the evidence as to the working of the machines under which he held that they were to be classified by the Court among the gambling devices prohibited.]

I realize that it is not for the provincial Government nor its officers to say which are the automatic distributing machines which can be used in a legal way. But it seems to me that no licenses should be granted by the local Government without having it fully established by special officers or by mechanicians, that those machines may be used in a legal way, for example, gas distributors, the machines used by the Bell Telephone Company, cash registers for stores, etc. There is no doubt that those machines may be helpful and may be legally used, although no great skill is required to operate them; but at least the public knows perfectly well that it can neither lose nor gain anything by their use.

As to all these slot machines with devices similar to the ones in question now and which were seized in the present case—machines placed in saloons, tobacco stores, etc.—I have no hesitation in saying that they are used for illegal purposes and fall under Art. 226 Criminal Code.

The sentence is $10 and costs, and in default of payment, 30 days in jail. *Defendant convicted.*

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Annotation—Gaming (§ 1-20)—Use of automatic vending machines for gambling.

Every common gaming house is within the statutory definition of a "disorderly house" contained in Code sec. 228, and so also are common betting houses, common bawdy houses and all opium joints.

The idea of a "common gaming house," apart from statutory law, would seem far removed from the operation of an automatic machine by which on deposit of a small coin the customer could obtain a package of chewing gum, a newspaper, or some article of small merchandise, placarded as for sale in the particular

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machine. When these machines gave out uniformly the same quantity of goods, and nothing more, for each deposit of coin, there was no question of gaming. If, however, the machine gave out unequal quantities, or values from time to time for the same coin, and it was left to chance, so far as the purchaser was concerned, whether he got more or less, the machine would probably be classed as a "gambling machine," as this feature even if not announced to the public would soon become known and induce the patronage of those desiring to gamble. The machine might be considered as the automatic "hand" of the proprietor in delivering the goods and receiving the money. Its operation under such circumstances might also be a lottery offence within sec. 236 of the Criminal Code, 1906, Can.

Section 2 of R.S.C. 1886, c. 159, prohibited the sale of "any lot, card, or ticket, or other device for selling or otherwise disposing of property, real or personal, by lots, tickets, or any mode of chance whatsoever." The complainant went to the defendant's place of business, and having been told by the defendant that in certain spaces on the two shelves there were in cans of tea a gold watch, a diamond ring, or $20 in money, he paid one dollar and received a can of tea, which contained an article of small value; he handed the can back, paid an additional fifty cents and secured another can, which also contained an article of small value. He handed this can back also, paid another fifty cents, and secured another can, which also contained an article of small value. He then refused to pay any more money, and went away, taking the third can and the article in it with him. On a complaint laid by him before the police magistrate, the defendant was convicted in that he "unlawfully did sell certain packages of tea, being means of disposing of a gold watch, a diamond ring, $20 in money, by a mode of chance, against the form of the statute," etc.:—*Held*, that the transaction came within the terms of sec. 2, so as to make the defendant liable to conviction thereunder. *Regina* v. *Freeman*, 18 Ont. R. 524.

Newspaper proprietors distributed gratuitously thousands of metal discs, each bearing a distinctive number and the words, "keep this; it may be worth £100. See the Weekly Telegraph to-day." Periodically, numbers corresponding to those on some of the distributed discs, were published in the above paper, and it was announced that holders of these discs, on forwarding them, would receive a prize. No charge was made for the discs, and it was not necessary for the disc-holder either to purchase or produce a copy of the paper in order to have a chance of winning a prize. Information as to the winning numbers could be obtained gratuitously at the office of the paper. It was found that the scheme was formulated in order to induce people to buy the paper, and, as a consequence, the circulation had increased 20 per cent. *Held*, that this was a lottery, on the ground that, as, in fact, most of the recipients had to buy the paper, the chances of winning were paid for by them, and the prize-money was provided by them in the aggregate, and that, therefore, the discs were not

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distributed gratuitously: *Willis* v. *Young*, [1907] 1 K.B. 448, 71 J.P. 6, 21 Cox 362.

The introduction of vending machines with a so-called premium feature raised new questions as to the application of the criminal law. A fixed quantity of goods was sold for a fixed price, represented by the coin deposited in the slot of the machine, but, at uncertain intervals, so far as the buyer was concerned, there were issued "trade-checks," as they were termed, as a premium or bonus in addition to the chewing gum or other article intended to be bought, which was invariably turned out to the buyer on deposit of coin. These discs had a certain money value, because they were made redeemable for certain classes of goods at some shop or store. This trade-check feature might be operated as the means of a system of gaming between the buyer and the vending company, but wholly at the buyer's instance. He might continue to deposit coin in the automatic machine for the purpose of trying his luck in getting trade-checks, and thus an inducement would be held out to the public to buy superfluous quantities of the chewing gum, and increase the sales of the vending company. An additional feature in some of these vending machines was contrived to keep up the customer's interest, which might lag if a five-cent coin were essential to every operation. A separate slot was provided in which he could re-deposit each premium disc called a trade-check, already won, and so take a chance of getting more discs in return or of losing the one so deposited. In this operation of re-depositing a disc he could not win any gum, as gum was automatically issued only when the appropriate coin was deposited. Apart from the re-deposit feature, the position was much the same as if a storekeeper announced that to every tenth customer he would give a double quantity for the one price, but withheld from the public any means of knowing the numerical order of the customers, or how many customers had at any time to be served before the lucky tenth would be reached. Or, to apply the case of various prizes or premiums, what would be the result if the storekeeper announced that he had a scheme of prizes to be given on each sale in a fixed rotation, which he would not disclose further than to say that the customer on the next sale got no prize or a certain prize, as the case might be, and that this fixed rotation would be continued indefinitely, with the privilege to the customer to make as many continuous and separate purchases as he desired? If these prizes were sufficient in value to form an incentive to the purchaser to repeat or duplicate the purchase, with the object of winning a prize, it can hardly be doubted that the storekeeper would be amenable to the law against gaming houses or to that against lottery schemes, or possibly to both. The cases dealing with the operation of premiums with automatic vending machines in Canada have so far proceeded under the gaming laws rather than under the lottery laws.

It was held in *Fielding* v. *Turner*, [1903] 1 K.B. 867, that the operation of an automatic machine, in which no person but the player and the machine takes part, may constitute playing an

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unlawful game. In such a case the keeper, or owner of the machine, backs his chances against the person who uses it.

The question as to the effect of exhibiting in advance of each operation of a premium-giving machine the result to be obtained from the next deposit of coin has been considered in several recent cases, with a division of judicial opinion. The weight of authority favours the view that this does not prevent the classification of the machine as a gambling device. See *R.* v. *O'Meara*, 25 Can. Cr. Cas. 16, 25 D.L.R. 503, 34 O.L.R. 467; *Barcham* v. *The King*, 26 Can. Cr. Cas. 211, 31 D.L.R. 431, 25 Que. K.B. 354; and *R.* v. *Gerasse*, 26 Can. Cr. Cas. 246, 29 D.L.R. 523, (Man.), and the decision, above reported, of *R.* v. *Bernier*. The contrary view is supported by decisions in *R.* v. *Langlois*, 23 Can. Cr. Cas. 43 (Que.); *R.* v. *Stubbs* (No. 2), 24 Can. Cr. Cas. 303, 25 D.L.R. 424, Alta. (reversing *R.* v. *Stubbs* (No. 1), 24 Can. Cr. Cas. 60, 21 D.L.R. 541). See also, as to actual user for gambling between two customers, *R.* v. *Berry*, [1917] 1 W.W.R. 817.

In *Barcham* v. *The King*, *supra*, the prosecution was under Code sec. 235, as amended in 1910 and 1913, for keeping a gambling machine, and not under sec. 228 for keeping a gaming house. It was held that where an automatic gum vending machine is worked so as to give the customer, along with a package of chewing gum, a blank or a varying number of discs or trade-checks available for being re-played into the machine, and the manifest object is to induce people to gamble by enticing them with the chance of getting something of much larger value than the coin by repeated operations of the machine, it is none the less a gambling machine because each operation of it caused to be displayed the chance result which will follow the next deposit of either coin or disc. *Barcham* v. *The King*, 26 Can. Crim. Cas. 211, 31 D.L.R. 431.

In most of the other cases just referred to, the prosecutions took place under Cr. Code sec. 228, upon a charge of keeping a disorderly house, to wit, a common gaming house. The offences under secs. 228 and 235 are both indictable. The offence under sec. 228 is also subject to summary trial by a magistrate under Part XVI. of the Criminal Code without the consent of the accused: Code sec. 774. A prosecution under sec. 235 would be subject to summary trial under Part XVI. only with the consent of the accused and before the class of magistrates having the extended jurisdiction of summary trial conferred by Code sec. 777. When the charge is for "keeping" a disorderly house, sub-sec. (2) of Code sec. 228, as enacted in 1913, applies to make liable to be prosecuted and punished as the "keeper" the person in charge or management, and such person is to be deemed in law to be the keeper. See *R.* v. *Merker*, 27 Can. Cr. Cas. 113. Furthermore, on a charge under sec. 228 of keeping a disorderly house, sec. 986 of the Code makes it *primâ facie* evidence that the house is a disorderly one if an officer authorized to enter is prevented or obstructed; and if the house is fitted with any "contrivance for unlawful gaming" or with any device for concealing such contriv-

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ance or destroying it, such will be *primâ facie* evidence that the place is a common gaming house, and, consequently, a disorderly house under Code sec. 228. Sec. 985 also deals with *primâ facie* evidence of a place being a common gaming house where persons are "found in" upon a police raid made under a search order issued by a magistrate under sec. 641; but it was held by Beck, J., in *R.* v. *Hung Gee* (No. 1), 21 Can. Cr. Cas. 404, 13 D.L.R. 6, that only implements used in playing such games as are unlawful *per se* are within the purview of sec. 985 of the Criminal Code, 1906, which declares that certain paraphernalia and instruments used in playing any unlawful game found, on search, in a place suspected of being used as a common gaming house, shall, on a trial under secs. 228 or 229 of the Code, be *primâ facie* evidence of the fact that such place was used as a common gaming house; and, furthermore, that the game of "fan tan" is not an unlawful game *per se*.

Whether or not the application of sec. 986, as well as of sec. 985, is limited to cases in which a search order under sec. 641 has been issued, seems to be still unsettled. For the affirmative, reference may be had to *R.* v. *Hung Gee* (No. 1) (1913), 21 Can. Cr. Cas. 404, 13 D.L.R. 44; and for the negative *R.* v. *O'Meara* (1915), 25 Can. Cr. Cas. 16, 25 D.L.R. 503, 34 O.L.R. 467; *R.* v. *Gerasse*, 29 D.L.R. 523; and *R.* v. *Bernier*, reported above. The latter, indeed, assumes that the statutory presumption of Code sec. 985 is raised from the possession of a vending machine with the premium feature, kept for gain, but there was, in fact, testimony to prove that the public used the device for gambling. It does not appear from the opinions delivered in either the *Gerasse* or the *Bernier* case that a search order had been made; and there was no search order in the *O'Meara* case.

In 1913 a new section, numbered 228A, was added to the Criminal Code, and the material part of this new section, as regards gaming houses, is as follows:—

"Any one who, as landlord, lessor, tenant, occupier, agent or otherwise, has charge or control of any premises and knowingly permits such premises or any part thereof to be let *or used* for the purposes of a disorderly house shall be liable, upon summary conviction, to a fine of two hundred dollars and costs, or to imprisonment not exceeding two months, or to both fine and imprisonment."

A second sub-section deals only with the liability of landlords and landlords' agents in reference to tenancies of bawdy houses. It will be observed that the first sub-section quoted above creates an offence punishable on summary conviction and subject generally to the procedure of Part XV. of the Criminal Code; and also that the new section overlaps sec. 228, so that in many contingencies the offence might be charged under either, with the result that, if charged under 228, it is subject to summary trial under Part XVI., and, if charged under 228A, it is subject to the summary conviction procedure of Part XV. If the charge is under sec. 228, there is no appeal, except in the case of two

justices sitting together. Code sec. 797; *R.* v. *Merker* (1916), 27 Can. Cr. Cas. 113; *R.* v. *Dubuc* (1914), 22 Can. Cr. Cas. 426. But if the charge is under sec. 228A, an appeal lies on both the facts and the law under Code sec. 749 or on the law only under sec. 761 (stated case by a justice under Part XV. in respect of a summary conviction). With these differences of procedure and of rights of appeal, it becomes a matter of importance to the accused that the information which he is called upon to answer shall be specific as to the section of the Code under which the prosecution is laid, and that, in the event of its disclosing some offence against the gaming law, but not defining it in precise terms limited to one particular section of the Code, such amendments should be applied for by the defence as will limit the charge and fix the appropriate procedure upon it. Annotation.

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Alberta Supreme Court, Appellate Division, Scott, Stuart, Beck and McCarthy, JJ. February 9, 1917.

PLEADING (§ I N—110)—LEAVE TO AMEND AFTER CASE CLOSED.

Leave to amend the statement of claim, when asked *bonâ fide*, and when it can be made without injustice to the defendant, should be made on terms, even after the close of plaintiff's case.

Statement.

APPEAL from an order of the trial Judge refusing leave to amend a statement of claim in an action for damages for the death of the plaintiff's husband which she alleges was caused by the company and its servants. Reversed.

J. D. Mathews, and *Gray*, for appellant; *G. A. Walker*, for respondent.

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SCOTT, J.:—The deceased was a passenger from Calgary to Macleod on the company's railway on December 16, 1915, and was killed shortly after the arrival of the train at Macleod by being run over on the company's railway track by a sleeping car and locomotive.

In para. 16 of the company's statement of defence it alleged that the death of deceased was caused by his own negligence in leaving the platform at the station and crossing or attempting to cross the railway tracks at a place not intended for use by anyone other than the company's employees and in not proceeding directly from the train to the station along the platform, taking reasonable care not to walk off the platform on to the railway tracks where, as deceased well knew, trains frequently operated.

The plaintiff in her reply to that paragraph alleged in par. 4 thereof that if the deceased attempted to cross the tracks at a place not intended for use by anyone, or walked off the platform

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to the tracks, or was at that time a trespasser, it was due to the negligence or want of care on the part of the company, in that it supplied him with intoxicating liquor which rendered him drunk and incapable of caring for himself, that it supplied him with intoxicating liquor while he was intoxicated with the like result, that the company knew at the time he alighted from the train that he was drunk and incapable of taking care of himself, and notwithstanding such knowledge, the servants of the company left him standing on the platform at a time when they well knew that trains were being operated on the said lines and should have known that he was liable to walk on the tracks or fall from the platform thereto and be injured or killed, that with knowledge of his condition the company permitted him to remain standing on the platform at a time when, and at a place where it was dangerous, that the company failed in its duty to safely conduct him from the train to the station building and that the company did not take reasonable care that he should not walk off the platform or should not fall therefrom on to the railway tracks.

The company applied to the Master-in-Chambers to strike out this paragraph of the reply on the ground that it raised a new ground of claim and contained allegations of fact inconsistent with the plaintiff's previous pleading. The Master dismissed the application, but, on appeal from his order, Simmons, J., on June 12, 1916, allowed the appeal and directed the paragraph be struck out.

On June 14, 1916, the plaintiff gave the company notice that she would apply to the Judge presiding at the trial immediately prior to the trial for an order that she should be at liberty to amend her statement of claim by adding thereto another paragraph which is set out at length in the notice, the allegations therein being substantially the same as those contained in the paragraph of the reply which was struck out.

The trial took place at Macleod on June 19 and 20, 1916. Plaintiff's counsel did not make the application to amend the statement of claim until the conclusion of the plaintiff's case. It was then refused by the trial Judge, who stated that if it had been made at the opening of the trial it would have been allowed on terms, that the terms would no doubt have been the giving of such time to the company as might enable it to meet that phase

and plead to it and that it could not meet it at that time. He thereupon withdrew the case from the jury on the ground that the deceased was at the time of the accident a trespasser upon the company's property, and he directed that judgment be entered for the company.

A waiter upon the dining car on the train upon which the deceased traveled to Macleod on the day of the accident testified that deceased came into the dining car during the journey and had two drinks of Scotch whiskey which were supplied from the car and paid for by him, that when he had the two drinks, he (the witness) thought that he ought not to have any more and he told the steward not to give him any more. Upon being asked if the deceased was drunk he replied, "Well, he was not helplessly drunk, he certainly was intoxicated." This evidence was given without any objection by the company's counsel.

The conductor of the sleeping car of that train testified that the deceased was the last of the sleeper passengers to leave the train at Macleod and that he and the porter assisted the deceased off the train and left him standing on the platform at a point which the evidence shews was in the immediate vicinity of the place where he met his death.

R. 257 provides that a Judge may at any stage of the proceedings allow either party to alter or amend his pleadings or other proceedings in such manner and on such terms as may be necessary for the purpose of determining the real question in controversy between the parties.

Bramwell, L.J., in *Tildesley* v. *Harper*, 10 Ch. D., 393, says at p. 397:—

> My practice always has been to give leave to amend unless I have been satisfied that the party applying was acting *malâ fide* or that, by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise.

In *Clarapede* v. *Commercial Union Ins. Co.*, 32 W.R. 263, Brett, M.R., says:—

> However negligent or careless may have been the first omission and however late the proposed amendment it should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs.

In the notes to the corresponding English Rule (O. 28, r. 1) the case of *Hipgrave* v. *Case*, 28 Ch. D. 356, 361, is cited as holding that the Court will not readily allow at the trial an amendment

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the necessity for which was abundantly apparent months before, and then not asked for, but, upon referring to the report of that case, I find that the amendment was not applied for until the hearing of the appeal from the trial Judge and that Lord Selborne, L.C., merely expresses the view that the proper time for the plaintiff to apply for the amendment would *primâ facie* have been when the circumstances relied upon arose or that, at any rate, he should have applied for it at the hearing.

It does not appear that there was any unreasonable delay on the part of the plaintiff in applying for the amendment as there was not sufficient time between the date of the order striking out par. 4 of the reply and the date of the trial to apply for it before the trial. I am of the opinion that the trial Judge should have allowed the plaintiff to amend at the trial upon reasonable terms. If the company had shewn or even suggested that it was not then prepared to meet the case set up by the amendment, one of the terms which might be reasonably imposed would be the postponement of the trial and the payment by the plaintiff of the costs of the trial which would thus be rendered abortive. While it is true that the company's counsel stated that he objected to the amendment he did not state the grounds of his objections nor did he state that the company was not then prepared to meet the new case and there is nothing to shew that all the evidence was not given that could have been given upon the facts alleged in the proposed amendment.

I am therefore of opinion that the amendment should have been allowed subject to such terms as the trial Judge might have deemed reasonable, and I would therefore allow the appeal with costs and direct a new trial, the plaintiff to amend her statement of claim within one month in accordance with the notice given by her.

I would also direct that the costs of the first trial be in the discretion of the Judge presiding at the new trial as he will be in a better position than this division to decide whether the company was in a position at the first trial to meet the case set up by the proposed amendment and whether the company should have been entitled to an adjournment of the trial in consequence of the amendment.

As the questions whether the deceased was a trespasser upon

the company's property and whether the company was guilty of negligence will depend upon the evidence given at the new trial, it is unnecessary to consider whether the plaintiff has made out a case upon the pleadings as they now stand.

STUART and BECK, JJ., concurred with SCOTT, J.

McCARTHY, J. (dissenting):—This is an action brought by the plaintiff, the widow of the deceased M. C. McLean, on behalf of herself and child, to recover damages from the defendants in respect of the death of her late husband, which she in her statement of claim alleges to have been occasioned by the negligence of the defendants on the night of December 6, 1915.

The trial Judge at the conclusion of the plaintiff's case withdrew the case from the jury after having first refused the plaintiff's application to amend her statement of claim under the circumstances hereafter referred to, and the plaintiff appeals from these rulings. The deceased was a passenger on the south bound train from Calgary to Macleod, Alberta, on the evening in question. Upon the arrival of the train at Macleod it appears that it was immediately split up, a shunting locomotive taking off the sleeping car and dining car, which were the two rear cars of the train, the dining car being placed on a siding to the west of the station and the locomotive then proceeding easterly with the sleeping car which was to be placed at a point to the east of the station to await the arrival of the west bound passenger train, it was whilst proceeding easterly that the shunting train ran over the plaintiff's husband, he being found dead upon the track of the defendant company about eight minutes after the arrival of the south bound train at Macleod upon which he was a passenger from Calgary.

There is not nor there cannot be any direct evidence as to how the deceased got upon the track where he was found; it is to be observed, however, that the track upon which he was found is to the south of the station platform, to the south of the station-house proper, to the south of the business portion of the town and the deceased's residence, so it was unnecessary for the deceased to have crossed the track upon which he was found to have reached either of the above-mentioned points. Furthermore there was no crossing proper at the point where he was seen lying upon the track although one is provided east for those desiring to proceed south of the track in question.

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The appellants contend that even if the deceased was a trespasser upon the track under the circumstances above set out, that his death, if occasioned by being run over by the engine and car, could have been avoided by the exercise of ordinary diligence on the part of the defendants. It would appear from the evidence that one Scott, a trainman in the employ of the defendant company, was on the front platform of the sleeping car as it proceeded easterly and it was his duty to signal to the locomotive engineer if anything appeared to obstruct the passing train, such as trucks upon the station platform, baggage, etc., or people at the level crossing over which the train would be carried. The plaintiffs in effect contend that if Scott had used ordinary diligence that he would have seen the deceased lying upon the track and that his failure to see him was evidence of negligence which should have been left to the jury. If Scott's duty had been to watch between the two rails perhaps there might have been some evidence of negligence to submit to a jury, but from a perusal of his evidence I cannot see that there is anything which he did or omitted to do from which negligence on his part *can* be inferred—and upon that ground I think the trial Judge was right in not allowing that question to go to the jury. A failure to anticipate a thing so extraordinary and unusual as that a person should be found lying between the rails on a place where there is no way across the track and where the public have no occasion to be surely cannot be evidence of negligence.

From the evidence of Scott it would appear that he did see an object between the rails when the moving train was ten or twelve feet away, that he immediately signalled the locomotive engineer to stop the train but before it could be stopped the object was run over.

Appellants contend that the brakes were defective, but the evidence of the respondents goes to show that the train could not be stopped under any circumstances within a distance of less than forty-five feet, and from the moment Scott saw the object on the track ten or twelve feet away it was impossible to have stopped the train before passing over the object. This evidence appears to be uncontradicted. If the brakes were defective was that the cause of the train passing over the body? I think not, and from these facts negligence causing the death cannot be inferred.

The law governing the matter, as it is to be gathered from the decided cases, seems to be briefly stated in Phipson's Law of Evidence, 5th ed., p. 7, and in "Functions of Judge and Jury:"

> Whether there is *any* evidence, therefore, is for the Judge but whether there is *sufficient* evidence is for the jury. Thus in actions of negligence, it is for the Judge to say whether from any given state of facts negligence *can* be inferred, and for the latter to find whether it *ought* to be (*Metropolitan R. Co.* v. *Jackson*, 3 App. Cas. 193, 200).

The trial Judge had power to dismiss the action if he considered that there was no evidence on which the jury *could* reasonably find a breach of a duty "to take care of" on the part of the company to the deceased under the circumstances. The authorities seem to hold that this power ought to be exercised only where it is very clear that the plaintiff could not hold a verdict in her favour and if the matter is reasonably open to doubt the Judge ought to let the case go to the jury, and then decide, if necessary, whether there is any evidence on which the verdict or findings can be supported, and give judgment accordingly as was done in *Spooner* v. *Browning*, [1898] 1 Q.B. 528; *Hooper* v. *Holme* (1896) 13 T.L.R. 6, in the event of an appellate Court holding a contrary opinion.

In my opinion it would have made no difference in the case before us—there was no evidence of a breach of a duty to take care under the circumstances. There is no evidence of how or why the deceased reached the place of death. That his death was caused by the passing train is at best conjecture.

It would be necessary for the jury to presume many things against the respondents to hold them liable and I think the trial Judge was right in withdrawing the case from the jury.

It is unnecessary for me to go minutely into the authorities justifying his action. Many are referred to in *Metropolitan R. Co.* v. *Jackson*, *supra*, *Nightingale* v. *Union Colliery Co.*, 9 B.C.R. 453, 458.

The refusal of the trial Judge to permit the plaintiff to amend her statement of claim alleging in effect that the deceased was at the time of the accident drunk and incapable of caring for himself and that intoxicating liquor was supplied him by the defendants upon the train and that he was intoxicated and that they failed in a duty to conduct him safely from the train to the station is another ground for appeal.

The circumstances surrounding the application to amend

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so far as can be gathered from the record and what was stated in argument before us would appear to be that a similar allegation was contained in the plaintiff's reply to the defendant's statement of defence. The allegation was struck out by a Judge in Chambers. It was stated in argument that the Judge in Chambers stated that he would permit the plaintiff to amend her statement of claim so as to contain such an allegation. The plaintiff did not adopt the suggestion but served a notice of motion returnable at the trial (or immediately prior to the trial) for an order permitting an amendment of the statement of claim so as to plead such allegation.

The application was not made at the opening of the trial but at the close of the plaintiff's case on the third day of the trial and refused by the trial Judge.

It would appear that the plaintiff closed his case after having put in evidence to support the allegations contained in the statement of claim and thereafter determined to apply to amend.

Upon such an application there must be a discretion in the trial Judge.

The plaintiff having tendered evidence in support of the allegations contained in the pleadings as closed should not be permitted after the close of her case to set up an entirely new cause of action. After the evidence is in it cannot be argued that the plaintiff is entitled to then make a selection as to what cause of action she shall go to the jury on.

The facts sought to be alleged by the amendment must have been known to the plaintiff at the time the statement of claim was drawn or ought to have been known. They certainly were at the date of the reply, three weeks before the trial. I think the conclusion is irresistible having regard to the pleadings before the trial and to the conduct of the trial itself that counsel for the plaintiff deliberately refrained from making the application until after the close of the case, and I think it would be establishing a dangerous precedent indeed to permit such an amendment under such circumstances or to give a plaintiff after the close of his case a choice of action, not pleaded. It was argued that the amendment might have been granted on terms. The evidence of the deceased's condition on the train and what was supplied him on the train probably would be the evidence of transients

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occupying the same dining car as the deceased and it would not be doing justice to the parties, I mean to *both* parties, to allow the plaintiff at that stage of the proceedings to make her election as to what action would be proceeded with.

Under the circumstances I think the trial Judge exercised a proper discretion in refusing to allow the amendment. Vide: Cases collected in Holmested & Langton Judicature Act, 1898 ed., at p. 93, under headings "Amendment Refused."

McCarthy, J.

I am clearly of opinion that the appeal should be dismissed.

Appeal allowed.

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OUELLET v. MANAGER OF GOVERNMENT RAILWAYS.

Quebec Court of Review, Sir F. X. Lemieux, C.J., Pouliot, and Dorion, JJ. February 29, 1916.

CARRIERS (§ III G—443)—LIABILITY FOR DELAY—CONNECTING LINE—JOINT TARIFF.

An initial carrier, who contracted to be liable to the shipper for loss on connecting railways, unless expressly stipulated otherwise, has the burden of proof of the existence of such stipulation.

Statement.

APPEAL from the judgment of Belleau, J., Superior Court, in favour of the plaintiff in an action claiming $178 for delaying delivery of a shipment. Affirmed.

Plaintiff in November, 1913, shipped to Philadelphia two cars of potatoes by the Intercolonial Railway, having paid the cost of carriage to destination beforehand; the potatoes were only delivered in Philadelphia on January 5 in such a state of deterioration that the buyer would no longer accept them.

The defendant pleaded compliance on its part with the obligation assumed in the contract by delivering the potatoes with diligence at its terminus to the succeeding carrier; and that it was not responsible for the damages due to the delay of successive carriers.

The Superior Court for the District of Kamouraska, Belleau, J., on October 13, 1915, maintained the action for $128.10. Defendant inscribed in Review.

A. P. Mathieu, for appellant; *S. C. Riou*, for respondent.

Pouliot, J.

POULIOT, J.:—The only question at issue in this case is the question of la w, to wit: whether the carrier to whom goods have been entrusted, in this case the Intercolonial Railway, is responsible for the delay in the shipment and delivery beyond its own lines, after it has handed over the goods at its own terminus to

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another carrier. The defendant contends that its responsibility ceased when the cars of potatoes were delivered to the Grand Trunk at St. Lambert, the terminal station of the Intercolonial Railway.

This contention cannot prevail in view of the contract which intervened between plaintiff and the Intercolonial Railway, as contained in one of the clauses on the back of the bill of lading which clause expressly declares that the carrier shall be responsible for all loss and damage suffered on a line other than that of the original carrier when goods are shipped in virtue of a joint tariff, unless by express stipulation, the original carrier relieves himself of this liability by charging it on a succeeding carrier; and the burden of proof of this fact rests upon the original carrier.

The record discloses a joint tariff between the Intercolonial, the Grand Trunk and the New York Central. The Intercolonial cannot, therefore, escape its contractual liability if the delay or loss occurred whilst the cars in question were under the control of the Grand Trunk Railway and New York Central.

The Manager of Government Railways argues it is relieved from any liability owing to the fact that the delay in carriage and delivery occurred beyond the New York Central line, to wit: on the line of the Pennsylvania Railroad with which company the Intercolonial Railway has no joint tariff to Philadelphia.

An agent of the Intercolonial at Old Lake Road, the station whence the cars were shipped, could have limited the liability to the period of carriage over the Intercolonial Railway only, and could have prevented any liability beyond the lines where the Intercolonial Railway has a joint tariff, by inserting a clause to that effect.

Instead of so limiting the liability the Intercolonial Railway agent, in the name of the Intercolonial Railway, entered into a contract with the plaintiff whereby in consideration of the sum of $122 as regards the first car, and of $143 as regards the second car, the Intercolonial Railway undertook to carry and deliver within a reasonable delay to Philadelphia the perishable goods in question.

It does not appear that the plaintiff had any choice as to the line over which carriage was to be made, nor that he was told by the agent the amount of freight to be paid for each separate

carrier. There is nothing of record to shew that plaintiff was informed that there was no joint tariff as far as the place of delivery, a fact of which plaintiff was in absolute ignorance.

The carrier undertook by this contract for a fixed price to carry and deliver into Philadelphia the two cars of potatoes and it was immaterial to the plaintiff which route the Intercolonial chose to send the cars to their destination.

In the event of a breach in the performance of the contract or of tardy performance thereof the plaintiff had to deal solely with the company with which he contracted, saving the right of the carrier to exercise its recourse, if any, against any other party in default.

Had any doubt, on this point, existed in my mind, it would disappear immediately on account of the expressed stipulation in the bill of lading whereby the original carrier is authorized and entitled to recover damages from other carriers who may be responsible for loss or delay occurring on their lines. Therefore the first duty of the carrier which has undertaken to forward to a named destination the goods entrusted to it, is to pay the damages to him who has suffered, saving his recourse, if any.

In the present case, the Intercolonial bound itself by contract to carry and deliver to the consignees, within a reasonable delay, the two carloads in question. As this was not done it is legally liable for the damages resulting from the tardy delivery. The judgment is therefore confirmed.

DORION, J., dissented on the ground that as the delay occurred beyond the New York Central and on the Pennsylvania Railroad, the Pennsylvania Railroad not having a joint tariff with the Intercolonial Railway, the latter company was not responsible under the terms of the bill of lading.

Dorion, J.

Authorities cited by defendant, appellant: 7 Mignault, 398; *Chartier* v. *G.T.R. Co.*, 17 L.C.J. 26; *Gauthier* v. *C.P.R. Co.*, 3 Que. Q.B. 136; *Neil* v. *American Express*, 20 Que. S.C. 253; *Charbonneau* v. *C.P.R. Co.*, 6 Que. Q.B. 287; *Jeffrey* v. *Canada Shipping*, 7 Que. Q.B. 1; *Dionne* v. *C.P.R. Co.*, 1 Que. S.C. 168; *Rogers* v. *Great Western R. Co.*, 16 U.C.R. 389; *G.T.R. Co.* v. *McMillan* 16 Can. S.C.R. 543; *Brodie* v. *Northern R. Co.*, 6 O.R. 180.

Appeal dismissed.

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Alberta Supreme Court, Appellate Division, Scott, Stuart, Beck and Walsh, JJ., November 3, 1916.

1. SEDITION (§ I—5)—SPEAKING SEDITIOUS WORDS.
To constitute the crime of uttering seditious words, more must appear than the expression of disloyal and unpatriotic sentiments in a private conversation.
[*R.* v. *Cohen*, 25 Can. Cr. Cas. 302, 28 D.L.R. 74, distinguished.]

2. EVIDENCE (§ I B—15)—JUDICIAL NOTICE OF STATE OF WAR—SEDITION.
The Court will take judicial notice of the existence of a state of war between His Britannic Majesty and a foreign power on a trial for using seditious language.

3. SEDITION (§ I—10)—SEDITIOUS WORDS—INTENT CHARGED IN ALTERNATIVE—DUPLICITY IN INDICTMENT.
A count of an indictment charging the use of seditious language with intent "to raise disaffection among His Majesty's subjects, *or* to promote feelings of ill-will and hostility between different classes of His Majesty's subjects" will not, on appeal, be held invalid for duplicity where no objection was taken to same at the trial.

4. INDICTMENT (§ II E—27)—LACK OF PARTICULARS—SEDITION.
On an indictment for speaking seditious words with intent, etc., an objection that neither the words nor their purport were set out in the count, will not be made the subject of a reserved case where no objection was taken at the trial and where no application had been made to the trial Judge to order particulars; failure to supply reasonable particulars if demanded might have constituted a mistrial, but, where not demanded, the objection was cured by verdict.
[*The Queen* v. *Stroulger*, 17 Q.B.D. 327, followed.]

5. INDICTMENT (§ II G—61)—PARTICULARS NOT APPLIED FOR.
The proviso in Code sec. 853 (1) that the absence or insufficiency of details shall not vitiate an indictment, does not dispense with the right of the accused to demand particulars of the time, place and matter of the offence sufficient to identify the transaction complained of; the count will not be quashed for the absence of these details, nor is there any mis-trial on that account where no objection was raised at the trial and where the indictment followed a preliminary enquiry, the depositions upon which gave reasonable information to enable the accused to know what he had to answer.
[*Smith* v. *Moody*, [1903] 1 K.B. 56, considered.]

6. INDICTMENT (§ II E—25)—DESCRIPTION OF OFFENCE IN LANGUAGE OF STATUTE—CR. CODE SEC. 852.
The effect of sub-sections (2) and (3) of Code sec. 852, is to permit the use in an indictment of the popular word under which the offence is known instead of setting forth in detail all of the legal elements of the offence which such word indicates; for example, a charge of theft by fraudulent conversion without color of right may be laid simply as theft by charging that the accused "did steal" a specified article and naming as the owner the person in fraud of whom the accused converted the article to his own use.

Statement.

MOTION for leave to appeal following the refusal of Simmons, J., to reserve a case.

J. McK. Cameron, for appellant.

H. H. Parlee, for Crown.

Stuart, J.

STUART, J.:—The accused was tried by Simmons, J., without a jury on the charge "that the said Arthur F. Trainor, at Strathmore, on or about May 7, 1915, did speak seditious words with

intent to raise disaffection amongst His Majesty's subjects or to promote feelings of ill-will and hostility between different classes of His Majesty's subjects."

The questions which the trial Judge was asked but refused to reserve were:—

"1. Does the indictment or charge disclose any indictable offence and if not should I have discharged the accused?

"2. Was the charge bad for duplicity?

"3. Were the words sworn to have been used under the circumstances set out in the evidence seditious?

"4. Was there any evidence on which to convict, the accused's counsel contending that the words were meaningless without evidence (*a*) that a state of war existed; (*b*) that the Lusitania was a British ship; (*c*) that she was sunk by the King's enemies?

"5. Is the charge bad for not setting out the words used or their effect and also their meaning?"

The evidence against the accused was given by three witnesses. First, Edward Lambert testified that he kept a drug store in Strathmore, that on May 7, 1915, in the afternoon while he was sitting at his desk in his shop and while accused was also sitting at a desk writing, the witness' wife came in and said "The 'Lusitania' has been sunk by the Germans and a great many lives lost;" that the accused had said "Ha, ha, ha, so they have got her at last, have they;" that witness had gone into a back room for a few moments and had then returned when accused again said, "So they have got the 'Lusitania' at last, have they;" that he (witness) told him not to speak in that way; that the accused said, "Well, war is war;" that the witness said "You surely can't advocate the killing of innocent women, children and non-combatants;" and the accused said "Under the circumstances, yes;" that he (witness) remonstrated with him and then the accused said, "Look here, do not be a hypocrite; you know very well the British are killing women and children by trying to starve them;" that some argument ensued and the accused again said that war was war and that they (the Germans) had a right to do what they could or what they liked. The witness said also that he thought, but was not positive, that the accused had said when he first heard the news "that's a good job too" or "a good thing."

Secondly, Elizabeth Lambert, the wife of the first witness

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testified merely to hearing the accused say, "Ha, ha, ha, they have got her at last," but seemingly heard no other expression.

Thirdly, Joyce Pearcy, who was in charge of the telephone booth located in Lambert's store, said that when Mrs. Lambert told the news she (the witness) heard accused laugh and say, "That's good, so they have got her at last" and that during the argument which ensued she heard accused say that England had killed as many women and children as Germany had.

The accused, who is a Canadian by birth and was in the employ of the telephone department of the provincial Government, denied the use of the expression "that's good" and denied that he laughed. The trial Judge however accepted the evidence for the Crown holding that the accused had used the words which the witnesses had said he used.

I think it convenient to deal with the last question first.

Sec. 852 of the Criminal Code (ch. 146 R.S.C.), is as follows:

"Every count of an indictment shall contain and shall be sufficient if it contains in substance a statement that the accused has committed some indictable offence therein specified.

"2. Such a statement may be made in popular language without any technical averments or any allegations of matter not essential to be proved.

"3. Such a statement may be in the words of the enactment describing the offence or declaring the matter charged to be an indictable offence or in any words sufficient to give the accused notice of the offence with which he is charged.

"4. Form 64 affords examples of the manner of charging offences."

Now, it seems clear that the only thing intended by sub-sections 2 and 3 was that it is not necessary to set forth all the legal elements of the offence but that either popular or the statutory word or words may be used. For instance, it is not necessary in a charge of theft to use some such phrase as "did fraudulently and without colour of right convert to his use" a certain thing "with intent to deprive the owner of such thing." It is sufficient to say "did *steal*" such or such a thing, the property of so and so. Or, again, for instance under sec. 448, it is sufficient to say that the accused at such a time and place did assault so and so with intent to rob him, without setting forth the legal ingredients

of the crime of robbery. But the enactment does not mean that it is sufficient to say that the accused did on such a day "commit theft" or "steal," or "did commit an assault with intent to rob," without specifying the thing stolen or identifying the person assaulted, not necessarily by name but in some way or other.

As was said in *Smith* v. *Moody*, [1903] 1 K.B. 56, 60, all that is meant is that the offence itself (*i.e.*, the kind of offence, the nature of the crime) need only be described in words of the statute creating it. Take sec. 134 itself which reads, "every one is guilty of an indictable offence and liable to 2 years' imprisonment who speaks any seditious words or publishes any seditious libel or is a party to a seditious conspiracy." I do not think there is anything in sec. 852 which would validate a charge that the accused "was on such a day a party to a seditious conspiracy" or "did publish a seditious libel."

As Channell, J., said in *Smith* v. *Moody*, *supra*, "I do not think the section in any way dispenses with the usual necessity for specifying time and place and matter in the way in which it has hitherto been specified." Sub-sec. 4 refers to the form 64 as shewing the proper manner of charging offences. Form (*d*) is a form for perjury and it sets forth the substance at least of what the accused falsely swore to, as alleged. Form (*h*) is for defamatory libel and it contains the words "which libel was contained in an article headed or commencing (describe with so much detail as is sufficient to give the accused reasonable information as to the part of the publication to be relied on against him").

I think it is clear therefore that it would not be enough, *e.g.*, under sec. 334, to say that the accused on such a day "published a defamatory libel," and stop at that.

Sec. 853, Crim. Code (R.S.C. ch. 146), reads as follows:—

"Every count of an indictment shall contain so much detail of the circumstances of the alleged offence as is sufficient to give the accused reasonable information as to the act or omission to be proved against him and to identify the transaction referred to; provided that the absence or insufficiency of such details shall not vitiate the count."

Sec. 855 (so far as material here) says: "No count shall be deemed objectionable or insufficient for the reason only (*e*) that

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it does not set out the words used where words used are the subject of the charge," and sub-sec. 2 says that this shall not restrict or limit in any way the general provisions of secs. 852 and 853.

In my opinion the situation is that the Code contains directions insisting very strongly upon the necessity of giving the accused reasonable information as to the particulars of the offence with which he is charged. And I think a prosecutor drawing up a charge should not for a moment think of submitting to the Court and asking an accused to plead to a charge merely saying, *e.g.*, that the accused "committed perjury" or "published a defamatory libel" or as in this case "uttered seditious words" without specifying at least the substance and effect of the language complained of. I think sub-sec. (*e*) sec. 855 means no more than that the exact words complained of need not be set out. It does not say that it is unnecessary to state their substance and effect. I think the words ought to be identified in some form or other. If we look at sec. 861 we see a provision that on a charge of publishing a blasphemous, seditious, obscene or defamatory libel "the words thereof" do not need to be "set out" but that does not mean that the document complained of is not to be identified in some way, *e.g.*, as is suggested in the form I quoted above.

However, the words of the proviso to sec. 853 are very strong. It says "provided the absence or insufficiency of such details shall not vitiate the count." In my opinion this means that the count cannot be quashed owing to the absence or insufficiency of the details but it does not mean that the accused is not entitled to demand them. In a case like the present I think the accused would have a right to demand to be told what words he was charged with using. It may be that in view of sec. 860 (2) it would have been sufficient to reply to the demand that the words complained of were set out in the depositions but certainly the accused would be entitled to a statement either that all the words quoted in the depositions were still charged against him or that some were dropped and some still charged, specifying the particular words so dropped or so retained. Between this and inserting them in the formal charge there is perhaps little difference though for the sake of formality in the record the latter is decidedly preferable; but in my opinion the prosecutor in drawing up the charge in the present case should not have left the matter

in so vague and indefinite a form. We know that depositions are often mislaid.

However, the accused made no complaint at the trial. If he had done so and there had been no insertion of the words complained or of their substance and effect in the charge I think it would probably have constituted a mistrial. In view, nevertheless, of the absence of objection at the trial and of the terms of the proviso to sec. 853 I do not think the accused can now complain. This proviso I think makes *Smith* v. *Moody*, [1903] 1 K.B. 56, which is a case of summary conviction, distinguishable. Quite evidently the accused understood fully that he was being tried for the use of the language set forth in the depositions at the preliminary. It appears from the evidence that there was in fact a preliminary hearing.

In addition to this I think that any objection to the indictment was cured by the verdict. The case of *The Queen* v. *Stroulger*, 17 Q.B.D. 327, is a very strong case on this point. The accused was indicted and convicted of being "guilty of corrupt practices" at a certain election "against the form of the statute in that case made and provided." The statute had set forth various acts which were forbidden under penalty and had referred to these acts generally as corrupt practices but it was the several specific acts mentioned in various sections and not "corrupt practices" generally which were prohibited. At the trial two specific charges of bribery were proven. The Court for Crown Cases Reserved held that though the indictment was bad and would have been quashed if objected to yet it was cured by the verdict. Two Judges, Day and Denman, JJ., dissented, but the majority took the other view. In my humble opinion the view of the majority was the correct one and should be applied here. No doubt it would have been different if the charge had stated no offence at all but in that respect the present case is stronger even than *The Queen* v. *Stroulger*.

What has been said determines questions 1 and 2 also and that adversely to the accused. With regard to questions 1, 2 and 5 therefore I do not think the learned Judge should be asked to reserve a case and the appeal should be dismissed in respect of them.

With regard to question 4 very little need be said. It is

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well settled that the Court will take judicial notice that a state of war exists between His Majesty and a foreign power (Phipson, Law of Evidence, 4th ed., p. 13). On the other matter, in regard to the sinking of the "Lusitania" by a German submarine, the position is simple. The point involved was the meaning to be attributed to certain words alleged to have been used by the accused and not whether as a matter of fact there ever was a ship called the "Lusitania." In order to arrive at the meaning of the words complained of, I think the Judge or a jury was entitled, and not only entitled, but bound, to use any general knowledge he or they had. It is not strictly a question of judicial notice at all. It was quite open to the learned Judge from the evidence to take the view that the conversation between the accused and Lambert was evidently based on the assumption that the Germans had, in fact, sunk a ship called the "Lusitania" of British register. Whether such a thing had really happened or not was immaterial, in my opinion. The words used assumed that it had happened and the question for the Judge was, what meaning was to be attributed to the words of the accused? *i.e.*, in such circumstances, were they seditious?

I think the appeal should be dismissed therefore in regard to question 4 also.

There remains, then, question 3. Were the words seditious in the circumstances?

I think it is about time that the distinction between entertaining disloyal and unpatriotic sentiments and giving utterance to them in a chance expression, on the one hand, and the crime of uttering seditious words, on the other, should be adverted to. There was a long struggle in British legal history to establish the righteous principle that to convict of treason you must prove some overt act. So with sedition, it is not the disloyalty of the heart that the law forbids. Neither is it the utterance of a word or two which merely reveal the existence of such disloyalty that the law can punish under the name of sedition. It is the utterance of words which are expressive of an intention "to bring into hatred or contempt, or to excite disaffection against, the person of His Majesty or the government and constitution of the country, to excite people to attempt otherwise than by lawful means the alteration of any matter in the state by law established,

to raise discontent and disaffection among His Majesty's subjects, or to promote feelings of ill-will and hostility between different classes of His Majesty's subjects."

These are the words of the English draft Code and the Commissioners said it was as near a definition of the law as they could make.

What the accused said here amounted in my opinion, first, to the utterance of two words of satisfaction or delight, *i.e.*, "that's good," at the news of the sinking of the "Lusitania," second, to an argument that that act was justified because England was killing women and children by trying to starve Germany, *i.e.*, by the blockade. This latter was uttered after Lambert had started the argument owing to the use of the first expression. I can find nothing in his words which was intended as a condemnation of England for applying the blockade with the consequences mentioned. What he was saying was that "war was war," that any means at all were justified.

For myself I imagine the purpose of the blockade is to prevent food supplies from reaching Germany, and I think if that results in killing women and children in Germany it is perfectly justifiable and proper. I cannot find that the accused denied that. Rather I think he approved of it. The gist of the complaint against him is that having been led by Lambert into a discussion of what is and what is not justifiable in carrying on war, he used words which indicated that he thought Germany was justified in sinking the "Lusitania." Now, I detest such an opinion as strongly as any one but my present duty is to decide the law, not to express my moral or patriotic sentiments. For myself I am unable to see how the expression of such views, mistaken and detestable though they are upon the proper limitations of the laws of war, was calculated, or expressive of an intention, either to promote feelings of ill-will and hostility between different classes of His Majesty's subjects or to incite disaffection against His Majesty's government. With regard to the first, I think what the rule means is certain broad general classes of people, *e.g.*, French Canadians and English Canadians, Catholics and Protestants, foreign born subjects and natural born subjects and other such that could be mentioned. I do not think it means merely stirring up hatred and hostility against the person who utters the words.

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Then, were the words calculated or intended to create disaffection and discontent among His Majesty's subjects? I am bound to say that I cannot understand how a declaration of an opinion in an argument in a country store, that Germany was justified, as a measure of war, in sinking the "Lusitania," detestable though the opinion is in the hearts of all of us, can be said to have been calculated or expressive of an intention to stir up discontent or disaffection among His Majesty's subjects. It is of course running counter to the opinion of everyone who has any moral instinct at all, but why would the expression of an erroneous and even detestable opinion on the proper limits of civilized warfare be calculated, or expressive of an intention, to raise discontent and disaffection?

In deciding the law of sedition I do not think we should merely say: "This fellow is evidently a German sympathizer so we will clap him in jail." We must shew that he has broken the law, as properly interpreted, before we can do that.

So also with regard to the expression of joy over the sinking of the "Lusitania." I am clearly of opinion that the words were neither calculated in themselves nor expressive of an intention to promote feelings of ill-will and hostility between different classes of His Majesty's subjects. Certainly we cannot take the accused as himself constituting a whole class of His Majesty's subjects and I am unable to conceive how the words could possibly be calculated or expressive of an intention to stir up ill-will or hostility between any two classes of people. Then, were they calculated or expressive of an intention to arouse discontent and disaffection? After giving the matter my best, and, I hope, most dispassionate consideration, I find myself unable to say that they were.

Crankshaw in his notes to the Criminal Code mentions only four cases, between 1795 and the present time, of prosecution for seditious words, and they were all cases of public meetings and addresses. He says after speaking at length of seditious libel: "with regard to *seditious words* they have *on some few occasions*, been made the subject of prosecution." There have been more prosecutions for seditious words in Alberta in the past 2 years than in all the history of England for over 100 years and England has had numerous and critical wars in that time. The

Napoleonic crisis occurred during that period. I do not wish to say anything which would repress the patriotic zeal of our public officials but we all have great confidence in the stability and safety of our institutions and of the certain victory of our cause. In the circumstances I think something is due to the dignity of the law and that the Courts should not, unless in cases of gravity and danger, be asked to spend their time scrutinizing with undue particularity the foolish talk of men in bar-rooms and shops or a word or two evidently blurted out there impulsively and with no apparent deliberate purpose.

It may be asked, are men evidently traitors to be allowed to go around the country making such remarks as were made by the accused? The answer is that when a case is presented in which the accused is shewn to be going around saying such things in a persistent, systematic or habitual way then we shall have a different case to be dealt with according to different facts.

What I fear in this case is that the accused is being punished for his mere opinions and feelings and not for anything which is covered by the criminal law.

The case of *Rex* v. *Cohen*, 28 D.L.R. 74, 25 Can. Cr. Cas. 302, was, as I have stated, absolutely at the line. This case is I think beyond the line.

For these reasons I think the trial Judge should be asked to state a case upon question 3 submitted to him and the appeal should be allowed. Upon the argument of the reserved case, the views I express may no doubt be modified by what I hear from counsel.

Beck, J.
Scott, J.

BECK and SCOTT, JJ., concurred with STUART, J.

Walsh, J.

WALSH, J. (dissenting):—This appeal upon four of the five grounds presented to us in support of it affords an excellent illustration of a class of cases with which the time of this Court is, in my opinion, too often wasted. The appellant has been convicted of a criminal offence. The object of his appeal is to free himself from that conviction and relieve himself from the punishment imposed upon him under it. The question of his guilt or innocence of this offence is not in any sense involved in any of these four grounds. The question of the justice or injustice of this conviction because of any of the things complained of in them is not made a matter of argument before us for there

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is no contention that any of them prejudiced in the slightest degree the fairness of his trial. What is before us is as large and varied a collection of technicalities as an ingenious counsel by a vigorous but careful application of a legal fine tooth comb to the proceedings in the Court below has been able to get together out of them. These things have drifted into the trial of this man, and simply because they are there and not because of any harm that they have done to him or anyone else it is urged that he must go unpunished of the offence of which he has been adjudged guilty.

Let me take one of these grounds of appeal as an illustration. The charge is that he did at a certain time and place speak seditious words with a certain defined intent. He had a preliminary hearing on this charge before a justice of the peace in the course of which witnesses testified to the exact language which in their memory of it he used on the occasion in question, and he then learned, if he did not know before, just what it was that he was charged with. He was committed for trial upon this charge and when he was arraigned he pleaded not guilty. No objection whatever was taken by his counsel to the wording of the formal charge upon which he was so arraigned, nor was any application made to the presiding Judge for any further particulars than were contained in it. He went to trial upon that charge without a murmur, his defence being conducted by experienced counsel. There is not only an entire lack of anything in the record which is even remotely suggestive of dissatisfaction on the part of counsel with the form of the charge or with the extent of the information given by it to the accused, but there is on the other hand to be found in it an express statement to the contrary. When counsel for the Crown proposed to put in evidence something that was not covered by this charge, counsel for the defence very properly objected, and in so doing stated that the accused had elected to be tried on the charge as laid. And yet after all this, when the accused knew from the start what was charged against him, when knowing that if he needed further information respecting it, all that he had to do was to ask for it and it would be ordered to him—he never even suggested such a thing as that, but deliberately went to his trial on the charge framed as this one was—he now asks this Court to say that he should go unpunished of

this offence though convicted of it, because the words which he is said to have spoken are not set out in the formal charge.

There is a section in the Code which provides that a charge is sufficient if laid in the language of the enactment describing it. There is another section which says that no count shall be deemed objectionable or insufficient for the reason only that it does not set out the words used, where words used are the subject of the charge. And there are other sections throughout the Code which seek to protect a conviction against successful attack when the attack is based simply upon some unimportant departure from recognized rules or methods of procedure or phraseology from which no harm has come to the accused. I think that I am safe in saying that the spirit of Parliament, as reflected in the Criminal Code, is to prevent as far as possible miscarriage of justice upon purely technical grounds. But notwithstanding these provisions and in spite of the facts to which I have adverted, this Court solemnly sat and patiently listened for a considerable part of a day to arguments of counsel as to the validity of this conviction because of this objection and three others, each of which was as highly technical and as absolutely harmless as it.

I hope the day will come when the functions of a Judge of this Court, presiding at the trial of a man properly before him on a criminal charge, will be to see in the first place that the accused is given such full information respecting the offence which he is said to have committed as will enable him to properly defend himself and then to determine the guilt or innocence of the accused and convict or acquit accordingly, and when the function of the Court on appeal from that verdict will be to determine whether or not this duty of the trial Judge has been so performed that no miscarriage of justice has resulted. In a great majority of cases it undoubtedly happens that it is possible for the duties of the trial Judge and of the appellate tribunal to be, and they are, therefore, discharged in this spirit; for the percentage of cases in which technicalities are relied upon to stay the course of justice is comparatively small. Even so, however, there are too many cases in which the question of the guilt or innocence of the accused and the question of the fairness or unfairness of his trial are lost sight of in a cloud of bewildering argument as to the regularity or propriety of this, that, or the other

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unimportant step in the trial which has absolutely nothing whatever to do with the justice of the case.

I think that the Court should be astute to avoid giving effect to such objections, not only in the interests of justice, but in order that the Court may retain the confidence of the public. for I know of nothing except the flagrant dishonesty of a Judge which is so calculated to undermine public confidence in our Courts as the freeing of a criminal for some reason which to the lay mind is absolutely silly. All of this, however, is quite by the way. My brother Stuart has given to each of these four grounds of appeal careful consideration and I concur in the opinion that he has reached that there is nothing in any of them upon which this Court can interfere.

In the remaining ground of appeal there is, however, legal merit for it is that the words which the accused has been convicted of speaking were not seditious under the circumstances. If that is so, he of course should not have been convicted. I quite agree that the references made by the accused to the sinking of the "Lusitania" do not bring him within the pale of the law. They stamp him as not only a most disloyal British subject but also as a man quite devoid of the ordinary instincts of humanity. But that is not enough to give them the tinge of criminality. They are expressive not of disapproval of anything that His Majesty's government did or failed to do in the conduct of the war, but of satisfaction with, and exultation over a hellish deed which one of His Majesty's enemies perpetrated in defiance of the rules of war. How the gloating over some dastardly deed of the enemy could bring the person of His Majesty or the government and constitution of the country into hatred or contempt or excite dissatisfaction against them or amongst His Majesty's subjects, I am unable to understand. They must of course have created a strong feeling of repugnance on the part of those who heard them, to the disloyal and inhuman man who spoke them, but that does not make them seditious, and it is with the crime of sedition that we have here to do. I do not think, however, that the rest of his language can be put in the same category. One witness says that he remarked to him "Look here, do not be a hypocrite, you know very well the British are killing women and children by trying to starve them." Another witness, evidently referring to the same remark, said that the accused said that

England had killed as many women and children as Germany had. It seems to me that it makes no difference that his remark was made in support of the contention of the accused that the sinking of the "Lusitania" was justified, if it was so made. That act of the enemy was under strong condemnation by the man with whom the accused had this talk because, as he put it, it involved "the killing of innocent women, children, and non-combatants." It evidently created in his mind a greater detestation of the enemy than was called into being by the mere fact that a state of war existed between the British Empire and Germany. I think it was quite open to the trial Judge to infer from these words that it was the intent of the accused to excite an equal feeling of resentment against His Majesty's government because of the fact, as he put it, that "the British are killing women and children by starving them," and if that is so his words were seditious. Nor it seems to me, does it matter that he was but stating the truth, if such is the case. It is the utterance of the words with the seditious intent and not their falsity that constitutes the offence.

Three people who heard the conversation in question were witnesses on the trial, though only two of them heard the part of it which I think seditious. It took place in a store in the town of Strathmore, and the evidence is that at least three other persons were in the store during its progress and overheard it. Having regard to what was said by this Court in *Rex* v. *Felton*, 28 D.L.R. 372, 25 Can. Cr. Cas. 207, 9 A.L.R. 238, and *Rex* v. *Cohen*, 28 D.L.R. 74, 25 Can. Cr. Cas. 302, 9 A.L.R. 329, I think it impossible to hold that the trial Judge erred in convicting the accused in view both of the language used and the circumstances under which it was used.

I quite agree with a great deal that my brother Stuart has said as to the distinction between mere disloyalty and sedition and as to the unwisdom of indiscriminate prosecutions for this offence. It is neither necessary or wise to rush into Court every fool with a wagging tongue and an empty head, because of something which he has said about the war which savours of disloyalty or disaffection. At the same time in a province so cosmopolitan in its make-up as this is, and under conditions as trying as those which we are now experiencing, it certainly would be exceedingly dangerous to permit unbridled liberty of speech to every hot

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head in the community upon the subject of the war and the British Empire's participation in, and conduct of it. Much in this respect must be left to the good sense of the authorities. I would dismiss the appeal.

Direction that case be stated by trial Judge.

N.B.—On a case being stated in pursuance of the direction of the Appellate Division and the appeal thereon coming on to be heard before the same Court, an order was made on consent of counsel for the Crown that the conviction be quashed.

Conviction quashed.

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Saskatchewan Supreme Court, Sir Frederick Haultain, C.J., Newlands, Elwood, and McKay, JJ. March 10, 1917.

EXECUTION (§ I—8)—LIEN — PRIORITIES — AGREEMENT OF SALE—LAND TITLES ACT.

The English Judgments Acts (1838 to 1868) and the writ of *elegit*, if ever applicable to the North-West Territories, are not now in force in Saskatchewan; under a *fi. fa.* of the lands of an execution debtor, a sheriff may sell and transfer the lands, until registration of the sale, an execution creditor can only sell the property of his debtor subject to the same equities as when the title was in the debtor; when the sheriff's transfer has been registered, all unregistered incumbrances are not protected by the Land Titles Act (R.S.S. ch. 41).

The Land Titles Act, R.S.S. ch. 41, sec. 118, as amended by ch. 16, sec. 17, 1912-13, gives a writ of execution which has been filed in the proper Land Titles office priority as a charge on the lands over prior equitable mortgages, liens, charges or encumbrances not registered or protected by caveat.

The interest of the vendor who has not transferred the legal title to his vendee may be seized and sold under a *fi. fa.*, subject to the equities existing against the vendor.

[*Parke* v. *Ilsley*, 12 Gr. 69, considered.]

An execution creditor cannot by *fi. fa.* obtain subsequent instalments of purchase money due under a prior agreement of sale; he must proceed by garnishee or equitable execution.

Statement.

APPEAL by defendant execution creditor from a judgment removing an execution as a cloud on title. Affirmed.

W. B. O'Regan and *W. A. Doherty*, for appellant.

J. A. Allan, K.C., for respondents.

Haultain, C.J.

HAULTAIN, C.J.:—The plaintiffs were the purchasers under a written agreement of sale of certain lands from one Feodor Dootoff, and, having completed their part of the agreement, obtained a transfer of the lands from Dootoff upon registration of which a certificate of title to the said lands was granted to them. The plaintiffs had protected their agreement with Dootoff by caveat filed on May 26, 1911.

In August, 1913, the defendant obtained a judgment against Dootoff in the District Court of the Judicial district of Yorkton, and issued execution thereon against the lands of Dootoff, which was filed in the Land Titles Office on August 18, 1913, and subsequently was renewed on July 26, 1915. At the time the execution was filed, Dootoff was the registered owner of the land, and a portion of the purchase money was still due to Dootoff by the plaintiffs. This amount was later paid to Dootoff by the plaintiffs, whereupon Dootoff conveyed to them as stated above.

It is admitted that the plaintiffs had no notice of the defendant's execution other than what, if any, may be presumed by the filing of the execution.

The plaintiffs claimed a declaration that the execution forms a cloud on their title, and asked for an order directing the defendant and the registrar to remove the execution from the title to land in question. On the trial of the action the plaintiffs were granted the relief asked for, and the defendant now appeals.

From 1878 up to 1886 the Territorial Ordinances made full provision for the sale of lands under writs of *fieri facias* and the registration of deeds of lands sold under process of law: Ord. No. 4 of 1878, secs. 32, 33; Ord. No. 9 of 1879, sec. 20; Ord. No. 2 of 1884, sec. 3; Ord. No. 3 of 1884, secs. 33, 34 and 37. These enactments, in my opinion, abolished the writ of elegit, and repealed the Judgments Acts, 1838 to 1868, if they ever were a part of the law of England applicable to the Territories.

If the remedy provided for judgment creditors by writ of *fieri facias* against lands under the ordinances above mentioned was not exclusive, the Territories Real Property Act must, in my opinion, have excluded the statutory effect of a judgment under the Judgments Acts. If those Acts could even then have been in force in the Territories, the new section added to the Land Titles Act by ch. 16, sec. 17, of the statutes of 1912-13 must have accomplished their repeal. See also secs. 245-255 and 263 of Ord. No. 2 of 1886.

In 1886 the Dominion Parliament passed the Territories Real Property Act, 49 Vict. ch. 16. This Act came into force on January 1, 1887, and by sec. 140 repealed "all laws, statutes, Acts, ordinances, rules, regulations and practice whatever relating to freehold and other interests in land in the Territories," so far as the same were inconsistent with the provisions of the Act.

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In the same year, the Judicature Ordinance, 1886, No. 2 of 1886, was passed by the North-West Council. This ordinance (sec. 273) makes provision for writs of execution against lands and for sales under the writs, but does not contain any provision, similar to that in sec. 33 of Ord. No. 4 of 1878 and sec. 37 of Ord. No. 3 of 1884, making the writs binding on lands, presumably, in view of the fact that the Dominion Parliament had exercised its paramount jurisdiction in that regard by enacting that no land (*i.e.* land under the Act), should be bound by any such writ or other process until a copy of the writ and a memorandum of the lands intended to be charged thereby had been delivered to the registrar. (The Territories Real Property Act, 49 Vict. ch. 26, sec. 94.) Sec. 273 of Ordinance No. 2 of 1886, has been reenacted from time to time and is now in its original language our Rule of Court No. 486 (1), (2). Our present r. No. 488, relating to the form of conveyance of land not under the Land Titles Act on sale by the sheriff, first appeared in the statute book as sec. 347 of the Judicature Ordinance of 1893.

The present statutory provisions relating to the question involved in this case are as follows:—

1. Rule of Court 486. Any person who becomes entitled to issue a writ of execution against goods, may at or after the time of issuing the same, issue a writ of execution against the lands of the person liable, in any judicial district, provided that not less than $50 remain due and unpaid on the judgment, and deliver the same to the sheriff of the district named in the writ and charged with the execution of the writ of execution against goods, at or after the time of delivery to him of the writ against goods, and either before or after any return thereof; but such officer shall not sell the said lands within less than one year from the day on which the writ against the lands is delivered to him, nor until three months' notice of such sales has been posted in a conspicuous place in the sheriff's and local registrar's offices respectively, and published two months in the newspaper nearest the land to be sold.

(2) Where more than one newspaper is published in the same locality the notice of sale may be published in either one.

(3) One month's notice of such sale shall be mailed by registered letter to all persons appearing on the records of the Land Titles Office to be interested in said lands unless the same is dispensed with by a Judge's order on application which may be *ex parte*.

The first two subsections of this rule form part of the statutory law of the province, being r. No. 364 of the Judicature Ordinance, ch. 21 of the Consolidated Ordinances of the Territories, 1898.

This rule, read in conjunction with secs. 121 and 122 of the

Land Titles Act (R.S.S. ch. 41), clearly empowers a sale by the sheriff under a writ of *fi. fa.* of the "lands" of the execution debtor, and a transfer by the sheriff to the purchaser.

No sale by a sheriff has any effect until it has been confirmed by the Court or a Judge. In the application to the Judge for confirmation, notice must be given to all registered mortgagees and incumbrancers. The transfer must be registered within 2 months after confirmation, and if not so registered it ceases to be valid as against the owner of the land sold and any person claiming by, from or through him.

The form of transfer of land under process of law appended to the Land Titles Act, transfers the land of the judgment debtor who is stated to be the registered owner subject to the mortgages and incumbrances hereinafter described. That, of course, means registered mortgages and incumbrances. Until registration of the transfer, the sale would be subject to the general rule that "an execution creditor can only sell the property of his debtor subject to all such charges, liens and equities as the same was subject to in the hands of his debtor." *Jellett* v. *Wilkie*, 26 Can. S.C.R. 282, per Strong, C.J., at p. 288.

But as soon as the transfer is registered, the Act will apply and will invalidate all such charges, liens and equities as are not protected by or under the Act. Per Strong, C.J., at p. 292.

The question now arises whether the interest of a vendor who has not transferred the title to his vendee is subject to a writ of *fieri facias* against lands.

It would seem that in Lord Bridgman's time a trust was not subject to an elegit. But it was long ago established that a judgment creditor might redeem a mortgage in fee and it is now equally well settled that he may prosecute his elegit against any other equitable interest. Lewin on Trusts, 11th ed., 1006.

Whatever that undefined thing, a vendor's interest, may be, it seems to me that a vendor who has agreed to sell but retains the legal title as security for the payment of his purchase-money has, until full payment has been made, a beneficial interest in the land, which, coupled with the legal title, may be seized and sold under execution, subject, of course, to the general equitable principles already stated.

There is a great conflict of authority on this point. The case of *Parke* v. *Riley*, 12 Gr. 69, 71; 3 E. & A. 215, has been cited and followed in Ontario as authority for the broad proposition that

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Where a vendor has made an agreement to sell and a writ issues against his lands before conveyance, the writ does not bind the legal estate in his hands and a sale thereof by the sheriff under the writ passes nothing. Armour on Titles, 3rd ed., 179. *Re Trusts Corp. of Ontario and Boehmer*, 26 O.R., 191; *Re Lewis* v. *Thorne*, 14 O.R. 133.

The case of *Parke* v. *Riley* was decided on the following facts: A. entered into a parol agreement with R. for sale to him of certain land, received part of the price and gave R. possession of the premises. A. subsequently assigned by parol the balance of the price to S. to whom he was indebted. R., after this assignment, delivered to the sheriff an execution against the lands of A. and became the purchaser at the sale by the sheriff. It was held that *under these circumstances* no interest in the land passed under the sheriff's deed.

In any event, this case does not support that part of the proposition above stated, "that the writ does not bind the legal estate in the hands of the vendor." Baker, C.J., at p. 226, says:

> If a conveyance had been executed to R., without a mortgage given for the unpaid purchase-money, A. would still have had an equitable lien on the land for the amount, but, as the case stood, A. retained the legal estate subject to the equities arising out of the contract. That A. had a beneficial interest is not questioned, and I cannot understand why the judgment creditor cannot sell the legal estate, subject to and with the benefit of the existing equities, and by becoming the purchaser entitle himself to the purchase-money to be paid by R. or to the land if R. does not complete the purchase.

In *Re Lewis* v. *Thorne*, Boyd, C., expresses the opinion that executions against land coming in after the contract to sell cannot affect the devolution of title as between vendor and purchaser, on the authority of the dissenting judgment in *Parke* v. *Riley*. But in that case Lewis, the execution debtor, was only entitled to a share of the proceeds of certain lands which had been left to trustees by will on trust, to sell and distribute the proceeds among the children of the testatrix of whom the judgment debtor was one. The trustees contracted to sell the lands, and there were writs of *fieri facias* in the sheriff's hands against the lands of Lewis before the date of the contract. It was held that the share of the execution debtor in the proceeds of the sale was personal, and not real estate or an interest in lands, and that the execution against his lands could not affect the title as to form any obstacle to a conveyance by the trustees.

Re Trusts Corp. of Ontario and Boehmer only really decides that a judgment creditor of an insolvent deceased person has no

right to execution under an *ex parte* order against the estate in the hands of the administrator. As the estate was insolvent, "the rights of judgment creditors in such a case are to be sought under an administration order so that all may share *pari passu* under R.S.O. ch. 110, sec. 33, and R.S.O. ch. 108, secs. 4 and 8," per Street, J., at p. 193.

The case of *Parke* v. *Riley* is referred to by Meredith, C.J.C.P., in *Robinson* v. *Moffatt*, 37 O.L.R. 52, 31 D.L.R. 490, at p. 493, as follows:

> On what ground, or with what reason, can it be urged that an execution creditor of the vendor cannot acquire any charge upon the land, though a purchaser from the vendor would acquire right and title? He cannot, of course, acquire any higher right than his debtor had; but why not that much? I have no manner of doubt that the execution creditor, assuming that his execution is valid, has such a right in the lands in question, but of course to be worked out in the regular way by sheriff's sale of the judgment debtor's interest in the land. In a case in which the judgment debtor has no real interest in the legal estate in the land, as, for instance, if all the purchase-money had been paid, or validly assigned before the writ took effect, the execution could not stand substantially in the way of a conveyance to the purchaser free from encumbrance: and all this seems to me to be quite in accord with the judgment of the Court of Error and Appeal of this Province in the case of *Parke* v. *Riley*, 3 E. & A. 215; whilst, if the views of the dissenting Judge in that case could be accepted, the same result should follow now, even if it could not, as he contended, then.

The fact, that, owing to prior equities, the sheriff's deed might pass nothing, does not in any way militate against the opinion that the vendor's interest may be sold under execution. If he has been fully paid, he is then a bare trustee, and there would be nothing for the execution to fasten on or for the sheriff to convey, but if he has not been fully paid and still has the legal title, I can see no reason why his interest cannot be sold.

In the Alberta case of *Adanac Oil Co.* v. *Stocks*, 28 D.L.R. 215, Harvey, C.J., held that a vendor of land under an agreement for sale by instalments, while retaining the legal interest has also a beneficial interest in the lands until the whole of the instalments are paid, and, under an execution against such lands filed in the Land Titles Office, the sheriff may sell such interest.

A recent Alberta case, *Seay* v. *Sommerville Hardware Co.*, 33 D.L.R. 508, decides that a mere equitable interest in lands unsupported by any legal estate is not exigible under a writ of *fieri facias*. It also decided that "what remains to the vendor after an agreement for sale, is not an estate or interest,

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but a right to money for the payment of which he has a lien upon the land, and as security for which he holds the legal estate; in respect of which he is a trustee, subject to his own rights." In view of the facts of the case, I respectfully submit that the *dicta* supporting this second finding are purely *obiter*.

A contrary opinion to the decision in *Adanac Oil Co.* v. *Stocks*, *supra*, was expressed by two Judges of the Alberta Court, Stuart, J. and Walsh, J., in *Traunweiser* v. *Johnson*, 23 D.L.R. 70, and *Merchants Bank* v. *Price*, 16 D.L.R. 104, 7 A.L.R. 344.

The English cases do not, in my opinion, help very much, owing to the position of a judgment creditor under the Judgment Acts. The execution creditor, to whom the lands of the debtor have been delivered in execution under a writ of elegit, has a legal right of entry enforceable against the debtor by an action to recover possession or by actual entry, if entry is not opposed. As tenant by elegit, he has a chattel interest in the land which continues as a legal estate which he is entitled to hold until he is fully paid out of the rents and profits. *The writ does not provide for or contemplate a sale*, but the judgment creditor is entitled to apply by originating summons for an order for sale of the debtor's interest in the land. He also has a charge upon the debtor's interest in the land, subject to any incumbrance existing at the date of the creation of the charge by registration of the writ or order. 14 Hals., p. 67. *Whitworth* v. *Gaugain* (1844), 3 Hare, 416, 67 E.R. 444.

The Land Titles Act, sec. 118, as amended by ch. 16, sec. 17 of the Statutes of 1912-13, reads as follows:

> 118. The sheriff or other duly qualified officer after the delivery to him of any execution or other writ then in force affecting land if a copy of such writ has not already been delivered or transmitted to the registrar shall on payment to him by the execution creditor named therein of fifty cents together with the amount of the registrar's fees forthwith deliver or transmit by registered letter to the registrar a copy of the writ and of all indorsements thereon certified under his hand and seal of office, if any, together with such registration fee.
>
> (2) Such writ shall bind and form a lien and charge on all the lands of the execution debtor situate within the judicial district of the sheriff who delivers or transmits such copy as fully and effectually to all intents and purposes as though the said lands were charged in writing by the execution debtor under his hand and seal from and only from the time of the receipt of a certified copy of the said writ by the registrar for the registration district in which such land is situated.

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

(4) The registrar on granting a certificate of title and on registering any transfer, mortgage or other instrument executed by the execution debtor affecting such land shall by memorandum upon the certificate of title in the register and on the duplicate issued by him express that such certificate, transfer, mortgage or other instrument is subject to such rights.

(5) Every writ received by the registrar of any district at the expiration of two years from the date of the receipt thereof shall cease to bind or affect the land of the execution debtor in such district unless before the expiration of such period of two years a renewal of such writ is filed with the registrar in the same manner as the original is required to be filed with him.

These provisions, apart from the amendment, subsec. (2), were evidently originally intended to give execution creditors who file their executions priority over subsequent purchasers, mortgagees, etc., of land under the Land Titles Act. Until the amendment of 1912-13 was made, the right of an execution creditor, even under a writ filed in the Land Titles Office, was subject to the general principle applied in *Jellett* v. *Wilkie*, *supra*. The amendment gives a writ of execution which has been filed a further significance and effect, somewhat analogous to those given to judgments by sec. 13 of the Judg nents Act, 1838. This amendment, as decided in *Union Bank* v. *Lumsden Milling Co.* (1915), 23 D.L.R. 460, 8 S.L.R. 263, gives a writ of execution against lands which has been filed in the proper Land Titles Office priority over prior equitable mortgages, liens, charges or incumbrances which are not registered or protected by caveat. Priority by registration under sec. 70 of the Land Titles Act is a very important element in this discussion. The priority given by that section cuts down very materially the general rule that the right of an execution creditor is subject to all prior charges, liens and equities.

In England, the charge created by sec. 13 of the Judgments Act, 1838, only gave the judgment creditor

> Such and the same remedies *in the Court of equity* . . as he would be entitled to in case the person against whom such judgment had been so entered up had power to charge the same hereditaments and had by writing under his hand agreed to charge the same with the amount of such judgment debt and interest thereon.

Accordingly, as I have already stated, the charge in England is upon the debtor's interest in the land subject to existing in-

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cumbrances and subsequent transactions without notice. There, or until recently at least, there was no priority by registration.

Now, what rights has an execution creditor over subsequent instalments of purchase-money due under a prior agreement of sale?

A distinction should be drawn between the right to sell under the first heading, and a right to a charge under the second heading. Under the first heading there is, in my opinion, no interest or estate in the land such as that possessed by a tenant by elegit but only a bare right to sell. In such a case, in my opinion, the only way in which a creditor can get at unpaid purchase-money is by garnishee proceedings or equitable execution.

Under the second heading, how can a mere "charge" affect a purchaser?

It was held in *Forth* v. *Duke of Norfolk*, 4 Madd. 505 (56 E.R. 791) that a purchaser *after notice* of a judgment against a vendor could not pay the purchase-money to him without being liable.

In *Brunton* v. *Neale*, 14 L.J. Ch. 8, the purchaser under agreement of sale paid a deposit, but did not pay the remainder of the purchase-money. Afterwards a creditor of the vendor obtained a judgment and sued out an elegit and brought ejectment against the purchaser who was in possession. The purchaser filed a bill against the vendor and creditor praying for specific performance and injunction against the creditor. The injunction was granted. The question whether a judgment against the vendor after he has contracted to sell confers a lien upon the purchase-money, is the subject of much doubt according to the English authorities. Serjeant Hill's opinion, cited in *Forth* v. *Duke of Norfolk*, *supra*, seems to have been accepted in that case. But in a later case, *Lodge* v. *Lyseley*, 4 Sim. 70 (58 E.R. 27), Shadwell, V.C., said:

> He should not have given the opinion the learned sergeant had done for it appeared to him that from the time H. A. S. entered into binding contracts to sell his estates to purchasers, he not having judgments against him at that time, the purchasers had a right to file a bill against him and have the legal estate conveyed.

Lewin, in the work already cited, at p. 1008, makes the following comment on this decision:

> And it may be argued that if the vendor die after the contract but before the conveyance, the purchase-money would go to the executor; and that if the contract work a notional conversion of the land into money in respect

of the vendor's representatives the same consequences ought to follow in respect of the vendor's judgment creditors.

In considering the English cases, it must always be borne in mind that registration under the Judgments Act, 1864, could not be made until the land was delivered in execution under a writ of elegit.

When the land is delivered by elegit on the return of the writ, the creditor was in legal possession of the land . . . I need not go into the difference between an actual writ of elegit and an order for a receiver because it was decided in *Hatton* v. *Haywood*, L.R. 9 Ch. 229, that where there has been a receiver appointed under a judgment, that that is equivalent to and in law is, delivery of the land under lawful authority, just in the same way and to the same extent as if there had been an elegit, and the creditor had been in legal possession by virtue of the elegit. *Re Pope* (1886), 17 Q.B.D. 743, per Cotton, L.J., at p. 751.

Under the 1912-13 amendment in question, the execution creditor has a charge on the lands of the debtor to the same extent only as though the lands were charged in writing by the execution debtor under his hand and seal.

I do not think that it can be seriously argued that a mortgage or charge under our Act given pending an agreement for sale could, by itself, in any way affect or bind the purchase-money.

A mortgagee or incumbrancee, *after entry* in case of default under sec. 93 (2) of the Land Titles Act, would be entitled to the rents, issues and profits and could thereby secure the purchase-money on notice to the purchaser.

Sec. 91 of the Land Titles Act enacts that

A mortgage or incumbrance under this Act shall have effect as security but shall not operate as a transfer of the land thereby charged. The mortgagee or chargee only has certain statutory rights *against* the land.

The reason for the decision in *Rose* v. *Watson* (1864), 10 H.L.C. 671 (11 E.R. 1187), where the mortgage was a mortgage deed, seems to me to apply *a fortiori* to a mere charge. Lord Cranworth, at p. 684, says:—

When a man mortgages his estate although there may be notice that there is such a mortgage, all persons who are indebted to the mortgagor in any way, in respect to that estate, must go on and deal with all contracts which have been entered into with the mortgagor, just as if no such mortgage had taken place, unless, indeed, the mortgagee having a right to interfere does interfere saying, "pay no longer." It is upon this principle that tenants are not only at liberty to pay, but are bound to pay their rents to the mortgagor until the mortgagee interferes to stop them. Precisely the same principle must apply to any other contract which exists between the mortgagor and third persons. Until the mortgagee interferes, in consequence of his mortgage, to prevent contracts being carried on between the mortgagor

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and other persons, those persons must deal with the mortgagor just as if no mortgage had taken place.

The charge which is created by the filing of the copy of the writ is equivalent to an equitable mortgage. *Sawyer-Massey Co.* v. *Waddell*, 6 Terr. L.R. 45.

An equitable mortgagee has no legal right to receive rents and cannot obtain that right by giving notice to tenants. *Ex p. Burrell*, 3 M. & A. 440, 7 L.J. Bk. 14.

In order to obtain the rents he must take out equitable execution, *e.g.*, by having a receiver appointed. The rent follows the title to the property and the appointment of a receiver would give the rents to the equitable mortgagee. The same principle would apply to purchase-money, the right to which would pass with the legal estate to the receiver on notice to the purchaser.

An important fact in the case stated for Sergeant Hill's opinion was that a judgment creditor had given notice of his judgment and in all probability would take out execution before the trustees parted with the purchase-money. If the lands of the debtor had been delivered in execution under a writ of elegit the creditor would, as shown above, have a legal estate in the land and would be entitled to the rents and profits and to the purchase-money on notice.

In view of the foregoing, I am of opinion that the charge of the execution creditor created by the statute does not bind or form a lien upon the purchase-money.

The appeal should, therefore, be dismissed, and the registrar should be ordered to remove the execution in question from the respondent's title.

Elwood, J.
McKay, J.

ELWOOD and MCKAY, JJ., concurred.

Newlands, J.

NEWLANDS, J.:—The effect of an execution when registered is set out in sec. 118 (2) of the Land Titles Act as amended by sec. 17, ch. 16 of the Acts of 1912-13.

If the land was charged in writing under the hand and seal of the execution debtor it would have no greater effect than if he had mortgaged them.

In *Rose* v. *Watson*, 10 H.L. Cas. 672, where the question whether a purchaser under an agreement of sale could continue to make payments to the vendor after having notice of a subsequent mortgage on the same property, Lord Cranworth, at p. 684, said:—

The only part of the case which, I confess, did, for a short time, create a doubt in my mind, was with reference to the payments made after the mortgage. But I think that my noble and learned friend has put the question quite upon the proper footing. When a man mortgages his estate, although there may be notice that there is such a mortgage, all persons who are indebted to the mortgagor in any way, in respect to that estate, must go on and deal with all contracts which have been entered into with the mortgagor, just as if no such mortgage had taken place; unless, indeed, the mortgagee having a right to interfere, does interfere, saying, "Pay no longer." It is upon this principle that tenants are not only at liberty to pay, but are bound to pay their rents to the mortgagor until the mortgagee interferes to stop them. Precisely the same principle must apply to any other contract which exists between the mortgagor and third persons. Until the mortgagee interferes, in consequence of his mortgage, to prevent contracts being carried on between the mortgagor and other persons, those persons must deal with the mortgagor just as if no mortgage had taken place.

Apart from the Land Titles Act what is the effect of the execution in this case? An execution may be issued against the lands of the person liable—r. 486. This execution requires the sheriff to make out of the lands of the execution debtor the amount named therein.

The question therefore arises whether, after selling his land by an agreement of sale, it is in law the land of the vendor so that it can be seized under an execution against lands.

In *Raynor* v. *Preston*, 18 Ch.D. 1, James, L.J., at p. 13, says:—

I agree that it is not accurate to call the relation between the vendor and purchaser of an estate under a contract while the contract is in *fieri* the relation of trustee and *cestui que trust*. But that is because it is uncertain whether the contract will or will not be performed, and the character in which the parties stand to one another remains in suspense as long as the contract is in *fieri*. But when the contract is performed by actual conveyance, or performed in everything but the mere formal act of sealing the engrossed deeds, then that completion relates back to the contract, and it is thereby ascertained that the relation was throughout that of trustee and *cestui que trust*. That is to say, it is ascertained that while the legal estate was in the vendor, the beneficial or equitable interest was wholly in the purchaser. And that, in my opinion, is the correct definition of a trust estate.

In this case the contract has been completed by payment and transfer. The vendor was therefore always a trustee of this land for the plaintiff, and in equity the plaintiff was the owner of the land.

As pointed out in *Rose* v. *Watson*, the plaintiff not only had the right, but it was his duty to continue making the payments on the agreement even after notice.

The only notice given plaintiff of the execution was by the

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filing of the same. This filing cannot be any more effective as a notice than the actual notice given in *Rose* v. *Watson*.

It therefore follows that the plaintiff had the right to continue making his payments under the agreement of sale, that the completion of these payments gave him the whole beneficial interest in the land from the date the agreement was entered into, from which date it ceased to be the land of the execution debtor and to be liable for his debts. Therefore, the execution in question does not bind the lands of the plaintiff and it should be removed as a cloud on his title.

The appeal should be dismissed with costs. *Appeal dismissed.*

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MACKINNON v. CRAFTS, LEE & GALLINGER.

Alberta Supreme Court, Appellate Division, Stuart, Beck, Walsh, and Ives, JJ. January 25, 1917.

LANDLORD AND TENANT (§ II B—10)—COVENANT RUNNING WITH THE LAND—TAXES—DISTRESS.

A lessee's covenant to pay all taxes on the demised premises, with a provision that in default the lessor may do so and recover by levy or distress by way of rent reserved, runs with the land.

[*Spencer's case*, 1 Smith's L. Cases, 12th ed., p. 62; *Vernon* v. *Smith*, 5 B. & Ald. 1 applied.]

Statement.

APPEAL from the judgment of the Chief Justice dismissing action. Affirmed.

Griesbach & O'Connor, for appellant.

Emery, Newell, Ford, Bolton & Mount, for respondent.

The judgment of the Court was delivered by

Beck, J.

BECK, J.:—The only point which it is necessary for us to express an opinion on in this appeal—one from the Chief Justice dismissing the plaintiff's action and allowing the counterclaim—is whether a certain covenant by the original lessee is binding upon his assigns. The covenant in question is as follows:—

That he (the lessee) will pay all taxes, etc., which may be rated or levied in connection with the said demised premises . . provided that in default of the lessess paying any such rates or taxes when the same fall due, the lessors may do so, and recover the amount thereof against the lessee (in addition to any other remedy they may have) by levy or distress by way of rent reserved;

and a general provision of the lease declares that the word "lessee" shall include the lessee's executors, administrators and approved assigns.

A large amount of taxes fell in arrears during the tenure of the assigns (Benson, Crabbs & Foster, Ltd). The lessors paid these

taxes and then distrained for the amount of them at the same time as they distrained for arrears of rent.

The liquidator claims in this particular action that this particular covenant was not binding upon the assigns so as to entitle the lessors to distrain upon the goods of the assigns.

In the effect of the words "by levy or distress by way of rent reserved" is *to make the taxes an additional rent* and not *merely to provide the same remedy as in the case of rent*, it cannot be questioned that the assignee of the lessee would be bound. My personal opinion is that these words merely provide the same remedy as in the case of rent, but we are all agreed that, assuming that they mean only this, the covenant in its entirety is one which runs with the land.

The rule was laid down in *Spencer's* case, 1 Smith's L. Cas., 12th ed., p. 62, that

> Although the covenant be for him and his assigns, yet if the thing to be done be *merely collateral to the land and doth not touch or concern the thing demised in any* sort, there the assignee shall not be charged. As if the lessee covenants for him and his assigns to build a house upon the land of the lessor *which is no parcel of the demise* or to pay any collateral sum to the lessor or to a stranger, it shall not bind the assignee, because it is merely collateral and in no manner touches or concerns the thing that was demised or that is assigned over.

It seems to be quite well acknowledged that a covenant to pay taxes imposed upon the demised premises is one running with the land. See *Gower* v. *Postmaster-General*, 57 L.T. 527; *Wix* v. *Ratson*, [1899] 1 Q.B. 474, 24 Cyc. tit., Landlord and Tenant, 920.

As to whether the other part of the covenant—the proviso—runs with the land, it no doubt was well open to argument; there is no decision that I know of directly in point; the cases which apply the rule in *Spencer's* case, 1 Sm. L. Cas., 12th ed., 62, or hold it inapplicable are not all consistent one with the other; so that to revert to the rule in *Spencer's* case, it is a question whether the lessor's right of distress of the lessee's goods for taxes by way of rent reserved is an obligation of the original lessee which is *merely collateral* and *in no manner touches or concerns the demised premises*. Best, J., in *Vernon* v. *Smith*, 5 B. & Ald. 1, 24 R.R. 257 (106 E.R. 1099), says:—

> The covenant here mentioned (*i.e.*, a covenant that a lessor would, at the end of the term, grant another lease—a covenant, which in *Spencer's* case was held to run with the land) is not beneficial to the estate granted, in the strict sense of the words, because it has no effect until that estate is at an end,

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but it is beneficial to the owner, *as owner*, and to no other person. By the terms *collateral covenants*, which do *not* pass to the assignee, are meant such as are beneficial to the lessor, *without regard to his continuing the owner of the estate*. This principle will reconcile all the cases.

The payment of the taxes falling due from time to time upon the land demised is for the benefit of the owner for the time being; not of the lessor without regard to his continuing owner. It is of the utmost importance that the owner for the time being, by reason of his being owner, and the taxes therefore being a charge upon his estate, should have the right effectually to prevent his estate from being burdened with a charge which the assignee is bound to discharge; and a covenant which provides such a remedy by means of distress upon such goods of the assignee as may chance to be upon the demised premises seems to me to be unquestionably one which comes within the rule in *Spencer's* case, interpreted according to the principle propounded by Best, J., which seems to be an entirely satisfactory one for reconciling the inconsistencies of the decisions.

In the result the appeal will be dismissed with costs.

Appeal dismissed.

QUE.

C. R.

LOISELLE v. CORP. OF COUNTY OF TEMISCAMING.

Quebec Court of Review, Fortin, Guerin and Archer, JJ. February 29, 1916.

MUNICIPAL CORPORATIONS (§ II C—50)—BY-LAW—NOTICE OF MEETING—REPEAL BY RESOLUTION.

A failure to serve notice of meeting upon a member of a municipal council invalidates a by-law passed thereat; such by-law cannot be repealed by a resolution.

Statement.

On March 10, 1915, the council of the County of Temiscaming adopted a by-law prohibiting the sale of intoxicating liquors and the granting of licenses for this purpose within the limits of the county. On April 6, 1915, the plaintiffs, municipal electors of the county, contested before the Courts the legality of the by-law, but the defendant made default. It called a special meeting of the county council for May 5, following. The minute book of the meeting is as follows:—

The secretary-treasurer gave communication of the notice calling a meeting and it is ascertained to the satisfaction of all members present that the absent members of the council had been duly notified in due time by registered letter; the secretary-treasurer read the minutes which were unanimously approved on the proposition of O.F., seconded by J.P.

The prefect then read the legal opinion of counsel consulted regarding the prohibition by-law adopted on March 10. It was then moved by A.J.,

seconded by O.F., that inasmuch as errors crept into by-law No. 17 adopted at the last meeting of the council on March 10 last prohibiting the sale of intoxicating liquors and the granting of licenses for this purpose within the limits of the municipality of the county of Temiscaming, as a result of which suit was taken against the council, be it resolved that in order to avoid further costs the said by-law be abrogated and annulled and be of no effect as of this date.

The resolution is unanimously adopted and the by-law declared abrogated.

It was then moved by N.B., seconded by J.D., that it be enacted and resolved as a by-law of the council to be known as by-law No. 18 which is to read as follows: "The sale of intoxicating liquors and the issue of licenses for that purpose are, by the present by-law, prohibited within the limits of the County of Temiscaming in virtue and under the provisions of ch. 15 of title IV. of the R.S.Q. 1909

The vote being taken on the present by-law, gave the following result:

The by-law is declared adopted by a majority of five votes.

Plaintiff then brought a new action to obtain the annulment of the proceedings of the council had on May 5, 1915, including the resolution annulling the by-law of March 10 previous, and the new prohibition by-law, alleging various illegalities.

Defendant denied the contentions of plaintiffs and declared they had no interest in the suit and further declared its readiness to pay the costs of the first action.

The Superior Court for the District of Pontiac, Weir, J., maintained the action on November 30, 1915. Defendant inscribed in review.

R. Millar, for appellant; *Devlin & Ste. Marie*, for respondent.

FORTIN, J.:—The by-law was annulled mainly on two grounds: firstly, because it does not appear that the Mayor of Amos, one of the members of the defendant corporation, was duly called to attend the special meeting held to abrogate the first by-law and to adopt a new one; secondly, because the abrogation carried at this meeting was done by way of resolution, not by by-law. Fortin, J.

As to the first ground, the defendant was unable to establish that the notice of meeting was sent to the Mayor of Amos whereas it was established that notices were sent to other members of the council, nor was this evidence read before the council itself because the minutes of meeting declared that it was ascertained to the satisfaction of all those present that the absent members were duly notified in due time by registered letter. Why the qualification "to the satisfaction of the members present" if the meeting had been in possession of the post office registration

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receipts? Besides, the law requires the mention in the minutes that the notice of meeting was duly served on the absent members. This irregularity entails the nullity of all proceedings adopted at the meeting (art. 127 Old Municipal Code). Art. 16 of the Muncipal Code (which does not apply in this case as this is not a municipal matter), upon which appellant relies, cannot cover this nullity as it is expressly excepted by the very terms of this art. 16. . . .

As to the abrogation by means of a resolution, I am also of the opinion that the defendant erred. It was acting in virtue of art. 1317 and following the R.S.Q. 1909. Now, all these articles mention by-laws only. The word "resolution" is not even mentioned either as regards the adoption or as regards the abrogation of a by-law. Furthermore, art. 1321, sub-sec. 13, when speaking of the abrogation of a by-law voted upon by the ratepayers states that the proper proceeding is by by-law. Art. 1325 enacts a similar provision as regards the abrogation of a by-law which has been communicated to the collector of provincial revenue. Under the Municipal Code the same principle applies, and in art. 460 the law definitely states what are the cases where proceedings may be taken by means of a resolution.

Lequin v. *Meigs* (1872), 16 L.C.J. 153. This rule seems to be universally recognized in matters of corporation (Angell and Ames, No. 329; Dillon, Municipal Corporations, 4th ed., No. 314).

Dillon on Municipal Corporations, 5th ed., sec. 571, says:—

It has been said that a resolution is an order of the council of a special and temporary character, while an ordinance (or by-law No. 570) prescribes a permanent rule of conduct, or government. This statement of the characteristics of resolutions and ordinances points out generally the proper province of these forms of municipal action. But in practical operation the distinction between a resolution and an ordinance depends upon the formalities attending the adoption of the respective acts.

A resolution properly so called becomes, when not controlled by statute or charter, operative by mere adoption by the council, whilst an ordinance usually depends for its validity upon approval by municipal executive, followed, when required, by recording and publication.

Reference may also be had to *Waterous Engine Works Co.* v. *Palmerston* (1896), 21 Can S.C.R. 556. I am of the opinion to confirm.

Appeal dismissed.

CHARRIER v. McCREIGHT.

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Alberta Supreme Court, Appellate Division, Stuart, Beck, Walsh and Ives, JJ. February 23, 1917.

LANDLORD AND TENANT (§ II D—30)—TERMINATION OF LEASE—FAILURE OF SUBJECT-MATTER—LIQUOR LICENSE.

The statutory abolition of bar rooms, the business whereof formed the basic consideration when entering into a lease of a hotel does not amount to such total destruction of the subject-matter as will terminate the lease, on the principle that a contract is discharged when there is a total failure of the subject-matter contracted for; a proviso that the lease shall terminate upon the lessee's failure to secure a liquor license does not extend throughout the whole term of the lease.

[*Vancouver Breweries* v. *Dana*, 26 D.L.R. 665, 52 Can. S.C.R. 134; *Taylor* v. *Caldwell*, 3 B. & S. 826; *Krell* v. *Henry*, [1903] 2 K.B. 740; *Grimsdick* v. *Sweetman*, [1909] 2 K.B. 740, referred to.]

Statement.

APPEAL by plaintiff from the judgment of Harvey, C.J., dismissing an action that a lease and agreement were determined. Affirmed.

C. C. McCaul, K.C., for appellant.

W. E. Payne, for respondent.

The judgment of the Court was delivered by

Ives, J.

IVES, J.:—The appellants urge that, upon proper construction of the lease and agreement in question construed together and construed with the aid of extrinsic as well as intrinsic evidence, their rights are subject to determination upon the principle applied in the cases of *Taylor* v. *Caldwell*, 3 B. & S. 826 (122 E.R. 309), and *Krell* v. *Henry*, [1903] 2 K.B. 740, rather than upon the principle applied in *Grimsdick* v. *Sweetman*, [1909] 2 K.B. 740, and followed by the Supreme Court of Canada in *Vancouver Breweries* v. *Dana*, 26 D.L.R. 665, 52 Can. S.C.R. 134.

In the case of *Taylor* v. *Caldwell*, the plaintiff obtained from the defendant under an agreement in writing a license to use certain premises of public entertainment, viz.: Surrey Gardens and Music Hall upon 4 certain dates named "for the purpose of giving a series of 4 grand concerts and day and night fetes at the said Gardens and Hall on those days respectively." Before the first day arrived the Music Hall had been destroyed by fire, and the plaintiff brought the action to recover loss occasioned by defendants' breach to furnish the use of the premises. Blackburn, J., delivering the judgment of the Court, in part says:—

> There seems no doubt that where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burthensome or even

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impossible. But this rule is only applicable when the contract is positive and absolute and not subject to any condition either express or implied; and there are authorities which, as we think, establish the principle that where from the nature of the contract it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfillment of the contract arrived some particular specified thing continued to exist, so that when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there in the absence of any expressed or implied warranty that the thing shall exist the contract is not to be construed as a positive contract but as subject to an implied condition that the parties shall be excused in case before breach, performance becomes impossible from the perishing of the thing without default of the contractor.

And the Judge goes on to point out that the object of the agreement was expressed therein, that its foundation was that the Music Hall should be in existence when the day of entertainment arrived and impliedly if not in existence then the contractor should be discharged from his obligation.

In the case of *Krell* v. *Henry*, [1903] 2 K.B. 740, the same principle was applied on the following facts. It had been announced that the coronation processions would take place in London on June 26 and 27, and would pass along Pall Mall.

The plaintiff owned apartments on this street, the windows of which afforded an excellent view of anything taking place there. On June 17, the defendant noticed an announcement in plaintiff's windows to the effect that windows to view the coronation were to be let. He interviewed the housekeeper on the subject, when it was pointed out to him what a good view of the processions could be obtained from the premises and he eventually agreed with the housekeeper to take the suite for the 2 days (not nights) in question for a sum of £75.

He paid a deposit of £25. The processions did not take place and he refused to pay the balance. On these facts it was held that the contract was a license to use the rooms for a particular purpose, that is to view the coronation processions, and, impliedly, subject to the condition that if no processions took place, the promisor would be absolved.

In these two cases it would appear that the principle is applicable only where there is a total failure of the subject-matter contracted for or where during the currency of the contract the subject-matter becomes entirely exhausted.

In the cases of *Re Shipton, Anderson & Co., and Harrison*

Bros. & Co., [1915] 3 K.B. 676, and *Berthoud* v. *Schweder & Co.*, 31 T.L.R. 404, cited by the appellants, there had been total destruction in the former and subsequent exhaustion in the latter of the subject-matter of the contract, hence the application of the principle of an implied condition in the positive contract.

There would seem to be no good authority pronounced in any of the English or American Courts for an extension of the principle to a condition short of the entire destruction of the subject-matter of the contract or its subsequent exhaustion during the term. Reduction in quantity or quality is not sufficient.

Certainly that is the rule when applied to leases as is clearly laid down in *Gowan* v. *Christie*, L.R. 2 Sc. App. 273. In that case a lease of minerals was under consideration. Referring to the principle of the Roman law that there is a warranty implied or expressed of possession of a subject capable of producing the contemplated fruits, Lord Selborne, L.C., says, p. 276:—

> Now in one point of view such a doctrine may be and I venture to say is perfectly intelligible and perfectly reasonable. When there is that which in the language of the law of this country would be called a total failure of consideration—when the landlord has not the thing to let which he purports to let and which is the consideration for the rent it is perfectly reasonable that the whole lease should fail *ab initio* and be subject to reduction. Nor is it a very wide extension of that principle to say that if a landlord warrants a continuation of the subject-matter for a certain number of years, a total failure of the subject-matter before that number of years has elapsed shall involve a reduction or termination of the contract at the time of that failure and thenceforward. Those views are perfectly intelligible. But they all resolve themselves into either the original non-existence or the subsequent exhaustion or failure of the subject-matter . . Lord Stair . . goes further (than the Roman text) . . and as it seems to me lays down the true principle in the most unequivocal terms. He says that there is a peril or risk undertaken by the lessee, that he is at the risk of the quantity and the value of the subject-matter, but he is not at the risk of the being or existence of it.

Lord Chelmsford entirely agrees with the Lord Chancellor and says further:—

> Where there is a total destruction or exhaustion of the subject-matter of a lease, there the lessee is entitled to abandon it. But I am not aware that where it is a case of sterility merely, the tenant has any such right.

Now, upon reading the cases of *Grimsdick* v. *Sweetman*, [1909] 2 K.B. 740, and *Vancouver Breweries* v. *Dana*, 26 D.L.R. 665, it is clear that the principle laid down in *Gowan* v. *Christie*, *supra*, was applied. In neither case was there a "total destruction or

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exhaustion of the subject-matter" of the demise but only a case of "sterility" or reduced value. In the case of *Vancouver Breweries* v. *Dana*, the Chief Justice very shortly says, p. 665:—

> I am of the opinion that the judgment below should be confirmed on the very short ground that the land and house, and not the license, were the subject-matter of the lease, and the right of the tenant to occupy the house for any other purpose continued after the cancellation of the license.

In the case at bar there is a demise of five adjoining lots of land and thereon was a large hotel building and there was a sale of the furniture and chattels furnishing the building and necessary in the conduct of the hotel business. The whole was acquired as a going concern. An incident of the business and possibly the most lucrative end of it was that done in the bar which occupied a comparatively small portion of the building. If we admit that the bar trade done under the authority of the license was by much the most lucrative part of the hotel business and that without it the lease and agreement would not have been entered into by the plaintiffs, can we say in the face of *Gowan* v. *Christie*, *supra*, and the other authorities that, when the new Liquor Act abolished all bars, the entire subject-matter of the lease and the agreement was destroyed or exhausted. The plaintiffs while conducting the bar business were also using the demised premises for the sale of cigars, soft drinks, meals and the letting of lodgings. Nothing has occurred to stop that part of the business. Is not the abolition of the bar by statute a risk that Lord Stair says must be undetaken by the lessee, *i.e.*, the risk as to quantity and value of the subject-matter of the lease? This would seem to me to be a case not of total destruction of the subject-matter but as Lord Chelmsford puts it a case of sterility.

The appellants urge that upon the evidence, extrinsic and intrinsic, there was an implied condition that if the license end of the business came to an end the lease came to an end, that a proper construction of the documents makes it a condition of the lease at least impliedly that the premises must be continued as licensed premises; and so brings the facts within the *dicta* of Duff, J., in *Vancouver Breweries* v. *Dana*, *supra*, but, even if we go so far, I have been unable to find any authority which would warrant the extension of the principle as contended for; and we don't know what Duff, J.'s, ultimate conclusions would be in such circumstances. But as Anglin, J., points out

it was easy to have expressed that intention if existent and quite as obviously a necessary thing to have expressed as was the possibility of destruction by fire and what was to happen in that event, and he continues:—

> The express provision for the contingency of destruction by fire and absence of a like provision relative to the contingency of loss of license, seems to *exclude* the possibility of finding in the instrument any implied condition such as contended for.

Finally it is contended by the plaintiffs that the proper construction of these provisions in the lease that the lessees "agree to maintain and protect the license upon the said premises" and in the agreement

> That this lease and the term hereby granted is conditional upon the lessees receiving a retail license to sell spirituous liquors upon the said premises and in the event of the lessees failing to secure said license then the lease and the term hereby granted shall terminate.

Under the then existing state of the law the license existing at the date of the lease—March 29—would expire on June 30, following. The plaintiffs would require to apply for a new license and their application would have to be in the hands of the Attorney-General on or before April 1, but meantime, between the date of a transfer, as in this case and the expiration of the license transferred, the transferee was entitled to do business under the existing license for 60 days and might continue for a further period with the Attorney-General's consent.

Thus the plaintiffs on March 29 commenced business under defendant's license transferred to them, and would so continue until their application for license in their own name would be dealt with in May following and if recommended by the commissioners they would, on July 1 following, continue doing business under their own license, and thereafter would apply for a renewal of their license in each succeeding April. I use the word renewal advisedly because the Act apparently contemplates succeeding applications covering the same premises by the same licensee as renewals. See sec. 34 Liquor License Ordinance. Hence the reason for the provision in the agreement to the end that if the purchasers (the plaintiffs) do not receive a license the agreement is to become void but the purchasers are to reassign the license transferred to them and account for the period of their possession of the premises, the period of possession contemplated being that during which the plaintiffs would operate under trans-

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fer of defendants' license. And the proviso for determining the agreement in the event of plaintiffs not receiving a license was of no further effect after the new license of the premises issued to the plaintiffs. It had then served the purpose for which it was inserted and it would be a straining of words to extend the provisions recited in the lease and the agreement to cover the annual renewal of the plaintiff's license throughout the term of the lease.

I think the appeal should be dismissed with costs.

Appeal dismissed.

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QUEBEC BANK v. MILDING.

Saskatchewan Supreme Court, Sir Frederick Haultain, C.J., Lamont and Elwood, JJ. March 10, 1917.

1. MORTGAGE (§ VI E—90)—VOLUNTEERS AND RESERVISTS RELIEF ACT—"INTERESTED IN HIS OWN RIGHT AS MORTGAGOR."

A volunteer has a *bonâ fide* interest "in his own right," in the land covered by a mortgage made by him as personal representative, out of which he was entitled to a distributive share, within the meaning of the Volunteers and Reservists Relief Act (Sask. 1916, ch. 7, sec. 2), and is therefore entitled to protection from sale under the mortgage by virtue of the provisions in that Act.

2. APPEARANCE (§ I—2) — MORTGAGE FORECLOSURE — APPLICATION FOR RELIEF.

An appearance to the writ of summons is not a pre-requisite to the defendant's right to apply for relief against the confirmation of a mortgage sale.

Statement.

APPEAL by plaintiff bank from a judgment setting aside the confirmation of a mortgage sale. Affirmed.

C. M. Johnston, for appellant; *P. H. Gordon*, for respondent.

The judgment of the Court was delivered by

Elwood, J.

ELWOOD, J.:—On the argument before us a number of preliminary objections were taken by the appellant. The first one, namely, that the application made to the local master at Swift Current was an *ex parte* one, was abandoned. The second one was that the defendant not having appeared to the writ of summons has no status to appeal.

The defendant, however, is not defending the action and never intended defending the action. His application is on two grounds: the first, that a payment having been made to the sheriff after the order *nisi* was granted, there should have been a new period fixed for redemption, and this not having been done the sale should not have been held, and, secondly, that he is entitled to the protection of the Volunteers and Reservists Relief Act, being ch. 7

of the Saskatchewan statutes of 1916; and that, therefore, a sale should not have taken place. I am of opinion that there was no necessity for entering an appearance under these circumstances.

The third objection was that no further material should have been allowed to be read on the application to the Judge in Chambers.

The only manner in which the two objections could be brought to the attention of the Judge in Chambers was by reading material. The respondent had no actual notice of the application to confirm the sale, the notice of motion of that application was served simply by posting in the office of the local registrar, and there is at least strong evidence that, until after the sale was made and confirmed, the respondent believed that the sale was not going to take place, and it was only after the actual confirmation that he became aware of the sale, and of course the only way in which he could have the matter opened up was by reading the material which he brought before the Judge in Chambers.

In my opinion effect cannot either be given to the contention that the Judge in Chambers should have referred the whole matter back to the Local Master for reconsideration. He could have so referred it, if he had so desired; but he was not bound to.

In view of the conclusion that I have come to on the question of the effect of the Volunteers and Reservists Relief Act, it is not necessary that I should express any opinion on the contention that the payment to the sheriff, under the particular circumstances of this case, had the effect of extending the time for redemption. Secs. 2 and 3 of the Volunteers and Reservists Relief Act are as follows:—

2. This Act is passed only for the protection of the property and interests held *bonâ fide* in their own right by persons who have joined or who may at any time hereafter join as volunteers the forces raised by the Government of Canada on account of the war now existing, or who have left or who may at any time hereafter leave Canada to join the British, French, Belgian, Russian, Italian or Serbian armies or the army of any other power which may hereafter become an ally of Great Britain for the purposes of this war, either as volunteers or reservists, and its provisions shall apply to such persons exclusively; and whenever land or other property is referred to herein, the same shall mean only the land or property of such a volunteer or reservist, or in which such a volunteer or reservist is interested *bonâ fide* and in his own right as purchaser, mortgagor or incumbrancer, caveator, or as the case may be.

3. Notwithstanding any provision in any agreement for sale of land, or in any bond, mortgage or other lien or incumbrance affecting land, made by a volunteer or reservist, or the obligations of which have been assumed by

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or have devolved upon a volunteer or reservist, either before or after the date when this Act comes into force, no action or other proceeding, judicial or extra-judicial, for cancellation, sale or foreclosure or upon a personal covenant contained in any such instrument shall be had or taken during the continuance of the present war or until the expiration of six months after the conclusion thereof.

The mortgage in question in this case was made by the defendant as personal representative of the estate of Aaron Milding, deceased. The evidence shews that the defendant is one of the next of kin of the deceased, and, as such, is entitled to a one-fourth share in the estate, and that, after payment of all debts of the estate, there will be a considerable balance to be distributed among the beneficiaries.

If sec. 3 of the above Act were standing alone, it seems to me that there could be no doubt that the plaintiff would be prevented from proceeding with the sale, because the mortgage in question was made by a volunteer. In another matter which came before me, I expressed the opinion that sec. 3 must be considered in conjunction with sec. 2 above. I am, however, of the opinion that sec. 2 does not in this case prevent the Act from applying, because I am of the opinion that the volunteer is interested *bonâ fide* in his own right in the land covered by the mortgage. I take the words "in his own right" to be intended to distinguish land so held from land which is held by him solely as trustee for some person else, and, in which latter case, he has no personal interest.

Having come to this conclusion, then, in my opinion, the Judge in Chambers was correct in holding that the Act protected the land from sale, and in holding that the order confirming the sale should be set aside.

The appeal, therefore, in my opinion, should be dismissed with costs. *Appeal dismissed.*

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QUEBEC BANK v. GREENLEES.

Alberta Supreme Court, Appellate Division, Stuart, Beck, Walsh and Ives, JJ. February 23, 1917.

VENDOR AND PURCHASER (§ III—35)—ASSIGNMENT—PURCHASER'S EQUITIES—RESCISSION—LIEN.

The assignee of an agreement for the sale of land takes it subject to the purchaser's equities, including his right to rescind the contract for fraud; he is bound to make restitution of the money received by him under such contract, and the purchaser is entitled to a lien therefor.

Statement.

APPEAL by plaintiff from the judgment of Harvey, C.J., 32 D.L.R. 282, dismissing an action by an assignee for payments under an agreement of sale. Affirmed.

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Walsh, J.

C. S. Blanchard, for respondent.

The judgment of the Court was delivered by

WALSH, J.:—The plaintiff is the assignee from the vendors of an agreement for the sale to the defendants of certain lands. The purchase price was $16,000 payable as follows: $4,667 on the execution of the agreement, $5,667 on February 24, 1914, and $5,666 on February 24, 1915, the deferred payments carrying interest at 7 per cent. The cash payment was made to the vendors, a partnership carrying on business under the name of the F. M. Ginther Land Co. Before the first of the deferred payments fell due the agreement was assigned to the plaintiff by assignment in writing absolute in form. The instalment payable on February 24, 1914, with interest, was paid by the defendants, and interest on the balance of $5,666 was paid to June 14, 1915, but no part of this instalment or of the interest thereon since the last mentioned date had been paid. This action was brought to recover this sum of $5,666 with interest from the date to which it has been so paid.

The defendants as a defence to the action set up various misrepresentations and acts of misconduct on the part of the vendors, and by counterclaim to which they have made the vendors and the plaintiff parties defendant they ask for rescission of the contract upon this ground, and repayment of the moneys paid by them under it. The Chief Justice who tried the case found it necessary to consider but one of the several misrepresentations or acts of misconduct complained of by the defendants, and finding that one established and sufficient for the purpose gave effect to it by dismissing the plaintiff's action, and decreeing the rescission of the contract, and the repayment of the sums paid under it. The facts upon which he reached this conclusion may shortly be stated as follows: "The defendants live in Scotland and the vendors were real estate agents carrying on business in Medicine Hat near which the property lies. The defendants had made, through the vendors as their agents, an investment in Medicine Hat real estate which turned out very profitably for them. When it was disposed of they, at the vendors' solicitation, decided to enter into this agreement which was for the purchase of 160 acres at $100 per acre. They knew absolutely noth-

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ing of this land except what the vendors told them of it and they described it and its money-making possibilities in glowing terms. They thought and had reason to think from the character of the relations that had grown up between them and the nature of their communications with respect to this property, all of which were by letter, that the vendors in recommending this property to them were doing it as their trusted agents whose only solicitude was for the welfare of their clients. It is true that the names of these agents appeared as vendors in the formal contract of sale, but their idea was that this was, as the Chief Justice puts it, "merely a matter of convenience due to the Ginther Land Co. perhaps having taken the property in its own name while waiting to hear from them." And so influenced by their recommendation and having implicit confidence not only in the integrity but in the disinterestedness of their agents they agreed to buy the property. The fact is, however, that these agents owned the land which they thus sold to their principals, having bought it a month earlier at $40 an acre.

Instead therefore of being inspired by the high-minded and disinterested motives with which the defendants credited them in advising them into the purchase of this property they were prompted by the sordid desire to make a tremendous profit for themselves out of it.

It is unnecessary to discuss the facts of the case in any greater detail. The Chief Justice made a careful review of them in his reasons for judgment and reached the conclusion that all of the defendant's contentions with respect to them are well established by the evidence and in that conclusion I thoroughly agree.

Neither does it seem necessary to discuss at any length the law relating to this aspect of the case. It is too late in the day for vendors having such relations as these men had with the defendants to be able to successfully contend that the latter are bound by such a contract as this when absolutely no disclosure of their personal interest in the subject-matter of it was made to them. It is idle to discuss what the defendants' attitude towards the proposition which eventuated in this contract might have been had they known that the men upon whose opinion of the property they acted in entering into it were in fact the owners of it, for no one can say with certainty what it would have been. They were entitled to know that fact and it was not told to them and so

they are entitled to be relieved of the obligation that they entered into in ignorance of it. It is argued that the defendants after learning the truth affirmed the contract, but the evidence does not support this contention. It is true that their suspicions were aroused some time before they made their last payment under the contract, but full and exact knowledge of all of which they now complain only came to them after the commencement of this action and the facts thus learned were at once made the basis of their defence and counterclaim. It is also contended that, inasmuch as after learning of the falsity of one of the representations of which they complain, namely, the distance of this property from Medicine Hat, they affirmed the contract, it is impossible for them to repudiate it now upon the ground with which I have dealt. I think that this contention must fail too. The misrepresentation which they condoned was quite separate and distinct from the misconduct upon which the judgment in their favour rests. I think that it was quite open to them to waive that misrepresentation without thereby precluding themselves from setting up against their contract any subsequently discovered facts relating to other misrepresentations or acts of misconduct on the part of their vendors.

If the vendors were the plaintiffs in this action I think that they could not succeed. The present plaintiff's rights are no higher than theirs for it took the agreement subject to the equities and that means in the facts of this case subject to the purchaser's right to be relieved from it for the cause here shewn. Concurring fully as I do with the view that the Chief Justice took both of the facts and the law I think that his judgment dismissing the plaintiff's action and rescinding the agreement must stand. It follows from this that his judgment directing the re-payment by the vendors of the money paid directly to them under this agreement must also stand.

An argument was made before us on behalf of the Quebec Bank, defendant by counterclaim, which it was stated was not presented to the Chief Justice. It was said in the first place that there is nothing in the evidence to shew that any part of the money for which judgment has gone against it was paid to or received by it and that seems to be so. There was no need, however, in view of the pleadings, to prove that. Par. 5 of the statement of claim alleges in express terms that payment was made

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by the defendant to the plaintiff of the instalment of principal and of the interest which it has been adjudged liable to repay to them. Further, the counterclaim expressly alleges the payment of these sums to the plaintiff and there is no denial of it in the defence to it. So that there is in the pleadings so clear an admission of the payment of this money to the bank as to make entirely unnecessary the proof of that fact in evidence. The principal contention on behalf of the bank, however, is that there is no liability on its part to repay this money to the defendants. The assignment to it of this contract is on its face made for the expressed consideration of a past due indebtedness of $5,000. An agreement of even date between the vendors and the bank shews that this assignment was made as collateral security for the due payment of this indebtedness. There is nothing in the evidence outside of the correspondence to shew how the money which the plaintiff received under this contract reached it. The plaintiff's solicitors notified the defendants by letter of the assignment of the contract to it shortly after it was made and instructed them to remit to the plaintiff's branch at Medicine Hat the instalments of principal and interest due under it on February 24, 1914. The remittance of this amount was under cover of a letter from the defendant Greenlees to the vendors which does not shew how it was made, but states "we note it is to be made payable to the Quebec Bank of your city." The subsequent payment of interest was also remitted to the vendors and it is equally silent as to the method of payment but a red ink notation on it evidently made by one of the vendors shews that it was made by defendant by draft payable to the order of the plaintiff. The plaintiff's contention is that this money was paid to it not by the defendants but by the Ginther Company, and as there was no contract between it and the defendants they are not entitled to recover it from the plaintiff.

I think that it is clearly established not only by the admissions in the pleadings to which reference has already been made but as a fair inference from the correspondence that the money which the plaintiff received under this contract was paid directly by the defendants to it, the Ginther Company being but the medium through which payment was made. It was paid in partial discharge of a liability which the defendants then thought they were under to the plaintiff by reason of this contract and its assignment to the plaintiff. The plaintiff then was, by virtue of its

assignment and the notice of it given to the defendants, the party entitled to receive the money payable under the contract and the only party to whom payment of it could safely be made. With the falling of the contract the defendants' right to restitution of the money paid under it cannot be denied and their claim is for money had and received. It must be I should say against the party to whom it was properly paid by them in discharge *pro tanto* of their liability under the contract. The plaintiff is the party who has had and received this money of the defendants and by whom therefore repayment of it must be made. Mr. Clarke cited to us *Trowern* v. *Dominion Permanent Loan Co.*, a synopsis of the judgment in which case appears in 10 O.W.N. p. 320. The reasons for that judgment are not stated with sufficient fullness to enable me to say to what extent they are applicable to the facts of this case or to convince me that the view of the plaintiff's liability which I have expressed is wrong.

It was admitted by Mr. Blanchard on the argument that the formal judgment against the plaintiff on the defendants' counterclaim was by mistake entered for too large a sum. It will be reduced to $6,666.24 with interest on $6,141.64 from February 24, 1914, and on $524.60 from September 9, 1915.

Mr. Blanchard for the defendants asked us for something which he overlooked at the trial, namely, a declaration of the defendants' right to a lien on the lands for the amounts paid by them under this contract. The registered title to the land is in the personal representative of the party from whom the Ginther Land Co. bought it but there was filed as an exhibit on the trial a transfer of it from him to the Quebec Bank fit for registration together with his duplicate certificate of title. Mr. Clarke contends that the defendants are not entitled as against the plaintiff to a lien for the money paid by them to their vendors the Ginther Land Co., but I think that they are. The plaintiff's title to this land obviously rests upon the Ginther Company's title. The transfer is made to it in performance of the registered owner's contract to sell it to the Ginther Land Co. It is the nominee of the Ginther Company for the purpose of taking title to the land and making title in it to the defendants on completion of their contract. It has, in my opinion, no greater right to protection against the defendants' lien than the Ginther Company would

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have had if the transfer had been taken to it and as against the Ginther Company the defendants' right to a lien is absolute. I think that the defendants are entitled to the declaration asked for, and judgment for it will go accordingly.

With the correction of the amount of the defendants' judgment against the plaintiff above indicated the appeal should be dismissed with costs. As no costs were occasioned by the stating of the incorrect amount of the defendants' claim against the plaintiff in the final judgment for it was promptly admitted by Mr. Blanchard, when drawn to his attention, his right to full costs of the appeal is not affected by it. *Appeal dismissed.*

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REX v. MURRAY and MAHONEY.

Alberta Supreme Court, Appellate Division, Scott, Stuart, Beck and Walsh, JJ. November 3, 1916.

1. JURY (§ I D—40)—SUPPLYING WITH REASONABLE REFRESHMENT—CRIMINAL TRIAL.

Leave to appeal in a criminal case will not be granted on the ground that the jurors were kept eight hours without food in contravention of Code sec. 946 which directs that they be allowed "reasonable refreshment," unless prejudice to the accused is shown; nor can prejudice to the accused be assumed from that delay where the jury continued their deliberations for an hour after refreshments were provided.

2. EVIDENCE (§ XI V—896)—IDENTIFICATION OF PERSON BY VOICE.

Evidence of the identity of the accused as the person who assaulted the complainant may be given by the latter's identification of the voice of the accused when taken into custody as being the voice of the man who spoke when the assault took place and whom he could not otherwise identify.

3. INDICTMENT (§ III—65)—JOINDER OF PERSONS ACCUSED—DUTY OF CROWN PROSECUTOR AS TO SEPARATE TRIAL.

When the depositions taken before the committing magistrate disclose the fact that on the preliminary enquiry evidence had been given of statements made by each of the accused in the absence of the other, which tended to implicate the one but not the other, and which might work an injustice to such other if introduced at a joint trial, the prosecuting counsel desiring to use such statements in evidence when the trial shall take place should see to it either that separate indictments are laid against the two accused or that an application to the trial Judge for a separate trial is not opposed by the prosecution. (*Per* Beck, J.)

4. APPEAL (§ XI—721)—CRIMINAL CASE—MOTION FOR LEAVE TO APPEAL—TRIAL JUDGE STATING GROUNDS FOR REFUSING A RESERVED CASE.

Where a Judge refuses to reserve a case it would be expedient that he give his reasons for refusal, and in doing so certify the facts sufficiently to shew the Court whether the question of law has a foundation in fact. In default of the trial Judge doing this, a proper course for the Court of Appeal to take on a motion for leave to appeal would be to request him to do so for the purpose of informing the Court of Appeal sufficiently to enable it to decide whether or not the trial Judge should be directed to reserve the question. (*Per* Beck, J.)

Statement.

MOTION on behalf of defendants Murray and Mahoney for leave to appeal upon questions as to which the trial Judge had

refused to reserve a case. For the decision of the Appellate Division upon the questions which had been reserved, see *R.* v. *Murray* (No. 1), 28 D.L.R. 372, 25 Can. Cr. Cas. 214, 9 A.L.R. 319.

J. McK. Cameron, for appellant.

H. H. Parlee, K.C., for Crown.

BECK, J.:—This is a case in which there was a case reserved by Hyndman, J., on a point upon which we have already given our decision (see 28 D.L.R. 372, 25 Can. Cr. Cas. 214, 9 A.L.R. 319). It is now before us on an adjourned hearing of a motion for leave to appeal from the refusal of Hyndman, J., to reserve the following questions:—

2. Was the refusal to supply refreshments to the jury, under the circumstances alleged, a contravention of sec. 946 of the Criminal Code, and if so, does it invalidate the verdict or entitle the accused to a new trial?

3. Was the evidence of Grant re the identity of the accused admissible; if so, should I have instructed the jury to consider it with caution, or did I give the jury proper and sufficient instructions in reference to it?

4. Should I have instructed the jury that any statements made by one prisoner, not in the presence of the other, were not to be considered as evidence against the prisoner not present when said statements were made, or were my instructions sufficient?

5. Should I have instructed the jury that the acts and conduct of each prisoner was not evidence except against himself, and that they should consider the case made out separately against each defendant, or were my instructions sufficient?

6. Should I have instructed the jury that they were entitled to acquit one prisoner and convict the other?

7. Should I have instructed the jury as to what in law an accomplice was so that they could decide whether or not witness R. J. Bolt was an accomplice with the prisoners, and, further, that if they found he was an accomplice, they should not have convicted on his evidence alone without corroboration, or were my instructions sufficient?

8. Should I have instructed the jury that as against Murray there was no corroboration of the testimony of R. J. Bolt in

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any particular implicating Murray, or were my instructions sufficient?

9. Did I sufficiently instruct the jury as to their duty in weighing and applying the different parts of the evidence against the prisoners separately, or may the jury have been confused or misled by my directions or non-directions?

10. If any or all of the above questions are answered in favor of prisoners, should convictions be quashed, or should new trials be ordered?

I take the questions *seriatim* as they are numbered above.

2. Sec. 946 of the Criminal Code reads:—

"Jurors, after having been sworn, shall be allowed at any time before giving their verdict the use of fire and light, when out of Court, and shall also be allowed reasonable refreshment."

By sec. 1014, the Court, before which any accused person is tried, may, either during or after the trial, reserve any question of law arising either on the trial or on any proceedings preliminary, subsequent or incidental thereto or arising out of the direction of the Judge.

Sec. 1019 provides that no conviction shall be set aside nor any new trial directed although it appears that . . . something not according to the law was done at the trial . . . unless, in the opinion of the Court of Appeal, some substantial wrong or miscarriage was thereby occasioned on the trial.

It seems to me that it would have been open for the trial Judge to have stated the facts relating to the jury receiving or not receiving refreshments and to have reserved as a question of law arising upon the facts whether or not there had been a substantial breach of sec. 1014, occasioning some substantial wrong or miscarriage.

The Judge has not reported the facts; but has made the following statement: "Counsel for prisoners alleges, but counsel for the Crown disputes, that the jury while in the room deliberating on the case had requested food and refreshment which was denied them by their attendants and that they were kept without any food or refreshments from 2 o'clock in the afternoon until a quarter after 10 at night."

It also appears that the jury retired to consider their verdict at 7.25 p.m. and rendered their verdict of guilty at 11 p.m.

If I am right in my understanding that the trial Judge was made acquainted, before the jury dispersed, with the fact that there had been a breach of the provisions of sec. 1014, I think that he should have at once inquired into and satisfied himself of the facts and should in any case have given appropriate instructions to the sheriff or his officers and explained the matter to the jury. If he learned them before the verdict of the jury had been recorded, I think he should then have decided whether or not there had been a mis-trial on that account; if he was of opinion that there had been a mis-trial his duty then, I think, would have been to discharge the jury and direct a trial *de novo*.

However, accepting as correctly representating the facts, the complaint of the counsel for the prisoners as put forth with somewhat more detail during the course of his argument before us, I am of opinion that the reasonable inference is that no substantial wrong or mis-carriage to the prisoners was occasioned and therefore that it is unnecessary now to ask the trial Judge to ascertain and certify the facts, which otherwise I think we could have asked him to do; and, in doing so, I think he might if he thought proper take the evidence in some form or other of any of the jurors, for however far the rule against jurors giving evidence of what has occurred during their deliberations goes (and I think it has been carried much too far; see cases listed in Mews' Digest ("Practice—Trial—Affidavits to impugn verdict," vol. 11, p. 530) there is no decision that I am aware of that goes beyond rejecting affidavits of jurors shewing their own or their fellows' mis-conduct.

3. Evidence as to identity. The evidence has not been returned; but the character of the evidence of the identity of the accused Mahoney is sufficiently indicated in the Judge's charge to the jury. Grant was the person who was robbed. So far as he is concerned his evidence of the identity of Mahoney consisted solely in his asserting that he recognized at the Police Court the voice of Mahoney as that of one of the men who had assaulted him, he having heard the voice before only on the occasion of the robbery.

There can be no doubt that evidence of identity by means of identification of the voice alone is sufficient evidence. We identify people many times a day in this way in conversations

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over the telephone. It is scarcely necessary to support this proposition by authority but a number of cases, some of which were before the days of telephones, will be found collected in Wigmore on Evidence, pars. 660 and 669.

If there was nothing more than this involved in the question I should say that, examining the Judge's charge, it appears to me that he gave a quite sufficient warning to the jury of the weakness of the evidence and the danger of convicting upon it.

But some assertions are made by counsel for the prisoners that the circumstances under which Grant heard Mahoney's voice at the police station were such as to render his evidence of identification valueless. What those circumstances were can be made to appear to us only by the evidence bearing on them being reported to us by the trial Judge. Whatever they were, however, it seems to me that they could not possibly result in our finding that the evidence was *inadmissible* and that is all that is open under the form of this question. They might I think shew that the identification was made under such circumstances that it was fallacious or so weak that if it stood alone there would be no evidence on which, the case being a criminal case and the jury being therefore bound to acquit unless they were convinced of the prisoners' guilt beyond a reasonable doubt, the Court could properly say as a matter of law that there was no evidence justifying the conviction. The question of identification as it comes up in our criminal Courts is one of the highest importance and in view of my experience of some of the methods adopted to procure it I think it well to call some special attention to it on this occasion. Some of these methods are no better than this which I give as a sample: A detective or police officer telephones to the informant, "We've got your man; come down to the cells and identify him." The informant goes down, sees a man alone whom the police have arrested and believe to be the offender and says, "Yes, that's the man."

Instead of expressing my own views I quote those expressed by eminent Judges in England.

In *R.* v. *Smith and Evans* (1908), 1 Cr. App. R. 203, the two accused were kept at the police station and were there identified by the witnesses whom the police called in for that purpose. No other men were put with the prisoners, who were identified

mainly by their clothes. The Court found that there was ample evidence of identification by other witnesses at other times, but said: "Without doubt there was a good deal that was unsatisfactory about the identification at the police station and the chairman was right in saying that the wrong procedure with regard to this had been adopted. Such methods as were resorted to in this case make this particular identification nearly valueless and police authorities ought to know that this is not the right way to identify."

R. v. *Bundy*, 75 J.P. 111. The facts are long and I shall not set them out. The conviction was quashed and the identification, which was based on suggestions from the police, was pointed out to be fallacious and the method strongly deprecated. In *R.* v. *Gardner* (1916), 80 J.P. 135, the Court said: "The only evidence of identification was that of witnesses who said they saw him coming away from the neighbourhood of the cottage carrying a bag. Not one of them had an opportunity of picking him out of a number of other men. Each one of them saw him for the first time, after that day, in the dock. It is impossible to say that any jury would have been justified in convicting him on that evidence alone."

Rex v. *Dickman*, 26 T.L.R. 640; 74 J.P. 449, this passage is found in the judgment of the Court:—

"He need not say that he deprecated in the strongest manner any attempt to point out beforehand to a person, coming for the purpose of seeing if he could identify another, the person to be identified, and they hoped that instances of this being done were extremely rare. He desired to say that if they thought in any case that justice depended on the independent identification of the person charged, and that the identification appeared to have been induced by any suggestion or other means, they would not hesitate to quash any conviction which followed. The police ought not, either directly or indirectly, to do anything which might prevent the identification from being absolutely independent and they should be most scrupulous in seeing that it was so."

In view of the form of the question, however, I think the trial Judge was right in refusing to reserve it.

4. Instructions as to statements made by one of the accused not in the presence of the other. Not having the evidence

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before us we have not this, the usual method, of ascertaining the facts, and the trial Judge has contented himself, no doubt as a matter of course because he was not asked to do more, with merely certifying his refusal to reserve certain questions without certifying the facts upon which the question purports to be founded or giving his reasons for his refusal. This suggests that where a Judge refuses to reserve a case it would be expedient that he give his reasons for refusal and in doing so certify the facts sufficiently to shew the Court whether the question of law has a foundation in fact. In default of the trial Judge doing this, I should think a proper course for the Court to take would be to request him to do so for the purpose of informing the Court sufficiently to enable it to decide whether or not the trial Judge should be directed to reserve the question. In the present case I am inclined to think that we may assume a foundation in fact, by reason of the statements of counsel for the accused and an apparent assent to them by counsel for the Crown; and as I think that on another question the accused are entitled to a reserved case I think we may direct one upon this question also, inasmuch as if the foundation in fact exists it would seem from a perusal of the Judge's charge that it is a proper matter for argument that a sufficient direction was not given.

Question (5) seems to involve the same difficulty as that which arises under question (4). We are uncertain as at present informed whether these questions have a proper foundation on fact.

Question (6) seems to fall under question (9).

Questions (7) and (8). From a reading of the charge there seems to me to have been a sufficient direction to the jury.

9. The sufficiency of the Judge's instructions to the jury as to such of the evidence as was applicable to one of the accused only.

In the case stated the trial Judge says that the two accused were jointly charged, that they were represented by the same counsel; that their counsel moved for separate trials on the ground that certain statements made by each, while not evidence against the other, would have to be admitted, if they were tried jointly, to the prejudice of the accused.

The Judge refused the application; and undoubtedly as a general rule the discretion of the trial Judge on such a question

cannot be reviewed; *The King* v. *Martin*, 9 Can. Cr. Cas. 371 at 383, but I cannot refrain from remarking that from what appears before us the Crown prosecutor—who was not the counsel for the Crown who appeared before us—if not in laying the charge as a joint charge, at all events in opposing the application of counsel for the accused, was not, it would seem, taking that attitude of impartiality and fairness which should be the attitude of prosecuting counsel.

It was stated during the argument that the depositions taken before the committing magistrate disclosed that evidence had then been given of statements and conduct made by each of the accused in the absence of the other which tended to implicate the one but of course not both. This evidence was again brought out on the trial and obviously when the joint charge was laid it was intended that it should be brought out. Under those circumstances I should have been glad to have found that the Crown prosecutor had not opposed the application for separate trials.

In *R.* v. *Weir* (No. 4), 3 Can. Cr. Cas. 351, Wurtele, J., said: "When several persons were indicted jointly, *the Crown* always has the option to try them either together or separately; but the defendants cannot demand *as a matter of right* to be tried separately. Upon good ground being shewn, however, for a severance, the presiding Judge may, in his discretion, grant them separate trials. The general rule is that persons jointly indicted should be jointly tried; but *when in any particular instance this would work an injustice to any of such joint defendants* the presiding Judge should, on due cause being shewn, permit a severance and allow separate trials. The discretion of the presiding Judge must not be exercised in a desultory or unmethodical manner but it must be guided and regulated by judicial principles and fixed rules.

"The usual grounds are: (1) That the defendants have antagonistic defences. (2) That important evidence in favour of one of the defendants which would be admissible on a separate trial would not be allowed on a joint trial. (3) *That evidence, which is incompetent against one defendant, is to be introduced against another* and that it *would work prejudicially to the former with the jury.* (4) That a confession made by one of the defendants, if introduced and proved, would be calculated to pre-

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judice the jury against the other defendant; and (5) that one of the defendants could give evidence for the whole or some of the other defendants and would become a competent and compellable witness on the separate trials of such other defendants."

Moss, C.J., in *Rex* v. *Martin* (*supra*) says:—

"The confession is, of course, no evidence against any one but the person making it, and it is the duty of the trial Judge, a duty carefully performed in the present instance, to warn the jury not to pay the slightest attention to it, except so far as it goes to affect such person. But, though this appears to be the law, *it is impossible not to feel that such a confession must inevitably have its effect upon the minds of the jury*, especially where it may seem to fit in with or explain evidence affecting the other prisoner: Arch. Cr. Pl. and Ev., 22d ed., p. 311; *and the plainest principles of justice require* that when it is intended by the Crown to make use of such a confession the prisoners should be tried separately. *The Queen* v. *Weir* (*supra*). I do not know whether in this case the prisoners knew that the Crown intended to use the confession of the wife. If they did not, the husband had no opportunity of making an application for a separate trial. . . . "But the circumstances of the present case are such—I am referring to the confession—*that I can hardly conceive that a separate trial would have been refused*, had there been an opportunity of making it at the proper time."

I fear that some Judges are too apt to defer, perhaps insensibly, to Crown prosecutors because of their representing the Crown, and on this account I think it well to do something to save from possible oblivion the authorities which the late Mr. Justice Taschereau, of the Supreme Court of Canada, collected in his book on the Criminal Law of Canada, the last edition of which appeared in 1893, and which has long ago, in consequence of more recent works on the same subject, gone out of use. I extract some of the passages which he quoted:—

Blackburn, J., in *R.* v. *Berens*, 4 F. & F. 842, said that the position of prosecuting counsel in a criminal case is not that of an ordinary counsel in a civil case, but that he is acting in a quasi-judicial capacity, and ought to regard himself as part of the Court; that while he was there to conduct his case, he was to do it at his discretion, but with a feeling of responsibility, not as

if trying to obtain a verdict, but *to assist the Judge in fairly putting the case before the jury and nothing more.*

R. v. *Puddick*, 4 F.& F. 497, it is said *per* Crompton, J.: "The counsel for the prosecution are to regard themselves as ministers of justice, and not to struggle for a conviction as in a case at *nisi prius;* nor to be betrayed by feelings of professional rivalry to regard the question at issue as one of professional superiority and to contest for skill and pre-eminence."

From a long passage quoted from Dickinson's Quarter Sessions, in which it said the words are those of Sergeant Talford, I quote these words: "He should refrain from indulging in invective and from appealing to the prejudices or passions of the jury; for it is neither in good taste nor right feeling to struggle for a conviction as an advocate in a civil cause contends for a verdict."

The trial Judge in the present case having, however, acceded to the contention of the Crown Prosecutor, we are called upon to consider whether his charge to the jury sufficiently differentiated the evidence applicable to each alone and sufficiently warned them that they must be careful not to allow evidence implicating one only to prejudice their minds against the other. In my opinion he failed to do this. I extract all the passages from his charge which seem to me to bear upon the question:—

"It resolves itself into believing the story of George Grant or not, that *these* were the men who held him up on the day in which he says he was assaulted and robbed in the way he says he was by *these men*. . . .

"You must satisfy yourselves beyond a reasonable doubt that George Grant was actually robbed on this occasion and that *those men or one of them* were the robbers. The story therefore begins with Grant. If his story is all imagination, then, of course, that is the end of the case. If you believe that he was held up, then you will have to go further and satisfy yourselves who the *robbers were*. . . . If you are satisfied that the man (Grant) was there and held up, actually held up by *these men*."

Then speaking of the identification by Grant of Mahoney by identifying his voice, the trial Judge said:—

"*That* evidence is sufficient to convict Mahoney.

"So far as Grant's evidence is concerned there is nothing in that that implicates Murray, that is, *he does not identify Murray.*

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The only identification of the *perpetrators* of this crime is the voice of Mahoney. So that as far as Grant's evidence is concerned, it *does not affect Murray, that is, directly.*

"Then the other witness, the *only witness who could affect* Murray, is Bolt.

"That is your duty and responsibility to decide whether or not you believe *these men are the men, or one of them,* that held up Grant.

"If there is a reasonable doubt in your mind as to the guilt of *these men or either of them,* it is your duty to give them the benefit of that reasonable doubt."

The charge is a long one. There is a very distinct instruction to the jury that so far as Grant's evidence of identification goes that implicated directly only Mahoney. This specific instruction seems to me to emphasize the necessity for giving a like instruction—equally distinct—as to any other evidence on other points which was not applicable equally to both the accused. It is true that in some instances a distinction is made between the accused and either of them, but the inference to be drawn from these expressions if taken in exact literalness seems to me to be rather against than in favour of the accused, against whom any particular item of evidence might not be applicable or of equal weight. Experience teaches us that jurors sometimes get very queer notions of their duties and I cannot help believing that the learned Judge left the question of their right to find one guilty and to acquit the other in such a way that they may, in the terms of the question, have been confused or misled, instead of making this point quite clear to them as justice to the accused required should be done.

I think that, on this ground, counsel for the prisoner should succeed on his motion for leave to appeal from the refusal to reserve a case. There seems not much reason to believe that a reference to the evidence could in any way affect this question arising as it does upon the face of the charge and upon facts appearing in the case stated as it now stands. As counsel for the Crown has not consented to our disposing of the case as if the case had been reserved nothing remains but to direct him to state a case, but as obviously a re-argument would be useless, doubtless the Crown will now consent to an order for a new trial of the two

accused separately, which in my opinion is the form in which, had the case been reserved, the order should go.

In the result I would refuse the motion as to questions (2), (3), (7) and (8) and allow the motion as to the remaining questions.

WALSH, J., concurred.

Stuart, J.

STUART, J.:—In this case I think there was no good ground shewn for asking the trial Judge to reserve a case under questions 2, 3, 7 and 8.

With respect to the alleged refusal to supply the jury with food, if we take the facts to be as serious even as stated by counsel for the appellant, I am unable to conclude that any substantial wrong to the accused was shewn. In such a matter I think a narrower rule ought to be applied than with respect to occurrences in Court in course of the actual trial, *e.g.*, in the admission or rejection of evidence and the like.

What counsel for the accused asked us practically to hold was that the absence of food for a couple of hours may have prejudiced the accused in some way or other and that the mere possibility of prejudice, not the certainty of it, was enough. I do not think the possibility is really serious enough to consider. The jury eventually got their refreshments at least an hour before verdict. At the same time it may be well to observe that a jury ought always to be treated as needing food at usual times just as much as the officers of the Court. I agree with the remarks of my brother Beck on the third question.

Upon the remaining questions I think there is sufficient ground shewn in the judgment of Mr. Justice Beck, at least for having a case reserved, and on these remaining questions I would allow the appeal, and direct the trial Judge to reserve a case. The evidence should be presented to us by the trial Judge, or as much thereof as he decides is necessary for a proper argument of the case. When the second argument, which the Crown apparently desired, is over, I shall be, I hope, prepared if I am a member of the Court to express a final opinion on the matter involved. I see no advantage in the circumstances in saying more at present.

Scott, J.

SCOTT, J.:—I concur.

Leave to appeal refused on questions 2, 3, 7 and 8 and granted on the others.

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La BANQUE NATIONALE v. KENNEDY.

Quebec Court of Review, Archibald, A.C.J., Charbonneau and Demers, JJ. February 12, 1916.

FRAUDULENT CONVEYANCES (§ VIII—40)—SIMULATED SALE—REMEDIES—ACTION PAULIENNE.

A sale by an insolvent of all his assets to his cousin, under which no purchase-money was passed at the time of the conveyance, though later some of the proceeds were used to pay some claims, is fraudulent and preferential, and may be successfully attacked, in an action paulienne, by a secured creditor, who was paid the secured amount, for a balance of an unsecured amount due him.

Statement.

APPEAL from the judgment of Globensky, J., Superior Court of District of St. Francis, annulling a sale. Affirmed.

This was an action praying for the annulment of the sale between two cousins of two houses and contents, including a piano, which comprised all the assets of the vendor. The sale was for $10,500, which the vendor declared to have received in cash, but in reality this was never paid. The plaintiff, creditor of the vendor on a note of $6,900, brought suit against both parties to the deed alleging the sale was fraudulent, simulated and that it rendered its debtor, the vendor, completely insolvent; and that the buyer knew the financial difficulties of his cousin and participated in the fraud.

The buyer protested, pleading good faith and his ignorance of the insolvency of the vendor and the $1,000 of the price of sale was paid to the plaintiff for its hypothec and that divers other amounts were paid to ordinary creditors.

The vendor also contested, denying his insolvency and his intention of committing fraud, alleging that, on the contrary, he sold his assets at their full value with the sole purpose of paying his creditors.

W. C. Tracy, for appellants; *F. Campbell*, K.C., for respondent.

Charbonneau, J.

CHARBONNEAU, J.:—This is an *actio pauliana*. The defendant, J. C. Kennedy, was sued by the plaintiff on a note of $6,900. On June, 1911, he filed a plea, serious on its face, but which was shown to be absolutely frivolous. Six days after having filed this plea, he sold all his assets, movable and immovable, to the other defendant, Angus Kennedy, for the sum of $10,500, which the vendor acknowledges to have received before the signing of the deed. It is this deed which the plaintiff has prayed the Court to set aside as simulated and fraudulent and prejudicial to its interests.

As in all transactions of this kind, the parties attempted to place it under such varied circumstances as would render it plausible; but it remains none the less true that at the time the deed declared that the purchase price had been paid, the defendant, Angus Kennedy, had not paid a single cent. He had given a cheque which was only paid two months after and he obtained receipts from various creditors of the other defendant which bear every appearance of being post dated.

Whether or not the transaction was a simulated one, it is established that this sale made J. D. Kennedy completely insolvent; that he was withdrawing from the reach of his creditors all his assets by transferring them to the other defendant; that the defendant, Angus Kennedy, could not but know of the insolvency which he was helping to create. Even supposing the National Bank received out of this transaction the payment of $1,000 guaranteed by mortgage on the immovable in question, it yet remained creditor to the amount of $6,900 to pay which the defendant, J. D. Kennedy, has not one cent of assets. The fact that other creditors were paid, if these payments are not fictitious, would at the most constitute a fraudulent preference in their favour levied on the common pledge of all the creditors. This cannot be opposed to the present action.

I am of the opinion to confirm the judgment with costs.

Appeal dismissed.

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Saskatchewan Supreme Court, Newlands, Lamont and McKay, JJ., November 18, 1916.

1. OBSTRUCTING JUSTICE (§ I—10)—TAMPERING WITH WITNESSES—SPECIAL COMMISSIONER TAKING EVIDENCE AS DELEGATE—PROOF OF AUTHORITY TO DELEGATE POWER.

To warrant a conviction under sec. 180 of the Criminal Code, upon a charge that the accused did unlawfully attempt to dissuade certain witnesses from giving evidence before members of a Royal Commission appointed to investigate a certain charge, where the facts merely established an attempt to dissuade the witnesses from giving evidence before a special commissioner appointed by said Royal Commissioners to take such evidence, it must be shown that the Royal Commissioners were acting within the scope of their commission in appointing such special commissioner.

2. WITNESSES (§ III—59)—DISSUASION FROM GIVING EVIDENCE—LACK OF AUTHORITY IN TRIBUNAL.

The provision contained in Cr. Code sec. 180 to the effect that every one is guilty of an indictable offence and liable to two years' imprisonment who dissuades or attempts to dissuade any person by threats, bribes, or other corrupt means from giving evidence "in any cause or matter, civil or criminal," contemplates that the person to be dissuaded

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must be one who is required to give evidence; it was not intended to apply where the dissuasion was from giving evidence before a person having no proper authority to take the same.

CROWN Case reserved by Haultain, C.J., as follows:—

"The accused was tried before me and a jury, at Regina, on the 26th day of September, A.D. 1916, on a charge under sec. 180 (*a*) of the Criminal Code, that he, on or about the 27th day of March, 1916, at the City of Regina, did corruptly by promising one H. M. Hillman that the said Hillman would be paid a larger sum of money for a certain liquor stock, owned by him and taken over by the Province of Saskatchewan, *unlawfully attempt to dissuade the said H. M. Hillman and his wife from giving evidence before the Honourable James Thomas Brown and the Honourable Edward Lindsey Elwood*, two Justices of the Supreme Court of Saskatchewan, duly appointed by the Lieutenant-Governor of the Province of Saskatchewan in council, to enquire into certain matters among them being the charge "that one J. F. Bole did receive money from the George Velie Co., an applicant for a liquor license, for the purpose of securing such license."

On the said charge the jury found the accused guilty.

The evidence established the facts:

That the Honourable Mr. Justice Brown and the Honourable Mr. Justice Elwood had been appointed a Royal Commission under the provisions of ch. 18 of the Revised Statutes of Saskatchewan, 1909, to enquire, among other things, into the said charge against J. F. Bole.

That the said Royal Commission on March 24th, 1916, issued on order of commission to one R. B. Graham, of Winnipeg, to take at Winnipeg the evidence of said Hillman and his wife, respecting the said charges, the said order or commission being returnable on April 1st, 1916.

That the day before the date on which Hillman and his wife were to attend before Mr. Graham to give evidence, the accused, who was at Regina, had a telephone conversation with both Hillman and his wife with regard to the evidence to be given by them. The charge against the accused is founded on the said telephone conversation, the evidence with regard to which is hereto appended.

Counsel for the accused took the objection that the said

Royal Commission had no authority to appoint Mr. Graham at Winnipeg to take evidence, and that, therefore, an attempt to dissuade Hillman and his wife from giving evidence before Mr. Graham would not establish the said charge against the accused, and requested me to withdraw the case from the jury. I allowed the case to go to the jury.

The question reserved for the opinion of the Court is:

"Was I right in holding that there was some evidence upon which the jury might find the accused guilty of the offence as charged?"

H. E. Sampson, for the Crown.

H. Y. McDonald, K.C., for the accused.

The judgment of the Court was delivered by

McKay, J.

McKAY, J.:—To state it shortly, the charge under which the accused was tried was that he did unlawfully attempt to dissuade H. M. Hillman and his wife from giving evidence before the Honourable James Thomas Brown and Honourable Edward Lindsey Elwood, Commissioners duly appointed to investigate a certain charge.

The evidence shews that what he did do was that he attempted to dissuade the Hillmans from giving evidence before R. B. Graham at Winnipeg, who had been appointed by the said Commissioners to take the evidence of the Hillmans in connection with the said charge they were investigating.

It seems to me that the questions to first decide, in order to answer the question submitted, are:—

1. Must the person or persons to be dissuaded be required to give evidence before a tribunal of competent jurisdiction, that is, a tribunal having legal authority to take the evidence?

2. Had R. B. Graham such authority, or, in other words, had the Commissioners herein authority to appoint said Graham to take the evidence of the Hillmans?

As to 1, the section of the Criminal Code under which the charge herein was laid reads as follows:—

> "180. CORRUPTING JURIES AND WITNESSES.—Every one is guilty of an indictable offence and liable to two years' imprisonment who—
>
> (*a*) dissuades or attempts to dissuade any person by threats, bribes, or other corrupt means from giving evidence in any cause or matter, civil or criminal."

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This section in my opinion contemplates that the person to be dissuaded must be required to give evidence before a tribunal having proper authority to take the evidence, otherwise it would be an offence under this section 180 (*a*) to dissuade a person from making a statement before any person having no authority whatever, which I think was never intended by this section 180 (*a*).

Russell on Crimes, 7th ed., at p. 541, in dealing with interference of witnesses states:—

> "It is an offence at common law to use threats or persuasion to witnesses to induce them not to appear or give evidence in Courts of justice, even if the threats or persuasion fail."

I would not limit the above section to Courts of justice, but I am of the opinion it should be limited to a tribunal having legal authority to take the evidence of the proposed witness.

This brings me to question No. 2. Had the Commissioners herein authority to appoint said R. B. Graham to take the evidence of the Hillmans? The Commissioners were appointed under ch. 18, R.S.S. (1909), sec. 2 of which gives the powers of the Commissioners and reads as follows:—

> "2. The Lieutenant-Governor may by the commission by which he appoints them confer upon the Commissioners the power of summoning witnesses before them and to require such witnesses to give evidence on oath, orally or in writing or on solemn affirmation (if they are persons entitled to affirm in civil matters) and to produce such documents and things as the Commissioners may deem requisite to the full investigation of the matters into which they are appointed to inquire; and the Commissioners shall have the same power to enforce the attendance of witnesses and to compel them to give evidence as is vested in any Court of record in civil cases."

Under this section the only powers that can be conferred upon the Commissioners are:—

1. To summon witnesses before them. 2. To require such witnesses (*a*) to give evidence on oath, orally or in writing, or on solemn affirmation, (*b*) to produce such documents and things as the Commissioners may deem requisite to the full investigation of the matters into which they are appointed to inquire. 3. And

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the Commissioners shall have the same power to enforce the attendance of witnesses and to compel them to give evidence as is vested in any Court of record in civil cases.

To my mind there is nothing in this section that would authorize the Commissioners to appoint somebody else to summon and hear witnesses.

The above clauses 1 and 2 clearly indicate that the Commissioners themselves are to hear the witnesses, and clause 3, which is in the concluding words of the section, simply confers upon the Commissioners the powers of a Court of record in civil cases to enforce the attendance of witnesses and to compel them to give evidence before themselves. It does not confer upon the Commissioners all the powers of a Court, such as issuing a commission to somebody else to summon and hear the evidence of witnesses.

It is to be noted that R.S.C. 1906, ch. 104, similar to the Provincial Act, ch. 18, under consideration, by sec. 9 expressly gives authority to the Commissioners appointed under that Act to appoint somebody else to take the evidence of witnesses under certain circumstances, but there is no such provision in said ch. 18.

I am, therefore, of the opinion that the Commissioners had no authority to appoint Mr. R. B. Graham to take the evidence of the Hillmans, and he had no jurisdiction to take their evidence, and the attempt to dissuade Hillman and his wife from giving evidence before Mr. Graham does not establish the charge preferred against the accused, and, for the above reasons, the question submitted should be answered in the negative.

Judgment for the accused.

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Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Walsh, JJ. February 9, 1917.

TAXES (§ III E—140)—TERMINATION OF LIABILITY—FORFEITURE—SATISFACTION.

Lands forfeited under tax enforcement proceedings, under the Town Act (Alta.), are deemed to be taken in satisfaction of the taxes, and the personal liability of the taxpayer is thereby terminated.

Statement.

APPEAL by the plaintiff from a judgment of Mahaffy, Dist. Ct. J., of Stettler, whereby he dismissed the action of the Town of Castor, to recover personally from the defendant, certain arrears of taxes in respect of certain lots which had been assessed in the

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name of the defendant, and which had, by means of the tax enforcement provisions of the Town Act, become forfeited to the town. Affirmed.

George F. Auxier, for appellant; *E. C. Locke*, for respondent.

HARVEY, C.J. (dissenting):—This is an action to recover taxes imposed upon certain lands which the defendant purchased in 1910 and for which he has since paid the full purchase price. The taxes are for the years 1910 to 1915 inclusive, and amount in all with penalties to $323.48.

In 1914 the taxes up to that time were shown on a tax enforcement return which was submitted to a Judge and confirmed by his adjudication on June 10, 1914. A copy of the adjudication was sent to the defendant on July 17, 1914, and a copy was registered in the Land Titles Office on July 2, 1915. In April, 1915, notice of forfeiture was sent to defendant and published in the Alberta *Gazette* and in the Castor *Advance*. No further steps have been taken in respect to the forfeiture proceedings. The matter came before Mahaffy, Dist. J., by way of stated case, and he dismissed the plaintiff's action, being of opinion that the forfeiture provision had deprived it of the right to sue for the taxes.

Sec. 305 of the Town Act (ch. 2, 1911-12, Alta.) provides that:

> The taxes due upon any land may be recovered with costs from any owner or tenant originally assessed therefor . . and such taxes shall be a special lien upon the land and shall be collectable by action or distress as a landlord may recover rent in arrear.

And sec. 306 provides that a certified copy of the roll shall be *primâ facie* evidence of "the debt."

It is apparent that inasmuch as the taxes for 1914 and 1915 were not included in the return which was the subject of the Judge's adjudication, there may be different considerations applying to them from those applying to the taxes for the preceding years.

It appears from the stated case that for each of the years the defendant was assessed and no question was raised as to his being properly assessable as owner.

Such being the case, the right to sue for the taxes which is given by sec. 305 must exist unless it has been lost in some way. There is no suggestion that there is any provision of the Act which has expressly taken it away, but it is urged that the for-

feiture of the defendant's lands by the plaintiff deprives it of the right to sue. I can see no basis for this view other than that such forfeiture amounts to a payment or satisfaction. It is necessary then to consider what the effect of the forfeiture proceedings is.

It is provided by the Act that each January the secretary-treasurer of the town shall prepare a "tax enforcement return," which shall contain particulars of all overdue taxes. Thereafter on application to a Judge a time may be fixed for holding a Court for confirmation of the return. Notice of the time and place fixed is then to be given to all persons interested. Until the confirmation all taxes may be paid, provided the costs occasioned by the application to the Judge, the advertising, etc., are paid.

At the time and place appointed, the Judge, after hearing the evidence adduced, is to:—

> Adjudge and determine whether or not the taxes imposed respectively upon each lot or parcel of land included in the tax enforcement return were either wholly or in part in default and report the adjudication to the secretary-treasurer of the town . . and the effect of such adjudication when registered as hereinbefore provided shall be to vest in the town the said lands free from all liens, mortgages and encumbrances of every nature and kind whatsoever, subject however to redemption by the owners respectively of the said lands at any time within one year from the date of the adjudication by the payment to the secretary-treasurer of the town of the amounts named, including expenses as aforesaid, together with . . any taxes which may have accrued on the said land since the date of such adjudication, including any penalties. (Sec. 331.)

A later—not an earlier—provision of the same section provides for registration of a copy of the adjudication in the proper Land Titles Office, and by an earlier section (327) it is provided that the land shewn on a return, unless and until it becomes vested in the town, shall continue liable to assessment and taxation in the same manner as other lands in the town.

The adjudication in the present case was not registered until July 2, 1915, which was probably after the assessment and taxation for that year, though the case does not shew. The lands, not being vested in the town until the registration, they were assessable and taxable under sec. 327 against the defendant, the then owner. The taxes, therefore, certainly for 1914, and probably for 1915, seem to be recoverable under sec. 305 by action

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against the defendant, and the forfeiture proceedings have no relation whatever to them.

To return to the provisions relating to the forfeiture proceedings we find that not more than two and not less than one month before the period of redemption expires, the secretary-treasurer is required to publish in the Alberta *Gazette* and in a local newspaper a notice of the forfeiture and of the date of the expiry of the period of redemption, and that between 90 days and 60 days before such expiration of the period of redemption a similar notice is to be sent by mail to the parties interested. A form of notice is given and it states that unless the land is redeemed on or before the date specified "the same will be absolutely forfeited for non-payment of taxes." The notice is required to shew separately, (1) the amount found by the tax enforcement return, (2) the taxes accrued since that date, (3) expenses of advertising, etc., (4) costs, (5) redemption fee.

It is then provided that upon payment within the year of the taxes, expenses and redemption fee, the secretary-treasurer will give a certificate which may be registered and such registration will discharge the lands from such adjudication and its effect, (sec. 332), but if not redeemed within a year "the registrar on the written application of the secretary-treasurer shall issue a certificate of title under the Land Titles Act in favour of the town freed from all liens, mortgages and encumbrances of every nature and kind whatsoever." (Sec. 333.)

It is then provided (sec. 335), that any land which becomes the property of the town in manner provided by sec. 331, "may, subject to the approval of the Minister, be sold, leased or otherwise disposed of by the council of the town on such terms and conditions as it may fix."

The provisions to which I have referred were all in the Act as it was passed in 1911-12, with the exception that at that time the period of redemption was 3 years, which was altered to 1 year, as it now is, in 1913 (1st sess. ch. 8, sec. 20). The original Act also provided that in order to redeem there must be paid a redemption fee of 5 cents per acre, but not less than $2. This was repealed in 1914 (ch. 7, sec. 14), though the reference to the redemption fee in other places still remains. The original Act also provided (sec. 334), that as soon as the return was confirmed

the town should pay out of the general revenue all school taxes the subject of the adjudication. In 1915 (ch. 15), this was repealed and in its place was substituted a provision that after a certificate of title has issued in favour of the town, while the land is owned by the town, it shall be assessed in the name of the town for all taxes required to be levied as if it were assessed to an ordinary individual.

In the previous year, 1914 (ch. 7, sec. 16), a new sub-section had been added to sec. 335, as follows:—

(2) Where any land has been sold under the provisions of this section, any balance remaining after the payment of all taxes, costs, charges and expenses up to and including the date of such sale shall be paid by the town to the person as against whom such land was forfeited, and such person may sue for and recover such amount in any Court of competent jurisdiction.

In 1916 (ch. 16, secs. 8 and 9), two further amendments were made, which however appear to have little importance to the question under consideration. The time for giving notice of the expiration of the period of redemption was altered to the time between 30 and 60 days before such expiration, instead of between 60 and 90 days, and another sub-section was added to 335 providing for the town paying taxes to local improvement districts, rural municipalities, etc., and for a *pro rata* distribution in the event of the proceeds of the sale not proving sufficient to pay all taxes in full. This, of course, was to provide for the case of lands in the town which, prior to their becoming part of the town municipality, had been in some other organization to which they had become liable for taxes, which still remained unpaid.

Going no further back than the original Town Act in 1911-12, we find that at first after forfeiture, the period of redemption having expired, there was nothing which suggested that the original owner of the land had any further interest in it or in what might happen to it, the town municipality having become the absolute owner of it for its own use, and having absolute control of it, subject only to the Minister's supervision. Then the amendment of 1914 came, which established an entirely different principle. The taxes for which the land was forfeited could be obtained only by a sale of the land, which would give the town money instead of land. Now, upon such sale the town deducts the amount of the original owner's liability for taxes, expenses, and everything above that belongs to him. All the ad-

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vantage that may come from an increase in the value of the land or in a good sale accrues to the original owner and not to the town, and it may be that the land may have valuable improvements on it, for it is only the value without improvements which is assessed.

Such being the case, I am quite unable to see on what principle it can be held that the town has taken the land in payment or satisfaction of the taxes. When the taxes are first imposed the town has a lien on the land. When the return is confirmed and the confirmation registered, a further step has been taken and the lands are vested in the town, but with the right of the original owner to redeem them. Then, after the period of redemption has expired and a certificate of title issued, the town's right is advanced another step. It is then in a position to sell and enforce the lien originally given and to obtain its taxes, but it may not obtain anything more than the taxes and expenses. In other words, it holds the lands as owner as security for the taxes and expenses.

The Saskatchewan case of *Smart* v. *Melfort*, 28 D.L.R. 513, confirmed on appeal, 32 D.L.R. 552, does not appear to have any application to the present case, for it is based on the view that under their Act the town became the owner of the lands for its own benefit. In my opinion McNeill, D.C.J., took the proper view and correctly distinguished that decision from *Granum* v. *Lennox*, [1917] 1 W.W.R. 1070. It is true that no provision is made by the Act whereby the defendant can get back his land if he pays the taxes, but a similar condition of affairs did not stand in the way of the Courts allowing a mortgagee under the old system of mortgages after foreclosure of the equity of redemption still to pursue his personal remedy. The Courts did hold, however, that he thereby gave the mortgagee the right to get the land back, and there can be no doubt that if the defendant pays his taxes the Courts will be able to provide a way for him to get his land back if the legislature does not. I am of opinion, therefore, that the appeal should be allowed with costs and that the plaintiff should have judgment for the amount of the taxes for which the defendant is liable with costs.

No question is raised as to any of the taxes except those for the year 1915. There are 14 lots in all, assessed for each year,

at an average value of $50 for each lot. The taxes for the year 1910 were $11.13, and for 1915 they had increased to $73.29, or, in other words, to 10 1-3 per cent. of the assessed value. This in itself furnishes the explanation why the defendant would prefer to be free from the land with the burden of the taxes, and why the plaintiff equally should prefer a different result. But this is not all. While the assessment for 1915 is $700 it is admitted that the value of the lots, which in 1911 was $700, has gradually decreased and that in 1915 they had no substantial market value. This seems to indicate a remarkable condition of affairs, for it means that because a man happens to be entitled to certain lands which are of no value to him because he cannot sell them he may yet be taxed a very substantial sum each year—that in addition to the loss of all the money which he previously paid in days of inflated value he is to be called on each year for a substantial reminder of his lack of foresight.

Sec. 267 provides that land shall be assessed at its actual cash value. The only way in which the actual cash value can be ascertained is by the market, but it is admitted that these lots have no value in the market either for cash or on terms, therefore they have no assessable value. It is also provided, however, by sec. 267 that if the value at which land is assessed is more or less than its actual cash value the amount of the assessment shall not be varied on appeal, if the value at which it is assessed bears a fair and just relation to the value at which other land in the immediate vicinity thereof is assessed. I am of opinion that this provision in this and other Assessment Acts has done more to bring about and sustain the inordinately high assessment that has existed and still exists in many of the towns and cities of the province. It is to be hoped, however, that the consequences which we see in the case at bar of a tax rate of over ten per cent. a year on a value that is purely fictitious is not a fair example of the consequences of such a course generally.

It is admitted in the present case that the conditions specified in the statute exist; in other words, that the assessment of the lots in question bears a fair relation to the value at which other lands in the immediate vicinity are assessed. That means that the assessment, not merely of the lots in question, but of other lands in the immediate vicinity, is a dishonest assessment, that it is a representation to the public that the town has assets

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which do not exist. And it must not be forgotten that the town borrows on its debentures on its assessment; in other words, on its own representation as to the value of its assets.

It must be apparent that no such provision of the statute could justify the upholding a purely fictitious assessment such as this, even without the proviso which it contains, that in no case shall an obviously excessive assessment be maintained.

By sec. 300 the minimum tax which these lots must bear is $1 each, being 50 cents for general taxes and 50 cents for school taxes. It is clear from the facts of the case that for 1915 that should also be the maximum and the taxes recoverable therefore for 1915 will be $14 instead of $73.29 as claimed. The defendant may feel gratified that that year also sees the end of his personal liability, for the statute only authorises the continuance of the assessment as before until the lands become vested in the town by the registration of the adjudication, which as already stated took place as regards these lots in July, 1915. It is true that the statute seems to make no provision for the assessment from that time until the certificate of title is issued to the town but we are not called on to consider the effect of that omission here.

The claim also includes the costs of the proceedings for confirmation of the tax enforcement return. These are not taxes and I find no provision which makes the defendant personally liable for them, though of course they would have to be paid if he wished to redeem his land. The amount of these costs, therefore, should be deducted from the claim. It is stated that no appeal was taken from the assessment. It is apparent, however, from the statement of the law in *Bow Valley* v. *McLean*, 26 D.L.R. 716, which I followed in *Varson* v. *Vegreville*, 28 D.L.R. 734, and *Coleman* v. *Head Syndicate*, [1917] 1 W.W.R. 1074, that the defendant is not precluded by that fact from taking these objections here.

The plaintiff should have judgment for the amount claimed with the deductions I have specified, and the amount admitted to have been paid.

Stuart, J.

STUART, J.:—The substantial defence was that the lands had been taken in payment by the town by means of the procedure provided by the Act and that there was therefore no right of action.

This contention the trial Judge upheld in the judgment appealed from.

It appears that one Hugh Smith was, and still is, the registered owner of the lots in question; that he had agreed to sell them to the defendant prior to the first year for which the arrears of taxes are charged, and had been paid in full therefor. Nothing, however, turns upon this because the defendant is admitted to have been properly assessed in respect of the lots. The arrears claimed are for the years 1910, 1911, 1912, 1913 and 1914, as well as for 1915.

No evidence was taken, but a stated case, setting forth the facts which were not in dispute, was submitted to the trial Judge. From this stated case I quote the following:—

10. On January 1, 1914, there were arrears of taxes assessed against all of the said lands on the books of plaintiff corporation amounting to $125.66; on June 10, 1914, $223.87, and on July 2, 1915, $266.31.

11. On or about January 1, 1914, all of the said lands were included in the tax enforcement return prepared by the secretary-treasurer of the plaintiff corporation in accordance with sec. 324 of the Town Act in respect of such taxes as were in arrears on the said date.

12. The said tax enforcement return was duly audited and notices of the Court of Confirmation sent in accordance with the provisions of the Town Act.

13. On June 10, 1914, a Court of Confirmation was held at the Town of Castor, Alberta, in accordance with the provisions of the Town Act by Lees, Co. J., and at such time and place the said Judge adjudicated upon and confirmed the said return in respect of the said land and arrears of taxes due thereon as above mentioned.

14. On July 17, 1914, a copy of the said adjudication was sent to the defendant by the secretary-treasurer of the plaintiff corporation in accordance with the provisions of sub-section 5 of sec. 331 of the Town Act.

15. On April 7, 1915, notice of forfeiture in respect of the said lands was sent to the defendant by registered mail and in or about the month of April, 1915, notices of forfeiture were published in the Alberta *Gazette*, and in the Castor *Advance*, a newspaper published within the limits of the plaintiff corporation, in accordance with sub-sec. 6 of sec. 331 of the Town Act.

16. On July 2, 1915, a copy of the adjudication in par. 13 hereof referred to, certified by the secretary-treasurer of the plaintiff corporation, was forwarded by registered mail to the registrar of the Land Titles Office for the North Alberta Land Registration District in accordance with the provisions of sub-sec. 4 of sec. 331 of the Town Act and such adjudication was in or about the month of July, 1915, registered against the lands.

17. No application for the issue of certificate of title has ever been made by the secretary-treasurer of the plaintiff corporation under the provisions of sec. 333 of the Town Act and no certificate of title has ever issued to the plaintiff corporation.

18. The statement of claim herein was issued on or about March 14, 1916.

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19. The question submitted to the Court is: "Can the plaintiff recover all or any of the said arrears of taxes assessed against the said lands hereinbefore and in the plaintiff's statement of claim referred to, by action against the defendant personally."

Sec. 305 of the Act does not expressly call the taxes a debt nor does it say expressly that they may be recovered as a debt. Sec. 310, which seems to be a belated survival from some old Act which allowed assessment of personal property, refers to taxes which are not a lien upon land and in that section the words are "the town may recover the same *as a debt*." Nevertheless it would appear fairly clear that the effect of sec. 305 is to give a right of action against the person as well as a right to enforce the lien by action.

The question therefore is: "What, if anything, has taken that right of action away?" If, upon the proper interpretation of the statute, the proceedings which are provided for forfeiting the land and which were adopted in this case should be held to lead to the result that the taxes are paid, then, of course, the right of action must be held to have ceased.

There are three methods provided for collecting the taxes; first, by distress (sec. 307), second, by action (sec. 305), third, by forfeiture of the land itself (secs. 324 to 331, inclusive). In this case the town first had recourse to the last of these remedies.

It was suggested by the appellant that the secretary-treasurer of the town had no option but was obliged to take the course he did. There seems to me to be nothing in this contention. It is true that sec. 324 makes the preparation of "the tax enforcement return" obligatory; and sec. 325 makes the submission of that return to the auditor also obligatory. But there is nothing in sec. 328 which makes it obligatory upon the secretary-treasurer to apply to the Judge to fix a time and place for the confirmation of the return. The taking of that step is left entirely to the option of the secretary-treasurer, or to the council.

Having, therefore, the option of making the application to the Judge or not, as it pleased, the town decided to make the application. The application was heard and the adjudication provided for in sec. 331 was made.

It is merely one example of a Judge's troubles when he is asked to work out the meaning of a statute that the word "hereinbefore" in the words above quoted is meaningless because the

provision for registration referred to is not "hereinbefore" but "hereinafter" mentioned. One just has to say that "hereinbefore" really means "hereinafter," that is all, and of course a little thing like that ought not to trouble one.

Sub-sec. 4 of sec. 331 directs the secretary-treasurer to send a copy of the Judge's adjudication to the registrar of land titles and the registrar is to register it "against the lands." By sub-sec. 6 the secretary-treasurer is directed, some time during the eleventh month after the adjudication, to publish in the Alberta *Gazette* and in a newspaper "a notice stating that the land named therein has been *forfeited* for non-payment of taxes and stating the time at which the period of *redemption* will *expire*." He is also directed during the first thirty of the ninety days next preceding the last date for redemption to send a notice to the owner which must be in the form set forth in the section. This form notifies the owner that unless payment is made before the time fixed the land "will be *absolutely forfeited* for non-payment of taxes."

By sec. 333 it is provided that if payment is not made within the time fixed for redemption the registrar shall, upon the application of the secretary-treasurer, issue a certificate of title for the lands in favour of the town "freed from all liens, mortgages and encumbrances of every nature and kind whatsoever."

In the present case the secretary-treasurer has not made such an application and no certificate of title has yet been issued in favour of the town.

By sec. 335 it is provided that "any lot or parcel of land which *becomes the property of the town* in the manner provided by sec. 331 hereof, may, subject to the approval of the Minister, be sold, leased or otherwise disposed of by the council of the town on such terms and conditions as it may fix," and sub-sec. 2 says:—

> Where any land has been sold under the provisions of this section any balance remaining after the payment of all taxes, costs, charges and expenses up to and including the date of such sale shall be paid by the town to the person as against whom such land was forfeited and such person may sue for and recover such amount in any Court of competent jurisdiction.

The real question is whether or not the effect of this legislation is that upon the forfeiture by means of the adjudication confirming the return, and the lapse of a year, the taxes are to be considered as paid. In considering this question it seems to me that one essential matter to be decided is whether we are to take the legislature as meaning what it says. Are we not somewhat

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inclined to take an Act as meaning what it says when we think that what it says is good and right, but when we perceive the possibility of something resulting which does not appeal to our sense of justice then to begin a search for some ground for a different interpretation? If the words of secs. 327, 331, 333, 334 and clause 1 of 335 are read in their obvious, plain, everyday meaning they certainly mean that the lands have become the property of the town. The legislature itself has interpreted the word "forfeited" as meaning "absolutely forfeited" by inserting those words in the form of notice. What else can be reasonably inferred from the fixing of a year for "redemption?" Are we to play fast and loose with the ordinary English language? There would surely be no question about the matter at all if it were not for sub-sec. 2 of sec. 335, which directs the balance of the proceeds of a sale by the town of the land forfeited, over the taxes unpaid and charges, to be paid to the person against whom the lands were forfeited. And I cannot see that that section really alters the situation.

The land is finally and irrevocably taken away from the owner. There is not to be found in the statute a single provision giving him any further right in the land which he can protect in a Court of law. How can it be said that a man has an interest or right in land when no judicial remedy is open to him whatever in order to protect that interest?

The analogy suggested between mortgages, which are contracts between parties, and a statutory lien and a statutory forfeiture seems to me to be a false one. The old mortgage conveyed the legal estate to the mortgagee. At law upon default the mortgagor was helpless. The Courts of equity allowed him a right of redemption. If he did not exercise it in the proper time the Courts of equity foreclosed that right by an order of their own—an order over which they had a right and power of control. If the mortgagee still proceeded on the covenant at law the Courts of equity would "re-open" the foreclosure, that is, they would rescind, in favour of the mortgagor, their own order. Now, a statute of the legislature is not exactly the same thing as the order of a Court of equity. What power has the Court to repeal, merely with reference to an individual case, a statute of the legislature and say that it will "re-open a foreclosure" that is,

relieve from a forfeiture decreed by the legislature? Surely no authority is needed for the proposition that it has no such power.

For myself I cannot see that the provisions of sec. 335, sub-sec. 2, have the effect of preserving a right *in the land*, to the ratepayer. He is given a right to an uncertain sum of money and may sue for it. But he is given no right whatever to have anything to say as to what the amount of that uncertain sum shall be.

In my opinion no importance at all should be attached in a Court to the provision for supervision by the Minister of Municipalities of any sale that the town may make. The provision was there before any right to the balance was given to the ratepayer. Sub-sec. 2 was an addition made in 1914 but the first part of the section was a previous enactment. Obviously, therefore, it was not intended, at least originally, as a protection to the ratepayer.

The power of the Minister is an administrative, not a judicial, one. We have here no recognized *droit administratif* such as exists in France and other continental countries. See Dicey on Law of the Constitution, 324. The ratepayer has no means of interfering with the process of sale. He may make representations, no doubt, to the Minister, either directly or perhaps through his representative in the legislature, but that is a political matter. He cannot appeal to a Court to protect his interest in the balance of the proceeds. That means absolutely no less than that his right, that is, his legal or equitable right, defensible in a Court of law or equity, is entirely gone. His land has been taken from him and he must submit and just await the result of administrative action over which he can exercise no control and in which he has no right of intervention whatever. If he can discover that there happens to remain a balance in the hands of the secretary-treasurer the legislature says that he may have it and may even sue for it. By an added section enacted in 1916, which may or may not be the proper subject of reference in a case where everything was done before 1916, the balance is distributable among other rating authorities. But, in my opinion, the provisions of sec. 335, sub-sec. 2, are a mere matter of legislative "grace," to use my brother Beck's suggestion during the argument. It is to be observed that the sub-section does not say anything about what is to be done with moneys derived from leasing, or otherwise disposing of the land, aside from a sale.

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The circumstance that a certificate of title has not been issued seems to me to make no difference. The statutory title has already been created. The certificate is only the evidence of it and nothing more.

For these reasons I think the town has taken the land in payment of the taxes and that being so, I think the defendant's plea that the taxes were paid is proven. The appeal should be dismissed with costs.

Beck, J.

BECK, J., concurred with STUART, J.

Walsh, J.

WALSH, J.:—I have read the judgment of my brother Stuart and I fully concur in its reasoning and result. I desire, however, to add a word or two on my own account.

But for sub-sec. 2 of sec. 335 which was added to the Town Act in 1914 it could not be seriously contended that the defendant remained personally liable for the taxes after forfeiture of the lands upon which they were imposed. Until this amendment was made a town which procured the vesting in it of land in respect of which forfeiture proceedings had been taken clearly took the same in satisfaction of the taxes and that was an end of the taxpayer's personal liability for them. What change in this respect has this sub-section made?

In my opinion it has made none. It simply provides that in the event of the land being sold by the town it shall pay to the person as against whom it was forfeited any surplus over taxes, costs, charges and expenses which may result from such sale.

If the statute compelled the town to sell the land and to account to the ratepayer for the surplus the contention that it holds the land simply in security for the taxes would have great strength. But it does nothing of the sort. Nowhere in the statute is there even a suggestion that it must sell. It holds the land when the last link is forged in the chain of its statutory title by a "certificate of title under the provisions of the Land Titles Act . . freed from all liens, mortgages and encumbrances of every nature and kind whatsoever," which is conclusive evidence of its ownership as against all the world. It has an absolutely new title which cuts out every antecedent interest, and under which in the absence of any statutory obligation to sell, and there is none, it can hold the property forever if it so

desires. If, in the opinion of the municipal authorities, it is suitable as a site for a town hall or for a market place or a park there is, in my opinion, nothing in the Act to prevent the corporation from using it in perpetuity for any such purpose. If it wants to sell, lease or otherwise dispose of the land it can only do so with the consent of the Minister, but a holding of it for its own purpose is not any one of these things. How can it be said that property so held is held by way of security only?

As I read the Act the corporation has its choice of four methods of dealing with this land after it acquires it under its forfeiture proceedings. It may hold, it may sell, it may lease or it may otherwise dispose of it, *e.g.*, by an exchange. As to which one of these methods it shall adopt the former owner of it has as of right nothing whatever to say. Under only one of them has he as of right any interest whatever in what is realized by the corporation from the property for the maximum of his claim under the statute is to the surplus resulting from a sale. The corporation may hold it for ever, or it may out of its rentals satisfy in a short time all of its taxes, costs, charges and expenses standing against it or it may by an exchange get other property in its stead out of which these items are all met and a surplus results, but in none of these cases can the former owner as of right get a dollar of benefit from any of these things. The Minister might insist as a term of his consent to a lease or other disposal that the ratepayer should get something out of it, and again he might not. Even if he did the former owner would get this something not as a matter of right but of justice or favour.

With the land vested in the corporation by an indefeasible title, with the ratepayer's right of redemption absolutely gone without a voice in the control or disposition of the property and with the maximum of his right a claim to the surplus resulting from a dealing with it if the corporation deals with it in one specified way in preference to one of three other different methods open to it, it seems to me that it cannot be said that the land is held by the town merely in security for the taxes.

For this reason, in addition to those given by my brother Stuart, I think the appeal should be dismissed, and with costs.

Appeal dismissed.

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HODGSON, SUMNER & CO. v. THE KING.

Exchequer Court of Canada, Audette, J. May 6, 1915.

CROWN (§ II—20)—LIABILITY FOR LOSS OF GOODS IN CUSTOMS.

The Crown is not liable for the loss of goods while in the custody of customs officers.

Statement.

THIS was a claim against the Crown by petition of right for the recovery of $260.89, the value of certain goods which were alleged to have been lost or stolen while in the custody of the Customs authorities.

A. Geoffrion, K.C., for suppliants.

L. T. Marechal, K.C., for respondent.

Audette, J.

AUDETTE, J.:—The suppliants brought their petition of right to recover the sum of $260.89, being the value to them of certain goods purchased in and imported from Germany, and which would appear to have been stolen or lost at the Custom House in Montreal. The above value includes the duty paid.

The goods in question, which were fancy goods bought for the Christmas trade, belonged out and out to the suppliants, having been bought by them in Germany. The goods were packed in a large case, four feet by three feet and three feet in height. This case, one of several, was taken from the steamer to the third flat of the examining warehouse, where the goods were examined and appraised, as appears by ex. No. 2, and sent down to the basement of the building for delivery.

Such delivery is usually made—at any rate it was at the date in question—under the practice prevailing at the Custom House of the Port of Montreal, upon this examination ticket, ex. No. 2, being handed to the checking Customs clerk, who takes receipt for the goods upon this ticket, which is finally retained by him.

Upon obtaining this examination ticket, the suppliants deputed their own carter to go and take delivery of the case in question. Upon enquiry, and after searches being made, it was found that the case was missing, and a correspondence was started between the said suppliants and the Collector of Customs at Montreal in respect of the same. On March 10, 1911, the Collector of Customs, addressed to the suppliants a letter reading as follows:—

Referring to your letter of the 4th inst. respecting one case ex S.S. *Montezuma* short-delivered to you from the Examining Warehouse on entry No. 54578A, I beg to inform you that this package was duly received in the examining warehouse, examined by appraiser and returned to the ground

floor where all trace of it, I regret to say, has been lost. A very thorough search has been made without avail. I return you the examination ticket and can only trust that sooner or later trace of the package may be found.

R. S. WHITE, Collector of Customs.

This established beyond controversy the failure on behalf of the Customs authorities to deliver the goods after due demand had been made therefor.

The goods have ever since been missing and the suppliants are suing to recover the value thereof.

For the loss of goods under such circumstances is the Crown liable? That is the question to be determined in the present action.

The same question has been under consideration before this Court in the case of *Corse* v. *The Queen*, 3 Can. Ex. 13, where the question has been answered in the negative, denying the subject any redress. There is no reason for reaching any other conclusion, the present case not being distinguishable from the *Corse* case.

The suppliants not being entitled to the relief sought by their petition of right, there will be judgment for respondent with costs.

Judgment accordingly.

ARNEGARD v. BOARD OF TRUSTEES OF BARONS CONSOL. SCHOOL DISTRICT.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck, and McCarthy, JJ. March 9, 1917.

SCHOOLS (§ IV—70)—CONSOLIDATION OF SCHOOL DISTRICTS—ASSUMPTION OF LIABILITIES.

The purpose of sec. 40(*d*) of the School Ordinance (Alta.) is to preserve upon a consolidation of school districts, the separate entity—not the corporate existence—of the original districts, for the purpose of discharging their distinct debts and liabilities, and the section only permits the board of the consolidated district to enter into an agreement for the taking over and assumption of the assets and liabilities of all the districts, and not of any single district.

Statement.

APPEAL by plaintiff from the judgment of Walsh, J., dismissing the action to annul an agreement entered into by a school board. Reversed.

H. D. Mann, for plaintiff. *W. D. Gow*, for defendants.

The judgment of the Court was delivered by

Stuart, J.

STUART, J.:—In the year 1915 there were existing in the neighbourhood of Barons, Alberta, 7 school districts organized under the provisions of the School Ordinance. According to the evidence of one Gow who was secretary-treasurer of the defendant

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corporation, 4 of these districts were "old districts," and had in that year in the regular way provided by the Ordinance, elected their respective Boards of Trustees, consisting of 3 members each. Gow said, however, "there were three new districts formed and official trustees appointed for these districts." This would indicate that the Minister of Education had acted under the provisions of sec. 39 of the School Ordinance which reads as follows:—

39. In case any portion of the Province of Alberta has not been erected into a school district the minister may order the erection of such portion into a district provided that it contains (*a*) fifteen children between the ages of five and sixteen inclusive: and notice of the erection of any such district shall be published in the official gazette, which notice shall be conclusive evidence that the district has been duly erected and constituted in accordance with the provisions of this Ordinance.

Provided, however, that should the minister consider it desirable that a consolidated school district be established and that a school district be erected with a view of having it become a part of the proposed consolidated school district the restriction provided for in this section shall not apply.

Sec. 40 provides that in case of the erection of any district under sec. 39 the minister may appoint a person to call a meeting of the ratepayers to elect trustees. But the above evidence of Gow would rather indicate that there has been no such meeting but that the Minister had under sec. 7 (2) of the Ordinance appointed official trustees for the 3 "new districts." It would appear likely that these "new districts" had been organized by the Minister under sec. 39 with a view to consolidation and that the restriction as to the number of children might have been disregarded.

By sec. 40 (*a*):—

The minister may authorize a vote of the resident ratepayers of each of any two or more contiguous districts . . for the purpose of ascertaining whether or not the majority of such resident ratepayers are in favour of the union of such school districts into a consolidated school district.

By sec. 40 (*b*):—

Upon the minister being satisfied that the majority of the resident ratepayers voting in the manner hereinbefore provided are in favour of the union of such school districts as aforesaid he may by order, notice of which shall be published in the official Gazette, unite such school district into a consolidated district.

It does not appear to be very plain whether these provisions mean that before an individual school district can be put into a consolidated district there must be a majority in that district voting for the union or whether the vote is considered a general one over the districts at large so that a general majority of all the voters in the area to be covered by the proposed consolidated

district could bring into the union any separate district even though within that separate district the majority may have been adverse.

But that is not very material. The 7 districts, the 4 old districts and the 3 "new districts" were united into a consolidated school district under these provisions in the year 1915, sometime about the month of August. The validity of the consolidation is not now in question. The name and number given to the consolidated district under the provisions of sec. 40 (*c*) of the Ordinance was "The Barons Consolidated School District No. 8 of the Province of Alberta."

By sec. 40 (*f*) of the Ordinance it is enacted that:—

> Upon the formation of any such consolidated school district as aforesaid the first board of trustees . . shall consist of the chairman of the board of trustees of each of the school districts united into such consolidated school district and thereafter the board of trustees of such consolidated school district shall consist of one trustee elected by the ratepayers of each of the districts so united to be elected annually as nearly as may be in accordance with the provisions of this Ordinance respecting the election of school trustees.

From this it will appear that for the balance of the year 1915, the chairmen of the Boards of the several districts constituted *ex officio* the Board of Trustees for the consolidated District. Whether in the "new districts" spoken of by Gow there was anything more than a mere "official trustee" who would no doubt be considered "chairman," does not very clearly appear from the evidence; but certainly in the 4 old districts the 3 trustees theretofore constituting under the Ordinance the Board of Trustees for each of those districts would continue in office as such Board of Trustees until the end of the year.

This clearly appears from the provisions of sec. 40 (*d*) and sec. 40 (*f*), the latter being above quoted.

Sec. 40 (*d*) provides this in part:—

> Upon the union of two or more districts as aforesaid into a consolidated district none of the districts so united shall lose its existence as a corporate body; and the debts and liabilities of every such district shall continue to be a charge upon such district as fully and completely as if no union had taken place, but the business of each such district shall be managed and conducted as provided in this Ordinance excepting in so far as variation is made herein applying to the administration of such districts when united into a consolidated school district.

The purpose of this provision is obvious. The separate entity of the original districts is to continue for the purpose of the discharge of their distinct debts and liabilities. But the main-

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tenance and conduct of a school for the children of the consolidated district is transferred to the Board of Trustees of the consolidated district. Thus sec. (40) (*e*) reads:—

> The trustees of each consolidated school district shall be a corporation under the name of "The Board of Trustees of —— Consolidated School District No — of the Province of Alberta," and shall possess all the powers and perform all the duties and be subject to all the liabilities conferred and imposed by this ordinance upon the trustees of town school districts, and in addition thereto shall have power to provide for the conveyance of pupils to and from school and to pay the cost thereof.

Before proceeding to the actual cause of the present litigation it may be well, as this is the first time these provisions have come before the Court to make one or two remarks. By this ordinance neither a school district, whether individual or consolidated, nor the inhabitants or ratepayers thereof, are made a body corporate. Sec. 40 (*e*) just quoted makes merely the "Board of Trustees" of a consolidated district a body corporate. Sec. 85 says, "The trustees of every district shall be a corporation under the name, etc." There is no section making the districts themselves bodies corporate, yet sec. 40 (*d*) above quoted says that upon the consolidation "none of the districts so united shall lose its existence as a body corporate." This seems to be a draughtsman's slip. Certainly it was never intended to have two bodies corporate, one the district or its ratepayers, and the other the "Board of Trustees." There are indeed provisions in the ordinance about districts acquiring property and about transfers of school sites to "the district" but the form of school debenture authorized shews that it is the *Board* which is considered the real and true "body corporate."

There is therefore a rather peculiar result following in regard to the continued existence of the original individual bodies corporate. The districts are to continue. But the annual election of a Board of Trustees consisting of 3 members is to discontinue. It will be noticed that by sec. 40 (*f*) above quoted, after the first temporary Board of Trustees of the consolidated district, consisting of the chairmen of the separate Boards, has acted till the end of the year, an election of a member from each of the original districts which are continued in existence is to take place and these form the Board of Trustees for the consolidated district. Then comes sec. (40 (*h*), which says that:—

> In every school district so united into a consolidated district the school trustee elected as hereinbefore provided (*i. e.* by sec. 40 (*f*)) shall with respect to all the property, assets and liabilities of such district so united possess all the powers and be subject to all the responsibilities of the board of trustees

for such district but the secretary-treasurer of the consolidated district shall be the secretary-treasurer of each of the districts so united into such consolidated district.

Now, remembering that sec. 85, as pointed out, makes the Board of Trustees of a district the body corporate and that there is no section making the district itself or its ratepayers a body corporate it will be seen that the effect of sec. 40 (*h*) is evidently to put the one trustee annually elected from each original district into the place of the Board of Trustees theretofore to be elected and acting in that district. If the original distinct bodies corporate continue, then, it appears that it would be this single trustee who, being clothed with all the powers and subject to all the responsibility of the preceding Board of Trustees who were the body corporate, is to be now considered as the "body corporate." It looks as if we had here another example of a "corporation sole," *i.e.*, of one single person being *ex officio* a corporate body, a thing hitherto perhaps only exemplified in the King or a bishop. However this may be, it is clear that up to the end of 1915, the individual Boards of Trustees of the separate districts still continued in existence and their place was only taken by the individual trustee elected from the district to be a member also of the consolidated Board when the regular annual election took place in January, 1916, under sec. 53 of the ordinance.

The present trouble arose out of a certain proceeding taken under the proviso to sec. 40 (*d*), not yet quoted. It reads as follows:—

> Provided that the board of the consolidated district may, with the consent of the Minister, take over the assets and assume the liabilities of the districts included in such consolidation, upon such terms and conditions as may be agreed upon by the said board, and the trustees representing the several districts; but such agreement shall not prejudicially affect the rights or security of the holder of any debentures issued by any of such districts.

What happened was this. One of the separate districts which were united was the Barons School District No. 2220. This district had a school site and building which latter had cost about $7,500. Apparently it was centrally situated and was considered as the most suitable place for the conduct of the consolidated school. On August 7, 1915, this district purported through the chairman of its Board and secretary-treasurer to lease to the consolidated district, or to its Board, the school building for a term of 3 years at an annual rental of $400 and the lease contains this clause:—

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If at the expiration of this lease the Barons Consolidated School District shall be made permanent the said consolidated school district agrees to purchase and the Barons School District No. 2220 agrees to sell the school property covered by this lease for the sum of $6,500 on terms to be agreed upon.

The building was apparently used in the fall of 1915 for the purpose of the consolidated school. Then in November of that year the question of additional accommodation came up. The matter was considered at several meetings. In December the idea of acting under the proviso to sec. 40 (*d*) was suggested and on December 17, a resolution was passed by the consolidated Board adopting a committee's report reading as follows:—

Whereas it is not advisable to build on property not owned by the district we therefore recommend that the Consolidated Board interview the Barons District Board and if they are willing to transfer this school together with all assets and liabilities that this board proceed to purchase the Barons School property as soon as possible.

This resolution was carried; but one member of the Board, one Wilson, who was such apparently as chairman of the Board of Trustees of an original district called the Lundy School District, voted against the resolution. All the others, including one Popham who was at that time one of the Consolidated Board from the Goldendale School District voted for the resolution.

A committee consisting of Popham, Allen and McClellant was appointed "to wait upon the Barons School Board and submit the proposition."

That Board apparently viewed the proposal favourably and agreed to it and an agreement was executed by one Mackenzie Welsh as chairman and one J. W. Gow as secretary-treasurer on behalf of the Board of Trustees of the Barons Consolidated School District No. 8, and also by the same Mackenzie Welsh, as chairman and the same J. W. Gow as secretary-treasurer on behalf of the Board of Trustees of the Barons School District No. 2220. What had happened doubtless was that on an organization of the consolidated Board, the chairman of the original Barons District Board was elected chairman of the New Consolidated Board and the same also happened in regard to the secretary-treasurer.

By this agreement the Board of the Consolidated District agreed to take over all the assets and to assume all the liabilities of the original separate Barons School District and the latter district agreed in consideration of the assumption of all its liabili-

ties by the Board of the Consolidated District to convey all its assets, including its school site and building, cash on hand, and arrears of unpaid taxes, to the Board of the Consolidated District.

The outstanding liabilities thus agreed to be assumed amounted to about $6,500, while the assets, taking the site and building at cost, were said in the evidence to amount in value to about $10,000. There was however some suggestion that the school building had been poorly built and was deteriorating, but with this we have nothing to do.

Now, the annual elections provided for in sec. 40 (*f*) came on in January, and the plaintiff Arnegard was elected as the trustee from the Goldendale District, thus taking the place upon the Board of Popham, the old chairman from that district.

On January 24, the first meeting of the New Board was held and a communication was read from the Minister of Education regarding the transfer of the site. Upon the motion of Arnegard the consideration of this matter was postponed.

At some later meetings Arnegard attempted to reopen the discussion of the proposed assumption of the assets and liabilities of the old separate Barons School District, but in this attempt he was unsuccessful. The chairman apparently ruled that the matter had been decided already and was not open for discussion.

On May 15, 1916, the Minister of Education indicated his approval of the agreement of December 30, 1915.

Sometime in September, 1916, the separate Barons District by its officers transferred the school site to the consolidated district or its trustees. This transfer was registered on September 14, 1916, but nothing further was done in regard to the carrying on of the agreement of December, 1915. The cash on hand was not handed over nor any of the arrears of taxes collected.

On September 8, the plaintiff, suing as a ratepayer of the Goldendale District, began this action against the defendants wherein he claims a declaration that the agreement of December 30, 1915, is null and void, an injunction restraining the defendants from proceeding or acting further upon it, damages and costs.

The two grounds upon which the plaintiff claims that the agreement is null and void are, first, that upon the true interpretation of the proviso to sec. 40 (*d*) above quoted it was necessary that every member of the then provisional Board of Trustees

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of the Consolidated District should assent to the agreement, and secondly, that it was not competent under that section for the Board of the Consolidated District to assume the liabilities and take over the assets of merely one or some but not all of the separate districts, but that only the assets and liabilities of all the separate districts could be taken over and assumed at the same time and under one general agreement.

Walsh, J., who tried the action held against the plaintiff on both grounds. The plaintiff has now appealed.

There is no doubt that the plaintiff cannot succeed upon the first ground except in so far as it is involved in the second. The 7 trustees in their capacity as members of the Board of Trustees of the consolidated district were of course charged with the duty of protecting the interests of the consolidated district. But their action in deciding to enter into the agreement was taken purely on behalf of the consolidated district and that action, just as any other decision they might have to make, could be decided by a majority of the votes on the Board.

For the second objection I think there is a great deal more to be said and it is with considerable hesitation that I venture to adopt a conclusion at variance with the carefully reasoned opinion of the trial Judge. As he points out, the strict grammatical construction of the proviso in question is certainly in favour of the plaintiff's contention. In giving power to the Board of the consolidated district "to take over the assets and assume the liabilities of the districts" it is noticeable that the words "or any one of them" are not there and they could easily have been inserted; indeed, I rather think they would have been inserted if such an idea had ever occurred to the minds of the persons responsible for the legislation and had been intended to be adopted.

Then I think sufficient importance has not been attached to the last clause of the proviso; "but that such agreement shall not prejudicially affect the rights or security of the holder of *any* debentures issued by *any* of such districts." Here again the words are not "*any* such agreement" but merely "such agreement" which would seem to be intended to refer to a single agreement as if there could be only one and no more. Then, again, even if the words "such agreement" could be treated as meaning

"any such agreement" and as referable to each of a possible series of agreements dealing with each district in succession it would appear to me to be certain that the concluding words would not have been "any debentures issued by any of such districts" but rather "any debentures issued by the district whose assets and liabilities are being taken over and assumed." As the words stand in the clause it seems fairly clear that what is intended is that the single agreement shall not affect the rights of the holders of the debentures of the various districts.

Then I think that upon one point the reasoning adopted by the trial Judge is not entirely satisfactory. He says in his judgment:—

> It is said that this buying out of the assets and assuming the liabilities of one of the districts might be unfair to the others which must retain their property and pay their debts as best they can. The answer to that is that the agreement on the part of the consolidated district is that of the majority of the representations of these minor districts for its board is constituted by the election to it of one trustee from each of the districts in the consolidation, and it is not to be assumed that they will act unjustly to their constituents.

I confess I am unable to see how that can be taken as a satisfactory answer to the objection. If the majority governs, then those trustees who are thinking of the interests of the districts from which they come and are in the minority are powerless to prevent what may seem to them an unfair bargain. Indeed it seems to me to be impossible to say whether a particular bargain about the assets and liabilities of one individual district is fair and equitable or not until you know what kind of a bargain, if any, is going to be made about the assets and liabilities of the remaining districts. The consolidated district having become bound by one bargain it might not be possible to make a just and equitable bargain later on about the assets and liabilities of any of the remaining districts without a re-adjustment of the first bargain. No doubt it might be a very difficult task to arrive at a bargain where there are 8 parties who must agree to it and so many adjustments would have to be made. No doubt also it would be rather unlikely that the consolidated Board would want to acquire a number of school houses, which, through the very purpose and intent of the consolidation, have become useless and therefore of less value. But I think these difficulties and contingencies were foreseen by the legislature and for that very reason it provided for the continuance of the individual districts and of a Board of Trustees (consisting of one person) with a secretary-

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treasurer, the same person, in each. The idea seems to have been this. The legislature says in effect to the old individual districts and to the consolidated district, "if you *can* agree upon a fair and equitable plan whereby there need be no more work for the individual boards to do, no property for them to look after, no liabilities for them to be particularly concerned about, but whereby all the business of disposing of the assets and meeting the liabilities of the old districts can be conducted by the new consolidated Board, then well and good; you are given power to do so. But if that is found impossible owing to a conflict of interests and divergence of opinion as to what is fair and just, then all that can be done is for the old districts to go on through their respective single trustees, dispose of their assets, levy their rates and meet their obligations as they mature."

I think, therefore, that it is not quite right to look at the bargain made between the consolidated Board and the old Barons Board and say that it appears to be a fair bargain. If we could look upon it merely as a purchase of a school-site and school building by the consolidated Board for a certain price that might be all well enough. But that is not what it purported to be. The defendants avowedly acted under sec. 40 (*d*) and I do not think they can now be heard to say that all they were doing was buying a school building and site.

It seems clear that the whole trouble has arisen just because one of the original districts, viz., the Barons District, happened to be central and therefore had certain property which it was worth while for the consolidated board to buy. By the consolidation the property of the Barons District was not deteriorated; but the property—the site and building of each of the other three old districts for which they had paid good money and have no doubt incurred liabilities have become perhaps so much useless material. That perhaps was just where the shoe was pinching. And these were things which in order to make a fair and equitable adjustment under sec. 40 (*d*), if a single agreement for the taking over of all assets and assumption of all liabilities were to be made, would have to be considered.

The Board of the consolidated district has of course power under sec. 95 (8) "to purchase or rent school sites or premises;" and it could under that section make a purchase of what property it thought right to buy from the old Barons District at a proper

price. Debentures would perhaps have to be issued but that is probably what the legislature intended should be done in such a case.

It is evident that the parties acted in absolute good faith and that they adopted what they thought was a more convenient and less cumbersome plan of dealing with the matter upon a view of sec. 40 (*d*) which was so much a possible and reasonable view that it met with the approval of the learned trial Judge and also that of the Minister of Education. But the fact that no harm would be done in this particular case by allowing the transaction to proceed cannot have any weight when we have to construe, for the benefit of all such cases in the future, the meaning of sec. 40 (*d*).

There is another consideration which appears to me to favour interpretation of that section which I have adopted. We can easily conceive the possibility of such a case as this arising. Suppose it is proposed by a consolidated board to take over the assets and assume the liabilities of a single district. That proposal may meet with stronger opposition in the consolidated board than appeared in this case. The vote in its favour might conceivably be carried by the single vote of the trustee representing the individual district whose assets and liabilities it was proposed to assume. That individual would be representing conflicting interests. As a member of the joint board it might be his duty to vote against it. His conscience might tell him he ought to do so in the interest of the consolidated district. But he might see that it was decidedly to the advantage of the particular district from which he came and where his taxable property was situated that the proposal should be adopted. Can it be said that is was the intention of the legislature to place him in that equivocal position? Of course some such situation might also arise under the other interpretation when a vote was being taken upon an agreement for the assumption of the assets and liabilities of all the districts. But in that case the necessity for an assent to the agreement by each individual trustee before it could go through would be a full safeguard.

For these reasons I have no doubt that the proviso to sec. 40 (*d*) is intended only to permit an agreement for the taking over and assumption of the assets and liabilities of all the dis-

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tricts and I think, therefore, the appeal should be allowed with costs, the judgment below dismissing the action set aside and judgment entered declaring the agreement of December, 1915, null and void and restraining the defendants from proceeding further therewith. This declaration that the agreement in question is null and void does not apparently lead to any complication except what is involved in the transfer of the property to the defendants. No doubt this can be adjusted by the parties, and if not, an application may be made to a single Judge.

The defendants' counterclaim should also be dismissed and the plaintiff should have his costs of the action.

McCARTHY, J., through illness, took no part in the judgment.

Appeal allowed.

MAN.

K. B.

HUTCHINGS v. CAN. NAT. FIRE INS. CO. (No. 1.)

Manitoba Court of King's Bench, Galt, J. February 14, 1917.

MANDAMUS (§ I E—40)—TO ENFORCE TRANSFER OF SHARES.

Recording a transfer of shares is not such a public duty as will be compelled by prerogative writ of mandamus; mandamus may be obtained in an action upon sufficient grounds. [See case following.]

Statement.

MOTION on behalf of Hutchings *et al*, applicants, for an order of mandamus commanding the Canada National Fire Insurance Co., respondents, to forthwith enter, register and record the name of two of the applicants as owners of certain shares in the Canada National Fire Insurance Co. assigned to them by the applicant Hutchings, and commanding said company to forthwith cause to be entered in the proper books of the said company the transfers of said shares and to issue certificates therefor.

A. E. Hoskin, K.C., for plaintiffs.

W. P. Fillmore, for defendants.

Galt, J.

GALT, J.:—This motion was launched on behalf of the applicants by a notice of motion, special leave therefor being granted by Macdonald, J. No action is pending between the parties.

A preliminary objection was taken by counsel on behalf of the respondent company to the above mode of procedure upon the ground that where the remedy sought is only in respect of private rights mandamus can only be obtained in an action.

Hoskin, K.C., in support of the motion, contended that in Manitoba there are three modes in which a mandamus may be obtained:—(1) The prerogative writ of mandamus (now to be

obtained by judgment or order) but which formerly was embodied in a writ) See K.B. rule No. 874. (2) By order or judgment in an action. (3) By order or judgment on a motion made to the Court by special leave of the Court or a Judge without any action.

In *Frankel* v. *Winnipeg*, 8 D.L.R. 219, 23 Man. L.R. 296, I had occasion to deal with this question, and I pointed out that where the applicant was seeking relief by way of prerogative order of mandamus the proceedings should be styled in the name of the sovereign *ex relatione* the applicant against the respondent, and I furthermore pointed out that in such a case the applicant must have a legal right to the performance of some duty of a public, and not merely of a private character, and that there must be no other effective lawful method of enforcing his rights.

In the *Frankel* case, just as in this one, the motion was based upon a notice of motion by special leave, and no action was pending.

In the present case Mr. Hoskin correctly says that in the *Frankel* case the question of procedure had not been argued by counsel. I have now had the benefit of a very careful argument by counsel on both sides, and I see no reason to depart from the opinion I expressed in the *Frankel* case.

The rules relied upon by Mr. Hoskin in support of his motion are rules 872-886, inclusive. The particular rule relied upon is 876, which reads as follows:—

> Nothing in the preceding rules contained shall take away the jurisdiction of the Court to grant orders of mandamus; nor shall any order of mandamus issued be invalid by reason of the right of the prosecutor to proceed by action for mandamus; but *in all cases a claim for a mandamus shall be proceeded with by action under the preceding rules, unless leave is granted by the Court or a Judge to proceed otherwise.*

This particular rule was first introduced into Manitoba by the Queen's Bench Act, 1895, ch. 6, r. 874. At that time the procedure relating to mandamus was perfectly well settled in England, Ontario and Manitoba. The ancient prerogative writ of mandamus was obtainable by a simple motion to the Court supported by affidavit, and if the material warranted it the Court would grant an order *nisi* and the motion would then come before the Court for judgment. This was the only form of mandamus known to the law until 1854, when the Common Law Procedure Act was passed in England, and adopted shortly afterwards in Ontario, allowing litigants to include a claim for a mandamus in an ordinary action at law. The prerogative writ of mandamus

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was never granted if it appeared that the applicant had any other adequate mode of relief open to him. But prior to the Common Law Procedure Act many cases arose where parties obtained relief by way of prerogative writ in respect of claims which were not specially, or even at all, of a public nature, simply because no other remedy was open to them. After the Common Law Procedure Act, the right to a prerogative writ of mandamus was necessarily interfered with in many cases because the applicant was met with the objection that he could obtain relief by action.

That being the state of our procedure up to the year 1895 it seems impossible to believe that the legislature could have intended to have introduced a third mode of obtaining such important relief as that by mandamus by such a provision as I have above placed in italics,—namely, "but in all cases a claim for a mandamus shall be proceeded with by action under the preceding rules, unless leave is granted by the Court or a Judge to proceed otherwise." I take this provision to mean that the Court or a Judge may conclude from the material, whether in an action or not, that the proper relief would be that which would have been granted under the old prerogative writ of mandamus or a judgment or order to the same effect, in which case the applicant would have a right to apply on notice of motion by special leave without action or pleadings.

The subsequent rules relied upon by Mr. Hoskin as being applicable to a notice of motion for mandamus would apply quite accurately to a motion for an order similar to the prerogative writ, and there is no necessity to read these rules as applicable to a notice of motion for private relief, as argued by Mr. Hoskin.

Several cases have arisen and are reported in which one or more of the points dealt with before me have been entirely overlooked, but the principles upon which the right to either of the two kinds of mandamus rest are not doubtful.

In *The Queen* v. *Lambourn Valley R. Co.*, 22 Q.B.D. 463, a shareholder in a railway company made a real and absolute transfer of his shares for a nominal consideration to an insolvent person in order to avoid liability for future calls. The company refused to register the transfer. A rule *nisi* for a prerogative writ of mandamus to compel the company to register the transfer having been granted, it was held that inasmuch as the prosecutor had another specific and sufficient remedy, viz., by action of

mandamus, the prerogative writ ought not to issue, and the rule must be discharged.

In *Reg.* v. *London & N.W. R. Co.* (1896), 65 L.J., N.S., Q.B.D., 516, relief was sought by the applicants against the railway company in respect of the delivery of postal packets at stations on the railway line. A rule for a prerogative writ of mandamus was made absolute by the Court, but, in giving judgment, the Court expressed a strong opinion that a rule for a prerogative writ is not a proper mode for enforcing a statutory obligation which can be made the subject of an action, and their lordships expressly approved of the decision of *Reg.* v. *Lambourn Valley R., supra*. This case apparently involved the rights of the public as well as of the particular applicant.

In *Toronto Public Library Board* v. *City of Toronto*, 19 P.R. (Ont.) 329, the plaintiffs brought an action claiming a mandamus. In delivering judgment, Boyd, C., says, at p. 331:—

> It was not disputed that it was competent to move in a summary way, in the action, for the writ of mandamus, though it was argued that the discretion of the Court should be exercised against the application. But, being a public matter resting upon a statutory obligation, I think the Court should simply act in furtherance of the plaintiffs' demand, which appears to be well founded. It is matter of less cost to move as in Chambers; and the alleged expense of a special levy will not be diminished if postponed till the case can be heard next year . . . no objection was made that an action did not lie for this relief. The rule in England is, no doubt, that, when a public body is required to perform a statutory duty at the instance of one entitled to call for such performance, the proper method is to move summarily for the prerogative writ of mandamus, according to the prescribed procedure in the Crown Office. . . . But in this province all the divisions have co-ordinate jurisdiction . . . and the practice in cases of the prerogative writ is assimilated to that in ordinary applications of a summary nature. . . . In my opinion, the affidavits should be re-sworn and further intituled as they would be in an application (not in an action) for the prerogative writ.

This case appears to me to strongly support the construction I have placed upon rule 876. The Chancellor being of opinion that the relief sought was of a public nature, granted leave to the applicant to alter the caption of his material, reswear the affidavits, and apply for the prerogative writ; or, in accordance with the phraseology of our rule, he granted the applicant leave "to proceed otherwise" than by action.

In the present case the relief sought is not such as to justify a prerogative order, and there is no procedure in Manitoba which warrants a notice of motion in such a case, unless an action be pending. For this reason the motion must be dismissed with costs.

Motion dismissed.

MAN.

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HUTCHINGS v. CAN. NAT. FIRE INS. CO. (No. 2.)

Manitoba Court of King's Bench, Galt, J. February 14, 1917.

COMPANY (§ VE—185)—RESTRICTING SHARES TRANSFERS—ULTRA VIRES.

A by-law of a Dominion company which places restrictions upon the transfer of fully paid shares is *ultra vires*, unless specially authorized by statute.

[See case following.]

Statement.

MOTION on behalf of the plaintiffs for an order of mandamus in the above action, commanding the Canada National Fire Insurance Co. to forthwith enter, register and record the name of the plaintiff, Isaac Pitblado as the owner of 50 fully paid up shares of the capital stock of the Canada National Fire Insurance Co., and the name of John T. Haig as the owner of 10 shares in said company, and to forthwith rectify the register or other records of the said company by striking out the name of the plaintiff, E. F. Hutchings as owner of the shares, and inserting the names of his co-plaintiffs as above mentioned. By consent of counsel this motion is to be dealt with as a motion for judgment.

A. E. Hoskin, K.C., for plaintiff; *W. P. Fillmore*, for defendants.

Galt, J.

GALT, J.:—Art. 7 of the company's by-laws provides as follows:—

(a) Shares in the capital stock of the company shall be transferable only on the books of the company by the owner in person or by attorney on surrender of the certificate of stock properly endorsed.

(b) Transfers and allotment of shares shall not be valid unless approved by the Board of Directors.

For greater certainty but not so as to restrict anything herein contained, or (and) in addition thereto, the directors may refuse to register any transfer of stock heretofore or hereafter made upon which the company has a lien, and the directors without assigning any reason, may refuse to register any transfer of stock heretofore or hereafter made whether fully paid up stock or not, to a person of whom they do not approve.

The last clause above mentioned was passed by way of an amendment to the by-laws at a recent meeting in January last.

The shares in question are all fully paid shares, and transfers thereof were executed by E. F. Hutchings to the two plaintiffs in the month of November, 1916. The transfers were duly forwarded to the company for registration. The directors of the company have refused to register the transfers of shares from E. F. Hutchings to I. Pitblado and J. T. Haig respectively or to approve of the transfers, without assigning any reason for such refusal. For all that appears, the directors may have thought

the company had a lien on the shares, but the evidence negatives the existence of any lien.

In the case of *Re Good and Jacob Y. Shantz Son & Co.*, 21 O.L.R. 153, a very similar set of facts (except as to a possible lien) was dealt with by Teetzel, J., as trial Judge, and by the Divisional Court in Ontario. There a company incorporated under the Dominion Companies Act, R.S.C. (1906) ch. 79, purporting to act under the authority of sec. 80, passed a by-law providing that shareholders might, with the consent of the board of directors, but not otherwise, transfer their shares, and that no person should be allowed to hold or own stock in the company without the consent of the board, and that all transfers of stock must be approved by the majority of the directors before being entered.

The trial Judge and the Divisional Court both held that it was beyond the powers of the company, as defined by the Act, to prohibit the transfer of paid-up shares. By special leave the case was carried to the Court of Appeal and was upheld by that Court, Meredith and Magee, JJ.A., dissenting. The case has since been unanimously approved by the same Court in *Re Belleville Driving Assoc.*, 31 O.L.R. 79.

The Canada National Fire Insurance Co. were incorporated by Dominion statute, just as was the Jacob Y. Shantz Son & Co. Ltd. In this and other respects the cases appear to be on all fours. But counsel, in his carefully prepared argument, endeavoured to show that Teetzel, J., the Divisional Court of Ontario, and the Court of Appeal for Ontario had mistaken the law and should have decided otherwise.

While it is true that the company laws of the Dominion and of Manitoba are largely based upon English prototypes, there are many divergencies in our legislation, and accordingly it is not always safe to rely upon an English decision when interpreting a question of Canadian company law.

Several cases decided by the Court of Appeal in England and by single Judges were cited by counsel upon which decisions a plausible argument was based in opposition to the decision in the *Good and Shantz* case.

No decision of higher authority than the Court of Appeal in England was cited to me at variance with the conclusion arrived at by the Ontario Court of Appeal. Their judgment, if I may respectfully say so, commends itself to me as a decision under

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our Canadian Company Act. Accordingly I find the plaintiffs entitled to judgment for a mandamus as claimed, together with the costs of this motion. *Judgment for plaintiff.*

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HUTCHINGS v. CAN. NAT. FIRE INS. CO. (No. 3.)

Manitoba Court of Appeal, Howell, C.J.M., Perdue, Cameron and Haggart, JJ.A. April 3, 1917.

COMPANY (§ VE—185)—RESTRICTING SHARES TRANSFERS—ULTRA VIRES.

A by-law of a company incorporated by special Act, which includes part 2 of the Companies Act (R.S.C. 1906, ch. 79) which purports to authorize directors of the company to refuse to transfer shares to a particular person or persons without assigning a reason, is *ultra vires*, in the absence of express authority in the special Act.

Statement.

APPEAL by defendant from the judgment of Galt, J., *ante*. Affirmed.

A. E. Hoskin, K.C., and *E. R. Siddal*, for plaintiffs; *W. P. Fillmore*, for defendants.

Perdue, J.A.

PERDUE, J.A.:—The defendant company was incorporated by Dominion statute, 8 & 9 Edw. VII. ch. 89. Part II. of the Companies Act applies to the company, except certain sections, which are expressly excluded by the special Act of incorporation. Each of the plaintiffs, Lulu D. Birt and Ernest F. Hutchings, was the holder of fully paid up shares in the company. Each held a certificate for his or her shares. Each of these plaintiffs executed a transfer of his or her shares to the other plaintiff, E. F. Hutchings, in the form endorsed upon the certificate issued by the company. The certificates and transfers were delivered to the company with a request that the shares should be transferred to E. F. Hutchings. The plaintiffs who executed these transfers were not, nor was either of them, indebted to the company, and it had no lien on the shares. The company refused to register the transfers, and gave no reasons for the refusal. The plaintiffs then brought this action for a mandamus or order that the company transfer the shares to the transferee and register him as the owner of them. The motion was heard before Galt, J., who made an order for a mandamus as claimed. From that order the defendant appeals.

Art. 7 of the company's by-laws provides as follows:—

(a) Shares in the capital stock of the company shall be transferable only on the books of the company by the owner in person or by attorney on surrender of the certificate of stock properly endorsed.

(b) Transfers and allotment of shares shall not be valid unless approved by the Board of Directors.

For greater certainty, but not so as to restrict anything herein contained, or (and) in addition thereto, the directors may refuse to register any transfer of stock heretofore or hereafter made upon which the company has a lien, and the directors, without assigning any reason, may refuse to register any transfer of stock heretofore or hereafter made whether fully paid up stock or not, to a person of whom they do not approve.

The transferee is the father of the other plaintiffs, but was not a purchaser for value.

The question at issue in the case turns upon the power of the directors of the company to pass the restrictions upon the right to transfer contained in clause (*b*) of art. 7.

There is a line of English cases commencing with the *Gresham Life Assce. Co.; Ex parte Penney* (1872), L.R. 8 Ch. 446, upholding such a restriction. In that case Sir W. M. James, L.J., said the Court could not sit in appeal:—

From the deliberate decision of the Board of Directors to whom, by the constitution of the company, the question of determining the eligibility or non-eligibility of new members is committed.

Sir G. Mellish, L.J., expressed the following opinion:—

This being an insurance company, it is quite obvious that it may be a matter of very great importance to the company that they should have a substantial body of shareholders. The very existence . . of the company may depend upon that, and in order to procure that by the deed of settlement the directors are invested with an absolute power to reject any transferee.

The Court, therefore, upheld the refusal by the directors to register the transfer. It was held also that the directors were not called upon to declare their reasons for the refusal.

The above decision was followed in *Re Bell Bros. Ltd.* (1891), 65 L.T. (N.S.) 245; *Re Coalport China Co.*, [1895] 2 Ch. 404; *Re Bede Steam Shipping Co.*, [1917] 1 Ch. 123, and in other cases.

In the *Gresham Life* case, the company had been incorporated under 7 & 8 Vict. 110 by the provisions of which the company was formed by a deed of settlement, which was executed by every shareholder who covenanted to perform the engagements in the deed. The power given to the directors to rejecta transfer was, therefore, a matter of covenant on the part of the shareholders and they were bound by it.

In the formation of joint stock companies under English law there has always been present an idea of a voluntary association of persons similar to a partnership, modified by provisions for transfer of shares, limited liability of shareholders and other matters. Sir Frederick Pollock says:—

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In trading corporations the relation of the members or shareholders to one another is in fact a modified contract of partnership, which, in the view of Courts of equity is governed by the ordinary rules of partnership law, so far as they are not excluded by the constitution of the company. Pollock on Contracts, 8th ed. 128.

By the English Companies Act, 1862, and also under the existing Act, a joint stock company is formed in the following manner. A memorandum of association is drawn up which sets out the name of the proposed company, the objects of the company, the limitation of liability, the amount of capital and the number of shares. These provisions are compulsory, but others may be inserted. The conditions in the memorandum of association are fundamental, and with a few exceptions unalterable. This memorandum may be accompanied by the articles of association, which are subordinate to it, and which relate to the internal regulations of the company. Both the memorandum of association and the articles of association must be signed by the persons applying for incorporation. See Companies (Consolidation) Act, 1908, secs. 2-16, Palmer's Com. Law, 10th ed., 26-50. Upon the registration of these a certificate of incorporation is granted. The company may, by special resolution (that is a resolution passed by a three-fourths majority of members present at a general meeting specially called for the purpose), alter or add to its articles of association; secs. 13 and 69.

Under the English law power may be given to the directors by agreement of the members to refuse to register transfers of which they do not approve. This agreement may be inserted in the articles of association in the first instance or added by special resolution of the shareholders. The very widest freedom is allowed in framing the provisions in the articles as long as they do not transcend the limits of the memorandum of association. See *Ashbury R. Co.* v. *Riche*, L.R. 7 H.L. 653, 670; and Palmer, 10th ed., p. 38. On the other hand, companies formed under the Dominion Act are incorporated by letters patent or by special Act. According to the method chosen for incorporation, the part of the Companies Act made specially applicable to it applies to the company when formed. Power is given to the directors to pass by-laws in respect of the matters set out in the Act, but they cannot by any vote or agreement of the shareholders exceed the limits to this power prescribed by the Act.

The Great West Permanent Loan Co. was, as above mentioned,

incorporated by a special Act, and the clauses contained in Part II. of the Companies Act apply. There was nothing in the special Act giving the directors power to refuse or disapprove of a transfer of shares. The sections of the Companies Act dealing with transfers of shares are the following, secs. 138, 143, 145 and 146 (R.S.C. 1906 ch. 79).

Sec. 132 confers upon the directors the power to pass by-laws for "(*a*) the regulating of the allotment of stock, the issue and registration of certificates of stock, the forfeiture of stock for non-payment, the disposal of forfeited stock, and of the proceeds thereof, *and the transfer of stock*."

The stock of the company is declared by the Act to be personal estate and to be transferable. Shares in companies constitute an exceedingly common and important form of personal estate embracing an enormous amount of wealth. I think one may safely say that the spirit of Canadian company law is to make stock or shares in companies transferable, readily and simply, and to place as little difficulty as possible in the way of the transfer. If the business and membership of an intended company is such that it would be advisable to provide some restriction upon the transfer of shares to persons whom it would not be in the interests of the company to have as shareholders such provision should be inserted in the special Act of incorporation.

Reading sec. 132 along with the other provisions of the Companies Act, and having in mind the spirit and intention of the Act, I am of opinion that power is not given to the directors by that section to pass by-laws to place any further restriction upon the transfer and registration of shares than is set forth in the other sections above referred to. "Regulating the transfer of stock" should not be taken as giving power to refuse or prohibit such transfer, when parliament had already made special provisions in the Act restricting transfers in particular instances: secs. 143, 145.

Sec. 138 does not extend the powers of directors in regard to passing by-laws.

This question was most carefully considered by the Ontario Courts in *Re Good & Shantz Ltd.*, 21 O.L.R. 153; 23 O.L.R. 544. Teetzel, J., held that it was beyond the powers of a company incorporated under the Companies Act to pass a by-law making

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transfers of shares subject to the approval of the directors. Both the Divisional Court, and the Court of Appeal upheld that finding. Practically the same question was considered in a number of earlier cases, which are cited in the judgments in *Re Good & Shantz*. The last mentioned case was followed by the Court of Appeal in *Belleville Driving Association*, 31 O.L.R. 79, and must now be regarded as settled law insofar as the Ontario Courts are concerned.

I would dismiss the appeal with costs.

Cameron, J.A.

CAMERON, J.A.:—This is a motion for an order for a mandamus to compel the defendants to register the names of two of the plaintiffs, Isaac Pitblado and John T. Haig, as the transferees of shares. The three other motions, heard at the same time, differed as to the facts involved in certain, but not important, particulars. The motions were heard before Galt, J., who granted the application in each case. The question arises as to the validity of a by-law (set out in the judgment appealed from) requiring the approval of the company's Board of Directors to a transfer of shares. The approval in all cases was refused, no reason being assigned by the directors. There is no direct evidence bearing upon their motive.

It was argued that Galt, J., was in error in refusing to follow certain English decisions in cases arising out of the English statutes, and in adopting the view set out in decisions of the Ontario Courts under the Canadian Act, R.S.C. ch. 79.

The considerations involved lead to a survey of the history of the rise of corporations in England and in this country. A useful summary is found in Angell & Ames on Corporations, p. 44 *et seq.* See also Palmer on Company Law, 10th ed., p. 5, and the valuable observations of Lord Eldon in *Van Sandau* v. *Moore*, 1 Russ. 441 (38 E.R. 171).

Co-partnerships, consisting of a large number of persons, were found necessary to carry on certain businesses, such as insurance. At first formed by mere deed, the partners afterwards applied to the legislature for its sanction, enabling the partnership or unincorporated company to sue and be sued in the name of some one person, for example, the secretary. The object was to make the association a quasi-corporation. It was subse-

quently provided by Lord Redesdale that a memorial of the individuals interested should be filed. But this was found defective, as the remedy, either for or against the individual named, was ineffective, and in 1825 remedy was given as against the individuals. An Act was passed, 1 Vict. ch. 73, to confer certain powers and immunities on trading and other companies, creating a new system partaking of the nature of a corporation though governed by the general law of partnership. This Act was not successful in its operation.

By the Act of 1844, the object of which was declared to be "to invest joint stock companies" with the qualities and incidents of corporations, uniform provision was made for the incorporation of companies by a general law otherwise than by special Act or Royal charter. That Act, ch. 110, 7 & 8 Vict., extended to partnerships the shares of which were transferable without consent of the co-partners and to partnerships consisting of more than 25 members. It was provided that a deed of settlement containing the various particulars and covenants set forth, under the hands and seals of the shareholders, should be filed with the registrar, who thereupon granted a certificate entitling the incorporators to the powers and privileges mentioned, subject to the Act and to the deed of settlement.

No provision for limited liability was made in the Act, and it is to be noted the fundamental idea of a partnership was still in some considerable degree preserved.

The principle of limited liability was introduced in 1855, ch. 133, 18 & 19 Vict., whereby members of certificated companies thereunder were declared free from liability and enacted that if execution shall have been issued against the company and its assets be found insufficient then it may be issued against the shareholders to the extent of the amount unpaid on their shares. In 1856, the existing Acts were repealed and codified and this was again done in 1862.

The Act of 1862, ch. 89, 25 & 26 Vict. prohibited partnerships of more than 10 persons in some cases and 20 persons in others, unless registered under the Act or otherwise set forth. In cases where the liability is limited to the amount unpaid on the shares, a memorandum of association must be filed stating, amongst other things, the amount of capital and the shares into which it is divided. The subscribers must affix their names to the

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number of shares taken by them. The company may increase its capital by the issue of shares or modify the amounts of its shares, etc., but otherwise the memorandum of association cannot be altered. The memorandum of association is to be accompanied by articles of association, signed by the subscribers, and prescribing such regulations as they may deem expedient. They may adopt all or any of the provisions contained in Table A, which are to be taken as applying if no separate articles are filed or insofar as the filed articles do not exclude them.

Subject to the provisions of the Act and of the memorandum, a company may, by special resolution, alter the articles of association; regulations so made are of the same validity as if part of the articles. Such resolution is to be passed by three-fourths of the members of the company at a general meeting to be called on notice and to be confirmed at a subsequent general meeting.

By sec. 22, "The shares . . of any member of a company under this Act shall be personal estate capable of being transferred in manner provided by the regulations of the company."

In Table A a form is given for the transfer of shares, expressing it to be subject to the several conditions on which the transferor held it.

In 1908, an Act consolidating the Act of 1862 and amending Acts was passed, in which the provisions as to the memorandum and articles of association are reproduced without substantial change.

By sec. 22 of the Act of 1908, it is provided that: "The shares . . of any member of a company shall be personal estate transferable in manner provided by the articles of the company." This is substantially sec. 22 of the Act of 1862. Table A (of the Act of 1908) says, "The directors may decline to register transfer of shares, not being fully paid up shares, to a person of whom they do not approve," and also in cases where there is a lien, sec. 20 of first schedule.

It was on the foregoing statutory provisions that the English cases have been decided. In some of them the restriction on the transfer is to be found in the deed of settlement, in others in the articles of association. It is argued that sec. 22 of the Act of 1862, under which articles of association are adopted, is no wider than secs. 45 & 80 of R.S.C. ch. 79, and if it was open to a

company under the Act of 1862 to pass an article restricting transfers of shares to transferees approved by the directors, then directors under our Act have the power to pass a by-law to the same effect.

The first Canadian statute dealing with the incorporation of companies in a general way is that of 1864, ch. 23, 27-28 Vict. This Act was passed in view not only of the English legislation on the subject, but also of that in the United States, the history of which is referred to in Angell & Ames, p. 50 *et seq.* The constitution of the State of New York, adopted in 1846, forbade the issue of special charters and permitted those who wished to obtain incorporation under general laws. The Canadian Act of 1864 discards the cumbersome machinery of a deed of settlement or memorandum of association, with the supplemental articles of association, and simply provides, following the method then prevailing in the United States, for the issue of letters patent containing the provisions and giving the powers set forth in the Act.

By sec. 7 of the Act of 1864, the directors can pass by-laws not contrary to law, "to regulate the allotment of stock, the making of calls thereon, the payment thereof . . the transfer of stock," etc. By sec. 9, "The stock of the company shall be deemed personal property, and shall be transferable, in such manner only, and subject to all such conditions and restrictions as by the *letters patent*, or by the by-laws of the company, shall be provided." By sec. 27, the liability of the shareholders is limited. All these, and other principal provisions of this Act have been preserved in the subsequent legislation down to and including the Dominion Companies Act, R.S.C. ch. 79.

There are plainly wide differences between our legislation and that in England. It was pointed out by the late Chief Justice Killam that "Companies registered under these (the English) Acts, while they are given a certain corporate status, are treated as quasi-partnerships." *Walsh* v. *N.W. Electric Co.*, 11 Man. L.R. 629, 641. We have in the legislation of the Dominion parliament no provision for memorandums of association or articles of association signed by the members, forming the constitution of the company and setting forth the contracts and covenants between the members and making and defining its powers. Under our statute we must look to the Act to find these.

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The letters patent are subject to the provisions of the Act, and it is to the Act itself that we must go to discover the powers of the company to enact by-laws. Under the letters patent an artificial person comes into existence, having the powers given it by the legislature. It acts by by-laws and those are to be viewed in a different light from, and are subjected to other tests than contracts.

In *Re Gresham Life* (1872), L.R.8 Ch. App. 446, the restrictive provision was embodied in the deed of settlement. It was held that under it the directors were not bound to disclose their reasons for rejecting a transferee, provided they had fairly considered the question and that, in the absence of evidence to the contrary, the Court would assume they had acted reasonably and *bonâ fide*. If there were such evidence, the Court had jurisdiction to interfere.

In *Re Bell*, 65 L.T.R. (N.S.) 245, the articles of association provided that: "The directors shall have an absolute discretion as to accepting or rejecting any transfer of shares . . and they shall not be bound to give any reason for rejecting any such transfer." It was held by Chitty, J., that the directors of a company, in exercising this power, must do so in good faith in the interest of the company, and with due regard to the shareholder's right to transfer his shares and the question of the transferee's right must be fairly considered. He inferred from the evidence, and from the absence of evidence, that the real objection to the transferee was that he was not one of the Bell family. This objection he considered inadmissible and rectified the register by entering the transferee's name thereon.

In *Re Coalport China Co.*, [1895] 2 Ch. 404, where directors, who had power, under the articles of association, to refuse to register a transfer, if they considered the transferee not a desirable person, resolved at a meeting held for that purpose that the registration in question should be refused, it was held that in the absence of evidence that the directors had not acted *bonâ fide*, the refusal could not be questioned. "It is for those who say that the directors have exercised their powers improperly to give some evidence to that effect," per Lindley, L.J., p. 407.

In *Re Bede Steam Shipping Co.*, [1917], 1 Ch. 123, a power in the articles of association for directors to refuse to register trans-

fers, "if in their opinion it is contrary to the interests of the company that the proposed transferee should be a member thereof", was held only to justify a refusal to register on grounds personal to the transferee, but not on the grounds that they considered it undesirable to increase the numbers of the shareholders, or intended to affect the policy of the company.

There is no question that in England the power given the subscribers to adopt either in the deed of settlement, or memorandum, or articles of association, a provision restricting generally or specifically the transfer of shares to transferees has been assumed and acted on and held valid, and thus, to some degree, one incident of a partnership, the impossibility of one member transferring his share without the consent of the other members, has been continued in incorporated companies. The members of the partnership, in becoming incorporated, are given the authority to introduce into their corporation, this incident, if not absolutely, certainly to a great degree, and the exercise of that authority, within the limits indicated in the decisions, has been upheld.

Under R.S.C. ch. 79, sec. 8, any provision of the Act that could be the subject of a by-law can be embodied in the letters patent and is then unrepealable by by-law. By sec. 45: "The stock of the company shall be personal estate, and shall be transferable in such manner and subject to all such conditions and restrictions as are prescribed by this part or by the letters patent of the company. Sec. 65 provides that: "No transfer of shares whereof the whole amount has not been paid in shall be made without the consent of the directors." Sec. 66, "No share shall be transferable until all previous calls thereon are duly paid" and sec. 67, "The directors may decline to register any transfer of shares belonging to any shareholder who is indebted to the company." Sec. 45 is repeated in Part II, sec. 138. Sec. 66 is sec. 143 of Part II., but sec. 67 is not apparently re-enacted in Part II.

Sec. 80 (*a*) is repeated in sec. 132 of Part II., with the substitution of special Act for letters patent.

It was argued that sec. 45 of the Dominion Act is no more restrictive, but just as broad in its terms as the corresponding sec. 22 of the English Acts, that a company can act only by by-laws, and has inherent power to pass such. It was pointed

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out that the articles of association can be altered under the English Act as can by-laws under the Dominion Act, and that practically articles of association and by-laws are of the same effect. If articles restricting transfers of shares to transferees acceptable to the directors are valid, then, it is argued, similar by-laws under our Act must be upheld to the same degree. And applying the law as stated in the English cases, there being no direct evidence here to cast doubt upon the *bonâ fides* and reasonableness of the directors' action in refusing to register, this motion must fail.

The subject has been recently dealt with by the Ontario Courts. It was held by Teetzel, J., in *Re Good & Shantz Co.*, 21 O.L.R. 153, in case of a company incorporated under R.S.C. ch. 79, that the Act nowhere authorized a company to refuse to transfer on their books fully paid-up shares, notwithstanding that existence of a by-law purporting to give the directors that power, following MacMahon, J., in *Re Imperial Starch Co.*, 10 O.L.R. 22, and refusing to follow *Re Macdonald and Mail Printing* Co. (1876) 6 P.R. (Ont.) 309, and *Re Gresham Life* and *Re Coalport China Co.* (*supra*). The judgment of Teetzel, J., was unanimously affirmed by the Divisional Court (Mulock, C.J., Maclaren, J.A., and Clute, J.). The *Gresham* case was distinguished as involving a matter of contract, and not, therefore, subject to the same conditions and tests as a by-law. On appeal to the Court of Appeal the judgment of the Divisional Court was affirmed by Moss, C.J.O., Garrow, J.A., and Sutherland, J., Meredith and Magee, JJ.A., dissenting. Moss, C.J.O., held that secs. 45 and 80 must be read together and that they could not be construed as giving the power claimed. Both he and Garrow, J.A., draw distinctions between the English and Canadian statutory provisions. Meredith, J.A., delivered a dissenting judgment, and his reasoning has been largely followed by counsel for the appellant on this argument. He considered sec. 45 the controlling section and gave a wider construction to sec. 80 than the majority of the Court. In the result, seven Judges as against two dissenting, refused to concede directors the power claimed.

The judgment in *Re Good & Shantz*, *supra*, was followed by Lennox, J., and by the Court of Appeal (Meredith, C.J.O., Maclaren, Magee and Hodgins, JJ.A.) in *Re Belleville Driving*

Association, 31 O.L.R. 79. This adds five Judges to the seven above recorded as adverse to giving companies power to pass by-laws such as those in question.

In *Re Macdonald & Mail Printing Co.*, 6 P.R. (Ont.) 309, Hagarty, C.J., held the directors could refuse their assent to a transfer without assigning reasons, and that their refusal to allow a transfer was justifiable in the circumstances there arising, refusing to follow Richards, C.J., who took a different view in *Re Smith* v. *Canada Car Co.*, 6 P.R. (Ont.) 107, on the ground that the *Gresham* case had been reported since the judgment in that case. I refer also to *Re Panton & Cramp Steel Co.*, 9 O.L.R. 3, in which case, however, there was no by-law.

It is true that the decision in *Re Good & Shantz* has been subjected to criticism. In Mulvey on Canadian Company Law, pp. 70-73, that case is discussed, and the author holds that by-laws of a company and articles of association are of the same force and effect, and that it is by means of by-laws that mutual covenants between the shareholders are entered into. See also Mitchell on Canadian Commercial Corporations, p. 969.

In the United States the weight of authority is against upholding restrictions on transfers.

Shares of stock in a corporation being personal property, and the *jus disponendi* being incident to the very nature of property, it follows that a by-law which undertakes to prohibit a shareholder from freely transferring his shares is ordinarily void as being in restraint of trade and against common right. Cyc. X. 359.

A majority of the shareholders of a corporation cannot, without express authority by the charter, pass a by-law, making the right to transfer shares depend upon the approval of the board of directors, or any other agent of the company. Morawetz, Law of Private Corporations, p. 321.

A by-law requiring any unreasonable formality, or imposing any extraordinary impediment on the transfer of stock, unless the power to make it has been expressly conferred by the legislature, would be void. Angell & Ames, on Corporations, 11th ed., at p. 603.

The by-laws of a corporation cannot legally prohibit or limit the right of a stockholder to sell his stock. Cook on Corporations, 622*d*. (7th ed., page 1851).

Had it not been for the decisions of the Ontario Judges, I might possibly have felt more at liberty than I do to adopt the views pressed upon us by defendants' counsel. But the weight of authority against adopting those views is too great to be disregarded. Moreover, I think the principle underlying those decisions of preserving as far as possible the free transferability

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of shares as personal property sound and should be largely dealt in, unless the legislature has clearly authorized restrictions that may be imposed thereon.

I would dismiss these appeals.

HOWELL, C.J.M., and HAGGART, J.A., concurred in the dismissal of the appeal. *Appeal dismissed.*

UNIVERSAL LAND SECURITY Co. v. JACKSON.

ALTA.

S. C.

Alberta Supreme Court, Appellate Division, Stuart, Beck, Walsh and Ives, JJ. January 25, 1917.

VENDOR AND PURCHASER (§ I C—10)—WANT OF TITLE TO MINERALS—RESCISSION.

Absence of title in the vendor to the mines and minerals in land entitles the purchaser to a rescission of the agreement of sale.

Statement.

APPEAL by the plaintiff company from a judgment of Harvey, C.J., dismissing the plaintiff's action with costs and rescinding the agreement sued on—one for the sale and purchase of land—and declaring a lien in favour of the defendant—the purchaser—for the amount of purchase money, which he had paid, with interest, etc.

C. H. Grant, for appellant; *E. B. Edwards*, for respondent.

Beck, J.

BECK, J.:—The land in question was originally owned by two persons, Madson and Whitlam. They made an agreement, January 6, 1913, to sell to Boyt and Green; the agreement comprising some 90 odd lots, and containing a provision for the conveyance of individual lots upon payment therefor at certain specified rates.

On January 20, 1913, Boyt and Green made an agreement to sell to the defendants three of the lots comprised in the Madson and Whitlam agreement. Boyt and Green made also agreements for the sale of other of the lots to various persons.

By an instrument dated January 11, 1914, made between Boyt and Green as assignors and the plaintiff company as assignees, Boyt and Green assigned to the plaintiff company all their interest in the lands and in the agreements for sale and in the moneys owing by the purchasers.

It is stated in this assignment that Boyt and Green were trustees for the plaintiff company, but from the provisions of the assignment one would be inclined to infer that the assignment was by way of securing some liability of Boyt and Green to the company.

This action is one, in effect, for specific performance of the agreement, Boyt and Green to the defendants. The defences set up are substantially two—misrepresentation and absence of title in the plaintiff company or in Boyt and Green—and there is a counterclaim for rescission.

At the trial it being stated that Whitlam had become the registered owner of the lands since the commencement of the action and that the plaintiff company had assigned its interest to him, Whitlam was added as a party plaintiff.

The trial Judge found in favour of the defendants on the issue as to misrepresentations. We are agreed that it is unnecessary for us to consider the evidence upon this issue inasmuch as we are of the opinion that the plaintiffs fail on the issue as to title.

The facts with regard to the title were as follows: The title, as I have described it, relates only to the surface; the defendant was entitled, because of there being no reservation in the agreement, to the minerals, and neither the plaintiff company nor Whitlam had title to the minerals or any power to compel a conveyance of them.

It may be thought that the absence of the title to the minerals at all events those which underlie or may underlie any land bought for farming purposes, or at all events for building purposes, ought to be treated by the Court like the absence of title to an inconsiderable portion of the land sold, with respect to which the Court would allow compensation, or like a mere defect in title, which the Court would allow the vendor a reasonable time to remedy, but even if it were possible, in view of the well-established principles of the Courts, whose jurisprudence we are in a general way at least bound to follow, to extend the application of those principles in such a way as to accept and adopt such a view, it must not be overlooked that the ownership of the minerals may be a matter of much greater moment than at first sight it may appear to be. In some parts of the province coal underlies the surface throughout very large tracts, oil and natural gas have been found in paying quantities in some parts. Owing to the configuration of the land coal in the northern part of the province is ordinarily worked by means, not of vertical or inclined shafts, but of horizontal or level tunnels, many of them, for example, several under what is now the City of Edmonton, running for very

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considerable distances and passing under what, either at the time of the making of the tunnels were, or have since become, building lots. This condition of things, in fact, was the occasion of so great a fear of possible injury to buildings, that, as a means of meeting such a danger, to some extent at least, if it should become actual or probable, the City of Edmonton obtained from the legislature power to expropriate mining rights, and it must be remembered that, according to the law of England, which I assume to be applicable in this province, the owner of the minerals is under obligation only to preserve the surface in its natural state, irrespective of the increased burden of buildings.

In the present instance, not only was there an absence of title to the mining rights, but there was actually outstanding a coal mining lease of 20 acres, which included the lots, the subject-matter of the agreement.

The defendants repudiated the agreement on the ground of absence of title to the minerals by their defence and counter-claim before the title had been acquired; indeed, it has not yet been acquired or contracted for.

This, in our opinion, is a complete defence to the action and a complete ground for rescission of the agreement. In truth, the present case is, so far as this Court is concerned, concluded by our own decision in the case of *Innis* v. *Costello*, 33 D.L.R. 602, decided so recently as the 13th of the present month.

In the case of *Bellamy* v. *Debenham*, [1891] 1 Ch. 412, 60 L.J. Ch. 166, 64 L.T. 478, there was an absence of title to the minerals. The purchase price of the property was £800; the vendors (after repudiation) got in the title to the minerals for the very small sum of £10 10s., and yet the Court appear to have considered the question of compensation as scarcely open to argument.

There has been and still remains so much misunderstanding or doubt in the minds of some members at least of the profession as to what this Court has decided as to the obligations of a vendor upon the ordinary form of agreement for sale and purchase of land for a price payable by instalments, and the rights of the purchaser, that I think it well to give a synopsis of what I think is the result of our decisions, without expecting my brother Judges to examine it critically and to express an opinion upon it, because it may be that, as I shall put it, it may seem to call for some

restrictions, limitations or exceptions which I have not thought worth while in what is intended as merely a statement of general rules to express; and because it is quite unnecessary as part of the reasons for decision in the present case.

1. The purchaser under an agreement of sale of lands can repudiate the contract for want of title in the vendor at any time before the vendor has acquired or placed himself in such a position that he can enforce a right to acquire a title according to the exigency of the agreement: *Nimons* v. *Stewart*, 1 A.L.R. 384, per Beck, J.; *Graves* v. *Mason*, 2 A.L.R. 179, per Stuart, J.; *Reeve* v. *Mullen*, 14 D.L.R. 345, 6 A.L.R. 291, Court *en banc*.

This rule is perhaps subject to an exception in case there is a want of title only to so comparatively a small portion of the subject-matter of the sale that the Court would hold it to be a case for compensation.

2. If the objection to the title relates only to some defect in the title, as distinguished from an absolute want of title, or relates to a want of title to only such a comparatively small portion of the subject-matter of the sale as above mentioned, then the vendor has until the time at which he is bound to shew title to perfect the title in the one case, or to acquire title to the small portion in the other, before the purchaser can repudiate; and where the case is one for compensation, and compensation is offered, presumably he could not repudiate.

3. Under our common form of agreement for sale and purchase of land for a price payable by instalments, where a transfer is to be given on payment of the purchase-money in full, the purchaser is entitled to demand of the vendor, before he pays any deferred instalment, that the vendor shew that he has a good title or can compel a conveyance to himself so as to have a good title at the maturity of the last instalment: *Rutherford* v. *Walker*, 1 A.L.R. 122, per Beck, J.; *Graves* v. *Mason*, 1 A.L.R. 250, *per* Scott, J.; *Goodchild* v. *Bethel*, 19 D.L.R. 161, 8 A.L.R. 98; *Ewing* v. *McGill*, 22 D.L.R. 834, 8 A.L.R. 104, 105; *Lee* v. *Sheer*, 19 D.L.R. 36, 8 A.L.R. 161; *Krom* v. *Kaiser*, 21 D.L.R. 700, 8 A.L.R. 287; *Armstrong* v. *Marshall*, 22 D.L.R. 51, 8 A.L.R. 449; *Ballantyne* v. *Hellinger*, 8 A.L.R. 442; *Newberry* v. *Langan*, 8 D.L.R. 845, 47 Can. S.C.R. 114.

4. If therefore the purchaser makes such a demand he is en-

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titled to have the demand complied with within a reasonable time, or within a time fixed by notice, if the time be reasonable, and in default to repudiate the agreement. *Vide* the same cases.

5. A repudiation may be made by the purchaser bringing an action for rescission or by his making it in his defence to the vendor's action: *Reeve* v. *Mullen, supra; Ewing* v. *McGill, supra.*

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6. Where there is no repudiation the Court will give a reasonable time to the vendor and this is usually done by way of a reference.

I agree in the disposition of this case proposed by my brother Walsh.

Walsh, J.

WALSH, J.:—This is a vendor's action for specific performance with a counterclaim for rescission, the defence and counterclaim being based upon (*a*) certain material misrepresentations on the part of the plaintiff as to municipal and other improvements that were either under way or that it had been decided to set on foot with reference to this and other property in the same district, and (*b*) that while the agreement sued upon was for the sale of the lands without any reservation or exception, the defendant did not then, as a matter of fact, own any but the surface rights, the title to the coal underlying the surface being in someone else and the lands being subject to an existing coal lease and the plaintiff was not in a position to get in these outstanding rights. The Chief Justice who tried the case found that some of the misrepresentations complained of had been made and upon this ground he dismissed the action and gave judgment for rescission as asked for by the defendants and from this judgment the plaintiff appeals.

In order to determine whether or not the view which the Chief Justice took of the facts upon which he based his judgment is one that would commend itself to us it would be necessary for us to read with care all of the evidence given at the trial and the appeal-book is by no means a small one. In view of the fact that the other ground of defence and counterclaim taken by defendants is, under judgments of the Appellate Division, one that we must give effect to, it seems to me quite unnecessary to undergo the trouble and take the time to study the evidence with a view to deciding whether or not the judgment under appeal can be sustained on the ground on which the Chief Justice rested it.

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The facts as to the title are plain and undisputed. By the agreement in question the vendors agreed to transfer to the defendants the land in question, subject only to the conditions and reservations in the original grant thereof from the Crown. The appeal was argued on the understanding that the mines and minerals were not reserved by the Crown in its original grant of these lands. The vendor's title to these lands was under an agreement of sale which reserved to their vendors all mines and minerals under the same and they have never since acquired title or the right to call for title to the same. Unless this case is distinguishable from *Innis* v. *Costello*, 33 D.L.R. 602, decided less than a fortnight ago by the Appellate Division, this want of title to the mines and minerals must be given effect to as it was in that case by a judgment dismissing the plaintiff's action and rescinding the agreement.

The only ground of distinction that I can see between the two cases is that in the former the repudiation of the contract upon discovery of the lack of title was made by notice to the plaintiff, while here it was made by the statement of defence. This Court held, however, in *Ewing* v. *McGill*, 22 D.L.R. 834, 8 A.L.R. 104, that repudiation can be effectively made by the statement of defence and that ground of distinction therefore vanishes.

The plaintiffs complain that the lien given by the judgment upon the lands in question is too broad and in this I think they are quite right. It should be limited to the interest of the defendants, vendors, Boyt and Green, in the land. I think the blame for this lies upon the solicitors and not upon the trial Judge.

In his reasons for judgment the Chief Justice merely said that there would be a declaration of lien on the property and the solicitors elaborated this in the formal judgment into a judgment giving the defendants a lien on the land not confining it to the interest of their vendors in it.

The formal judgment should be varied accordingly and otherwise the appeal should be dismissed with costs.

STUART, and IVES, J.., concurred with Walsh, J.

Stuart, J.
Ives, J.

Judgment varied.

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THE KING v. MACDONALD.

Saskatchewan Supreme Court, Sir Frederick Haultain, C.J., Newlands, Brown, and McKay, JJ. March, 10, 1917.

MUNICIPAL CORPORATIONS (§ II C—105)—REGULATION OF BUSINESS—LICENSE TO PRACTISE LAW—ULTRA VIRES—CONSTRUCTION OF STATUTES.

Municipal by-laws, in so far as they purport to regulate, license and control barristers or solicitors, are *ultra vires*. The general legislation in the City Act, as to the regulation and licensing of businesses or callings, cannot override the special legislation as to barristers and solicitors contained in the Legal Profession Act (R.S.S. 1909, ch. 104).

Statement. CASE stated by the police magistrate of the City of Saskatoon under sec. 761 of the Crim. Code of Canada.

H. L. Jordan, K.C., for respondent.

H. P. Newcombe, for appellant.

The judgment of the Court was delivered by

McKay, J. McKAY, J.:—On November 1, 1916, an information was laid under oath by Charles H. Price charging that the said B. D. Macdonald between January 1 and October 24, 1916, at the City of Saskatoon, in the Province of Saskatchewan, did carry on business as barrister and solicitor in an office situate on Second Avenue in the City of Saskatoon, under the name and style of Macdonald & Stewart, without having a license therefor from the City of Saskatoon, contrary to the provisions of by-law No. 890 of the city of Saskatoon and amendments thereto.

On November 10, 1916, the said police magistrate found the said Bernard D. Macdonald guilty of the said offence and convicted him thereof. The following are the facts stated by the magistrate:—

(*a*) Defendant is a duly qualified and enrolled barrister and solicitor of the Supreme Court of Saskatchewan and paid the fees and dues prescribed by the Law Society of Saskatchewan, for the year 1916, amounting to $10. (*b*) Defendant has practised as barrister and solicitor in an office situated on Second Ave. in the City of Saskatoon between January 1 and October 24, 1916, under the name and style of "Macdonald & Stewart." (*c*) Defendant has paid no license fee to the city in respect of his said practice under by-law 890 and amendments thereto, and no license has been issued to him. (*d*) The annual license fee payable by the defendant as provided for in the by-law No. 890 and amendments thereto of the City of Saskatoon would amount to $53.42. (*e*) The city has repeatedly demanded payment of the said license fee from the defendant. (*f*) The defendant is a supporter of separate schools in the St. Paul's R.C. Separate School District, Number 344, of which the City of Saskatoon forms a part, and the defendant is so described on the assessment roll of the City of Saskatoon for the year 1915.

The questions submitted to this Court are as follows:—

1. Are the aforesaid by-laws Nos. 890, 891 and 972 *ultra vires* of the City of Saskatoon, in so far as they purport to regulate, license or control barristers or solicitors? 2. The said Bernard D. Macdonald being a barrister and solicitor of the Supreme Court of Saskatchewan, has the said City of Saskatoon power to enact a by-law to control, regulate or license barristers and solicitors of the Supreme Court of Saskatchewan? 3. The said B. D. Macdonald being a supporter of the separate school in St. Paul's Separate School District No. 344, of which the City of Saskatoon forms a part, does such license prejudicially affect the rights of the said B. D. Macdonald with respect to separate schools? 4. Do the said by-laws Nos. 890, 891 and 972 refer to or include barristers and solicitors?

Taking up the first question submitted: The section of the by-law under which the conviction herein was made is sec. 162 of by-law 890 of the City of Saskatoon, as added by by-law 972 of said city, and reads as follows:—

BUSINESS LICENSES.

162. A license shall be taken out by every person who carries on any of the businesses enumerated in this clause and he shall pay therefor an annual license fee calculated according to the floor or ground space occupied by him for the purpose of such business at the following rates per square foot:—

List of Businesses and License Fees.	Rate per sq. foot.
Brick Yards - - - -	0.16 cents.
Ice Houses - - - -	0.16 "
Offices (Business and Professional) -	4.8 cents.

It is to be noted that this section says: "A license shall be taken out, etc.," and "he shall pay therefor an annual license fee, etc." And by-law No. 891 imposes a penalty for breach of any by-law of the city, which said penalty and the license fees payable under by-law 890 and amendments may be recovered and enforced by summary conviction.

Counsel for the City of Saskatoon contends that sec. 204 of the City Act, ch. 16 of 1915, Saskatchewan statutes, sub-sec. 62, gives the city authority to impose this license upon barristers and solicitors. This section reads as follows:—

204. For greater certainty but not so as to limit the general powers conferred by the preceding section of this Act, the council may make by-laws or regulations for all or any of the following purposes:—

62. Controlling, regulating and licensing livery, feed and sale stables, motor liveries, real estate dealers and agents; intelligence officers or employment officers or agents, butcher shops or stalls, skating, roller or curling rinks and all other businesses, industries or callings carried on or to be carried on within the municipality, or commercial travellers or other persons selling goods, wares, merchandise or other effects of any kind whatsoever or offering the same for sale by sample cards, specimens or otherwise for or on account of any merchant, manufacturer or other person selling directly to the consumer not having his principal place of business in the city; and collecting license fees for the same.

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Counsel for the city argues that in the foregoing section the words "and all other businesses, industries or callings" include barristers and solicitors, hence the section gives the city the power claimed.

Even admitting that these words are wide enough to include barristers and solicitors, yet I do not think it gives to the city the power claimed. If this section has the wide meaning given to it by counsel for the city, then why enact secs. 63 and 64 which deal with other businesses, industries or callings carried on within the municipality?

Furthermore, it is to be noted that the by-law passed under sub-sec. 62 is for "controlling, regulating, licensing," etc. If this section were construed to include barristers and solicitors, then the City of Saskatoon could pass a by-law to control, regulate and license barristers and solicitors carrying on business within the city, and, under sec. 207 of the City Act could prohibit them from practising without a license, and under sec. 208 of said Act could refuse or revoke the license without giving any reason and thus prevent them from practising there.

In other words, this general legislation in the City Act would be made to override the special legislation with regard to barristers and solicitors contained in the Legal Profession Act, ch. 104, R.S.S. 1909, which deals with their control and regulation, and which entitles them to practise anywhere in the Province of Saskatchewan upon complying with this last mentioned Act and the rules made thereunder.

At p. 286 of Maxwell on Statutes, 5th ed., the author states:—

> Having already given its attention to the particular subject, and provided for it, the legislature is reasonably presumed not to intend to alter that special provision by a subsequent general enactment, unless that intention is manifested in explicit language, or there be something which shews that the attention of the legislature had been turned to the special Act, and that the general one was intended to embrace the special cases within the previous one; or something in the nature of the general one making it unlikely that an exception was intended as regards the special Act. The general statute is read as silently excluding from its operation the cases which have been provided for by the special one,

and cites the following authorities in support of this statement: *Fitzgerald* v. *Champneys*, 2 Jo. & H. 31, 54, 30 L.J. Ch. 777; *Barker* v. *Edger*, [1898] A.C. 748, 754; *Garnett* v. *Bradley*, 9 App. Cas. 944, 950.

As the intention of the legislature is not manifested in explicit

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language, in sub-sec. 62 above referred to, to include barristers and solicitors therein and thus alter the previous law as to them, I am of the opinion that it does not include them and it was never intended that it should.

The case of the *Corp. of the City of Victoria* v. *Belyea*, 12 B.C.R. 112, cited by counsel for the city, is really distinguishable from the case at bar.

The British Columbia Act, under which the *Victoria* case was decided, only confers power to issue licenses and levy and collect the same. It does not confer the power to control and regulate the licensees as does our Act. And, further, the original Act had the words "barrister or solicitor" and later the word "profession" was apparently substituted. All of which clearly indicates that the legislature intended to include barristers and solicitors.

In my opinion, therefore, the first question submitted should be answered in the affirmative, and as this answer disposes of the whole case it is not necessary to answer the other questions, and the conviction should be quashed with costs.

Conviction quashed.

McPHEE v. BELL.

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Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Ives, JJ. January 26, 1917.

ACCORD AND SATISFACTION (§ I—7)—*Release—Compromise and settlement of action—Proceedings to wind up.*]—Appeal by defendant from the judgment of Simmons, J. Reversed.

C. C. McCaul, K.C., for appellant.

S. W. Field, for respondent.

The judgment of the Court was delivered by

STUART, J.:—The plaintiff and the defendant Bell had been partners under the firm name of Bell and McPhee, and had been engaged in a timber business. Subsequently they sought incorporation and a company called Timbers Limited was incorporated, in which McPhee held 49 shares, Bell 50 shares and the defendant Robertson 1 share. Some, but apparently not all, of the assets of Bell and McPhee were transferred to the company. The company continued business for a while and then disagreements arose between the two chief shareholders, the plaintiff and the defendant. The plaintiff made an application under the Winding-up Ordin-

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ance for an order to wind up the company. This was opposed by Bell. Instead of granting or refusing the application Simmons, J., before whom it came, made several orders providing for an enquiry into the condition of the company. The Judge made also some suggestion as to a settlement and asked the disputing parties to make sealed offers of a price at which they would buy or sell their respective interests.

The plaintiff McPhee then began this action. In his statement of claim he sets forth the history of the partnership and the company, the applications before Simmons, J., the negotiations for settlement, alleges that an agreement was arrived at, and asks an order of the Court directing the settlement to be carried out.

The defendant Bell denies the making of any agreement of settlement, and also alleges that owing to a concealment of facts by the plaintiff McPhee as to the real value of the assets, the defendant is not bound to carry out any settlement that may have been made. Upon the argument before us the position was also taken that the defendant could even on account of a mere unilateral mistake withdraw from the settlement.

The trial Judge gave judgment for the plaintiff and the defendant appeals.

The vital question therefore appears to be: was the release of the Nelson claim a condition upon which only the defendant Bell, through his solicitor Winkler, agreed to accept the bond for $6,000, and take it as a satisfactory bond? The plaintiff alleges that he did procure a bond of indemnity satisfactory to Bell to be executed by two sureties approved by the defendant.

Upon the facts I conclude that Winkler never agreed to accept the bond for $6,000 without a release of the Nelson claim. If the plaintiffs never agreed to secure a release which would be available to protect Bell then there never was any agreement between the parties. I think that was what Winkler was demanding, and, as a careful solicitor, properly demanding. If on the other hand the plaintiff, through Coulter, did agree to obtain such a release, then he did not do so, and the bond required by the defendant was never produced. The plaintiff does not offer even now to obtain this release. It might be possible, perhaps, in some circumstances other than those of the present case, that such a condition might be imposed by the Court, and the agreement

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ordered to be specifically performed, provided that condition were complied with by the plaintiff. But I do not think this is a proper case for such a course. In the first place, I think the actual position was that Coulter and Winkler misunderstood each other. Winkler, being bound to protect his client, would naturally be thinking of stringent conditions. Coulter, having much less responsibility as to the protection of a client, because McPhee was merely continuing a liability already upon him, would naturally be more careless in his view of the suggested Nelson release. He would therefore be the less likely to realize the seriousness of Winkler's requirement, and very probably merely thought Winkler wanted a verbal assurance from him that Nelson would give no trouble.

My opinion, therefore, is that they were really not agreed upon the point at all, and that this being so there was no agreement which the Court can enforce.

But there is also another view of the matter. McPhee had applied to wind up the company. Bell was opposing that application. There was a dispute, a piece of litigation between them. In those circumstances I think the principle of accord and satisfaction might very properly be applied. This principle is that a mere agreement to compromise a dispute of such a kind is not enforceable unless the agreement, that is, what has been agreed to be done, has been actually done and completed. That is, the "accord" must also be followed by satisfaction. In some cases too, the very making of the accord, the agreement, may, if the parties so intend, be itself taken as the satisfaction. See Cyc., vol. 1, 313.

And even without applying this somewhat technical principle or rather, perhaps, by applying the second branch of the principle, as to the accord and satisfaction being one and the same, it seems to me that in such an affair as here occurred it must be taken as quite possible for either party to withdraw at any time before the actual settlement was effected and completed. It was a back and forward discussion between solicitors. It was a matter of such a kind that something might crop up even at the last moment which would cause a hitch. I do not think it was ever intended that there should be anything binding upon either party until the matter was actually completed and ended by the execution of documents and passing of money. Perhaps it might have been

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otherwise if more formal negotiations had taken place or if the terms of settlement had been stated in open Court and noted by a Judge. But as things occurred here I think Bell was at liberty for any reason he liked, whether good or bad, to withdraw at any time before the actual completion of the documents.

I think, therefore, it is unnecessary to deal with the other grounds of defence raised. The appeal should be allowed, the judgment below set aside, and the action dismissed with costs. But as the grounds of appeal argued before us were not argued in the Court below I think there should be no costs of the appeal.

Appeal allowed.

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STEVES v. KINNIE.

British Columbia Supreme Court, Macdonald, J. January 11, 1917.

MASTER AND SERVANT (§ II A—35)—*Injury to seaman—Negligence—Tug and tow.*]—Action by seaman for personal injuries.

McCrossan, for plaintiffs; *Robinson*, for defendants.

MACDONALD, J.:—The plaintiff was employed by the defendants on the tug "Naid." He is a master mariner; but the boat was under the management of the defendant Edmund Kinnie as captain. He had his son and co-defendant, Harold Kinnie, as chief engineer. On May 28, 1916, the tug towed a boom of logs from Port Moody on Burrard Inlet down through the First Narrows into English Bay. The intention was to deliver the logs in False Creek but the defendant, having some other work in hand, and desirous of taking advantage of the state of the tides, determined to moor the boom at the buoy almost opposite the English Bay pier and towards the entrance to False Creek. He rounded Stanley Park and came down on the north side of the Bay with the flowing tide. As the buoy was approached, the tug stopped and the tow line shortened and then the plaintiff was instructed to go with the defendant, Harold Kinnie, in the dinghy to the buoy and be ready to moor the boom when it approached close enough for that purpose. The line supplied for mooring was short and required that the boom should come practically up to the edge of the buoy. To carry on the work to advantage, it was necessary that some one should step off the dinghy and put the wire tie rope through the ring in the centre of the buoy. He should then be ready to put it around the nose

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of the boom when close enough to do so. The tug "Elsie" was moored to the buoy at the time and the plaintiff tied the dinghy to the rope used in mooring the "Elsie." The evidence is somewhat contradictory as to what took place after the plaintiff had reached the buoy, but the fact is apparent that the boom was, by some motive power, brought not only up to the buoy but over it, in such a way as to throw the plaintiff off the buoy and crush him against the side of the tug "Elsie," causing him serious injury. Plaintiff alleges that this accident was due to the negligence of the defendants. Defendants, while denying any negligence, at the same time contend that the plaintiff contributed to his own injury by his breach of instructions, as to the manner of doing his work and carelessness while on the buoy. He had more experience in work of this kind than the defendant Harold Kinnie. I find he was not improperly or contrary to instructions upon the buoy. He was there ready to take part in mooring the buoy, and apparently the landing was sufficient to accommodate both of them. He had a right to expect that the boom would simply come up close enough to be moored and would not overrun it. If he had seen the boom approaching, and been able to determine that its speed was such that it would properly overrun the buoy, he might have escaped by plunging into the water, but this is not the way in which the events transpired. Plaintiff had not control of the speed of the boom and if the defendants were guilty of negligence in towing the boom which continued up to the time of, and was the proximate cause of, the accident, then, even though the plaintiff might have taken such precautions, the defendants would still be liable. I think the facts are such as to require an explanation by the defendant to shew why the boom was brought up to the buoy in such a manner as to cause the accident. There is no question as to the defendant, Edmund Kinnie, being a competent mariner. It is claimed by the plaintiff that in endeavouring to moor the boom of logs, he came head-on with the flowing tide for that purpose and that this was bad seamanship. I am quite satisfied that the proper way for a boat to approach a wharf, when going down stream, with the current, is to pass the wharf and, then turn and come up against the current and make the landing. It would be wrong, therefore, for the defendants with a flowing tide of any appreciable strength, not to bring the boom around and up to the buoy

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against the force of the tide. The contrary was not contended by the defendants, but the evidence on the point was contradictory. The defendants were in a similar position to a boat coming to anchor in a stream. The precautions to be taken in that event are outlined in 26 Hals. Laws of England, at p. 589.

There was also a divergence of opinion as to the direction that the tide took at the buoy. Plaintiff's witnesses asserted that the "Elsie" was trailing towards the mouth of False Creek, shewing that this was the direction of the tide, while the evidence on the part of the defence was that this boat was lying towards the English Bay pier. Then there was evidence that the effect of the tide was not apparent at the buoy. It would appear beyond question, that the general effect of the flowing tide would be towards False Creek, although there might be local eddies and currents in other directions throughout English Bay. It was considered, on the part of the defence, that there was no particular danger attached to the mooring of the boom, so that the plaintiff was not engaged in a dangerous occupation at the time of the accident. I think, however, that it was a somewhat difficult operation to perform successfully and required considerable care on the part of the captain in charge of the tow. He had rendered his task more arduous by utilising such a short wire rope for tying the boom, thus requiring that it should be brought up close to the buoy, and involving closer calculation in the speed of the boom and necessitating that its way should disappear at the proper time. The plaintiff was thus in a dangerous position, where, if proper care were not exercised, a disaster might happen. Did the defendant, Edmund Kinnie, then, under these circumstances, fulfil his duty, as stated by Lord Watson in *Smith* v. *Baker*, [1891] A.C. 325, at p. 353, viz:—

> It does not appear to me to admit of dispute that, at common law, a master who employs a servant in work of a dangerous character is bound to take all reasonable precautions for the workman's safety.

This rule is of general application. In order to escape liability, I think the onus is cast upon the defendants of shewing that all reasonable precautions were taken and that the accident was inevitable. Plaintiff, in other words, does not require to affirmatively prove negligence on the part of defendants. It might be said to exist *primâ facie*. The defendants were in much the same position as the defendants in *The Polynésien* case, [1910] P. 28, at 30, referred to as follows by Sir John Bigham:—

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This is a case in which a steamer in charge of a licensed pilot ran into a vessel lying at her moorings, and sank her, in broad daylight.

The law applicable to such a case is stated in *The City of Peking* (1888), 14 App. Cas. 40, at p. 43, where Lord Watson, in delivering the judgment of the Court, said: "When a vessel under steam runs down a ship at her moorings in broad daylight, that fact is by itself *primâ facie* evidence of fault, and she cannot escape liability for the consequences of her act, except by proving that a competent seaman could not have averted or mitigated the disaster by the exercise of ordinary care and skill." Thus the onus is cast upon the steamer of shewing that the disaster was one which could not have been provided against by the exercise of ordinary care and skill, by which is meant that kind of care and skill which is to be expected of properly qualified men.

Lord Esher, in *The Merchant Prince*, [1892] P. 179, at 187, also considers the liability, where a ship under way runs into another ship at anchor. He considered this *primâ facie* evidence of negligence on her part. That the ship at anchor has only to so state, and that it was daylight, and then the mere fact of running into her is evidence of negligence on the other side. He says that the plain rule to govern the acts of sailors, under these circumstances, is this:—

Unless you can get rid of it, it is negligence proved against you that you have run into a ship at anchor. Then they have gone on with some variation of phraseology, but I am bound to say that if you look into all the cases with an agreement of fact, that the only way for a man to get rid of that, which circumstances prove against him as negligence, is to shew that it occurred by an accident which was inevitable by him—that is, an accident the cause of which was such that he could not by any act of his have avoided its result. He can only get rid of that proof against him by shewing inevitable accident, that is, by shewing that the cause of the collision was a cause not produced by him, but a cause the result of which he could not avoid. Inevitable means unavoidable. Unavoidable means unavoidable by him. That being so, there comes the proposition which Lopes, L.J., has put into form that a man has got to shew that the cause of the accident was a cause the result of which he could not avoid. If he cannot tell you what the cause is, how can he tell you that the cause was one the result of which he could not avoid? That appears to me to be perfect reasoning.

Fry, L.J., in the same case, refers to the burden resting upon the defendants of shewing inevitable accident and then adds:—

To sustain that, the defendants must do one or other of two things. They must either shew what was the cause of the accident, and shew that the result of that cause was inevitable, or they must shew all the possible causes, one or other of which produced the effect, and must further shew with regard to every one of these possible causes that the result could not have been avoided. Unless they do one or other of these two things, it does not appear to me that they have shewn inevitable accident.

The question is whether, assuming the onus is cast upon the defendants of shewing what was the cause of the accident, have

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they satisfied such burden and cleared themselves of liability? Defendant, Edmund Kinnie, in his examination for discovery, accounted for the running down of the buoy by the boom as follows:—

Q. Now what happened was this, was it not, that the tide carried the ends of the boom sticks on to the buoy and upset the buoy. Isn't that correct? A. Yes, that is right. Q. Precipitating your son into the water? A. Well, not exactly that. Q. Well, part of the boom anyway? A. The boom was forging ahead a little. Q. That would be going ahead in a southerly direction? A. Yes, sir. Q. Westerly of the buoy? A. Yes, sir. Q. And it carried her into the buoy and upset the buoy and your son, and sent them into the water? A. Well, the boom hadn't quite stopped. When these boom sticks came up against the buoy, the boom was still forging a little ahead. That is what upset it. Q. But there is no question but what it was the boom that upset it? A. Sure it was. Q. It upset the buoy? A. Yes, sir. Q. And the nose sticks of the boom went clean over the buoy? A. That is right. Q. And jammed Captain Steves' leg between the tow and the stem of the tug "Elsie"? A. Yes, sir. Q. And your son was thrown off into the water as well, wasn't he? A. Yes, sir.

In a previous part of the examination for discovery, he had stated that the tide was running east at the anchor buoy and, while denying that he approached the buoy in a direct head on manner, he stated that he came up to the side of it and that his boat, as well as the boom, were heading south when he came to the buoy. The admissions, thus contained in the examination for discovery, if taken by themselves, would indicate that this defendant was excusing or accounting for the upsetting of the buoy by the force of the tide. This would mean that the tide was the motive power propelling the boom towards the buoy, so that he would not have been pursuing proper seamanship in thus coming up with the tide to moor the boom of logs. He had already admitted that plaintiff had to be on the buoy to pass the wire rope through the ring of the buoy and attach it to the nose of the boom. If then, he brought up his tow to the buoy with the tide, he was bound to over-run the buoy and cause disaster. He receded, however, from this position at the trial and stated that there was no tide at the buoy. He expressed the opinion that the accident was caused by the boom being affected by a swell, which resulted from one of the C.P.R. boats passing out in English Bay on its way to the First Narrows. This did not appeal to me as a probable cause and, in any event, it would only have disturbed the boom and would not have moved it far enough to have jammed the plaintiff against the boat

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"Elsie. "The tug "Naid" had still its tow line attached to the boom, at the time of the accident, and the captain, at this time, should have had full knowledge of the condition of the tide at that particular point. It was contended that he miscalculated and thus was excused in over-running the buoy, but he should have checked the speed of the boom or stopped its way, before the event could happen. I think that, if the tide did not cause the accident, it resulted from the boom being brought up to the buoy by the tug at too great a speed. The assessors appointed have not agreed upon the question of negligence or as to whether there was bad seamanship. Aside from any conclusion which they reached, I have to determine the liability or otherwise of the defendants. Defendants have neither shewn to my satisfaction what was the cause of the accident, nor have they shewn that such accident was inevitable. I find them guilty of negligence and liable to the plaintiff in damages.

In arriving at a conclusion, I have considered the judgment in *Bank Shipping Co.* v. *City of Seattle*, 10 B.C.R. 513, and I do not consider that such judgment, as far as concerns the case at bar, is affected by *City of New Westminster* v. *S.S. "Maagen,"* 18 B.C.R. 441, 14 Can. Ex. 323, as the facts were different. It is contended that the defendants are not liable under the Employers' Liability Act, as it does not apply to an employee on a boat. This contention may be tenable, but it is not material, as the Act does not require to be utilised, in view of the fact, that the personal negligence of the defendants forms the ground for the plaintiff's cause of action. There will be judgment for the plaintiff and I think a proper amount to allow him for damages would be $1,000. *Judgment for plaintiff.*

PAW v. McPHEE.

N. S.
S. C.

Nova Scotia Supreme Court, Russell, J., Ritchie, E.J., and Harris and Chisholm, JJ. January 9, 1917.

SOLICITORS (§ II B—25)—*Authority as to verbal agreement for the sale of land—Specific performance.*]—Appeal from the judgment of Drysdale, J., dismissing plaintiff's action for the specific performance of an oral agreement alleged to have been made between plaintiff and the defendant, McPhee, for the purchase of land. Affirmed.

The evidence of the solicitor through whom the sale relied

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upon by plaintiff was made, and which was accepted by the trial Judge, was to the effect that the property in question was devised to the defendant, McPhee, by her husband, who after the making of the will gave a lease of the property to one Neville with an option to purchase, free of encumbrances for the sum of $2,500. The solicitor, who was acting for plaintiff as well as for the defendant McPhee, explained to the latter that certain difficulties had arisen between Neville and plaintiff, who claimed to be a partner with Neville in connection with the purchase of the property and had expended a considerable amount of money in repairs, and asked whether she would be willing to sell the property to plaintiff, to which McPhee replied that "she did not care who had it, provided she had her money; that his money was as good as anybody else's." The option was not exercised and subsequently the solicitor told plaintiff that he could have the property. Plaintiff asked whether payment would be required money down or whether it would be taken in instalments, to which the solicitor replied that he would have to see the defendant McPhee about it, but he would advise her to leave a considerable part on mortgage.

The trial Judge dismissed the action on the ground that the authority of the solicitor did not go to the extent of making a sale to plaintiff without submitting plaintiff's offer to defendant.

T. W. Murphy, K.C., for plaintiff, appellant.

W. A. Henry, K.C., and *L. A. Lovett*, K.C., for defendant, respondent.

RUSSELL, J.:—The Court was of opinion at the argument that there was no reason for doubting the soundness of the conclusion reached by the trial Judge. I think that there was very great doubt whether the plaintiff could under any possible view of the evidence maintain an action for the specific performance of the contract declared on. The contract was oral and the acts of part performance relied on consisted only of the expenditure of money in repairs. But it is not necessary to consider that branch of the case as the conclusion of the trial Judge on the evidence has not been successfully attacked.

HARRIS, and CHISHOLM, JJ., concurred.

RITCHIE, E.J.:—I would dismiss the appeal with costs for the reasons stated in the judgment appealed from.

Appeal dismissed.

SIMPSON v. LOC. BOARD OF HEALTH OF BELLEVILLE. ONT.

S. C.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Hodgins, J.A., Lennox and Masten, JJ. December 12, 1916.

COSTS (§ I—14)—*Security for—Action against Board of Health—Public Authorities Protection Act, sec. 16—"Person"—Interpretation Act, sec. 29 (x)—Fatal Accidents Act—Affidavits—Defence—Public Health Act, sec. 26—Reduction of security.*]—Appeal from the judgment of Middleton, J., dismissing an appeal by the plaintiffs from an order of the Local Judge at Belleville requiring them to give security in the sum of $400 for the defendants' costs of the action. Varied.

MIDDLETON, J.:—The plaintiffs sue under the Fatal Accidents Act, R.S.O. 1914, ch. 151, to recover damages for the death of their daughter, 8 years of age. The defendants are the Local Board of Health and the Medical Officer of Health. The allegation is that in January, 1916, the child was taken ill with diphtheria, and that the Board of Health and Medical Officer of Health isolated her, but failed to supply her with proper medical attendance, medicine, and assistance, and that as the result the child died. The order appealed from was made upon the theory that the case is one falling within the provisions of the Public Authorities Protection Act, R.S.O. 1914, ch. 89, sec. 16 (1): "Where an action is brought against a Justice of the Peace or against any person for any act done in pursuance or execution or intended execution of any statute, or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such statute, duty or authority, the defendant may . . . apply for security for costs."*

By the Interpretation Act, R.S.O. 1914, ch. 1, sec. 29 (*x*), "person" includes "any body corporate or politic;" and I think it is clear that this action falls within the purview of the statute. There is no room for any suggestion that there was malice or that

*Sub-section (2) of sec. 16 provides: "The application shall be upon notice and an affidavit of the defendant or his agent shewing the nature of the action and of the defence, and shewing to the satisfaction of the Court or Judge that the plaintiff is not possessed of property sufficient to answer the costs of the action in case a judgment should be given in favour of the defendant, and that the defendant has a good defence upon the merits, or that the grounds of action are trivial or frivolous; and thereupon the Court or Judge may make an order that the plaintiff shall give security for the costs to be incurred in such action."

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the action of the Medical Officer of Health and the Board was only colourable within the Act.

The allegation is that the defendants acted negligently in failing to discharge the duties imposed upon them by the statute and acted negligently in the discharge of their duties.

It is next argued that, inasmuch as this action is brought under the Fatal Accidents Act, the provisions of the Public Authorities Protection Act cannot apply.

I do not so understand the law. The Fatal Accidents Act is a general statute, giving a right of action which did not exist at common law. The Public Authorities Protection Act confers upon certain individuals the right to security for costs where their conduct is attacked. It is an Act for protection of these individuals; and it seems plain to me that the two statutes stand together and that there is no conflict between their provisions. If there is a cause of action under the Fatal Accidents Act, an action will lie; but, if the defendants are entitled to the protection of the other statute, that protection must be accorded to them.

Then it is argued that there is no liability for costs, as authority is given to the municipality, under sec. 26 of the Public Health Act, R.S.O. 1914, ch. 218, where an action is brought against a Local Board of Health or any officer, to assume the liability or the defence of the action, and to pay any damages which may be awarded. By material which has been filed since the argument of the motion, it is shewn that the municipality here has assumed the defence of the action, and it is said that the effect of this assumption of the defence is to relieve the defendants from the necessity of incurring any costs in their own defence, and that, inasmuch as they can incur no costs, they need no security for costs.

It is by no means clear to me that if the action is dismissed with costs the plaintiffs will escape liability merely because, under this statutory authority, the municipality has seen fit to undertake the burden of the defence of the action. It may possibly be so, but this is a question yet to be determined, and it should not now be entered upon. If the circumstances exist which entitle the defendants to an order for security for costs, I think the order should be made, and that the other question should be left to be determined when it arises. If there is no liability for costs upon a judgment awarding costs, then the sureties may escape; but the defendants ought not to be placed in

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jeopardy as to the possible outcome of the litigation upon this question, when the statute entitles them to security. It may well be that the municipality undertaking the defence is subrogated to all the defendants' rights as against the plaintiffs.

Finally, it was argued, and I so determined, that the affidavit shewing involvency was not sufficient; but, as no good purpose could be served by discharging the application with liberty to renew it on other material, as was done in *Robinson* v. *Morris* (1908), 15 O.L.R. 649, it was arranged that further material on both sides should be put in; and this has been done. On this material, insolvency is abundantly established.

The appeal failing on all grounds is dismissed, but the costs are to be in the cause to the successful party.

The plaintiffs appealed from the order of MIDDLETON, J.

W. C. Mikel, K.C., for appellants; *A. A. Macdonald*, for defendants, respondents.

At the close of the argument, the judgment of the Court was delivered by MEREDITH, C.J.C.P.:—Having regard to the very indefinite manner in which the plaintiffs' claim is stated, the affidavits upon which the order in question was made shew sufficiently the nature of the action and the defence, and that the defendants have a good defence on the merits, and also shew that the plaintiffs are not possessed of property sufficient to answer the costs of the action in case a judgment should be given in favour of the defendants. There is no doubt that the facts support the order; all that is contended for is that they are not sufficiently set out in the affidavits in support of the motion; but, if that were so, there is no reason why a further affidavit should not be made and filed now. The plaintiffs' pleadings hardly warrant them in a demand for particularity and accuracy.

But, as it now appears that the defendants' costs are likely to be small, owing to the action of the municipal corporation in having assumed the defence of this action some length of time after it was brought, under the provisions of sec. 26 of the Public Health Act, and the corporation being excluded from the benefit of the Act which entitles the defendants to security for costs—see sec. 17 of the Public Authorities Protection Act—the amount of the security ordered to be given should be reduced.

The order will accordingly be varied by reducing the amount to $200, subject of course to the provisions of Rules 381 and 382.

All costs to be costs in the action.

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W.C.B.

CLARK v. CHATHAM, WALLACEBURG & LAKE ERIE R. Co.
(Re Workmen's Compensation Act.)

The Workmen's Compensation Board, Ontario, Hon. G. A. Kingston and A. W. Wright, Commissioners, March 2, 1917.

MASTER AND SERVANT (§ V—340)—*Workmen's Compensation Act, Ont., 4 Geo. V. 1914, ch. 25, sec. 3 (2)—"Accident arising out of and in the course of employment"—Heart disease.*]—Application for compensation under the Act. Granted.

J. M. Pike, K.C., for dependants (plaintiffs).

COMMISSIONER KINGSTON:—There are two points in issue here: 1. Was there injury by accident within the meaning of sec. 3? 2. Did such injuries arise out of the employment?

There seems no doubt that whatever the occurrence was, it happened in course of the employment, and in the absence of proof to the contrary, it would be presumed under sec. 3 (2) that the accident and consequent death arose out of the employment. Practically the same proof would be required to rebut this presumption as would be required to satisfy the onus which I consider is properly on the railway company to shew that there was not an accident at all, or, in other words, as the railway contends, that this was the fall of a man already dead.

The workman, who was a conductor on a radial car, according to the evidence had been able to attend to his work regularly right up to the moment of the accident. He fell from the car which at the moment was going at a moderate rate of speed—probably not more than 5 or 6 miles an hour, around an easy curve. It is of no importance, in my opinion, whether he fell off or was thrown off: either would be an accident. It is strongly contended that the fall was not of so violent a nature as to cause death. The man, however, was picked up dead, and the natural presumption is that the fall was the cause. A post mortem, however, revealed the fact that the man had a badly diseased heart, and it is sought from this circumstance to prove that the fall was not the cause of death but rather the consequence: that the alleged accident was not an accident at all but the fall of a dead man. I think, however, the proof adduced falls considerably short of this.

I am quite prepared to believe that this fall would in all probability not have caused death to a man in perfectly sound health, and it seems altogether probable that it is the combination of both the bad heart and the accident that produced the result.

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I do not consider, however, that the Board could fairly find on the evidence that the man was dead when he fell.

In view of the section in our Act to which I have referred, which is not in the English Act, the English cases cited by counsel for the railway company, in my opinion, are not applicable. I consider the evidence fully warrants the conclusion that, though the fall from the car may not have been the whole cause of death, it at least accelerated a pre-existing condition, and in either case the claim should be allowed.

COMMISSIONER WRIGHT:—In my opinion there was an accident within the meaning of the Act: the contention of the employer that the workman died from heart disease before he fell from the car is not sustained by the evidence taken at the hearing in Chatham, February 9. As the accident happened in the course of the workman's employment and arose out of it, the award made by the Board should stand. *Judgment for plaintiff.*

Re CLARK AND TOWN OF LEAMINGTON.

S. C.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Hodgins, JJ.A. January 12, 1917.

TAXES (§ I E—45)—*Business assessment—Unlicensed hotel—"Business"—Assessment Act, R.S.O. 1914, ch. 195, sec. 10 (1) (j), (11).*]—Appeal by J. C. Clark from an order of the Judge of the County Court of the County of Essex dismissing Clark's appeal from the decision of the Court of Revision for the Town of Leamington confirming a business assessment of $800 in respect of his hotel in Leamington. Affirmed.

E. C. Awrey, for appellant.

J. B. Clarke, K.C., for the town corporation, respondent.

The judgment of the Court was delivered by

HODGINS, J.A.:—Case stated by Dromgole, County Court Judge of Essex, after dismissing an appeal by Clark against a business assessment of $800 for 1916, in respect of his hotel in Leamington.

The town was under local option, and so the hotel in question is not one "in respect of which a tavern license has been granted:" sec. 10 (1) (*j*) of the Assessment Act, R.S.O. 1914, ch. 195.

The governing words in that section are to be found in the opening paragraph and in sub-sec. (1) (*j*) and sub-sec. (11). The section begins thus: "Irrespective of any assessment of land under

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this Act, every person occupying or using land for the purpose of any business mentioned or described in this section shall be assessed for a sum to be called 'Business Assessment.'"

Sub-section (1) (*j*), after enumerating several businesses such as a restaurant, eating-house, or other house of public entertainment, or a hotel in respect of which a tavern license has been granted, adds, "or any business not before in this section or in clause (*k*) specially mentioned." And sub-sec. (11) is as follows: "(11) Wherever in this section general words are used for the purpose of including any business which is not expressly mentioned, such general words shall be construed as including any business not expressly mentioned, whether or not such business is of the same kind as or of a different kind from those expressly mentioned."

An unlicensed hotel carries on a business for profit, as "business" is defined in *Rideau Club* v. *City of Ottawa*, 15 O.L.R. 118; in fact, the license affects only one out of many items of the traveller's joy. Apart from any other words which may sufficiently describe an unlicensed hotel business, I think it may well be treated as comprehended in the words "any business not before in this section . . . specially mentioned." These are general words used "for the purpose of including any business which is not expressly mentioned," and therefore are to be construed as including any business not expressly mentioned (sub-sec. (11)), and so come within the opening words of the section as if they were mentioned and described in the section.

The appeal should be dismissed with costs to be paid by J. C. Clark to the municipality. *Appeal dismissed.*

HUNKA v. HUNKA.

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S. C.

Alberta Supreme Court, Appellate Division, Stuart, Beck and Walsh, JJ. January 26, 1917.

APPEAL (§ VII M—535)—*Errors warranting reversal—Evidence—Judge's findings.*]—Appeal by plaintiff claimant, the son of the execution debtor, from the judgment of Taylor, Dist. J., in favour of the defendant execution creditor, in an interpleader issue. Reversed.

A. U. G. Bury, for appellant; *C. M. Boyton*, for respondent.

The judgment of the Court was delivered by

WALSH, J.:—The goods in question are two horses and some

farm implements. The claimant, his father, the execution debtor, and a brother of the claimant gave evidence which if true establishes beyond controversy his ownership of all of these goods. No evidence was offered for the defendant. The appeal book does not shew that the trial Judge gave any reasons for his judgment. All that it reports him to have said is: "I will have to find that the goods are the property of the defendant, that is, the defendant in the original action, and judgment will go accordingly with costs." We must assume that he disbelieved the story of the plaintiff and his witnesses, for if he had believed them his judgment must have gone the other way. Unfortunately though we do not know why he did so and there are several reasons which might have influenced him to do so. Their manner and demeanour may have impressed him unfavourably or the story which they told may have appealed to him to be so improbable as to have led to his disbelief in it or the minor discrepancies which appear between the evidence of the plaintiff and that of his father may have caused him to think that their main story was not founded in truth. The importance of knowing what it was that operated in the mind of the Judge to induce him to find as a fact that the goods were those of the execution debtor can well be illustrated by the judgment of this Court in *Western Motors* v. *Gilfoy*, 25 D.L.R. 378. In my judgment at the close of the trial of that action, I gave as my reason for finding for the plaintiff the existence of certain facts which I understood to be established by the evidence, but when the reporter's notes were transcribed it was found that I had misconceived that evidence and my judgment was very properly reversed. It is perhaps possible that if I had contented myself with a simple finding of the facts without giving any reason for it, my judgment would not have been disturbed; at any rate the reversal of it would have been made very much more difficult. We have before us, therefore, practically nothing but the evidence in the case to guide us to a proper determination of it and this it is our duty to study with care. The rule which should be applied by an appellate Court in dealing with an appeal which turns upon a question of fact is well stated by Lindley, M.R., in delivering the judgment of the Court of Appeal in *Coghlan* v. *Cumberland*, [1898] 1 Ch. 704. See also *Knight* v. *Hanson*, 3 W.L.R. 412, and cases there cited. *Granby* v. *Menard*, 31 Can. S.C.R. 14, and

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cases collected under that title at p. 335 of Cameron, Index of Can. Cases Judicially Noticed.

There is nothing in the case before us to suggest that the judgment in appeal turned on the Judge's view of the manner and demeanour of these witnesses. If there was I would be much more reluctant to disturb his findings than I now am. Apart from that I can see absolutely nothing to justify the conclusion that these people deliberately fabricated this story to serve their own dishonest ends but on the contrary I find quite sufficient to satisfy me of its reasonableness and its honesty. As Anglin, J., said in *Greene Swift & Co.* v. *Lawrence*, 7 D.L.R. 589, at p. 599, "however loath we may be to reverse the decision of a trial Judge on the question of fact, it is our duty to do so if the evidence coerces our judgment so to do" quoting from *The "Jairloch,"* [1899] 2 Ir. 1, at p. 13. The evidence in this case coerces my judgment to reverse this finding, and I would, therefore, allow the appeal with costs and direct that the judgment below be set aside and judgment entered in favour of the plaintiff with costs. *Appeal allowed.*

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S. C.

GODDARD v. PRIME.

Saskatchewan Supreme Court, Sir Frederick Haultain, C.J., Lamont, and McKay, JJ. March 10, 1917.

APPEAL (§ VII M—535)—*Reversing trial Judge upon findings of fact—Evidence—Corroboration.*]—Appeal by defendant from a judgment in favour of plaintiff in an action to recover money lent. Reversed.

W. B. Willoughby, K.C. for appellant.

W. B. Scott, for respondent.

The judgment of the Court was delivered by

HAULTAIN, C.J.:—I entirely agree with the Judge who tried this case that the story of the plaintiff sounds suspicious. The plaintiff was at the time in question a waiter in a C.P.R. dining-car. His evidence is to the following effect:

On May 21, 1913, the defendant asked for a loan of $500 which the plaintiff agreed to make. A receipt was written out by the plaintiff and signed by the defendant in the following form:—

May 22nd, 1913.

Received from Mr. Goddard $500.

Mr. J. Prime.

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The plaintiff says that he was at Prime's house at the time but that the receipt was made out at the barn at the back of the house where they had gone at Prime's request.

The receipt was made out and signed in duplicate, by way of carbon copy, and was held by the defendant until the following day. On the following day the defendant went down to the C.P.R. yard where the dining-car was and the plaintiff gave the defendant $500, including "two $25 bills" and the rest in $10 and $5 bills. The plaintiff was getting $30 a month wages, and, in addition to his wages, said that he had been making from $150 to $200 from tips for several years.

At the time he gave the $500 to the defendant, he had about $2,000, which he kept in a grip in the linen locker in the dining-car. As soon as the money was paid over, the defendant handed the duplicate or carbon copy of the receipt to the plaintiff. The defendant agreed to pay the money back in 6 months with interest at 10% per annum. Plaintiff never mentioned the loan or asked for payment until June, 1914, 13 months later. After that nothing more was said about it until August 23, 1915, when the defendant went to plaintiff's house and accused him of telling people that he owed the plaintiff some money, and threatened to take the matter to his lawyer if he continued to make such a statement. There was no further mention of the subject between them until some time in November, 1915, the day before the action was begun.

The defendant denied the loan and that he had ever given a receipt, and said that he had never met the plaintiff at the time the loan was alleged to have been made.

The evidence in the case is very conflicting, and it is strongly urged by the respondent that "in a case of direct conflict of testimony the finding of the primary Judge is to be regarded as decisive and should not be overturned on appeal by Judges who have not had the advantage of seeing the witnesses and observing their demeanour under examination." *Grasett* v. *Carter*, 10 Can. S.C.R. 105, 125.

That is a broad statement, and, in view of a number of later decisions, must be taken with considerable modification.

The trial Judge says in his judgment "that the plaintiff's story, though improbable, is corroborated to some extent by his wife," and, as he was impressed with her demeanour in the witness

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box, he believed her evidence. Her evidence, which he says he believes, is that the plaintiff and his wife went to Spokane in October, 1913, and that he handed her $2,00[illegible]nd showed her the receipt, and told her the defendant signed it at the time he borrowed the money. Upon this evidence the Judge finds as follows: "Now, the circumstances concerning that receipt are suspicious, but I will find as a fact that the money was loaned and the receipt was given." The only comment I will make on this finding is, that Mrs. Goddard's evidence does not corroborate anything at all, except that her husband told her that Prime had borrowed money and that a certain document was shown to her.

All the evidence convinces me that at the time of the alleged loan, Prime had never met or spoken to Goddard and Goddard had not been at Prime's house.

In view of all these facts, I think I am justified in not believing the extraordinary, suspicious and improbable story of the plaintiff.

The appeal should be allowed with costs, the judgment appealed from set aside, and judgment entered for the defendant with costs of action. *Appeal allowed.*

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CANADIAN MORTGAGE INVEST. CO. v. CAMERON.

Alberta Supreme Court, Appellate Division, Stuart, Beck, Walsh, and Ives, JJ. February 22, 1917.

INTEREST (§ II B—65)—*Mortgage—Statement of rate—Covenant.*]—Appeal by the plaintiff from a judgment of Harvey, C.J., 32 D.L.R. 54. Affirmed by an equally divided Court. [32 D.L.R. 54, affirmed; see also *Stubbs* v. *Standard Reliance*, annotated, 32 D.L.R. 57.]

Note:—The Court being equally divided, no headnote stating a principle of law as established by the judgments can be made.—ED.

Frank Ford, K.C., for plaintiff; *J. A. Lavelle*, and *J. A. Ross*, for defendant.

WALSH, J.:—This is a mortgage action which was tried by the Chief Justice from whose judgment the plaintiff appeals on various grounds.

The plaintiff's principal ground of dissatisfaction with the judgment is that it deprives it entirely of interest upon the principal money secured by the mortgage which interest amounts roughly to $1,300. The payments of the principal money and

interest secured by it are blended, and sec. 6 of the Interest Act, ch. 120 R.S.C., therefore applies to it. That section reads as follows:—

Whenever any principal money or interest secured by mortgage of real estate is, by the same, made payable on the sinking fund plan, or on any plan under which the payments of principal, money and interest are blended, or on any plan which involves an allowance of interest on stipulated repayments, no interest whatever shall be chargeable, payable or recoverable on any part of the principal money advanced, unless the mortgage contains a statement shewing the amount of such principal money and the rate of interest chargeable thereon, calculated yearly or half-yearly, not in advance.

The Chief Justice held that this section was not complied with in this mortgage because although it shews the amount of the principal money and the rate of interest chargeable thereon, it does not shew whether such interest was calculated yearly or half-yearly. He held that the section requires this to be shewn in the statement (a decision which has since been unanimously concurred in by the Manitoba Court of Appeal in *Stubbs* v. *Standard Reliance Corp.*, 32 D.L.R. 57. Richards, J., in delivering the judgment of the Court having expressly approved of and adopted it), and for this contravention of this provision he has imposed upon the plaintiff the punishment called for by the section, namely, the loss of all interest upon the principal money.

There is in the body of the mortgage a statement that it is made in consideration of the sum of $1,400 lent to the defendant by the plaintiff, but there is nothing in it except in the defendants' covenants to shew the rate of interest or how it is computed. These covenants read as follows:—

1. That he will pay the above sum of $1,400 and interest thereon at the rate hereinafter specified . . as follows: that is to say, in instalments of $179.90 half yearly on June 24 and December 24 in each year until the whole of said principal sum and the interest thereon is fully paid and satisfied, making in all 10 half yearly instalments, the first of said instalments to become due and be payable on December 24, 1907. All arrears of both principal and interest to bear interest at 10% per annum as hereinafter provided.

2. That he will pay interest on the said sum or so much thereof as remains unpaid at the rate of 10% per annum by half yearly payments on December 24 and June 24 in each and every year until the whole of the principal money and interest is paid and satisfied, etc.

It was argued before us that even though these covenants contain all the information that the section requires to be given in the mortgage, they are not a statement within the meaning

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of the section. If that is so, there is no statutory statement whatever in this mortgage, and that is at once an end of the matter, for the section says no statement no interest. I do not think, however, that this contention can succeed.

The evil which the section aims to prevent is the imposition of an extortionate rate of interest through the medium of blended payments of principal and interest. Under this system, without the protection which this section affords, a highly usurious rate of interest might be wrapped up in these innocent appearing blended payments without the slightest suspicion on the part of an ignorant or careless borrower that he was being made the victim of it. And so parliament stepped in and decreed that such a mortgage should itself tell the mortgagor exactly how much of the aggregate of these blended payments represents principal and exactly the rate at which the interest included in them calculated yearly or half-yearly not in advance is charged under penalty of the loss of all interest for breach of this direction. I think that if such a mortgage gives all of the information to which the mortgagor is entitled under the statute the exact form of words which it uses to convey it to him is absolutely immaterial. A statement is something which is stated. Surely if there is to be found within and as part of the mortgage something which states the amount of the principal money and the rate of interest chargeable therein calculated in one of the methods prescribed by the section the mortgage does contain a statement of these things. The main thing, in fact the only thing, needed is to give to the mortgagor the information to which the section entitles him, and I think he can be given it just as effectually through the medium of his own covenants as he can by tabulating it in a formal statement.

The Chief Justice has treated these covenants as a statement though he suggested a doubt as to whether or not they could be properly so treated. The question was incidentally dealt with in *Colonial Investment Co.* v. *Borland*, 6 D.L.R. 211, 5 A.L.R.71. The Chief Justice in delivering the judgment of the Court *en banc*, at p. 214, says:—

> There is nothing in the covenant to pay the principal and interest at 12% to suggest that it is in the result the same as far as amount is concerned as the payments under the proviso and a slight computation shews that it is not in fact. Moreover, it is not a compliance with the statute since it provides for interest monthly and not "yearly or half-yearly not in advance".

This rather suggests the idea that if the covenants there had been in substance sufficient for that purpose they would have been regarded as a statement under the Act, but it is of course far short of a decision to that effect.

Being then as I am of the opinion that these covenants may be treated as a statement under the section, the next inquiry must be whether or not they meet all of its requirements. The only respect in which their sufficiency is complained of if they are entitled to be considered as a statement is that upon which the Chief Justice rested his judgment, namely, that they do not shew whether the interest has been calculated upon a yearly or half-yearly basis. With great respect, I find myself quite unable to agree with the view which he took of this question for, in my opinion, these covenants shew quite clearly that the interest has been calculated on a half-yearly basis.

These covenants, though in form separate and distinct, are in reality but one, for by express reference the second one is incorporated in the first. The first covenant is that the mortgagor will pay the principal money "and interest thereon at the rate hereinafter specified" in ten half-yearly payments of $179.90 each. The rate of interest is thereinafter specified in the second covenant, and it is "ten per centum per annum by half-yearly payments" on dates which are the same as those set for the payment of the half-yearly instalments of blended principal and interest. The combined effect of these covenants which must be read together is that the defendant thereby agrees to pay the principal sum of $1,400 with interest thereon at the rate of 10% per annum by half-yearly payments by paying to the plaintiff 10 half-yearly instalments of $179.90 each. This, though an exceedingly inartistic is, to my way of thinking, a perfectly effective way of conveying to the mortgagor knowledge of the fact that his half-yearly instalments have been worked out by computing interest upon the principal money from time to time unpaid at the rate of 10% per annum calculated half-yearly, capable of confirmation by the making of a comparatively easy calculation.

If these covenants do not mean what I think they do I am quite unable to understand what they do mean. In my opinion they mean either that or nothing. They are in marked contrast to the covenants referred to in the above quoted extract from the judgment in *Colonial Investment* v. *Borland*, *supra*. There is

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everything in the covenant to pay $1,400 with interest at 10% per annum by half-yearly payments "to suggest that it is in the result the same as far as amount is concerned" as the blended payments for it practically says that that is the basis upon which these latter amounts have been worked out and a computation which I have made shews that it is so in fact. Surely the defendant when he agreed to repay this principal money with interest at the specified rate by half-yearly payments in instalments of blended principal and interest must have known if he concerned himself about the matter at all exactly what the principal was and the rate of interest that he was being charged and that it was calculated upon a half-yearly basis and that is all so far as this statute is concerned that he was entitled to be told.

Being therefore of the opinion that the requirements of sec. 6, even under the Chief Justice's construction of it, have been fully complied with in this mortgage the plaintiff, in my judgment, cannot be deprived of the interest secured by it.

Another ground of appeal is based upon certain deductions from the amount of the plaintiff's claim.

The mortgage sued upon was made contemporaneously with another mortgage from the defendant to the plaintiff on other land for $1,100. But $1,000 however was advanced on the latter mortgage and it was paid off in full and discharged in the year 1911. In his statement of defence the defendant says that the amount exacted by the plaintiff from him for a discharge of this mortgage "was largely in excess of the amount that was then due or which remained unpaid" under it and by way of counterclaim he claimed payment of the amount of such excess. The Chief Justice has with great care taken an account of the amount due on this $1,000 mortgage at the date of its discharge and has found that including an overcharge of $43.44 in connection with the costs of the two loans, and an allowance of $6.17 to which the defendant is entitled for interest, the defendants paid $143.75 more for discharge of it than was really owing by him under it and he gives him credit for that sum on the $1,400 mortgage now sued upon. The plaintiff objects that he had no right to open up the accounts of this discharged mortgage, but I think that under the circumstances he had that right. The original transaction was really one borrowing of $2,400, though for convenience it took the form of a distinct mortgage of $1,400 and $1,000. The proceeds

of the loan were made by two cheques of $1,500 and $900 respectively, a portion of each cheque being attributed to each mortgage. Payments made by the defendant on account, with the exception of his final payment on the $1,000 mortgage, were applied partly upon one and partly upon the other of these mortgages. They were so long as the $1,000 mortgage was on foot treated practically as one mortgage for $2,400. The payment of $740 which was demanded of the defendant for a discharge of the $1,000 mortgage was made without the rendering of any statement shewing how that amount was arrived at and the defendant paid it practically because he was compelled to do so in order that he might get a discharge of that mortgage and thus be able to complete a sale of the mortgaged premises which he had contracted for. The evidence from which the Chief Justice has taken the account is that of the plaintiffs' own witnesses taken under commission in Toronto, elicited, it is true, by cross-examination but without objection. I should say that, if by mistake of fact, to put it as charitably as possible, the defendant paid more for a discharge than the plaintiff was entitled to he could maintain an action to recover the excess of such payment and I do not see why he cannot have such a claim given effect to in this action. Objection is taken to the method of computation adopted by the Chief Justice and an elaborate calculation is submitted for the plaintiff to shew the errors of it. In my opinion, however, the method of the trial Judge is the proper one. I think, however, with respect, that the Judge should not have given the defendant credit for the sums of $2, $10, $2 and $14, aggregating $28, which form part of the items $17.59 and $28.85 with which the account opens. These sums represent the charges which he holds to have been improperly made by the plaintiff and deducted from the principal money advanced. Full particulars of these charges were given to the defendant in 1907 when the loans were closed and he signed acknowledgments of their correctness and accepted cheques for the balance of the proceeds of the loans without protest. No objection seems to have been made by him at any time to these sums, not even in his pleadings, until the commission evidence was being taken, 8 years after the loan was closed, and that, I think, is too late for such a complaint to prevail. I would reduce the amount overpaid by $39.20 consisting of these items plus $11.20 being a rough

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estimate of the interest on them, thus leaving the amount overpaid at $104.55. The other items deducted are for insurance and interest, and they should not be interfered with. Nothing was said to justify any interference on our part with the judgment of $200 awarded the defendant as damages under his counterclaim.

I think the plaintiff is entitled to the usual mortgage judgment with a reference to the clerk at Edmonton to take the accounts in which all proper allowances for interest shall be made and tax to the plaintiff its costs and a direction to deduct from the amount found due the above sum of $104.55 and the sum of $200 awarded the defendant on the other branch of his counterclaim. The defendant should get his costs of the counterclaim as taxed and the plaintiff should have its costs of this appeal.

BECK, J., concurred with WALSH, J.

IVES, J.:—This is a mortgage action brought by the plaintiff to recover moneys for principal and interest under a mortgage of lands executed by the defendant on or about June 24, 1907. During the trial it developed that the instrument provided for the repayment of principal and interest upon a sinking fund plan in blended instalments payable half-yearly and at the close of the trial the defendant asked and obtained leave to amend his defence by pleading the Interest Act, ch. 120, R.S.C.

The Chief Justice held that the provisions of sec. 6 of the Act had not been complied with and therefore no interest could be recovered by the plaintiff. This is the main ground of the appeal.

I think it will not be disputed that the Interest Act had for its object solely the protection of careless or ignorant borrowers and was brought about by the disclosures of notorious transactions which had been ventilated in the Courts.

The forms of the mortgage before us would indicate that it was not intended for use where the sinking fund plan of repayment was to be adopted, but was the ordinary form and changed in the conveyancer's office to suit the provisions of this loan.

Secs. 6 and 7 of the Act material here are as follows:— (for sec. 6 see judgment of Walsh, J.).

Sec. 7. Whenever the rate of interest shewn in such statement is less than the rate of interest which would be chargeable by virtue of any other provision, calculation or stipulation in the mortgage, no greater rate of interest shall be chargeable, payable or recoverable, on the principal money advanced than the rate shewn in such statement.

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Now, there can be no question that the draftsman of these two sections had in mind when using the word "statement" in sec. 7 the exact thing which he required as a "statement" in sec. 6. And this being so, why did he in sec. 7 clearly distinguish between "statement" and "other provision, calculation or stipulation" if the requirements of sec. 6 for a "statement" are fulfilled by simply naming a rate of interest and time of payment in a covenant of the mortgagor? The words "other provision, calculation or stipulation" certainly comprise the covenants of the mortgagor. And if his covenants to pay interest at a rate and date named together with some other provision or stipulation in the mortgage wherein the principal and interest are blended and made repayable by instalments, their number and amounts being given, satisfied the requirement of sec. 6 for a "statement" what object has been effected by the Act? Again if the two sections may be complied with by searching the covenants of the mortgagor and relieving the mortgagee from any duty of exhibiting the "statement" called for we immediately face a difficulty of harmonizing the two sections. In sec. 6 if there is no statement no interest is chargeable while under sec. 7 we can get over the penalty by taking the lowest rate of interest to be found in some other provision of the mortgage because we say that a "statement" is shewn if we get the information aimed at out of "any other provision, calculation or stipulation."

If, on the other hand, the draftsman intended to impose upon the mortgagee, who prepares the mortgage as a rule, the duty of clearly exhibiting the statement the two sections are harmonious. The borrower comes to execute his mortgage and there is exhibited to him a blended sum which he is about to covenant that he will repay and with which he will charge his lands. He knows what the principal is, he sees the rate of interest to be charged and he knows that by the Interest Act he is protected against the payment of any interest calculated at a greater rate than shewn in the statement, no matter what may be found in any other provision of the mortgage and he is therefore in a position to assent to the agreement.

The only method by which the borrower can come to the conclusion here that the blended instalments are the result of interest calculated at the rate of 10% per annum is by inference. No

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where in the mortgage is it so stated. And is he to infer that the interest has been calculated yearly or half-yearly? True, it is payable half-yearly, but that is certainly not the same thing. To protect himself is he left to the problem of two calculations and forced to admit that the mortgage shews the statement required because by accident it may be one of his calculations, results in the blended instalment or within a cent or two of it? Surely the draftsman did not intend to leave him in this mire to extricate himself by some hit or miss means.

I think upon this branch of the case the result of the judgment appealed from is right and should be affirmed but I agree with my brother Walsh as to the other grounds of appeal and his disposition of them.

The award of costs at the trial is also appealed. The defendant did not deny liability but the amount was disputed. It became a question of accounts. The result of the judgment was under $160, the main contentions of the defendant being upheld. I think under the circumstances that we cannot say the trial Judge did not exercise his discretion judicially. He certainly has the right to order the successful plaintiff to pay costs under certain circumstances, and I do not think in this case the exercise of that discretion should be interfered with. See *Harris* v. *Petherick* (1879), 4 Q.B.D. 611 and *Fane* v. *Fane* (1879), 13 Ch. D. 228.

I think the respondents should have the costs of the appeal.

STUART, J., concurred with IVES, J.

Appeal dismissed, the Court being equally divided.

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