Dominion Law Reports

CITED "D.L.R."

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

VOL. 1

EDITED BY

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ASSISTED BY A STAFF OF EDITORS

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1912

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(Alphabetically arranged.)

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Page 47, for "M.L.R. 22 B.R. 365," read "M.L.R. 21 B.R. 365 (Que.)."
Page 53, for "M.L.R. 22 B.R.," read "M.L.R. 21 B.R."

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ELFORD v. THOMPSON.

Saskatchewan Supreme Court, Wetmore, C.J. January 8, 1912.

1. CONTRACTS (§ IV C—345)—INCOMPLETE PERFORMANCE—QUANTUM MERUIT.

The mere fact of a building contractor abandoning his contract does not preclude him from recovering on a quantum meruit for the work already done if there is evidence of a fresh contract to pay for same, and such fresh contract may arise from a notice by the property owner to the contractor that he will engage other tradesman to complete the work and charge the cost to the contractor's account.

[*Sumpter* v. *Hedges*, [1898] 1 Q.B. 673, followed; and see Leake on Contracts, 6th ed., pages 34 and 38; 2 Canadian Ten Year Digest, 4315, *Simpson* v. *Rubeck* (1911), 3 O.W.N. 577, and see Annotation to this case, p. 9.]

2. CONTRACTS (II D 4—185)—SPECIFICATIONS IN BUILDING CONTRACT—MUNICIPAL BY-LAW.

Where the specifications for a plumbing contract for installation of plumbing on the construction of a row of attached houses, stipulated that the contractor should supply all stacks necessary to fill all requirements of city by-laws and the tender and formal contract did not mention the number of stacks, the contractor will be bound to supply separate stacks for each house in conformity with the city building by-law although the plans shewed only one stack for each pair of houses.

3. DAMAGES (§ III P)—LOSS OF PROFITS—DELAY IN COMPLETING BUILDING.

Loss of probable rentals from houses in course of construction because of the contractor's delay in completing can be allowed to the owner in abatement of the price only when a time has been specified for doing the work or after the owner has given notice to proceed with it.

[See 2 Canadian Ten Year Digest, 4279, 4315.]

ACTION by the plaintiff firm (Elford & Cornish) for the price of work and labour for plumbing and heating equipment under a building contract.

Judgment was given for the plaintiffs after deducting an allowance for defects in the work as to which the defendant counterclaimed.

B. D. MacDonald, for plaintiffs.

D. Maclean, for defendant.

WETMORE, C.J.:—The plaintiffs, on March 22nd, 1910, tendered to do plumbing, heating, galvanized iron work, roofing, eaves-troughing, etc., for the defendant, according to certain plans and specifications in respect to a terrace which the defendant was building or about to build in Nutana. The price for this work was apportioned in the tender; that is, a certain price was named for each kind of work specified, the total amount being

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$2,331. No time was specified in such tender for the payment of the price or prices for this work, nor was it stated when it was to be completed. The evidence as to when the plaintiffs commenced to do such work is not satisfactory. It is quite clear, however, that they were delayed either in commencing the work or proceeding with it after they commenced by reason of the fact that the defendant was unable to procure bricks. From what I can gather from the evidence, I find that the plaintiffs commenced their work somewhere about the end of June; and I also find that they so commenced it because the defendant, after receiving the tender, intimated to them in some way to do it. The evidence in this respect is also very vague and unsatisfactory, but it warrants my drawing the conclusion I have stated. On the 8th of July, however, and after the plaintiffs had commenced the work, a formal agreement was drawn up and signed by the respective parties, which is as follows:—

Saskatoon, Sask., July 8th, 1910.

Contract between Mr. J. H. Thompson and Elford and Cornish.

Whereby Elford and Cornish agree to install in Mr. Thompson's terrace in Nutana—

6. plumbing outfits according to plans and specifications.

6 New Idea furnaces, 4 No. 618, 2 No. 519, complete in every particular, guaranteeing same to heat building to a temperature of 70 degrees when the termometer is 40 below, providing proper fuel is used.

3 forty brl. galvanized iron cisterns, eave troughing, conductor pipe.

Roofing, etc., according to plans and specifications.

All for the sum of twenty-three hundred and thirty-one dollars.

$2,331.00—Accepted. ELFORD AND CORNISH.

Although the plaintiffs at the trial attempted to rely upon the tender of 22nd March as constituting the agreement between the parties, and although the agreement above set forth only came out incidently on the cross-examination of one of the plaintiffs, it is nevertheless the formal agreement, and is the only one set out in the statement of claim upon which the plaintiffs have, apart from compensation for extras, based their action, and must govern me, therefore, in deciding what are the rights of the parties. It is only necessary to refer to two matters growing out of this agreement for the purpose of deciding the question in controversy. The agreement (a) does not state when the work was to be completed; (b) it provides for the payment of a lump sum for doing the work and providing the materials. It was in contemplation between the parties when the arrangement was first entered into between them that the building in question would be completed about the first of

August, and this did not form part of any agreement between them. The omission of the defendant to procure the bricks prevented this idea being realized. Later on, along about October and November, the work agreed by the plaintiffs to be done by them did not proceed satisfactorily; as a matter of fact it stopped; and the excuse given by one of the plaintiffs for not completing it was that they were busy and short-handed. On the 3rd of November the defendant caused a letter to be written to the plaintiffs by one La Chance, who was the architect who prepared the plans and specifications referred to, and who is mentioned throughout the general conditions prefixed to the specifications. La Chance, however, had no authority under the agreement or the specifications to give notice terminating it, or to require the contractors to proceed with their work. I do not consider this material, however, as the defendant constituted him his agent to write the letter above referred to, and signified that it was written by his authority by delivering it himself to the plaintiffs. The letter is as follows:—

Nov. 3rd, 1910.

Messrs. Elford and Cornish,
City.

(Re Mr. J. H. Thompson's Terraces.)

Gentlemen,—

The writer is instructed to write you regarding the delay on your part in completing the plumbing and heating work on the Thompson Terraces and to give you three days' notice to proceed with the work, failing to do so Mr. Thompson will be compelled to put other tradesmen on the work and complete same and charge same to your account.

You should realize the position without any notice from me and finish this work in order to allow tenants moving in before the intense cold weather sets in, also to allow Mr. Thompson to collect his rents, which means considerable to him, for every day he is deprived of this revenue.

Trusting you will take this letter in the spirit it is written and bend your energies to the immediate completion of the above mentioned works without further delay,

I remain, sincerely yours.
W. W. LACHANCE.

The plaintiffs the same day, and three or four hours after the foregoing letter was delivered, wrote the following letter:—

Saskatoon, Sask., Nov. 3, 1910.

Mr. James Thompson,
Saskatoon.

Dear Sir,—

We have received $500 on contract existing between us; and

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if get a cheque for $1,000 within three days from date, we will at once proceed with work.

Yours respectfully,
ELFORD AND CORNISH,
Per M. G. Smith.

I am of opinion that this was a recognition of La Chance's agency, and also indicated pretty strongly that the plaintiffs were attempting to act fast and loose with the defendant, because they had no right at that time under their agreement to demand a cheque for $1,000, and it was an evasion of the request contained in the letter received by them. There was a desperate effort made on the part of the plaintiffs at the trial to establish that they were always ready and willing to go on with their work on this building, and that whenever it was in a condition to have it carried on they sent men to attend to it. I find that such was not he case. On the contrary, I find that for some time prior to the 3rd of November and down to the time that the defendant employed the Saskatchewan Hardware Company to complete the work, if the plaintiffs sent any one to do any work at the building it was merely a pretence, and not an earnest effort to go on with it. I may say that the evidence does not satisfy me that they sent any one at all except a man on the 14th of November, after the Saskatchewan Hardware Company were employed, and he was sent as a mere pretence; he came when it was getting dark at that time of the year, and he was not prepared to do the work according to the specifications.

On the 8th of November, La Chance, under the authority of the defendant, wrote the following letter to the plaintiffs:—

Messrs Elford and Cornish,
City.

(Re Thompson's Terraces.)

Gentlemen,—

In confirmation of our conversation of this A.M. will say that Mr. James Thompson is willing to wait until Thursday of this week for your men to complete his work, but will not wait beyond this time, as he will put other contractors on the job and complete the work and charge same to your account.

Sincerely yours,
W. W. LA CHANCE.

No attention was paid to this letter. The Thursday mentioned in it fell on the 10th of November. No person was sent by the plaintiffs even under the pretence of doing work until the 14th of November. The defendant swore that he employed the Saskatchewan Hardware Company about the 5th of November to complete the work. There was no evidence as to when

that company actually commenced to work at the building. I do not consider that material, because the plaintiffs did not send any one to work until after the time specified in the letter of the 8th of November, and there was no attempt on the part of the defendant to prevent the plaintiffs working before the 14th of November. I am of opinion that the whole matter is precluded by the uncontradicted testimony of Hutchinson, the manager of the Saskatchewan Hardware Company. He swore that when the defendant approached him to take over and finish the work in question, before agreeing to do so, he interviewed the plaintiffs, as a matter of ordinary business etiquette, and was informed by them that they were satisfied that he should go on with the work, as they could not get any men to do it, anyway, and accordingly he (Hutchinson) made the arrangement with the defendant and went on and did the work. I find that the plaintiffs abandoned the contract, and that notwithstanding the fact that Hutchinson did not communicate to the defendant what had taken place between him and the plaintiffs. The price agreed to be paid for the work being a lump sum, it was not payable under the contract in whole or in part until such work was completed. In *Sumpter* v. *Hedges*, [1898] 1 Q.B. 673, A. L. Smith, L.J., lays down the following, at p. 674:—

"The law is that where there is a contract to do work for a lump sum, until the work is completed the price of it cannot be charged. Therefore, the plaintiff could not recover on the original contract. It is suggested, however, that the plaintiff was entitled to recover for the work he did on a quantum meruit. But in order that that may be so there must be evidence of a fresh contract to pay for the work already done."

This was practically concurred in by Chitty, L.J. Collins, L.P., laid great stress upon the plaintiff being unable to recover because he had abandoned his contract, but he did so under the circumstances of that case; he does not lay down that the mere fact of a contractor abandoning his contract precluded him from recovering on a quantum meruit.

I am of opinion that if there was, as Smith, L.J., put it, "evidence of a fresh contract to pay for the work already done," the contractor can recover although he abandon the contract. I am of opinion that there was evidence from which I might and do find that there was a fresh contract to pay for the work already done upon which the plaintiffs are entitled to recover on a quantum meruit. I think that such is to be gathered from the letter of the 3rd November. In that letter, La Chance writing for the defendant, after calling attention to the delay in completing the work, goes on to state that he is instructed to give "three days' notice to proceed with the work. Failing to do so, Mr. Thompson will be compelled to put other tradesmen on to the work and complete same and charge same to your

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account." Such, therefore, was to be the result of the plaintiffs' omission or neglect to proceed with the work, and that such was to be the result is reiterated in the letter of the 8th November. I cannot construe this as meaning anything else than an expression of intention on the defendant's part to charge what he had to pay to other tradesmen for completing the work against what the plaintiffs were entitled to be paid under the contract, if they had completed it, of course, also charging them with payments made on account and paying them the balance.

The plaintiffs also claim for extras. They set up that the specifications called for what they call three stacks; that the Terrace consisted of six houses, and the specifications called for one stack to two houses, and that as they were about putting them in the city officials insisted that they must put in six stacks, or one to each house; that this was communicated to the defendant, who told them to go on and do it. The defendant denied this altogether. He states he refused to pay for putting those so-called extra stacks in, and that the plaintiffs agreed to put them in for the same money—by that I understand, to put them in as part of the contract. This action was tried all round with very considerable disregard to details. For instance, the plans of this Terrace, although referred to both in the tender of the 22nd March and the formal agreement of the 8th July, were not put in evidence, and without them I am utterly at a loss to understand some matters. I can find nothing in the tender, the agreement, or the specifications making any reference to three or any specified number of stacks or pipes, but I find the following in the specifications applicable to this work:—

> *Water.* (1) Lay in from street line ½" lead pipe to inside of front wall and carry from same ½" best Canadian wrought iron pipe, lap welded, to supply all fixtures throughout the building with hot and cold water as required. Place on services entering cellars ¾/2" stop and waste tap, same to be placed clear of coal bins and connect so that they will waste into floor drains. Provide also ½" bibb tap for hose coupling, same to be carried through wall with cut off tap. All fixtures to be fitted with necessary fittings, holdfasts and hangers of most approved make, and all pipes to be laid with fall to waste. Contractor is to provide all necessary soil pipes, stacks, local vents, breathers and wastes, etc., necessary to fill all requirements of *city by-laws*, finish of pipes to be concealed where possible. Flash where vent pipes pass through roof with heavy sheet lead and flanges.
>
> *Drains.* (2) Provide and lay drains as per city ordinances, lay with proper fall, all joints to be made with pig lead and oakum, provide clean-outs at the foot of all risers, having heavy brass plugs.

Cornish, one of the plaintiffs, testified that the so-called change with respect to the stacks (or pipes, as he called them) was made to conform to the city by-laws. The plaintiffs, therefore, in doing such work as so charged were merely doing what the specifications called for, and, therefore, what they agreed to do under their contract. I find that the defendant did not agree to pay for this so-called extra work, and I may add that if he did I have great doubts, in view of what was laid down by James, L.J., in *Sharpe* v. *San Paulo Railway Company*, L.R. 8 Ch. at p. 608, whether it would not have been nudum pactum. I may further add that there is no evidence to enable me to find what the cost of putting in this alleged extra was. This is the only extra claimed, and I cannot allow for it.

The result is, therefore as follows:—

Allow the plaintiffs the contract price	$2,331.00
Deduct from that—	
Cash paid as per statement of claim	$500.00
Cash paid after action brought as per admission at trial	900.00
	1,400.00
Balance	$ 931.00

The next question to decide is, what is the defendant entitled to charge against the plaintiffs for completing the work? As the defendant has counterclaimed with respect to all this, I will consider it in dealing with such counterclaim.

The defendant counterclaims for damages on several grounds: In the first place, for loss of rentals occasioned by the delay of the plaintiffs in carrying on their work. As no time was specified for doing this work, I am of opinion that the plaintiffs can only be charged with delay from the expiration of the time given to them by the notice to proceed with the work, that is the 10th of November, and practically from that time the defendant took charge of the work himself and the plaintiffs cannot be held responsible for any loss of rentals that resulted. This is made more emphatic by the fact that the defendant himself is responsible for some of the delays, at least, that took place earlier in the course of the operations, by reason of his inability to procure bricks. And again, the testimony has left me quite abroad as to the extent of the delay caused by that inability.

In the next place, he claims for the difference in price between the baths supplied for the houses by the plaintiffs and those specified in the specifications. I cannot find out by reading the specifications the number of baths that were to be supplied or the character of them. I presume that the plans would disclose the number. The baths are described in the specifications

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as follows: "Baths Place No. 346½ Z," which conveys no meaning whatever to me as to their character. It seems, however, to be very clear, according to the evidence, that the plaintiffs did not put in baths of the character called for, and that those put in were cheaper. The plaintiffs stated that the defendant consented to that. The defendant denies that he did. I really cannot see why he should consent to it. The plaintiffs had made their agreement for the work, which, as I understand, included the materials. Why would the defendant then consent to cheaper materials being put in than what the agreement contemplated, unless he was to get the benefit of it? But the question of the damages he is entitled to is left all abroad. All the defendant knows about it is that he got some figures from a dealer and he knows that there was a difference of about $6 on each bath between the price of those put in and those called for by the contract. That is not only very vague, but it is not legal evidence on the subject. The defendant would only be entitled to nominal damages, which I put at $5.

The next claim is damages for putting in inferior sinks. No evidence was given with respect to that claim.

He also claims for defective work performed with respect to

(a) the tanks and eaves troughs and basement floors;
(b) the roof permitting leakage and damages to plaster and burlap;
(c) plumbing exposing vent pipes, contrary to the specifications;
(d) not properly staying water-pipes in basement.

I find that the roofing was defective and damaged the plaster, for which I allow $25 damages. I also find that the eaves troughing was defective, for which I also allow $25. The vent pipes were improperly left exposed, for which I allow $60. The water pipes were not properly stayed in the basement, for which I allow $30.

The last item of counterclaim is for $518.61, the amount paid to the Saskatchewan Hardware Company, the company employed by the defendant to complete the work. There is no evidence to establish that the materials or such material in the company's account which the defendant paid for ever went into the Terrace at all. Hutchinson, the company's manager, stated in his evidence-in-chief that the goods were supplied for the job, but in cross-examination he swore he could not swear they went into the Terrace; he could not swear they ever left the company's warehouse. The defendant is not more clear in his testimony in this respect. He states that the company had men in there, but how many, and how long they worked, or what they did, he does not state, and the most he will say with respect to the materials is that he expected they went into the building, and that is all the evidence there was on that subject. As a

matter of fact, the company's foreman under whom the work was done was not called as a witness. I am, therefore, unable to allow the defendant anything on this part of his counterclaim, beyond what is proved by the plaintiffs and their witnesses as the amount it would cost to complete the work, which was from $60 to $75. I fix it at $75. I regret this because I feel morally certain that if the amount it actually did cost to complete the work had been made clear, the plaintiffs would not be found entitled to as much as I am constrained to award them.

There will be judgment for the plaintiffs on their claim for $931, less the $75 which I find was required to complete the work, or $856 (that is the amount that I find they are entitled to recover on a quantum meruit after crediting the cash payments) with costs. Judgment for the defendant upon his counter claim for $145 and costs. One judgment to be set off against the other, and the plaintiffs to have execution for the balance.

Judgment for plaintiff.

Annotation—Contracts (IV C—345)—Failure of contractor to complete work on building contract.

Annotation
Contracts

The leading authority in the Ontario Courts is *Sherlock* v. *Powell* (1899), 26 A.R. 407, where it was held that where there is a contract to do specified work for a fixed sum, with a proviso for payment of proportionate amounts, equal to eighty per cent. of this fixed sum, as the work is done, and the balance of twenty per cent. in thirty days after completion and acceptance, completion is a condition precedent to the right of payment, and where the work is not completed there is no right to recover for the portion done as upon a quantum meruit. That case was followed in *Simpson* v. *Rubeck* (1911), 3 O.W.N. 577.

In *Kelly* v. *Tourist Hotel Co.* (1909), 20 O.L.R. 267, the claim was for work done and materials supplied by the plaintiffs for the defendants in connection with the building of an hotel, under a written contract dated the 26th June, 1907. The plaintiffs undertook to complete the work, to the satisfaction of an architect, in accordance with specifications and drawings and with the conditions of the agreement, for $115,000, which the defendants were to pay as the work progressed in monthly payments representing 85 per cent. of the amount of the work done and materials supplied, and for this percentage the architect was to issue progress estimates each month, on which payments were to be made, and the final payment was to be made on the expiration of thirty-one days after the plaintiffs had fulfilled the agreement. Payments were to be made only upon the written certificates of the architect that they were due. The plaintiffs were to complete and have ready for occupation by the 1st January, 1908, the first and second flats and part of the basement; to complete the remainder, except the outside finishing, by the 1st April, 1908 and to complete the whole by the 15th May, 1908. A large amount of the work was done, and nine progress estimates, the last dated the 1st June, 1908, were given by C., acting for the architect, amounting to $57,533.36. The amounts mentioned in five of these certificates were paid by the defen-

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dants, and a portion of the sixth; the defendants refused to make any further payments, on the ground that the plaintiffs were in default in not procuring and delivering to the defendants a bond guaranteeing the performance of the contract, which, by the contract, the plaintiffs undertook to do within fifteen days from the date of the contract. The plaintiffs thereupon stopped work on the building, and on the 14th July, 1908, brought this action to recover the amount alleged to be due to them for all work done and materials supplied by them, and to enforce their lien therefor under the Mechanics' and Wage Earners' Lien Act. Pending the action and on the 19th July, 1909, ten days before the trial, the architect gave the plaintiffs another progress estimate in which he estimated the cost of the work to the date of the estimate at $64,263.49. It was held, that the defendants' refusal to make further payments was not justifiable, nor were the plaintiffs justified in discontinuing work. The plaintiffs were not entitled to be paid anything but the sums for which the architect had give them progress estimates; and were not entitled, in this action, to recover for the amount of the estimate of the 19th July, 1909, nor to recover on a quantum meruit: *Kelly* v. *Tourist Hotel Co.* (1909), 20 O.L.R. 267 (D.C.).

A recent case under Quebec laws arose upon a contract for the construction of works, whereby it was provided that the works should be fully completed at a certain time and that no money should be payable to the contractors until the whole of the works were completed. In an action by the contractors for the full amount of the contract price, the trial Judge refused leave to amend the claim by adding a count for quantum meruit; found that the works were still incomplete at the time of action; but entered judgment in favour of the plaintiffs for a portion of the contract price with nine-tenths of the costs. The defendant alone appealed from this decision and the trial Court judgment was affirmed by the Court of Review (Que.). It was held, reversing that judgment, that, as the whole of the works had not been completed at the time of the institution of the action, the condition precedent to payment had not been accomplished and the plaintiffs had no right of action under the contract: *Whiting* v. *Blondin*, 34 Can. S.C.R. 453.

Where a party engages to perform work in a certain specified manner for an agreed price, and he performs the work, but not in the manner specified, such party can recover only the agreed price less the cost of altering the work so as to make it correspond with the specifications: *Clarke* v. *Lee*, 3 Terr. L.R. 191.

In another Western Canada case, the plaintiff agreed to build, for a fixed lump sum, a foundation for a building, the defendant supplying materials on the ground, and the plaintiff, owing to non-supply of lime, abandoned the work, though it was found on the evidence that the defendant had got what he bargained for, with some shortcoming, for which damages would compensate him. It was held, that although the plaintiff was not entitled to succeed on his claim under the original special contract, he was entitled to recover on a quantum meruit, and the pleadings were directed to be amended accordingly: *Burns* v. *Ussherwood*, 4 Terr. L.R. 389.

Judge Emden (on Building Contracts, 4th ed., 1907, page 120) says:

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Annotation (*continued*)—Contracts (IV C—345)—Failure of contractor to complete work on building contract.

"Although it is the general rule that a person, retaining the benefit of a part performed consideration may render himself liable upon a new contract to pay for it, as in the case of his accepting an incomplete delivery of goods under a contract of sale: *Champion* v. *Short*, 1 Camp. 53; Sale of Goods Act, 1893, yet the circumstances in building contracts are generally such that there is no option of returning or rejecting the consideration performed, in which case no promise can be implied to pay for it. And if a builder, after expending a certain sum, decline to perform the rest of the contract, he has no lien on the land for the money which he has expended: *Wallis* v. *Smith*, 21 Ch. D. 243.

In the case of a building contract, the mere fact that the part performance has been beneficial, as that the buildings remain upon the land, is not enough to render the employer liable, and is not such an acceptance as imports a new promise to pay for the work; it must be shewn that he has taken the benefit of the part performance under circumstances sufficient to raise an implied promise to pay for the work done, notwithstanding the non-performance of the special contract, and some positive acquiescence in the incomplete or existing state of the building is necessary to render him liable to pay according to measure and value: *Munro* v. *Butt*, 8 E. & B. 738; *Pattinson* v. *Luckley*, L.R. 10 Ex. 330; *Whittaker* v. *Dunn*, 3 T.L.R. 602. See *Ellis* v. *Hamlen*, 3 Taunt. 52; *Ranger* v. *Great Western Ry. Co.*, 5 H.L. Cas. 118. See *Wallis* v. *Smith*, 21 Ch. D. 243.

So where the plaintiff, a builder, who had contracted to erect certain buildings on the defendant's land for a lump sum, abandoned the contract after he had done part of the work and the defendant thereupon completed the buildings; it was held that the plaintiff could not recover from the defendant in respect of the work which he had done as upon a quantum meruit, there being no evidence of any fresh contract to pay for the same: *Sumpter* v. *Hedges*, [1898] 1 Q.B. 673, following *Munro* v. *Butt*, 8 E. & B. 738. See also in this volume the Nova Scotia case of *Dixon* v. *Ross* (1912), 1 D.L.R. 17, and see 3 Halsbury's Laws of England, p. 183.

But where the contract contains a "vesting clause," and the contractor fails to complete, he cannot recover the materials, although the building owner does not complete the works himself or by another contractor: *Hart* v. *Porthgain Harbour Co., Ltd.*, [1903] 1 Ch. 690.

Judge Emden (Emden on Building Contracts, 4th ed., page 121, says: "It is important to note that in *Sumpter* v. *Hedges*, [1898] 1 Q.B. 673, reliance was placed upon the fact that the plaintiff had abandoned his contract. Where the builder has not abandoned, and, in addition to accepting the benefit of the work done by the builder under the contract, the employer does something which puts it out of the power of the builder to complete, it seems that the builder may recover as on a quantum meruit."

In *Lysaght* v. *Pearson* (The Times, March 3, 1879), referred to and not doubted in the case of *Sumpter* v. *Hedges*, [1898] 1 Q.B. 673, at p. 675), an action was brought to recover £240, the price of a corrugated iron roof, made and erected by the plaintiff for the defendant. The defendant entered into negotiations with the plaintiff for the supply of two corrugated iron roofs in January, 1877, and after some correspondence it was agreed that they should be supplied and erected for £320. The plain-

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tiff supplied and erected the larger of the two roofs, but refused to supply the second and smaller roof until the price of the larger had been paid to him. The defendant refused to pay the price of either roof until the whole of the work contracted for had been completed, and gave the plaintiff notice to proceed with the second roof. On his refusal the defendant employed another person to supply and erect it. The defence set up by the defendant was that the contract being entire and indivisible, the completion of the work was a condition precedent. Stephen, J., held plaintiff entitled to recover, subject to a deduction which was assessed by the jury, for damages for delay in erecting the small roof. The Court of Appeal held that as the contract was entire, the plaintiff would not have been entitled to sue if the defendant had done nothing to alter the position of the plaintiff, for the plaintiff had throughout been in the wrong, and was not ready and willing to perform his part of the contract. But the defendant had taken the matter into his own hands and had completed the second roof. He had not merely taken possession of the property; if he had only done that, he would not have been liable; but he had completed the second roof, so that it was impossible for the plaintiff to complete it. The plaintiff was therefore entiled to sue on a quantum meruit, and the judgment of the Court below was affirmed.

In a more recent case, *Townend* v. *Queen's Laundry* (unreported), heard by Ridley and Darling, JJ., in the Divisional Court on May 23, 1906, the contract was to remove certain machinery into a laundry and leave it in "good working order." The plaintiff having, as he thought, completed the work, brought an action for the contract price. The defendants resisted the claim on the ground of non-completion, and the County Court Judge nonsuited the plaintiff. On appeal it was pointed out that, after the plaintiff had left the work, the defendants had called in local engineers to complete it, and they had written the plaintiff to this effect. This letter, although read in the County Court, had not been specifically relied on by the plaintiff in the County Court. It was held by the Divisional Court that the defendants, on their own admission, having put it out of the plaintiff's power to complete, he was entitled to sue as on a quantum meruit. In the result a new trial was ordered.

Where a lessor contracted to pay his tenant, at a valuation, for certain erections, pursuant to a plan to be agreed upon, provided they were completed in two months; and no plan was agreed on, and, after the condition broken, the lessor encouraged the lessee to proceed with the work; it was held that the lessee might recover as for work and labour on an implied promise arising out of so many of the facts as were applicable to the new agreement: *Burn* v. *Miller*, 4 Taunt. 745.

Where a contract is divisible, and is part performed, the contractor can apparently recover for what he had done. So in *Collins Bay Co.* v. *New York and Ottawa Ry. Co.* (1902), 32 Can. S.C.R. 216, by a contract to remove spans from a wrecked bridge in a river, the contractors agreed as follows: "to remove both spans of the wrecked bridge and to put them ashore for the sum of $25,000, we to be paid $5,000 as soon as one span is removed from the channel and another $5,000 as soon as one span is put ashore, and the balance as soon as the work is completed . . . It

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being understood and agreed that we push the work with all reasonable dispatch, but if we fail to complete work this season we are to have the right to complete it next season." It was held that the contract was divisible, and the contractors, having removed one span from the channel and put it ashore, were entitled to the two payments of $5,000 each, notwithstanding the whole work was not completed in the second season.

Judge Emden in commenting upon the authorities says (4th ed., page 124):—

> "Assume that a house having been completed, say, to the roof, the builder throws up the job, does he forfeit all that he has expended in providing materials? It is easy to understand that he should forfeit what he has been paid for work and labour, but that he should actually lose materials which he has purchased, and be not compensated in any way for them, does not accord with justice. Strange to say, there appears to be no definite authority for the proposition that, in the circumstances above set out the builder can recover the price of materials supplied. It is probable that the system of payment by instalments upon the architect's certificates is to a large extent responsible for this lack of authority. It is worthy of remark, however, that in *Sumpter* v. *Hedges*, where the builder had definitely abandoned his contract, it was not disputed that he was entitled to be paid for materials supplied by him which were used by the employer in the completion of the work. In any event it is submitted that in the case of non-completion, from whatever cause, a builder is entitled to recover the fair value of loose materials brought on to the ground by him and actually used by the employer for the completion of the work. See *Stegman* v. *O'Connor* (1899), 80 L.T. 234."

Where, however, the contract contains a clause vesting the materials in the employer as they come on the land, it would seem that, inasmuch as such a vesting clause is in effect a security that the builder shall perform his contract, he will be precluded from recovering such materials where he has not completed. See per Farwell, J., in *Hart* v. *Porthgain Harbour Co. Ltd.*, [1903] 1 Ch. 690, at pp. 695, 696.

When a builder contracts to do certain work in consideration of a fixed sum to be paid "on completion," and the further performance is prevented by some accident or event that may excuse the non-completion (*e.g.*, destruction by fire of the premises on which the work is to be done), yet, if there be no default of the employer, the builder has no claim for the part performed before the prevention occurred: *Appleby* v. *Myers*, L.R. 2 C.P. 651.

But if the contract be to erect certain buildings, and provide materials and workmanship, for which payment is to be made from time to time as performed or supplied, the claim for the part which is performed remains valid, although further performance may be prevented by accident, and the part already performed become useless: *Chandler* v. *Webster*, [1904] 1 K.B. 493.

And where a contractor was employed at continuous work upon the repairs to a building, which was accidentally destroyed by fire before the repairs were completed, he was entitled to charge for his work and mat-

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erials rendered up to that time: *Menetone* v. *Athawes*, 3 Burr. 1592; *Tripp* v. *Armitage*, 4 M. & W. 699; *Gillett* v. *Maewan*, 1 Taunt. 137.

As to failure to complete because of dismissal of the contractor by the owner, see cases cited in 2 Can. Ten Year Digest 4279 et seq.

As to contracts requiring a certificate of completion signed by an architect or engineer, as a condition precedent to recovery of price, see 2 Can. Ten Year Digest 4305 et seq.

For American cases, see Annotations, 5 L.R.A. (N.S.) 1105; 16 L.R.A. (N.S.) 801; 20 L.R.A. (N.S.) 872; 22 L.R.A. (N.S.) 364.

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CLARKSON v. NELSON AND FORT SHEPHERD RAILWAY CO.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, and Galliher, JJ.A. January 9, 1912.

1. JURY (§ I D 1—38)—DENIAL OF RIGHT TO JURY TRIAL—CIVIL ACTION INVOLVING LOCAL INVESTIGATION BY EXPERTS.

Where a statutory authority is conferred upon the Court to dispense with the jury in any cause "requiring local investigation," the discretion will be exercised in favour of a trial without a jury if the case is one in which the principal issue is the amount of fire damage occasioned to timber lands in proof of which a large number of experts upon the value of standing timber are to be called.

APPEAL on behalf of plaintiff from an order of Hunter, C. J., of Supreme Court of British Columbia, refusing the plaintiff a jury trial in an action for damages against a railway for injury to timber lands by fire, for which the railway company was alleged to be responsible.

The appeal was dismissed.

Davis, K.C., for appellant.

A. H. MacNeill, K.C., for respondents.

MACDONALD, C.J.A.:—The plaintiffs claim damages for injury to timber lands by fire, alleged to have originated from defendant's operation of its railway. The question which will occupy the greater part of the time of the Court and witnesses will be the ascertainment of the quantity of timber destroyed or injured, and this will be attested by expert witnesses, or witnesses skilled in estimating the quantities of standing and down timber on the lands in question, and the extent to which the same was destroyed or injured or affected by reason of the wrong complained of.

The plaintiffs desire to have the damages ascertained by a jury, but the learned Chief Justice of the Supreme Court of British Columbia by the order appealed from, refused a jury. If the case falls within order 36, r. 5, so as to give a Judge juris-

diction to dispense with the jury, then the exercise of his discretion will not be lightly interfered with. Rule 5 above referred to is comprehensive, and in my opinion gives a large discretion to the Judge; it gives him discretion to order a trial without a jury of any cause requiring local investigation. That term is wide enough to cover almost any case, but it is obvious that it should not receive any such wide interpretation. The application of this rule must in every case depend upon the facts. I do not think that by the term "local investigation," a mere "view" was meant. The practice of taking a "view" is as old as trial by jury. The legislature meant something different when it is used the term "local investigation." As there can be no local investigation other than a view by either a jury or a Court, except through the evidence, then I take it the term must have reference to the nature of the evidence.

It seems to me that the case before us is the best example we could have of what is meant by that term. We are told that a large number of witnesses are to be called to give evidence on both sides who are not witnesses in the primary sense of the word, but who qualify themselves to give evidence by an investigation of the locus in quo. If this case does not fall within Rule 5, I cannot conceive of one where that part of the rule now under consideration can be applied. The appeal should be dismissed.

IRVING, J.A., and GALLIHER, J.A., concurred.

Appeal dismissed.

RE SIMPSON AND VILLAGE OF CALEDONIA.

Ontario High Court, Riddell, J. January 5, 1912.

1. MUNICIPAL CORPORATIONS (§ II C 3—112)—EARLY CLOSING BY-LAW—LEGISLATIVE POWER WITHOUT PETITION.

A municipal council in Ontario has power under the Shop Regulation Act, R.S.O. 1897, ch. 257, sec. 44, to pass a by-law regulating the time of closing of shops not earlier than 7 p.m., within the municipality, independently of the presentation to the council of a petition of electors.

1. MUNICIPAL CORPORATIONS (§ II C 3—112)—EARLY CLOSING BY-LAW—IRREGULAR PETITIONS.

Where various petitions are presented to a municipal council under the Shop Regulation Act (Ont.) for an early closing by-law, but the petitions together contain the signatures less than the requisite three-quarters in number of the occupiers of shops to be affected by the proposed by-law, the petitions may be treated as supererogatory, and the council may, without reference thereto, pass a by-law for closing of shops, and may therein provide for closing at the same or a different time than had been petitioned for, subject to the restriction in such case of the closing hour being not earlier than 7 p.m., which restriction does not apply, where the by-law is made upon a duly signed petition under sec. 44 (3).

[For other cases, see 2 Canadian Ten Year Digest, 2626, 2627, 2637, 2639, 2641, 2649.]

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3. CONSTITUTIONAL LAW (§ I B—4)—LEGISLATIVE FUNCTIONS OF MUNICIPAL COUNCIL—WHEN SUBJECT TO CONTROL BY COURTS.

While the Courts will closely scrutinize by-laws of municipal councils which limit freedom of trade, the Court's jurisdiction should not be exercised to quash a by-law unless the municipal council has clearly exceeded its powers.

ON the 26th October, 1911, the Council of the Village of Caledonia passed a by-law that all shops within the village, belonging to certain classes named, should be closed and remain closed between seven o'clock in the afternoon of every business day (excepting Saturdays, etc.), and five of the clock in the forenoon of the next following day. Several petitions were presented to the council for the passage of such by-law; and this motion was made to quash the by-law, on the ground of the insufficiency of these petitions.

The motion was dismissed.

J. G. Farmer, K.C., for the applicant.

H. Arrell, for the Corporation of the Village of Caledonia.

RIDDELL, J.:—R.S.O. 1897 ch. 257, sec. 44, is the statute under which the by-law was passed; and it will be seen that sub-sec. 2* gives the local council power to pass such a by-law as this without petition, *i.e.*, to close shops between 7 p.m. and 5 a.m. By sub-sec. 3,† it is made obligatory on the council to pass a by-law giving effect to petitions, where such petitions are properly signed, and requiring shops to be closed "at the times and hours mentioned in that behalf in the application." This is quite different from the power given in sub-sec. 2, which is wholly optional with the council—and does not limit or modify that power.

*44 (2) Any local council may by by-law require that during the whole or any part or parts of the year, all or any class or classes of shops within the municipality shall be closed, and remain closed on each or any day of the week at and during any time or hours between seven of the clock in the afternoon of any day and five of the clock in the forenoon of the next following day.

†(3) If any application is received by or presented to a local council praying for the passing of a by-law requiring the closing of any class or classes of shops situate within the municipality, and the council is satisfied that such application is signed by not less than three-fourths in number of the occupiers of shops within the municipality and belonging to the class or each of the classes to which such application relates, the council shall, within one month after the receipt or presentation of such application, pass a by-law giving effect to the said application and requiring all shops within the municipality, belonging to the class or classes specified in the application, to be closed during the period of the year, and at the times and hours mentioned in that behalf in the application.

(18) Subject to the provisions in this section contained, any by-law passed by a local council under the authority of this Act shall for all purposes whatsoever be deemed and taken to have been passed under and by authority of the Municipal Act and as if this section had formed part of the Municipal Act; and this section shall be read and construed as if it formed part of the Municipal Act.

The case of *Re Halladay and City of Ottawa*, 14 O.L.R. 458, 15 O.L.R. 65, differs from the present. There the by-law ordered the closing at six o'clock; and, consequently, it could not have been made under sub-sec. 2. The Court held that the proper number of persons had not signed the petition; that such a petition properly signed was a prerequisite; and the by-law could not stand.

But here the by-law is one which the council could pass without petition at all. (The by-law does not purport to be in pursuance of petition). I cannot think that the power given by the statute is diminished by the fact that wholly unnecessary petitions have been filed.

While the acts of councils which interfere with the freedom of the subject to trade when and where he will must be closely scrutinised, and found to be justified by legislation in order to be sustained; on the other hand, no attempt should be made by the Court to interfere with the exercise by these legislative bodies of their constitutional functions. We have no more right to interfere with them, when they are within their powers, than with any other legislating body, parliament or legislature.

The motion should be dismissed with costs.

By-law sustained.

DIXON v. ROSS.

Nova Scotia Supreme Court, Sir Charles Townshend, C.J., Meagher, and Drysdale, JJ. January 13, 1912.

1. CONTRACTS (§ IV C—345)—BUILDING CONTRACT—INCOMPLETE PERFORMANCE—CONDITION PRECEDENT.

The completion of a building contract is a condition precedent to the builder's right to recover unless the contract provides otherwise or unless there has been a waiver of such condition by the other party, or an interference preventing the completion of the contract.

[See *Elford* v *Thompson* (1912), 1 D.L.R. 1, and annotation to same, page 9.]

2. MECHANICS' LIENS (§ VIII—73)—PROCEDURE—STATUTORY DIRECTIONS AS TO TRIAL—"ALL QUESTIONS ARISING."

Under the statutory direction contained in the Mechanics' Lien Act, R.S.N.S. 1900, ch. 171, sec. 30, which specifies that in a mechanics' lien action the trial Judge shall "do all things necessary to try and otherwise finally dispose of the action and of all matters, questions and accounts arising in the action," it is sufficient if the trial Judge disposes of all questions which are necessary to be tried to enable him to dispose of the action.

[See also Ontario Mechanics' Lien Act, 10 Edw. VII. (Ont.) ch. 69, sec. 37 (3); Manitoba Mechanics' Lien Act, R.S.M. 1902, ch. 110, sec. 31; B.C. Mechanics' Lien Act, R.S.B.C. 1897, ch. 132, sec. 16; New Brunswick Mechanics' Lien Act, R.S.N.B. 1903, ch. 147, sec. 50.]

3. APPEAL (§ VII L—472)—STATUTORY PROCEEDING—REFERRING EVIDENCE TO APPELLATE COURT WITHOUT FINDING.

Upon the trial of a mechanics' lien action under the statutory pro-

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visions of the Nova Scotia Mechanics' Lien Act the trial Judge should not refer any of the questions involved to the Court of Appeal without himself deciding the same, but if it appears that the question which he did decide was sufficient to dispose of the action the case need not be referred back to deal with questions which could not affect the result.

APPEAL from the judgment at trial dismissing an action under the Mechanics' Lien Act, R.S.N.S. (1900), ch. 171 and amending Acts to recover the sum of $1,216.05 alleged to be due plaintiff from defendant under a building contract.

The appeal was dismissed by the Full Court.

The cause was tried at Sydney, C.B., before FINLAYSON, County Court Judge, when counsel for defendant on the conclusion of plaintiff's case moved to dismiss the action and to vacate the lien on the ground among others that plaintiff had not completed his contract and for that reason was not entitled to a lien or to succeed in an action for the balance due.

The learned Judge delivered judgment as follows (after reciting the facts):—

JUDGE FINLAYSON:—There are so many important questions involved which I feel can only be settled by the Appeal Court that it is better for me to grant the motion than that the parties to the expense of a long trial and still be no further ahead. I cannot find that the act of the defendant on the 20th of July (refusing to admit a man sent by plaintiff to take stock of what was required to be done) was such that it can be construed into a refusal or prevention of plaintiff completing his contract, and that it is unreasonable for him to treat it as such, nor can it be held as sufficient reason for him not performing his contract. I do not find that there is any money due the plaintiff under the contract except the last instalment and this instalment is not due except on the completion of the contract, which he admits is not completed at this date. He cannot succeed on a quantum meruit. *Sherlock* v. *Powell*, 26 Ont. App. R. 407; *Kelly* v. *Tourist Hotel Co.*, 20 O.L.R. 267, 268. Mr. Justice Lister in the former case cites with approval the following from Hudson on Building Contracts, 2nd ed.:—

> When the contract is entered and the completion is a condition to payment, no English case has yet decided that any alleged substantial performance will enable the builder to recover unless there is some act of the employer, such as acceptance or prevention, or evidence from which a new contract can be implied to pay for the work as performed and according to value, although not completely finished.

I cannot find anything in these cases which helps the plaintiff. The other questions arising, such as the substitution of arbitrators for the architect on the contract and the objection

urged by Mr. Burchell, had better be dealt with by the Appeal Court. Mr. Burchell's motion will be granted.

The plaintiff appealed.

HALIFAX, January 9th, 1912.

J. J. Ritchie, K.C., for the appellant:—There must be a new trial because the trial Judge failed to find on all the points in the action. He cannot say, as he did in his judgment, "I will leave them for the Appeal Court rather than put the parties to the expense of a long trial." He must try all questions in the suit. Mechanics' Lien Act R.S.N.S. (1900) ch. 171, sec. 30. If a person's property is improved by the construction of a building thereon the law will give a lien for the materials used. *Einstein* v. *Jameson*, 95 Pa. State Reps. 403, 407. If a woman assents to a contract made by her husband and accepts the goods her personal estate is liable: *Bodey* v. *Thackeray*, 143 Pa. St. 171 and 175. If she does not take steps to prevent a contract made by her husband to improve her property her separate estate is liable: *Schwartz* v. *Saunders*, 46 Ill. 18; Phillips on Mechanics' Liens, 187, 188, 189. The rule in Ontario is different, but there a married woman could not contract: Holmested on Mechanics' Liens 9, 10; *Wagner* v. *Jefferson*, 37 U.C. Q.B. 551. According to the definition in the Mechanics' Lien Act (N.S.) "owner" would include "wife." The taking of promissory notes under sec. 25 does not waive the lien. We are not too late in point of time in filing our claim of lien because the contract is not yet completed: *Day* v. *Crown Grain Co.*, 39 Can. S.C.R. 258. Ross and his wife refused admission to plaintiff's men and thus prevented the completion of the contract.

C. J. Burchell, K.C., contra:—The trial Judge found that plaintiff did not complete his contract and was not prevented from completing it, and he was therefore not entitled to a lien. He decided the case on this point and was therefore not bound to decide all points in dispute. The appellant has no further rights under the Mechanics' Lien Act than he has under a contract: *Kelly* v. *Tourist Hotel Co.*, 20 O.L.R. 267. There was a settlement on February 13th, and the appellant, by taking notes which he negotiated, took them in payment of his claim. This period had expired on the 14th of June so that the lien, which was registered on July 26th was too late. When a note is given on a contract and is negotiated it destroys the lien: *Arbuthnot* v. *Winnipeg Manufacturing Co.*, 16 Man. R. 401; *National Supply Co.* v. *Horrobin*, 16 Man. R. 472; *Brooks-Sanford Co.* v. *Tellier Construction Co.*, 22 O.L.R. 176, 183. A lien cannot be filed against the wife. The contract is under seal and all the work was done on the credit of Ross who was the only

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one on the notes. Mere knowledge or consent is not enough to give rise to a lien. There must be a contract: *Geering* v. *Robinson*, 27 Ont. App. R. 364; *Slattery* v. *Lillis*, 10 O.L.R. 697; *Graham* v. *Williams*, 9 O.R. 458; *Wagner* v. *Jefferson*, 37 U.C.Q.B. 554. The barn and fence were not extras; they were separate contracts: Hudson on Building Contracts, 348; *Watson* v. *O'Beirne*, 7 U.C.Q.B. 345.

Ritchie, K.C., replied.

SIR CHARLES TOWNSHEND, C.J.:—The learned counsel for plaintiff contended that there must in any case be a new trial here as the County Court Judge had not decided several questions but dealt with the case as stated in his decision as follows:—

> There are so many important questions involved which I feel can only be settled by the Appeal Court that I think it is better for me to grant the motion than put the parties to the expense of a long trial and still be no further ahead.

Again he says:—

> The other questions arising, such as the substitution of arbitrators for the architect on the contract and the objections urged by Mr. Burchell, had better be dealt with by the Appeal Court.

Now, with all respect, I feel compelled to state that the County Court Judge cannot adopt this course in any case which comes before him, and decidedly not in a proceeding under chapter 171 Mechanics' Lien Act.

It is clearly the duty of the Judge to hear and decide all issues and questions properly coming before him and necessary to the full determination of the matters in controversy, leaving it to the suitors to appeal to this Court or not as they may be advised. If it were otherwise the Judge below might force parties to appeal who were not prepared to bear the expense, or for other reasons did not wish to proceed with further litigation. By R.S.N.S. ch. 171, sec. 30 (1)* it is provided that he

*30 (1) After the delivery of the statement of defence, where the plaintiff's claim is disputed, or after the time for delivery of defence in all other cases, where it is desired to try the action otherwise than at the ordinary sittings of the Court, either party may apply to a Judge who has power to try the action to fix a day for the trial thereof, and the Judge shall make an appointment fixing the day and place of trial, and on the day appointed, or on such other day to which the trial is adjourned, shall proceed to try the action and all questions which arise therein, or which are necessary to be tried to fully 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 at the trial shall take all accounts, make all inquiries and give all directions, and do all things necessary to try and otherwise finally dispose of the action, and of all matters, questions and accounts arising in the action, or at the trial, and to adjust the rights and liabilities of, and give all necessary relief to, all parties to the action, or who have been served with the notice of trial, and shall embody all results in the judgment (Form K).

shall appoint a day for the trial and "shall proceed to try the action and all questions which arise therein, or which are necessary to be tried to fully dispose of the action, etc., etc."

Under this clause it seems to me to be sufficient if he tries and disposes of all questions which are necessary to be tried to enable him to dispose of the action.

In this case the Judge below, although referring, as I have already remarked, many questions to the Court of Appeal, has himself decided a question which, if right, necessarily disposes of the whole action, and makes it quite unnecessary for this Court to deal with the other questions not properly before us.

He says:—

> I cannot find that the act of the defendant on the 20th July was such that it can be construed into a refusal or prevention of plaintiff completing his contract, and that it is unreasonable for him to treat it as such; nor can it be held as sufficient reason for him not performing his contract. I do not find that there is any money due the plaintiff under the contract except the last instalment, and this instalment is not due except on the completion of the contract, which he admits is not completed up to this date.

This finding is conclusive against plaintiff's action, unless it can be successfully attacked. The plaintiff, in his direct examination, admits that the contract was not completed, the worth of which he estimates to be between $40 and $50.

Now there is nothing more clearly settled that the principle laid down in Hudson on Building Contracts, cited in the decision below, that completion of the contract is a condition precedent of the right to recover, and that no allegation or proof of substantial performance suffices, unless the contractor can shew that this condition was waived by some act of the employer, or some evidence by which a new contract can be implied to pay for the work performed according to value. That is what the plaintiff has attempted to do here by evidence that he was prevented from completing his contract by the defendant.

After a careful perusal of the evidence and the correspondence between plaintiff's and defendant's solicitors I agree in the conclusion arrived at by the Judge of the County Court. There was at no time any waiver by the defendant of his right to have the building completed and I think, after all that took place in regard to arbitrating as to what should still be done, there was no genuine attempt on the part of the plaintiff to complete it and no interference on the part of the defendant.

This appeal should be dismissed with costs.

As a matter of course I have not dealt with the other questions discussed at the argument, for two reasons. 1st. The questions do not come properly before us, the Judge below not having decided any of them. 2nd. If all were decided favour-

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ably to the plaintiff it would not help him in any way in the view taken of the contract not being completed.

DRYSDALE, and MEAGHER, JJ., concurred.

Appeal dismissed.

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Jan. 10.

PATTERSON v. NEILL.

Ontario High Court, Middleton, J., in Chambers. January 10, 1912.

1. DISCOVERY AND INSPECTION (§ I—1)—DEPOSITIONS AND EXAMINATION—COUNTERCLAIM AS A DEFENCE.

Where the pleadings shew that there is no defence to the principal action except by way of counterclaim, the defendant is not entitled to be relieved from making discovery pending the disposal of the counterclaim.

2. DEPOSITIONS (§ II—8)—SCOPE OF EXAMINATION FOR DISCOVERY—POSTPONING INTERROGATORIES RELATING ONLY TO CONSEQUENTIAL RELIEF—ONT. CON. RULE 472.

An order may be made under Ontario Consolidated Rule 472 to withhold the right of discovery upon oath from the opposite party in respect of matters which relate only to consequential relief to be given in the event of the plaintiff succeeding on the main issue if the enforcement of discovery before the trial of that issue would be of an oppressive character.

APPEAL by the plaintiff from an order of the Master in Chambers dismissing the plaintiff's motion for an order requiring the defendant Mills to attend for re-examination for discovery and to answer certain questions which he refused, upon the advice of counsel, to answer when examined.

The Master was of opinion that the discovery sought was not relevant to the main issue, but only applicable to the consequential relief sought, and was, therefore, properly withheld.

The appeal was allowed as it now appeared that the real defence was by way of counterclaim only.

A. R. Clute, for plaintiff.

C. M. Garvey, for defendant Mills.

MIDDLETON, J.:—The questions argued on this motion are of importance; and, while the general rule is free from difficulty, its application to particular cases is not by any means easy.

At one time in the Court of Chancery discovery was granted in the widest possible way. For the purpose of discovery, the allegations in the bill were assumed to be true, and discovery upon that footing followed as a matter of right. What is now Con. Rule 472 was passed to remedy a situation found to be intolerable; and this Rule gives the right to withhold discovery until after any issue or question of right shall have been determined. This power is quite distinct from the right to direct one question or issue to be tried before the others, and may be

exercised when there has been an order under Con. Rule 531, or where, from the nature of the case, it is clear that the issue as to which discovery is sought is one which will not be dealt with at the hearing. Where there is a clear preliminary issue to be determined, discovery ought not to be allowed of matters which only become material if the issue is found in the plaintiff's favour, if the granting of such discovery at an early stage can be deemed to be oppressive. When the discovery, even though it may be regarded as consequential, is not oppressive, the discretion given by this Rule ought not to be used to withhold the information sought.

The Chancery practice was justified by three reasons of substance and weight: (1) that the postponement might cause the loss of the information altogether, by reason of death or inevitable accident; (2) that the obtaining of the information before that might enable a plaintiff to obtain an immediate final adjudication of his rights without a reference; (3) that the plaintiff ought to know the true state of accounts, etc., as this will enable him to see exactly what is really involved in the litigation, and will enable him to act in the light of this knowledge. See cases collected in Bray on Discovery, p. 28. These reasons have not lost their weight, and must be considered when the provisions of this Rule are invoked.

Bedell v. *Ryckman*, 5 O.L.R. 670, is an instance of the class of cases in which discovery as to accounts should be withheld; it differs widely from this case, but is valuable as an exposition of the principle and a summary of the cases.

Here a scrutiny of the pleadings shews that there is really no defence. A good counterclaim is set up; and, if what is stated can be proved, the defendants may well be entitled to be allowed against any sum for which they may be accountable the sums which they have been compelled to pay and the loss they have sustained.

I cannot see any preliminary issue to try, nor can I see that the discovery sought imposes any hardship on the defendants in any way. Beyond this, the reasons for the Chancery rule seem to me cogent.

I hesitate much before interfering with the exercise of discretion by an experienced Master, but I have had a conference with him, and he tells me that he had not apprehended the situation as it has been now developed.

For these reasons, I think the appeal should be allowed and the motion granted, and an order should be made for examination on the lines suggested. Costs to the plaintiff in any event.

Order for further discovery.

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Jan. 17.

CARON v. BANNERMAN.

Manitoba King's Bench, Prendergast, J. January 17, 1912.

1. COURTS (§ I A)—INHERENT POWERS AND JURISDICTION—RELIEF AGAINST DEFAULT IN COURT PROCEEDINGS.

The Court has inherent power to grant relief against any manifest hardship in respect of proceedings taken upon default where the default was accidental and without blame on the part of the person seeking to set aside the adjudication made in his absence.

2. COSTS (§ II 20)—TAXATION—CERTIFICATE SETTLED ON EX PARTE HEARING—RELIEF AGAINST DEFAULT.

Where the party entitled to oppose a taxation was not represented because of the sudden illness of his solicitor and the taxation proceeded ex parte and a certificate was issued, the Court may invoke its inherent jurisdiction upon an appeal from the taxation to vacate the certificate and extend the time for filing objections, so as to conform to a general order of Court which limits such appeals to items concerning which objections were filed before the close of the taxation.

THE plaintiff, Lister, agreed to sell land to the defendant who filed a caveat. Lister then brought this action to set aside the caveat. Defendant counterclaimed for specific performance. During the progress of the action Lister was committed to a hospital for the insane, and Caron, the inspector of public institutions, was appointed committee of his estate and made a plaintiff.

The action was tried before Metcalfe, J., who dismissed same with costs and gave judgment for the defendant on his counterclaim (19 W.L.R. 182).

Subsequently a motion was made on behalf of the plaintiff by way of appeal from the certificate of the taxing officer and the taxation of the costs of the defendant under the judgment herein against the following items:—

Fee advising on evidence	$ 10.00
Fee advising on evidence, Mr. O'Connor	10.00
Paid Monkman witness fee, additional	28.90
Bell witness fee, additional	100.00
Paid Dr. Bruce Smith, expenses from and to Toronto, hotel bill and alienist fee of $100.00 per day from date of leaving Toronto until return there	1,524.00
Paid G. H. Walker, fee	10.00

and against the taxation of fee of $600.00 for the defendant's costs or for an order directing the said taxing officer to review the said taxation and giving leave to the plaintiff to bring in objections to the said taxation or for an order disallowing the items above referred to, and directing the taxing officer to alter his certificate of taxation in accordance therewith or for such further or other order as to the Court might seem just on the following grounds:—

(1) That the taxing officer should not have allowed two items for ten dollars each, for advising on evidence and that the taxing officer had no power to allow any greater fee than five dollars.

(2) On the ground that the additional witness fee paid to Monkman, Bell, Dr. Bruce Smith and G. H. Walker should not have been allowed, or if allowed, are excessive and unreasonable.

(3) On the ground that the taxing officer should not have allowed a fee of three hundred dollars for the costs of defence and a further fee of three hundred dollars for costs of counterclaim.

H. Phillipps, for plaintiff.
J. E. O'Connor, for defendant.

PRENDERGAST, J.:—The solicitor for plaintiff was seized with a most sudden and very grave attack of illness, whereby he was rendered unable to either attend personally on taxation of the costs of the opposite party or advise anyone in his office of the same.

The taxation was proceeded with. Of course, no objection to the same could be taken on behalf of plaintiff under Rule 968, and a certificate of taxation was consequently issued.

The matter was then brought before me on plaintiff's behalf, on notice of motion by way of appeal as to certain items of the taxation.

This is a very exceptional case and one which may result in a great hardship, and I think the plaintiff should have relief if at all possible.

There is no special rule provided under which that relief can be granted. But the inherent powers of the Court to grant relief for any manifest hardship due to circumstances for which the party is in no way responsible, and over which he had no control whatsoever, are surely wide enough to meet such a case as this.

The question is: what form should this relief take?

I do not think I should entertain the appeal in the sense of reviewing the taxation on the merits. I should not disregard in this respect, even in this case, the well established rule of practice (Holmested & Langton, p. 1396, and *Snowden* v. *Huntington*, 12 Pr. R. 248) that there can be no appeal except as to such items of taxation as are objected to in the manner provided by Rule 965,—and no such objections were taken.

It will be in order, in my opinion—without imputing any irregularity in the taxation proceedings (and in fact such proceedings are shewn to have been perfectly regular) but owing to the very special circumstances—to vacate the certificate issued which stands in the way of the plaintiff now taking his objections, and to allow him time to take the same in proper form.

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The certificate of taxation will be vacated, and the plaintiff will have three days to formulate his objections under said rule, the same to be limited to such items as are set out in the notice of motion.

There will be no costs of the present application.

Certificate of taxation vacated.

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Jan. 3.

MANN v. FITZGERALD.

Ontario High Court. Trial before Middleton, J. January 3, 1912.

1. EJECTMENT (§ II A—15)—DISPUTED BOUNDARY—ADVERSE POSSESSION —NO PAPER TITLE.

On the trial of an action of ejectment in respect of a parcel of land claimed by two adjoining owners, if neither of them has any paper title to the disputed land, the action will be dismissed, notwithstanding proof that plaintiff had placed a tent on the land and was ousted by the defendant, if it appears that such was the only act of possession by the plaintiff and that the lands were not enclosed and that the defendant had at intervals exercised acts of possession equally adverse as to the plaintiff.

[See also the Annotation at end of this case.]

TRIAL of an action of ejectment, to recover a parcel of land known as Deihl's point, a peninsula extending into Cameron Lake, physically connected with lot No. 26, 10th concession, Fenelon, but lying in front of lot 25.

The action was dismissed.

Messrs. *E. D. Armour*, K.C., and *A. D. Armour*, for plaintiffs.
Messrs. *R. J. McLaughlin*, K.C., and *J. A. Peel*, for defendant.

MIDDLETON, J.:—Fenelon was surveyed in 1824, by James Kirkpatrick, and his instructions called for a traverse of all lakes in the township. His plan shews that the shores of the lake were very inaccurately surveyed, as the peninsula in question is not shewn at all.

There is an allowance for road between lots 25 and 26, and this, if extended across the bay behind the peninsula, will cross it at a narrow portage.

On the 31st March, 1825, the Crown patented lot 25 to Kirkpatrick (the surveyor), giving the waters of Cameron Lake as the west boundary of the lot. This, I think, is the east side of the bay, and does not include the peninsula.

On the 27th September, 1839, the Crown patented lot 26. The north boundary is described as running to Cameron Lake, thence southerly, westerly, and southerly to the southern limit of said broken lot 26, otherwise to the allowance for road between broken lots 26 and 25. This is very easy to understand when the

plan of 1824 is looked at, but it is difficult to apply to the actual survey.

The plaintiffs contend that the water line must be followed quite regardless of directions, and thus the whole peninsula is included.

I think the more natural thing to do is to follow the water's edge to where the road allowance, extended across the bay, intersects the shores of Cameron Lake at the western side of this peninsula, and then turn easterly.

The effect of this is, that this peninsula, situate in front of lot 25, and partly in concession 9 and partly in concession 10, is not patented.

The owners of lots 25 and 26 always assumed that this road allowance should be continued across this bay, and that the portage across the isthmus, where the extended road would cross it, formed the true boundary between lots 25 and 26. In 1868, they had this line run to enable timber to be cut and removed, upon the assumption that this was the true boundary; and from that time down to the present the owners of these lots, by word and conduct, have always treated this as the established line between the two lots.

The point in front of lot 25 has long been known as Deihl's point, from the fact that in 1833 Kirkpatrick sold this lot to one Peter Deihl, and from that time on Deihl and his grantees have used this point as though it was their own. There has not been any enclosure or physical occupation of the point; the land was not suited for cultivation; but the use has been just such as would be expected had this been, as it was assumed to be, part of 25.

This assumption of ownership was acquiesced in, in the fullest manner, by the owner of lot 26 from time to time; and, when the owner of lot 26 sold the water front of that lot, he recognised the portage as the boundary of his lot.

The plaintiffs claim title under a conveyance made by Eades on the 9th October, 1909. Eades had, he thought, conveyed his whole water front, and had no idea that he had any claim to this point, and intended selling the rear part of the land only.

The conveyance, as prepared by the purchasers' solicitor, covered "all those parts of 26 in the 10th concession, Fenelon, not heretofore sold and conveyed by metes and bounds by conveyances duly registered." This description is quite adequate to carry Deihl's point if it formed part of lot 26, and if the title was vested in Eades; even though he was quite ignorant of the fact, this deed would convey to the plaintiffs. The plaintiffs may have perpetrated a fraud upon Eades in obtaining his signature to this deed, but he alone can complain of the fraud, and this cannot aid the defendant, even if proved.

Taking the view I do as to what passed by the patent, I do

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not think that the plaintiffs have any paper title to the lands in question. Nor has the defendant any title.

Mr. Armour argues that, this being the case, the plaintiffs must succeed, because they took possession of the land and were ousted.

No doubt, possession implies ownership and casts upon one who seeks to disturb possession the onus of shewing title in himself. The kind of possession interfered with is a matter of importance. Here it was the mere placing of a tent on this sandy point. The defendant has shewn a better title; he has shewn the same kind or a better kind of possession, extending over many years, and that the persons through whom the plaintiffs purport to claim title have acknowledged his claim. All this would be of little value if the plaintiffs had a conveyance and were entitled to the protection of the Registry Act; but it seems to me of the greatest value when the contest is treated as one between two parties neither of whom has the paper title.

If I am right in assuming that the title is still in the Crown, no doubt, on the facts being placed before the Minister, he will direct a patent to issue to the defendant. There can be no doubt, upon the evidence as placed before me, that the defendant's claim has been recognised for many years, and the plaintiffs are seeking to avail themselves of a dishonest advantage in the way the deed from Eades to them is drawn. Eades, as I have said, did not intend to sell this parcel, and would not have done anything to interfere with Fitzgerald's position. I do not think the form of the description was, at the time, intended to be tricky, but the plaintiffs now seek to avail themselves of the situation created, and to acquire this point without paying for it. This land is said to be worth $1,000 as a site for a summer residence. Action dismissed with costs.

Action dismissed.

Annotation

Ejectment

Annotation—Ejectment (§ II A—15)—Ejectment as between trespassers upon unpatented land—Effect of priority of possessory acts under colour of title.

Isolated acts of trespass will not bar the true owner. *Allison* v. *Rednor*, 14 U.C.R. 459; *Young* v. *Elliott*, 23 U.C.R. 420. The length of time during which each act of trespass continues is a matter of degree only and not of principle. The usurper's possession, which is wrongful, both in its inception and continuance, is not to be extended by construction beyond its actual duration. Armour on Titles, 3rd ed., page 304. The possession of the intruder, ineffectual for the purpose of transferring title, ceases upon its abandonment to be effectual for any purpose. *Trustees, Executors and Agency Co.* v. *Short*, 13 App. Cas., at p. 798.

If an intruder voluntarily abandons the land, which being vacant, is taken possession of by a second intruder, the latter may retain possession as against every one but the holder of the paper title until that has

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Annotation

Ejectment

Annotation (*continued*)—Ejectment (§ II A—15)—Ejectment as between trespassers upon unpatented land—Effect of priority of possessory acts under colour of title.

been extinguished. Armour on Titles, 3rd ed., page 307. But if the first trespasser is *dispossessed* by a subsequent one, the possession of the first is a sufficient title upon which to maintain ejectment against his disseisor. *Asher* v. *Whitlock*, L.R. 1 Q.B. 1.

In an action in Nova Scotia for trespass to woodland by cutting, it appeared that both plaintiff and defendant claimed under deeds of the locus, from the same original grantor, but that plaintiff's title was prior in point of time. Defendant detailed isolated acts of cutting in various years, many of them matters of small moment, which may have been unknown to the real owner, and also gave evidence to shew that he had at times turned his cattle out to roam and feed in the woods. It was held, that the acts shewn were insufficient to establish such actual or constructive possession as to bar plaintiff's claim, and that defendant could not escape liability for the cutting by an alleged sale of the land to a third person, it appearing that such sale was not a bona fide transaction, but a scheme to avoid liability, and that the real transaction was an authority from defendant to do the cutting. *Grue* v. *Davidson*, 43 N.S.R. 242.

The fact of the defendant being what is technically called tenant in possession, of itself amounts to primâ facie proof that he is seised in fee, or otherwise legally entitled to the possession, until the contrary is proved. To such an extent does this doctrine obtain that it has been held in numerous cases that, even if it appear by the evidence that neither party is entitled to possession, but that the right is vested in some third person, not a party to the record, the defendant is entitled to the verdict, per Sullivan, C.J., in *Gaudet* v. *Hayes*, 3 E.L.R. 152. See *Doe d. Wawn* v. *Horn*, 3 M. & W. 333; *Cully* v. *Doe d. Taylerson*, 11 A. & E. 1008; *Doe d. Lloyd* v. *Passingham*, 6 B. & C. 305.

The plaintiff must remove every possibility of title in another before he can recover, no presumption being admitted against the person in possession. *Gaudet* v. *Hayes* (1906), 3 E.L.R. 152, 153 (P.E.I.); *Richards* v. *Richards*, 15 East 294(n).

A squatter upon Crown land, which he has partly cleared, and upon which he had built a house, gave a registered mortgage of it in 1874, for value, and in 1881 conveyed the equity of redemption by registered deed to the mortgagee, remaining in occupation of the land as tenant. In 1898 a son of the squatter, having no knowledge of the mortgage or deed, or that his father occupied the land as tenant, obtained a grant of the land from the Crown. It was held that he should not be declared a trustee of the land for the purchaser from the father. Semble, that sec. 69 of the Registry Act, 57 Vict. ch. 20 (C.S.N.B., 1903, ch. 151, sec. 66), by which it is provided that "the registration of any instrument under this Act shall constitute notice of the instrument to all persons claiming any interest in the lands subsequent to such registration," does not apply to an instrument not properly on the registry, such as a conveyance of Crown land by a squatter. *Robin* v. *Theriault*, 3 N.B. Eq. 14.

Adverse possession to cut down a documentary title of a defined lot must be made out clearly and satisfactorily, and must be open and exclusive of some definite part or of the whole; and evidence of acts of cutting hay and planting crops on parts of the lot, the location of which

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Annotation

Ejectment

Annotation (*continued*)—Ejectment (§ II A—15)—Ejectment as between trespassers upon unpatented land—Effect of priority of possessory acts under colour of title.

are not so defined as to make it possible to adjudge their position or boundaries, amount only to acts of trespass. *Cairns* v. *Horsman*, 35 N.B.R. 436.

The possession necessary to entitle a plaintiff to maintain a possessory action in the Province of Quebec must be continuous and uninterrupted, peaceable, public and as proprietor, for the whole period of a year and a day immediately preceding the disturbance complained of. *Couture* v. *Couture*, 34 Can. S.C.R. 716.

In an action of ejectment it appeared that the land belonged to the Crown, and was in peaceable possession of its grantee, the defendant, but that the plaintiff and his predecessors in title had enjoyed uninterrupted occupation thereof for a period of fifty-six years down to a date about seven years prior to the date of action. Held, that judgment was rightly entered for the defendant. Occupation against the Crown for any period less than the sixty years required by the Nullum Tempus Act is of no avail against the title and legal possession of the Crown, and still less against its grantee in actual possession. The Act 21 Jac. I. ch. 14, only regulates procedure, and its effect is that if any information of intrusion is filed and the Crown has been out of possession for twenty years, the defendant is allowed to retain possession till the Crown has established its title. Where no information has been filed, there is nothing to prevent the Crown or its grantee from making a peacable entry and then holding possession by virtue of title. Decisions by Courts of New Brunswick and Nova Scotia to the effect that when the Crown has been out of actual possession for twenty years it could not make a grant until it had first established its title by information of intrusion, overruled. (Decision in *Maddison* v. *Emmerson*, 34 Can. S.C.R. 533, affirmed.) *Emmerson* v. *Maddison*, [1906] A.C. 569.

In a recent Ontario case the acts relied on in support of a claim to title by possession were that the claimant had sold the timber off the land in question; had afterwards cleared it and had sowed and harvested one crop of wheat; had then for some years taken hay from it; and had then used it as pasture land. The land was not wholly enclosed, one end being bounded by a marsh, and through this marsh cattle could and did stray into it. It was held that there had not been such possession as is necessary to bar the right of the true owner. *McIntyre* v. *Thompson*, 1 O.L.R. 163 (C.A.).

A party asserting a title to land by adverse possession should prove it most clearly and, although there is no statutory requirement that the evidence of such party and members of his family must be corroborated, it would be unsafe, unless such evidence appears to be correct beyond reasonable doubt, to hold that a title by possession has been gained in the absence of strong additional evidence by disinterested witnesses. When a husband and wife are living together, the possession of any property on which they are living or which is occupied by them must ordinarily be attributed to the husband as the head of the family, and the wife cannot acquire title to the property for herself by length of possession under the Real Property Limitation Act, R.S.M. 1902, ch. 100. *Callaway* v. *Platt*, 17 Man. R. 485.

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Annotation

Ejectment

Annotation (*continued*)—Ejectment (§ II A—15)—Ejectment as between trespassers upon unpatented land—Effect of priority of possessory acts under colour of title.

In Manitoba it is held, following *Buckham* v. *Stewart* (1897), 11 Man. R. 625, and *Trustees* v. *Short* (1888), 13 A.C. 793, that occasional entries upon the land by a relative of the defendant for the purpose of cutting hay for several years after the defendant had left the land vacant, had not the effect of continuing his actual possession beyond that time. *British Canadian Co.* v. *Farmer*, 15 Man. R. 593.

The possession of a part of land claimed under colour of title is constructive possession of the whole which may ripen into an indefeasible title if open, exclusive and continuous for the whole statutory period. Carrying on lumbering operations during successive winters with no acts of possession during the remainder of each year does not constitute continuous possession. And it is not exclusive where other parties lumbered on the land continuously or at intervals, during any portion of such period. *Wood* v. *LeBlanc*, 34 Can. S.C.R. 627; *Borden* v. *Jackson* (1910), 45 N.S.R. 81.

Evidence that defendant had cut timber on the lands in dispute for many years and also tapped maple trees for sugar, but had not fenced the land until within the statutory period, will not prove a title by possession as against the paper title; such acts of ownership are mere trespasses. *Horton* v. *Casey* (1893), 22 Can. S.C.R. 739; and see *McConaghy* v. *Denmark*, 4 Can. S.C.R. 609.

In a Nova Scotia case McL., by his will, devised sixty acres of land to his son charged with the maintenance of his widow and daughter. Shortly afterwards the son with the widow and other heirs conveyed away four of the sixty acres and nearly thirty years later they were deeded to McD. Under a judgment against the executors of McL. the sixty acres were sold by the sheriff and fifty including the said four were conveyed by the purchaser to McL.'s son. The sheriff's sale was illegal under the Nova Scotia law. The son lived on the fifty acres for a time and then went to the United States, leaving his mother and sister in occupation until he returned twenty years later. During this time he occasionally cut hay on the four acres, which were only partly enclosed, and let his cattle pasture on it. In an action for a declaration of title to the four acres, held, that the occupation by the son under colour of title of the fifty acres was not constructive possession of the four which he had conveyed away and his alleged acts of ownership over which were merely intermittent acts of trespass. (*McDonald* v. *McIsaac*, 38 N.S.R. 163, affirmed.) *McIsaac* v. *McDonald*, 37 Can. S.C.R. 157.

The declarations of one in adverse possession made on the premises while in occupation, importing a claim of a statutory title in himself are admissible in an action of ejectment against his representative to support the presumption of title from possession whether they are against interest or not and whether made before or after the statutory title accrued. *Randle* v. *McNeil*, 38 N.B.R. 406.

For American cases see Annotations in Vol. 22 L.R.A. (New Series), page 1100, and 10 L.R.A. (New Series) 404.

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THOMPSON v. BALDRY.

Manitoba King's Bench. Motion before Macdonald, J. January 8, 1912.

1. INJUNCTION (§ I A—14)—WHEN GRANTED—CONVENIENT REMEDY—PROBABLE IRREPARABLE INJURY NOT A PREREQUISITE.

The right to grant an injunction is not limited to cases in which irreparable mischief may otherwise result and in which the plaintiff could not be compensated in damages; and the transfer of a promissory note may be enjoined in an action for cancellation thereof if the Court is satisfied that it is just and convenient to grant the same.

[See Mackenzie's Yearly Practice (Eng.) 1912, pages 1258 et seq.; 6 Encyc. Laws of England, page 468.]

MOTION to continue until the trial an interim injunction restraining the defendants from negotiating or disposing of certain promissory notes, alleged to have been obtained from the plaintiff by fraud, and of which the plaintiff claimed the cancellation.

The injunction was ordered to be continued until trial.

Swift, for plaintiff.

Foley, for defendants.

MACDONALD, J.:—This is a motion to continue an injunction. The plaintiff alleges in his statement of claim that the promissory notes, the negotiation of which is sought to be restrained were made by the plaintiff and received by the defendants under representations made by the defendant George E. Baldry, which were falsely and wilfully made to induce the plaintiff to make said notes.

The statement of claim alleges certain matters which, if true, would entitle the plaintiff to a return and cancellation of said notes.

On the return of the motion it was urged by counsel for the defendants that this is a case in which, if plaintiff is wronged, he can be sufficiently compensated in damages and there is no evidence that the defendant is not a man of substance; that it is not a matter in which irreparable mischief may result if injunction not granted and that the affidavit in support of the motion is founded on belief without stating grounds of belief.

The plaintiff in his affidavit in support of his motion verifies the allegations contained in his statement of claim and this of itself is sufficient to entitle to an injunction.

The material in his affidavit to which objection is taken is in paragraph 6, where he says: "I verily believe and fear that unless an injunction be granted restraining the defendants from dealing with the remaining notes in the defendants' possession that the said defendant will negotiate the said notes," etc. The objection is that the grounds of his belief are not set forth, and the case of *In re Young* (1900), L.R. 2 Ch. D., p. 753, cited, but

I do not think that this case has any application here. Supposing we leave out his belief and he simply alleges fear of negotiation, it seems to me sufficient in a case of this kind.

There are cases, other than those in which irreparable mischief may result, in which injunctions may be granted, and even where the plaintiff might be compensated in damage, and I am of the opinion that this is one of them. The action, in part, is that the notes may be delivered up to the plaintiff and the injunction is ancillary to the action.

The defendant files an affidavit in opposing the motion denying the truth of the allegations contained in the plaintiff's statement of claim, but to give effect to this would be trying the case. I cannot see that any harm can come to the defendant by continuing the injunction until the trial, which trial, however, should be expedited.

Costs in the cause.

Injunction continued.

HELSON v. MORRISEY, FERNIE, and MICHEL RAILWAY CO.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, and Galliher, JJ.A. January 9, 1912.

1. RAILWAYS (§ II D 2—38)—TRAIN MOVING REVERSELY IN MAKING UP—WARNING—LOOKOUT—BRAKEMAN ON THE LAST CAR CONNECTED.

A number of railway cars which are connected and are forced backward by the concussion made in coupling will constitute a "train" before getting under way in a forward direction, and where there is a statutory obligation to station a brakeman on the last car of a train moving reversely, the railway must station the brakeman on the car last coupled, although the reverse motion is used only in the operation of taking on that car.

[*Hollinger* v. *C.P.R.*, 20 Ont. App. R. 244, 250, approved.]

APPEAL from the judgment at trial dismissing the plaintiff's action for damages because of the alleged negligent backing of cars without due warning.

The Court of Appeal ordered a new trial.

McTaggart, for appellant.

Messrs. *Davis*, K.C., and *M. A. Macdonald*, for respondents.

IRVING, J.A.:—In this case there must be a new trial. The provisions of sec. 100 of the Railway Act, 1897*, were not put before the learned Judge in his charge.

*The reference is to the Railway (B.C.) Act, R.S.B.C. 1897, ch. 163, applicable to railways under provincial and not federal authority, and sec. 100 is as follows:—

100. Whenever a train of cars is moving reversely in a city, town, or village, the locomotive being in the rear, the company shall station on the last car in the train a person who shall warn parties standing on or crossing the railway of the approach of such train under a penalty of one hundred dollars for any contravention of the above provisions.

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It was admitted that the place in which the act took place was a village. It therefore became the duty of the Judge to draw the attention of the jury to the rule laid down by the legislature under the above section, and give to them a definition of the word "train." What is a "train" is a question for the Court, and it may be that in giving that definition the Judge may trench, apparently, on the duty of the jury to deal with the facts.

An engine with its tender has been held in *Hollinger* v. *C.P.R.*, 21 Ont. R. 705, affirmed 20 A.R. 250, to be a train. Three trucks without an engine attached have been held to be a train: *Cox* v. *G.W.R. Co.* (1882), 9 Q.B.D. 106; and it seems to me that if a number of cars are connected and are forced backward by the concussion made in coupling, that they constitute a train.

It was argued that it would be unreasonable to expect that a man was to be stationed on the last of a number of cars about to be coupled up, and that a proper allowance ought to be made in order that the man who had been the rear brakesman to reach the new rear end of the train—or at any rate that until the newly coupled train got under way, that the section should not apply—that there should be a certain space allowed to be traversed by the end of the train ("running out the slack" it was called) before it became necessary to station a man at the end.

None of these arguments in my opinion should be allowed to whittle away the meaning of the language of the statute.

Then assuming that I am wrong and that it is permissible to "run out the slack" without a man being placed at the rear of the train, it should have been left to the jury—was the "train moving reversely" as a train, or was the accident the result of merely running out the slack?

There was one other portion of the judgment objected to. The learned Judge told the jury that if the plaintiff contributed by his own negligence, and that negligence on his part contributed to the negligence of defendant, then he cannot recover—p. 155. That, however, must be read with the portion at p. 149, where the learned Judge (compare *Jones* v. *Toronto & York R.W.*, 23 Ont. L.R. 331) pointed out that, although the plaintiff

The Railway Act, R.S.B.C. 1897, ch. 163, was repealed and a new statute known as the British Columbia Railway Act (1911), 1 Geo. V., ch. 44, substituted (March 1, 1911). The corresponding section of this new Act is sec. 191, which reads as follows:

> 191. Whenever in any city, town or village, any train is passing over or along a highway at rail-level and is not headed by an engine moving forward in the ordinary manner, the company shall station on that part of the train, or of the tender if that is in front, which is then foremost a person who shall warn persons standing on or crossing, or about to cross the track of such railway.

himself might have been guilty of negligence, yet if the defendants could have by taking ordinary care have avoided the mischief, then the plaintiff's negligence would be no defence.

It might have been plainer if the extract I have given from p. 149 had followed immediately after that taken from p. 155; but if this objection stood alone, I would not be in favour of granting a new trial.

MACDONALD, C.J.A., and GALLIHER, J.A., concur.

New trial ordered.

MILLER v. WINN.

Ontario High Court, J. S. Cartwright, K.C., Master in Chambers. January 3, 1912.

1. COSTS (§ I—14)—SECURITY FOR, BY NON-RESIDENT—FOREIGN CORPORATION WITH BRANCH IN JURISDICTION.

A foreign corporation with a branch office within the jurisdiction, will not be absolved from giving security for costs on bringing an action if its only asset immediately exigible under execution within the jurisdiction and apart from bills receivable, is the office furniture as to which the landlords' preferential lien might defeat any judgment which the defendant might secure for costs against it.

MOTION on behalf of the plaintiffs to set aside a præcipe order requiring the plaintiffs to give security for the defendant's costs and staying proceedings meanwhile.

S. G. Crowell, for plaintiffs.
T. N. Phelan, for defendants.

CARTWRIGHT, M.C.:—In the writ of summons the plaintiffs were said to "carry on business at New York, Toronto, and elsewhere," and they were also said by their solicitors to be "incorporated under the laws of the State of New York and to have been carrying on a large business in Ontario for some years, with head offices at Toronto." To a demand by the defendants' solicitors, dated the 22nd November, for a statement of the assets of the plaintiffs in this province, no reply was sent, and on the 11th December the defendants took out the order in question. The plaintiffs thereupon launched the present motion, supporting it only by the affidavit of a gentleman described therein as "Canadian manager of the plaintiffs," who described the plaintiffs' assets as consisting of their office furniture, worth $300, and accounts receivable of over $2,400, and of current contracts to over $3,500.

Upon this state of facts, which were not in any way in doubt, the defendants were entitled to have security. The plaintiffs were certainly a foreign corporation, and their residence was at New York, so far as such a plaintiff can have a residence. This

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was shewn by their having no substantial assets here—nothing immediately exigible in execution except the furniture, and on it the landlord would always have a preferential lien. If the plaintiffs were in as large a way of business as their Canadian manager asserted, it would be easy for them to comply with the order, and they could have no difficulty in giving the usual security, either by bond or payment into Court. Motion to vacate the order dismissed with costs to the defendants in the cause.

Security order stands.

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BANK OF TORONTO v. GRAHAM.

Saskatchewan Supreme Court, Regina Judicial District, Wetmore, C.J. January 17, 1912.

1. ASSIGNMENT (§ III—30)—CHOSE IN ACTION—NOTICE OF TRANSFER.

The notice of the transfer of a chose in action required to be given to the debtor in order to vest in the transferee a right of action in his own name under Saskatchewan laws (Con. Ord. 1898, ch. 41) is sufficient if the transfer is produced and shewn to the debtor, and the debtor is not protected by payments thereafter made to the transferor.

[See also vol. 1 Can. Ten Year Digest 605-612.]

2. ASSIGNMENT (§ III—30)—TRANSFER OF LIEN NOTE—PROVINCIAL LAW GOVERNING NOTICE.

The transfer of a "lien note" is subject to the provincial law dealing with assignments of choses in action and with the method of giving notice to the debtor that the transfer has been made.

[See also vol. 2 Can. Ten Year Digest 3427.]

DEFENDANT purchased a team of horses and gave the vendor a lien note. The vendor assigned the note to the plaintiff bank which forwarded it to their agent for collection. The bank's agent notified defendant that he held note for collection and of assignment endorsed thereon. Defendant subsequently paid the agent of the party to whom the lien note was originally given. It was held in an action by the bank that it was entitled to recover and that defendant having had notice of the transfer of the lien note was not protected by the payment made to the vendor of the horses.

H. V. Bigelow, for plaintiff.

L. H. Cumming, for defendant.

WETMORE, C.J.:—I find that the note sued on in this case was forwarded by the plaintiff to the Northern Crown Bank for collection; that the agent of that bank (Clancy) notified the defendant that he had received such note for collection, and that in response to such notice the defendant came to the last named bank and that Mr. Clancy shewed him the transfer or assignment of that note to the Bank of Toronto signed by Walter T. Ross the payee, and that he read it over and explained

it to him, and that therefore the defendant had full notice of the assignment. This took place before the note became due. Nevertheless, the defendant, with full notice of that assignment as stated, afterwards paid to Patterson $360 which Patterson, professing to act as the agent of Ross, received in full settlement of the note. I am of the opinion that under ch. 41 of the Consolidated Ordinances, 1898, that was sufficient notice to the defendant to entitle the plaintiff to hold him liable on the note. The cases cited by Mr. Cumming I do not consider applicable to the Saskatchewan Act. *The Imperial Bank* v. *Georges*, 12 W.L.R. 398,* was decided under the provisions of the Alberta statute, which provides that in order to entitle the assignee of a chose in action to sue under that Act he must give express notice in writing to the party liable to pay. That is so stated by Beck, J., in his judgment in that case, at p. 399.

In *Reynolds* v. *McPhalen*, 7 W.L.R. 380, the Manitoba statute there under consideration provided that the notice of assignment must be in writing although it does not provide by whom it must be given. *The Maple Leaf Rubber Co.* v. *Brodie*,† 18 Que. S.C. 352, is not in the library and therefore not available to me. It is mentioned, however, in 1 Digest Can. Case Law, p. 614, and I should judge from the reference made to it there that the Quebec Act directs that a mere sale or transfer of a debt does not invest the purchaser with a right of action against the debtor unless the transfer has been signified to the debtor and that the necessity of such signification is not removed by proof of the debtor's knowledge of such transfer. Just what is meant by "signification" I cannot state, but in the case now under consideration, signification if by that notice is meant, was not a mere matter of knowledge; it was brought right home to the defendant.

It is not necessary for me to decide that where the Act directs that notice in writing has to be given that that means that it has to be given by the transferee to the debtor. All that is necessary for me to state is that the Saskatchewan Ordinance does not require a notice in writing to be given.

My attention has been drawn to 4 Halsbury's Laws of England, p. 381. Now the English statute, which is sec. 25, clause 6 of the Judicature Act (1873), requires notice in writing to be given and provides that the right of action under this statute is not complete until such notice is given. With all respect to such a high authority as Lord Halsbury I have some doubts whether the cases that he cited in the note at p. 381 just bears out what the text contends for in the case of the English statute, but I do think that by analogy they bear out what I have held in respect to the Saskatchewan Ordinance, but I will go

**Imperial Bank* v. *Georges* (1909), 2 Alta. L.R. 386, trial before Beck, J.
†*Maple Leaf Rubber Co.* v. *Brodie*, 1 Can. Ten Year Dig. 606.

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further in this case. I find that, as a matter of fact, the manager of the plaintiff bank mailed the notice of the assignment to the defendant and that he received it. I do not find that from the mere fact of mailing but I find it from the fact, which I accept as true, that he admitted receiving the notice to Mr. Duncan, the manager. I am not as fully satisfied with respect to this fact as I am of the other fact of the assignment being shewn to him by Mr. Clancy, but the defendant has contradicted everybody; he contradicts every witness that has been brought by the plaintiff and he contradicts in some respects his own admission which he has signed, and his contradictions are of such a character that I feel unable to give him full credit. Although he denies ever getting this notice and denies admitting to Mr. Duncan that he did get it, I accept Mr. Duncan's statement under the character of the testimony which has been produced, and for these reasons I award judgment for the plaintiff for the amount of claim.

Judgment for plaintiff.

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Jan. 9.

CANADIAN FINANCIERS, LIMITED (plaintiffs) v. HONG WO (defendants).

British Columbia Court of Appeal, Macdonald, C.J.A., Irving and Galliher, JJ.A. January 9, 1912.

1. PRINCIPAL AND AGENT (§ III—36)—AGENT'S FRAUD OR WRONG—EFFECT ON RIGHT TO COMPENSATION.

An agent is not entitled to any remuneration in respect of a transaction in which he has been guilty of any misconduct or breach of faith towards his principal.

2. BROKERS (§ II B—11)—REAL ESTATE AGENTS—COLLUSION WITH OPPOSITE PARTY—COMMISSION.

If a real estate agent entrusted to find a purchaser of property directly or indirectly colludes with the purchaser and so acts in opposition to the interests of the principal, he is not entitled to any commission.

[*Andrews* v. *Ramsay*, [1903] 2 K.B. 635, applied; see also vol. 1, Halsbury's Laws of England, page 196, section 416.]

3. PRINCIPAL AND AGENT (§ II C—20)—PROFITS RECEIVED FROM AGENT'S UNAUTHORIZED FRAUD—LIABILITY OF PRINCIPAL TO REFUND.

A principal is bound to refund to the party with whom his agent contracted on his behalf any profit in the transaction represented by the money he has received through the fraud of his agent, whether the principal authorized the fraud or not.

[*Kettlewell* v. *Refuge Assurance Co.*, [1908] 1 K.B. 545, [1909] A.C. 243, applied.]

APPEAL by defendant from a judgment of the Supreme Court of British Columbia in favour of plaintiff corporation for commission as real estate agents upon an alleged contract of sale of defendant's lands.

The appeal was allowed and the action dismissed.

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CANADIAN FINANCIERS, LIMITED v. HONG WO.

Irving, J.A.

L. G. McPhillips, K.C., for appellant.
Sir Charles Hibbert Tupper, K.C., for respondent.

IRVING, J.A.:—The plaintiffs sue for a commission for selling the defendant's property. A defence raised is that the plaintiffs were guilty of a breach of their duty to the defendant in that they permitted a sale to be made to one of their clerks without informing the defendant of the identity of the purchaser.

The facts are very simple. The defendant entrusted his property to the plaintiffs for sale, the listing being done with Mr. Snyder, a clerk in the sales department of the company. A few days later Snyder brought to the defendant's house Mr. Smiley—a clerk in the audit department—and introduced him to the defendant as a gentleman recently arrived from England, who was anxious to buy some property. Hong Wo wanted $240 a foot frontage, but Smiley having been previously informed by Snyder that the property could be bought for $215 refused to pay so much. Then Snyder, without disclosing that he and Smiley were in the plaintiffs' office, and that Smiley had seen the listing, or that he (Snyder) had told Smiley the minimum figure at which Hong Wo would sell, took part in the discussion that was going on between the defendant and Smiley, and acting as well for the seller as the buyer, brought the parties together, with the result that Hong Wo agreed to accept from Smiley $215 a foot. The defendant afterwards refused to complete the sale to Smiley.

Under these circumstances are the plaintiffs entitled to recover their commission?

The plaintiffs are responsible for Snyder's misconduct—the act being within the scope of his authority. Besides it is well established that a principal (the plaintiffs) cannot retain a profit made by the fraud of their agent whether the principal authorised the fraud or not: *Kettlewell* v. *Refuge Assurance Co.*, [1908] 1 K.B. 545, 552.*

Then the rule of law applies that an agent is not entitled to any remuneration in respect of which he has been guilty of any misconduct or breach of faith: *Salomons* v. *Pender* (1865) 3 H. & C., p. 637, seems to me very much in point. There Martin, B., points out something that too many real estate agents seem to forget, that is, that the seller of an estate must be presumed to be desirous of obtaining as high a price as can fairly be obtained therefor; and the purchaser must equally be

*The reference is to the judgment of Buckley, L.J., in which the result is concurred in upon different grounds from those given by the other members of the English Court of Appeal. The decision of the Court was affirmed on a further appeal to the House of Lords, *Kettlewell* v. *Refuge Assurance Co.*, [1909] A.C. 243, the respondent not being called on and no reasons of judgment being given on the last appeal.

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presumed to desire to buy it for as low a price as he may. He states the rule to be this: "That if a man employed as agent becomes himself to any extent a principal, he thereby annihilates any right which he may have as agent. It is not a question of profit or not; the rule is the same whether the principal has been damnified or not.

In *Andrews* v. *Ramsay*, [1903] 2 K.B. 635, Lord Alverstone hits the nail on the head, at p. 638. A principal is entitled to an honest agent, and it is only the honest agent who is entitled to any commission.

In my opinion, if an agent directly or indirectly colludes with the other side, and so acts in opposition to the interests of the principal, he is not entitled to any commission. The same principle underlies the decision in *Hodson* v. *Deans*, [1903] 2 Ch. 647, where the sale by a mortgagee Friendly Society to one of its officers was set aside. I would allow the appeal.

MACDONALD, C.J.A., and GALLIHER, J.A., concurred.

Appeal allowed.

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Jan. 3.

CROWTHER v. TOWN OF COBOURG.

Ontario High Court. Trial before Middleton, J. January 3, 1912.

1. WATERS (§ II E—101)—POLLUTION BY SEWAGE—INFRINGEMENT OF RIPARIAN RIGHTS.

If a riparian owner or other person, not having acquired a prescriptive right to do so as against other riparian owners, prejudicially affects the condition of the water so as sensibly to injure the riparian owner lower down, he becomes liable to the latter in an action for damages and an injunction to restrain further pollution of the stream.

[See Garrett on Nuisances, 3rd ed. 1908, page 127.]

2. INJUNCTION (§ I F—58)—DRAINS AND SEWERS—INFRINGEMENT OF RIPARIAN RIGHTS.

The owner of land on the bank of a river can maintain an action to restrain the fouling of the water by municipal drainage works without shewing that the fouling is actually injurious to him, if it appears that there is a probability that in summer the stream would thereby be made dangerous to health.

[*Crossley* v. *Lightowler*, L.R. 2 Ch. 478, and *Young* v. *Bankier* [1893] A.C. 691, applied.]

TRIAL of action to restrain the defendants from draining sewage or offensive matter into a stream flowing through the plaintiff's land, and for damages.

H. M. East, for the plaintiff.

Messrs. *F. M. Field*, K.C., and *F. F. Hall*, for the defendants.

MIDDLETON, J.:—The plaintiff owns a large hotel. The hotel grounds extend on both side of a stream and pond, commonly called "Factory Creek." The defendants have recently con-

structed an 8-inch title drain, some 2,000 ft. long, along King street, with a branch on Stuart street, for the purpose of draining that part of the town west of the creek.

The by-law was passed in pursuance of a recommendation of the Local Board of Health, who, being "impressed with the unsanitary conditions" of that portion of the town to be drained, "recommend the council to construct what sewers are necessary to put the locality into sanitary condition." The drain directed to be constructed is by the by-law said "to be exclusively used for carrying off water from cellars, baths, and sinks."

The drain thus constructed empties into the creek a little south of King street.

Some nine houses are permitted to use this sewer or drain, and, in some instances at any rate, these houses are equipped with water-closets which discharge into the drain and the creek by its means.

I am inclined to think that it was always intended that this sewer should be used in this way. Unless it is to be so used, the requirement of the Local Board of Health is not being met. That Board did not desire a mere drain to carry away water from cellars, but required a sewer sufficient to place the district in a sanitary condition. And it seems to me that the council, from the outset, laboured under the mistaken idea that, so long as the by-law did not expressly permit the discharge of sewage, the individuals and not the municipality must answer to the plaintiff. The situation is, that the municipality bring by this drain this filth and deposit it in the stream. I do not think I am in any way concerned with how it reaches the drain—the municipality must take steps to protect the drain from wrongful use, if the use is wrongful, and cannot shift the burden upon the plaintiff.

In the last edition (1908) of Garrett on Nuisances, p. 127, the law is thus stated: "Whereas a riparian owner has, subject to the corresponding rights of his fellow riparian owners, the right to the temporary use of the water as it passes his land for the ordinary purposes of life, it cannot be suggested that he has any right, apart from prescription, as against other riparian owners, to pollute it in the smallest degree. It follows that, if a riparian owner or other person, not having acquired a prescriptive right to do so as against other riparian owners, prejudicially affects the condition of the water so as sensibly to injure the riparian owner lower down, the latter has his remedy by action."

In this case the defendants sought to shew that the amount of sewage discharged into this water at its normal flow would not create a nuisance, in the sense that it would not cause a noxious smell to arise or would not be apt to produce disease. I do not think there is at the present time any serious danger of the stream being so defiled as to become an offence to the eye or the

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nose, but there is nevertheless a danger, quite real and measurable, that in the hot summer months the stream may become, because of this defilement, a source both of annoyance and danger, and, in the event of disease in the houses draining into the stream, this danger might become very acute. I do not think the action is in any sense premature or unjustified, quite apart from the danger of prescriptive rights being acquired or the right to complain being lost by laches or acquiescence.

But, I think, the law places the plaintiff's rights upon a higher plane, and that the statement quoted from Garrett is justified by the cases. The defendants have "no right to pollute this stream in the smallest degree." I do not think they can call upon the plaintiff to enter into a discussion as to the degree of dilution up to which sewage is to be regarded as innocuous and beyond which it is dangerous.

It is said that, so long as no real harm is done the plaintiff, it would be a hardship to restrain the municipality from using this natural stream to convey the sewage to the lake; but this ignores the fact that the plaintiff's right to this stream is a property right, and the municipality have no right to take or destroy the property of an individual without compensation. Many an individual has had to suffer from a failure to recognise this elementary ethical principle, and the only difference in the case of a municipality is, that it is given the power to expropriate.

Young v. *Bankier*, [1893] A.C. 691, is a good illustration. According to the head-note, taken from the judgment of Lord Macnaghten: "Every riparian proprietor is entitled to have the natural water of the stream transmitted to him without sensible alteration in its character or quality. Any invasion of this right causing actual damage or calculated to found a claim which may ripen into an adverse right entitles the party injured to the intervention of the Court." What was there done was to discharge water pumped from a mine into a soft water stream. The added water was pure, but hard in quality, and made the water of the stream hard. This shews that nuisance or no nuisance is not the question, but the right to the water in its natural condition.

The same view was taken in *Attorney-General* v. *Corporation of Birmingham*, 4 K. & J. 528, where Sir W. Page Wood, V.-C., said of the plaintiff (p. 540): "He has a clear right to enjoy the river which before the defendants' operations flowed unpolluted—or at all events so far unpolluted that fish could live in the stream and cattle would drink of it—through his grounds for three miles and upwards, in exactly the same condition in which it flowed formerly."

This case also affords an answer to the objection that it will be a serious thing to deprive those now using this drain of this

means of getting rid of their drainage. As put in the head-note: "In deciding on the right of a single proprietor to an injunction to restrain such interference, the circumstance that a vast population will suffer (e.g., by remaining undrained), unless his rights are invaded, is one which this Court cannot take into consideration." As said by Lindley, M.R., in *Roberts* v. *Gwyrfai District Council*, [1899] 2 Ch. D. 608: "I know of no duty of the Court which it is more important to observe and no power of the Court which it is more important to enforce than its power, of keeping public bodies within their rights. The moment public bodies exceed their rights, they do so to the injury and oppression of private individuals, and those persons are entitled to be protected from injury arising from the operations of public bodies."

The earlier case of *Embrey* v. *Owen*, 6 Ex. 353, places the plaintiff's right upon the same high plane. Parke, B., says, p. 369: "The right to have the stream flow in its natural state, without diminution or alteration, is an incident to the property in the land through which it passes." And (p. 368): "Actual perceptible damage is not indispensable as the foundation of an action. It is sufficient to shew the violation of a right, in which case the law will presume damage."

To the same effect is *Crossley* v. *Lightowler*, L.R. 2 Ch. 478. As stated in the head-note, this case determines that "the owner of lands on the banks of a river can maintain a suit to restrain the fouling of the water of the river without shewing that the fouling is actually injurious to him." See also *Wood* v. *Waud*, 3 Ex. 748.

I have dealt with the case as though the town was a riparian proprietor. No doubt, it is in one sense, as the stream crosses King street, but what is complained of is, the bringing of filth from the lands of those who are not riparian proprietors and depositing this in the stream. No riparian proprietor could justify this: *Ormerod* v. *Todmorden Joint Stock Mill Co.*, 11 Q.B.D. 155.

Then it is said others foul this stream. This affords no answer: *Crossley* v. *Lightowler*, L.R. 2 Ch. 478. No case was made on the evidence for more than nominal damages, so I award $1 damages and an injunction restraining the defendants from in any way polluting the stream in question by discharging or permitting to be discharged through the drain in question any sewage or other foul or noxious matter.

The defendants must also pay the costs.

Injunction ordered.

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Jan. 8.

GULLIVAN v. STREVEL.

Manitoba King's Bench. Trial before Macdonald, J. January 8, 1912.

1. WITNESS (§ III—50)—DISCREDITING FROM DENIAL OF CONVERSATION—INTERESTED PARTY.

The denial by the defendant of a conversation which the trial Judge finds took place is not sufficient to set aside the defendant's evidence in favour of the plaintiffs in an action for commission on the sale of land, where such denial does not appear to have been made with intent wilfully to pervert the facts and might be attributable to the infirmities of age.

TRIAL of action brought by a real estate agent for commission in making an alleged sale of lands for the defendant. The agreement for sale had been signed by plaintiff on behalf of defendant but the defendant repudiated his authority.

The action was dismissed.

Messrs. *C. P. Fullerton*, and *H. N. Baker*, for plaintiff.

Messrs. *R. M. Dennistoun*, K.C., and *C. H. Locke*, for defendant.

MACDONALD, J.:—The plaintiff, a real estate agent, sues the defendant for commission on a sale of land.

The issue is purely one of facts and the evidence is most conflicting.

The defendant was the owner of property on the corner of Broadway and Donald Streets in the City of Winnipeg.

On the 7th November, 1911, the plaintiff and Samuel Dunn, a son-in-law of the defendant, discussed a sale of this property and as a result of this discussion the plaintiff wrote the defendant a letter (Ex. 1) enclosing a cheque for $500 deposit and offering $550 per foot Broadway frontage and also enclosed a receipt shewing the price and terms of purchase. This offer the defendant declined and returned the cheque through Mr. Dunn, who had brought it to her for the plaintiff. On the 11th November the plaintiff for the first time personally interviewed the defendant at her residence, her husband being present, and expressed surprise at her rejecting his offer after his conversation with Dunn. He then tried to induce her to sell, and after considerable discussion, states that he finally succeeded, and that she agreed to sell at $550 a foot and he was to have until Wednesday to close a sale.

On Monday, the 13th November, the plaintiff claims to have made a sale on the terms agreed upon with the defendant, and on that date wrote her a letter (Ex. 3) reciting what he claims were the terms of the sale and enclosing a cheque for $500 deposit on the purchase price.

He had previous to writing advised her over the telephone of having made the sale and the conversation over the telephone was, by a pre-arrangement between the plaintiff and his steno-

grapher, taken down by the latter; the object being to secure corroborative evidence. I fail, however, to see that this is corroborative. It may be, to some extent, corroborative of the plaintiff's evidence that he had the property for sale from the defendant, but it is not corroborative that he had it for sale at $550 a foot; on the contrary the defendant was and is very emphatic that the price was $60,500, and as there were not quite 110 feet, the price at which the plaintiff sold would fall upwards of five hundred dollars short of the $60,500.

The plaintiff affirms and the defendant denies an agreement to sell, and I am asked to hold that because the defendant denies the telephonic conversation referred to that she is unworthy of belief, and that the plaintiff's evidence should be accepted.

Had the plaintiff sold at $60,500, I would not hesitate to find in his favour. The telephone conversation mentioned, I am convinced, did take place, but it would surely be a harsh, and to my mind, an unwarrantable finding, that because of this error, attributable possibly to the infirmities of old age, to hold that the defendant wilfully perverted the facts.

There is then the evidence of the plaintiff against that of the defendant, the plaintiff corroborated to some extent by his stenographer, and the defendant corroborated to some extent by her husband. To entitle him to succeed, the plaintiff must make out the stronger case. He has not done so.

The action is dismissed with costs.

Action dismissed.

RE NAN SING.

British Columbia Supreme Court, Gregory, J. January 10, 1912.

WILL. (1 C—32)—REVOCATION BY DESTROYING—PRESUMPTION FROM NOT FINDING AFTER PROPER SEARCH.

Where the decedent is proved to have had his will in his own custody but after due search it cannot be found or otherwise accounted for at his death, it will be presumed that the decedent destroyed the will with the intention of revoking it.

[*Sugden* v. *St. Leonards*, L.R. 1 P.D. 154, applied. See also Theobald on Wills, 7th ed., page 91.]

MOTION for grant of probate of an alleged missing will of deceased on proof of its contents.

The motion was refused with leave to renew on additional material.

A. D. Crease, for the motion.

Mann, for the official guardian.

GREGORY, J.:—This is an application for probate of a last will. Although Mr. Crease has made a very careful and exhaustive argument in support of the application, I do not think I am justified in granting it on the material before me.

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There can be no doubt that the deceased sometime prior to his death made a will in the terms deposed to, but I am not satisfied either that a proper search has been made for it, or that it may not have been revoked by the testator.

In *Sugden* v. *Lord St. Leonards*, L.R. 1 P.D., 154, Sir J. Hannen at p. 195, says: "Where a will is shewn to have been in the custody of a testator, and is not found at his death, the presumption, in the absence of evidence to the contrary, is that the testator himself destroyed it."

At p. 217, when before the Court of Appeal, Cockburn, C.J., states the rule as follows:—

> Where a will is shewn to have been in the custody of a testator, and is not found at his death, the well-known presumption arises that the will has been destroyed by the testator for the purpose of revoking it.

And at p. 231, Jessel, M.R., deals with the presumption in the same way. Mr. Crease refers to *Finch* v. *Finch*, L.R. 1 P. & D., 371, as qualifying the application of the rule of law. If it does, I can only say that it was the decision of a single Judge, Sir J. P. Wilde, and was cited to the Court in *Sugden* v. *Lord St. Leonards*, L.R. 1 P.D. 154, which nevertheless stated the rule as above.

The will was admittedly at one time in the custody of the deceased. One Henry Thomas Boyd deposes that he was informed (he does not state by whom) that Abraham Barlow had sent the will to Kamloops for registration. Abraham Barlow himself, after stating that he drew the original will and made the copy offered for probate, adds: "to my knowledge said 'deed' was forwarded by mail to the registrar of deeds at Kamloops." And that is all the information I am given. Barlow does not even state that he forwarded the "deed" as he calls it. There is nothing to shew that it may not still be at the registry office in Kamloops, or that, there being no statutory provision for its registration or custody there, it was not returned to the deceased or to Barlow.

Mr. Crease has satisfied me that the declaration made by the deceased to his wife (now widow) is admissible, but, I think she should be produced before the Court so that she could be examined as to all that was said at the time by the deceased. All the affidavits are so brief that they are abrupt, and there is not that detailed information given which should be supplied on occasions of this kind. This arises no doubt from the fact that the solicitor has tried to save the estate the expense of a trip up the Cariboo Road, but I do not see how that can be avoided unless the parties are brought down, and I think that the more satisfactory course.

The application will be dismissed, but with leave to renew it any time that the additional material is available, and it will

not be necessary to renew it before me. But before this is done, there should be an affidavit filed shewing who would be interested in the estate in case of an intestacy, and all such persons should be notified of the application, the official guardian for any infants. If the official guardian thinks he is entitled to any costs on the present application he will have to apply to me for an order.

Motion refused with leave to renew.

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CANADIAN PACIFIC RAILWAY CO. (Appellant, defendant) v. **WALLER** (Respondent, plaintiff.)

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Quebec King's Bench (Appeal Side). Present:—Archambeault, C.J., Lavergne, Cross, and Gervais, JJ.

1. EVIDENCE (§ II E 6—180)—FALSE IMPRISONMENT AND MALICIOUS PROSECUTION—BURDEN OF PROOF—QUEBEC LAW.

In an action for damages resulting from false arrest the onus of proving that the complainant acted imprudently and without reasonable and probable cause in procuring such arrest lies upon the plaintiff.

2. MALICIOUS PROSECUTION (§ II B—17)—MALICE INFERRED—QUEBEC LAW.

The entire absence of reasonable and probable cause constitutes malice in law which entitles the plaintiff to recover damages.

3. MALICIOUS PROSECUTION (§ I—3)—RESPONSIBILITY FOR FAULT—QUEBEC LAW.

The principles of the French law as laid down in article 1053 of the Civil Code of the Province of Quebec and not the principles of the English law govern in such a case.

[*Copeland* v. *Leclerc* (1886), M.L.R. 22 B.R. 365, disapproved.]

4. EVIDENCE (§ X C—697)—PARTY'S OWN DECLARATION OR ADMISSION—ALLEGED ADMISSION AFTER ACQUITTAL AS EVIDENCE IN CIVIL ACTION FOR DAMAGES.

Evidence of an alleged incriminating admission said to have been made by the plaintiff, after his acquittal, is not admissible for the defence in an action for malicious prosecution in proof of reasonable and probable cause where the question of guilt is not in issue.

[Compare *Watt* v. *Clark*, 18 O.R. 602.]

THIS case was decided on an appeal to the Court of King's Bench by the company-defendant, from the judgment of the Superior Court for the district of Montreal (Greenshields, J.), rendered on the 14th of January, 1911, condemning the appellant to pay to George Waller, the plaintiff (respondent), the sum of $300 as damages for malicious prosecution and false arrest.

The facts of the case are fully set forth in the notes of Mr. Justice Greenshields who rendered the judgment appealed from on February 14th, 1911, which judgment was as follows:—

GREENSHIELDS, J.:—This is an action in damages for "malicious prosecution." The facts are free from difficulty.

The plaintiff for some three years had been in the employ of the company-defendant, as news agent, travelling on its trains, selling the goods of the defendant company to its passengers, under a commission agreement.

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Up to the happening of the events charged in the plaintiff's declaration, no complaint had ever been made against him. He had, apparently, enjoyed the confidence of his employers, and was from time to time, entrusted with their goods for the purpose of selling the same on the defendant company's trains.

On the morning of the 20th of November, 1909, the plaintiff was in the exercise of his duties, on one of the Eastern bound trains of the company-defendant, about two hours in time distant from the city of Ottawa. He was asleep in the smoking compartment of one of the day coaches composing the train. He was awakened by an Italian, who was a passenger and who could not speak English, but beckoned him to the forward part of the car. Going forward, the plaintiff was addressed by another Italian, who could speak English, saying that a pocket-book (wallet), containing a sum of about $120, had been lost or stolen from the person of the Italian who had called him to the front part of the car.

The Italian, acting as interpreter, said to the plaintiff, that his compatriot, who had lost the money, suspected him of having stolen it. The plaintiff at once denied any connection with the loss of the pocket-book and money in question, and, after some discussion, returned to the smoking compartment.

A short time afterwards the conductor in charge of the train, without being especially called, but passing through the car in the ordinary course of his duties, was told by the English-speaking Italian that either one or two Italians had lost their money, but, particularly, that one had lost a pocket-book containing about $120. On making enquiries, the conductor Parks was told that the Italians suspected the plaintiff, the news agent. In stating the grounds of their suspicion, they said they had been asleep, and waking up on two occasions had found the news agent seated in the seat opposite to them. Search was made for the pocket-book, but without success.

The plaintiff came into the car from the smoking compartment and asked the conductor what the trouble was. The conductor told him of the alleged loss and told him, at the same time, that he was suspected.

Then and there, the plaintiff invited the conductor to search his person; again denying any connection or knowledge of the loss. The conductor, rightly or wrongly, decided that he had no authority to make such search and refrained from doing so.

At the first opportunity, the conductor sent a telegram to the superintendent in Ottawa, which telegram is not before the Court, but which, he says, contained the information that a passenger (the Italian), claimed to have lost, or been robbed of his money, and that the news agent was suspected. On the arrival of the train at the Union Station in Ottawa, about four, or half past four in the morning, it was met by a special constable of the company-defendant (Woods).

Without speaking to the conductor and without any conversation with the Italians, or any of them, the special constable took charge of the plaintiff.

It should be remarked in passing, that there were in this car, according to the testimony of the conductor, from twenty-five to thirty persons of different nationalities and classes.

Having taken the plaintiff in custody, the special constable of the defendant company proceeded to search his person and his baggage and found nothing of an incriminating nature on the one or in the other. He found a sum of money, amounting, as he says, to about $73, which, it is established, was the property of the company-defendant, the proceeds of sales made by the plaintiff of the company-defendant's property, and which was subsequently handed over to the company.

The special constable Woods, thereupon conducted the plaintiff to the police station, where he was locked up over night. The following day, the special constable laid a charge against the plaintiff for theft of the sum of $120, said complaint being received before Leet, justice of the peace, upon which a warrant issued, and the plaintiff was placed under arrest, and being unable to give bail, was confined in the common gaol until the 23rd day of November, when, appearing before O'Keefe, magistrate, of the city of Ottawa, with jurisdiction in such matters, he was honourably discharged.

It must be observed that the special constable acting on behalf of the defendant company, had no information, and took no steps to obtain information other than that contained in the telegram. The more or less suspicious circumstance, if true, that the plaintiff was found on the awakening of the Italians seated in their seat, was not communicated to the special constable. No conversation, so far as the record shews, took place, between the special constable and any passenger on the train, but, says the special constable: "I acted entirely upon the information contained in the telegram sent by the conductor," which contained only the statement that the plaintiff was suspected.

As above stated, the innocence of the plaintiff was declared by the magistrate, and he was honourably discharged.

In his action, the plaintiff alleges his arrest without reasonable cause—his detention, his subsequent discharge and damages suffered. The company-defendant pleads in effect, that the defendant acted without malice and had reasonable and probable cause.

It should be added, that the defendant has offered the testimony of two witnesses, to the effect that, long after the plaintiff's discharge, he made certain incriminating admissions to two witnesses (Miller and Levine). The plaintiff denies in the most formal manner, ever having made the admissions or statements

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testified to by these two witnesses. One of these witnesses, Miller, caused the arrest of the plaintiff on two occasions, but no conviction intervened; on one charge, the plaintiff was acquitted; on the other, he was discharged upon the payment of the costs, but the nature of the charges are not disclosed. The witness Miller is presently under indictment for theft.

The witness Levine differs entirely in his version from that of Miller, as to the conversation which took place in the latter part of December, which is the date of the alleged incriminating admission.

Judging from the demeanour of the witnesses, I hesitate to attach any importance to their testimony. I had grave doubts at the trial as to whether their testimony should be allowed under the issues as joined, and admitted the same, after hesitation, only upon the ground that the plaintiff in cross-examination had been asked whether he made such statements, and denying the same, I allowed the evidence of Miller and Levine to discredit his testimony.

I agree with the ably presented pretention of the defendant's counsel, that in matters of this kind, recourse should be had to the English law, and English jurisprudence; but I cannot find it greatly differs from the French law. A plaintiff seeking damages under the English law and jurisprudence, and under the French law and jurisprudence, must establish his discharge and that the defendant causing his arrest acted without reasonable and probable cause. In other words, without taking the ordinary means to ascertain whether the information received was such as to induce a prudent man to believe it was true.

In the present case, from the statement of facts already made the employee of the defendant acted without taking any steps to ascertain whether the suspicions communicated to him by the telegram received from the conductor, had any foundation in fact. As a matter of fact, I find the suspicions were absolutely unfounded, and I have no hesitation in holding that where a company causes the arrest of an employee without reasonable and probable cause, as I find was done in this case, that there is malice in law sufficient to maintain an action of damages.

In laying down this principle, I am convinced that I do not run counter to the English jurisprudence or the jurisprudence of the French Courts, and the jurisprudence of our own Courts abundantly sustains the proposition: *Desaulniers & Hird*, R.J.Q. 15 K.B. 396; *Massé* v. *The Dominion Bridge Co.*, R.J.Q. 35 S.C. 367.

Upon the whole, I find that the plaintiff has established all the essential elements to entitle him to succeed in his demand.

He was confined to gaol for three days. After being dismissed by the company-defendant, he was unable to obtain em-

ployment, and, on the 15th of March, started business on his own account as a dealer in second-hand goods, but was unable to obtain a license from the city of Montreal, the cause of which is not clearly established.

The plaintiff is entitled to judgment, and I assess his damages at the sum of $300, for which it will go in his favour.

A. R. Holden, for appellant, contended that in judging the actions of appellant it should be borne in mind that it was a corporation and must act through its representatives whose various actions must be considered together. The trial Judge evidently founded his judgment upon the actions of the constable Woods, alone, but this it was submitted, was not proper under the circumstances and appellant's conduct could be fairly examined only by considering the actions of the conductor and the superintendent to whom he telegraphed and the constable Woods all taken together and when so considered the position of the appellant was the only reasonable one. Appellant relied on the English authorities in support of the following legal propositions, viz., that in an action for malicious prosecution the plaintiff has to prove, firstly, that he was innocent and that his innocence was pronounced by the tribunal before which the accusation was made; secondly, that there was a want of reasonable and probable cause for the prosecution or, as it may be otherwise stated that the circumstances of the case were such as to be in the eyes of the Judge, inconsistent with the existence of reasonable and probable cause; and lastly, that the proceedings of which he complains were initiated in a malicious spirit, that is, from an improper motive and not in furtherance of justice: *Abrath* v. *North Eastern Railway Co.*, 11 Q.B.D. 440; *Cox* v. *English, Scottish and Australian Bank Ltd.*, [1905] A.C., p. 168, House of Lords. The only possible inference of malice cannot be an inference of law (the only basis of the judgment now appealed from), but must be an inference of fact, so as to shew that the complainant actually did not belive the statement to be true: *Wright* v. *Greenwood*, 1 W.R. 393; *Mitchell* v. *Jenkins*, 3 L.J.K.B. 35; *Hicks* v. *Faulkner*, 46 L.T. 127; *Brown* v. *Hawkes* (1891), 2 Q.B. 718; *George* v. *Radford*, 3 Car. & P. 464. The English law also lays down clearly that to shew that the prosecutor was in the wrong, is not enough to make him liable in damages, it must appear that he was maliciously so, through anger, ill-feeling, or any bad motive or feeling, differing from a sincere desire to put the law into force: *Darling* v. *Cooper*, 11 Cox C.C. 533; *Byne* v. *Moore*, 5 Taunt. 187; *Lowe* v. *Collum*, 13 Cox C.C. 641; *Harris* v. *National Provincial Bank*, 49 J.P. 390. In the present case as there was no proof at all of malice in fact the action must fail.

Reference was also made to the Quebec cases of *Hétu* v.

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Dixville Butter and Cheese Association, R.J.Q. 16 K.B. 333, confirmed by the Supreme Court, 40 S.C.R. 128; *Langevin* v. *Lecompte*, R.J.Q. 19 K.B. 198; *Grothé* v. *Saunders*, 5 L.N. 213, and M.L.R. 3 Q.B. 208; *Lajeunesse* v. *O'Brien*, 5 R.L. 242.

G. C. Papineau-Couture, for respondent, contended that in a case of this kind the plaintiff was obliged to prove two things only: (1) that he was innocent of the charge laid against him —and this innocence is proved by the filing of a certificate of acquittal or discharge—and that the production of this certificate is absolute proof of plaintiff's innocence, and that he is not obliged to review the evidence offered in the criminal Courts as to whether or no he is really innocent; and (2) that the person who laid the charge or caused his arrest acted negligently, imprudently, without taking the proper precautions to ascertain whether or not a prima facie case existed against him.

Article 1053 of the Civil Code must be the guide in determining questions of liability arising from false arrest, and negligence is the only basis upon which can be founded an action in tort or in damages for malicious prosecutions. Besides there is practically no difference between the French and the English law on this subject: *Hétu* v. *Dixville Butter and Cheese Association*, R.J.Q. 16 K.B., remarks of Taschereau, C.J., at p. 334. If appellant's contention is right then an action of this kind could never lie against a corporation as a corporation as such can never be guilty of malice in fact. See opinion of Lord Bramwell in *Abrath* v. *N.E. Ry. Co.*, 11 A.C. 247. This would be contrary to our entire jurisprudence. Our Courts have never exacted proof of malice in fact but have invariably inferred malice in law from want of reasonable and probable cause: *Lachance* v. *Casault*, R.J.Q. 12 K.B. 179; *Gauthier* v. *Chenery*, R.J.Q. 34 S.C. 133; *Massé* v. *Dominion Bridge Co.*, Court of Review, R.J.Q. 38 S.C. 429; *Shaw* v. *McKenzie*, 6 S.C.R. 181. French authorities are to the same effect: 20 Laurent no. 462; Sourdat, De la Responsabilité, vol. 1, nos. 655, 657, 663, and 664; *Fuzier-Herman* Rep. Général, Verbo "Dénonciation Calomnieuse" nos. 223-237; *Pandectes Françaises* Verbo "Responsabilité" nos. 544, 545, 556, 562.

Holden, in reply.

The case was argued before the Court of King's Bench, composed of ARCHAMBEAULT, C.J., LAVERGNE, CROSS, and GERVAIS, JJ., and judgment on the appeal being reserved for deliberation thereon, the unanimous judgment of the Court of King's Bench (appeal side) was subsequently delivered by ARCHAMBEAULT, C.J., as follows:—

(*Translated.*)

ARCHAMBEAULT, C.J.:—This is an action in damages for false arrest. Respondent had been in the employ of the com-

pany-appellant as news agent on the trains moving between Ottawa and Montreal for about three years. On November 20, 1909, about 2 a.m., an Italian on board the train complained to the conductor of the loss of his pocket-book containing about $120, which he thought had been stolen during his sleep, and added that he suspected Waller of the theft. His suspicion was based on the fact that he had gone to sleep next to one of his countrymen and that on two occasions on awakening they found respondent seated opposite to them. Respondent denied the accusation and invited the conductor to search him. The latter declined, but sent a telegram to the company's superintendent at Ottawa, informing him of the facts. On the arrival of the train at Ottawa, respondent was arrested by a constable in the employ of the company and arrested for theft. He remained in prison three days. On November 23, he appeared before a police magistrate and was acquitted. He then sued the company in damages for false arrest. The Superior Court maintained his action, to the amount of $300 and the company complains of this judgment.

The reasons given by the Court below are as follows: "Considering that the constable, in causing the arrest of the plaintiff acted imprudently and without due care, and had no reasonable or probable cause for his said act.

"Considering that the entire absence of reasonable and probable cause constitutes malice in law which entitles the plaintiff to recover damages." The company complains of this judgment. It maintains that proof of absence of reasonable and probable cause is not sufficient and that it can only be held liable in case malice is proven against it. It adds that such malice only exists when the arrest of a person results from circumstances compelling a presumption that the author of the arrest did not act solely with the view of obtaining the punishment of an infraction of the law.

Were we to apply in this case the rules of the English law I should not be prepared to say that the appellant was wrong. Although the contrary has been stated, I believe that the English law differs from the French law on this point. Under the French law it is sufficient to prove that the complainant acted imprudently, rashly, and without taking the necessary precautions to prevent the arrest of an innocent person. The English law, if I interpret it correctly, goes further; it requires proof of malice, that is, to say, the complainant must have acted "under some other motive than that of the furtherance of justice." (Street, p. 331.)

But it is not the English law which governs this case; it is our Civil Code.

Years ago the contrary was held, notably in the case of *Copeland* v. *Leclerc* (1886), Ramsay, J., M.L.R., 22 B.R. 365; and in

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the case of *Pinsonneault* v. *Lebastien* (1887), Johnson, J., 31 Jurist, p. 167. These decisions were based on the reasoning that as the English criminal law obtains here this law could not be carried into effect if complainants acting in good faith could be held responsible in damages for false arrest.

This doctrine has met the same fate as that which wished to decide the question of damages resulting from common fault according to the principles of English law.

To-day our jurisprudence is firmly established on one, and the other question and everybody now admits that in matters of false arrest as in questions of damages resulting from false arrest the principles of our civil law must obtain.

The rule of our law is to be found in art. 1053, C.C.; this rule renders every person responsible for the damages caused to another person resulting from his fault, whether such fault result from his act, imprudence, neglect or want of skill?

This doctrine has always obtained in French law.

Pothier speaks as follows on this point in his Treatise on Criminal Procedure, at no. 46:—

> La dénonciation est un acte par lequel un particulier donne avis à l'officier chargé du ministère public, d'un crime qui a été commis.
>
> Cette dénonciation engage le dénonciateur aux dommages et intérêts envers l'accusé, au cas qu'il se trouvât qu'elle eut été faite témérairement; et il peut même être sujet à plus grande peine, s'il paraissait que la dénonciation eut été évidemment calomnieuse.

The modern French authors lay down the same principles. 1. Sourdat, De la Responsabilité, no. 633, says:—

> La dénonciation d'un citoyen, à l'autorité, comme coupable de quelque crime ou délit, est évidemment l'un des faits les plus préjudiciables pour celui qui en est l'objet, car elle entache l'honneur et peut blesser gravement les intérêts matériels. Si donc elle est reconnue fausse, celui qui en est l'auteur et qui l'a portée avec légèreté, sans examiner de près les imputations qu'il dirigeait, sans s'assurer de leur sincérité, celui-là doit une réparation civile.

At no. 664 this author states that an action brought before the civil Courts may, like prosecutions before the criminal Courts, give rise to damages if the plaintiff was guilty of neglect and imprudence and did not properly enquire into the true state of facts.

Jurisprudence in France is to the same effect:—

Pandectes Françaises, Vo. Responsabilité, nos. 544, 545, 556, 562.

> 544. Poursuites correctionnelles ou criminelles.—D'une façon générale, il est permis à la personne victime d'un délit, de dénoncer à l'autorité celui qu'elle croit être le coupable. Encore faut-il, cependant, que la plainte soit portée non seulement de bonne foi, mais aussi avec circonspection, car elle constitue par elle-même l'un des faits les plus préjudiciables pour celui qui en est l'objet, parce qu'elle

entache l'honneur, et peut lôser gravement les intérêts matériels. Il est évident qu'une dénonciation faite par méchanceté, et dans la seule intention de nuire, ouvre contre son auteur une action en indemnité; il suffit même qu'elle soit faite témérairement et sans réflexion.

545. Pour que l'auteur d'une plainte ou d'une dénonciation soit affranchi de toute responsabilité à raison du préjudice matériel ou moral qu'il a pu causer, il faut que les faits dénoncés soient exacts, ou tout au moins, que le plaignant ou dénonciateur ait agi de bonne foi, sans malveillance coupable, et sans imprudence ni légèreté.

556. La plainte portée par la prétendue victime d'un vol, peut donner ouverture, au profit des personnes désignées faussement comme coupables, à des dommanges-intérêts, s'il est établi que la plainte leur a occasionné un préjudice, et qu'elle a été faite avec imprudence et légèreté.

562. Jugé que la plainte portée au parquet, et suivie d'une instruction close par une ordonnance de non-lieu, rend son auteur passible de dommages-intérêts, encore qu'elle n'ait pas été faite avec mauvaise foi, si elle a été portée témérairement, et avec une légèreté regrettable.

As has been seen therefore, the rule laid down by Pothier still obtains; if the complaint is maliciously or even rashly made, there is liability in damages; and this rule is only an application of that laid down in art. 1053, because whether there be malice or simply rashness, there is fault. But this fault is more serious in the case of malice than in the case of ordinary rashness.

The rule is now expressed in our jurisprudence, and was stated in these terms by the trial Judge, by saying that there is liability in damages when an arrest is made without reasonable and probable cause. This Court decided this, not long ago in the case of *The Lake of the Woods Milling Co.* v. *Ralston*. When a person has been thus arrested without reasonable and probable cause it is evident that the complainant acted, at least, imprudently, and negligently, that is to say, he is at fault.

The formulas of the English law have influenced the terminology of our jurisprudence in this matter as in many others, and it has come to pass in legal parlance that we say that when there is absence of reasonable and probable cause there is malice. This is the reason why the rule was laid down that liability in damages for false arrest exists only when there is malice.

It is evident that used in this sense the word "malice" has not the same meaning as that it has in the English law. This expression does not mean that the complainant must have been actuated by another motive than that of punishing contraventions to the law. It simply means "absence of reasonable and probable cause" in English legal parlance, or "fault" if we wish to use the term of our civil law.

Here we have to deal with indemnifying justice and not with primitive justice. The law cannot hesitate between the one who commits an error and the one who suffers therefrom. The

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damages caused by an error due to a fault, even if this fault consists merely in imprudence, must be compensated.

In the present case the company certainly acted without reasonable and probable cause. The sole fact that the person robbed stated that he suspected the respondent because he was near him, is no justification, especially when it is proven that there were many other passengers in the same car.

There is on the record proof of which I must say a word in conclusion. Appellant produced two witnesses to establish that respondent had declared he had found the money on the floor and had hidden it in his chest. This proof is illegal and cannot affect the case. The trial Judge allowed it only to contradict respondent, who had been questioned on this point. But he did not take it into account in rendering judgment and we are of opinion that he was right in leaving this proof aside.

For these reasons, I am of opinion that the judgment of the Court of first instance is well founded and should be confirmed.

Appeal dismissed with costs.

Meredith, Macpherson, Hague and Holden, solicitors for appellant.

Jacobs, Hall and Couture, solicitors for respondent.

Annotation

Malicious prosecution

Annotation—Malicious prosecution (§ II B—17)—Principles of reasonable and probable cause in English and French law compared.

As to what constitutes reasonable and probable cause: Hilliard on Torts, p. 430, sec. 18, has laid down the following, now classic, definition:

"Probable cause for instituting prosecution is held to be such a state of affairs, known to and influencing the prosecutor, as would lead a man of ordinary caution and prudence, acting conscientiously, impartially and reasonably, and without prejudice upon the facts within the party's knowledge, to believe or entertain an honest and strong suspicion that the accused person is guilty."

Greenleaf on Evidence, vol. 2, No. 454, p. 480, gives the following definition:—

"Probable cause for a criminal prosecution is understood to be such conduct on the part of the accused as may induce the Court to infer that the prosecution was undertaken from public motives.

"Probable cause has reference to the common standard of human judgment and conduct.

"If the defendant can shew that he had probable cause for his conduct, that is, that from such information as would induce a reasonable and prudent man to believe the plaintiff guilty of a crime, to institute prosecution, he is not guilty.

"It is not enough to shew that the case appeared sufficient to this particular party, but it must be sufficient to induce a sober, sensible and discreet person to act upon it, or must fail as a justification for the proceeding upon general grounds. (Idem, vol. 2, p. 483, note.)"

Or as Mr. Justice Wurtele laid it down:—

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Malicious prosecution

Annotation (*continued*)—**Malicious prosecution (§ II B—17)—Principles of reasonable and probable cause in English and French law compared.**

"To justify the defence of reasonable and probable cause, the circumstances must be such as would produce in the mind of a cautious and prudent man, an honest conviction of the guilt of the party he accuses. (*Parker* v. *Langridge*, R.J.Q., 1 Q.B., p. 45.)"

Addison on Torts, 7th edition, p. 222, says:—

"In determining whether or not there was a probable cause for the arrest the Judge has to ask himself, whether a reasonable man in the position of defendant, and having the knowledge which defendant in fact had or could and ought to have had, would have supposed at the time of the prosecution that the prisoner was guilty."

19 Am. & Eng. Ency. 637, says:—

"Though there are many verbal differences in the definition of probable cause in the present connection, there is a substantial agreement among the cases that the probable cause for the institution of a criminal proceeding is the existence of facts sufficient to induce, in the mind of a reasonable man, a belief in the guilt of the accused. But in order to exonerate himself from liability the defendant must have acted upon all the facts within his knowledge; he cannot justify the prosecution by shewing prima facie circumstances of guilt, but excluding those within his knowledge, tending to prove innocence."

As Addison on Torts says, 7th ed., p. 225 et seq.:—

"If circumstances of suspicion existed, which might have been readily removed by proper enquiry and no enquiry was made there is an evidence of want of probable cause."

The same principle is laid down in the American and English Encyclopædia of Law, vol. 19, p. 659:—

"The mere suspicion of a party's guilt does not constitute probable cause for the institution of criminal proceedings against him; nor has a man the right to put the criminal law in motion against another and deprive him of his liberty upon the mere conjecture that he has been guilty of a crime."

The Quebec law of malicious prosecution.—In France as in the Province of Quebec, the laying of a criminal charge, which is unfounded, renders the person who makes said charge liable to the person whom he accuses, in damages and interest, if the complaint was laid lightly, without taking the necessary care and precaution, and without verifying in so far as possible, whether or not there is a prima facie case against the person accused. See 20 Laurent, No. 462; R.L. (N.S.), vol. 1, p. 53 et seq., where the theory of French doctrine and jurisprudence is expounded.

Sirey, Code Civil Ann., 1382, 1383, C.N., edition 1841:—

No. 795. L'auteur d'une plainte suivie d'une ordonnance et d'un arrêt de non-lieu peut même être condamné à des dommages intérêts, bien que la plainte n'ait pas été faite de mauvaise foi, s'il est constaté qu'elle a été portée témérairement et avec une légèreté regrettable.

Fuzier-Herman, Rep. Général, Vo. Dénonciation calomnieuse, Nos. 223, 224, 225, 226-237, specially No. 226.

Malice, as regards malicious prosecution.—This question does not appear to be quite settled in England even yet, the chief difficulty arising

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Annotation (*continued*)—Malicious prosecution (§ II B—17)—Principles of reasonable and probable cause in English and French law compared.

from the overlapping jurisdictions of Judge and jury. No less an authority than Stephens is of opinion that the distinction between malice and want of reasonable cause is obsolete. At page 31 of his Malicious Prosecution, he says:—

> "The essential ground of this action is that a legal prosecution was carried on without a probable cause.
>
> "We say this is emphatically the essential ground, because every other allegation may be implied but this; but this must be substantially and expressly proved, and cannot be implied.
>
> "From the want of probable cause, malice may be, and most commonly is implied. The knowledge of the defendant is also implied.
>
> "From the most express malice the want of probable cause cannot be implied."

And at page 36, he goes on to say:—

> "For reasons which will presently appear, I am of opinion that the whole of the distinction between malice and want of reasonable cause is obsolete, and that it would greatly conduce to a clear understanding of the law of malicious prosecution if the supposed necessity of proving malice were done away with altogether, and the question of reasonable cause frankly recognised as a question of fact for the jury; as I shall argue that it practically has been, at least, since the decision of the House of Lords in *Abrath* v. *N. E. R. Co.*, 11 A.C. 247."

This question has also been touched upon by the Quebec Courts.

Grothe v. *Saunders*, 5 L.N. 213 (1882), Johnson, J., p. 214.—As to malice, if there is no want of probable cause, malice is immaterial; but one way or the other the only suggestion on the subject of malice was the fact that the bill had been laid before the grand jury without previous examination before a magistrate. It is a practice which I do not approve of, unless there is necessity for it; but the law has provided for that and vested the Crown counsel with the discretion of permitting it as was done here; and the plaintiff gives the best reason for it, for he says the defendant had already addressed himself to a magistrate who would not act.

I will only cite two authorities on the general principles in this sort of action. In *Willans* v. *Taylor*, 6 Bing. 186, Ch. J. Tindal said: "The facts ought to be such as to satisfy any reasonable mind that the accuser had no ground for the proceeding but his desire to injure the accused."

Hilliard on Torts, p. 428:—

> "Where the plaintiff has been acquitted on the charge brought against him the acquittal does not raise a presumption of want of probable cause."

This judgment was confirmed by the Court of King's Bench, M.L.R. 3 Q.B. 208, Cross, J., p. 212.

The policy of the law should not be too severe towards those who, in the public interest, resort to the legal tribunals to have their grievances investigated; when good faith appears on their part and probable cause, they should be excused, although their prosecution may fail, and that even when the object of it is put to inconvenience and damage. The judgment of the Superior Court will therefore be confirmed.

In *Lajeunesse* v. *O'Brien*, 5 R.L., p. 242 (1874), after pointing out that

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Annotation (*continued*)—Malicious prosecution (§ II B—17)—Principles of reasonable and probable cause in English and French law compared.

the proceedings complained of were unfounded, as shewn by the evidence in those proceedings, Johnson, J., stated the principle to be applied as follows (p. 243):—

> "The plaintiff, however, to succeed must go farther than this. He must shew that the plaintiff in the first case not only had no just cause but no probable cause; not only that the step taken was unfounded in itself and could not bear the light of examination and evidence, but that it could not reasonably at the time have appeared to be well founded to the plaintiff in that case. I cannot say in this particular instance that the defendant had nothing whatever to go upon in acting as he did. What there was may not have appeared sufficient to the Judge who discharged the capias and the seizure and may not appear sufficient to me; but I cannot say that acting upon professional advice as he is proved to have done and without any proof of express malice he is to be made liable by a merely erroneous procedure to the same consequences that would have ensued if he had acted from impure motives and without any apparent cause to him."

In the case of *Shaw* v. *McKenzie* the majority of the Court of King's Bench for the Province of Quebec decided that "an action of damage for false imprisonment will not lie unless there be want of probable cause and malice combined," 25 L.C.J. 40. Dorion, C.J., and Cross, J., dissented. The Supreme Court unanimously reversed this judgment, 6 Can. S.C.R. 181.

Taschereau, J., at page 192, said:—

> "On the whole, I agree with the Chief Justice of the Court of Queen's Bench, and Mr. Justice Cross, who dissented from the majority of the Court appealed from, that Shaw's arrest was entirely unjustifiable, and that it is clearly established in the present case that the respondents had no reasonable or probable cause for issuing the writ of capais in question."

In *Abrath* v. *North Eastern Ry. Co.*, 11 A.C. 247, and in *Brown* v. *Hawkes*, [1891] 2 Q.B. 718, the Court decided that the complainant had acted with reasonable and probable cause, and although the question of malice was touched upon it was not essential for the decision of the cases.

The Quebec cases on malice as regards malicious prosecution.—The leading Quebec cases on the subject are the following:—

Massé v. *Dominion Bridge Co.*, R.J.Q. 35 S.C. 367, Bruneau, J.:—

> "Malice is inferred from the absence of reasonable cause and from the very nature of the injury."

In the same case, Dunlop, J., speaking for the Court of Review, R.J.Q. 38 S.C. 433, said:—

> "The sole question to be decided in the present case is whether the superintendent of the company-defendant, in laying the information for the search warrant and causing it to be executed, acted without reasonable or probable cause."

And the Court held:—

> "That an employer, who through his servants, finds a workman in a place, at an hour, and under circumstances which lead to suspicion, but for which an explanation is offered on the spot, who refuses to

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Annotation (*continued*)—Malicious prosecution (§ II B—17)—Principles of reasonable and probable cause in English and French law compared.

verify the same and causes a search warrant to issue and be executed at the workman's house, does so without probable cause, and inferentially through malice, and is liable for the damages thereby caused."

In *Hétu* v. *Dixville Butter and Cheese Association*, the Supreme Court confirmed the judgment of the Court of King's Bench, R.J.Q. 16 K.B. 333, and Fitzpatrick, C.J., said in regard to the question of reasonable and probable cause and malice:—

"Under the English system, in an action for malicious prosecution, the plaintiff has the burden throughout of establishing that the circumstances of the prosecution were such that the Judge can see no reasonable nor probable cause for instituting it: *Abrath* v. *North Eastern Railway Co.*, 11 App. Cas. 247; *Cox* v. *English, Scotch and Australian Bank* (1905), A.C. 168, at p. 170; and the principles applicable in cases arising in Quebec, will be found laid down in article 1053 of the Code, 'Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill.' To make the party responsible, it is necessary that the damage should be caused by his fault; and to lay an information, when in possession of facts sufficient to establish a bonâ fide belief of guilt, is not a fault, but the exercise of an undoubted right.

"In Quebec, as in English Courts, it must be alleged and proved that there was fault, that is to say, that the prosecutor acted, to use the words of the Cour de Cassation: 'dans le dessein coupable de nuire ou, du moins, avec une indiscrétion et une légèreté répréhensibles' (Fuzier-Herman, Vo. Dénonciation calomnieuse, No. 231; Sourdat, Responsabilité, Vol. 1, No. 633; Recueil Philly, sommaires Mars, 1908, No. 1930); and the plaintiff in his declaration thought it necessary to allege, in conformity with this view of the law, the prosecution was started maliciously to injure him and without reasonable and probable cause.

"It is not necessary, however, for the purposes of this case to determine that point; the evidence given is sufficient to prove that the party prosecuting entertained a reasonable bonâ fide belief based upon full conviction founded upon reasonable grounds that the appellant was guilty of the offence which had undoubtedly been committed."

In the case of *Lachance* v. *Casault*, R.J.Q. 12 K.B. 179, the Court of King's Bench unanimously reversed the decision of the Superior Court and granted $200 damages for false arrest on the ground that it had been established that respondent did not act in good faith and with probable cause.

In *Desaulniers* v. *Hird*, R.J.Q. 15 K.B. 396, Dunlop, J., said, pp. 397-8:—

"The test for determining liability for damages in such cases as this is, "Was the information within the knowledge of the party laying it, such as would induce a reasonable and prudent man to believe the plaintiff guilty of the crime charged.'"

The last case decided by the Court of King's Bench previous to *C.P.R.* v. *Waller*, supra, is that of *Ralston* v. *The Lake of the Woods Milling Co.*, R.J.Q. 20 K.B. 536. The action was dismissed and Carroll, J., said:—

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Annotation (*continued*)—Malicious prosecution (§ II B—17)—Principles of reasonable and probable cause in English and French law compared.

"I understand that it is unfortunate for Ralston to have been arrested, although he was innocent, and to find himself now with his action dismissed, but the appearances of his guilt could not have been stronger than they were, and were sufficient to justify the arrest."

But he added:—

"Malice, from the legal point of view, is often inferred from the gross negligence of a person, who without informing himself, and simply on suspicion, causes another's arrest."

It is curious to note, in view of the specific holding in the *Waller* case, the opinion of Mr. Justice Cross in this *Ralston* case decided two months before:—

"The respondent failed to prove the special matters set up in his declaration as establishing malice. In fact, the prosecutions are not shewn to have been malicious, unless it be considered that, as regards one of the charges, namely, the charge of having applied a false trade description, the appellant had no reason to suspect that the respondent had done anything of the sort at all, and that, that being so, the complete absence of reason of suspicion or belief would amount to malice. I hardly think that one can go so far as that, and therefore consider that the judgment should be reversed and the action dismissed.

"Our law and English law appear to be the same as regards what a plaintiff must prove in order to succeed in such an action as this one: *Corea* v. *Peiris*, [1909] A.C. 549."

Article 1053 of the Quebec Civil Code which is the basis of all actions in tort reads as follows:—

"Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill."

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Ontario High Court, Cartwright, K.C., Master in Chambers.
January 3, 1912.

1. DEPOSITIONS (§ III—10)—DISCLOSURE OF INFORMATION AND BELIEF.

The right of examination for discovery extends not only to the knowledge and recollection of the adverse party, but also to his information and belief.

[*Vanhorn* v. *Verral*, 3 O.W.N. 337, 439, followed.]

2. DISCOVERY (§ I—2)—LITERARY PROPERTY.

In an action to restrain the author of a biography not yet published from making use of certain literary material, on the ground that the author obtained it from plaintiff by misrepresenting that the views he would propound in the book would not be in adverse criticism of the subject of the biography and on the ground that the work had been so adverse that it had been rejected by the publisher at whose instance it was written, the defendant may be ordered on discovery to deposit in

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Court all extracts and copies of material supplied to him by the plaintiff and to answer interrogatories in regard thereto.
[See Ross on Discovery, 1912 ed., pages 152, 176.]

MOTION by the plaintiff for an order requiring the defendant to make further production and answer questions which he refused to answer upon his examination for discovery.

The order was made.

I. F. Hellmuth, K.C., for plaintiff.
G. F. Shepley, K.C., for defendant.

THE MASTER:—The gist of the action is to restrain the defendant from making use of original papers and other materials furnished to him by the plaintiff and his late father, to enable the defendant to write a life of the late William Lyon Mackenzie, to form one of a series published by Morang & Co., and intituled "The Makers of Canada."

The plaintiff, by the statement of claim, alleges that such materials were furnished only on the assurance of the defendant that he was "in sympathy with the character he was to depict as one of 'The Makers of Canada,' but that he concealed from the plaintiff the fact that he had previously been instrumental in having Morang & Co. reject a life of Mr. Mackenzie, written by another author for 'The Makers of Canada,' as being too favourable."

The statement of defence asserts that the defendant was given permission to make such use of the material as he might deem proper, without any limitations, restrictions, or terms whatever.

The plaintiff rests his case on the foregoing alleged representations of the defendant and on the facts set out in the statement of claim, and particularly on the alleged concealment of his having induced Morang & Co. to reject the previous life of William Lyon Mackenzie as being too favourable.

Everything, therefore, that is relevant to these allegations of the plaintiff and tends to prove their truth must be disclosed by the defendant, as well by production of documents as by answering questions. The production will also shew whether, to use the technical term, any of the material was garbled, so as to shew the defendant's animus.

As has lately been pointed out, discovery extends not only to the knowledge and recollection of the adverse party but also to his information and belief. See *Vanhorn* v. *Verral*, 3 O.W.N. 337, 439. Counsel seem too often to forget not only this rule, but also that the chief object of examination for discovery is to obtain all possible admissions from the party examined so as to limit as far as possible the points on which evidence must be given at the trial.

Here the defendant is alleged to have obtained access to the

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materials in possession of the plaintiff and his father, on the understanding that he would write a life of the plaintiff's maternal grandfather which would justify his being given a place among "The Makers of Canada;" but that, instead of doing so, he produced a work of such an opposite character that the Morang Co. refused to publish it—a fact which has been the subject of a long course of litigation between them and the defendant.

As the plaintiff asks a return of all extracts and copies, they should all (if required) be deposited in Court, and should certainly be produced on the further examination of the defendant, which should be at his own expense. The costs of this motion will be to the plaintiff in the cause in any event.

Order made for further discovery.

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Supreme Court of Nova Scotia, Sir Charles Townshend, C.J., Graham, E.J., and Russell, and Laurence, JJ. January 13, 1912

1. WILLS (§ III A—75)—LEGACY IN TRUST FOR WIDOW WITH POWER TO HER TO DRAW UPON CAPITAL—PROOF OF DEMAND.

Where a will provided that certain bank stocks and bank deposits should be held by the executors in trust for the widow of testator with power, if she should request it, to transfer same to her absolutely for her own use, a written request is not essential, and the widow's election or request may be shewn by proof of the transfer to her of the shares and bank deposits.

[See also Theobald on Wills, 7th ed., page 469.]

2. WILLS (§ III G 2—126)—POWER OF DISPOSAL BY CESTUI QUE TRUST—ENLARGING BENEFITS OR ESTATE—VESTING.

Where a bequest of moneys and shares was made to the executors in trust for the widow of the testator, with a power containing the words "notwithstanding anything hereinbefore contained" to withdraw the moneys and shares and transfer to her absolutely for her own use, the transfer made under such direction has the effect of vesting the property in the widow as upon an absolute gift and her right thereto is not limited to such part of it as she may actually use, or give away.

THIS was a stated case submitted to the Court to determine the construction of the 4th and 6th clauses of the last will and testament of Samuel Shatford, deceased.

The testator devised all his real and personal estate to his executors (his wife Sarah Jane Shatford and his brother Henry A. Shatford) in trust for the use and purposes mentioned. After providing for the payment of his debts and funeral expenses and certain specific legacies the testator continued: "4th. To permit my said wife, Sarah Jane, to use and occupy or rent and enjoy the proceeds of the house and barn and shop and premises on Beech street, with the stock-in-trade and furniture connected

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with said shop and house, to use and enjoy the same during the term of her natural life. Also to pay towards her support and maintenance the interest or income yearly from all stock held by me in the Halifax Banking Company at the time of my decease, and also the interest on any moneys held by me in said bank on deposit receipt or otherwise, together with the income from any moneys in the Dominion Savings Bank, with power however to my said executors to change and alter said investments by withdrawing said principal sums and re-investing them from time to time, if they are of opinion that it can be done to advantage and with safety to my estate, so as to produce a larger income or yearly interest for my said wife, and, if my said wife should request it, to withdraw and transfer to her absolutely for her own use, notwithstanding anything hereinbefore contained, all stock held by me in said Halifax Banking Company at the time of my decease, and all moneys held by me in said bank on deposit receipt or otherwise and any moneys in said Dominion Savings Bank to be disposed of by her as she may see fit.

"6th. On the death of my wife the principal sums reserved to produce an income for her as aforesaid, and the house, lot and premises on Beech street to be conveyed to my said daughter" (the residuary legatee) "absolutely to her sole and separate use free from the control, debt and obligations of any husband she may marry, etc."

The executors settled the estate and passed their accounts in the Probate Court in 1892, and transferred and paid over to the widow for her own use the bank stock and the moneys on deposit. The bank stock was sold for the sum of $4,370.75 and with a portion of the proceeds debenture stock of the city of Halifax of the par value of $3,000 was purchased. Just previous to her death the widow had possession of this debenture stock and cash in the savings bank to the amount of $1,146.44 which was claimed by plaintiff, a daughter of testator by a former marriage, as heir of her father under his will.

The sole question was whether defendants, the administrators of the widow, were liable to account to plaintiff for the shares in the Halifax Banking Company and for the two sums of money on deposit to the credit of testator at the time of his death, or for any part thereof, or for the proceeds thereof or for securities in which the same had been reinvested.

The matter was heard before DRYSDALE, J. (who after stating the facts) gave judgment as follows:

DRYSDALE, J.:—I think the whole question turns upon the testator's intention as disclosed in the latter part of clause 4.

The testator started with an intention to set aside a principal fund to provide an income for his wife, but plainly ended with a direction that, at his wife's option, she should have the power, on request, to take over such moneys absolutely for her own use.

I think if we could find in the case a request or election by the wife to the trustees to have withdrawn, transferred and paid over to her the said bank stock and moneys for her own absolute use, it would be the plain duty of the trustees to obey such election and request, and that such stock and moneys would from thenceforth be clearly the absolute property of the widow according to testator's intention as so expressed in the clause. It is argued, however, that there is no evidence of such an election and request; it is true I do not find in the case a formal writing electing to take the principal funds in question, but evidence is here of the acts of the parties shewing an election and intention, to my mind, quite as strong as a formal letter, request, or demand. Before passing their accounts the executors joined in an absolute transfer of the said bank stock to the widow, and withdrew and paid over to her the said moneys in said banks, and this, it seems to me, is conclusive of the intention of the widow to elect and take over the latter part of said clause 4. Her request was all that was required to have the stock and funds transferred to her absolutely for her own use, and I feel bound to infer such request where I find her co-trustee joining with her in such transfer.

Of course, if she, the widow, elected and took the principal fund absolutely under clause 4, there would be no principal fund reserved, at least so far as those moneys were concerned, for the operation of clause 6.

It was argued for plaintiff that clause 4 only enabled the widow to withdraw the principal moneys mentioned in said clause should she require the same, but I cannot so construe it. I think the intention is very clear and plain that if the widow merely requested it she was entitled absolutely to the fund for her own use. She may not have spent it all; no doubt she did not; if she did she had a right to, I think; but if the investments left by her as part of her estate come from such moneys transferred to her, I think, once she took and handled them as her own, by way of investment or otherwise, this was a disposal of the moneys within the contemplation of the clause. In my view, once the widow elected to have the stock and funds transferred to her absolutely for her own use, to be disposed of by her as she might see fit, the property became absolutely hers on the request and transfer, and spending it or giving it away does not control the vesting. One must in all cases get at the intention of the testator from the words of the will, and it seems to me this testator has shewn a clear intention to let his wife have these funds absolutely as her own if she should request it. That she did request it is, I think, clear from the acts of the executors, and in my opinion the plaintiff's action fails and must be dismissed with costs.

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Argument.

The plaintiff appealed and the appeal was argued on November 16, 1911.

A. A. MacKay, K.C., for appellant. This is in the nature of a power and requires some formal election. Jarman on Wills, 789. Assuming that the widow made an election she only took a life estate under the will. *In re Bagshaw's Trusts*, 46 L.J. Ch. 567; *Sherratt* v. *Bentley*, 2 M. & K. 149; *In re Pounder*, 56 L.J. Ch. 113; *Constable* v. *Bull*, 3 DeG. & S. 411; *Re Sheldon and Kemble*, 53 L.T. 527; *In re Sanford*, [1901] 1 Ch. 939; *In re Stringer's Estate*, 6 Ch. D. 1; *In re Wilcock*, [1898] 1 Ch. D. 95; Theobald on Wills, 497 (*a*), 513; *Green* v. *Carley*, 20 Gr. Ch. 234; *In re Thompson*, 14 Ch. D. 263; *Bradley* v. *Westcott*, 13 Ves. 450; *Scott* v. *Joscelyn*, 20 Beav. 174; *In re Pedratte*, 27 Beav. 583; *In re McVicar*, 25 L.L.R. 307; *Grosvenor* v. *Watkins*, L.R. 6 C.P. 500.

H. Mellish, K.C., for respondent: There is no inconsistency. If only part of the property owned by the testator is disposed of in a will it is no evidence that the testator did not own the remainder: *In re Edwards* (1906), 1 Ch. 574.

MacKay, replied.

SIR CHARLES TOWNSHEND, C.J.:—I do not see that I can usefully add anything to the decision of Drysdale, J., in regard to the construction of this will. I entirely concur in all he has said, and in the reasons for his judgment. I think it is too clear for argument. Testator first provides "also to pay to her towards her support and maintenance the interest or income yearly from all stocks held by me in the Halifax Banking Co. at the time of my decease, and also the interest on any moneys held by me in said bank on deposit or otherwise together with the income from any moneys in Dominion Savings Bank." And then adds, "And if my said wife should request it, to withdraw and transfer to her absolutely for her own use, notwithstanding anything hereinbefore contained, all stock held by me in said Halifax Banking Company at the time of my decease and all moneys held by me in said bank on deposit receipt or otherwise, and any moneys in said Dominion Savings Bank to be disposed of as she may see fit."

There is nothing in clause 6, nor in any other part of the will in conflict with this power which was duly exercised by the trustees. No written request was required to enable the trustees to exercise the power, and their intention and her request or wish is clearly shewn by her action and the action of her co-executor.

This appeal must be dismissed with costs.

GRAHAM, E.J.:—The late Samuel Shatford by his will which was admitted to probate the 10th June, 1891, made the following

trust provisions after devising the estate to the executors, his wife and his brother Henry, namely. (The learned Judge here referred to clauses four and six of the will, already set out in full.)

At the time of the probate these shares and deposits of money mentioned in the fourth and sixth clauses were as follows:—

"(*a*). 95 shares of the par value of $25 each in the capital stock of the Halifax Banking Company.

"(*b*) $480 cash on deposit in said Halifax Banking Company.

"(*c*) $379.17 on deposit in the Dominion Savings Bank."

On the 6th October, 1891, the 95 shares were transferred in the bank books to the name of Sarah Jane Shatford, and both deposits were delivered to her.

Subsequently, on the consolidation of the two banks she obtained 44 shares of the Canadian Bank of Commerce for those in the Halifax Banking Company, and on the 27th January, 1910, sold these shares for $4,370.75 and on the 30th February she bought city debentures worth $3,000 with the proceeds.

At the time of her death she had in her possession these city debentures and a savings bank book of the Dominion with $1,146.44 to her credit.

On the 30th December, 1892, the executors passed their accounts in the Court of Probate under their hands and in these accounts these items appear as credits:—

95 shares Halifax Banking Co.'s stock, 112 to widow	$2,128.00
Paid interest on ditto to widow	51.00
To deposit Halifax Banking Co. to widow	480.00
Paid widow money withdrawn Dominion Savings Bank	379.17
And, at the close, By balance for distribution	688.90

The plaintiff who is the daughter of the testator by a former wife claims the proceeds of the shares and the amount of the deposit upon two grounds:—

First, that by the true construction of the will the widow took but a life interest in the shares and deposits and, second, that there was no request by the widow for the execution of the trust in her favour; or, if there was, it was only in respect to the amount which is not forthcoming, *i.e.*, which she presumably has spent.

For the first position a class of cases is cited represented by *Constable* v. *Bull*, 3 DeG. & Sm. 411. They have to do with repugnant provisions in a will, as where there is an apparently absolute gift of property to a donee and in a later clause there is a disposition of it at the death of the first donee; the effect of

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that is to cut down the first provision to a life interest. In 1 Jarman on Wills, p. 566, it is said:—

"If a testator in one part of his will gives to a person an estate of inheritance in lands or an absolute interest in personalty and in subsequent passages unequivocally shews that he means the devisee or legatee to take a life estate only, the prior gift is restricted accordingly. It must be borne in mind, however, that the rule only applies where the later gift shews with reasonable certainty that the testator did not mean the prior gift to take effect according to its terms. The simplest example of the general rule is where a gift apparently absolute is cut down to a life estate by a subsequent direction that on A.'s death the property is to go to B. There are numerous authorities to this effect. But the subsequent direction must be unambiguous. *Re Jones* (1898), 1 Ch. 438."

Here there is very little repugnancy, if any. The gift over is consistent with the contingency of a default on the part of the widow to call for the execution of the trust in her favour. The testator was providing for a maintenance for his widow. He provided for that by giving her the interest upon a fund which he indicated for her life, but in case it would be insufficient he provided that the capital itself should be transferred to her at her request, but in case she did not exercise the power thus given to her that can be read between the lines there was the gift over of the capital to the daughter contained in the 6th clause.

The words "notwithstanding anything hereinbefore contained" shew the testator intended to enlarge the life interest to an absolute gift of the capital at her request.

Then as to whether or not she made the request and whether the proceeds came into her possession as a result of the execution of the trust or in some other way, I think the inferences are all in favour of the defendants.

The trustees, Henry and she, are both dead. But the transfers and payments over to her are writings and facts and the entries in the probate accounts are most cogent. The only legitimate way in which this could have happened was in the carrying out of the trust. The only evidence the other way is the admission relied upon in her will, made shortly before her death, in which she makes no provision disposing of the city debentures, which lends itself to the contention that she had not made the request. But she does refer to the savings bank deposit and she had mixed her own deposits there with the proceeds of the deposits she took over from the estate.

It is not a certainty at all. This property may have been overlooked by the draftsman of her will.

The transfer of the whole fund from the estate to her looks very much as if she intended an appropriation of the whole for

herself under the power in the will. There are no words restricting the amount she might appropriate, or purporting to be a gift over to the daughter of any amount remaining unappropriated by her. And what remains appears to have been appropriated under the provision as much as that part which she has spent or is not forthcoming.

I do not agree with the contention that the transfers and the probate accounts only indicate an intention to relieve Henry of the trust and that the widow continued as a trustee in respect to these shares and deposits. That could not legally be done and there is no presumption in favour of that having been done. It cannot be contended that this withdrawal and change was never done under the provision giving the trustees power to re-invest. The accounts are against that view. The evidence points to the exercise of the trust by the trustees under the terms of the will in favour of the wife in compliance with her request.

I think the appeal should be dismissed and with costs.

LAURENCE, J., was not present on account of illness and expressed no opinion.

Appeal dismissed.

FERGUSON v. EYRE.

Divisional Court (Ont.). Boyd, C., Latchford and Middleton, JJ. January 5, 1912.

1. APPEAL (§ VII I 6—375)—ORDER STRIKING OUT JURY NOTICE—AMENDMENT OF GENERAL RULES OF COURT PENDING APPEAL.

Although an order upon an interlocutory application to strike out the jury notice may have been improperly made under the general rules of Court in force at the time it was made, the Divisional Court hearing an appeal therefrom may make the substantive order which by the new Rules of Court passed, pending the appeal, the Court appealed from is authorised to make.

[*Bank of Toronto* v. *Keystone Fire Ins. Co.*, 18 P.R. (Ont.) 113, followed; and see Canadian Ten Year Digest, 1943, 1946, 1948.]

An appeal by the defendant from an order of MEREDITH, C.J.C.P., striking out the defendant's jury notice.

Harcourt Ferguson, for the defendant.

R. McKay, K.C., for the plaintiff.

The judgment of the Court was delivered by MIDDLETON, J.:—In this case we are bound by the decision in *Bank of Toronto* v. *Keystone Fire Insurance Co.*, 18 P.R. 113. The Chief Justice of the Common Pleas was not "the Judge presiding at the trial," within sec. 110 of the Ontario Judicature Act, and he had no jurisdiction to strike out the jury notice.

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Under the Rule passed on the 23rd December last,* since this case was argued, the jury notice would, upon application, be struck out, because the case is clearly one "which ought not to be tried with a jury." We can see no good purpose to be served by putting the parties to the expense of a motion under this Rule; so, while we allow the appeal, we make a substantive order striking out the jury notice, and directing that the action be transferred to the non-jury list.

Costs throughout in the cause.

*1322—(1) Where an application is made to a Judge in Chambers under section 110 of the Ontario Judicature Act, and it appears to him that the action is one which ought to be tried without a jury, he shall direct that the issues shall be tried and the damages assessed without a jury; and, in case the action has been entered for trial, shall direct the action to be transferred to the non-jury list.

(2) The refusal of such an order by the Judge in Chambers shall not interfere with the right of the Judge presiding at the trial to try the action without a jury, nor shall an order made in Chambers striking out a jury notice interfere with the right of the Judge presiding at the trial to direct a trial by jury.

(3) The Judge presiding at a jury sittings or a non-jury sittings in Toronto may, in his discretion, strike out the jury notice and transfer the action for trial to a non-jury sittings; and this power may be exercised notwithstanding that the case is not on the peremptory list before the said Judge.

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WALLACE v. SMART.

Manitoba King's Bench. Trial before Mathers, C.J.K.B. January 8, 1912.

1. EXECUTION (§ II—15)—SUPPLEMENTARY PROCEEDINGS—CREDITOR'S ACTION TO REACH EQUITY UNDISCLOSED ON LAND RECORDS.

Where a conveyance absolute in form is held merely as a mortgage security, the equity of redemption may be sold under execution upon a judgment against the person entitled to the equity, although the right of redemption is not disclosed upon the documents of title or upon the registry records.

[*McCabe* v. *Thompson*, 6 Grant 175, and *Fitzgibbon* v. *Duggan*, 11 Grant 188, distinguished. See also Annotation to this case.]

2. TRUSTS (§ I D—21)—ABSOLUTE DEED IN EFFECT A MORTGAGE—RIGHTS OF FORECLOSURE AND SALE.

A power of sale will not be implied where a mortgagee holds by a deed absolute in form; the mortgagee's remedy is by foreclosure by judicial process where there is no express trust for sale of the lands.

[*Oland* v. *McNeil*, 32 Can. S.C.R. 23, distinguished.]

3. VENDOR AND PURCHASER (§ III—38)—NOTICE OF ADVERSE CLAIM BEFORE COMPLETION OF PURCHASE.

A purchaser of land is bound by notice of an adverse claim at any time before he has completed his purchase by actual payment, and, if part payment only has been made, his right to hold as a bona fide purchaser without notice will be limited to payments made before notice of the adverse claim.

[*Rose* v. *Peterkin*, 13 Can. S.C.R. 677, applied; and see Godefroi on Trusts, 2nd ed. 694.]

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4. MORTGAGE (§ VI C—80)—FORECLOSURE OR SALE UNDER SECOND MORTGAGE—WHEN FIRST MORTGAGEE A PARTY.

A mortgagee under a second mortgage cannot claim a judicial sale of the interest of the first mortgagee without the latter's consent, but he may sell the equity of the mortgagor subject to the prior mortgage without making the first mortgagee a party.

5. PARTIES (II A 8—105)—CREDITOR'S ACTION—REACHING EQUITY UNDER ABSOLUTE CONVEYANCE INTENDED AS MORTGAGE.

Where a mortgagee holds by a conveyance absolute in form, but which is in effect a mortgage only, he may be made a co-defendant in a creditor's action for a sale in aid of execution against the owner of the equity without any offer by the plaintiff to redeem; and the plaintiff may upon, his debtor's interest being ascertained, elect either to redeem or to sell subject to the mortgagee's claim.

[*Moore* v. *Hobson*, 14 Grant 703, followed; and see Bell and Dunn on Mortgages, 225.]

TRIAL of an action brought by a judgment creditor to have declared what the extent of his debtor's interest or equity was in lands held in the name of another defendant and to declare that the title of the latter was as mortgagee only, and for a judicial sale of the judgment debtor's interest in aid of execution. Judgment was given for the plaintiff.

Messrs. *J. E. O'Connor* and *R. Jacob*, for plaintiff.
Messrs. *B. C. Parker* and *A. H. S. Murray*, for defendants.

MATHERS, C.J.K.B.:—This is an action by the plaintiff to sell the interest of the defendant Smart in lot 250, part of 79 St. James, Plan 49, under a registered judgment recovered by the plaintiff against him. The land at the commencement of the action stood in the name of the defendant Hinch, subject to a mortgage, but during its pendency was transferred to and certificate of title issued to the defendant Bonter, subject to the same mortgage and also subject to the lis pendens which the plaintiff had registered. The plaintiff's certificate of judgment was registered on the 28th February, 1911. On the 13th May, 1911, the defendant Bonter agreed to purchase the lot in question from Hinch for $9,800, and on that day paid a deposit of $55. On the 15th May, 1911, two days later, this action was commenced and a lis pendens registered, and before anything else was done by the defendant Bonter towards the completion of the purchase he had full knowledge of the action as it was then constituted.

The plaintiff alleges that Hinch is a mortgagee without power of sale, and that Bonter bought with notice of the plaintiff's rights. He asks for a declaration that his judgment forms a lien and charge upon the interest of the defendant Smart in the land, and for a direction that the same be sold to satisfy his claim, or in the alternative, that he may be permitted to redeem the land. The defendant Hinch admits that he was the registered owner at the commencement of the action, but denied that

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the defendant Smart is entitled to any estate or interest therein. The defendant Bonter claims to have been an innocent purchaser for value without notice.

It was not seriously disputed at the trial that although the defendant Hinch held the land by a title absolute in form, yet he held merely as a security for the price of certain lumber and building materials which he had supplied to Smart, and I find as a fact that Hinch held the land as security only, or, in other words, that he was but a mortgagee.

Neither was it disputed that before the defendant Bonter had done anything more than the payment of $55 as a deposit on the purchase price, he had full notice of the plaintiff's claim that Smart had an interest in the lands in question, and he completed the purchase, reserving $1,000 to cover the plaintiff's claim.

The defendant Smart had entered into a contract with the defendant Hinch and also a contract with one Russell for the erection of a dwelling house for each of them. He was unable to procure the lumber and building materials requisite upon his own credit, and he applied to the defendant Hinch, who, although not a lumber dealer, agreed to sell them to him, and Hinch purchased the materials from a regular dealer at wholesale prices and resold to Smart at the regular retail prices, thereby making a considerable profit. It was claimed by the plaintiff at the trial that Smart did not purchase the lumber from Hinch, but that Hinch merely guaranteed Smart's account to the regular dealer, and that consequently Hinch must account to Smart for the discount which he obtained. The agreement in writing entered into between Hinch and Smart puts it beyond doubt that the arrangement was that Hinch should sell the lumber and building materials to Smart, and I find that the transaction took that form, and that Smart is not entitled to be credited with the profit which Hinch made on the purchase and sale of the building materials.

In order to secure Hinch, Smart assigned the contract for the construction of the Russell house, and all interest which Smart had in the said lot 250 (to quote from the agreement) "as security for any sums for which the contractor (Smart) may become indebted to" Hinch.

At the trial it was first contended by counsel for the defendant Hinch that where a party holds as mortgagee by a title absolute in form, the equity of redemption is not saleable under a judgment, and *McCabe* v. *Thompson*, 6 Gr. 175, and *Fitz-Gibbon* v. *Duggan*, 11 Gr. 188, were cited. These cases, however, turned entirely upon the fact that the Ontario statute for the sale of equities of redemption did not extend to such a case, but only to cases where the equity of redemption appeared on the face of the mortgage.

By the Judgments Act, 91 R.S.M. 1902, the expression "land" is interpreted to cover all interests whether legal or equitable and is quite wide enough to include such an interest as the defendant Smart had in this land.

It was also contended that Hinch had the powers of sale conferred by the Short Forms of Indenture Act; but it is quite clear that, as the instrument creating the security does not purport to be made pursuant to that Act, Hinch is not entitled to invoke its provisions.

The position of Hinch seems to be that he was a mortgagee without a power of sale. None of the writings gave him a power to sell. An attempt was made to prove an oral power of sale, but even if such a power could be conferred by word of mouth, a point on which I express no opinion, I cannot hold that Smart ever gave Hinch authority to sell without his consent.

It has been held that a power of sale will not be implied where a mortgagee holds by a deed absolute in form: *Pearson* v. *Benson*, 28 Beav. 598; Bell & Dunn on Mortgages 169. But even if Hinch had a power of sale he could not exercise it before default by the mortgagor. As no time was fixed for payment of the mortgage moneys Smart would not be in default until he had failed to comply with a demand for payment, and no demand was made.

It follows that Hinch had no power to sell even with notice to Smart and the plaintiff, but it is not contended that notice of the exercise of the pretended power of sale was given. Hinch's right was to foreclosure: Fisher on Mortgages, par. 1001, 1004; *James* v. *James*, L.R. 16 Eq. 153; *Backhouse* v. *Charlton*, 8 C.D. 444.

This is not like the case of *Oland* v. *McNeil*, 32 S.C.R. 23, relied upon by Hinch's counsel. In that case the holder of the title, absolute in form, held it under an express trust for sale and it was held that he had a right to sell without notice. Here there was no trust for sale express or implied, but Hinch held merely as a mortgagee without power of sale.

I hold, therefore, that as against the defendant Hinch the interest which the plaintiff had acquired by the registration of his certificate of judgment has not been affected by the attempted sale.

At the time the defendant Bonter paid his deposit of $55 he had no notice of the plaintiff's claim, but he acquired notice immediately afterwards. It is said that at that time the statement of claim merely alleged that Hinch held the lands in trust for Smart, and that the claim that he held as a mortgagee was not put forward until after Bonter had completed the sale. I do not think it makes any difference so long as Bonter had notice that the plaintiff claimed some interest in the land that was saleable under his registered certificate of judgment. For

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example, it has been held that notice that a party had a judgment or a warrant of attorney affecting an estate bound the purchaser, though in fact it turned out that the claimant had a mortgage: Dart, Vendor and Purchaser, 876, 889.

The fact that Bonter is a purchaser from a mortgagee who held by deed absolute in form protects him only if he had no notice: *Rose* v. *Peterkin*, 13 S.C.R. 677, 27 Cyc. 1033. If a purchaser has notice before he has completed his purchase by actual payment, he is affected. Although the conveyance has been made, if payment has not, he must hold his hand; and if part payment has been made, he is an innocent purchaser only to the extent that payment has been made: 35 Cyc. 346, 347, 23 A. & E. Encyc. 520; Smith's Equity, 354; *Tourville* v. *Nash*, 3 P. Williams 307; Dart on Vendor and Purchaser, 836. He claims the benefit of section 91 of the Real Property Act, but as the certificate of title under which he holds is expressly made subject to the plaintiff's lis pendens, that section cannot aid him.

In my opinion, therefore, the defendant Bonter, except as to the sum of $55, is in no better position than the defendant Hinch.

It is, however, contended that an encumbrancer cannot force a sale upon a prior mortgagee, and that the only right of the sub-encumbrancer is to redeem. As a general rule, a sub-mortgagee cannot make a prior mortgagee a party without offering to redeem him: *Rogers* v. *Lewis*, 12 Gr. 257; *McDougall* v. *Campbell*, 6 S.C.R. 502. And it may, I think, be taken as settled that a sale of the interest of a prior mortgagee will not be decreed at the instance of a sub-mortgagee without his consent. But that only applies to a case where the plaintiff seeks to sell, not only his own interest, but also the interest of the prior mortgagee and force the prior mortgagee in this way to realize his claim. It has no reference to a case where the subsequent encumbrancer only seeks to sell the interest of the mortgagor subject to the rights of the prior mortgagee. That can always be done, and a judgment creditor, having a registered judgment, has always had the right to bring an action to sell the equity of redemption held by his judgment debtor without making the mortgagee a party. And where a prior mortgagee holds by a title absolute in form, he may be made a party defendant without an offer to redeem: Holmested & Langton, 325; Bell & Dunn on Mortgages, 225; *Moore* v. *Hobson*, 14 Gr. 703. In such a case the second mortgagee has the option of redeeming or foreclosing or selling subject to the prior mortgagee, per Spragge, V.-C., at 704. In this case the plaintiff elects to sell, and he is entitled to that relief.

There will be a declaration that the plaintiff's judgment formed a charge upon the interest of the defendant Smart in the lands in question and for an order directing the sale of that

interest, or the plaintiff may, at his option, redeem. In order to ascertain what that interest is, there will be a reference to the Master to take the accounts as between Smart and Hinch.

The defendant Bonter is entitled to a lien to the extent of the deposit paid at the time of the sale, and interest thereon, to be paid out of the proceeds of the sale in priority to the plaintiff's claim.

The proper disposition of the costs involves some difficulty. Ordinarily a mortgagee is entitled to the costs incurred by him for the protection, realization or redemption of his security. But wrongful resistance of a right to redeem will justify withholding all or a portion of the costs of suit: *Winters* v. *McKinstry*, 14 Man. R. at 308, and costs may be given against him to the extent that they have been increased by his improper conduct: Fisher on Mortgages, par. 1872. The defendant Hinch denied that Smart had any interest in the land and claimed himself to be the absolute owner. He had no reasonable ground for raising an issue of this kind, and to the extent that the costs have been increased by Hinch's denial of Smart's interest he must be charged. The plaintiff had a right to take action for the sale of Smart's interest and to make Hinch a party as before pointed out, not because he is entitled to any relief against him, but because of the form of Hinch's security.

As the proceedings are entirely for the plaintiff's benefit and can be of no advantage to Hinch, the latter should be recouped any expense he is put to, except that which was incurred by his own misconduct. I, therefore, make the following directions as to costs.

1. The defendant Hinch is entitled to his general costs of the action, to be taxed and added to his claim, except in so far as such costs are increased by his denial of Smart's interest in the land and by the sale made to Bonter, and the adding of the latter as a party.

2. The costs mentioned in above exception will be taxed and deducted from Hinch's claim.

3. The plaintiff's costs of suit shall be taxed and added to his judgment debt.

4. The defendant Bonter's costs of suit shall be added to the sum of $55, for which he is given a lien and be paid out of the proceeds of sale in preference to the plaintiff's claim and costs. But Hinch's claim as against Smart shall be reduced a like amount.

5. In the event of the plaintiff electing to sell the equity of redemption and the sale not realizing sufficient to pay the claims of Hinch and Bonter and their taxed costs, they shall be entitled to recover against the plaintiff such costs as remain unpaid.

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6. The costs of the reference to the Master and further directions are reserved.

There will be a reference to the Master to take the accounts between Hinch and Smart as in the case of a mortgage action. Mr. Murray draws my attention to the fact that Hinch has paid $1,542.70 to discharge a prior mortgage. He may, of course, add any such payments properly made in relief of the estate to his claim.

Order for judicial sale.

Annotation

Creditor's action

Annotation—Creditor's action (§ III—12)—Creditor's action to reach undisclosed equity of debtor—Deed intended as mortgage.

The general rule is that a prior incumbrancer is not a proper party to an action for foreclosure or sale, the subsequent incumbrancer's right against the prior incumbrancer being only to redeem him. But when the prior mortgage was created by a deed absolute in form this subsequent mortgagee was held to be entitled to bring the prior mortgagee before the Court for the purpose of shewing that he was a mortgagee and redeemable. *Moore* v. *Hobson* (1868), 14 Gr. 703. See *Rogers* v. *Lewis* (1866), 12 Gr. 257. The execution creditors, if there are any, of the alleged mortgagee are necessary parties to such an action. *Glass* v. *Freckleton* (1864), 10 Gr. 470. And see *Darling* v. *Wilson* (1869), 16 Gr. 255; Bell & Dunn on Mortgages (1899 Canada), page 225.

In the Province of Saskatchewan a judgment is not a lien upon land. *Bocz* v. *Spiller* (1905), 1 W.L.R. 366 (Sask.).

Whatever effect it obtains is through the filing of the execution in the Land Titles office. The effect of such filing is set out in the Land Titles Act (Sask.), sec. 129, which provides that the sheriff shall transmit a copy of the writ of execution to the registrar of land titles and that such writ shall bind the land covered thereby only from the time of receipt. The same statute provides that thereafter no transfer by the execution debtor shall be effectual except subject to the rights of the execution creditor under the writ, and that the same be noted on the register and on the certificates of title when registering a transfer or issuing a certificate of title. It was held that this could not apply to lands against whose *registered* owner there was no execution of record and that the creditor's remedy was to register a caveat under sec. 136 of the Land Titles Act (Sask.) and so prevent the lands getting into the hands of an innocent purchaser for value without notice before the execution creditor could apply to the Courts for equitable execution against the debtor's interest. The creditor could then apply to have a receiver appointed for the interest of the judgment debtor and to have the Court direct a sale thereof under the Judicature Act (Sask.), sec. 3, sub-sec. 8, or take out an originating summons calling upon the execution debtor and the trustee who has the legal estate to shew cause why the property should not be sold to realize the amount of the execution under Judicature Rule 246. *Canadian Pacific Ry. Co.* v. *Silzer* (1900), 3 Sask. R. 162.

In the last mentioned Saskatchewan case, the plaintiff sold certain land to defendant S. under agreement for sale, whereby he became entitled to a transfer upon payment of the agreed purchase price and compliance with stated conditions. Subsequently the American Abell Co. recovered a

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Annotation

Creditor's action

Annotation (*continued*)—Creditor's action (§ III—12)—Creditor's action to reach undisclosed equity of debtor—Deed intended as mortgage.

judgment against S., and registered execution in the usual form against his land. S., after such registration, assigned his whole equitable interest in such land to the defendant T. J. S. The legal title during this time remained in the plaintiff. In an action by plaintiff under the contract, the American Abell Co. claimed a right to intervene as having an interest in the land under their writ of execution. It was held by Lamont, J., that, having regard to the provisions of the Land Titles Act, it was evidently the intention of the Legislature that writs of execution should bind only the interests of registered owners of land, and that the execution did not bind the equitable interest of the defendant S. 2. That no lien is created by an execution against land, only such rights being acquired as are given by the Land Titles Act, and which are not available as against equitable interests. *Canadian Pacific Railway Co.* v. *Silzer* (1910), 3 Sask. R. 162.

In Ontario, the Judicature Act (Ont.), sec. 58, sub-sec. 9, does not give jurisdiction to appoint a receiver in cases where prior to that Act no Court had such jurisdiction. And, in order to justify the making of an order for the appointment of a receiver at the instance of a judgment creditor, the circumstances of the case must be such as would have enabled the Court of Chancery to make such an order before the Judicature Act. Where the plaintiffs were judgment creditors of the defendant, and were also the trustees entitled to receive the rents and other property in respect of which they asked that they should be appointed receivers, to which the defendant was beneficially entitled, it was held, that there was no impediment in the way of their receiving such rents and other property, and their motion for an order appointing them receivers was unnecessary. *O'Donnell* v. *Faulkner*, 1 O.L.R. 21

Execution creditors registered their judgment in British Columbia in April, 1907, against the lands of the judgment debtor, pursuant to the Judgments Act of British Columbia. Previous to this, in January, 1906, the debtor conveyed a certain lot to plaintiff, who neglected, through ignorance of section 74 of the Land Registry Act, to register his conveyance until August, 1907, when he found this judgment registered against the lot. In an action to set aside this cloud upon his title, the learned trial Judge ruled that section 74, making registration of conveyances a *sine qua non* to the passing of any title, at law or in equity, to lands governed, it was held, on appeal, that the Judgments Act gives the judgment creditor only a right to register against the interest in lands possessed by the judgment debtor; and that in this case the debtor, having conveyed the land to plaintiff so long before the execution creditors' judgment was obtained, was a dry trustee of the land for plaintiff. (*Levy* v. *Gleason* (1907), 13 B.C.R. 357, explained.) *Entwisle* v. *Lenz*, 14 B.C.R. 51.

A certificate of lis pendens should be registered to entitle the judgment creditor to priority as against a purchaser pendente lite without notice or if a receiver order has been made in respect of rents and profits of land, it is likewise advisable to register the order. Armour on Titles, 3rd ed., page 178.

For American cases, see annotations in 2 L.R.A. (N.S.) 988, 23 L.R.A. (N.S.) 1, 27 L.R.A. (N.S.) 454.

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DUVAL v. O'BEIRNE.

Ontario High Court, Middleton, J., in Chambers, January 10, 1912.

1. COSTS (§ I—14)—ORDERING SECURITY FOR COSTS—"SHEWING" GOOD DEFENCE.

On an application for security for costs made by a newspaper proprietor in respect of an alleged libellous news item for which he is sued, his affidavit that he has a good defence on the merits is not a compliance with the Ontario statute, 9 Edw. VII. ch. 12, sec. 40, which enables the court to order security where the publication has been made in good faith and where it is "shewn on affidavit" that the defendant has a good defence on the merits; the newspaper proprietor claiming the benefit of the statute must state the facts under oath and not merely his conclusion as to their legal effect which is a question to be decided by the Court.

2. LIBEL AND SLANDER (§ II B—15)—INNUENDO INVOLVING CRIMINAL CHARGE—NEWSPAPER LIBEL IN NEWS ITEM.

Where the words of an alleged libel are capable of the criminal meaning charged in the innuendo, although the words would not be libellous *per se*, the action brought thereon "involves" a criminal charge within the meaning of a statute (9 Edw. VII. ch. 40, sec. 12 (2)) restricting the class of cases in which security for costs may be ordered against the plaintiff in favour of a newspaper publisher.

APPEAL by the plaintiff from an order of the Local Judge at Stratford, requiring the plaintiff to give security for the defendant's costs of an action for libel.

The appeal was allowed.

W. D. Gregory, for the plaintiff.

R. C. H. Cassels, for the defendant.

MIDDLETON, J.:—The defendant quite innocently published in his newspaper as a "social item": "Mr. and Mrs. P. Duval (née Mrs. Hetherington) have returned from their honeymoon trip, and have taken up their residence, No. 7 Moderwell street." This item of news reached the newspaper office, and was published in good faith. It now appears that Mr. Duval was a married man, and Mrs. Hetherington is a married woman, and it is said that this item, by its reference to a "honeymoon," implies that Mr. Duval, the plaintiff, has been guilty of the crime of bigamy; and the action is brought on that theory, with an apt innuendo.

The motion for security is based on an affidavit which has not been prepared with the care and precision necessary when the defendant seeks to avail himself of the statutory privilege which has been granted in actions for libel contained in a newspaper. The affidavit must "shew" the various things mentioned in the statute. It is not enough for the defendant to swear that he has a good defence on the merits. He may be quite wrong in his opinion, as he may not know or appreciate the law. He must state the facts; and, upon the facts as stated, the Court will express an opinion whether a defence is shewn: *Lancaster* v. *Ryckman*, 15 P.R. 199.

If clause 4 of the affidavit is to be taken as shewing the nature of the defence, it is not sufficient. It reads: "The alleged libel was published in good faith. The same was sent to my office as a 'personal,' for publication as an item of news, and the publication took place without any knowledge by me of the facts; and on the 30th day of November I inserted in the newspaper in which the alleged libel was published a full apology therefor, and a full and fair retractation thereof, and this was so published in as conspicuous a place and type as was the alleged libel."

If this is intended as a plea under sec. 7 of the Libel and Slander Act, 9 Edw. VII. ch. 40, it is not a defence at all, but a plea in mitigation of damages. But sec. 7 requires, not merely an apology, but that there should be no actual malice or gross negligence. Probably there was no actual malice; and this may sufficiently appear; but nothing is suggested to shew that there was not gross negligence. Nothing is said as to what, if any, inquiry was made from the person who handed in this item, or of any precaution being taken to prevent the insertion of false items that might be sent for publication by any malicious individual.

If it is intended to rely on sec. 8 (2), as may be surmised from the use of the words of sub-sec. (*a*), "that the alleged libel was published in good faith," and the mention of the publication of a retractation, as required by sub-sec. (*c*), then it may perhaps be inferred that enough is said to answer sub-sec. (*d*), "that the publication took place in mistake or misapprehension of the facts;" but this is not by any means clear. Further, I am not satisfied that sub-sec. (*b*) is in any way met. How is it shewn that there was reasonable ground to believe that this publication was for the public benefit? I cannot think that this item of merely personal gossip is the kind of thing contemplated by the statute.

Then, does this libel "involve a criminal charge?" The words without the innuendo do not. The innuendo cannot be said to be improperly pleaded, and the innuendo shews that the words may well be capable of a meaning which does involve a criminal charge. This, in the opinion of the majority of the Divisional Court in *Paladino* v. *Gustin*, 17 P.R. 553, is enough.

The same principle is also clearly stated in *Smyth* v. *Stephenson*, 17 P.R. 374, at p. 376, by Meredith, C.J., and by Falconbridge, C.J., in *Kelly* v. *Ross*, 1 O.W.N. 48.

I find sec. 12 very difficult to construe. Sub-section (1) requires a defence to be shewn. Section 7 does not create a defence; it allows a plea in mitigation of damages. Section 8 (2) limits the recovery to actual damages if certain facts "appear on the trial." This does not create a defence. Yet, when a criminal charge is involved under sec. 12 (2), the existence of these circumstances, which reduce the damages only, is made to

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give a right to security—though it is clear that the right under sub-sec. (2) is intended to be narrower than under sub-sec. (1). It may be that this indicates that the facts that reduce the damages under sec. 8 were thought by the legislators to constitute a defence within that section.

I have not now to determine this question, because I do not think the case is brought within sec. 8, either in its entirety or eliminating clause (*c*), under 12 (2).

For the reasons given in Kelly v. Ross, supra, the action is not trivial or frivolous. It must be a very exceptional case that can be either, when crime is charged.

I think the appeal should be allowed and the motion should be dismissed with costs to the plaintiff in any event.

Security order vacated.

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Jan. 9.

RE MABEL FRENCH.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, and Galliher, JJ.A. January 9, 1912.

1. BARRISTER (§ I A—6)—RIGHT TO PRACTICE—ADMITTING WOMEN AS BARRISTERS AND SOLICITORS—INTERPRETATION OF STATUTE—LEGAL PROFESSIONS ACT (B.C.).

At common law a woman could not be admitted as an attorney or be called to the Bar and this disability continues in British Columbia notwithstanding the general terms of the Legal Professions Act specifying the conditions upon which "persons" may be called to the Bar.

APPEAL from an order of the Supreme Court of British Columbia refusing to admit to the Bar of British Columbia under the Legal Professions Act, 1895, a woman who had been admitted as an attorney in the province of New Brunswick.

The appeal was dismissed.

J. A. Russell, for appellant.

L. G. McPhillips, K.C., for respondent.

MACDONALD, C.J.A.:—If at common law women are not eligible to the legal profession, then I think it is quite clear that the Legal Professions Act cannot be construed as extending to them. It has been often affirmed by the highest authorities that a statute will not be construed to change the existing law unless the intention to do so is clearly expressed, or can fairly be inferred from the language and scope of the enactment, and our statute does not, in my opinion, respond to either of these tests.

The trend of authority at common law is that women are not eligible. No case can be found in English or Canadian jurisprudence in support of the appellant's application. The only direct authority is the other way, and there are many inferentially against it. In the United States the cases are conflicting,

but the one which was decided by the highest authority there—the Supreme Court—and which is based upon the common law of England, is against the appellant.

That there are cogent reasons for a change, based upon changes in the legal status of women, and the enlarged activities of modern life, may be admitted, but if we were to give effect to these considerations, we should be usurping the functions of the legislature rather than discharging the duty of the Court, which is to decide what the law is, not what it ought to be. I would dismiss the appeal.

IRVING, J.A.:—In reading sec. 10 of the Interpretation Act, and its sub-sections 13 and 14, with which we are concerned, it is well to remember that sec. 2 of the same Act provides that the Interpretation Act shall not take effect where the provision is inconsistent with the intention and object of such Act, or "where the interpretation which such provision would give to any word is inconsistent with the context."

An interpretation clause should be understood to define the meaning of the word thereby interpreted in cases as to which there is nothing else in the Act opposed to or inconsistent with that interpretation.

What is the subject matter of the statute we are discussing? It was passed in 1884, and relates to the incorporation of the law society, to which body is committed power to make rules for the education and examination of students, and for their call to the bar or admission as solicitors, and it also enables them to admit to practice, barristers and solicitors of certain other countries upon complying with certain conditions.

The present applicant bases her application upon her admission in 1906 to practice as an attorney in New Brunswick, and her call in the following year to the Bar of that province, and it is argued that there is nothing in the context of the Legal Professions Act, 1895, to prevent the section relating to admission of barristers and solicitors from New Brunswick being read so as to include a lady.

In the event of her admission or call, she would become a member of the law society, and in reading the particular section upon which she bases her application, we must have regard to the whole Act.

Some three years after the Act in question was passed a decision was given by Chitty, J., in *Re Duke of Somerset* (1887), 34 Ch.D., 465, on refusing to appoint a woman guardian ad litem to an infant defendant. In the course of his judgment he said: "To grant the application would be a dangerous innovation, as a married woman, so far as I can see, would not be responsible for the costs of an improper action, or liable to pay those of an improper defence, or, at most, would only be responsible for such

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costs to the extent of her separate estate, which would necessitate an inquiry as to her separate estate with all its attendant inconveniences."

That was the position then; but before that it was laid down in the Mirror of Justice, a work issued at the time of William the Conqueror, "femes ne poient estre attorneys," ch. 5, secs. 1 and 3—Pulling, p. 9. Nor could they be articled because they were not sui juris. Marriage, by the common law of England (which we took over as of 19th November, 1858) merged the persona of the wife in that of the husband, and operated as a gift to the husband of the enjoyment of every kind of property of which she was possessed during the coverture—an absolute right to the personal estate; a right to her choses in action if he reduced them into possession; and a right to the rents and profits of her real estate: 12 B.C. 780.

On the 19th November, 1858, the admission of attorneys in England was regulated by 6 & 7 Vict. (Imp.) ch. 73, passed 22nd August, 1843. That Act contains an interpretation clause—48—to the effect that a word importing the masculine gender only shall extend and be applied to a female as well as a male.

That Act governed until 1877, when the Solicitors Act, 1877, was passed, vesting in the Incorporated Law Society the powers of admitting to practice theretofore vested under 6 & 7 Vict., ch. 73, and certain amending Acts, in certain Judges.

The expression used in all those Acts is "person."

I think we can take judicial notice of the fact that no woman has been admitted in England as an attorney or solicitor. To my mind, having regard to the common law disability above referred to, this fact that no woman has ever been admitted in England, is conclusive that the word "person" in our own Act was not intended to include a woman. The context of our Act refers to a profession for men, and men alone. It is not necessary to go through all the earlier B.C. statutes. They are very interesting, but it is sufficient to say that by the Order in Council of 4th April, 1856, establishing the Supreme Court of Civil Justice of the colony of Vancouver Island, the Court was authorised to admit certain "persons"; and the same expression is used in the Order of Court made by "Matthew Baillie Begbie, Judge in the Court of British Columbia" in 1858, for the admission of attorneys to practice in the colony on the mainland; and in all the Acts since passed, the word "person" has been used.

In the case of *Nairn* v. *University of St. Andrews*, [1909] A.C. p. 147, Lord Loreburn, L.C., at p. 161, says: "It would require a convincing demonstration to satisfy me that parliament intended to effect a constitutional change so momentous and far-reaching by so furtive a process. It is a dangerous assumption to suppose that the legislature foresees every pos-

sible result that may ensue from the unguarded use of a single word, or that the language used in statutes is so precisely accurate that you can pick out from various Acts this and that expression and, skilfully piecing them together lay a safe foundation for some remote inference. Your lordships are aware that from early times Courts of law have been continuously obliged, in endeavouring loyally to carry out the intentions of parliament, to observe a series of familiar precautions for interpreting statutes so imperfect and obscure as they often are."

And Lord Robertson says, at p. 166: "Subject matter and fundamental constitutional law are guides of construction never to be neglected in favour of verbal possibilities."

In England no woman can be admitted a student of an Inn of Court, 2 Hals. 363, note Q., therefore no woman can be called to the Bar in England.

In the province of Ontario, the Benchers declared they had no power to call a woman to the Bar, and the Ontario Legislature recognised the correctness of their decision empowering them to do so, if they thought proper. In the province of New Brunswick, in *Re French* (1905), 37 N.B.R. 359, an application similar to the one now before us was made. The application was refused. All that has been urged here was urged before that Court, and from my point of view nothing can be said more than was said by Barker, J., concurred in by two other members of the Court in giving his reasons. Shortly stated, his opinion was that as at common law, a woman could not be admitted in practice, and as the Interpretation Act could not be used to bring about so radical a change, she was not entitled to succeed. In that opinion, I concur.

GALLIHER, J.A., concurred in dismissing the appeal.

Appeal dismissed.

LAFEX v. LAFEX.

Ontario High Court, J. S. Cartwright, K.C., Master in Chambers. January 3, 1912.

1. VENUE (§ II A—15)—CHANGE OF, IN CIVIL ACTION—CONVENIENCE OF WITNESSES.

The venue of an action will be changed to the locality where the cause of action arose, if the defendant shews that the number of witnesses there far exceed in number those who would be convenienced by the venue stated in the plaintiff's process.

[*Macdonald* v. *Park*, 2 O.W.R. 972, followed.]

Motion by defendant to change the venue in an action brought by her husband against her for conversion of chattels.

D. Inglis Grant, for the motion.

J. MacGregor, for plaintiff, contra.

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THE MASTER:—Motion by the defendant to change the venue from Toronto to Parry Sound. The action was by husband against wife to recover damages for the sale by the wife, four years ago, of certain chattels left on a farm in the Parry Sound district, then owned by the plaintiff. The defendant swore to eight or ten witnesses, besides herself, all resident at or near Parry Sound. The plaintiff, in answer, swore to three witnesses, one at Toronto, one at Peterborough, and one at Rosseau, which is only four or five miles from Parry Sound. The Master said that "the home of the action" (*McDonald* v. *Park*, 2 O.W.R. 972) was certainly at Parry Sound. The sittings at Parry Sound will be held on the 6th May, and the plaintiff cannot now be heard to complain of a delay of four months after waiting for four years. On all grounds, the order changing the venue should be made Costs in the cause.

Venue changed.

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Jan. 8.

RE PROVENCHER ELECTION; BARKWILL v. MOLLOY.

Manitoba Court of Appeal, Richards, J.A., in Chambers. January 8, 1912.

1. ELECTIONS (§ IV—92)—PRELIMINARY OBJECTIONS—EXTENDING TIME.

The Court having jurisdiction over contested election cases under the Dominion Controverted Elections Act, has power to extend the time for filing preliminary objections to a petition filed against the return of a member of parliament although the five days limited therefor by statute had expired.

[See Macpherson's Election Law of Canada, pages 634, 660.]

2. PLEADING (I P—130)—FILING AFTER DEFAULT—MOTION FOR LEAVE.

The party seeking to file objections after the lapse of the time limited by statute should apply for an order of extension, and if he files his objections late and without leave and the opposing party moves to strike them out, the filing will be allowed to stand only upon terms of paying the costs of the motion to strike out.

[*Eaton* v. *Storer*, 22 Ch.D. 91, followed.]

3. ELECTIONS (IV—90)—PETITION TO CONTEST—INTERLOCUTORY PROCEEDINGS—JURISDICTION TO EXTEND TIME.

The power given to the Court under sec. 87 of the Controverted Elections Act, to extend the period limited for proceedings "on the application of any of the parties to a petition" applies only to interlocutory proceedings after a petition has been regularly filed upon which the Court has acquired jurisdiction and before the petition itself has lapsed.

[*Re Glengarry Election*, 14 Can. S.C.R. 453, and the *Assiniboia Election Case*, *Davin* v. *McDougall*, 27 Can. S.C.R. 215, distinguished; *Re Bothwell Election*, 9 Ont. P.R. 485, followed.]

MOTION in Chambers in behalf of the petitioners Barkwill and Gagnon to strike out preliminary objections to an election petition under the Dominion Controverted Elections Act filed by the respondent after the lapse of five days from the service of the petition.

Order made extending time and dismissing motion with costs to be paid by the respondent whose objections were filed late.

H. P. Blackwood, for petitioners.
A. B. Hudson, for respondent.

RICHARDS, J.A.:—Barkwill and Gagnon filed a petition under the Dominion Controverted Elections Act against the return of the respondent, John Patrick Molloy, as member elect for the Dominion constituency of Provencher. The petition was served on the respondent at the Town of Morris, where he resides, seven days later he filed preliminary objections to it.

Sections 19 and 87 of the Act are:—

"19. Within five days after the service of the petition and the accompanying notice, the respondent may present in writing any preliminary objections or grounds of insufficiency which he has to urge against the petition or the petitioner, or against any further proceeding thereon, and shall, in such case, at the same time, file a copy thereof for the petitioner, and the Court shall hear the parties upon such objections and grounds, and shall decide the same in a summary manner."

"87. The Court shall, upon sufficient cause being shewn, have power, on the application of any of the parties to a petition, to extend, from time to time, the period limited by this Act, for taking any steps or proceedings by such party."

No rules have been made by Manitoba Judges affecting proceedings under the Dominion Controverted Elections Act.

The petitioners took out a summons to shew cause why the preliminary objections should not be struck out because they were filed after the five days allowed by section 19.

On the return the respondent's affidavit stated that he had been told by the Deputy Sheriff, who served the petition upon him, that he had ten days from service within which to take action, and he gave that as his reason for not coming to Winnipeg and consulting his solicitor until the seventh day, that on which the preliminary objections were filed. The Deputy Sheriff's affidavit, filed by the petitioners, denied his having made any such statement. I do not think it necessary to decide which is correct. The respondent evidently, for some reason, thought he had the ten days within which to take his first proceeding. There is nothing in the papers served upon him to shew when he should take any proceeding.

From the report in *McDougall* v. *Davin*, 2 Terr. L.R. 417, it appears that in a similar case Mr. Justice Richardson struck out preliminary objections which were filed after the closing of the clerk's office on the fifth day after the service of the petition. I think I must assume that he also held that he had no power to extend the time. An appeal was taken to the Supreme Court of Canada, whose judgment is reported in 27 Can. S.C.R. at p. 215. [*West Assiniboia Election Case, Davin* v. *McDougall.*] They held that an appeal did not lie as the case was not one within

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section 50, now section 64, of the Controverted Elections Act, the section giving the right of appeal in the case of preliminary objections. The Judges, both in the Supreme Court and in the judgment reported in 2 Terr. L.R. 417, stated that they refrained from expressing an opinion upon the merits of the judgment of Mr. Justice Richardson.

It was held in *Re Glengarry Election*, 14 Can. S.C.R. 453, that after the six months allowed for the bringing on the petition for trial have elapsed, if no order extending the time has been made within that six months, an application to extend the time is made too late. That decision was discussed by Davie, C.J., in the Burrard Election case, which I shall refer to later. He pointed out that the decision disallowing an application (made after the time has expired) to extend the time for trial, rests upon reasons of public policy and on the ground that the Legislature never could have intended that an election petition should be permitted to hang on indefinitely; that six months was to be the ordinary limit and that it could only be extended for good cause shewn within that six months, or within some extension of the time for trial, granted before the time had expired.

I agree with Davie, C.J., that that decision is not applicable to such a matter as this. Letting the six months expire, without getting further time to bring on the trial, is allowing the whole proceeding to die by lapse of time. When the six months have elapsed, without an order extending the time and without going to trial, the petition has lapsed, and there remains nothing before the Court in respect of which an extension can be granted. It is similar to the proceeding under the old practice where the plaintiff was out of Court unless he filed his declaration within one year after the defendant had appeared to the writ.

The same principle applies to the decision in *King* v. *Davenport*, 4 Q.B.D. 402, where an order to extend time for delivery of statement of claim was held invalid, because the action was at an end, by effluxion of time, on the day before the order was made.

In *Re North Perth*, 18 O.L.R. 661, cited by the present petitioner, a petition delivered to the Registrar at his house, and after his office hours on the last day allowed by the Act for presenting the petition, was held to have been delivered too late, because section 13 of the Act says that "presentation of a petition *shall* be made by delivering it at the office of the clerk of the Court, during office hours, or in any other prescribed manner," and there was no other manner prescribed.

A motion under section 87 to extend the time for presenting the petition was refused in that case. The learned Judge held that section 87 applied only to interlocutory proceedings and not to the presentation of a petition—that is, to the initiation of the proceedings under the Act. He held, in effect, that until a

petition had been presented, and unless it had been so presented within the time provided by the Act, the Court had no jurisdiction of any kind under the Act.

Section 63 of the then Dominion Controverted Elections Act, ch. 9, R.S.C. 1886 (section 86 of the present Act), provides that until rules were made by the Judges of the several Courts of each province, the principles, practice and rules on which election petitions touching the election of members of the House of Commons in England were on 26th May, 1874, dealt with shall be observed by the Courts and Judges.

The English rules thus in force require the petition to leave with the clerk at the time of filing the petition a copy of the petition to be sent to the returning officer.

In *Re Lisgar Election*, 20 Can. S.C.R. 1, and in *Re Burrard Election*, 31 Can. S.C.R. 459, it was held that the failure to leave the copy with the clerk within the time allowed for presenting the petition was fatal to the proceeding. In each of these cases the petition was, for the above reason, dismissed, or ordered to be taken off file.

In those cases the Judges differed greatly in their views. But I take it that in each case the reason for the decision was that the delivery of the copy within the time allowed was as essential a preliminary to the acquiring of jurisdiction by the Court as was the presentation of the petition itself, and that, therefore, all the proceedings necessary to give jurisdiction had not been taken within the time limited.

It will be seen that section 12 says "the petition *must* be presented not later than thirty days after," etc.

In each if the above cases the action, petition, or proceeding either had not been initiated within the time peremptorily limited by the law for its commencement, or had expired before the time of the attempted extension, and so was no longer before the Court.

I am unable to find that proceedings, to be taken after commencement of the action and during its course, are subject to the rules applicable to such cases as the above.

In England it was enacted by Order VIII. rule 7, of the County Court Rules, 1875, that "the summons in an action brought to recover lands shall be delivered to the bailiff forty clear days at least before the return day, and shall be served thirty-five clear days before the return day thereof." In *Barker v. Palmer*, 8 Q.B.D. 9, cited by the present petitioner, it was held that, because the summons had been delivered to the bailiff only thirty-nine days before the return, the County Court Judge had not power to try the action, though the summons was served on the defendant thirty-eight days before the return day.

That case was decided on the peremptory language of the rule. It is analogous to a case where, though notice of trial is

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properly given, the case itself is not entered for trial the number of days that the law prescribes before the Court sitting.

In *Alexander* v. *McAllister*, 34 N.B. Rep. 163, a motion was made to set aside the preliminary objections, on the ground that a copy thereof, for the petitioner, had not been filed with the clerk of the Court, as required by the section in question (then section 12, now section 19). It was held in that case that, by taking subsequent proceedings before he applied to strike out the preliminary objections, the petitioner had waived his right to apply to strike them out. Several of the Judges held that the failure to furnish the copy was at most only an irregularity, and none of them expressed a contrary opinion. That holding is not an obiter dictum. It is essential to the decision. If the objections were a nullity the petitioner's subsequent proceedings would not have vitalized them. A void proceeding is not given life by waiver.

The above decision was subsequent to *Re Lisgar Election* mentioned above. Apparently that case was considered as it is referred to in the judgment of Barker, J.

I take it that the filing of a copy of the preliminary objections for the petitioner is as necessary under section 19 to compliance with that section, as the delivery of a copy of the petition itself was in *Re Lisgar* and *Re Burrard* to compliance with the English rule. The failure to file the copy of the objections stands, therefore, according to the decision of the New Brunswick case, as I understand it, in the same position as would the failure to file the objections themselves.

Assuming that decision and those of the Supreme Court in *Re Lisgar* and *Re Burrard* to be correct, the difference seems to be that in the case of the initiation of proceedings no jurisdiction accrues to the Court till full compliance with the preliminaries giving jurisdiction, while in the case of the copy of the objections, it affects only an interlocutory proceeding in the action, and becomes merely an irregularity.

In *Re Bothwell Election Petition*, 9 Ont. P.R. 485, the petitioner moved for an order for the examination of the respondents, claiming that the case was at issue, because of the preliminary objections not having been filed until after the expiration of the five days. The motion came before Mr. Justice Osler, who refused the order until after the final disposal of a rule nisi which, he said in his judgment, had been granted to set aside the preliminary objections; but, although he refused on that ground, he said: 'The preliminary objections which have been filed in this case, although presented after the expiration of five days from the service of the petition, are not a void proceeding, inasmuch as the time for their presentation may be extended by a Judge, section 43, and that, by analogy to ordinary practice,

even after the expiration of the term originally fixed by statute: *Wheeler* v. *Gibbs*, 3 S.C.R. 374. They are at most irregular."

Section 43, above referred to, is in chapter 10 of 37 Viet. It became section 64 in chapter 9, R.S.C. 1886. It is now section 87.

Though the above quoted language is, perhaps, an obiter dictum, it is that of a Judge whose views are entitled to great consideration. I cannot find any report of a decision on the rule nisi that the learned Judge refers to.

Then in *Re Burrard Election Petition*, reported in 32 C.L.J. (N.S.) at p. 638, it was held by Davie, C.J., that the time for filing preliminary objections could be extended beyond the five days, and that, following Wheeler v. Gibbs, mentioned above, such extension could be applied for after the five days had elapsed.

Section 18 of the Act says that the petition, etc., shall be served within ten days after the day of presentation, etc., "or within such longer time as the Court . . . allows."

There is no provision that such longer time may be applied for after the expiration of the ten days. But, in *Stratton* v. *Burnham*, 41 Can. S.C.R. 410, it was held that the extension might be granted after the ten days had expired.

The only direct decisions that I can find on both points in question are those of Richardson, J., and Davie, C.J., which contradict each other. But, the views of Osler, J., and the New Brunswick Judges agree with that of Davie, C.J., as to the filing after the five days being only an irregularity, and those of the Supreme Court in Stratton v. Burnham, and of Osler, J., support his opinion that an extension of time may be granted, though applied for after the lapse of the time allowed as of course by the Act. I think, therefore, that the weight of authority is in favour of the respondent's contention.

The language of section 19 is permissive. It does not say that the objections may not be filed after the five days, and there is nothing in it saying, or implying, that the right is absolutely gone at the end of that period. Section 87 seems to me to give power to extend the time.

In view of the importance to a respondent of the right to file preliminary objections and have them passed upon, I do not think I ought to hold that all right to file such objections, and all power to grant leave to file them, expired with the five days from the service of the petition.

The respondent, on being served with the summons, gave notice of an application for leave to extend the time for filing the preliminary objections. I think that, had that been the only motion before me, and had the same material been before me as I have had on these two applications, it would have been my duty to extend the time.

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Though the language of section 19 is permissive and does not, in words, definitely limit the respondent to the five days, as a period after which he may not file the objections without leave of the Court, I think that, reading it with section 87, I should hold that the intention of the Act is that, if he desires to file objections after that period, he should apply for an order extending the time. If that is correct, it follows that, if he files them after the five days, and without such order, he incurs the risk of such filing being declared irregular, and of its being ordered that the objections be removed from the files of the Court. I do not feel certain that I ought not to take that course in this case. But as I would, as just intimated, have allowed them to be refiled during the extension of time applied for by the respondent, the taking off and refiling would cause useless costs and trouble.

I think the rule to be applied on that point is that in *Eaton v. Storer*, 22 Ch. D. 91. There an order for further time to reply was refused by a Judge, the plaintiff shewing no reason why he had not filed his pleading during the time allowed by the rules of Court. The plaintiff, nevertheless, delivered a replication, which the defendant returned as being irregular. The plaintiff then appealed from the order refusing him time. I quote from the judgment of the Court of Appeal, delivered by Sir George Jessel, M.R.:—

"According to the usual practice of the Court the plaintiff's application ought to have been granted by the Vice-Chancellor. The plaintiff was out of time, and in that case, if a motion is made for judgment on admissions in the pleadings, or if the analogous step is taken, of a motion to dismiss for want of prosecution, the usual course is to give the plaintiff time to take the next step upon his paying costs, which is a sufficient punishment, and will prevent the rules from becoming a dead letter. This course will not be departed from unless there is some special circumstances such as excessive delay. . . . Our order now will be that the delivery of the reply . . . shall stand, the plaintiff paying the costs of the application to the Vice-Chancellor, but having his costs of the appeal."

There will be an order, therefore, that the respondent pay to the petitioners their costs of this motion which I fix at thirty-five dollars, and that the preliminary objections stand as properly filed.

As the respondent's action has caused the petitioners a serious loss of time, the order is to provide that the time within which the trial of the petition shall be commenced be extended till the ninth day of July, A.D. 1912, inclusive of that date.

Order confirming the filing on terms.

LAYCOCK (plaintiff) v. LEE & FRASER (defendants).

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British Columbia Court of Appeal, Macdonald, C.J.A., Irving and Galliher, JJ.A. January 9, 1912.

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Jan. 9.

1. BROKERS (§ II A—5)—REAL ESTATE AGENTS—FIDUCIARY RELATIONSHIP TO THEIR PRINCIPAL—DUTY TO DISCLOSE INFORMATION.

Where real estate agents, while acting in a fiduciary relation to the property owner, become aware of a change of circumstances affecting the property, but not known to the owner, which would make wholly inadequate the price at which the owner had previously authorized them to sell, they are bound as agents to disclose the fact to their principal and to advise him to seek independent advice before taking from him an option of purchase in their own names at the price he had named.

[See also 1 Halsbury's Laws of England, page 189.]

2. PRINCIPAL AND AGENT (§ III—31)—FIDUCIARY CAPACITY OF REAL ESTATE AGENT—CONFLICT OF INTEREST—OPTION OF PURCHASE.

Where an option of purchase has been obtained by real estate agents to themselves from the owner under circumstances which render the same voidable for non-disclosure by the agents of facts brought to their knowledge while they were acting in a fiduciary capacity for the owner, a conveyance made to the agents in conformity with such option may be set aside together with the option agreement which is impeached; and the conveyance will not operate by way of estoppel or confirmation unless it clearly appears that the owner had, in the meantime, obtained from some source the information and advice which his agents had improperly withheld and, notwithstanding the same, had elected to affirm the transaction.

[For other cases see 2 Can. Ten Year Digest 2995 et seq.]

3. ESTOPPEL (§ III D—60)—TRANSACTION AFFECTED WITH FIDUCIARY RELATIONSHIP—NON-DISCLOSURE—ACTS CONSTITUTING RATIFICATION.

To establish estoppel by ratification of a voidable transaction entered into between parties in a fiduciary relationship it must be shewn by clear and cogent evidence that the party against whom the estoppel is set up elected to proceed with the transaction as valid, notwithstanding the breach by the other party of the fiduciary obligation to disclose certain facts, and that such election was made after having brought to his mind the proper materials upon which to exercise his power of election.

[See also *United Shoe Co. of Canada* v. *Brunet*, [1909] A.C. 330, 18 Que. K.B. 511, 2 Can. Ten Year Digest 3344.]

APPEAL by defendants, Lee and Fraser, from a judgment in favour of plaintiff setting aside an option of purchase procured by defendants from plaintiff while acting as his real estate agents for non-disclosure of material facts as to the enhancement in value of the lands, and setting aside a conveyance of the lands made in conformity with the option.

The appeal was dismissed.

W. J. Taylor, K.C., for appellants.

Maclean, K.C., for respondent.

IRVING, J.A.:—I would dismiss this appeal. The facts of the case seem to me to establish that there was a fiduciary relationship between the plaintiff and his agents that called for

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the fullest disclosures from them before they purchased the property from him.

They had advised him to purchase the property in question; they, as his agents, had learned that he would be satisfied to sell under normal conditions at a comparatively small advance; then came a complete change. The street which had been an insignificant back street was, possibly by reason of events which no one could forecast, about to become one of the main arteries of the town. It was the defendants' duty to point this out to him, and to tell him that he had a right to look for a much greater profit than that which he, under former conditions, had been willing to accept.

It was their duty to point out to him, in the change of circumstances, that a two weeks' option to purchase this property at a fixed sum was so advantageous to anyone wanting property that the option itself would be worth $500. See on the duty to disclose, judgment by Fry, J., in *Davies* v. *London & Provincial*, L.R. 8 Ch. D., at p. 474.

As to the argument that the plaintiff by signing the deed on 2nd November implementing the option, lost his right to complain. This was founded on an amendment allowed at the trial. The plaintiff says, at p. 22:—

"At that time I knew very little about real estate. I had given them a signed option and I was under the impression that the signed option was absolutely binding and that I could not make any objection to it."

The answer to the appellant's argument is that the defendants on the 2nd November still owed him the duty to advise him of the true value of the property, and that he should seek independent advice.

If the defendants are entitled to succeed on this plea, it is by virtue of the doctrine of estoppel.

I doubt if that plea is properly pleaded, but assuming that it is, in my opinion the defendants must shew, by clear and cogent evidence (*De Bussche* v. *Alt*, 8 Ch. D., at 313), that the plaintiff had presented to his mind proper materials to exercise his power of election. Failing that evidence, the same principles which impeach the original purchase destroy also the effect of any subsequent confirmation made in the same absence of independent advice and assistance.

MACDONALD, C.J.A., and GALLIHER, J.A., concurred.

Appeal dismissed.

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Jan. 8.

NIXON v. DOWDLE.

Manitoba King's Bench. Trial before Macdonald, J. January 8, 1912.

1. BROKERS (§ II B—10)—REAL ESTATE AGENTS—EFFECT OF OPTION ON RIGHT TO COMPENSATION.

The fact that real estate brokers after their employment by the landowner take to themselves an option from the owner to sell to them at the price fixed, does not preclude them from claiming the commission originally agreed upon, if the option was not intended to be in substitution for the previous agreement, but was given for the express purpose of satisfying a prospective purchaser of the agent's right to sell.

[For cases on the general law of options, see Labatt's "Law of Options," 36 Can. Law Journal 521.]

TRIAL of action for commission on the sale of land brought by S. G. Nixon and R. W. Gough against J. E. Dowdle, doing business as real estate agents.

Judgment was given for the plaintiffs.

Messrs. *A. B. Hudson* and *J. E. Adamson*, for plaintiffs.
Messrs. *A. C. Galt*, K.C., and *C. S. Tupper*, for defendant.

MACDONALD, J.:—The plaintiffs are real estate agents doing business in Winnipeg, and bring this action for commission on the sale of land.

The defendant was the owner of certain farm lands at or near Swift Current in the Province of Saskatchewan, and meeting the plaintiff Nixon in Swift Current, they discussed the placing of the property in the market, and the best method of doing so.

The plaintiff interested one G. W. Prout, of Winnipeg, in the purchase at $55 an acre, being the price placed upon it by the defendant. Prout visited the property when he was told that the price had been raised to $250 an acre. On the return of Prout and reporting to the plaintiff Nixon the increase in price the latter again went to Swift Current, interviewed the defendant and told him that he could get Prout to purchase at $55 an acre; and finally the defendant agreed to sell at that figure, and in order to satisfy Prout that he could purchase as originally offered, secured from the defendant an option (Ex. 1). This option fully sets out the terms of the sale, and the purchase by Prout was carried out in conformity therewith, and the plaintiffs now claim a commission on the sale, which the plaintiff Nixon asserts was agreed to be paid to him by the defendant.

The option, however, was made out to the plaintiff Nixon and the defendant now contends that, although the sale was carried out with and in the name of Prout, the sale was in the first instance to Nixon, and that the name of Prout as purchaser was subsequently, at the request of Nixon, substituted.

The defendant says that he never saw or heard of Prout until the 17th May, 1911, the date upon which the agreement

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of sale was signed. In this, however, he is clearly mistaken, as the $500 deposit was paid at least two weeks before the agreement was signed, and a receipt (Ex. 2) was given to and in the name of Prout, for that deposit, and this receipt further recites: "Given in pursuance of option dated the 27th day of April, 1911, made between J. E. Dowdle and S. O. Nixon." These words were evidently added after the receipt was signed, as the defendant places his initials opposite them. I am satisfied that the defendant knew that the plaintiff Nixon was not the purchaser at the time of giving him the option, and that the option was given for the purpose of enabling Nixon to conclude a sale with Prout, which he succeeded in doing.

The defendant knew that Nixon was a real estate agent, and knowing also that he was endeavouring to sell his property it is unreasonable to say that he did not intend to pay him a commission. I find that at the time that the defendant agreed to dispose of his property at $55 an acre, he agreed to pay the plaintiff a commission of 5%, and although there is evidence of a dispute over this at a later stage of the negotiations there is nothing in the way of a release of the agreement to pay such commission.

The defendant, it is clear, attempted to evade payment of this commission. It was mentioned at the time of the execution of the agreement with Prout and suggested that the claim of the plaintiff Nixon for such commission be inserted in the agreement and the defendant then repudiated any liability for commission, and it is stated Nixon was sent for, and it is claimed that he there and then abandoned his claim.

Mr. Smythe, the solicitor who was closing the agreement, says that upon the defendant stating to Mr. Nixon that he had given him an option, and if he wanted to substitute some one else, he would not pay a commission, and that finally Nixon said he would not let the question of commission stand in the way of the deal going through. Considering the fact that there was no foundation for or truth in the contention that another purchaser was being substituted for the plaintiff Nixon, I cannot but believe that the witness Smythe is mistaken, or that he has confused Prout and Nixon. It is possible that it was agreed that the question of the commission should be omitted from the agreement, and that this witness concluded from that fact that the plaintiff was abandoning his claim.

The plaintiff Nixon denies that he was in Smyth's office on the occasion referred to, and that any such conversation as stated ever took place, and in this he is corroborated by the defendant himself, who says that Nixon never claimed a commission and that he never heard of such claim excepting through the Courts. He further says that at the time of the execution of the agreement Prout said there should be a commission to Nixon, and

upon the defendant objecting, Prout replied, "Very well, go on, and if Nixon wants a commission he can look to Dowdle for it."

Finding that the property was placed in the hands of the plaintiff Nixon for sale and that there was an agreement to pay him 5% commission in the event of his concluding a sale, and he having concluded a sale the plaintiffs are entitled to the commission agreed upon and there will be judgment in their favour for $1,760 with costs.

Judgment for plaintiffs.

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MINNESOTA AND ONTARIO POWER CO. v. RAT PORTAGE LUMBER CO.

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Jan. 5.

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

INJUNCTION (§ II—130)—GRANTING INTERIM ORDER UNTIL TRIAL—BONA FIDE DISPUTE.

Where there is a bona fide dispute by the defendant of the plaintiff's title to riparian rights in an action for interference, an interlocutory injunction will not be granted, unless the interim injury sustained by the plaintiff is clearly greater, in case he succeeds in the action, than the interim injury which the defendant would sustain, by the interlocutory injunction.

[See Mackenzie's Yearly Practice (Eng., 1912, pages 1263, 1264; Canadian Ten Year Digest, 1720, 1728, 1730.]

Motion by the plaintiffs for an interim injunction restraining the defendants and each of them from interfering with the natural flow of the waters of the Rainy River past the lands and works of the plaintiffs at or near Fort Frances, by damming and storing the waters of certain lakes.

The motion was dismissed.

Glyn Osler, for the plaintiffs.

G. H. Watson, K.C., for the defendants the Rainy River Lumber Company and the Shelwin Company.

R. B. Henderson, for the defendants the Rat Portage Lumber Company and the Northern Construction Company.

MIDDLETON, J.:—Further consideration has confirmed my view, expressed upon the argument, that no case has been made which would warrant the granting of an interim injunction. The plaintiffs' rights are by no means clear, and there can be no doubt that the defendants have for years used the water in the manner contemplated. I fear that any injunction will necessarily occasion the defendants greater injury than the plaintiffs will sustain between the present time and the trial. I cannot say that the plaintiffs have shewn that the balance of convenience is in favour of the injunction; and, when the right asserted is denied, and there can be no question as to the *bona*

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fides of the dispute, the rule is against interference, unless the injury done to the plaintiff is clearly greater, if in the end he should be found to be right, than the injury to the defendant by an injunction, if in the end he (the defendant) is found to be right.

On this motion it would be quite out of place for me to attempt to consider the merits. When once satisfied that there is a real question to be tried, I ought not to interfere with the ordinary course of litigation, save in cases where a *modus vivendi* can be suggested which is on the whole advantageous.

The plaintiffs may amend as they desire; and, if a trial can be had with advantage at an earlier date than that fixed for the Fort Frances sittings, no doubt some arrangement may be made to meet the convenience of the parties. Costs in the cause.

Interim injunction refused.

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Jan. 9.

THE KING v. CHLOPEK.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, and Galliher, J.J.A. January 9, 1912.

1. FISHERIES (§ I B—9)—TACKLE AND APPLIANCES—FOREIGN SHIP IN CANADIAN WATERS—USE OF DORIES.

Dories used with a fishing vessel are a part of the fishing tackle or appliances of the vessel and proof that the fish were being transferred from her dories to a vessel not permitted to fish in Canadian waters at the point within Canadian jurisdiction, at which the vessel was overhauled, is evidence of illegal fishing within the Customs and Fisheries Protection Act (Canada).

[For other cases see 1 Canadian Ten Year Digest 1449-1453.]

2. EVIDENCE (§ II C 9—205)—PRESUMPTION FROM WITHHOLDING OR DESTROYING EVIDENCE—APPLICATION IN INTERNATIONAL LAW.

Per IRVING, J.A.:—A presumption is raised against a spoliator who destroys or conceals the things, the finding of which would be evidence against him, and such presumption is applicable in matters of international law.

[For other cases see Odger's Law of Evidence, Canadian edition, 1911, pages 408-410.]

APPEAL by defendant from a judgment of the Chief Justice of the Supreme Court of British Columbia in favour of the Crown upholding a seizure of defendant's vessel for illegally fishing in Canadian waters in contravention of the Customs and Fisheries Protection Act, R.S.C. (1906), ch. 47.

The appeal was dismissed and the seizure sustained.

Messrs. *W. B. A. Ritchie*, K.C., and *R. L. Reid*, K.C., for appellants.

Macdonald, for the Crown.

MACDONALD, C.J.A.:—In the view I take of the evidence, it becomes unnecessary to determine the construction which ought

to be placed upon R.S.C. 1906, ch. 47, sec. 21*; therefore, for the purpose of this opinion, I will assume that the onus of proof of the offence charged was upon the respondent. I have had the advantage of reading the reasons for judgment of Mr. Justice Irving, and I concur in his view of the evidence. I will only venture to add to those reasons by referring to other evidence which to my mind has an important bearing upon the case, and which indicates very clearly how little confidence the captain of the "Edrie" had in the bearings which he claims to have taken just before the seizure, and upon which appellant relies. He admits that as early as 11.50 he knew the character of the approaching ship. From that time until the seizure was made he was making very strenuous efforts to get in his dories and fishing gear. In other words, he was taking up that which would have proven beyond question whether he was or was not within the three mile limit. He was destroying the evidence which would, according to his story, have established beyond dispute that he was outside the three mile limit. The excuse which he gives for this does not appeal to me. I take the following extracts from his evidence:—

Q. I am asking you this—at 11.50 you were absolutely certain that it was a Canadian cruiser?

A. Yes, sir.

Q. Now, those buoys remained in the water there from 11.50 until 5 or 10 minutes to 1.

A. Yes.

Q. And your bearings were taken for the purpose of convincing you that you were outside?

A. Yes.

Q. Now, is there any reason why they should not have remained there 10 or 15 minutes longer to convince the captain of the "Rainbow" that you were outside?

A. Yes, there is this reason—if those buoys had remained 10 or 15 minutes longer there the men would have had to haul this gear in and look at it for 10 or 15 minutes and would not be doing anything.

Q. Now, if those buoys remained there when the "Rainbow" came up, the "Rainbow" could have taken the bearings just as well as you.

A. I suppose they could.

Q. The buoys were anchored there?

A. Yes.

Q. And there was no chance of moving at all?

A. No.

*21. The burden of proving the illegality of any seizure, made for alleged violation of any of the provisions of this Act, or that the officer or person seizing was not by this Act authorised to seize, shall lie upon the owner or claimant.

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Q. And the "Rainbow" was within 200 yards of you when you took up that last buoy?

A. Yes.

I would dismiss the appeal.

IRVING, J.A.:—I would dismiss this appeal. I reach that conclusion on the facts of the case, and irrespective of the onus which the appellants contend that the learned Chief Justice improperly placed upon them.

The contention put forward by the appellants that sec. 21 applies to a class of action wholly different from this action is, in my opinion, sound.

Coming to the facts of the case, it is established beyond doubt that the "Edrie" was on the day in question in Canadian waters.

There were on the bridge of the "Rainbow" in addition to the quartermaster at the wheel, (1) Commander Stewart directing the navigation of the "Rainbow," and taking from time to time her bearings and the bearings of the "Edrie"; (2) Mr. Moore, the first lieutenant, who verified two of the fixes of the "Edrie" made by Commander Stewart, and who also fixed the position of the "Rainbow" at R; (3) Lieutenant Edwards, who held the range finder on the "Edrie" from 14,000 yards down to 75 yards, and who, for the information of Captain Stewart, called out the diminishing distances at every 100 yards; and (4) Lieutenant Holt, who watched the "Edrie" and her small boats through a telescope, and who from time to time reported to Captain Stewart the movements of the vessel and her dories. From the bearings thus taken, Commander Stewart has placed the "Edrie" on the chart as being at 12.39 at a point marked 1; at 12.48 at a point marked 2; and at 1.10 at a point marked R. Each of these three places are within the three mile limit.

Lieut. Holt reported that when he first saw the dories they were to the southward of the "Edrie," and that later he picked them up close alongside her.

During the period that elapsed between the time when the "Edrie" was first sighted until she was at point R., she was engaged in getting the fish out of the dories on to her own deck. It was the final act necessary to reduce the fish into actual possession. That act, or the act of lifting the dories bodily with the fish on board them, seems to me as much a part of the operation of fishing as those things which are admittedly "fishing," e.g., dropping the hooks overboard or pulling the lines in to see if anything has been caught, are.

At any rate, proof of that operation—of lifting the fish from the dories on to the deck of the "Edrie", both dories and "Edrie" being within Canadian waters—raised a sufficient case to require evidence to be adduced by the defendants that

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they were not fishing: see *Hollis* v. *Young*, [1909] 1 K.B. 629; and when that evidence was given it transpired that the "Edrie", although pretending to shew their captors where they had been fishing, and that they had picked up all their gear, had, in fact, left a large amount, fully one-half of their outfit, in the sea. The deliberateness of this concealment is shewn by the fact no mention of the circumstance of the loss was made in the "Edrie's" log, a very carefully prepared document.

The inference I would draw from this act of abandonment—this suppression of evidence—was that the unrecovered gear was in Canadian waters, and its existence was concealed from the "Rainbow" officers in order that it might not be used as evidence against the defendants' ship, which the master then knew was arrested for fishing in Canadian waters.

Starkie, in his laws of Evidence (1853), speaks of the suppression or destruction of evidence as a "prejudicial circumstance of great weight", and Wills on Circumstantial Evidence (1902), reproduces the statement with approval.

The principle of presuming against a spoliator is adopted in international law when papers have been spoliated by a captured party: *The Hunter* (1815), 1 Dodson 480.

GALLIHER, J.A.:—The evidence adduced by the Crown satisfies me that appellants were fishing within the three mile limit.

I agree with my brother Irving that the dories are a part of the fishing tackle or appliances. The appeal should be dismissed.

Defendant's appeal dismissed.

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British Columbia Court of Appeal, Macdonald, C.J.A., Irving and Galliher, JJ.A. January 9, 1912.

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Jan. 9.

1. NEW TRIAL (§ II—8)—CRIMINAL CASE—MISDIRECTION OF JURY AS TO UNIMPORTANT QUESTION—STATUTORY RESTRICTION AS TO SUBSTANTIAL WRONG (CR. CODE 1019).

Upon an appeal in a criminal case, the Court of Appeal should not grant a new trial merely because a portion of the Judge's charge was objectionable if of opinion that, irrespective of the charge, the jury could not have done otherwise than convict the accused and consequently that the misdirection could not have occasioned any "substantial wrong" to the accused within the terms of the Criminal Code (Can. 1906), sec. 1019.

[See also Tremeear's Criminal Code, 2nd ed., 1908, pages 806-808; and see Annotation to this case.]

2. APPEAL (§ VII J—7)—INSTRUCTION TO JURY ON CRIMINAL TRIAL—OBJECTION NOT TAKEN AT TRIAL.

While the lack of objection on the prisoner's behalf at a criminal trial to an erroneous instruction in the Judge's charge is not neces-

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sarily fatal to an appeal, it is a matter which the appellate Court will consider as a circumstance tending to uphold the trial proceedings not withstanding the irregularity, when determining whether or not any substantial wrong or miscarriage had been thereby occasioned without which the conviction must be affirmed under sec. 1019 of the Cr. Code (Can.) 1906.

APPEAL by the accused from a conviction for theft of the clothes of the prosecutrix.

The conviction was affirmed by a majority of the Court.

W. P. Grant, for appellant.

W. A. Macdonald, K.C., for the Crown.

MACDONALD, C.J.A.:—On the argument, I was inclined to the opinion that a new trial ought to be ordered, but upon reading the case, and upon further consideration, I think that, although that portion of the charge complained of is objectionable, no substantial wrong has been done to the prisoner.

The jury might properly have been told that there was evidence from which they might conclude that the prisoner desired to prevent the complainant from returning to Vancouver on that morning, and that it was open to them to infer that the motive for the alleged taking of the clothes was, by that means, to prevent her from doing so. The objection is one more of form than of substance. Section 1019 of the Criminal Code imposes upon this Court a duty which it ought not to shrink from performing. The Court is not to quash a conviction, and order a new trial, unless it is convinced that a substantial wrong has been done the prisoner, or that there has been a miscarriage of justice arising out of the matter complained of.

In this case the prisoner was caught with the clothes in his valise, and all the circumstances tend to discredit the truth of his story that he had no knowledge of how they came there. That portion of the Judge's charge complained of relates to a matter which, while very proper to be considered by a jury in determining the truth or falsity of the evidence, was one which the Crown was not bound to prove. On the evidence, I am unable to say how the jury could have done other than convict him irrespective of anything which the learned Judge said in his charge. I think sec. 1019 was intended to cover just such a case as this, and to prevent the scandal of delay and uncertainty in the punishment of crime. The lack of objection by prisoner's counsel to the charge at the time when the matter could have been instantly rectified, while not necessarily fatal to an appeal, is a matter which we ought to consider both in its relation to the general practice of Courts not to grant new trials where no objection has been taken, and to the probable effect which the words complained of had upon those who heard them. If prisoner's counsel did not apprehend any prejudice to his client, it is not unreasonable to suppose that this phase

of the case was not regarded by anyone as of much moment. I would dismiss the appeal.

IRVING, J.A.:—The prisoner complains of that part of the charge set out in the following words:—

> "It is suggested on the part of the Crown, or if it is not suggested, your common sense would suggest to you that there would be a motive which we can readily understand on the Chinaman's part for the taking of those clothes. There is sufficient evidence here, if you find that the intention of taking that girl to Prince Rupert was to embark her in the business of prostitution and it is a matter of common knowledge that one of the most usual ways of forcing them to embark in the business of prostitution by the men who intend to profit by their becoming prostitutes, is by taking away their clothes."

The case made against the prisoner was that he had stolen her clothes.

The evidence of the prosecutrix was that she had gone to Prince Rupert with him; that he and she lived together in a cabin, and immediately adjoining their cabin, and under the same roof, there lived another Chinaman named Mah Hung with another woman—Kitty Stevens.

"On the morning she went to come home" (I use her own words) "to Vancouver," her clothes—everything, including boots—were taken from her room and were found in the prisoner's bag when he was arrested.

The arrest was made on the dock whilst he was waiting for his steamer.

It was suggested by the defence (and this was the only defence) that the woman had placed them there. But the woman denied this, and the evidence of the policeman who made the arrest shews that the prisoner did not make this contention at the time of the arrest.

It was argued before us that there was no evidence of any intention on the part of the prisoner to place her in a house of ill-fame—or to support what the learned Judge speaks of as a matter of common knowledge.

There is this evidence, and having regard to the proximity of the two cabins, and the character of the inmates, it seems to me to be cogent.

> (P. 8) "He said he was going back, and I said, I wanted to come too, and he said, I had better wait and he was going to send me a ticket when he got back."
>
> (P. 11) "I told him (this is in a conversation which must have taken place after the arrest) I told him that he was a pretty foolish fellow to bring all this trouble on himself . . . I said, I did not think he would do it. I said,

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Mah Hung must be a pretty bad fellow to put bad thoughts in his head to get him to do that."

The Judge's charge is very clear, and to my mind eminently fair, but it is said that the prisoner is entitled to a new trial because there was no evidence of this practice. Jurors are supposed to be men of the world, and they are allowed to act upon matters within their general knowledge.

If the Judge had said to them:—

"It is urged on the prisoner's behalf that he could have no motive for stealing these clothes—that they were of no use to him, that may be quite true, he could not wear them himself, but he might sell them, or you may find that he had an ulterior motive. It is not necessary that his motive should be proved; but in considering whether he had any ulterior motive, you, as men of the world, may use your general knowledge and determine the question of motive (if you think necessary to go into that) by considering whether the taking away of her clothes was part of a scheme to leave her in Mah Hung's clutches."

Had the learned Judge put it that way, I think there could have been no objection to the charge.

And wherein do the two ways differ—only in the matter of words, it seems to me.

I do not know that it is common knowledge that a practice of that kind is resorted to, but the existence of the practice is immaterial. It was put before the jury the suggestion that the detention of the clothes might be done for ulterior purposes.

It is quite usual and proper for a Judge or counsel to refer to notorious matters without proof: see *R.* v. *Dowling*, 7 State Trials (N.S.) 390; *R.* v. *Duff*, 7 State Trials (N.S.) at p. 917, and some authorities cited at pp. 382 and 383 in 15 B.C.R.

There is another point to be observed that when the matter was fresh, counsel for the prisoner took no objection to the fairness of the charge. I would uphold the conviction.

GALLIHER, J.A.:—I would quash the conviction and order a new trial. The charge complained of is set out in my brother Irving's judgment.

There is to my mind no evidence whatever that the prisoner had any thought of forcing the girl to embark in the business of prostitution.

It was not necessary to prove such in order to convict the prisoner if the jury believed the story of the girl in preference to that of the prisoner. The Judge put it to the jury very pointedly that they might infer intention (of which there was no evidence from which such intention could be inferred) on the ground that it was a matter of common knowledge that the stealing of the clothes was one way of forcing the girl into that life.

I am unable to say that this might not have influenced the jury in reaching their verdict, and if it did, the prisoner has not had a fair trial.

Conviction affirmed.

Annotation—New trial (§ II—8)—Judge's charge—Instruction to jury in criminal case—Misdirection as a "substantial wrong"—Cr. Code (Can. 1906) sec. 1019.

Annotation
New trial

Under Canadian jurisprudence a bill of exceptions will not lie in a criminal case. *Whelan* v. *Reg.*, 28 U.C.Q.B. 132; *Duval* v. *Reg.*, 14 Lower Canada Rep. 74, 79. These were cases before the Criminal Code and now, by Code sec. 1014, "no proceedings in error" shall be taken in any criminal case. But 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 of the proceedings preliminary, subsequent, or incidental thereto *or arising out of the direction of the Judge*, for the opinion of the Court of Appeal. Cr. Code sec. 1014(2); sec. 2(7). The trial Court may reserve a case on a question of law ex mero motu or upon the application of the accused made either during or after the trial. Cr. Code Amendment Act, 1909 (Can.), amending sec. 1014(3). If the trial Judge refuses to reserve a question of law, the party concerned may then apply directly to the Court of Appeal for leave to appeal and thereupon, if leave be granted, a case must be "stated" in like manner as it would have been "reserved" had the trial Judge granted the application made to him instead of refusing it. Cr. Code sec. 1015.

By Code section 1019 it is enacted that no conviction shall be set aside nor any new trial directed, although it appears that some evidence was improperly admitted or rejected, or that something not according to law was done at the trial or *some misdirection given*, unless, in the opinion of the Court of Appeal, some substantial wrong or miscarriage was thereby occasioned on the trial: Provided that if the Court of Appeal is of opinion that any challenge for the defence was improperly disallowed, a new trial shall be granted.

Where a conviction has been made without the legal proof required by law of an essential part of the crime, such defect is a "substantial wrong or miscarriage" at the trial within this section and the conviction must be set aside. *The King* v. *Drummond*, 10 Can. Cr. Cas. 340.

The intention is that the improper admission of evidence shall not in itself constitute a sufficient reason for granting a new trial, and that it is not necessarily a "substantial wrong or miscarriage." (*Makin* v. *New South Wales* (1894), A.C. 57, distinguished.) *R.* v. *Woods* (1897), 2 Can. Cr. Cas. 159 (B.C.).

But in the absence of a direct and unmistakable enactment, the Court should not, upon a case reserved, affirm a conviction, where material evidence has been improperly received, because, in the opinion of the Court there is sufficient good evidence to support a verdict. *R.* v. *Dixon*, 29 N.S.R. 462; *R.* v. *Gibson* (1887), 18 Q.B.D. 537.

If a most important and substantial ground of defence clearly disclosed by the evidence is not submitted to the jury by the Judge's charge, the conviction cannot stand, although the prisoner's counsel did not ask at the trial for any other or fuller direction. *R.* v. *Theriault* (1894), 2 Can. Cr. Cas. 444 (N.B.).

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Annotation

New trial

Annotation (*continued*)—New trial (§ II—8)—Judge's charge—Instruction to jury in criminal case—Misdirection as a "substantial wrong"—Cr. Code (Can. 1906) sec. 1019.

The strictness of the rule applied in civil cases in some of the provinces by which an objection not raised at a time when it could have been remedied, cannot afterwards be allowed, should not be applied to cases of misdirection in criminal cases. (*R.* v. *Fick* (1866), 16 U.C.C.P. 379, disapproved.) Ibid.

Where an alleged confession is received in evidence after objection by the accused, and the trial Judge before the conclusion of the trial reverses his ruling and strikes out the evidence of the alleged confession, at the same time directing the jury to disregard it, the jury should be discharged and a new jury empanelled. *R.* v. *Songer* (1898), 2 Can. Cr. Cas. 501.

An accused person has the right to have his case submitted to the jury without any comment on his failure to testify being made by the trial Judge, and although such comment is afterwards withdrawn, the making of same is a substantial wrong to the accused, and if he is convicted he is entitled to a new trial by reason thereof. *R.* v. *Coleman* (1898), 2 Can. Cr. Cas. 523 (Ont.).

The English Act, 7 Edw. VII. (Imp.), ch. 23, sec. 4, conferring special powers on the English Court of Criminal Appeal, is in these words:—

"The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable *or cannot be supported having regard to the evidence*, or that the judgment of the Court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal;

"Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred."

Sir Charles Fitzpatrick, C.J., in *Allen* v. *The King* (1911), 44 Can. S.C.R. 335, 18 Can. Cr. Cas. 1, said:—

"There are, obviously, verbal distinctions which can be made between the English Act and the section of our Code. The English statute enacts that the appeal shall be allowed in a certain number of enumerated cases —including that of a verdict *which cannot be supported having regard to the evidence*—and that in any others the appeal shall be dismissed. As appears by the citation from *Rex* v. *Fisher*, [1910] 1 K.B. 149, that statute has been construed by the Court of Criminal Appeals to mean that the conviction must be set aside where improper evidence has been admitted even if having regard to the whole evidence there is sufficient to support the verdict. This is now the settled rule notwithstanding the proviso to the English Act that the appeal may be dismissed even if the point raised might be decided in favour of the appellant if the Court considers that no substantial miscarriage of justice has occurred.

"Our section 1019 is practically to the same effect. It provides that no conviction shall be set aside if it appears that some evidence was improperly admitted unless some substantial wrong or miscarriage of justice was thereby occasioned. The underlying principle of both is that, while the

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Annotation

New trial

Annotation (*continued*)—**New trial** (§ II—8)—**Judge's charge—Instruction to jury in criminal case—Misdirection as a "substantial wrong"—Cr. Code (Can. 1906) sec. 1019.**

Court has a discretion to exercise in cases where improper evidence has been admitted, that discretion must be exercised in such a way as to do the prisoner no substantial wrong or to occasion no miscarriage of justice; and what greater wrong can be done a prisoner than to deprive him of the benefit of a trial by a jury of his peers on a question of fact so directly relevant to the issue as the one in question here—the existence of previous threats—and to substitute therefor the decision of Judges who have not heard the evidence and who have never seen the prisoner? It may well be that in our opinion sitting here in an atmosphere very different from that in which the case was tried the evidence was quite sufficient, taken in its entirety, to support the verdict, but can we say that the admittedly improper questions put by the Crown prosecutor and the answers which the prisoner apparently very reluctantly gave did not influence the jury in the conclusion they reached? We must not overlook the fact that it is the free unbiassed verdict of the jury that the accused was entitled to have.

"Despite all the changes made in recent years in the procedure in criminal and quasi-criminal cases, the classic saying of Lord Hardwicke still holds that 'it is the greatest consequence to the law of England and to the subject that these powers of the Judge and jury are kept distinct, that the Judge determines the law, and the jury the fact; and if ever they come to be confounded it will prove the confusion and destruction of the law of England.'" *Allen* v. *The King* (1911), 44 Can. S.C.R. 335, 18 Can. Cr. Cas. 1.

And where upon a material question in a murder trial as to whether there were two or three Italians present at the time of the quarrel, a witness stated on examination in chief that there were only two, but on cross-examination on behalf of the accused said there were three, and the trial Judge in his charge to the jury erroneously represented that the first statement was of three and that this was varied to two on cross-examination, the jury may have assumed from this error in reversing the order of the depositions that the statement as to the presence of three Italians, which was the more favourable to the accused, had been withdrawn by the witness, and such irregularity constitutes error, entitling accused to a new trial. *The King* v. *De Marco* (1906), 17 Can. Cr. Cas. 497.

RE WOEFFLE.

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Jan. 11.

Ontario High Court, Middleton, J. January 11, 1912.

1. WILLS (§ III B—80)—PERSON TO BE ASCERTAINED BY FUTURE CONTINGENCY.

Where a legacy is left by will to persons not named but who are so described by reference to some extrinsic fact that they could be ascertained by extrinsic evidence at the time when the legacy is to take effect, the bequest will be sustained; hence, a bequest in the following words: "to the party at whose house I die" is not void on the ground of uncertainty.

[See Theobald on Wills, 7th ed., with Canadian notes, pages 69, 273, 274.]

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RE WOEFFLE.

2. EVIDENCE (§ VI J—572)—BEQUEST TO "PARTY AT WHOSE HOUSE I DIE" —INTERPRETATION—IDENTITY OF PERSON INTENDED.

A bequest in the following terms: "to the party at whose house I die," may be construed in the light of the surrounding circumstances as a gift to the son-in-law of the decedent as head of the household where the testator was making his home at the time of his decease, and not to the owner of the house.

[See Odgers' Law of Evidence, 1911 ed., pages 561 et seq.]

MOTION by the executors of the will of Martin Woeffle for an order, under Con. Rule 938, determining a question as to the construction of the will arising in the administration of the estate.

By the clause of the will of which the interpretation was sought, the testator made a bequest "to the party at whose house I die."

An order was made declaring the testator's son-in-law who was the occupant entitled as against the opposing claim of the property owner.

J. D. Bissett, for the executors.

H. S. White, for the testator's son-in-law.

H. H. Davis, for the owner of the house in which the testator died.

MIDDLETON, J.:—This case is well covered by *Stubbs* v. *Sargon*, 2 Keen 255, affirmed 3 My. & Cr. 507. There the testatrix gave certain property to be divided "amongst her partners who should be in co-partnership with her at the time of her decease or to whom she might have disposed of her business in such shares and proportions as her trustees should think fit." It was said that this was void, because of "the undefined character of the persons who were to take under it, as well as the indefinite nature of their interest." The devise was upheld because "the persons were so described with reference to some extrinsic fact as that the subject of the devised (sic) could be ascertained by extrinsic evidence at the time when the devise was to take effect." "It was nothing more than the common case of a gift to a class of persons who should fill a particular character, to be ascertained by some act or event extrinsic to the will indeed. . . Thus a gift to the persons who should be the testator's servants at the time of her decease would be perfectly good, though it would probably depend in a great degree upon the acts of the testator who should fill that character." See the report of this case, 6 L.J.N.S. Ch. 255.

Applying this principle to the facts shewn, I have no doubt that the son-in-law, as head of the household where the testator was living at his death, takes. This was his "house" in the sense in which the testator used the term. He was referring to the house as an abode and place of residence, and in no way to the ownership. Declare accordingly. Costs out of the estate.

Order accordingly.

COMPTON v. ALLWARD.

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Jan. 8.

Manitoba King's Bench. Trial before Mathers, C.J.K.B. January 8, 1912.

1. ASSIGNMENT (§ I—17)—DAMAGES FOR TORT—COLLISION ON HIGHWAY.

A claim for damages for personal injuries from a collision on the highway due to the defendant's driving on the wrong side of the road is not assignable.

[*McGregor* v. *Campbell*, 19 Man. R. 38, and *McCormack* v. *Toronto Ry. Co.*, 13 O.L.R. 656, followed.]

2. BAILMENT (§ II—10)—CLAIM IN TORT BY BAILEE AGAINST WRONGDOER FOR INJURY TO PROPERTY.

As against a wrongdoer the possession of a bailee is title, and the bailee is entitled to recover for the whole loss or deterioration of the subject of the bailment, ex. gr., a horse and buggy hired from a livery stable keeper), and the wrongdoer having once paid full damages to the bailee has an answer to any action by the bailor against him.

[*Re The Winkfield* [1902] P.D. 42; *Glenwood Lumber Co.* v. *Phillips*, [1904] A.C. 405 and *Turner* v. *Snider*, 16 Man. R. 81, followed; and see Beven on Negligence, 3rd ed. 1908, pages 736, 737.]

3. BAILMENT (§ III—17)—DAMAGES RECOVERED BY BAILEE FOR LOSS OF CHATTEL—ACCOUNTING TO BAILOR.

Where a bailee in possession recovers from a wrongdoer the damage done to the subject of the bailment, the moneys received in excess of the monetary interest of the bailee in the chattel are deemed to have been received to the use of the bailor and the bailee must account to the bailor in respect thereof.

[See Beven on Negligence, 3rd ed. 1908, page 737.]

4. NEGLIGENCE (§ I D—71)—HIGHWAY—LAW OF THE ROAD.

Driving in the dark on the wrong side of the road and so causing a collision the danger of which neither driver could foresee in time to avoid it, is actionable negligence.

[See Oliphant on Horses, 6th Can. ed. 342.]

TRIAL of action for the value of a horse killed and buggy destroyed by a collision with another buggy driven by the defendant.

Judgment was given for the plaintiff.

A claim for personal injuries sustained by another occupant of the plaintiff's buggy claimed by assignment to the plaintiff from the injured person who was not a party to the action was disallowed on the ground that such claim is not assignable.

Messrs. *M. G. Macneil* and *B. L. Deacon*, for plaintiff.
W. Thornburn, for defendant.

MATHERS, C.J.K.B.:—On a dark night in October last the plaintiff was driving a horse and buggy which he had hired from a livery stable keeper westward on Portage Avenue in this city between the St. James bridge and the city limits. He was on the north side of the travelled portion of the road, which at the point in question, was about twenty-four feet wide. The horse was trotting at from six to seven miles per hour. He heard no noise of anything approaching, but suddenly observed a horse

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he believed to be about twenty-five feet away coming towards him on the same side of the road. The plaintiff turned to the right to avoid a collision, but in an instant the buggy driven by the defendant crashed into the buggy he was driving. Both horses broke loose and ran away. The plaintiff was pulled over the dashboard by the reins, as also was the defendant. The plaintiff's buggy was damaged to the extent of $5. The horse ran away westward, and when a short distance beyond the city limits collided with a baker's delivery waggon and the horse sustained injuries from which he afterwards died.

With the plaintiff in the buggy was a young lady Louisa Wilson, who was thrown out by the collision and found in the north ditch close to the buggy in an unconscious condition. She was not seriously injured, but was unable to resume her ordinary occupation for about a week.

This action is brought by the plaintiff to recover damages for the value of the horse and the damages to the buggy and for personal injuries. He also sues upon an assignment from Miss Wilson for the damages sustained by her.

The negligence alleged against the defendant is that he was driving recklessly and rapidly on the wrong side of the road.

I find as a fact that the defendant was driving on the wrong side of the road, that is, on the north side—City Charter, sec. 737; but I cannot find that he was driving recklessly or negligently, except in so far as driving on the wrong side of the road in a dark night constitutes negligence.

It is objected first as to the part of the claim held under an assignment from Miss Wilson, that such a claim is not assignable and, therefore, that the plaintiff cannot recover upon it. With this contention I agree. The law is so settled by *McGregor* v. *Campbell*, 19 Man. R. 38, and *McCormack* v. *Toronto R.W. Co.*, 13 O.L.R. 656.

It is further objected that the plaintiff being merely a bailee and not the owner of either the horse or the buggy, and not being liable over to the owner for the damage, cannot recover.

The right of the bailee to recover under the circumstances of this case is stated by Collins, M.R., delivering the judgment of the Court of Appeal in *Re "The Winkfield,"* [1902] P.D. at p. 60: "The root principle of the whole discussion is that, as against a wrongdoer, possession is title. The chattel that has been converted or damaged, is deemed to be the chattel of the possessor and of no other, and, therefore, its loss or deterioration is his loss, and to him, if he demands it, it must be recouped. His obligation to account to the bailor is really not ad rem in the discussion. It only comes in after he has carried his legal position to its logical consequence against a wrongdoer, and serves to soothe a mind disconcerted by the notion that a person who is not himself the complete owner should be entitled to receive back

the full value of the chattel converted or destroyed. There is no inconsistency between the two positions; the one is the complement of the other. As between bailee and stranger possession gives title—that is, not a limited interest, but absolute and complete ownership, and he is entitled to receive back a complete equivalent for the whole loss or deterioration of the thing itself. As between bailor and bailee the real interests of each must be inquired into, and, as the bailee has to account for the thing bailed, so he must account for that which has become its equivalent and now represents it. What he has received above his own interest he has received to the use of his bailor. The wrongdoer, having once paid full damages to the bailee, has an answer to any action by the bailor."

This judgment was approved by the Privy Council in *Glenwood Lumber Co.* v. *Phillips*, [1904] A.C. 405. Lord Davey, who delivered the judgment of the Privy Council, after quoting from the judgment of the Master of the Rolls in "The Winkfield" case, concludes the paragraph: "Their Lordships do not consider it necessary to refer at any greater length to the reasoning and authorities by which the Master of the Rolls supports this conclusion, and are content to express their entire concurrence in it."

These cases were followed by Mr. Justice Richards in *Turner* v. *Snider*, 16 Man. R. at page 81.

As the law stands, I think that the plaintiff is entitled to recover from the defendant the full value of the horse and of the damages to the buggy, provided the damage was caused by the negligence of the defendant.

The defendant was driving at about six or seven miles an hour, and on the north side of the road coming towards the city. The travelled portion of the road was there about twenty-four feet wide, so that there was ample room for him to have driven on the proper side. The plaintiff, coming towards the defendant, saw his horse when about twenty-five feet away, and no doubt the defendant could have seen the plaintiff's horse had he been keeping a look-out. He says, however, he saw nothing and heard nothing until the crash took place. From this I infer that he was not exercising the care that a man driving in the dark on the wrong side of the road should have taken.

That driving as the defendant did under the circumstances constitutes negligence is, I think, established by such authorities as Oliphant on Horses, 6th Can. ed. 342; Angell on Highways, par. 337, and *Leame* v. *Bray*, 3 East 593.

I find, therefore, that the defendant was guilty of the negligence charged and is liable to the plaintiff for the value of the horse and the damage to the buggy.

I find the value of the horse to be $500 and the damage to the buggy was $5.

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The plaintiff's claim for loss of earnings was not sustained by the evidence.

As before pointed out, the claim of Miss Wilson was not assignable and therefore the plaintiff cannot recover upon it.

There will be judgment for the plaintiff for $505 and costs of suit.

Judgment for plaintiff.

Annotation—Bailment (§ II—10)—Recovery by bailee against wrongdoer for loss of thing bailed.

Annotation

Bailment

The *Winkfield Case*, [1902] P. 42, 71 L.J.P. 21, which is approved and adopted by the Privy Council in *Glenwood Lumber Co.* v. *Phillips*, [1904] A.C. 405, 20 Times L.R. 431, must be accepted in the full breadth of its generalization as the statement of the modern doctrine that the bailee with a mere possession may recover the whole damage done to the bailment by the wrongdoer for whose act he is not responsible over to his bailor. Beven on Negligence, 3rd ed., 1908, page 736. In the *Winkfield Case*, the Court of Appeal overruled the decision in *Claridge* v. *South Staffordshire Tramway Co.*, [1892] 1 Q.B. 422, and established the rule that in an action against a stranger for loss of goods caused by his negligence, the bailee in possession can recover the value of the goods, although he would have had a good answer to an action by the bailor for damages for the loss of the thing bailed. Beven on Negligence, 3rd ed., 735.

In this connection the dictum of Parke, B., in *Nicolls* v. *Bastard*, 2 C. M. & R. 660, must be noticed: "I think you will find the rule is that either the bailor or the bailee may sue, and whichever first obtains damages it is a full satisfaction." "No proposition can be more clear," says Parke, B., *Manders* v. *Williams*, 4 Ex. 344, "than that either the bailor or the bailee of a chattel may maintain an action in respect of it against a wrongdoer; the latter by virtue of his possession, the former by reason of his property": *Fleetwellin* v. *Race*, 1 Bulst. 69; 2 Wms. Saund. 47 (e), (f). The circumstances in which two rights of action are available are discussed: *Beckham* v. *Drake*, 2 H.L.C. 587, 588. Quære.—What is the position of a wrongdoer who with knowledge communicated by the terms of the claim made upon him, and against the direction of the bailor, pays the full value of the article damaged to one with a right to nominal damages only? A cabman whose cab is smashed up, obtains the full value of it from the wrongdoer, though the owner warns him not to pay. How much of the value may the owner lose? As to payment under compulsion: *Lampleigh* v. *Brathwait*, 1 Sm. L.C. (11th ed.) 141, 163. The position of the owner of goods out of his possession is treated in Pollock and Maitland, Hist. of English Law (2nd ed.), Vol. II., 156-183. Ames, Hist. of Trover, Harvard, L.R. Vol. XI., 277, 374; Beven on Negligence, 3rd ed., 737 (n).

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Jan. 2.

Ontario High Court of Justice, Sutherland, J., at Non-Jury Sittings. January 2, 1912.

1. INSURANCE (§ VI A—246)—FIRE POLICY—NOTICE OF LOSS BY BENEFICIARY.

Notice to a fire insurance company by the person to whom, by the terms of the policy, the loss is by direction of the assured made payable is a valid notice on behalf of the assured.

[See also Welford & Otter-Barry's Fire Insurance, 1911 ed., p. 249.]

2. INSURANCE (II E 1—78)—WARRANTIES—STATEMENT IN APPLICATION AS TO PREVIOUS FIRES.

Where the question in an application for fire insurance upon a printed form supplied by the insurance company was answered by the applicant that he had had no previous fire, but the printed form also contained a reference to "the property to be insured," which might be viewed as limiting the scope of the question to any previous fires affecting the same stock-in-trade, the answer will not be held to be one material to the risk so as to invalidate an insurance policy if the previous fire was upon another stock in trade and was of so trifling a character that it could not reasonably be supposed to have affected the acceptance of the application by the insurers.

[*Western Assurance Co.* v. *Harrison*, 33 Can. S.C.R. 473, distinguished.]

3. INSURANCE (§ IV A—166)—FIRE POLICY—ASSIGNEE FOR CREDITORS—BENEFICIARY FOR PAYMENT OF LOSS.

The assignee for creditors of the assured is entitled to maintain a joint action with the beneficiary to whom the loss is made payable by the policy, for the moneys payable under a fire insurance policy placed by the insolvent debtor upon his goods, notwithstanding that the transfer of the policy has not been consented to by the insurers.

4. INSURANCE (§ VI H 3—425)—FIRE POLICY—CONDITION AS TO SUPPLY OF PROOFS OF LOSS BEFORE ACTION.

Where the insurers have made a demand upon the insured for proofs of loss, the right of action under Ontario statutory condition 17 relating to fire insurance policies, does not accrue until sixty days after the proofs of loss have been furnished, and where incomplete proofs of loss were first supplied and invoices and a statutory certificate were then promptly demanded by the insurers by way of further proof, the sixty day period is to be computed from the completion of the proofs upon the latter being supplied.

[*Rice* v. *Provincial Insurance Co.*, 7 U.C.C.P. 548, distinguished.]

5. INSURANCE (§ VI A—247)—FIRE POLICY—COMPLETING PROOFS OF LOSS BEFORE ACTION—STATUTORY POWER TO RELIEVE AGAINST FORFEITURE OF CLAIM FOR DEFECTS IN PROOFS.

Where an action upon a fire insurance policy is premature by reason of having been brought within sixty days from the completion of proofs of loss, but more than sixty days after the delivery of the first "proofs of loss" by the insured, the Court may relieve the insured from strict compliance with Ontario statutory condition 13 as to furnishing proofs of loss by virtue of the statutory powers contained in sec. 172 of the Ontario Insurance Act, enabling the Court to deal with the merits of the action where it considers it inequitable that the insurance should be forfeited for insufficiency of the proofs supplied before action.

6. ACTION (§ II B—45)—CONSOLIDATION OF ACTIONS FOR SAME DEMAND—PREMATURE ACTION BY SAME PLAINTIFFS.

An order may be made consolidating two actions brought by the same plaintiffs to recover the loss under a fire insurance policy, where

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the second action was brought within the statutory period of limitation to prevent the lapse of the claim in case it should be held that the first action was premature.

[*Martin* v. *Martin*, [1897] 1 Q.B. 429, applied.]

TRIAL of actions upon fire insurance policies.

Judgment was given for the plaintiffs.

Messrs. *Rowell*, K.C., and *Kerr*, for plaintiff.

Messrs. *Blackstock*, K.C., and *Rose*, K.C., for defendants.

SUTHERLAND, J.:—Charles A. Jeffrey is a merchant, who, during portions of the years 1905 and 1906 for about 13 months had been doing business in the town of Blenheim, Kent County. While there a small fire, or as he terms it "smudge," occurred in an unused part of the basement under the store occupied by him among some rubbish which had been thrown there when the premises were being remodelled. A little damage was done to goods from smoke and there was a speedy adjustment by the insurance company interested at $200.

During 1906 he sold out at Blenheim and add not resume mercantile operations until May, 1908, when he opened a store in the town of Kingsville, Essex County, where he continued to carry on business until November, 1909. A firm of general merchants, Wright & Hughes, had been engaged in business at the town of Dresden, Kent County, for some time, and having got into financial difficulties made an assignment on the 21st October, 1909, to E. C. Martin.

Assisted by the members of the insolvent firm, the assignee took stock and made an inventory under date November 1st, 1909, as follows:—

Stock-in-trade	$15,812.10
Fixtures	1,162.75
Stable outfit	225.00
Book debts (good)	1,241.77
Doubtful and bad	863.00

Jeffrey bought the stock from the assignee practically from this list for $12,600, and later, having meantime himself taken stock, applied for and obtained from the assignee a rebate on price, for shortages of $500. He thereupon had a closing sale at Kingsville and removed the balance of the stock from there to Dresden and consolidated the two stocks. After buying the Dresden stock he also advertised a slaughter sale there. He immediately began to buy and bring new goods to his store at Dresden.

A policy of insurance on the Wright and Hughes stock for $3,000 taken out by that firm in the Rimouski Fire Insurance Company on the 18th May, 1909, had been assigned to the assignee and by him to Jeffrey. Requiring additional insurance or wishing to readjust his insurance, the latter applied to one

Gillaspie, a local agent representing at Dresden a number of insurance companies. There is considerable controversy as to the amount of stock Jeffrey brought over from Kingsville, the amount of goods he sold out of the Wright & Hughes stock during his opening sale, the amount of new goods bought, and the amount of goods in stock on the 20th December, 1909, when he applied to the Rimouski Fire Insurance Company for $5,000 insurance. He had then, according to his written application, in addition to $3,000 policy in that company, other existing insurance in various companies to the amount of $10,000. It is not, I think, quite clear whether he gave up some of this other insurance at the time or not. In said application, th then cash valuation placed upon the stock is $25,000. Jeffrey himself cannot recall making any representation as to its value at the time, but the application is signed by him though apparently filled out by the agent. There is, however, some slight independent evidence as to the then probable value of the stock.

On December 5th, 1909, Charles B. Laur, a commercial traveller, who was accustomed to examine and estimate the value of stocks and had made sales of goods to Jeffrey at Kingsville, called on him at his new place of business in Dresden to solicit an order. While there he made an examination and valuation of the stock. It can hardly be considered a very thorough examination as he himself says he was only engaged upon it for about 20 minutes. He does say, however, that he went carefully through it by departments and estimated it to be worth $27,500 or $28,000. He also says that it was a stock above the average, some of it old and depreciated, but the proportion of this character small in comparison to the amount of the whole stock or to the general run of stocks. He thinks his estimate was a fair one at the time. He admits that as to part of the stock, viz., crockery and groceries, while he looked it over, he took Jeffrey's word somewhat for it, particularly as to the crockery, with which class of goods he was not familiar.

His evidence places a rather higher valuation on the stock than the analysis which expert accountants subsequently made would indicate and which will be referred to later on.

A new policy in the Rimouski Fire Insurance Company was issued on the 14th January, 1910, for $5,000 in pursuance of said application. In April, 1910, the plaintiff again applied to Gillaspie for additional insurance or a readjustment of his policies, and in an application to the defendant company for $5,000 insurance signed by him and filled out by the agent there is a representation that the "present cash value" of the stock is $25,000. In addition to the $8,000 of insurance then existing in the Rimouski Fire Insurance Company, the application states that there is further concurrent insurance in several companies amounting to several thousand dollars.

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A new policy in the defendant company for $5,000 was issued dated 29th April, 1910. In the following August Jeffrey took stock and at the trial the question of whether it was well and honestly taken or not was a matter of controversy. It was taken by Jeffrey and his employees; Jeffrey himself and Walter S. Dynes took the fixtures and some reserve stock of groceries; Alice Henderson took the millinery, Leto McInerney and Jenny Bear the general groceries and crockery; Walter S. Dynes assisted in part by Genevieve McInerney took the boots and shoes, gents' furnishings and clothing; Dynes also took the furs and part of the staples; Jessie McInerney and Genevieve McInerney the dress goods, silks, trimmings and part of the staples; Jessie Dynes the smallwear. Dynes states in evidence that a few old out-of-style goods were not taken at all.

The course of procedure was to measure, count or weigh the different goods, enter the cost prices in detail on slips and in small books, compute and extend the totals. The various clerks mentioned testify in a general way that the work was carefully and accurately done and checked and that such goods as were sold during the period of stock-taking were deducted.

When it was completed the various items on the slips and in the small books were recopied into three blotters, marked 1, 2 and 3 and put in at the trial as Exhibit 6. Towards the end of each of these books there is a summary of the various amounts set out in the previous pages in that book, and at the end of the third book a general summary as follows:—

Book 1	$ 6,006.95
Book 2	11,267.75
Book 3	4,942.56
Millinery	547.59
Crockery	235.50
Crockery	25.50
Fixtures	1,507.45
Total	$24,533.30

It is shewn in evidence that a number of small errors had crept into the entries and calculations and had been rectified to the extent of about $200 by Jeffrey and Lena McInerney who had checked them all over; and the copying from the slips and small books into the blotters 1, 2 and 3 (Ex. 6) was done by Mrs. Mary Young and Jeffrey himself. Mrs. Young went into Jeffrey's employ about 8th or 9th August, 1910, as cashier, and continued therein until the 20th October following. She testifies that the entries in the blotters 1, 2 and 3 are correct copies of the slips in so far as her share of the work is concerned and Jeffrey himself gives similar evidence as regards his share of the work. Small errors in amounts or calculations were, I think, later on discovered by Strong and Grant.

Gillaspie, the insurance agent at Dresden, represented all the four companies against whom claims are being made in this and other actions. He was often at the store in question. In August he learned from Jeffrey that the stock had been taken and that he desired further insurance. I think at this time the only existing insurance was the $8,000 in the Rimouski Fire Insurance Company and the $5,000 in the Crown Life. Mr. Gillaspie did not make an inspection of the stock himself. He testified that he had taken an inspector representing an insurance company into the store and had him shewn all over the stock earlier in the Spring. He also states that he saw the slips of the stock-taking and the totals but did not see the books 1, 2 and 3 which form Exhibit 6. He accordingly applied to Jeffrey to obtain the additional insurance. It appears likely from the evidence of both Jeffrey and Gillaspie that the former signed the applications for an additional $8,000 of insurance and the latter filled in the particulars later. Jeffrey seems to have made varying statements with regard to this, testifying on his examination for discovery that they were filled in before he signed and at the trial that they were filled in after.

In the two applications for the additional insurance dated 31st August, 1910, the present cash value of the stock was again placed at $25,000. Gillaspie says that he did this notwithstanding that he knew that the stock-taking had shewn only $22,973.67 for the reason that the stock was then considered to be unusually low and the applications were intended to apply to and the subsequent insurance to cover a general average of and value of the stock. He also stated that he took the Anglo-American Fire Insurance Company and Montreal Canada Fire Insurance Company applications to Toronto and saw the head clerk or one of the inspectors and went over them with him telling of having seen the stock sheets at $24,000.

Gillaspie says he asked Jeffrey at the time these applications were being considered "if he had ever had a fire before" to which he replied no. Jeffrey says he did not see the question in the applications and it was not called to his attention when he signed them. In pursuance of said applications two new policies were issued, both dated 27th September, 1910, one in the Anglo-American Fire Insurance Company for $4,000, the other in the Montreal Canada Fire Insurance Company for $4,000.

In October, the plaintiff met with a severe accident which he says seriously affected his health, rendered him unable to attend very much to business from then on, and perhaps affected his memory somewhat. Between that time and the 25th December, 1910, Miss Henderson had a good deal of the charge of the store.

On the morning of the 25th December early a fire occurred totally destroying the stock in question. The original slips and

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small blotters on which the stock had been taken were burned as well as the books of the Kingsville business. The three blotters 1, 2 and 3, Exhibit 6, with two sales books, the first covering the period from August 6th, 1910, to 22nd November, 1910, and also a purchase ledger shewing the purchases from wholesale firms since the stock-taking and all of which were in a small safe were preserved. The wholesale firm of Gault Bros. had been furnishing goods from time to time to Jeffrey and to secure them he had notified the various insurance companies in question to make the loss, if any, payable under the policies payable to them.

Attached to the Rimouski Fire Insurance Company policy dated 3rd May, 1909, there is under date 2nd September, 1910, the following:—

> Notice is hereby received and accepted that the loss, if any, is to be made payable to Gault Bros., Limited, of Montreal, further concurrent insurance permitted without notice until required; further concurrent insurance $4,000 Anglo-American; $4,000 Montreal.

Included in a renewal receipt dated December 20th, 1910, attached to the policy in the same company dated January 14th, 1910, there is the following; "Loss, if any, payable to Gault Bros., Montreal, as their interest may appear." In the case of the defendant companies' policy and the policies of the Montreal Canada and Anglo-American Companies the loss is also made payable if any, to Gault Bros., and in every case further concurrent insurance is permitted without notice.

On or about the 28th December, 1910, the following letter was written to the defendant company and receipt is admitted.

> Montreal, 28th Dec., 1910.
>
> The Crown Fire Insurance Co.,
> Toronto, Ont.
>
> Dear Sirs,—We have just learned that the premises of C. A. Jeffrey, of Dresden, have been destroyed by fire, and that the loss is a total one. Your policy No. 503707 for $5,000 due April 2nd, 1911, is made payable to ourselves as our interests may appear, and we shall be glad to receive your settlement for the same in due course.
>
> Yours truly,
>
> THE GAULT BROTHERS CO., LIMITED.
> (Sgd.) A. HAMILTON GAULT, *Director*.

Jeffrey says that within four or five days and certainly within a week after the fire John R. Grant, representing the defendants and other insurance companies concerned as an adjustor went to Dresden, where he placed the books which he had saved from the fire at his disposal which he took away with him retaining for a week or so. Jeffrey says he gave Grant all the information he had at his disposal at the time.

On the 20th February, 1911, Jeffrey made an assignment for the benefit of his creditors to the plaintiff James G. Strong.

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On the 1st February, 1911, the plaintiffs' proofs of loss and claim under the said policy in the defendant company were prepared, accompanied by a statutory declaration made by Charles A. Jeffrey in which the statement is made that the stock in question at the time of the fire in the premises in question amounted in value to $25,056.74 and that the additional insurance on the property beyond the sum of $5,000 claimed under defendants' policy in this action was as follows: The Rimouski Fire Insurance Company, $5,000 and $3,000; Anglo-American Fire Insurance, $4,000, and the Montreal Canada Fire Insurance Company, $4,000.

The plaintiffs' solicitors sent in to the defendant company the said proofs of loss and claim accompanied by a letter dated 4th February, 1911, at which time they were acting both for the assignee, Mr. Strong, and the Gault Bros., Limited. The company having declined to pay, a writ was issued against the defendants on the 26th April, 1911, at the instance of Charles G. Strong and the Gault Bros., Limited, as plaintiffs, in which they make a claim under said policy and state that "the said Charles A. Jeffrey duly furnished proofs of his loss to the defendants in accordance with the terms of the policy of insurance and of the statutory conditions incorporated therein" and although at the commencement of this action the period of 60 days after notice and proofs of loss required by the said policy of insurance has expired, and the defendants have objected and refused and still neglect and refuse to pay the said sum of $5,000 insurance money or any part thereof to the plaintiffs, the Gault Bros. Limited, as their interest did appear or to the plaintiff James G. Strong, the assignee for the general benefit of all creditors of the said Charles A. Jeffrey.

The defendants in their statement of defence plead in paragraph 2 that they did not consent to any assignment to the plaintiff Strong and do not admit the right of either of plaintiffs to maintain the action This objection was not pressed at the trial and the plaintiffs are, I think, clearly entitled to maintain the action. The defendants also in their statement of defence plead that Jeffrey did not forthwith after loss give notice in writing to the company. I think the notice given by Gault Bros., Limited, was sufficient. Defendants also plead that Jeffrey did not deliver as soon after the fire as practicable as particular an account of the loss as the nature of the case permitted, and further that he did not as required in support of the claim produce, as it was practical for him to do, books of accounts, warehouse receipts and stock lists, etc., but neglected and refused so to do, and that in consequence the thirteenth statutory condition is a bar to his claim. They also claim that no sufficient proofs of loss were delivered, and in consequence the seventeenth statutory condition

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is a bar to the action. They further claim that the action was commenced less than 60 days after completion of the proofs of loss, wherefore and by virtue of the seventeenth statutory condition the same is premature and the defendants submit that it ought to be dismissed.

In their reply the plaintiffs set out in detail the steps taken by them to furnish as full, detailed and complete proofs and information as possible.

At the opening of the trial the defendants made an application to amend their statement of defence in certain respects which application after argument was reserved by me to be disposed of later and was at the conclusion of the evidence allowed and the following amendments made to the statement of defence:—

8. Charles A. Jeffrey mentioned in the statement of claim made application in writing to the defendants for the policy mentioned in the statement of claim and in his said application omitted to communicate to the defendants a circumstance material to be made known to the defendants in order to enable them to judge of the risk they undertook, to wit, the circumstance that the said Charles A. Jeffrey had previously had a stock of goods or merchandise destroyed or damaged by fire, wherefore by virtue of the first statutory condition the insurance in respect of which this action is brought is of no force.

9. In the said application the said Charles A. Jeffrey misrepresented a further circumstance material to be made known to the defendants in order to enable them to judge of the risk they undertook in that he represented that the value of the stock to be insured was $25,000 whereas it was in fact of much less value, wherefore and by virtue of the first statutory condition the insurance in respect of which this action is brought is of no force.

10. The said Charles A. Jeffrey furnished to the defendants proofs of loss and a statutory declaration in support thereof in which he declared that the property insured by the policy referred to in the statement of claim amounted in value at the time of the fire to $25,056.74 whereas in fact the said property was of much less value, wherefore and by virtue of the fifteenth statutory condition the claim of the plaintiffs upon the policy referred to in the pleadings was vitiated.

When the evidence had all been taken with the exception of a witness for the plaintiffs, Mrs. Young, who was ill at the time of the trial, I allowed her evidence to be taken subsequently and argument to be postponed. During the intervening period the plaintiffs discovered that a carload of sugar valued at $1,379 had been omitted from the goods which they had estimated as having gone over from Kingsville to Dresden. Affidavits of Jeffrey and Strong were put in with reference to this item and a letter from the wholesale house accompanied by invoices made exhibits thereto.

Considerable evidence was given as to the amount of stock

carried by Jeffrey while doing business at Kingsville, the extent of the business done by him while there and the extent to which the stock was depreciated both in amount, character and condition by the removal sale held by him in November, 1909, before transferring the balance of the stock to Dresden. Evidence was also given as to the living expenses of Jeffrey while in Kingsville and at Dresden and as to the rates of profit which he made in connection with his business at Kingsville and at Dresden and whether 25 per cent. would be a fair estimate for profit all round.

At the time Jeffrey commenced business in Kingsville he put only about $500 in cash into it. He was at that time the owner of certain real estate in London, Ontario, worth approximately $8,000 and on which there were incumbrances to the extent of about $2,000, and he received the rentals of these properties. At the time of the fire his liabilities were about $22,000.

The plaintiff, Strong, who seems to be a man of experience and reliability, put in an analysis of the business done by Jeffrey and the results as well as he could make them up from the material available and covering the period from May, 1908, down to the 24th August, 1910, the time when the stock was last taken before the fire. He admits that as to some of the details he is obliged to accept and rely upon statements made by Jeffrey. He admits, also, that it is not possible to obtain absolutely accurate results but thinks his analysis and statement are fairly reliable. His estimate is that on August, 1910, when the stock was taken its value was $25,103.15.

The plaintiffs also called Arthur C. Neff, a chartered accountant of experience. Three statements are filed prepared by him and which in his evidence he explains and shews how he arrived at. In the first of these (Exhibit 35), he estimates that Jeffrey had stock on hand at the time of leaving Kingsville amounting to $10,787.22. In the second (Exhibit 34), he gives an estimate of the stock at Dresden in April, 1910, at $26,377.89; and in the third (Exhibit —), of merchandise on hand at the time of the fire at $25,070.75.

In each of these statements in arriving at the amount of merchandise sold and for the purpose of making a valuation thereof a deduction of 25 per cent. on cost for estimated profits on sales was made. Upon the evidence I think it likely that 25 per cent. is a reasonable estimate. Neff testifies that his office has checked up the books in this matter, one of his assistants, Frederick Todd, doing the work and he verifying it as far as practicable. He admits that the work is only approximate and to some extent is based upon information furnished by Jeffrey. He also admits that if the alleged slaughter sales were carried on on a large scale and bargains being given it would affect the estimates as to the amount of stock on hand at the various times a good deal.

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Frederick Todd, also a chartered accountant, was called and verified the figures contained in Exhibits 33, 34 and 35. He shewed how he utilized the books and papers available including the bank books. He also put in a statement as of date 20th December, 1909, shewing his estimate of stock on hand at that time as $24,243.92.

The defendant company called as one of its witnesses Charles H. Hughes, one of the members of the firm of Wright & Hughes. He stated that on the 10th September, 1899, that firm had taken stock in a fair and usual way, at invoice prices, and with the result that they then had on hand apparently $14,800 worth of stock. He said that while it would not be called a first-class stock it was a fair stock and he believed they then had on hand that amount. After the assignment he says that Martin prepared an inventory with his assistance, taking into account the new goods purchased and which had come into stock and the sales made meantime. A deduction for estimated profits on sales of 25 per cent. was made. They thus arrived at the sum of $15,810 of stock-in-trade shewn in Martin's statement (Exhibit 16).

John R. Grant was called on behalf of the defendant company. He stated that he had investigated the books carefully; and met the plaintiff Strong a number of times in connection with the matter; that they had done some joint checking of their respective statements, sometimes agreeing, sometimes disagreeing. He had made an estimate of the stock Jeffrey probably had on hand at the time of the fire. In one statement he estimates that the cost price of the stock transferred by Jeffrey from Kingsville to Dresden would be approximately $7,083.26. In another that the stock on hand on the 24th August, 1910, was approximately $13,068.78, and in yet another that the sound value of the stock at the time of the fire was approximately $11,275.49. He also seemed to be a man of some experience in matters of this kind. The item of $1,379 (carload of sugar) if taken into consideration in estimating the value of stock transferred by Jeffrey from Kingsville to Dresden would tend to strengthen the estimate of plaintiffs' witnesses. It would later on not be of any service as having gone into the stock it would be taken into consideration in the stock-taking of August, 1910.

There is, obviously, therefore, a very wide difference of opinion between Strong, Neff and Todd on the one side, and Grant on the other, with respect to the probable value of the stock at the different dates mentioned. Grant was asked this question: "Assuming the stock-taking in August, 1910, to be an honest one, what amount of stock would be on hand at the time of the fire in December following?" And his answer to this was twenty-three or twenty-four thousand dollars. He was

also asked this question: "Assuming the stock-taking to have been an honest one, do you know anything wrong in the claim put in by the plaintiffs except in the case of errors in small sums amounting to perhaps four or five hundred dollars?" To this he answered that he could not say there was anything wrong. He also was obliged to admit that on the face of it the stock-taking looked like an honest one, and to justify the figures in the statements prepared by him it must be treated as a bogus stock-taking to the extent of about one-half. He also stated that the figures of Strong, Neff and Todd and his own figures did not differ very much as to the business done by the insolvent Jeffrey from August to December, 1910.

A letter, Exhibit 44, dated November 22nd, 1909, was put in which had been written by Jeffrey to the London Shoe Company in which the following statement is made, referring to the Wright & Hughes stock: "Re stock. Instead of there being $15,812.10 stock there is only $12,532.28, taken by competent people," etc.

Among other exhibits put in at the trial was Exhibit 30, which is a copy of a statement said to have been made by Jeffrey to a bank over his signature on the 30th August, 1910, in connection with his business operations. In this document Jeffrey then estimated the "stock on hand present value" at $24,300.

While the evidence is not perhaps in all respects as satisfactory as it might be or as it could have been made if some of the books and papers had not been destroyed in the fire, I have come to the conclusion that the stock-taking in August, 1910, was well and accurately done, and its results carried honestly and carefully into the three books constituting Exhibit 6. It seems to me, therefore, that it furnishes a proper and fairly safe point from which to start.

I have also come to the conclusion that following the business down from that date as shewn in the various statements put in and already referred to, it is reasonably established that at the time of the fire on the 26th December, 1910, there was in the store approximately $25,000 worth of goods estimated at cost prices. It is to be noted in this connection that some of Jeffrey's clerks called for the plaintiffs expressed the opinion that the stock was larger at the time of the fire than when taken in August.

But assuming there was $25,000 worth of stock estimated at cost prices, it is contended on behalf of the defendants, first, that some substantial allowance should be made for depreciation through age and change of style in the goods and for stock wear and the like; and second, that the representation of Jeffrey in the applications for insurance was that the $25,000 was cash value or present cash value. As to the first of these contentions

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it may be said that allowing a fairly liberal reduction of 10 or 12 per cent. on the $25,000 there would still be stock to the full value on the aggregate sums mentioned in the various policies, viz., $22,000. As to the second, it is clear that the agent of the companies understood it as a valuation of the stock at cost prices and it is clear also that as to two of the policies in question he mentioned to representatives of the companies at the head office having seen the stock sheets at $24,000. In each application between the words "cash value or present cash value" in the column and the figures "25,000," the agent has written in opposite the words "on stock-in-trade consisting of" the following words: "dry goods, ready-made clothing, furnishings, millinery, groceries, crockery, glassware and such other goods kept for sale in a general store."

It is fairly clear from the evidence of Jeffrey that all he understood he was representing or intended to represent was that his average stock taken at cost prices amounted approximately to $25,000. Upon the whole evidence, I do not think it will be possible to find that there was any misrepresentation on his part as to the value of stock. See the remarks of Meredith, C.J., in *Perth Mutual Fire Insurance Co.* v. *Eacrett*, printed cases in appeal, vol. 146, page 4, at 50.

I have also come to the conclusion on the whole evidence that Jeffrey and the plaintiffs furnished the defendant company with every reasonable facility for investigating the facts as to the amount of stock at the time of the fire and supplied to them every reasonable book, paper and document in their possession or which, under the circumstances, it was reasonable to ask for.

The defendants laid much stress in argument upon the fact that Jeffrey had in the application for insurance made the statement that he had had no previous fire. This statement they say was a material one and proved to be untrue. They contend, therefore, that upon the contract the plaintiffs cannot succeed. They rely upon the case of the *Western Assurance Co.* v. *Harrison*, 33 Can. S.C.R. 473. The headnote of this case is as follows:—

> In an application for insurance against fire among the questions to the applicant were: "Have you . . . . ever had any property destroyed by fire? Ans. Yes. Give date of fire and, if insured, name of company interested. Ans. 1892. National and London and Lancashire." The evidence shewed that there was a fire on the applicant's property in 1882, and two fires in 1892, and the insurance by the policy granted on this application was on property which replaced that destroyed by the latter fires:—Held, reversing the judgment appealed from, 35 N.S. Rep. 488, that the above questions were material to the risk and the answers untrue. The first statutory condition, therefore, precluded recovery on the policy.

It seems altogether likely that such a small fire, or "smudge" as Jeffrey speaks of, if it had been known to the companies at the

time the insurance was being effected would not have led them to refuse to grant the insurance. That seems rather the view which Frank H. Todd and Frank F. Nichol, two underwriters called on behalf of the defendants, expressed.

Of course, it would be usual for the representatives of the company if they thought fit to look into the facts and pass judgment upon a matter of that sort. I might say in passing and referring further to the evidence of the two last witnesses on another point, that Todd, who was connected with the Crown and Rimouski companies, stated that they were in the habit of insuring to the full amount on certain classes of stock, but that 80 per cent. was generally the limit on dry goods and groceries, and that agents were not usually authorised to exceed that percentage. Nichol, the underwriter for the Anglo-American and Montreal-Canada, said that they insured up to 80, 90 or even 100 per cent. in proper cases. He seemed to indicate that it would not be an unusual thing to insure up to $22,000 on a $25,000 stock.

But again adverting to the question of the materiality of the representations as to a former fire, the plaintiffs contend:—

1. That as to the policy in the Rimouski Fire Insurance Co., dated 18th May, 1909, assigned to Jeffrey, the latter made no representation to the company at all and the company did not see fit when the assignee of Wright & Hughes was assigning it to Jeffrey and getting the company's consent thereto, to ask anything about any former fires which he may have had.

2. As to the policy on the 14th January, 1910, in the Rimouski Fire Insurance Company, it is argued that in the application of the 20th December, 1909, the question asked was in this form: "Have you ever had any property destroyed by fire?" And the answer is "No"; and that on a strict interpretation of that question and answer as applied to the actual previous fire which Jeffrey had had or which had occurred in his premises the answer is true. None of his property had been destroyed by fire; it had only been injured by smoke.

3. In the defendant company's policy dated 29th April, 1910, no such question is asked or answered at all. This may well have been and therefore probably was an oversight.

4. In the application dated 31st August, 1910, to the Anglo-American Fire Insurance Company on which the policy dated 27th September, 1910, issued, the question is put and answered as follows: "Have you ever had any property destroyed or damaged by fire?" A. "No."

5. And in the application dated also 31st August, 1910, to the Montreal Canada Fire Insurance Company under which a policy subsequently issued on the 27th September, 1910, the question has also been answered as in the case of the Anglo-American last mentioned.

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But in the present case the former fire occurred in different premises, viz., those then occupied by Jeffrey at Blenheim. Each of the four applications hereinbefore referred to has a clause somewhat similar to that dealt with in the case of *Stott* v. *London & Lancashire Fire Insurance Co.*, 21 O.R. 312. In a form of application for fire insurance the questions were asked: "Have you ever had any property destroyed or damaged by fire? If so, when and where?" Also, "Has this risk been refused by any other company, or has any company cancelled a policy or receipt on it?" To both which questions the applicant answered "No," and signed a memorandum at the foot of the application form whereby he covenanted and agreed with the company that the foregoing was a just, true and full exposition of all the facts and circumstances in regard to the situation, condition, value and risk of the property to be insured, and that it should be held to form the basis of the liability of the company and form a part and be a condition of the insurance contract. As a matter of fact the insured had had other properties, but unconnected with the property now in question, destroyed by fire:—Held, however, that the answer to the first of the above questions was immaterial to the risk."

In the present case in the printed clause at the foot of the application there is in each case the reference to "the property to be insured," etc. Upon this authority I think I should hold that the question as to the former fire under the circumstances is not one material to the risk.

There is another point not raised in the pleadings, but which perhaps I should mention. In the application of Jeffrey to the Rimouski Fire Insurance Company dated 20th December, 1909, and that to the defendant company on which the policy in question in this action was issued, there appears the following statement: "The applicant covenants and agrees that the property or articles described shall not be insured to more than two-thirds of their actual value." Attached to the first of these applications is a memorandum to the effect that there was further insurance on Jeffrey's stock to the extent of $13,000. The application itself is for additional $5,000, making in all $18,000. In the application to the Crown Fire which was for $5,000 there is the statement that there is further concurrent insurance amounting to $15,600. It is apparent, therefore, that in each case the company itself when issuing the policy was ignoring this feature of the applications and putting on additional insurance which carried the total amount of insurance up to an amount in excess of two-thirds of the estimated cash value or present cash value of the stock at $25,000.

I have come to the conclusion that the plaintiffs did deliver as soon as practicable such particulars and account of the loss as the nature of the case reasonably permitted and were neces-

sary. I have also come to the conclusion that the plaintiffs submitted reasonably satisfactory proofs of loss. But when were these supplied? The initial proofs were furnished by the plaintiffs to the defendant company on the 4th February, 1911. One week later the defendant company served a notice upon the plaintiff company demanding, among other things, invoices of goods purchased by Jeffrey from the who'esale firms with which he was dealing and the production of a certificate under the hand of a magistrate, notary public, commissioner, etc., under statutory condition No. 13, sub-secs. (*d*) and (*e*). It was not until the 17th day of March, 1911, apparently, that the said requisition was complied with. On that date, apparently, a commissioner's certificate, dated 21st February, 1911, was, among other things, supplied to the defendant company. The probable reason that it was not delivered sooner is that in the meantime the plaintiff company was finding difficulty in getting together the invoices which had been demanded.

The plaintiffs rely upon the case of *Rice* v. *The Provincial Insurance Company*, 7 U.C.C.P. 548, for the proposition that the 60 days referred to in statutory condition 17 which is as follows: "The loss shall not be payable until 60 days after the completion of the proofs of loss unless otherwise provided for by the contract of insurance" are to be computed from the 4th February, 1911, when they furnished the proofs upon which they rely. I was at first disposed to think that that case had application to the present case, but have somewhat reluctantly come to the conclusion that it does not.

The defendant company seems under statutory condition 13, sub-secs. (*d*) and (*e*), to have a right to demand the proofs therein set out and the plaintiffs are required to reasonably satisfy the demand. In some cases this might under the statute work a serious inconvenience to a plaintiff. If a defendant company were after preliminary proofs had been supplied to it to wait as long as it thought safe and then demand the proofs mentioned in sub-sec. (*d*), and after its requisitions had been complied with wait as long as possible again and demand requisitions under sub-sec. (*e*), the result it could easily be conceived might be to delay the period for payment of the loss much beyond the 60 days referred to in statutory condition 17. If such were the facts in the present case, one would feel inclined to relieve, if possible, a plaintiff from such a condition of things. In the present instance, however, the defendant company with reasonable promptness made their demand and though that demand was dated on the 11th February, 1911, it was not complied with by the plaintiffs until the 17th March following. I am inclined to think, therefore, that the action was brought by the plaintiffs prematurely and in strictness should not have been commenced until at least 60 days subsequent to the 17th March, 1911.

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I think, however, this is a case in which I should give the plaintiff company the benefit of sec. 172 of the Insurance Act if it is properly applicable, as I think it is. In part, that section is as follows:—

> Or where for any other reason the Court or Judge before whom a question relating to such insurance is tried or inquired into, considers it inequitable that the insurance should be deemed void or forfeited, by reason of imperfect compliance with such conditions, no objection to the sufficiency of such statement or proof or amendment or supplemental statement or proof (as the case may be) shall in any of such cases be allowed as a discharge of the liability of the company on such contract of insurance wherever entered into.

Subsequent to the trial of the action at my request counsel appeared before me by appointment to further discuss the effect of statutory conditions 13 and 17 and of said sec. 172 as applicable to the facts in this case.

The plaintiffs within a year from the date of the fire, namely, on the 20th December, 1911, issued new writs in this and the other actions in question and applied to me to consolidate the present actions and said new actions. It seems to me that under Rule 435, Consolidated Rules of Practice and *Martin* v. *Martin*, [1897] 1 Q.B. 429, I have power to make such order of consolidation. I think it is proper, in my view of the case, and in the light of the findings I have made, to do so, and I make an order consolidating the two actions accordingly.

But this brings up the question of what under the circumstances should be done about costs. The plaintiffs brought the present action, as I have already indicated and held, prematurely and under ordinary circumstances and following such cases as *Dodge Mfg. Co.* v. *Hortop Milling Co.*, 14 O.W.R. 3, 115, 265 and *National Stationery Co.* v. *British American Assurance Company*, 14 O.W.R., at page 281, I would have been disposed to require them to pay the defendants' costs of the action. I permitted, however, as already indicated, amendments to be made at a late date to enable the defendant company to set up defences which otherwise, under their statement of defence, as originally filed, they could not have raised.

The defence as to the action having been brought prematurely is also a rather technical one, and under all the circumstances the best conclusion I have been able to come to on the question of costs is to make no order as to same. The plaintiff will, therefore, have judgment for the full amount of the policy as against the defendant company in this action.

Actions similar to this have been brought against the Rimouski Fire Insurance Company on the two policies already mentioned for $3,000 and $5,000, that is $8,000 in all and against the Anglo-American Fire Insurance Company for $4,000 and the Montreal Canada Fire Insurance Company for $4,000 in re-

spect to the policies hereinbefore mentioned and a new writ in each case was issued on the 20th December, 1911. It was, as I understood, agreed by counsel that the evidence in the present case should be taken as applicable to all said other actions and a similar judgment pronounced in each case. There will, accordingly, be a similar order of consolidation in each of said cases and a judgment in favour of the plaintiffs as against the said defendant companies respectively for said amounts, without costs.

Judgment for plaintiffs.

COLE v. CROSS.

Manitoba King's Bench, Macdonald, J. January 8, 1912.

1. VENDOR AND PURCHASER (§ I C—10)—ACCEPTANCE BY CONTRACT OF VENDOR'S TITLE—CAVEAT FILED IN REGISTRY.

Under an agreement for sale of Saskatchewan lands, providing for a transfer under the Real Property Act (Sask.) or for a deed without covenants other than as against encumbrances and further providing that the purchaser "accepts the title of the vendor," the purchaser is not entitled to compel the vendor to free the property from a caveat, for which the vendor was not responsible filed against the lands by third parties, claiming to set aside the prior transfer to the party from whom the vendor had purchased.

TRIAL of action for specific performance and motion to dispose of question of costs.

Judgment granted ordering conveyance by defendant to plaintiffs. No costs ordered to either party.

M. G. Macneil, for plaintiff.

Messrs. *J. B. Hugg* and *A. M. G. Ross*, for defendant..

MACDONALD, J.:—David Wark was the registered owner of section 27, in Township 5 and Range 5 west of the Second Meridian in the Province of Saskatchewan.

On the security of this section of land he borrowed money from the defendant Cross.

When the money thus borrowed became due Wark and the defendant made an agreement whereby the defendant was to take the land and accept the same in satisfaction of Wark's indebtedness to him, and from thenceforth the defendant became the owner of the said land and registered as such and received a duplicate certificate of title from the Assiniboia Land Registration District at Regina, in the Province of Saskatchewan, on the 31st day of December, A.D. 1907. Within an hour after the issue of this duplicate certificate a caveat was filed against the land by one John C. Latzke, and this caveat was endorsed upon the duplicate certificate forwarded to the defendant.

On the 17th day of December, 1907, the defendant entered

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into an agreement with the said Wark whereby he agreed to sell and "the said Wark agreed to purchase the said lands and upon payment of the" purchase money, the vendor agreed to convey the said lands "to the purchaser by a transfer under the Real Property Act or a deed without covenants other than against encumbrancers by the vendor" and it was further agreed that "the purchaser accepts the title of the vendor to the said lands and shall not be entitled to call for the production of any abstract of title or proof or evidence of title or any deeds, papers or documents relating to the said property other than those which are now in the possession of the vendor."

The benefits of this agreement extended to the executors, administrators and assigns of the vendor and purchasers.

On the 21st day of January, 1908, Wark, the purchaser, assigned his agreement with the defendant Cross, and all his interest therein and in the said lands to the plaintiffs who, thereafter, made payments to the defendant according to the terms of the said agreement and made a tender of the final payment demanding at the same time a transfer (to which he was entitled under the terms of the agreement), but demanding such transfer free from the caveat referred to, and the defendant being unable to comply with such demand, the plaintiffs bring this action seeking specific performance of the agreement of sale assigned to them, and also claiming damages in the event of the defendant being unable to specifically perform his agreement.

The caveat filed by Latzke was followed by an action brought in the Supreme Court of Saskatchewan against Christian Albright, D. W. Harvey, William F. Hepburn, David Wark, William H. Cross and subsequently, Francis E. Cole and George Anderson were made party defendants, and by this action the plaintiffs seek to set aside the conveyance made by them to the defendant Wark and ask for an order directing the defendant Cross to reconvey the said lands to them, charging the said defendants Cross and Wark with a knowledge of the fraudulent representations under which they allege they conveyed the said property to the defendant Wark.

Before the trial of this action in Saskatchewan the plaintiffs abandoned as against the defendant Cross, but continued as against all the other defendants, and upon the case being heard the action was dismissed as against all the defendants, thus settling and putting at rest the rights of the defendants Wark and Cross and establishing the title of the latter free from the caveat endorsed upon his certificate of title.

The defendant Cross can now transfer the property to the plaintiffs and there will be an order that he do so convey forthwith.

The remaining question is that of costs. Counsel on both

sides admitted that the case came down to trial principally to settle who is entitled to the costs.

Now, it seems to me that under the circumstances the plaintiffs acted in an unreasonable manner, even were they entitled to receive from the defendant a transfer free from the caveat; the defendant was in no way responsible for such caveat; he got a transfer from his co-defendant Wark with the latter's certificate of title free from encumbrances, and he was justified in his assurance to the plaintiffs that the title was all right and that they would be safe in taking over the agreement.

But were the plaintiffs entitled to a transfer such as they demanded?

Under the terms of the agreement I am of the opinion that they were not. The agreement provides for a transfer under the Real Property Act, or a deed without covenants other than against encumbrances by the vendor, and the purchaser accepted the title of the vendor to the said lands. The property was under the Real Property Act, and all that the plaintiffs were entitled to was a transfer and not to a title free from the caveat for which the defendant was in no way responsible, and furthermore, considering the fact that the plaintiffs here were also defendants in the Saskatchewan action and that the property would be tied up in their own hands, the reasonable thing for them to do would be to let matters stand until the Saskatchewan action was disposed of. The plaintiffs are, to my mind, clearly not entitled to costs.

Now, the question is, should the defendant by reason of the unreasonable conduct of the plaintiffs be awarded costs against the plaintiffs?

Had the defendant by his statement of defence not denied the assignment of David Wark to the plaintiffs, for that is practically what he did by his allegation that "the defendant does not admit the alleged assignment of David Wark to the plaintiffs," I would be disposed to allow him costs, and although this is not in reality the issue between the parties, yet it is made an issue when I think it should not have been. The other paragraphs of his statement of defence shews, however, his willingness to transfer the lands subject to the caveat, or to convey the same when the person entitled thereto shall have been ascertained, but I am led to the conclusion from his denial of the plaintiffs' rights under the assignment from Wark that he is not entitled to costs. There will, therefore, be no costs to either party.

Order for costs refused.

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CARLISLE v. GRAND TRUNK R.W. CO.

Ontario High Court, Trial before Riddell, J. January 8, 1912.

1. CARRIERS (§ II O 5—365)—RAILWAY—PASSENGERS' CHECKED BAGGAGE—FORWARDING BY EARLIER TRAIN—GRATUITOUS BAILMENT AT DESTINATION.

1. Where baggage is checked without extra charge upon an ordinary railway ticket and would ordinarily be forwarded upon the next passenger train, but the passenger who might have travelled by that train purposely delays his journey until a later train in the expectation that his baggage will have preceded him, the railway company is a gratuitous bailee and liable only for gross negligence as regards its custody of the baggage at the point of destination, after the time when it should have been claimed by the passenger, had he taken the earlier train.

[See MacMurchy and Denison's Law of Railways, 1911 ed., p. 443 et seq.]

2. BAILMENT (§ III—17)—DESTRUCTION OF GOODS WHILE IN BAILEE'S CUSTODY—PRESUMPTION—ONUS TO DISPROVE NEGLIGENCE.

Where goods are taken by any one as a bailee and are lost or destroyed when in his custody, he will be liable in damages, unless he shews circumstances negativing the presumption of negligence on his part which arises from such circumstances.

[*Pratt* v. *Waddington*, 23 O.L.R. 178, and *Polson* v. *Laurie* (1911), 3 O.W.N. 213, approved.]

3. EVIDENCE (§ II H 1—234)—PRESUMPTION—ONUS—RES IPSA LOQUITUR.

In case of accidental destruction of goods in a bailee's custody, where an accident is proved to have been caused by a hidden defect of such a nature that it could not be guarded against in the process of construction, nor discovered by subsequent examination, the presumption that the loss has resulted from the bailee's negligence is rebutted.

[See Beven on Negligence, 3rd ed., p. 116 et seq.]

4. NEGLIGENCE (§ I A—2)—GROSS NEGLIGENCE—LIABILITY OF GRATUITOUS BAILEE.

The gross negligence for which alone a gratuitous bailee can be made liable in the care of the goods which are the subject of the bailment must be such that any reasonable man would have considered insufficient the means of protection (if any) used by the bailee.

[*Giblin* v. *McMullen* (1868), L.R. 2 P.C. 317 and *Palin* v. *Reid* (1884), 10 A.R. 63, discussed.]

TRIAL of an action before RIDDELL, J.

The action was by husband and wife against the defendant railway company for the value of trunk and contents destroyed in the baggage room of the defendants at St. Catharines.

The action was dismissed.

H. H. Collier, K.C., for plaintiffs.

W. E. Foster, for defendants.

RIDDELL, J.:—The following are the facts. The plaintiffs purchased from the N. Y. C. and H. R. R. at New York, on the 23rd December, 1910, through tickets from New York to St. Catharines, Ontario, via the Grand Trunk Railway, and on that day checked the baggage in question in this action. The baggage reached St. Catharines the following day, the 24th of De-

cember, at 2.47 p.m. The plaintiffs did not, however, commence their journey from New York until the next day, after they had checked the baggage, that is 24th; they reached St. Catharines on Christmas morning (25th Dec.) at 10 a.m. The baggage on arrival at St. Catharines was placed in the baggage-room there and on the morning of the 25th December at about 5 a.m., there was an explosion in the baggage-room (two sections of the defendants' hot water heater or boiler, situated therein, giving way) causing damage to plaintiffs' trunk and contents. The total value of trunk and contents has been agreed on, at $800.00.

The tickets contained, printed on their face, a number of conditions, amongst them:

> Condition 5. Baggage liability is limited to wearing apparel not to exceed one hundred dollars in value for a whole ticket and fifty dollars for a half ticket, unless a greater value is declared by the owner and excess charge thereon paid at the time of taking passage.

One of the conditions endorsed on the baggage check is:—

> Baggage consists of passenger's wearing apparel, and liability is limited to $100 (except a greater or less amount is provided in tariffs) on full fare ticket, unless a greater value is declared by owner at time of checking and payment is made therefor.

There is no pretence that any greater value was declared by the owner at the time of checking or that any payment was made therefor.

The defendants contend that they held the baggage as bailees and at the strongest as against them simply as warehousemen and that they were not negligent and therefore not liable to the plaintiffs, or if held to be liable they are only liable under the terms or conditions endorsed on the tickets and baggage check for $100, and have so pleaded.

While I do not understand the plaintiffs at the trial to have expressly abandoned a claim against the defendants as common carriers, this was not pressed at the trial, and in the written argument counsel says: "It must be presumed that the railway company held the baggage after 9 p.m. of Saturday as warehousemen and the defendant company would, therefore, only be liable for negligence," thereby conceding that no claim lay against the defendants as common carriers.

Such cases as *Penton* v. *Grand Trunk R.W. Co.* (1869), 28 U.C.R. 367, and *Vineberg* v. *Grand Trunk R.W. Co.* (1886), 13 A.R. 93 shews that counsel was wise in making this concession. It remains to consider whether the defendants are liable other than as common carriers.

Early in the history of railways it was laid down by the Massachusetts Courts that baggage is supposed to travel by the same train as the passenger and that if the passenger fails (without the fault or to the knowledge of the railway com-

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pany) to travel by the same train, the liability of the railway company is but for gross negligence. *Collins* v. *B. & M. R.* (1852), 10 Cush. 506, is one of such cases.

Wilson v. *G. T. R. Co.*, 56 Maine 60: "It is implied in the contract that the baggage and passenger go together."

Marshall v. *Pontiac, etc., R. Co.* (1901), 126 Mich. 45:—

> Baggage implies a passenger who intends to go upon the train with his baggage and receive it upon the arrival of the train at the end of the journey. . . . If he (the plaintiff) had sold the ticket to another passenger he would stand in no different light from that in which he does now. . . . The defendant was not in fault in checking the baggage. Its agent, the baggage master, was justified in assuming that the plaintiff intended to accompany his baggage upon the next train.

The judgment says that is may not be "absolutely necessary for the passenger to go upon the same train with his baggage in order to entitle him to have his baggage taken care of at his destination by the railway company as a warehouseman. Where the passenger purchased his ticket with the bona fide intention to use it but without fault upon his part, did not accompany it, but went on a following train, a different case is presented."

Wood v. *Maine Central R.R. Co.* (1903), 98 Maine 98:—

> The relation of passenger and public carrier . . . entitles the passenger to have his personal baggage transported at the same time without any additional charge for the freight. . . . But in the absence of any special agreement therefor the carrier does not incur . . . liability as an insurer of the baggage unless the passenger accompanies it in its transportation or is prevented from doing so by the fault of the carrier. Where the owner did not intend to accompany his baggage . . . and . . . did not in fact . . . the defendant was only liable as a gratuitous bailee. *Graffam* v. *B. & M. R.*, 67 Maine 234; *Wilson* v. *Grand Trunk R.W. Co.*, 56 Maine 60, 57 Me. 138.

In the *Wood* case, the trunk was received at Wiscasset not accompanied by the owner; it was placed in the railway's baggage room at Wiscasset; that room was broken open and entered by thieves and the contents of the trunk stolen. The Court holding that the liability of the railway was as a gratuitous bailee, and that there was no such negligence as would render the company liable as a gratuitous bailee, the action was dismissed.

Cutler v. *N. L. R. Co.* (1887), 19 Q.B.D. 64, cannot be said to decide anything on this point although the judgment of A. L. Smith, J., p. 67, is suggestive.

There being nothing to take the case out of the general rule I think the defendants' liability, if any, is that of a gratuitous bailee—then they are liable only for "gross negligence." What

"gross negligence" is has been the subject of much judicial and editorial discussion.

Rolfe, B. (afterwards Lord Cranworth, L.C.), in *Wilson* v. *Brett* (1843), 11 M. & W. 113, pp. 115, 116, "could see no difference between negligence and gross negligence—that it was the same thing with the addition of a vituperative epithet" and Willes, J., in *Grill* v. *General Iron, etc.* (1866), L.R. 1 C.P. 600, at 612, quite agreed with this dictum.

Taunton, J., in *Doorman* v. *Jenkins* (1834), 2 A. & E. 256, at pp. 261, 262, says: "The phrase 'gross negligence' means nothing more than a great and aggravated degree of negligence, as distinguished from negligence of a lower degree."

Parke, B., in *Wyld* v. *Pickford* (1841), 8 M. & W. 443, at p. 460, says that in some of the cases the term has been defined in such a way as to mean ordinary negligence that is the want of such care as a prudent man would take of his own property; and cites Best, J., in *Batson* v. *Donovan* (1820), 4 B. & Ald. 21 and Dallas, C.J., in *Duff* v. *Budd* (1822), 3 Brod. & B. 177; Story on Bailments, sec. 11.

Lord Denman, C.J., giving the judgment of the Court in *Hinton* v. *Dibbin* (1842), 2 Q.B. 646 (A. & E. N.S.), at p. 661, says: "It may well be doubted whether between 'gross negligence' and 'negligence' merely any intelligible distinction exists."

This language is quoted by Cresswell, J., delivering the judgment of the Court in *Austin* v. *Manchester, etc.* (1850), 10 C.B. 454(at pp. 474, 475, and he says: "It is manifest that no uniform meaning has been ascribed to these words 'gross negligence' which are more correctly used in describing the sort of negligence for which a gratuitous bailee is responsible, and have been somewhat loosely used with reference to carriers for hire."

Erle, J., in *Cashill* v. *Wright* (1856), 6 E. & B. 891, at p. 899, says: "The legal meaning of gross negligence is greater negligence than the absence of . . . ordinary care."

Pollock, C.B., in *Beal* v. *S. D. R. Co.* (1860), 5 H. & N. 875, at p. 881, says: "There is a certain degree of negligence to which everyone attaches great blame. It is a mistake to suppose that things are not different because a strict line of demarcation cannot be drawn between them,"—and in this suggested definition agreed Crompton, J., giving the judgment of the Exchequer Chamber in the same case (1864), 3 H. & C. 337, at pp. 341, 342.

In *Lord* v. *Midland R. Co.* (1867), L.R. 2 C.P. 339, Willes, J., said: "Any negligence is gross in one who undertakes a duty and fails to perform it. The term 'gross negligence' is applied to the case of a gratuitous bailee who is not liable unless he fails to exercise the degree of skill which he possesses."

The leading case for any Canadian Court is *Giblin* v. *Mc-*

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Mullen (1868), L.R. 2 P.C. 317, pp. 336 et seq. After discussing the cases, Lord Chelmsford, delivering the opinion of the Judicial Committee, says:—

> The epithet "gross" is certainly not without its significance. The neglect for which according to Lord Holt, a gratuitous bailee incurs liability is such as to involve a breach of confidence or trust, not arising merely from some want of foresight or mistake of judgment, but from some culpable default . . . the degree of care and diligence which a bailee must exercise corresponds with the degree of negligence for which he is responsible.

And then adds:—

> The negligence for which alone they (*i.e.*, the bank, gratuitous bailees) could be made liable would have been the want of that ordinary diligence which men of common prudence generally exercise about their own affairs.

Further on the judgment shews that if "no one can fairly say that the means employed for the protection of the property . . . were not such as any reasonable man might properly have considered amply sufficient," a gratuitous bailee could not be held liable; and he cannot be called upon to "multiply his precautions so as not to omit anything which can make the loss of property entrusted to him next to impossible."

In our own Court of Appeal in *Palin* v. *Reid* (1884), 10 A.R. 63, it was considered that the "case fell within the class of cases where the bailment of goods is for the benefit of the bailor alone, and where the bailee is responsible only for gross negligence. Exception is often taken to the use of the word 'gross'—at all events we may consider that the liability can only arise from actual clear negligence." Cf. *Leggo* v. *Welland Vale Co.* (1901), 2 O.L.R. 45, at p. 49, per Armour, C.J.O., delivering the judgment of the Court. The *Palin* case decided also that the onus of establishing negligence is on the plaintiff—and where the evidence is equally consistent with the absence as with the presence of negligence the defendant is entitled to succeed because "no verdict for the plaintiff should be rested on mere surmise or guess."

Mr. Justice Burton (afterwards Sir George Burton, C.J.O.), says, p. 67 (it being the case of the loss of a box): "If we find upon the evidence that he (the defendant) did keep the box in the same manner as he kept his own, it goes a great way to dispel any presumption of gross negligence."

The facts of the damage as I find them, giving such weight to the evidence of the viva voce witnesses as I think, from having seen them at the trial, their evidence should have, are as follow:—

The trunk was placed in the baggage room of the railway company at St. Catharines which was heated by a closed hot

water system. The boiler had been bought from a Buffalo concern, the American Radiator Company, and was installed by the defendants' own men some three years before the accident—the "relief valve" and steam gauge were taken away each summer and tested, including the summer of 1910, at least they were taken away for that purpose.

In the system there was a tank at the top of the room which let down water through a 3 inch pipe into the boiler, then the water went into a 1 1/4 inch pipe which ran through the whole station and ultimately back into the 3 inch pipe—on the boiler was a gauge and on the tank a safety valve tested to 30 lbs.

The 24th December had been a very mild day, as was the 25th. The night operator, whose duty it was to look after the furnace from 7 p.m. to 7 a.m. put on fresh fuel at about 12.30 a.m., making a moderate fire, and at about 4.30 a.m. he had slightly checked the fire then just a moderate fire, by pulling out the damper—there was then between 10 and 15 lbs. of steam in the boiler and the gauge seemed to be working properly. At about 5 a.m. an explosion occurred. The pipes could not have frozen and had not frozen, but two sections of the boiler burst. This did not set fire to the building, but it damaged the plaintiff's property. Some attempt was made at the trial to shew that the closed system is not a proper system, but the evidence was not given in a satisfactory manner and I am satisfied that the closed system employed by the defendants is a safe system, no less safe than the open system advocated by the witness whose evidence I do not attach value to. It had, moreover, been used for years by the G.T.R. over their system and was not found dangerous.

It is wholly impossible to find anything like the "gross negligence" for which alone a gratuitous bailee is responsible.

The same result will follow if we consider the defendants bailees for reward—warehousemen. A proper system properly attended to as this was according to my finding—the explosion was not due to any negligence on the part of the defendants.

It is shewn that a section may be tested by the best methods known to the trade and stand the test thoroughly, that the section may be in use two or three years and then the section blow up without it having been possible for anyone to be aware of the defect—I find as a fact that the cause of the blowing up here was a hidden defect of such a nature as that it could neither be guarded against in the process of construction nor discovered by subsequent examination.

And, in my view, even though the defendants are chargeable as warehousemen they are not liable.

I accede in its entirety to the principle laid down in *Pratt* v. *Waddington* (1911), 23 O.L.R. 178, and by my own Divisional Court in *Polson* v. *Laurie* (1911), 3 O.W.N. 213, that where

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goods are taken by anyone as bailee and lost (and I add "or destroyed") when in his custody, the onus is upon him to shew circumstances negativing negligence on his part. Here the defendants have shewn all the circumstances.

"No evidence was kept back, all available witnesses seem to have been examined; there is no suspicion whatever of any bad faith" (per Hagerty, C.J.O., in *Palin* v. *Reid* (1884), 10 A.R. 63, at p. 65), and it has been proved that the accident was not due to negligence.

That such a defect causing an accident does not render the defendants liable is established by *Readhead* v. *Midland R. Co.* (1867), L.R. 2 Q.B. 412, affirmed in L.R. 4 Q.B. 379, and the long line of decisions following it.

The action will be dismissed with costs. It is unnecessary for me to consider the other points raised.

Action dismissed.

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C. C. LABEAU et al. (defendants) (appellants) v. THE DESBARATS ADVERTISING AGENCY, LTD. (plaintiffs) (respondents).

Quebec Court of King's Bench, Appeal Side, Sir Louis Jetté, C.J., Trenholme, Cross, Archambeault and Carroll, JJ.

1. CHAMPERTY AND MAINTENANCE (§ I—1)—ASSIGNMENT BY SEVERAL CREDITORS OF SEPARATE CLAIMS TO ONE PARTY FOR SUIT—QUEBEC CIVIL CODE, 1582.

When several creditors assign their several claims to one of their number, without selling them to him, but transferring them for the purpose of having but one suit brought against their common debtor, so as to avoid costs and multiplicity of actions, the defence of litigious rights cannot be pleaded, article 1582 of the Quebec Civil Code applying only in the case of an onerous contract based on speculation.

[*Powell* v. *Watters*, 28 Can. S.C.R. 133, followed.]

2. PRINCIPAL AND AGENT (§ II A—13)—AGENT FOR SALE OF GOODS AND SHARES—AUTHORITY TO ADVERTISE.

A financial agent engaged by a company to sell its shares and merchandise (*e.g.*, gas burners) on commission has the power to advertise the sale of the same and solicitations to subscribe for shares in the company.

3. CORPORATIONS AND COMPANIES (§ I B—5)—CORPORATE PURPOSES—AUTHORIZATION OF AGENT'S PROSPECTUS.

A prospectus ordered and prepared by an agent engaged by a company to sell its shares who has obtained from the directors of the company the information to be inserted therein, partly or wholly corrected by the president of the company, and received by the directors of the company without demur, will be held the prospectus of the company itself, especially when it is so described in its head-line.

4. CORPORATIONS AND COMPANIES (§ IV D 4—90)—CONTRACT BY FINANCIAL AGENT FOR ADVERTISING—RATIFICATION.

When an incorporated company allows a prospectus ordered and prepared by a financial agent employed by them to sell their shares

to be circulated amongst the public which purports to be the prospectus of the company and permits any advertisements based thereon to be published without any disclaimer on the part of the company, it will not be allowed to deny the authority of the apparent agent, who gave the orders for the printing and advertisements, whether such apparent agent be really the duly authorized agent of the company or not.

5. CORPORATIONS AND COMPANIES (§ IV G 5—131)—OFFICER'S LIABILITY TO CREDITORS—BUSINESS OPERATIONS OF COMPANY AFTER CHARTER BUT BEFORE PAYMENT OF STATUTORY PERCENTAGE OF CAPITAL.

When the directors of a company expressly or impliedly authorize the commencement of the operations of the company or the incurring of liabilities before ten per centum of the authorized capital of the company has been subscribed and paid in in conformity with the Quebec Companies Act, R.S.Q. (1909), article 6019, they are personally, jointly and severally liable with the company for the payment of such liabilities.

6. CORPORATIONS AND COMPANIES (§ I C—10)—COMMENCEMENT OF COMPANY'S OPERATIONS—QUEBEC COMPANIES ACT, R.S.Q. 1909, article 6019.

The renting of an office, payment of business tax, opening of a bank account, signing of a lease, and institution of suit by a company, constitute a commencement of operations and incurring of liabilities bringing the company within the purview of sec. 6019 R.S.Q.

7. NOVATION—PERSONAL OBLIGATION OF COMPANY'S AGENT FOR COMPANY'S DEBT—PROMISSORY NOTES GIVEN IN SECURITY.

When an agent, acting on behalf of a company, guarantees a contract made on behalf of such company and gives his own promissory notes to accommodate the third party with whom the contract is made, such giving of notes does not constitute novation, whereby a new debt and a new debtor would be substituted to a previous debt and a previous debtor.

8. CONTRACTS (§ III F—290)—LIABILITY FOR ACTS OF PERSON HELD OUT AS COMPANY'S AGENT.

A company is liable to third parties who in good faith contract with a person in reality not the agent of the company under the belief that he was so when the company and its directors have given reasonable cause for such belief.

THESE appeals were moved by the French Gas Saving Co. Ltd., and its directors from the judgment of the Superior Court for the district of Montreal, Archer, J., condemning the company-defendant and the directors thereof to pay to the company-plaintiff the sum of $2,130.83, price and value of certain printing, advertisements, prospectuses, stock-books, etc., done for the benefit of appellants.

The appeals were dismissed.

In March, 1910, plaintiffs sued under sec. 18 of the Quebec Companies Act of 1907, 7 Edw. VII. ch. 48; now Rev. Stat. Quebec, sec. 6019, which provides that no company can commence operations or incur liabilities before ten per centum of its authorised capital is subscribed and paid for, and a declaration under oath by the secretary of the company, establishing such fact, has been deposited in the Department of the Provincial Secretary, and that in default of so doing the directors of the company are personally jointly and severally liable with

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the company for the payment of any liabilities so incurred. Plaintiffs alleged non-compliance with these formalities by the company-defendant. Their first claim was for $1,573.03, the price of certain advertisements published in different Canadian newspapers at the request and to the knowledge and for the advantage of the defendants. The second item was for $501.80 which plaintiffs claimed as transferees from "Morton, Phillips & Co." as the price of stationery and prospectus printed for the company-defendant. The third item of $31 for printing of interim receipts and certificates was claimed as transferees from "Desbarats & Company"; and a fourth item of $25 transferred by the Eagle Publishing Co. Ltd., was for additional advertisements. The work was done and merchandise supplied in May and June, 1909.

The French Gas Company and its directors pleaded jointly that the company-defendant had held but one organisation meeting, that no act of business had ever been done as there was no business to do seeing only $250 worth of stock had been subscribed; that they had never had any dealings with plaintiffs and had never authorised or instructed any one to do so on their behalf; that the transfers of claims were fictitious and in any event only transfers of litigious rights; and that the claimants were total strangers to the company and its directors.

Plaintiffs answered that all the work done had been ordered by one Antoine Robert, the duly authorised agent of the defendants, and that they dealt with defendants both personally and through Robert; and that in any event plaintiffs and claimants contracted in good faith with Robert under the belief that he was the duly authorised agent of the defendants and that the defendants gave plaintiffs reasonable cause to believe that Robert was their agent, inasmuch as they were aware of all the contracts he entered into on their behalf, and acquiesced in the same and received and accepted the benefit thereof; and further inasmuch as the defendants never repudiated the authority of the said Robert to act on their behalf.

Defendants replied generally but admitted that ten per cent. of the authorised capital of their company which was $500,000 had not been subscribed or paid in according to law.

The trial was held before ARCHER, J., on the 13th, 14th, 15th and 16th September, 1910. A re-argument was ordered and took place on October 3rd, and judgment rendered on October 11th maintaining the plaintiffs' action in toto.

The facts and the law are fully set forth in the notes of judgment of ARCHER, J.

October 11, 1911. ARCHER, J.:—Plaintiffs claim from the company-defendant which was incorporated under and in virtue of the Quebec Companies Act of 1907, and the directors the sum

of $2,130.83 being $1,573.03 for advertisements published in different newspapers in Canada, for the benefit of the defendants, the balance being for different amounts transferred by the company's creditors to the plaintiffs, but for collection only.

The plaintiffs claim that this amount is due by the company and want to hold the directors jointly and severally responsible inasmuch as before commencing its operations and incurring liabilities ten per cent. of the company's authorised capital had not been subscribed and paid for as provided by sec. 6019, R.S.Q.

The plaintiffs further allege that all the work performed and goods sold and delivered were for the benefit of the company-defendant; that the claimants contracted with the defendants through their duly authorized agent, one Antoine Robert.

Moreover the claimants contend that they contracted in good faith with Robert under the belief that he was the duly authorized mandatory of the defendants, that defendants gave claimants reasonable cause to believe that Robert was their mandatory inasmuch as they were aware of all the contracts which he, the said Robert, entered into on behalf of the defendants, and acquiesced in the same and received and accepted the benefit therefor, used and accepted the goods which were supplied to them, and that they never repudiated the authority of said Robert, although they were aware that the said Robert held himself out as their duly authorized agent.

The defendants deny the principal allegations of the action and say that they had nothing whatsoever to do with the plaintiffs and other claimants, and never authorized any person to deal with or in any way contract with them, and that the company did not commence its operations or incur any liability. It is also claimed that the transfers are of litigious rights.

The first point argued by the parties is as to whether or not the claimants could transfer their claim to the present plaintiffs for collection. The defendants argue that the transfer being of litigious rights, the plaintiffs cannot recover.

In this case it is clearly established that the rights transferred were not sold to plaintiffs, but merely transferred for collection. There being no sale of the rights, but a mere transfer for collection, I consider that the defendants are wrong in their contention and that the plaintiffs could sue and recover the amounts transferred. (Mignault, tome 7, page 200, *Powell* v. *Watters*, 28 Can. S.C.R. 133; Civil Code 1582; Fuzier-Herman, Civil Code, art. 1699, No. 22; *McDonald* v. *Rankin*, M.L.R. 7 S.C. 46.

The declaration alleges four different contracts. The plaintiff is a company carrying on business in the city of Montreal, as an advertising agency. The defendant is a company incorporated, according to the laws of the Province of Quebec, on the 25th May, 1909. This company really replaced the company

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which has been known as the French Gas Saving Burner Co., Ltd. It was at the suggestion of Mr. Robert that the new company was formed with a higher capital.

It may be said also, that at the meeting where it was decided to get the new company incorporated with additional capital, a resolution had been passed authorizing Robert to have application forms in English and French printed, receipts and prospectusus, etc.

The witnesses say though, that this part of the resolution referring to Robert was never put in effect.

The principal object was to acquire the rights of Auguste Mouvant or of the Gas Saving Burner Co., Ltd., for the Canadian patents, Nos. 107, 821 and 109, 960.

The only subscribers to the capital stock were the five directors who had each subscribed 50 shares. To start effectually the business of the company it was necessary that more stock should be subscribed and at a meeting of the provisional directors held on the 28th May, 1909, it was resolved: "A stock book was directed to be opened for subscription and report thereon to be made at the general meeting of organization."

The directors decided that Mr. Robert should act as their financial agent and get the amounts subscribed.

There was no resolution passed by the directors to this effect, but they all agreed and it was understood that Mr. Robert should act as financial agent, he being paid 10% on the amount of stock subscribed and paid.

Before putting the stock on the market, the company rented offices and one was sublet to Mr. A. Robert.

Messrs. Robert and Leluau, president of the company, immediately took steps to get the offices conveniently divided. Subsequently burners were installed in the company's offices so as to have demonstrations and shew to the public the advantages of this new burner.

Several meetings were held at the company's office where the directors and other interested parties gave such demonstrations. Mr. Robert then called on Mr. Desbarats, president of the plaintiff company, in connection with the advertisements which should appear in the papers.

After several interviews with Mr. Robert, the company-plaintiff sent, on the 1st of June, a letter addressed to the company, but probably to the care of Mr. Robert. In this letter the advantage of advertising is shewn and a list of prices is enclosed. It does not appear by the evidence that this letter was ever seen by the directors.

Subsequently the question of advertising was further discussed and it was finally agreed that they should appear in some of the local as well as in Toronto and Quebec newspapers. Mr. Leluau, president of the company, was present when the adver-

tising contract was discussed. Mr. Desbarats, not knowing the financial standing of the company, asked Robert to guarantee the payment of the advertisements and the following document was signed by Robert.

> Large adv. to appear at once in Montreal papers as per list, but with "witness" added:
> Wed. Sat.
> for two weeks—
> four insertions in all; prices per line as per estimate.
> Bill to the French Gas Saving Co., Ltd., Montreal, but I will be responsible for these insertions.
>
> (Signed) ANT. ROBERT.
>
> 9th June, 1909.

It would appear that Robert only became surety for the company.

Mr. Leluau claims that he never authorized Robert to enter in any contract with the plaintiffs in the name of the company-defendant for the advertisements which appeared in the several papers referred to. On this point he is contradicted by Mr. Robert and Mr. Desbarats. The last mentioned witness declares that Leluau was present when the orders were given and that he could not but understand that Robert was the duly authorized agent of the company. It is established that the necessary material to prepare the advertisements was furnished by the directors at the demonstrations which were held at the company's office and more specially by the information given by Mr. Leluau, president of the company. Moreover, Mr. Desbarats swears that he took also his information from the prospectus which had been published, copies of which had been in the possession of each of the directors.

In looking over the advertisements, I was first under the impression that they were published for the benefit of Robert, who was trying to sell shares, he receiving 10% commission. After a further examination, I have come to the conclusion that these advertisements were for the benefit of the company; they go to shew that Robert was not merely a broker trying to sell the company's shares but that he was the company's agent.

In referring to exhibits D-1, D-2 and D-3 we see that one advertisement says that all application for shares and burners are to be sent to Ant. Robert, "and all remittances made to the order of the company and likewise sent to me" (Ant. Robert). He is an agent receiving orders for the company, but the remittances are to be made to the company.

Amongst the other advertisements is the following:

> A HANDSOME PROSPECTUS.
>
> The handsome prospectus *issued by the French Gas Saving Co., Limited, has just been received.* The advantages of this wonderful gas-saving device are clearly and attractively presented.

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Another reads as follows:

SEE HOW GAS IS SAVED.

This marvellous invention, the Mouvant Gas Burner, which saves 54 per cent. of gas, will make Montreal famous.

Come and see it burning in the offices of the French Gas Saving Co., Limited, 255 Notre Dame St. West, Montreal. Demonstrations every day from 9 to 5.

Another reads as follows:

Replace your electric lights with the self-lighting "Mouvant Gas Burner," and save money.

On Tuesday, June the 15th, *La Patrie* published the following advertisement:

LE BRULEUR MOUVANT.

Une démonstration publique demain, dans l'édifice de *La Patrie*. Tout ce qui est de nature à augmentre in a diminuer le c'est des choses nécessairies la vie est toujours bienvenu au public. Mais comme un grand nombre de spéculateurs ont abusé de la confiance de ce même public, celui-ci se montre aujourd'hui défiant quand on lui présente quelque chose de nouveau. Cependant, il se laisse convaincre quand on veut lui démontrer que l'objet qu'on lui offre possède réellement les qualités qu'on prétend. *C'est en vertu de ce principe que les promoteurs du brûleur àgaz Mouvant ont résolu de donner des démonstrations publiques afin de faire VOIR la supériorité de ce brûleur et l'économie qu'on peut realiser par son usage. Une de ces démonstrations aura lieu demain après midi, dans l'édifice de "La Patrie."* Elle commencera à trois heures. Elle est donnée dans le but de permettre aux consommateurs de la partie est l'advantage de se rendre compte par eux-mêmes de la véracité des rapports faits sur ce brûleur. M. Mouvant, l'inventeur, sera présent et donnera toutes les explications voulues. Il faut ajouter que le brûleur est fait non seulement pour le gaz, mais il peut aussi s'adapter aux appareils à acétylene et à gazoline. Son mérite le plus grand est d'économiser 54 pour cent. de la quantité de gaz consommé avec un brûleur ordinaire. Le public est cordialement invité. La démonstration est gratuite.

After a careful examination of all the circumstances, the evidence produced and also the advertisements to which I have referred, I have come to the conclusion that the advertisements in question were published, but for the benefit of the company and not for Robert as a broker. The advertisements refer to the prospectus which has been issued by the company. They also declare that demonstrations are given every day at the company's office in Montreal. Moreover, they advertise the sale of burners in the near future. In the advertisement which appears in *La Patrie*, it is said that the promoters will give a demonstration at the office of *La Patrie*. How could it be argued seriously that the directors did not know of these advertisements and did not approve of them? Moreover, it is established that

the secretary Mr. Laroeque had a scrap-book in which he made a collection of some of these advertisements.

I am, therefore, convinced that Robert was acting as an agent of the company and had the necessary authority to bind the company.

It is claimed that the president could not bind the company and the other directors. The plaintiffs were entitled to assume that the president was authorized to enter into an agreement with Robert and with them, it being an agreement in regard to which the Board would have had power to bind the company. They were entitled to assume that he had been duly clothed with the real authority which he was ostensibly exercising in allowing Robert, as agent, to enter in a contract for the advertisements referred to. *National Malleable Co.* v. *Smith's Falls*, 14 O.L.R. 22; Parker & Clark on Company Law, page 240.

See also *Duck* v. *Tower Galvanizing Co.*, [1901] 2 K.B. 314; *Sheppard* v. *Bonanza Nickel Co.*, 25 O.R. 305.

Thompson on Corporations, 2nd edition, vol. 2, par. 1690, says:—

> *Officer or agent performing acts within apparent scope of his powers. Effect of secret limitations on authority.* Corporations are not different from individuals in the application of the rule of agency binding the principal for the acts of his agent within the limits of the authority the principal holds him out as possessing. Under this rule corporations are held to whatever is within the apparent scope of the powers with which they have either intentionally or negligently clothed their agents, unless the parties with whom such agent contracts have notice that their powers are limited. Third persons will not be affected by secret instructions given agents restricting these powers.

Even if it had not been proved that Robert was a duly authorized agent for the company, I am of opinion that art. 1730 of the Civil Code which reads as follows, should apply:

> The mandator is liable to third parties who in good faith contract with a person not his mandatory, under the belief that he is so, when the mandator has given reasonable cause for such belief.

During Mr. Desbarats's examination it was established that at first the advertising accounts had been charged to Mr. Robert. It was only a few months after, that a new entry was made in the ledger, charging the amount for advertising to the company-defendant. Mr. Desbarats explained that the entry in the name of Robert was made through an error, the book-keeper not knowing the circumstances under which the contract had been entered into. As soon as the error was discovered the entry was made in the ledger which is a loose-leaf ledger. Moreover, the plaintiffs' ledger shews that a certain number of notes were given by Robert to cover the amount due under the contract and that he advanced the sum of $100.00.

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The defendants argue that these facts tend to prove that Desbarats never intended contracting with the company-defendant, but with Robert only. Mr. Desbarats explains that the notes were accommodation notes given so as to allow him to get the necessary cash to pay the different newspapers publishing the advertisements. These had to be paid promptly. Moreover, the sum of $100.00 was also to help him to finance. Both Messrs. Robert and Desbarats swear positively to these facts.

Though the above may have created a certain doubt in my mind, I think I am bound to accept the explanations given by Mr. Desbarats. The guarantee signed by Robert shews also that the entries must have been made in the books by error. The accounts were sent once a month to the company-defendant, but the plaintiffs never received any acknowledgment. It is only later on, when Mr. Desbarats met the president of the company, Mr. Leluau, that the former told him that the company would not be held responsible and later on a letter was sent by the company denying all liability.

Taking all the circumstances and the evidence produced I cannot help coming to the conclusion that the company is indebted in the sum claimed by Desbarats Co. Ltd.

The claim of Morton Phillips & Co. is for the printing of the prospectus and for a certain quantity of paper furnished to the company, etc. The only witness heard on behalf of the plaintiffs is Mr. Phillips who says that it is on Mr. Robert's declaration that he represented the company that he consented to furnish the goods and perform the work mentioned in their account.

The question to be decided here is as to whether or not Ant. Robert was the company's agent. In looking over the prospectus which has been filed, we have got to consider it as the company's prospectus. The material to prepare it was furnished by the directors. Mr. Robert swears positively that he was authorised to get it printed and moreover that the president of the company, Mr. Leluau, had revised it before published. The resolution passed by the directors of the old company on the 8th of May, 1909, may tend to shew the directors' intentions, though it is declared the same was never acted upon. This Mr. Leluau denies, but admits that he corrected the report which he had prepared for the company and which he signed as engineer.

The prospectus after being published was sent to the company's office but received by Mr. Robert who had his office adjoining the company's offices. Immediately after, copies of the prospectus were sent to the directors. Some of the directors even gave names of persons to whom the prospectus should be addressed. The secretary of the company, Mr. Laroque, had several copies of the prospectus which he distributed. On the

first leaf of this prospectus we see the seal of the company, following comes the names of the directors and a letter by Mr. Robert in which he declares that the financial part of the organisation has been entrusted to him. In the same letter he says that application for shares and burners should be addressed to him and all cheques and money orders made payable to the French Gas Saving Co. Ltd., and addressed to him. We must also remember that on the 28th day of May, a resolution had been passed by the provisional directors in which it was resolved "that a stock book should be opened for subscriptions."

The company had naturally to call the attention of the public and a prospectus was needed. Mr. Desbarats took his information from the prospectus to prepare the advertisements. In the advertisements which are known to the directors and which the president approved of, it is declared that the company has issued a prospectus which has been distributed.

All these facts do prove in my mind that Robert had been authorised at least by the president Leluau to get the prospectus printed. I therefore come to the conclusion that the company is bound to pay the amount due Morton Phillips & Co. As far as the paper is concerned I consider, under the circumstances of the case, that Robert had proper authority to buy and was acting within the scope of his authority.

As to Desbarats & Co.'s account, which is for interim receipts, it is clear that it was necessary to have interim receipts and they were required for the benefit of the company through Robert who, under the circumstances, must be considered as being duly authorised.

If Robert was only a broker and did not act within the scope of the powers which had been given him, I consider that the company is still liable as he was held out to the public as the company's agent having authority to bind the company in the contracts which he entered into. Moreover none of the directors ever repudiated within a reasonable time, the contracts entered into by Robert.

The claim of the Eagle Publishing Co. Ltd., for printing advertisements should also be maintained. As has been shewn, Robert had the necessary authority to order the same. If Robert, at any time, exceeded the authority given him, the company and the directors should have repudiated him. It is only in the month of September that the directors told Robert to discontinue to act for them as financial agent and cease to do anything whatsoever in the name of the company. Why should they give such an order if Robert was not doing anything that could bind them?

Robert was not an underwriter but the company's agent having the necessary authority to bind the company, and he

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acted within the scope of that authority. See Palmer's Company Law, 6th edition, page 327 et seq.

The plaintiffs ask by the conclusions of their action that the defendants Messrs. Leluau et al., the directors of the company-defendant, be jointly and severally held liable with the company for the payment of the sum of $2,130.83. The company-defendant, which was incorporated in the month of May, 1909, leased the premises which they occupy in the city of Montreal and opened an office where demonstrations were given in connection with the patents mentioned in their letters of incorporation.

As one of the patents was to lapse within a short time, they obtained from Ottawa further delay. The business tax imposed by the city of Montreal was paid, they commenced their operations and incurred liabilities, amongst them being those mentioned in their action.

The law which applies is section 6019 of the Revised Statutes, P.Q.:—

> The company shall not commence its operations or incur any liability before ten per cent. of its authorized capital has been subscribed, and paid for, and a declaration under oath, by the secretary of the company, establishing such fact, has been deposited in the department of the provincial secretary.
>
> Every director who expressly or impliedly authorizes such operations being so commenced or liabilities being so incurred, shall be jointly and severally liable with the company for the payment of such liabilities.
>
> This article shall not apply to companies existing before the first day of July, 1907.

This is a new clause inserted in the law by 7 Edw. VII. ch. 48, sec. 18. The object of this clause is certainly to protect the public against the promotors, etc.

In the present case I am of opinion that the evidence clearly shews that the company did not comply with the requirements of this section before commencing its operations.

In fact the evidence establishes clearly that there was only $250 paid in when the company commenced its operations. It would seem that the liabilities of the company were generally paid by the directors individually but always for the account of the company.

I forgot to mention also the fact that in the month of October, 1909, the Standard Lithographing Company sued the company-defendant for work done in connection with the prospectus in question. The company did not appear, default was taken, but subsequently the amount of debt and costs were paid. It is claimed by the defendant that this amount was paid by Mr. Mouvant personally. All that we know is that Mr. Mouvant paid the amount, but this does not go to shew that it was not

paid for the account of the company inasmuch specially that the costs were also paid.

Under the circumstances of the case I consider that the company should be condemned to pay the amount claimed and the directors for the reasons set forth must also be held jointly and severally liable with the company for the payment of these liabilities.

The directors of the company-defendant first of all filed an appeal from this judgment; three weeks later, the company-defendant also appealed. On motion these appeals were joined and one hearing ordered.

The appeal was heard by SIR LOUIS JETTÉ, C.J., TRENHOLME, CROSS, ARCHAMBEAULT, and CARROLL, JJ.

Messrs. *Campbell Lane and Gustave Lamothe*, K.C., for appellants:—The orders for advertisements were obtained from Robert and charged up to Robert's account. Only much later were these charged to the French Gas Co. It follows that Robert was really considered as the true debtor, all the more so as Robert paid $100 in cash and gave promissory notes to cover the account on which interest has been charged to date. The only information obtained from the officers of the appellant was so obtained at a public demonstration at which anybody could attend and therefore was not obtained with appellant's knowledge that same was to be used for advertisements. Robert was not the agent of the company but an underwriter who had accepted to float the stock of the company and was to be paid a 10 per cent. commission on the shares he sold. The contracts for advertising which he gave out were given out by him personally as promotor and appellants were not concerned therewith, and Robert was to pay for the same out of his commissions. The directors-appellants never authorised Robert to bind them and more than once warned him for his own sake against launching into a large expenditure. As to the claims transferred all was done by Robert directly who was unauthorised and if third parties choose to take anyone's word who claims he is an agent they must abide by the consequences. As soon as appellants learned of what Robert had done they repudiated it, first verbally and then in writing. That the transfer of the claims was one of litigious rights is shewn by the fact that the transferors knew before making the transfers that their claims were disputed. Nor did the appellants begin business and incur liabilities; they did not manufacture or sell a single burner and only held a few meetings. They had an office but did not carry on any business and any little expense was paid not by the company but by the individual directors.

Messrs. *G. C. Papineau Couture*, and *S. Beaudin*, K.C., for respondents:—Acts of business are shewn in fitting up an office

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and subletting part of it, in the payment of taxes, in the institution of a suit by company-appellant, by the opening of a bank account, by the giving of public demonstrations, quite apart from the incurring of the liabilities now sued on. That Robert was agent is shewn by a resolution of company-appellant authorising him to have applications, receipts, and prospectus printed and appellants are estopped from proving this resolution has now been put into force. In any event it is admitted Robert was appellant's agent to the extent of selling shares and burners. The prospectus when printed was sent to each director and none repudiated Robert; on the contrary they corrected proofs, made suggestions, gave information as to the contents, and even distributed same. The secretary collected them in a scrapbook. In the case of the other items, although the accounts were rendered in due course in the summer of 1909, there was no repudiation until December. The information for the advertisements came from Lebeau and the prospectus bearing the seal of the company; and their contents were certainly such as to lead the public to believe they were published by the company-appellant although signed by Robert, and the directors who saw them never made a move to stop their publication. And the additional fact that Robert was ordered to stop work by appellants in September is most significant. As a matter of fact operations were stopped by threat of proceedings from a Mr. Visseaux who claimed his patents had been infringed.

On the law: (1) The transfers are not a sale of litigious rights but merely transfers for collection allowed by law: 7 Mignault, p. 200; *Powell* v. *Watters*, 28 Can. S.C.R. 133; Civil Code, art. 1582; Fuzier-Herman Civil Code (Fr.), art. 1099, no. 22; *McDonald* v. *Rankin*, M.L.R. 7 S.C. 44; (2) plaintiffs were justified in assuming Robert was properly authorised: "Omnia præsumuntur rite acta"; *Montreal & St. Lawrence Power Co.* v. *Robert*, R.J.Q. 25 S.C. 473; *National Malleable Casting Co.* v. *Smith's Falls Malleable Casting Co.*, 14 O.L.R. 22. The law of mandate applies to corporations as well as to individuals: *Duck* v. *Tower Galvanizing Co.* (1901), 2 K.B. 314; *Shepherd* v. *Bonanza Nickel Co.*, 25 O.R. 305; Parker and Clark on Company Law, p. 240; Storey on Agency, pars. 443, 446*a*, 9th ed; Thompson on Corporations, 2nd ed., vol 2, p. 1690. See also Civil Code arts. 1704, 1727. *Commercial Union Ins. Co.* v. *Foote*, 3 Revue Critique, p. 40; *Poulin* v. *Williams*, 22 L.C.J. 18; *Gourd* v. *Fish and Game Club*, M.L.R. 6 S.C. 480. But if Robert was not really an agent as between himself and appellants art. 1730 Civil Code applies and appellants are still liable: *Morton* v. *Niagara District Mutual Fire Ins. Co.* (Beauchamp's Civil Code art. 1730, No. 1); *Cassidy* v. *Montreal Fish and Game Club* M.L.R. 6 S.C. 229; *Leclaire* v. *Landry*, 19 R.L. 342; *Columbia Mill Co.* v. *National Bank of Commerce*, 52 Minn. 224, 53 N.W.

1061; *Thompson* v. *Brantford Electric Ry. Co.*, 25 A.R. 340; *Ontario Western Lumber Co.* v. *Citizens' Telephone Co.*, 32 C.L.J. 237; *Laird* v. *The Birkenhead Ry. Co.*, 6 Jurist N.S. 140. Under the statute on which the action is based, therefore, read in conjunction with our Civil Code, appellants cannot escape.

Lamothe, in reply.

The case was reserved for consideration and subsequently the unanimous judgment of the Court of King's Bench was rendered by

TRENHOLME, J.:—The judgment of the Court below is sustained on every ground as found by the trial Judge. The very object for which this statutory law (R.S.Q. sec. 6019) had been passed was to meet a case like the present one. Had the appellants paid in the necessary ten per cent. of their authorized capital they would have had ample funds to meet their liabilities. The Court is of the further opinion that Robert was the duly authorized agent of the appellants and that even if he were not so, as between himself and appellants, he certainly must be so as between appellants and respondents to whom he had been held out most unmistakeably as the ostensible agent of the French Gas Saving Company.

Appeal dismissed.

Annotation—Principal and agent (§ II D—26)—Holding out as ostensible agent—Ratification and estoppel.

Annotation

Principal and agent

Article 1730 of the Quebec Civil Code is English law and has no counterpart in the Code Napoleon, although nearly all the legal principles on the question of mandate or agency in Quebec are drawn from the French law. In France the difficulty created by the absence of this article is overcome by a very strenuous and all embracing application of article 1998 of the Code Napoleon corresponding to article 1727 of the Quebec Civil Code.

In France ratification by the principal is premised whenever he had knowledge or should have had knowledge of the acts done by his apparent agent, and does not repudiate them or remains silent. Fuzier-Herman, Code Civil (Fr.), art. 1998, nos. 67 et seq.; Cass., 4th June, 1872; Dalloz, Périodique, 1872-1-441. Troplong, ed. 1846, Mandat, nos. 299, 610 and 612. The policy of the law in all these cases is clear. As Storey on Agency, p. 443, says: "Where one of two innocent persons is to suffer, he ought to suffer who misled the other into the contract, as holding out the agent as competent to act and as enjoying his confidence."

On the question of holding out by a company the following decisions are of interest.

In the case of the *National Malleable Casting Company* v. *The Smith's Falls Malleable Casting Co.*, 14 O.L.R. 22, there had been no by-law defining the general powers of the Board of Directors, and no resolution, yet the Court found the company liable, and the learned Judge who rendered the decision said:—

"Apart from the other objections the contract is in its nature one which primâ facie the Board of Directors might lawfully enter into,

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. . . And that being so the Board of Directors would certainly, I think, have had power to bind the company by entering into such an agreement, and if the Board could lawfully have done so, they could also, I think, have authorized the manager to do so for the company. And in the total absence of bad faith or notice, the plaintiffs were entitled to assume that he had been duly clothed with the real authority which he was ostensibly exercising in entering into the contracts in question."

In the case of *Morton* v. *The Niagara District Mutual Fire Insurance Company*, reported in Beauchamp's Civil Code, under article 1730, C.C., No. 1, a decision of the 13th of March, 1878, the facts were as follows:—

"The appellants here were suing the respondent for goods sold and delivered to one A. D., their principal agent, who had an office in Montreal. These effects consisted of books and papers which had been employed for the business of the company, and from which it benefited. The company produced a writing whereby its agent had obliged himself to furnish everything necessary for the office, and this in consideration of a commission on the business which he did for the company. The company claimed that its agent was only authorized to do the insurance business, and was not authorized to buy in its name.

"The Superior Court maintained the plea, and dismissed the action. In the Court of Appeals the judgment was reversed, because the company had allowed its agent to advertise himself as the only agent and manager of the company for the Province of Quebec, because it benefited by the books and papers sold, and because it had paid a similar account to another firm, and therefore it gave to the appellants reasonable cause to believe that its agent was duly authorized according to the provisions of article 1730."

The Cyclopedia of Law and Procedure in vol. 31 lays down the following principles:—

"Agency in fact as distinguished from agency in estoppel may be implied where one person by his conduct holds out another as his agent, or thereby invests him with apparent or ostensible authority as agent. . . . So, too, authority may be implied from the acquiescence of the alleged principal, in acts done in his behalf by the alleged agent, especially if the agent has repeatedly been permitted to perform acts like the one in question (p. 1219).

"The agent may sometimes invoke estoppel against his principal, when the latter seeks to hold him responsible for unauthorized acts; if the principal on being informed of them did not *promptly* repudiate them he will be estopped to deny the agent's authority" (p. 235).

A leading American authority is the case of *Columbia Mill Company* v. *National Bank of Commerce*, 52 Minn. 224, 53 N.W. 1061.

The Court here laid down the test as to apparent authority as follows:

"The rule as to apparent authority rests essentially on the doctrine of estoppel. The rule is that where one has reasonably and in good faith been led to believe from the appearance of authority which a principal permits his agent to have, and because of such belief, has in good faith dealt with the agent, the principal will not be allowed to deny the agency to the prejudice of one so dealing."

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Annotation (*continued*)—**Principal and agent (§ II D—26)—Holding out as ostensible agent—Ratification and estoppel.**

The general doctrine is that laid down in the American and English Encyclopedia of Law, 2nd edtion, vol. 7, p. 767:

"A corporation like a natural person is liable on an implied or quasi contract, as where it receives and uses goods, sent to it by another, or accepts the benefit of services, without any valid expressed contract to pay for them, or where money is paid to it by mistake, or obtained by it by fraud or in an ultra vires transaction."

Parker and Clark, at page 237, of their Company Law, say:—

"Nor are the directors and officers of the company the only agents of the company. It is usual for a company to employ other persons to act for it, and such persons will have power to bind the company within the limits of their agency. The authority cannot, as a rule, be denied unless their employment is beyond the power of the directors, or unless they had been irregularly employed, 'and the *person dealing with them have notice of the irregularity.*'"

In the case of *Laird* v. *The Birkenhead Railway Company*, 6 Jurists, N.S., p. 140, Sir W. Page Wood said:—

"I must say that when works of this kind are commenced in this way and carried on continually in the presence of the company's servants, for all the purposes of knowledge and acquiescence, a company is bound, so far as the agency of the servants goes, just as much as individuals would be. The consequence of what took place was that with the full knowledge therefore of the company, under the eyes of their servants, the plaintiff proceeded to lay out £1,200, and the tunnel was completed."

See also *Beverley* v. *Lincoln Gas Light*, 6 Ad. & El. 829; *East London Water Works Co.* v. *Bailey*, 4 Bing. 283; *Clark* v. *Cuckfield Union*, 21 L.J. Q.B. 349; *Wingate* v. *Enniskillen Oil Refining Co.*, 14 U.C.C.P. 379; *Turley* v. *Grafton Road Co.*, 8 U.C.Q.B. 579.

The leading case in Canada on the question of implied contracts is *Bernardin* v. *The Municipality of North Dufferin*, 19 Can. S.C.R. 581.

It was held in that case that a corporation is liable on an executed contract for the performance of work within the purposes for which it was created, which work it has adopted and of which it has received the benefit, though the contract was not executed under its corporate seal, and this applies to municipal as well as other corporations.

The decision in the *Bernardin Case* applies with particular force to the *French Gas Saving Co. Case* reported above.

Following are pertinent quotations from the exhaustive judgment and review of authorities of Gwynne, J., speaking for the majority of the Court:—

"In *The Fishmongers Co.* v. *Robertson*, 5 M. & G. 131, the contract sued upon was not one coming within any of the established exceptions to the general rule that contracts of corporations must be by deed. The subject-matter of the contract had no relation to any of the purposes for which the company were incorporated. It was a contract whereby the Fishmongers Company of London agreed with the defendants to withdraw their opposition to a bill introduced into Parliament by the defendants whereby they sought to be invested with power

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Annotation (*continued*)—**Principal and agent (§ II D—26)—Holding out as ostensible agent—Ratification and estoppel.**

to drain certain marsh lands in Ireland contiguous to which the Fishmongers Company owned land which they feared might be injuriously affected by the powers sought by the defendants; and the plaintiffs, alleging that they had performed all the stipulations and conditions agreed to be performed by them, averred in their declaration divers breaches by the defendants of the stipulations agreed to be performed by them, and it was held by the Court of Common Pleas in 1843, upon the objection that the contract was not executed under the seal of the plaintiffs, and was, therefore, invalid, that the contract having been executed by the plaintiffs and the defendants having thereby received the benefit of it they could not upon any principle of reason or justice be permitted to raise the objection. In that case the corporation, it is true, were the plaintiffs, but the same principle of reason and justice seems to me to apply to prevent a corporation, which has received the full benefit of a parol contract executed in every particular as agreed upon with the managing body, from resisting payment of the price agreed upon by contending that the contract had not been executed under their seal. Such a defence would be equally fraudulent and unjust whether urged by an individual in an action at the suit of the corporation who had executed the parol contract, or in an action by an individual who had executed it on his part against the corporation who had accepted and enjoyed the full benefit of it."

Again at page 595 Mr. Justice Gwynne, commenting on the judgment in *Sanders* v. *The Guardians of St. Neot's Union*, 8 Q.B. 810, said:—

"The Court based their judgment in that case upon a sound and rational principle, equally applicable to the case of every corporation and not limited to trading corporations only, namely, that where work has been executed for a corporation under a parol contract, which work was within the purposes for which the corporation was created, and it has been accepted and adopted and enjoyed by the corporation after its completion, it would in such case be fraudulent for the corporation, while enjoying the benefit of the work, to refuse to pay for it upon the ground that the contract in virtue of which it had been executed was invalid for want of the corporate seal, and that they should not be permitted to commit to such a fraud, that they cannot be permitted, in fact, to appeal to the rule of common law so as to enable them to commit a manifest fraud."

Mr. Justice Gwynne also quotes, with approval, at page 599, the remarks of Wightman, J., in the case of *Clarke* v. *The Cuckfield Union*, 21 L.J.Q.B. 349:—

"That wherever the purposes for which a corporation is created render it necessary that work should be done or goods supplied to carry such purposes into effect . . . and orders are given at a board regularly constituted, and having general authority to make contracts for work or goods necessary for the purposes for which the corporation was created, and the work is done or goods supplied and accepted by the corporation, and the whole consideration for payment executed, the corporation cannot keep the goods or the benefit and refuse to pay on the ground that though the members of the corpora-

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Annotation (*continued*)—Principal and agent (§ II D—26)—Holding out as ostensible agent—Ratification and estoppel.

tion who ordered the goods or work were competent to make a contract and bind the rest, the formality of a deed or of affixing the seal was wanting and then say—no action lies, we are not competent to make a parol contract, and we avail ourselves of our own disability."

Mr. Justice Gwynne finds this judgment to be recommended "as founded upon the plainest principle of justice."

The Dominion Companies Act has a provision very similar to that of the Quebec Companies' Act as to the liability of directors for premature commencement of business.

R.S.C. 1906, ch. 78, sec. 86, says: "Every director of any company who expressly or impliedly authorizes the commencement of operations by the company or the incurring of any liabilities by the company before ten per centum of its authorized capital has been subscribed and paid for, shall be jointly and severally liable with the company for the payment of any such liabilities so incurred."

It will be noted that the Quebec statute requires one more formality; the filing in the department of the Provincial Secretary of a declaration under oath by the secretary of any Quebec company establishing the payment of the necessary ten per cent.

This affords the public an easy means of verifying when it is safe to deal with a new company. It also affords the very best evidence that the law has been violated and does away with the necessity of examining the books of a company to find out whether or not the directors were at fault.

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British Columbia Court of Appeal. Macdonald, C.J.A., Irving, and Galliher, JJ.A. January 22, 1912.

1. DISCOVERY AND INSPECTION (§ I—2)—ORDERING FURTHER AFFIDAVIT ON PRODUCTION.

When an affidavit on production of documents has been filed but the correctness of the schedule of documents produced is impeached by the opposite party, an order will be made for a further and better affidavit only when from the first affidavit itself or from the documents therein referred to or from an admission in the pleadings of the party from whom discovery is sought, the Court is of opinion that the first affidavit is insufficient.

[*Jones* v. *Monte Video Gas Co.* (1880), 5 Q.B.D. 556, followed; and see Ross on Discovery, 1912, Can. ed., page 164.]

2. PLEADING (§ III D—333)—TITLE TO LAND—PLEA OF PURCHASE AT JUDICIAL SALE—PARTICULARS.

It is not necessary in setting up a title under a judicial sale to plead the preliminary proceedings leading up to the order or decree directing the sale if such order or decree was made by a superior Court as in such case the proceedings are presumed to be regular, but the order or decree itself should be pleaded with particularity and also the proceedings subsequent thereto taken to vest the title in the party claiming thereunder.

[See Odgers on Pleading, 1912, 7th ed., page 136.]

THE plaintiffs, by the order of Morrison, J., appealed from, were required to make a further and better affidavit of docu-

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ments. The order was based upon the affidavit of defendant's solicitor, that a mortgage and lease which were not referred to in the pleadings or in any admission of the plaintiffs, and which were not referred to in the documents mentioned in the affidavit of documents already filed, appeared in the records of the land registry office as affecting the property in question in this action.

The order appealed from was varied.

R. M. Macdonald, for appellant.

J. A. Jackson, for respondent.

MACDONALD, C.J.A.:—The circumstances in which a further affidavit of documents may be ordered are stated in *Jones* v. *Monte Video Gas Company* (1880), 5 Q.B.D., p. 556, where Brett, L.J., stated the practice which ought to be followed in these words:—

> We have consulted all the other members of the Court of Appeal who usually sit, and all were of opinion that the rule to be observed is as follows: Either party to an action has a right to take out a summons that the opposite party should make an affidavit of documents. When the affidavit is sworn, if from the affidavit itself, or from the documents therein referred to, or from an admission in the pleadings of the party from whom discovery is sought, the Master or Judge is of opinion that the affidavit is insufficient, he ought to make an order for a further affidavit. But except in cases of this description, no right to a further affidavit exists in favour of the party seeking production. It cannot be shewn by a contentious affidavit that the affidavit of documents is insufficient.

This rule of practice is also referred to in Halsbury's Laws of England, vol. II., p. 52, where the authorities are collected.

The case at bar, in so far as the lease and mortgage referred to are concerned, is clearly one falling within the authority above cited, and the order for a further affidavit of documents to include these is, I think, erroneous.

It may be that the defendant would be entitled to such an order as was made in *Ormerod* v. *St. George's Iron Works* (1906), 95 L.T. 694; or *Hall* v. *Truman* (1885), 29 Ch. D. 307, on making out a proper case, but we are not called upon to deal with that, but with the case which is now before us on a summons asking simply for a further and better affidavit of documents.

The order further directed that the better affidavit should include the documents mentioned in paragraph 16, erroneously referred to in the order as paragraph 9 of the amended statement of claim. Apart from the mistake in the numbering of the paragraph, I think the order is right, and in this respect I would confirm it with the necessary correction.

The plaintiffs also appeal from an order in the same cause directing them to give further particulars of how the sum of

$67,000, mentioned in the 12th, erroneously called the 5th paragraph of the amended statement of claim, is made up, and also of the matters mentioned in the said 16th paragraph. The rule relied upon by Mr. Macdonald is not inflexible: see *Kemp* v. *Goldberg* (1887), 36 Ch. D., at p. 507. The order as to said paragraph 12 was, I think, rightly made. Paragraph 16 reads as follows:—

> The plaintiff, Mossom G. Irwin, on or about the 31st day of April, 1911, purchased under an order of the Supreme Court of British Columbia, the interest of the said Paul G. Jung in the said lease, and received a conveyance under the provisions of the Judgment Act in his favour, of the interest of the said defendant Jung, therein and thereto, and paid into Court in satisfaction thereof $625,000.

And the plaintiffs were ordered to give "particulars of the proceedings taken to procure the sale of the defendant's interest in the said land under the Judgments Act." The style of cause or matter in which the order was made does not appear; there is nothing to identify it except the uncertain date, "on or about the 31st day of April, 1911."

While it is not necessary in the case of an order or decree of a superior Court to plead the proceedings leading up to the making of it, which we can presume prima facie to be regular, still the order or decree itself should be pleaded with particularity. The order should be confined to greater particularity with regard to the order of sale as above indicated, and the subsequent proceedings taken under it to vest the title in the plaintiffs.

Both the orders appealed from are interlocutory, and in the same cause, and were made on the same day, yet separate appeals are taken and separate appeal books prepared including in each the same pleadings which comprise more than half the appeal books. Separate summonses were issued in the first instance, and separate orders taken out, and in both orders mistakes were made which, if the orders were read literally, would produce a result quite different from that intended. The course pursued below by the respondent's solicitor was a needless multiplication of costs, as was the course pursued here by appellant's solicitor in taking separate appeals. In addition to this, in one of the appeal books the statement of claim and defence were interwoven together in such a way as to be most perplexing. The sum of which particulars is asked is mentioned in the appeal book twice as $67,000 and twice as $6,700. This appeal book is only another of the very many examples of the want of attention and care on the part of solicitors in the preparation of appeals which come before this Court. We have called attention to mistakes in appeal books over and over again without beneficial result, and I think it time we should indicate in another way that attention must be paid to the proper prepara-

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tion of appeal books. The result in this case is that the appellant succeeds in part in one appeal, and succeeds in having a variation made in part of the order in another appeal. I would, in view of the facts just alluded to, give no costs of this appeal to either party, and would deprive the respondent of his costs below.

IRVING, and GALLIHER, J.J.A., concurred.

Order below varied.

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WINDSOR, ESSEX AND LAKE SHORE RAPID RAILWAY CO. (defendants, appellants) v. **NELLES** et al. (plaintiffs, respondents).

Supreme Court of Canada, E. R. Cameron, K.C., Registrar in Chambers. January 18, 1912.

1. APPEAL (§ III E—90)—NOTICE OF APPEAL TO SUPREME COURT OF CANADA—TRIAL JUDGMENT DIRECTING REFERENCE.

An appeal from the judgment of the provincial Court of last resort affirming the judgment given at the trial of the action disposing of the rights of the parties and directing a reference to determine the amount of damages, is not an appeal from "a judgment upon a motion to enter a verdict or nonsuit upon a point reserved at the trial" within the terms of sec. 70 of the Supreme Court Act, R.S.C. (1906), ch. 139 so as to require a notice of appeal within twenty days after the decision of the Court of Appeal of the province.

2. APPEAL (§ II A—40)—JURISDICTION OF SUPREME COURT OF CANADA—FINAL JUDGMENT—VARYING REFEREE'S REPORT ON REFERENCE—FURTHER DIRECTIONS.

Where the judgment sought to be appealed from is that of the highest provincial Court of final resort upon an appeal from a judgment which varied the report of a referee or Master upon an appeal from his report in a reference which had been directed at the trial to assess the damages in the action, such judgment of the highest provincial Court is not a final judgment appealable to the Supreme Court of Canada, but an appeal lies from the judgment on further directions afterwards given upon the varied report.

[*Clark* v. *Goodall* (1911), 44 Can. S.C.R. 284, followed.]

3. APPEAL (§ III F—98)—EXTENSION OF TIME—APPEALS TO SUPREME COURT OF CANADA.

The limitation of sixty days for appealing to the Supreme Court of Canada under sec. 69 of the Supreme Court Act, R.S.C. (1906), ch. 139, may under sec. 71 of that Act be extended by the Court appealed from, but not by the Supreme Court of Canada.

APPLICATION on behalf of appellants to affirm the jurisdiction of the Supreme Court of Canada upon an appeal from the Court of Appeal for Ontario which had affirmed an order of Boyd, C., on further directions, giving judgment against the appellant defendants, and for leave to appeal and extending the time therefor, notwithstanding the lapse of the statutory period, from a previous judgment of the Court of Appeal in the same cause refusing to dismiss the action as against the defendant company.

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Statement.

The action was brought by two joint promisees upon a written agreement against Philip Hesseltine and other personal defendants, parties to the agreement, and against the Windsor, Essex and Lake Shore Rapid Railway Company who were alleged to have ratified and adopted the agreement.

The action was to recover from the defendants certain stocks of the face value of $72,000 and bonds of the face value of $45,000 issued by the Windsor, Essex and Lake Shore Rapid Railway Company, operating an interurban electric railway, or for damages for non-delivery of said stocks and bonds. The stocks and bonds in question had been issued to a construction company and pledged by the latter company to a trust company to raise money to build the railway. The Court of Appeal held on that appeal that the individual defendants incurred no personal liability under the written agreement in question; that, properly construed, it was merely an arrangement defining what the plaintiffs were to receive in stock and bonds from the company when organised, for their services as promotors and for the transfer of the control of the corporation. The action was tried by Clute, J., of the Ontario High Court and judgment given by him against both the individual defendants and the company in favour of the plaintiffs other than one Brian.

The Court of Appeal on this first appeal dismissed the action as against the individual defendants and varied the trial judgment by limiting the plaintiffs' recovery to a judgment against the company for damages for non-delivery of so much of the stock and bonds as the plaintiffs were entitled to, which proportion was to be ascertained by a reference and struck out directions as to the measure of damages other than that the value should be as of a date mentioned. *Nelles* v. *Hesseltine* (1908), 11 O.W.R. 1062. Mr. Justice R. M. Meredith in the Ontario Court of Appeal agreed that the individual defendants were not liable, but was also of opinion, dissenting on this point from the other members of the Court, that the railway company was not liable and was in favour of dismissing the action.

No further appeal was taken from this judgment of the Court of Appeal, and the reference proceeded before a Master of the Court. The Master's report was reviewed by Chief Justice Sir William Meredith on appeal from the report and an order was made by him (January 23, 1911) varying the report in certain respects. The company gave notice of an appeal to the Court of Appeal from that order; and on judgment being later given by Boyd, C., upon a motion for judgment on further directions and the question of costs, the company also served notice of appeal therefrom to the Court of Appeal. An order granting leave to appeal to the Court of Appeal from both judgments was made by a Judge of the

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latter Court on May 29, 1911, and the two appeals were consolidated in that Court. The present application is to affirm the jurisdiction on a proposed further appeal by the company to the Supreme Court of Canada from the judgment of the Court of Appeal on the second appeal to that Court, and for leave to appeal from the judgment of that Court on the first appeal thereto.

D. J. McDougal, for the motion.

W. L. Scott, contra.

THE REGISTRAR:—This is an application to affirm the jurisdiction of the Court, and for an order granting leave to appeal and extending the time for appeal, if such order is necessary. The notice of motion filed is not properly framed, but the appeal was argued before me as if the application made verbally was contained in the notice of motion.

The facts of the case, shortly, are as follows:—The plaintiffs sued certain individuals, as well as the Windsor, Essex and Lake Shore Rapid Railway Company, claiming specific performance of an agreement, or damages for the breach thereof. The action was heard by the Hon. Mr. Justice Clute and judgment pronounced on the 16th March, 1907, in favour of the plaintiffs. In the said judgment, the Court directed that in a certain event there should be a reference to the local Master at Sandwich to ascertain the value of certain stocks and bonds. An appeal was taken from this judgment to the Court of Appeal where judgment was pronounced on the 21st of April, 1908, allowing the appeal so far as it condemned the defendants personally, and varying, in other respects, the judgment of the Court below. No appeal was taken from this judgment.

The proceedings then went on before the Master, who made his report on the 7th April, 1909. From this report an appeal was taken which was heard by the Chief Justice of the Common Pleas Division, and judgment was pronounced on the 23rd January, 1911, varying the report of the Master.

The next proceeding shewn in the appeal book is an order made by the Chancellor, dated 8th March, 1911, which recites as follows:—

> Upon motion made unto the Court, etc., by way of further directions, and to dispose of the question of costs, and for judgment against the above named defendants, etc.

and proceeds to order the defendants to pay the plaintiffs certain sums of money and the costs incidental to the reference and of the motion.

On the 29th of May, 1911, Mr. Justice Garrow of the Court of Appeal, after reciting that the defendants had given notice of appeal to the Court of Appeal from the judgment of the Chief Justice of the Common Pleas Division, dated 23rd Janu-

ary, 1911, and also from the judgment of the Chancellor of the 8th March, 1911, and further reciting that it appeared that an appeal would lie from the Court of Appeal to the Supreme Court of Canada, granted leave to appeal direct to the Court of Appeal from both judgments, and consolidated the two appeals. These appeals came on for hearing before the Court of Appeal and judgment was pronounced on the 28th September, 1911, whereby they were dismissed. Security was allowed within sixty days for the purposes of an appeal to the Supreme Court, and the present application is now made, which raises the question of the jurisdiction of the Court.

The motion before me also includes an application to affirm the jurisdiction of this Court to hear an appeal from the judgment of the Court of Appeal of the 21st April, 1908, dismissing the appeal from the judgment of the Hon. Mr. Justice Clute at the trial.

As to the last application, I hold that the Supreme Court has no jurisdiction. Section 69 requires the appeal to be brought within sixty days. This time may be extended, under section 71, by the Court below, but not by the Supreme Court.

Secondly, I hold that, under the decision of the Supreme Court in *Clarke* v. *Goodall* (44 Can. S.C.R. 284), no appeal lies to the Supreme Court from so much of the judgment of the Court of Appeal, dated the 28th September, 1911, as affirms the judgment of Meredith, C.J., of the 23rd January, 1911, varying the report of the Master. In holding that no appeal lies from this judgment, I am not to be taken as being of the opinion that the Supreme Court may not, in dealing with an appeal from the final judgment, open up any interlocutory judgment of the Court of Appeal or any other Court below in this matter.

Mr. Scott contends that no notice of appeal to the Supreme Court from the Court of Appeal was given as required by section 70, but I hold that the words of that section "motion to enter a verdict or nonsuit upon a point reserved at the trial" do not apply to a case where judgment is given at the trial disposing of the rights of the parties with a reference to determine the amount.

The only question then remaining for me to determine is whether the Supreme Court has jurisdiction to hear an appeal from so much of the judgment of the Court of Appeal as affirmed the judgment of the Chancellor on further directions.

Section 36 of the "Supreme Court Act" provides generally that

> "an appeal shall lie to the Supreme Court from any final judgment of the highest Court of final resort, etc., in cases in which the Court of original jurisdiction is a superior Court."

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The present case falls within this section. The judgment is undoubtedly a final judgment, as was the judgment of the Chancellor on further directions. It is a judgment of the Court of Appeal and, therefore, of the highest Court of final resort in Ontario, and the case arose in a superior Court. The provisions of section 48, limiting appeals from the province of Ontario, it is admitted, do not exclude this case from the jurisdiction of this Court. The judgment of the Chancellor on further directions condemns the defendants to pay to the plaintiff Nelles the sum of $10,648.90, and to the plaintiff Newman the sum of $17,352.20. To my mind, therefore, there is no doubt that the case falls fully within the provisions of the "Supreme Court Act," and there is jurisdiction to hear an appeal from the judgment of the Court of Appeal in so far as it affirms the judgment of the Chancellor.

Jurisdiction affirmed in part.

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CITY OF MONTREAL (defendant, appellant) v. **JOHN LAYTON & CO.**, Ltd., (plaintiff, respondent), and **GOULD COLD STORAGE CO.** (Mis-en-cause).

Quebec Court of King's Bench, Appeal Side, Archambeault, C.J., Lavergne, Cross and Gervais, JJ., and Greenshields, J., ad hoc. January, 1912.

1. SEARCH AND SEIZURE (§ I—5)—WHAT CONSTITUTES A SEIZURE—STATUTORY AUTHORITY OF FOOD INSPECTOR—NOTICE TO BAILEE IN POSSESSION.

A letter or notice addressed by a food inspector to a company having certain articles in storage not to dispossess itself of said articles or otherwise dispose of the same does not constitute a valid seizure of said articles.

2. SEARCH AND SEIZURE (§ I—5)—LEGAL SEIZURE OF GOODS—TAKING POSSESSION.

A seizure of goods under authority of law requires that there should be a formal taking possession of the articles seized and a dispossession from the person having the custody thereof by the seizing official.

3. CONSTITUTIONAL LAW (§ II B—325)—DEPRIVATION OF PROPERTY—SEIZURE UNDER PUBLIC HEALTH LAWS—RIGHT OF TRIAL.

No person can legally be deprived of his property without being given an opportunity of being heard and obtaining compensation, and such hearing must be before the proper tribunal, a municipal officer having no jurisdiction in such a case to decree confiscation or destruction.

4. HEALTH (§ IV—20)—STATUTORY POWER TO "DISPOSE OF" DELETERIOUS FOODS—POWER TO DESTROY NOT INCLUDED.

The Public Health Act of the Province of Quebec does not justify the destruction of goods seized as deleterious to the public health; and the power to destroy will not be inferred from a statute authorizing health officers "to dispose of them (the articles seized) so that they shall not be offered for sale or serve as food for man."

5. INJUNCTION (§ I J—80)—MUNICIPAL HEALTH OFFICER—NON-COMPLIANCE WITH STATUTORY PRELIMINARIES FOR CONDEMNING FOOD STUFFS.

An injunction will lie to restrain a municipality from proceeding to confiscate and destroy articles (*e.g.*, eggs) which have been neither inspected nor seized.

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Statement.

THIS was an appeal from the judgment of the Superior Court for the district of Montreal, Weir, J., declaring permanent against the city of Montreal an interlocutory injunction restraining it from interfering with a certain quantity of eggs belonging to the plaintiff (respondent) in storage with the company mis-en-cause.

On March 2nd, 1911, the Layton Company obtained an interlocutory injunction enjoining and ordering the city of Montreal to cease and refrain from making any threats or statements in regard to their goods and to cease or refrain from seizing and destroying or taking possession of the same, to wit: about 4,886 cases of frozen canned eggs stored in the warehouse of the Gould Cold Storage Co., the whole until ordered to the contrary and under pain of all penalties provided by law; the petitioner undertaking not to remove or allow to be removed any of the said goods until final judgment but to have the right to take samples of them for the purposes of analysis and examination.

The parties then went to trial on the merits of the case (14th, 15th, 16th, 17th, 20th, 21st, 22nd, and 27th March, 1911), and on the 7th April, 1911, the Superior Court made the injunction permanent.

The facts are fully exposed in the notes of judgment of Weir, J.

WEIR, J.:—This case involves the consideration of important questions in respect of public health law and of the protection due to private property.

The plaintiff is an incorporated company, with headquarters in England. Its method of doing business is to freeze eggs in bulk at ten degrees below zero, having placed them in sealed cans, and then transship them in cold storage to points where a favourable market can be obtained. The process is a novel one and has been practised only during the last few years.

The company controls the International Export Company of Hankow, China, where the eggs in question were canned, congealed and shipped. In December, 1910, plaintiff had in storage with the mis-en-cause some 4,886 cases of these eggs, alleged to be worth $100,000. This is the balance of a shipment of 6,064 cases received here. On some of the tins is lithographed the following words:—

> John Layton & Company, guaranteed unadulterated. Free from water or any chemicals, and only from new laid eggs.
>
> Instructions. The contents of this tin are perishable and must be used promptly. Thaw by placing in cold water, running if possible. Heat should not be applied under any circumstances.

Evidence was given that these frozen eggs are used by bakers and confectioners, who withdraw them from cold storage as required. No complaints as to these eggs were received by the

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city, or otherwise made. Shortly before the 24th December, the chief food inspector of the city of Montreal, who is a veterinary surgeon by profession, saw by the United States newspapers that seizure of frozen eggs had taken place there and learned that there were some such eggs in Montreal. He sent the fish, fruit, and vegetable inspector to discover them. On the 24th December, 1910, the latter found plaintiff's eggs in the cold storage warehouse of the mis-en-cause, and promptly issued the following letter to the mis-en-cause, and this he calls a seizure. The Board of Commissioners of Montreal refer to it as a confiscation. The letter reads:—

Montreal, 24th Dec., 1910.

Mr. Gould, Manager of Gould Cold Storage Company.

Sir:—

Take notice that Russian gallon eggs in cans in your storage room 1, 5 story, are under seizure, until that time I get report of the sample I am taking with me. Estimate quantity in that room about 5 cars.

(Signed) T. E. GRENIER,
Food inspector.

The chief food inspector testifies that this is the usual mode of making a seizure in such cases. The examination of the samples (for others were taken subsequently by the city) occupied some time and plaintiff finally learned of the seizure of their goods. On the petition of plaintiff, interim and interlocutory injunctions against the city were in turn granted. The case is now before me on the action by plaintiff to have the alleged seizure of its goods annulled and the interlocutory injunction declared permanent. The city claims that it had the right to make the seizure of the frozen eggs (*a*) in virtue of the provision of its charter and by-laws, and (*b*) under the authority of the Quebec Public Health Act. I will first examine its charter and by-laws for the alleged source of its power and authority exercised in this case, and afterwards the stipulations of the Quebec Public Health Act.

The defendant pleads, that amongst the police powers and regulations, which it possesses, is the authority to establish a Board of Health in virtue of sub-paragraph 112 of art. 300 of the city charter. This sub-paragraph reads:—

> 112. To establish a Board of Health, with such privileges, powers and authority, as the council may deem fit; which Board may be composed of aldermen or of qualified citizens outside of the council; to take means to promote the health of the city; to provide precautionary measures against the introduction of diseases; to make regulations for preventing contagion or infection therefrom, and for diminishing the danger thereof; and to define and regulate the duties, powers and attributions of the health officers.

The city also refers to sub-paragraph 40 of art. 300 of its charter, as follows:—

40. To provide for and regulate the inspection of meats, poultry, fish, game, butter, cheese, lard, eggs, vegetables, flour, meal, milk; dairy products, fruit and other food products; to provide for the seizure, confiscation and summary destruction of any such products as are unsound, spoiled or unwholesome; to prohibit the bringing into the city and the having any such unsound, spoiled or unwholesome products and to define the duties, powers and attributions of the inspectors appointed for that purpose.

The plea states, that in accordance with such powers, by-law No. 105 concerning health, was passed and is still in force. This by-law, by section 11, provides for the constitution of the local Board of Health for the city of Montreal. The defendant alleges that every year, and in particular on the 11th April, 1910, the city council appointed the members of the Board of Health "to enforce the enactments of the above law and by-laws of the city generally, and governing the present case." Art. 17 of by-law 105 is specially referred to by the plea. It reads as follows:—

17. No person shall sell or have in his possession for sale any unwholesome meat, poultry, game, eggs, fish, unripe or decayed fruit or vegetable that might in any way be injurious to health; and any member or officer of the Board of Health is hereby authorised to seize and confiscate all such meat, poultry, game, eggs, fish, fruit or vegetable; the entire cost of removing any of such deleterious articles as may be found in any premises, to be paid by the delinquent in addition to the penalty provided in section 56 of this by-law.

The sub-paragraphs 40 and 112 of art. 300 of the city charter, confer exorbitant powers upon the city, but not without certain limitations.

The exercise of the authority conferred is associated with the obligation of defining and regulating the duties, powers and attributions of the health officers. These latter are not to have an absolute and unbounded power, which they might under certain circumstances abuse. Their duties and attributions are to be defined and regulated, presumably for the safeguard of individual and property rights. The city has completely neglected to do this.

Sub-paragraph 40 also authorises the city to provide for the seizure, confiscation and summary destruction of any such products as are unsound, spoiled or unwholesome. The mere enunciation in the by-law that any member or officer of the Board of Health is authorised to seize and confiscate such articles is not a conformity therewith. To act according to the spirit of the charter, the by-law should provide some method of making a seizure, such as the enumeration or description of the effects seized, the drawing up of a proces-verbal and the service of a copy thereof on the owner or possessor, the time and manner of declaring the seized products unwholesome, and the time and

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mode of declaring them confiscated. The by-law does not contain any provisions on these matters. The city in assuming to act under its charter in this connection, has ignored the limitations placed upon its authority.

On this subject, I refer to Biggar, Municipal Manual, p. 45 (sec. 10), where it is said:—

> But where it is provided that a power shall be exercised in a certain manner, or after certain conditions have been complied with it becomes necessary to determine whether any, and if any, which of these limitations may be transgressed without entailing the nullification of an act done otherwise than in the prescribed manner or without the prescribed preliminaries. If in order to carry out the essential purpose of the Legislature, strict compliance with the requirements of the statute appears to be a necessary condition precedent to the exercise of the power, non-observance thereof will be fatal. (See jurisprudence quoted) and at p. 331: And even where statutory authority exists in relation to the subject-matter of a by-law, the powers of a corporation must be exercised strictly within the limits and in the manner prescribed by the statute. (See jurisprudence quoted in note.)

Plaintiff avers that section 17 of the by-law in question is oppressive, unjust, illegal, ultra vires, and of no effect. Powers delegated by the Legislature to subordinate local authorities are always strictly construed and specially in this case when the powers delegated are of the extraordinary nature of those in question herein. The city has assumed the full powers indicated in the above mentioned sub-paragraphs and has ignored the limitative conditions contained in the associated clauses. Therefore, as far at least as section 17 of the said by-law is concerned, I have no doubt that it is illegal and void. There is an additional reason why the city cannot avail itself of section 17 of the said by-law. By its very terms, the seizure and confiscation are to be made by a member or officer of the Board of Health. The proceedings in this case are not shewn to have been made by either of such persons.

As the first source of the city's authority does not justify its proceedings in question herein, it becomes necessary to determine whether it acted under the provisions of the Quebec Public Health Act, contained in articles 3867 et seq. of the Revised Statutes of the Province.

Article 3913 reads as follows:—

> 3913. Every executive officer of the municipal sanitary authority or any other officer appointed by it for that purpose, may inspect all animals, dead or alive, meat, fowl, game, fish, fruit, vegetables, grease, bread, flour, milk or other liquids and food intended for human consumption and offered for sale, or deposited in a place or transported in a vehicle for the purpose of being afterwards sold or offered for sale, or delivered after being sold and if, upon inspection, such animals, liquid or food appear to be unwholesome, putrid, damaged or infected

with the germs of disease, or otherwise injurious to health, he may seize the same, carry them off, and dispose of them so that they shall not be offered for sale or serve as food for man.

The burden of proof that the animals, liquids or food are not intended to be sold, or serve as food for man, lies upon the owner or person who had possession thereof.

The proprietor of the articles, or the person in whose possession they were seized, is further liable to fine not exceeding fifty dollars.

The words municipal sanitary authority are interpreted by art. 3868 to mean (*a*) the municipal council, or (*b*) the local Board of Health to which the municipal council has delegated the powers conferred upon it by this section or by the by-laws made thereunder. It is alleged that the city council appoints every year the members of the local Board of Health, "to enforce the enactments of the above law and by-laws of the city generally and governing the present case." I find, as stated in section 11 of by-law 105, that the local Board of Health for the city of Montreal shall carry out and enforce the direction and regulations of the central Board of Health and exercise all the powers of health officers conferred by that State on the members of the local Board of Health. It is thus clear that the city has delegated its powers under the law to the local Board of Health, and that the latter is the municipal sanitary authority envisaged by art. 3913 of the Quebec Public Health Act.

The alleged inspection and seizure in this case were made by T. E. Grenier, who styles himself food inspector of the city of Montreal. He was a fruit merchant before his appointment and explains that he was named as fruit, fish and vegetable inspector and that such is his position at the present time.

Art. 3913 refers to an inspection by the executive officer of the municipal sanitary authority, or by "any other officer appointed for that purpose." Here we have a man appointed to inspect fruit, fish and vegetables, who is sent to inspect eggs, a duty which, from the character of the evidence herein produced, requires very special qualifications in order properly to exercise the discretion conferred by the Act. Was he appointed for that purpose? Apparently not and thus was not a competent officer under the Act. Moreover, there is no proof, that McCarrey is the executive officer of the local Board of Health, or that Grenier was appointed by it, according to art. 3913. According to their evidence, they were appointed by the Hygiene or Health Committee of the city of Montreal, presumably the committee named by the city in accordance with section 40 of the charter. This was a distinct organisation from the local Board of Health, which is the municipal sanitary authority named in the Act. The inspection referred to in the art. 3913

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must be made by the executive officer of the municipal sanitary authority or by another officer appointed by it. This was not done. The proceedings by Grenier were and are illegal for another reason. He swears that he made no inspection at all of the goods in question. He simply declared them under seizure and carried off certain samples. On the 27th of December, he returned and took away other samples. The statute gives no right of seizure until an inspection has been made, and it appears thereby that the food products are unwholesome, etc.

Grenier's actions were a violation of law and absolutely illegal. At the argument, the city did not seriously attempt to defend Grenier's acts, but argued that having secured samples of the goods in question and having obtained trustworthy reports that they were unfit for food, it was justified in its subsequent proceedings, particularly as it was ordered to act by the Provincial Board of Health. It is of interest briefly to note the incidents of these proceedings in the order in which they occurred. On January 6th, 1911, Dr. Milton Hersey, city analyst, made a written report of his analysis of the seized goods, addressed to Dr. McCarrey. This report cannot be called unfavourable. On January 10th, Dr. A. Bernier, bacteriologist, and M. H. McCrady, chemist, made a joint report on the same subject, addressed to the president and members of the Board of Health of the Province of Quebec. This report is distinctly unfavourable to plaintiff.

January 13th, 1911. Report from the chief food inspector to the Board of Commissioners of the city of Montreal.

January 24th. Meeting of the Board of Commissioners of the city of Montreal at which a report of the chief food inspector was submitted, stating that the report of the analysts on the eggs in question declared they were unfit for food; whereupon it was resolved in consequence that Dr. McCarrey receive instructions to act according to the prescriptions of the by-law in such case.

January 19th, 1911, Mr. Dale Harris, advocate, and Mr. Horsfield, manager of the John Layton Company appeared before the Board of Commissioners, in regard to the frozen eggs "qui ont été confisqués par le département de l'inspection des aliments comme étant impropres à la consommation par le public," as the minutes of the meeting say. Mr. Harris asked that in view of the difference between the experts' reports, a new analysis of the eggs be made in presence of the interested parties. Commissioner Lachapelle informed Mr. Harris that all necessary precautions had been taken by the Board and that the reports of the analysis made by the experts of the city and of the Provincial Board of Health agree absolutely in their essential parts; that there is no reason to grant the company's request and that the decision taken by the Board is final.

January 24th, 1911. Letter from the chief food inspector,

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headed "City Hall, Montreal Food Inspection Department," to the Gould Cold Storage Company, Ltd., notifying it that a quantity of eggs in cans said to be 9,000 packages, now in storage in its warehouse, have been inspected by the sanitary authorities of the city of Montreal, and that such eggs appear to be unwholesome, putrid, damaged, and affected with the germs of disease, and otherwise injurious to health. The company is further notified not to dispossess itself of the said goods until further action can be taken by the health authorities with regard to the same and to consider the said goods as continuing to be under seizure.

In connection with this letter, Dr. McCarrey testifies that he was instructed by the Board of Commissioners to act under the advice of the city attorneys and he did so, this letter having been drafted by one of them. He adds that he did not inspect these eggs.

January 25th, 1911. The Secretary of the Provincial Board of Health writes a letter addressed to the municipal corporation of the city of Montreal, ordering it, within a delay of 36 hours, to act in accordance with article 3913 of the Quebec Public Health Act as regards the eggs in question so that they be not used as food in Montreal or in the Province.

On the same day, at a meeting of the Board of Commissioners, this letter was submitted, and it was resolved to approve the said letter and to send it to the superintendent of the Food Inspection Department.

On the same day, Dr. McCarrey sent an extract of these minutes with a letter to the Gould Cold Storage Company, Ltd. in which he notifies the company to take communication of the notice from the Provincial Board of Health to govern itself accordingly and to act within the delay specified therein. A copy of the letter from the Provincial Board of Health was also served upon the Gould Cold Storage Company, Ltd.

January 26th, 1911. Messrs. Meredith & Co., attorneys for plaintiff, write to the chief food inspector in reference to his letter to the Gould Cold Storage Co., Ltd., and protest that the eggs are fresh and good.

On the same date, a letter was sent by the chief food inspector to Messrs. Meredith & Co., saying their letter was submitted to the Board of Commissioners. He adds: "An opportunity has been given to the owners of the eggs to have them removed from the Province. If this order is not complied with, my instructions are to cause the entire quantity of these frozen eggs to be immediately destroyed."

January 27, 1911. Letter to the chief food inspector from Messrs. Meredith & Co., asking to have four cases of the eggs for the purpose of having an analysis and examination of them made in the city. Also, for four cases to be shipped to Toronto and four cases to New York.

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January 28th, 1911. The chief food inspector writes to Messrs. Meredith & Co., that he is instructed by the Board of Commissioners to say that no alteration of their order can be made.

January 31st, 1911. Letter from the chief food inspector to Messrs. Meredith & Co., saying that he is instructed to say that as their clients decline to take advantage of the permission given to remove the goods in question from the Province, steps will be taken at once to destroy them.

January 31st, 1911. Letter from the chief food inspector to the Gould Cold Storage Co., Ltd., as follows:—

> Gentlemen:—
>
> You are hereby notified and required to allow the frozen canned eggs said to be good packages, belonging to John Layton & Company, now under seizure upon your premises, to be removed under the direction of Inspector Grenier, to the civic incinerator there to be destroyed.
>
> Yours truly,
>
> DR. J. J. MCCARREY,
> *Chief Food Inspector.*

February 1st, 1911. The city officials, under T. E. Grenier, began the removal of the frozen eggs from the warehouse of misen-cause and were stopped by the issue of an interim injunction in this case. The city authorities acted on the assumption that the alleged seizure practised by Grenier on the 24th December, 1910, was valid and continuing, and that the confiscation of the goods had been effected. This pretension is untenable for the reasons above stated, and for the further reason that as a matter of fact, the city had not taken possession of the goods in question or declared them confiscated. The said goods had not been seized or confiscated. Defendant further asserts that its chief food inspector was not obliged to make the inspection and seizure in person; that the examination and inspection of certain samples by experts at his request were equivalent to an inspection by him personally; that the seizure of the goods was being effected on the first of February, and that, in any event, it was bound to act as it did after having received the order from the Provincial Board of Health. It must be remembered that we are dealing here with statute law that must be strictly interpreted. The article does not give the inspector the option of delegating his powers or any part of them to any one else. Hence the inspection by the experts was not a compliance with the act. See Endlich on Interpretation of Statutes, sections 352 and 353.

It is to be noted, moreover, that Dr. Bernier and Mr. H. W. McCrady, two of the experts in question, do not act as delegates of the chief food inspector of the city or of the seizing officer, but made their report to the Provincial Board

of Health, and not to the city or any of its officers and the statement by the chief food inspector of the city that the eggs in question "appear to be unwholesome," etc., is ineffective as the inspection was not made by him.

It has been urged by the city that it is not a fair interpretation of the statute to hold that the municipal authorities must have in their employ experts qualified to say whether suspected food products are "infected with the germs of disease," etc., and that it has the right under a fair interpretation of the statute to refer such matters to outside experts, as a necessary proceeding. The answer is obvious that the Legislature intended to confer discretion upon a public official named and designated, and not to an unknown person or persons, whom he might choose to employ. The performance of duties, imposed by statute, by a public officer affords some security and certainty to the public, which would not be present, if he could delegate his powers to others. The rule of strict construction applies in this case.

The defendants further urge that they were obliged under the law to obey the order of the Provincial Board of Health. It is necessary now to examine that order.

THE ORDER OF THE PROVINCIAL BOARD OF HEALTH.

This order reads as follows:—

Conseil d'Hygiène de la Province de Québec.

Montréal 25 janvier, 1911.
9 rue St. Jacques.

A la Corporation Municipale de la Cité de Montréal.

Il est à la connaissance du Conseil d'Hygiène:

Qu'il y a actuellement dans un entrepôt frigorifique de votre Ville, The Gould Cold Storage Company, Limited, des œufs consignés à John Layton & Co.

Que des échantillons de ces œufs ont été soumis à l'analyse bactériologique, à l'épreuve physiologique et à l'examen physique, et que ces analyse, épreuve et examen ont démontré que ces œufs sont malsains, préjudiciables à la santé.

En conséquence, le Conseil d'Hygiène, se prévalant des pouvoirs que lui donne l'article 3875 de la loi d'hygiène publique de Québec, enjoint à votre corporation municipale d'appliquer dans un délai de trente-six heures, l'article 3913 de la dite loi; c'est-à-dire prendre les mesures voulues pour que les dits œufs ne puissent être délivrés à la consommation, non seulement à Montréal, mais même dans tout le territoire de la province, que le Conseil d'Hygiène doit également protéger.

Pour le Conseil d'Hygiène, par ordre du président.

ELZÉAR PELLETIER,
Secrétaire.

Approuvé
Pour le Conseil d'Hygiène
de la Province.
(Signé) E. P. LACHAPELLE,
Président.

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The portion of article 3875 referred to reads as follows:—

3875. The Board of Health shall in the interest of public health compel municipal councils to exercise and enforce such of their powers as, in the opinion of the Board of Health, the urgency of the case demands.

The letter was not addressed to the municipal council of Montreal and never reached that body. It was received by the Board of Commissioners of the city, who passed a resolution to approve of the said letter and to transmit it to the superintendent of the Food Inspection Department. That official made no inspection of the eggs in question under the terms of article 3913. Nor was any such inspection necessary in view of the terms of the order. The order did not say that the inspection and discretion referred to in the said article were to be made and exercised by the proper official. It was a command to take the necessary steps to prevent the delivery of the said eggs, not only in the city of Montreal, where the municipal corporation had jurisdiction, but even outside, in any part of the provincial territory, where the defendant had no jurisdiction whatever.

Such an order was never contemplated by the Legislature in passing the Quebec Public Health Act, is absolutely illegal, and affords no justification for the subsequent acts of the defendant. It is true that the Provincial Board of Health has the power to make a by-law or by-laws—"To define the causes which render animals, meat and other food products, unsuitable for consumption or prejudicial to health and to prohibit the sale, consumption or use of such meat or products." But it has never passed such a by-law and it cannot substitute thereof an arbitrary order such as the one now in question.

A great part of the enquête dealt with the question of whether the frozen eggs were good or bad, and the parties are entitled to a pronouncement by the Court on this subject.

[The learned Judge here reviewed the expert evidence exhaustively, and the different analyses made.]

It has, therefore, in my opinion, been clearly substantiated by the evidence from physical, chemical and bacteriological standpoints that the eggs in question were at the time of the seizure wholesome and fit for food. The plaintiff also asks to be protected against the publication of news items in the newspapers by the city and its officials. The chief food inspector of the city admitted that he gave out various interviews and reports to the press concerning the eggs in question, and especially the reports of the Provincial Board of Health. This practice cannot be too strongly condemned especially when business interests of a large amount as in this case are at stake. Although the city has acted illegally with negligence and injustice in respect of the goods in question herein it is easily conceivable that circumstances may arise in connection therewith

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as with any other food product when prompt legal steps may require to be taken. The Legislature has conferred important powers upon the municipal sanitary authority and it is only when an abuse of such powers occurs or when they are illegally used as in the present case that the Superior Court will intervene with its superintending and reforming control.

For this reason, the terms of the interlocutory injunction will be modified and subject to such amendment made permanent.

Costs are adjudged to the plaintiff.

The city entered an appeal against this judgment.

The appeal was heard at the September term (1911), by ARCHAMBEAULT, C.J., LAVERGNE, CROSS, GERVAIS, JJ., and GREENSHIELDS, J., ad hoc.

Messrs. *Aimé Geoffrion*, K.C., and *J. L. Archambault*, K.C., for the city (appellant):—The seizure is perfectly legal and within the powers and authority conferred to the city by its charter and by-laws. Eventually the Provincial Board of Health of Quebec had full right and power to act in conjunction with the city to the above purpose: 62 Vict. (Quebec), ch. 68, art. 299; par. 40 of art. 300, pars. 60 and 112 of same article. This law is derived from the statute of 1874: 37 Vict. ch. 51. Similar dispositions are to be found in 52 Vict. ch. 79; 3 Edw. VII. ch. 62; 4 Edw. VII. ch. 40. Under these the city has power to appoint a Board of Health, the officers of which have power of entry everywhere at all hours to remove therefrom any offensive matter found therein. They have authority to seize and confiscate all unripe or decayed fruit, vegetables, poultry, meat, etc., that may in any way be injurious to health. As far as the seizure is concerned no form has been enacted and the notice or letter sent by the officer was the only proceeding that could be taken in an emergency. In matters of public interest the forms of the Code of Civil Procedure need not be followed; it is enough to act according to common law. This seizure was followed by a notice from the Provincial Board which confirmed what the municipal authorities had done. The seizure being valid, was it justified? It is admitted from the expert evidence that it was justified and that public health called for the most stringent and radical methods.

Messrs. *S. Dale Harris*, and *S. Beaudin*, K.C., for respondent:—On the facts, the weight of evidence is entirely in favour of the plaintiff. In law, the actions of the city are not justified by sec. 17 of by-law 105, inasmuch as the person who claims to have seized is not a health officer and did not act on the instructions of the Board of Health, but on the instructions of the Board of Commissioners. In the second place it is an essential condition to the authority given by sec. 17 of this by-law that the food

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be in fact unwholesome and unfit for food. And if the actions of the city employees were in accord with the terms of this by-law then it must be ultra vires. Nor does the Public Health Act justify the actions of the city as there never was an inspection by a Health Officer and no Health Officer can delegate his powers. Moreover, the person who examined a few samples did not act with discretion and fairness. Maxwell, Interpretation of Statutes, 4th ed., p. 127; Craies (or Hardcastle) Statutory Law (1906), pp. 241 and 242. The order of the Provincial Board of Health, moreover, was illegal, because, even if the Board could give such order the conditions precedent to the giving of it were not fulfilled.

Geoffrion, in reply.

Judgment was rendered by the Court of King's Bench on December 30th, 1911, and entered of record in January, 1912, (Lavergne, J., dissenting on the ground that public interest justified the actions of the city).

The judgment of the majority of the Court was rendered by

CROSS, J.:—This was a proceeding by action for an injunction to stop the appellant from interfering with or destroying the respondents' merchandise.

The merchandise consisted of about 4,886 cases of egg yolks in a congealed state, which were in the refrigerators of the Gould Cold Storage Company.

On the 1st February, 1911, the appellant's servants were proceeding to have the merchandise carted to the city incinerator and destroyed, when they were stopped by the present suit.

If the pretensions of the respondents (plaintiffs in the case) be well founded, an officer of the appellant called a "chief food inspector," was thus about to destroy merchandise worth about $80,000, belonging to the respondents (plaintiffs in the case).

If, on the other hand, the pretensions of the city, appellant, be well founded, it would appear that there had been brought from Hankow, China, to Montreal in refrigerator chambers and was being kept in Montreal in refrigerator chambers a large quantity of what, at the time of the proceedings in question, was worthless garbage, but which the respondents were about to sell for food for human beings.

The appellant's defence to the action is a lengthy document of 38 paragraphs, wherein it asserts its right to interfere with the merchandise on the ground that the eggs were unfit for food and had been seized by an officer, whose act it adopts, and it relies, in justification of the seizure, both upon its health ordinance No. 105 and upon an order of the Board of Health of the Province, dated 26th January, 1911, said to have been

made under sections Nos. 3875 and 3913 of the Revised Statutes of Quebec.

The question of the fitness of the eggs for food of man was made an issue in the action, the plaintiffs (now respondents) alleging that they were good, and the defendant (now appellant) alleging that they were bad and unfit for food.

The Superior Court decided in favour of the plaintiffs, by a judgment in which it was held not only that there had been no valid seizure, but also that the eggs were fit for food.

It is manifest, inasmuch as the defendant pleads and relies upon a prior seizure, that the right of the defendant—the city—to destroy the plaintiff's merchandise—if such right existed—must rest upon some valid right of seizure and destruction warranted by law or by a valid city ordinance or decision of competent public authority or Court.

Before any question concerning the fitness of the eggs for food need be considered it consequently is appropriate to ascertain, firstly, whether or not the holding of the judgment to the effect that there had been no valid seizure is well founded or not; and, secondly, whether, in the absence of a valid prior seizure, the proceeding to cart off and destroy the eggs can be supported as an executive or administrative act of a health officer.

The relevant facts are as follows:—

On the 24th December, 1910, a person in the service of the defendant named T. E. Grenier, whose duty was that of a food inspector, in the course of searches for this kind of goods, discovered the eggs in question in the Gould Cold Storage warehouse and asked the persons, there in charge, for certain information, which they chose not to give him.

He seized and took away two cans of the eggs, and, on the same day, addressed to the storage company a letter worded as follows:—

> Sir,—Take notice that Russian gallon eggs in cans in your storage room 1,5 story, are under seizure, until that time I get report of the sample I am taking with me. Estimate quantity of eggs in that room about 5 cars.
>
> (Signed) T. E. GRENIER,
> *Food Inspector.*

It appears that the two cans of eggs actually seized were sent by the defendant to men of scientific knowledge to be analyzed.

The food inspector reported the matter to his superior officer, Dr. McCarrey, the defendant's chief food inspector, who from time to time sent a man to look at the eggs.

Nothing else was done with the eggs in the warehouse for a month, namely, till the 24th January, 1911, on which date a letter was sent to the Gould Cold Storage Company, worded as follows:—

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Montreal, 24th January, 1911.

To the Gould Cold Storage Co., Ltd.,
William Street, Montreal.

Gentlemen,—You are hereby notified that a quantity of eggs in tins, said to be 9,000 packages now in storage in your warehouse, have been inspected by the sanitary authorities of the city of Montreal, and that such eggs appear to be unwholesome, putrid, damaged and affected with the germs of disease and otherwise injurious to health.

You are accordingly hereby notified not to allow the said goods or any part of them to be removed or offered for sale, or otherwise dispossess yourself of the same until further action can be taken by the health authorities in regard to the same, and you will consider the said goods as continuing to be under seizure.

You are further notified that should any of the said goods be disposed of so as to serve as food for human beings and disease caused thereby, you will be held responsible for the damage that may result therefrom.

DR. J. J. MCCARREY,
Chief Food Inspector.

Again, on the next day, a letter was sent to the Gould Cold Storage Company, worded as follows:—

Food Inspection Dept.,
City Hall.

Montreal, 25th January, 1911.

To the Gould Cold Storage Company, Ltd.,
14 William Street.

Gentlemen,—You are hereby notified to take communication of the notice from the Provincial Board of Health concerning the eggs in tins, said to consist of about 9,000 packages, now in storage in your warehouse, and which have been inspected by the sanitary authorities of the city of Montreal, and appear to be unwholesome, putrid, damaged and affected with the germs of disease and otherwise injurious to health; govern yourself accordingly and act within the delay specified therein.

You are further notified that you are required to inform the chief food inspector as to what you have done or intend to do in the matter.

DR. J. J. MCCARREY,
Chief Food Inspector.

It may be observed that generally a seizing officer knows what he wishes to accomplish and does not apply to the defendant for assistance.

It was therefore peculiar that this seizing officer should thus in effect say to the persons in charge of the merchandise and against whom he was proceeding: "I have seized your eggs and I now require you to tell me what you intend to do in the matter."

The "notice" referred to in the last-mentioned letter consisted of an order addressed by the Board of Health of the Province to the city itself, commanding the city, with thirty-six hours, to take steps to prevent the eggs from being delivered for consumption in Montreal or anywhere in the Province.

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Some time in January it appears that the plaintiffs became aware of the proceedings of the food inspector, and applied to the defendant's Board of Commissioners for their consent to let other samples of the eggs be taken by the plaintiffs for analysis. It appears from a minute of the Board that the request was denied, the eggs being referred to in the minute as having been "confisques par le departement de l'inspection des aliments comme etant impropres a la consommation par le public." Were it not for the plain words of this refusal, I would hesitate to think that the city authorities would thus refuse to extend to the owners of a large consignment of merchandise a measure of ample fair treatment which a justice of the peace would with propriety accord to an arrested vagrant.

A correspondence ensued between the defendant's chief inspector and the plaintiff's solicitors. In a letter to the latter dated 26th January, the chief food inspector stated inter alia: "An opportunity has been given to the owners of the eggs to have them removed from the province. If this order is not complied with, my instructions are to cause the entire quantity of these frozen canned eggs to be immediately destroyed."

Two concluding letters, both written on the 31st January, 1911—the day before the application for the injunction—shew how the matter ended, so far as what happened before commencement of this suit is concerned.

In one addressed to the plaintiffs' solicitors, the chief food inspector stated: "I am instructed to say that as your clients decline to take advantage of the permission given to remove the goods in question from the province, steps will be at once taken to destroy them."

The other, addressed to the Gould Cold Storage Company Ltd., was worded as follows:—

> Gentlemen,—You are hereby notified and required to allow the frozen canned eggs said to be 9,000 packages, belonging to John Layton & Company, now under seizure upon your premises, to be removed under the direction of Inspector Grenier to the civic incinerator, there to be destroyed.
>
> Yours truly,
>
> DR. J. J. MCCARREY,
> *Chief Food Inspector.*

At no time between the 24th December, 1910, and the time at which the defendant commenced to cart off the eggs to the incinerator was any guardian placed in charge or any dispossession of the storage company effected.

I find that the inspector, who was supposed to be holding the goods under seizure—if anybody was doing it—so far from asserting direct custody, actually gave to the storage company (who are assumed to have been dispossessed by the seizure) his receipts for the six cans of eggs which at different times he took away as samples.

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Notwithstanding that the Gould Cold Storage Company called his attention to the fact that the goods were not seized, the chief food inspector did not proceed to have them seized, but relied upon his letter of the 24th January, which appears to have been submitted to the defendant's law department, as if that letter sufficed to establish the making of a seizure.

In these circumstances, can it be said that there was any seizure of the eggs made before the attempt to cart them off to the incinerator on the 1st February?

The learned Judge who gave the judgment in the Superior Court came to the conclusion that there had not been a valid seizure, apparently upon the ground that lack of official authority in the officer who made the so-called seizure, or, perhaps I should rather say upon the ground that the act of seizure, whether made by an officer legally competent or not, at all events upon the face of it did not purport to be the act of a member or officer of the Board of Health or an executive officer of the municipal sanitary authority, who alone could make such a seizure, whether acting under the provincial health law or under the city health ordinances.

It, however, appears to be unnecessary to enquire into the authority of the officers who acted, if in point of fact they did not actually make a seizure.

It is said for the defendant that a constable of the sanitary authority, in making a seizure of food supposed to be unsound, need not observe the formalities of a seizure as required by the Code of Procedure. I quite agree that he need not do so. The question, however, is not as to the formal requisites of a seizure, but whether there was any seizure at all, and if it be conceded that, because public health and safety require that the officer shall act with such promptitude as will not give him time to make written record of his act, it would seem that the same reason should make it all the more necessary for him to take effective physical custody and control of the things seized.

Seizure is defined as: "The taking possession of goods for a violation of a public law; as the taking possession of a ship for attempting an illicit trade. The seizure is complete as soon as the goods are within the power of the officer": Bouvier—Law Dict. vol. "Seizure."

In *Pelham* v. *Rose*, 76 U.S. (9 Wall.), 103 and 106, in the Supreme Court of the United States, it was said: "As applied to subjects capable of manual delivery, the term means caption, the physical taking into custody."

It is an act which dispossesses the party proceeded against. Article 623 C.P.; and the dispossession must result from the assertion of adverse legal authority: *Vinter* v. *Hind*, 10 Q.B.D. 63.

It has been held in this Court and elsewhere in *Brook* v.

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Booker, 17 Que. K.B. 193, 41 Can. S.C.R. 331, that a seizing officer could not make a valid seizure by writing out a paper au fond de son etude. It is as certain that he cannot seize a man's goods by simply writing letters to him, as was done in the present case, or by verbal communication such as by shouting at him in the street or elsewhere.

I therefore find, on this point, that only six out of about 9,000 cans of the eggs were really seized before the 1st of February.

I am thus brought, in the second place, to consider whether or not the act of the defendant's officer, in proceeding on the 1st of February to destroy the eggs, has been justified by the defendant as a valid executive act of a public health officer.

Counsel for the defendant on being asked, early in the course of his argument in support of the appeal, if there was any provision made whereby a person whose goods were being seized by a health officer could defend himself, answered in the affirmative, and, being further asked what the provision for right of defence was, answered that it would be a petition for injunction such as that made in this case, or an action in damages against the municipal corporation.

But, to speak of the proceeding, by which a party resorts to a Superior Court to restrain the act of a health officer as being a defence to the action of the officer, is obviously to make a misuse of language. In point of fact, and as counsel for the defendant in effect admitted at a later part of their argument, no provision whatever is made either in the clauses of the Provincial Health Law or in the defendant's health ordinance for any procedure whereby an interested party can be heard or can defend himself or procure release of his goods. The act of the health officer in seizing or destroying is put on the footing of being an administrative act, the legality or justice of which are not to be enquired into.

In this view it would have to be conceded that a health officer could not be stopped or interfered with if, finding 100 bags of flour piled in a shed, and finding two of the bags in front or on the top to have been fouled by dirt, he were to proceed to cart off the whole of the 100 bags to the dump as garbage.

The argument for the defendant is that public safety is a supreme law, and that it is necessary for the protection of public health that health officers should have this vast power and should, moreover, have the right to act summarily, even to the extent of depriving a person of his property without summons or process of law.

In considering the weight to be given to this argument based upon necessary protection of the public, it is proper to assume at the outset that the Legislature is a good judge of the cir-

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cumstances and conditions under which the exceptional power referred to should be conferred upon public boards or officers.

In this view, it is opportune to consider what there is of legislation in the matter, whether it be found in the acts of the Legislature or in ordinances of the municipal council.

The defendant relies upon by-law No. 105 of the city of Montreal, which contains in section 17 a provision worded as follows:—

> No person shall sell, or have in his possession for sale, any unwholesome meat, poultry, game, eggs, fish, unripe or decayed fruit or vegetables that might in any way be injurious to health, and any member or officer of the Board of Health is hereby authorized to seize and confiscate all such meat poultry, game, eggs, fish, fruit or vegetables; the entire cost of removing any of said deleterious articles as may be found in any premises to be paid by the delinquent in addition to the penalty provided in section 56 of this by-law.

Elsewhere in the by-law there is a penalty clause whereby in general terms any infraction of the by-law is made punishable to the extent of a specified penalty. It contains no provision, in the part relating to seizure of food products, for summons of an offender, or for hearing or judgment of confiscation.

Is such by-law sufficient authority for a health officer to do what the defendant's officer was about to do when restrained by the injunction?

In terms it authorises any member or officer of the Board of Health to seize and confiscate any unwholesome eggs "that might in any way be injurious to health," but it proceeds in the same sentence to ordain that the cost of removal shall be paid by the delinquent, in addition to the penalty provided in the ordinance. It appears to me that this must mean—if it has any legal validity—that the entire proceeding of the officer must be based upon some judicial finding or adjudication. If it were otherwise, does it mean that the officer, besides taking the article which he seizes, can also open the cash drawer of the party and take "the entire cost of removing," and if not, how is this entire cost to be recovered if not by summons, judgment and distress? Does this single sentence mean that for seizure there need be no summons or trial, but that to recover the expenses there shall be a summons and trial?

Assistance can be had by reference to decisions given elsewhere in local government cases, having, of course, due regard to the differences in the purport of the acts which govern the matter.

The Public Health Act, 1875, of Great Britain, contains the provisions to the following effect:—

> Section 116.—Any medical officer of health or inspector of nuisances may at all reasonable times inspect and examine any animal carcase, meat, poultry, game, flesh, fish, fruit, vegetables, corn, bread or

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milk exposed for sale, or deposited in any place for the purpose of sale or of preparation for sale and intended for the food of man, the proof that the same was not exposed or deposited for any such purpose, or was not intended for the food of man, resting with the party charged; and if any such animal carcase . . . or milk appears to such medical officer or inspector to be diseased or unsound or unwholesome or unfit for the food of man, he may seize and carry away the same himself or by an assistant, in order to have the same dealt with by a justice.

Section 117.—If it appears to the justice that any animal carcase . . . or milk so seized is diseased or unsound, or unwholesome, or unfit for the food of man, he shall condemn the same, and order it to be destroyed or so disposed of as to prevent it from being exposed for sale or used for the food of man; and the person to whom the same belongs or did belong at the time of exposure for sale, or in whose possession or on whose premises the same was found, shall be liable to a penalty not exceeding twenty pounds for every animal carcase or fish or piece of meat, flesh or fish, or corn, bread or flour, or for the milk so condemned, or, at the discretion of the justice without the infliction of a fine to imprisonment for a term of not more than three months.

The justice who under this section is empowered to convict the offender may be either the justice who may have ordered the article to be disposed of or destroyed, or any other justice having jurisdiction in the place.

Section 308.—Where any person sustains any damage by reason of the exercise of any of the powers of this Act in relation to any matter as to which he is not himself in default, full compensation shall be made to such person by the local authority exercising such powers; and any dispute as to the fact of damage or amount of compensation shall be settled by arbitration in manner provided by this act, or if the compensation claimed does not exceed the sum of twenty pounds, the same may, at the option of either party, be ascertained by and recovered before a Court of summary jurisdiction.

The contrast between the above quoted clauses of the Imperial Act and the provisions of the defendant's ordinance is manifest and striking. In the former, the destruction has to be ordered by a magistrate and plain provision is made for payment of full compensation to the owner if he is not in the wrong. In the latter—the defendant's health ordinance—there is no safeguard in the shape of requirement of a justice's order and no provision for compensation at the charge of the municipal corporation. The liability to forfeiture and destruction purports to be left to the uncontrolled decision of a single officer.

In respect to this latter characteristic, it may be observed incidentally that the defendant in this action adopts the act of its officer; but it is not responsible for the act of its health officer in making a seizure, and, had it not so adopted the act, the plaintiffs would have been left to look for payment of their $80,000 claim to the person of a city food inspector, if, indeed, it could be said that there could be any such claim at all, in a case where the act was done under statutory authority.

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But, reverting to the purport of the Imperial Act, I find that it was held in 1879, in *White* v. *Redfern*, 5 Q.B.D. 15:—

> That meat might be taken before a justice under the above sections (sections 116 and 117 of the Act), and condemned without any summons or notice to the person to whom it belonged, and that such person having been subsequently to the destruction of the meat summoned and convicted of an offence under the above sections, such conviction was good.

It had been objected by counsel that the meat could not be condemned by a justice, or an order for its destruction made, ex parte and without notice to him to attend and shew cause against the same.

In the observations of Field, J., it was said:—

> The point is one of some difficulty, and but for the provisions of the 308th section of the Public Health Act, 1875, giving compensation to any person sustaining damage by reason of the exercise of the powers of the Act, in relation to any matter as to which he is not himself in default, I should have had still greater difficulty. I feel very strongly the possible injustice that might be done by depriving a man of his property without giving him an opportunity of being heard and without giving him compensation if not himself in default, and it would require very strong words in an enactment to lead me to the conclusion that it was intended that this might be done.

After referring to the provisions and to the object of the Act, the Judges in that case came to the conclusion that a justice could order destruction of the meat without previous notice having been given to the owner, it being stated that: "The primary object is the prevention of an evil which in the nature of things presses for an immediate remedy."

As I have pointed out, the clauses of the Imperial Act which are calculated to secure a measure of fair treatment to the owner of the goods are not to be found in this by-law.

In the circumstances, I consider that, had the case of *White* v. *Redfern* turned upon the provisions of an ordinance such as the one relied upon by the defendant, it would have been held either that the ordinance was unreasonable and oppressive or that its meaning and effect was that there could be no confiscation without prior summons and opportunity to be heard.

In the United States, it is laid down as a conclusion resulting from numerous decisions that "municipal corporations cannot lawfully declare that to be a nuisance which was not per se a nuisance at common law, and consequently their actions cannot be considered conclusive as against a party adversely interested. Much less can this power be exercised by the administrative or executive boards of these corporations." Am. and Eng. Ency. of Law, 2nd ed., title, Boards of Health, p. 602.

The effect of statutory enactments purporting to empower public boards to declare what shall constitute a nuisance was

considered in a judgment of the state Court of Appeals in the New York case of *People* v. *Board of Health*, 140 N.Y. 1, 37 Am. St. Rep. 522, and, in relation to the right to be heard in defence before confiscation, it is of interest to note the observations following:—

> The question may be asked, how can these provisions conferring powers upon Boards of Health to interfere with and destroy property and to impose penalties and create crimes, stand with the constitution securing to every person due process of law before his property or personal rights or liberty can be interfered with? The answer must be that they could not stand if we were obliged to hold that the acts referred to made the determination of the Board of Health as to the existence of nuisances final and conclusive upon the owners of the premises whereon they are alleged to exist.
>
> Before such a final and conclusive determination could be made, resulting in the destruction of property, the imposition of penalties, and criminal punishments, the party proceeded against must have a hearing, not as matter of favour, but as matter of right, and the right to a hearing must be found in the Acts. . . . If the decisions of these boards were final and conclusive, even after a hearing, the citizen would in many cases hold his property subject to the judgments of men holding ephemeral positions in municipal bodies and Boards of Health, frequently uneducated and generally unfitted to discharge grave judicial functions.

It is true that in that case it was decided in the result that a Board of Health was not obliged to give any person a hearing before exercising its jurisdiction to declare a nuisance, but that, if it made such a declaration, it proceeded at its peril.

In the treatise already quoted from, it is said at page 604: "In the case of public emergency, the board may proceed to abate a nuisance without notice, but when the order of the board goes to the extent of depriving a person of the use of his property in a lawful pursuit, its action is invalid if no notice or opportunity of being heard has been afforded the individual."

All this with regard to boards and public bodies is applicable a fortiori where it is but a single officer who acts, and where there is no recorded order or decision in writing.

I therefore conclude that the city health ordinance cannot be relied upon to support the proposed destruction of the eggs.

The other statutory authority relied upon by the defendant is article 3913 R.S.Q. (a part of the Public Health Law) which is as follows:—

> 3913.—Every executive officer of the municipal sanitary authority or any other officer appointed by it for that purpose, may inspect all animals, dead or alive, meat, fowl, game, fish, fruit, vegetables, grease, bread, flour, milk or other liquids and food intended for human consumption and offered for sale, or deposited in a place or transported in a vehicle for the purpose of being afterwards sold or offered for sale, or delivered after being sold, and if, upon inspection, such animals,

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liquid or food appear to be unwholesome, putrid, damaged or infected with the germs of disease, or otherwise injurious to health, he may seize the same, carry them aff, and dispose of them so that they shall not be offered for sale or serve as food for man.

The burden of proof that the animals, liquids or food are not intended to be sold or to be delivered after having been sold or to serve as food for man, lies upon the owner or person who had possession thereof.

The proprietor of the articles, or the person in whose possession they were seized, is further liable to a fine not exceeding fifty dollars.

This enactment, in my opinion, cannot be relied upon to justify the act of the health officer, firstly, for the reason that the officer was proceeding to destroy the eggs, whereas the Act does not authorise the destruction of anything; and, secondly, because the seizure is authorised only if the things "upon inspection" appear to be unsound, etc., whereas the eggs which were about to be destroyed had not been inspected at all.

At to the first reason, it was argued for the defendant that the power given "to dispose of them so that they shall not be offered for sale or serve as food for man" really involves power to destroy. To this it can be answered that the power to destroy the property of another person, if intended to be given, should be given in clear terms and not be conjectured or inferred. Moreover, it is matter of common knowledge that cargoes of grain or flour, damaged in transit so as to be made unfit for human food, are repeatedly auctioned off in Montreal to cattle feeders or glue or paste manufacturers for large sums of money. So that it is not without good reason that the Act stops short of giving power to destroy.

The practical difficulty in application of the Act appears to arise from its being an incomplete copy of the Imperial Act in that the clause of the latter, whereby the goods can be finally dealt with by a justice, has been omitted and under our Act a seizing officer find no procedure for getting the thing seized off his hands. This feature would afford a partial explanation of the somewhat tawdry suggestion made by the defendant to the plaintiffs' solicitors in the correspondence, that the eggs (though stated to be dangerous to the health of consumers) should be exported.

It follows that, in announcing his decision and intention to destroy the eggs, and in proceeding to carry it out, the defendant's food inspector was acting without warrant of law. He thereby constituted himself a trespasser from the beginning, so that even if there had been a prior legal seizure, it would have been vitiated by the illegal use to which it was being put. The principle has long been recognised in law. It is stated in Broom's Maxims, 7th ed., at page 100, as follows: "If a person abuse an authority given by the law, he becomes a trespasser ab initio, as if he had never had that authority (ib. p. 242).

It is exemplified in our law, in the cases in which a pledgee is adjudged to restore the thing pledged if he abuse it, the idea being that the misuse of the pledge vitiates the agreement or consent by which he originally obtained possession of it. And, generally speaking, it is a mere application of the maxim spoliatus ante omnia restituendus, which makes it the first duty of the Court to order that he who has been wrongfully dispossessed shall be restored into possession before other rights will be enquired into.

In regard to the argument for the defendant, based upon the alleged importance or necessity of prompt action by the health officer, it may be added that the facts do not shew the existence of any urgency. The city authorities themselves took a month before they announced any decision. A commodity inclosed in soldered cans could not have been a nuisance to the neighbours.

There was more reason for urgency from the plaintiff's point of view.

The owners of the eggs had to see themselves cut out of the holiday trade and subjected to a running charge of $500 a month for warehouse and refrigerator service, while the scientists were investigating the contents of the six sample cans which they had thawed out and which were rotting on their hands, as eggs have a way of doing when taken out of the shells. During the month of investigation the chief food inspector did not even have one of his twenty-four assistants, or anybody else, in charge of the eggs. The defendant at least did not consider that there was any urgency.

The other reason why article 3913 cannot be relied upon is that there was no inspection of the goods which were about to be destroyed. Six only out of about 9,000 cans of the eggs were inspected. It appears to have been assumed that the condition and quality of all the cans were the same as those of the six. It is just as if, out of five car loads of cheese which would arrive in Montreal from as many country localities, the cheese in three or four boxes of one car load being inspected and found to be bad, this were to be treated as an inspection of the five car loads. No statutory or by-law authority whatever has been cited which could justify this mode of proceeding by sample. I can well understand that a food inspector who finds the upper layers of a box of fish to be in a state of decomposition, can truthfully say that he has inspected the box of fish and may proceed to deal with it, but it is a very different thing either for him or any number of scientists to pretend to have inspected the contents of 9,000 soldered tin cans of which they have opened only six.

It may be said that the necessity of the case was such that no detailed inspection could be expected to be made. What

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then, it may be asked, is the alternative? Is it to be concluded that because the trouble of inspecting the whole of five car loads of packages is great, they can be destroyed without inspection, or that the inspection of six cans shall answer as an inspection of the whole? Does it mean that there shall be an inspection if only one package is in question, but that, if there be several car loads there need not be an inspection?

I consider that acts of a penal or confiscatory kind are not to be so favourably considered as that, and cannot be supported upon mere inference or conjecture. The defendant might well have made the matter of inspection one of by-law regulation.

The Legislature has given the city ample and even generous power to make regulations for the inspection of eggs and other food products, but I do not find that it has made any such regulations at all, and certainly none have been cited to us to indicate how an officer shall proceed when he proposes to seize five car loads of merchandise.

In the case here in question, the officer saw only the front of a pile of the goods. Being asked if he counted the packages, he testified: "No, because I know it was impossible. They were all piled up to the ceiling, and I could not get over in the room. It was a large room, filled right up with those cans."

The result of the examination of the contents of the six cans might have formed a useful preliminary to a seizure of the entire lot, but not a ground for summary destruction of the whole.

The defendant's officers were proceeding to cart off and burn up the 9,000 cans of eggs without even having opened the packages. Of the nature or condition of the contents of these packages, neither they nor any of the experts who inspected the contents of six other cans had any direct knowledge whatever. As already pointed out, the defendant even assumed to refuse leave to the plaintiffs themselves to take some of the cans for inspection.

In these circumstances, the proceeding to destroy the eggs, made as it was in execution of a pre-determined and previously announced decision to destroy, was illegal and was an abuse of authority.

It was laid down in 1882 by Brett, L.J., in *Reg.* v. *Local Government Board*, 10 Q.B.D., at p. 321, in an action wherein the validity of a municipal ordinance was in question, that:—

> Wherever the legislature entrusts to any body of persons other than to the Superior Court the power of imposing an obligation upon individuals, the Courts ought to exercise, as widely as they can, the power of controlling those bodies of persons if those persons admittedly attempt to exercise powers beyond the powers given to them by Act of Parliament.

I consider that that is still a correct view, and one not in

conflict with the attitude of favourable construction of municipal by-laws taken in *Kruse* v. *Johnson*, [1898] 2 Q.B. 99.

It cannot be overlooked that here, as well as elsewhere, a sense of irresponsibility seems too often to manifest itself in the members of municipal governing bodies, such as led a Lord Justice in England, in a recent case, to give expression to a severe criticism of the propensity in question: *Hartlepool Electric Tramways Co.* v. *West Hartlepool Corporation*, 9 L.J.R., p. 1108.

These considerations apply with added force to a case such as the present one, wherein there is not even the assurance to be derived from the deliberation of a body of men acting under oath of office, but wherein, on the contrary, everything is made to depend upon the personal inclination or sense of duty of a single inspector, of whose proceedings no record is required to be made.

Acts, even of the principal officers of the Imperial Government, have quite recently been held to have been unwarranted, in more than one case wherein they did not go beyond the use of an unauthorised form of words in a requisition for a return under the Finance Act, with intimation of exposure to penalty in case of non-compliance: *Dyson* v. *Attorney-General*, 27 T.L.R. 143; *Burghes* v. *Attorney-General*, 27 T.L.R. 143.

It was argued in support of the appeal that, if the decision to destroy the eggs and the proceedings to carry out that decision should be held to be unauthorised, the act of the seizing officer should still be upheld to the extent of authorising him, under article 3913 R.S.Q., to prevent the eggs from being used or disposed of for food. Apart from the difficulty in procedure of awarding an injunction to a defendant who has not asked for one, it is clear that a defendant who has sought in his plea to maintain or justify a void seizure cannot ask to have the action dismissed on the ground that the facts proved would now justify him in making a seizure which would be good. This contention partakes of the same error as that already referred to, to treating the plaintiff's action as a defence to the act of the health officer. When it is seen that the defendant's plea, whereby it asserts a valid seizure or right to hold the goods, is not made out, the entire defence falls to the ground.

For these reasons I would dismiss the appeal. Though I prefer to base my conclusions upon reasons somewhat different from those of the learned Judge of the Superior Court, I would not for that reason be understood as disagreeing with the conclusions at which he has arrived in those parts of his judgment which treat of points upon which I have thought it necessary to express an opinion.

In the view which I have taken, the question of the quality or condition of the eggs does not properly arise, and it is to

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be regretted that so much of the time of the trial Court was taken up with the prosecution of a misplaced enquiry.

It appears to me that this is a case in which a well-meaning city food inspector, ill-equipped with by-law provisions and not effectively guided upon his requests for advice, has allowed himself to be stampeded by newspaper clamour into taking up a legally indefensible position.

I would dismiss the appeal and rescind the interlocutory order, which, in part, suspended the injunction, pending the appeal; but, as the injunction granted in respect of the order upon the mis-en-cause for delivery of the merchandise, is slightly beyond the terms of the petitioner's conclusions, and may, besides, unnecessarily impede the action of competent public authority, the wording of the injunction is somewhat modified in these respects. The conclusion at which the majority of the Judges has arrived is that the appeal be dismissed, with costs, subject to the alterations in the wording of the injunction just referred to.

Appeal dismissed.

N.B.—Leave was afterwards granted by the Court of King's Bench (appeal side) to the appellants the city of Montreal, to take a further appeal to the Judicial Committee of the Privy Council.

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Nova Scotia Supreme Court, Sir Charles Townshend, C.J., Graham, E.J., Russell and Drysdale, JJ. January 26, 1912.

1. CRIMINAL LAW (§ II D—58)—SPEEDY TRIAL—SUBSTITUTION OF CHARGE—FORMAL CONSENT OF JUDGE.

It is not necessary that the consent of the Judge required by section 834 of the Criminal Code as amended by chapter 9 of 8 & 9 Edw. VII. (Can. 1909), should be formally expressed, either verbally or in writing before proceeding with the trial of the prisoner on a substituted charge; such consent may be inferred from the fact that the Judge himself drew attention to the new charge, put the prisoner to his election, and proceeded with the trial.

[*The King* v. *Cohn*, 36 N.S.R. 240, *The King* v. *Cohon*, 6 Can. Cr. Cas. 386, distinguished.]

2. CRIMINAL LAW (§ II B—44)—TRIAL—PRISONER IGNORANT OF THE ENGLISH LANGUAGE—LIMITS OF HIS RIGHT TO HAVE EVIDENCE TRANSLATED.

A prisoner who is ignorant of the language in which the trial proceedings are conducted has no inherent right to be furnished with a literal translation of all that takes place at the trial; where the substance of the evidence in chief of a witness called on behalf of the prisoner is explained to him, the omission to explain to him in like manner what the witness said on cross-examination is not a ground for quashing a conviction, the prisoner having been represented by counsel and having suffered no prejudice by the omission.

[*The King* v. *Mecklette*, 18 O.L.R. 408, 15 Can. Cr. Cas. 17, followed.]

DEFENDANTS were bound over to appear for trial before the County Court Judge for District No. 7, on a charge of assault

with intent to rob. On the arraignment of the prisoners the charge was changed from assault with intent to rob to robbery, and the prisoners having elected to be tried before the Judge of the County Court were tried and convicted. A Crown case was reserved to determine the validity of the conviction on the ground that the consent of the Judge to the preferring of the substituted charge was not first obtained and on the further ground that the prisoners were Italians, ignorant of the English language and that a portion of the evidence given in English was not translated to them by the interpreter.

The facts and the case reserved are set out at length in the judgments.

The judgment was affirmed.

W. F. O'Connor, K.C., for the prisoners:—In preferring a new charge the Judge must give a formal consent under sec. 834 of the Criminal Code as amended by chapter 9, Acts of 1909, which was not given. This consent must be given before the charge is preferred. *The King* v. *Cohn* or *Cohon*, 6 Can. Cr. Cas. 386, 36 N.S.R. 240. It is not a substituted but a new or additional charge that can be preferred. The prisoners could not speak English and the evidence should have been interpreted so they could have understood what was going on. When a case stated is obscure the benefit of the doubt should be given to the prisoners: *Reg.* v. *Smith*, 25 N.S.R. 138.

S. Jenks, K.C., for the Crown:—There is no need of a formal consent under the Code sec. 834 as amended. Our practice is different from the English in this regard. The Judge gave his consent when he went on and tried the charge. The prisoners had an interpreter stand by them who was told to interpret any part of the evidence they could not understand.

SIR CHARLES TOWNSHEND, C.J.:—The prisoners were committed for trial on a charge of assaulting with intent to rob, and all eventually elected to be tried before the Judge of the County Court. On being brought up for trial the accusation against them was changed charging them that they with violence used against the person to prevent resistance did unlawfully steal from the person of one Frank Spagnola, and against his will, money amounting to the sum of $204.

The Judge called the attention of the prosecuting officer to the fact that the charge he was preferring was a new one and told him that they would have to elect under it. The new accusation was read to them, and they elected to be tried, pleaded not guilty, and were convicted.

The prisoners were Italians, natives of Calabria. The evidence for the prosecution was all given in Italian through an interpreter. Joseph Sylvester, one of the prisoners gave his evidence in English. Counsel for the prisoners asked that his

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evidence be translated to the other prisoners. The interpreter said that he could not translate English into the Calabrian dialect. I told him to give them a purport of the evidence which I thought was sufficient. He did this during the direct examination but omitted to do this on the cross-examination.

These are the facts as found in the case and upon which two questions have been reserved for our consideration.

First. Whether it was necessary for the Crown prosecutor to have obtained from me a written or verbal expressed consent to substitute the charge of robbery on which the accused were tried for the charge of assault with intent to rob, the charge for which they were committed?

Section 834, chapter 146, R.S.C. Criminal Code, as amended by chapter 9, sec. 834, Act of 1909, provides that:—

> The prosecuting officer may, with the consent of the Judge, prefer against the prisoner a charge of any offence for which he may be tried under the provisions of this part other than the charge for which he has been committed to jail for trial or bound over, etc., etc. Provided that the prisoner shall not be tried under this part on any such additional charge unless with his consent obtained as herein provided.

As already stated the prisoners consented and elected to be tried on this substituted charge. The statute, which is very explicit, does not require the written consent of the Judge to try the prisoner under the substituted charge, and the fact that the Judge himself pointed out to the prosecuting counsel that there was a new charge and that before he could proceed with the trial the prisoners must make their election, and after they had so elected proceeding with the trial and convicting the prisoners would seem to be as strong and perfect evidence of the Judge's consent to try them under it as could be desired. No mere verbal expressions could make it any better. His act was enough and it would be mere trifling with the words of the statute to say that to make the trial legal he must first either write out his consent or state verbally: "I consent to try these prisoners on the new charge." It would probably be better and more in order, if a new charge be substituted, for the Judge to make a note on his minutes of trial that he so consented, but in my opinion it would not be necessary to give jurisdiction.

We were referred to the case of *The King* v. *Cohn*, 36 N.S.R. 240, *R.* v. *Cohon*, 6 Can. Cr. Cas. 386, but the circumstances under which the Judge proceeded with the trial were not identical. There the circumstances under which the trial proceeded were as stated:—

> The prisoner consented to be tried before me for perjury on the depositions as returned by R. M. Langille, stipendiary magistrate, etc. Charge 3 was not contained in the information in the magistrate's Court, but was contained in the charge preferred by the Crown

prosecutor before me. Was I right in trying him on charge 3 under the general charge of perjury without the prisoner having specifically elected to be tried on the charge of perjury as set out in said charge 3?

In delivering judgment in that case I said:—

It seems very plain that the Judge could not try the prisoner under charge 3, at least without his, the Judge's consent, expressed in some way. This consent must be before this charge is preferred. The Judge reports that this was not done before or at any time.

Graham, E.J., says, in quashing the conviction:—

I put it simply on the ground that the Judge had not granted leave to add the charge.

Here we have a different state of facts. The Judge himself brought to the attention of the counsel for the Crown that it was a new charge, that the prisoners must again elect. This all shews not only that the prisoners consented but the Judge as well, by the very fact of his proceeding with the trial and convicting the accused.

Second. The second question is:—

Was it sufficient to give the prisoner the puroprt of the evidence given for the defence by one of them or was it necessary to have all the evidence direct as well as cross-examination translated to them?

It is to be observed that the prisoners were represented by counsel and his only request was to have the evidence of one of his fellow prisoners translated to him; while the purport of all the evidence except the cross-examination of one man was conveyed to the prisoners by the interpreter. There is no complaint of any prejudice suffered by the prisoners on this account.

In *The King* v. *Meceklette*, 18 O.L.R. 408, 15 Can. Cr. Cas. 17, Riddell, J., seems to think that it was not necessary. He says:—

There is much to be said in favour of the view that there is no inherent right in any foreigner that the proceedings taken in our Courts shall be made wholly intelligible to him; even though he should be charged with a crime. It might be impossible within a reasonable time to procure a person who could explain the proceedings to a foreign defendant. The cases in which a contrary doctrine is laid down are all upon some statutory or constitutional provision.

He further says:—

In any case the capacity of the interpreter is a question for the magistrate. All matters connected with the interpretation of evidence are for him and his finding cannot be attacked in this way.

So far as I can find there is no settled rule of law on this point, and the authorities seem to indicate that it is a matter for the Judge, always being careful that the prisoner suffers no prejudice on that account. As remarked by Riddell, J., if it were a positive rule that in such cases all the evidence must be

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strictly interpreted, then, obviously, in many cases, it would render the administration of the law impossible. We can easily conceive cases where no means exists of procuring an interpreter, and it would be unreasonable that crime should go unpunished where clear evidence is brought forward of guilt. If the Court were satisfied that the accused was really prejudiced in his defence thereby, then a case would exist for its interference. We have no allegation, nor suggestion of that nature here.

The stated case as first presented to the Court left us in some doubt as to the meaning and scope of the questions reserved, and we therefore directed the same to be returned to the Judge in order that he state more fully the facts and circumstances and explain the questions. In the amended statement we have before us all the facts on which this decision is based.

In my opinion the questions reserved should be answered as indicated, and the case dismissed. The conviction should be sustained.

GRAHAM, E.J.:—Under the speedy trial procedure the provision in force enabling a Crown prosecutor to prefer a charge against a prisoner other than the one for which the prisoner has been committed to gaol is as follows:—

> The prosecuting officer may with the consent of the Judge prefer against the prisoner a charge for any offence for which he may be tried under the provisions of this Part, other than the charge for which he has been committed to jail for trial, or bound over, although such charge does not appear or is not mentioned in the depositions upon which the prisoner was committed or is for a wholly distinct and unconnected offence. Provided that the prisoner shall not be tried under this Part or upon any such additional charge unless with his consent obtained as hereinbefore provided.

This is the case reserved by the County Court Judge's Criminal Court in respect to the defendants:—

> Amended stated case, pursuant to order of Court, dated January 13th, 1912.
>
> The above named were committed for trial on a charge of assault with intent to rob.
>
> They elected to be tried before the County Court Judge for district No. 7 on the 7th day of November, 1911, and I set down the trial for the 24th day of November, 1911.
>
> The Crown prosecutor intimated to me some days before the trial that he was going to prefer a charge of robbery against the accused instead of a charge of assault with intent to rob for which they were committed. On the day of the trial the fact that the prisoners were to be tried on this substituted charge escaped my memory. The prisoners were arraigned and when the clerk was reading the charge to them I stopped him and told the Crown prosecutor that the prisoners had not elected to be tried on this substituted charge and that I would not go on with the trial unless they did so. I then read the charge to the prisoners and asked them the usual questions asked

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prisoners when up for election. The prisoners elected to be tried on the substituted charge before me and I proceeded with their trial.

The prisoners are Italians, natives of Calabria. The evidence for the prosecution was all given in Italian through an interpreter. Joseph Sylvester, one of the prisoners, gave his evidence in English. Counsel for the prisoners asked that his evidence be translated to the other prisoners. The interpreter said that he could not translate English into the Calabrian dialect. I told him to give them a purport of the evidence, which I thought was sufficient. He did this during the direct examination but omitted to do this on the cross-examination.

Counsel for the accused asked for a stated case on the following points:—

First, whether it was necessary for the Crown prosecutor to have obtained from me a written or verbally expressed consent to substitute the charge of robbery on which the accused were tried for the charge of assault with intent to rob, the charge for which they were committed.

Secondly, was it sufficient to give the prisoners the purport of the evidence given for the defence by one of them, or was it necessary to have all the evidence, direct as well as cross-examination, translated to them?

The first inquiry is whether under the provision the obtaining of the consent of the Judge is necessary to prefer a new charge. There must, from the terms of the provision, be a consent of the Judge and a consent of the accused. The offence substituted is a more serious one.

The Court has decided that question in *Rex* v. *Cohn*, 36 N.S.R. 240, (*R.* v. *Cohon*, 6 Can. Cr. Cas. 386) under an earlier but similar provision when the statute did not expressly require the consent of the party. The present Chief Justice, then Townshend, J., said in that case:—

It seems very plain that the Judge could not try the prisoner under charge 3, at least without his, the Judge's consent expressed in some way. Sec. 773 of the Code says: "The county attorney, etc., may, with the consent of the Judge prefer against the prisoner a charge or charges, etc." (citing the words of the provision): "This consent must be" (obtained) "before the charge is preferred. The Judge reports that this was not done before or at any time. By sec. 767 after the prisoner elects to be tried it directs that the officer shall prefer the charge against him for which he has been committed for trial and draw up a record. The conviction, therefore, on this charge is bad and must be set aside.

Meagher, J., p. 252, says:—

Lastly, I am unable to conclude that he could have been legally tried upon charge No. 3, without the express consent of the Judge which was not given. In order to make the proceedings regular there should, I think, have been an order or something equivalent to it giving the leave so that it would appear as matter of record.

The other Judges also joined in setting aside that conviction on this ground. In my own opinion, this is said:—

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In my opinion the conviction on this charge must be quashed. I put it simply on the ground that the Judge had not granted leave to add the charge. *Rex* v. *Fuidge*, 9 Cox. Cr. Cas. 430.

The next enquiry is whether the provision as to obtaining the Judge's consent has been complied with. The learned Judge in the reserved case first sent up stated, "My consent to prefer said charge was not asked for by the prosecuting officer nor was it granted." That must be taken now to mean that it was not expressly granted. Of course "consent" in a statute of this character is an unfortunate expression to indicate what a Judge does. He usually decides and he grants or refuses orders. And because, according to its context it may have different meanings it lends itself to what I think is a fallacy in the argument for the Crown.

It is quite clear from the decisions that the application and the Judge's action thereon are like an application and an order to amend. That may, of course, be spoken of as the Judge's consent to an amendment. Both parties would be entitled to be heard. I do not see how it could be granted ex parte. There are very few orders, if any, that can be granted ex parte in a criminal case. And if discretion is not exercised it would be set aside. In some cases the Judge has refused to give his consent; in others the Court of Appeal has held that the Judge should not have granted his consent: *The King* v. *Carriere*, 6 Can. Cr. Cas. 6; *The King* v. *Douglas*, 12 Can. Cr. Cas. 120; *The King* v. *Lacelle*, 10 Can. Cr. Cas. 229; *Goodman* v. *Regina*, 3 O.R. 18.

Then the Judge must exercise his discretion. We cannot now exercise that discretion. The consent is a judicial act, I think, like the consent giving leave to prefer an indictment under the criminal statute to prevent vexatious indictments when no one has been bound over to prosecute only that it need not be as in the case of that statute a "written consent." In *Abrahams* v. *The Queen*, 6 Can. S.C.R. 16, Ritchie, C.J., says:—

> In acting under this statute the attorney or solicitor-general or Judge, as the case may be, exercises what is in the nature of a judicial function; he is judicially to decide whether the indictment is proper to be presented to or found by the grand jury, etc.

In sec. 834 before the amendment the first sub-section provided for the preferring of the new charge with the consent of the Judge and that only. Then sub-section 2 provided that:—

> Any such charge may thereupon be dealt with, prosecuted and disposed of . . . as if such charge had been the one upon which the prisoner was committed for trial.

The word "thereupon" surely meant after obtaining the consent of the Judge. And that word is still there, only that the first sub-section involves the obtaining of the Judge's consent as well as that of the prisoner. The consent of the prisoner is obtained by arraigning him again. The provision re-

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quires that the Judge must state to the prisoner "that he is charged with the offence describing it." That he has the option to be tried forthwith before a Judge or later before the Judge with a jury and so on. Now I think that when this proposed charge was read by the Judge to the prisoners under that provision it was a piece of paper not a charge which had been substituted for and took the place of the former charge by the order or consent of the Judge. I cannot make out whether the argument for the Crown is that the Judge really granted his consent to substitute the new charge or that it is to be presumed or inferred that he did grant it.

I shall have to deal with both contentions.

I have tried to shew that granting it is the exercise of a judicial act and it is not—like a consent of a parent or of a ministerial officer, or even as the prisoners' consent is given. If it is a judicial act it must find judicial expression. It must be pronounced. A Court speaks in such a way that its utterances will be found in its records. In making an order or consent affecting the rights of a prisoner that prisoner is entitled to hear it. There is estoppel too involved in a Judge's decision which prevents the matter being litigated again.

Any record of this conviction brought into a Court of Error would disclose that no consent of the Judge to the addition of the new charge had been obtained. There is no consent entered in the records of the Judge's Court to add that charge.

I think that the officer of the Court could not in this case from what took place make an entry that consent of the Judge had been obtained. The Judge was doing something else, namely, obtaining the election of the prisoner. Neither could the learned Judge amend his records from what took place and state that he gave consent. If he did, why does he not say so now? Did the Judge exercise his discretion? Did he go through the mental process of deliberating and deciding actively? Or has he to leave that to us to imply that he did so because he went on with the trial? There is nothing to amend by.

In a Court of Record an order made by a Court, or I suppose a consent, could be drawn up or entered subsequently. But the order or consent must have been granted orally at least. It must have reached expression. These things are not to be constructively made and supplied ex post facto on the record. The Judge would use no language in taking the prisoners' consent but was wholly referable to that matter. If there had been an application to amend then something might be said from the silence of the Judge, but there is generally deliberation and a decision, a nod would do. I can understand a prisoner or his counsel contending that he ought not in some instances to be charged with and tried for a more serious crime.

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Cases have decided that he ought not to be. But if he has to be tried he consents to be tried speedily and not wait for the regular sittings with a jury whatever the charge may be. But in these cases the prisoner waives nothing by silence when a Judge is proceeding irregularly. So that, on the whole, I think that when the Judge says that he did not expressly grant his consent then there has not been a compliance with the statute.

Take the other contention that it must be presumed or inferred that the Judge granted his consent.

There is this principle that where some preceding act or pre-existing fact is necessary to the validity of an official act, the presumption in favour of the validity of the official act is presumptive proof of such preceding act or pre-existing fact.

In practice Courts give effect to that principle every day. It is stated that an order has been made and it is presumed of course that it was granted on proper materials, that those existed in fact.

The Judge went on and took the consent of the prisoners to the charge as if he had granted consent to its substitution. Here the presumption would be very cogent if there was nothing more. But it is only a presumption and the established fact is the other way. It is completely answered by the admitted fact to the contrary in the case that no consent was given. You cannot presume or infer after that. There is no room for it. Besides, it is an equivocal thing on which to found a presumption or inference.

The Judge's going on with the case might be due to the fact that he did not know of the provision requiring his consent to be granted, or thought that it admitted of a construction that the requirement of such a consent was but directory, as was contended before us, or that he had, when the matter was casually mentioned to him outside by the prosecuting officer, at that time granted his consent and proceeded in mistake. It is equivocal. I have likened the granting of such an application to the granting of an amendment. Take an illustration in that connection. In a civil case a Judge receives testimony which is really inadmissible because the facts were not pleaded. But in the Court above counsel contends that the Judge must have amended because he received the evidence. Or, if the Judge reserved the point he would ask: "Did I grant the amendment because I received the evidence?" and adds, "I did not expressly order an amendment."

But all of this happened in *Rex* v. *Cohn*. There the Judge proceeded and tried the prisoner on the substituted charge. But inasmuch as he had not expressly given his consent to the new charge being preferred the conviction was quashed.

I have failed to appreciate any distinction between this case and the case as dealt with in the extracts from the opinions I

have quoted. It is true that in that case the statute at that time did not require the consent of the prisoner to the substitution of a new charge. But I have dealt with the point that taking that consent in this case did not constitute an expression of the Judge that he was granting his consent.

On this point, I think, that there should have been an expressed consent of the Judge to substitute a new charge and that the conviction must be quashed and a new trial ordered.

On the second question as to whether it is necessary to make the evidence known to a foreign prisoner, I would not express an opinion, but for the reason that a decision of Riddell, J., in *Rex* v. *Mecekletle*, 15 Can. Cr. Cas. 17, 18 O.L.R. 408, has been made use of here and it goes further than was required in the case he had before him, and it is now pushed further that that learned Judge went.

I think there are two common law principles well established in the administration of the criminal law in England on the subject.

One is that if a person was charged with a crime in England for which he was liable to be imprisoned, he was entitled, whether he had counsel or not, to be present in the Court and hear the proceedings. He had to be there. I think that without a statute neither he nor his counsel could waive that right.

The other is that a person charged with crime must have the opportunity of hearing and cross-examining the witnesses.

How is a person charged with crime who does not know the language of the proceedings, or a deaf man, to be treated?

In the case of *Reg.* v. *Ysscundo*, 6 Cox. Cr. Cas. 387, the mode of interpreting the English testimony for the benefit of the foreign prisoner was pointed out by Erle, J.

"A discussion subsequently arose as to whether every question and answer should be interpreted to the prisoner, or whether, when the evidence of each prisoner was concluded the whole should be read over to him to afford an opportunity for cross-examination. The learned Judge thought the latter course the more convenient one. He had known it adopted in several cases and accordingly that course was pursued."

In that case the defendant had no counsel.

In *The Queen* v. *Berry*, 1 Q.B.D. 451, Kelly, C.B., said:—

> I remember once trying a foreigner who knew no word of English, and there being a doubt as to the efficiency of the interpreter and whether the prisoner could understand every word of the proceedings I ordered the jury to be discharged.

He did not state whether or not the prisoner had counsel. The prisoner had counsel assigned to him in *Queen* v. *Berry*.

Irving, J., in *The King* v. *Walker*, 16 Can. Cr. Cas. 77, 97, 15 B.C.R. 100, 13 W.L.R. 47, referred to that passage and he said:—

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If anyone had asked me the question, is it not an inherent right in every person that the proceedings taken in our Courts against a prisoner should be made wholly intelligible to him I should have thought there was only one answer to that question. But it seems there are some who would hold a different view. See *Rex* v. *Meeellette*, 15 Can. Cr. Cas. 17, 18 O.L.R. 408. The manner in which witnesses ought to be examined lies chiefly in the discretion of the Judge before whom the action is tried and in this province I think the standard which the Judges in exercising that discretion have recognised as the correct standard is that laid down by Kelly, C.B., in *Reg.* v. *Berry*, 1 Q.B.D., at p. 451, namely, that the prisoner should understand every word of the proceedings, and of course that the Judge and jurors should also understand what is being said, although this is not always easy to imagine satisfactorily as Drake, J., pointed out in *Rex* v. *Louie*, 7 Can. Cr. Cas. 347.

Perhaps I ought to mention that while this learned Judge, Mr. Justice Irving, dissented in that case all the other Judges were in favour of quashing the conviction, one reason being that the interpreter had unsatisfactorily interpreted the testimony to the Court and jury.

Then I rely on the cases in Hawaii, cited in the judgment of Riddell, J., and that brings me to that case.

It was an application at Chambers for a habeas corpus, the prisoner having been convicted upon a summary trial before a magistrate. This will explain what the learned Judge meant when he said:—

> All questions as to admissibility of evidence, method of conducting examinations, etc., are considered as in the power of the trial tribunal and such questions cannot be raised upon applications of this character.

Surely that is not to be applied to appeals or cases reserved upon the very point after a trial. In that case a policeman swore that he, upon arresting the defendant (an Italian) had a conversation with him for about ten minutes, that the defendant spoke fairly good English and that he, the policeman, understood practically all the defendant said and that the defendant answered intelligently questions put to him in English. The interpreter swore "that he has no doubt that the defendant thoroughly understood all about the trial and the evidence given."

The learned Judge, says:—

> Were it open to me to consider all the allegations in the affidavits I should unhesitatingly believe the interpreter's statements. I am convinced that the defendant had a fair trial.

That justified the learned Judge's conclusion but he proceeded:—

> I think he did not decide what it is contended he did or even what he himself contended.
>
> There is, moreover, much to be said in favour of the view that

there is no inherent right in any foreigner that the proceedings taken in our Courts shall be made wholly intelligible to him even though he should be charged with crime. It might be impossible within a reasonable time and at a reasonable expense to procure a person who could explain the proceedings to a foreign defendant. The cases in which a contrary doctrine is laid down are all upon some statutory or constitutional provision. For instance in *Rex* v. *Ah Hay* (1888), 7 Haw. 319, a case in Hawaii, it was held that the accused must in some way be made acquainted with the evidence of the witnesses and that if he have no counsel the testimony, if in a language foreign to him, must be interpreted to him. But the constitution of Hawaii provided, sec. 7, that an accused person should have the right to meet the witnesses produced against him, and that he might by himself or his counsel at his election examine the witnesses. The Court held that sec. 7 is not complied with unless the accused is in some way made to understand the evidence in order to enable him to avail himself of his further expressed constitutional right of cross-examining the witnesses and of meeting their evidence by his own proofs.

He also refers to *The Republic of Hawaii* v. *Yamane*, 12 Haw. 189, to the same effect.

The provision in the constitution of Hawaii is a very common one in the constitutions of the different States of the Union. It is perhaps in all. But I have no doubt that this principle although there expressed is quite as binding as if it was expressed in the criminal law of England and of Canada.

I have cited two English cases to shew what the English Judges do. The American decisions shew that the principle existed at common law.

In *Jackson* v. *State*, 81 Wis. 131, Cassaday, J., says:—

> The right of the accused to meet the witnesses face to face was not granted but secured by the constitutional clauses mentioned. It is the right, therefore, as it existed at common law, that was thus secured.

The cases are cited in Wigmore on Evidence, sec. 1397.

In *Campbell* v. *The State*, 11 Georgia 374*a*, the learned Judge said:—

> The admission of dying declarations in evidence was never supposed in England to violate the well-established principle of the common law that the witnesses against the accused should be examined in his presence.
>
> The right of a party accused of crime to meet the witnesses against him face to face is no new principle. It is coeval with the common law.

In *Lambeth* v. *State*, 23 Miss. 357, the Judge says:—

> The object thus had in view in adopting the clause referred to was not to introduce a new or abolish an old rule of evidence. Their aim was simply to reassert a cherished principle of the common law which had sometimes been violated in the mother country in political prosecutions.

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In another case, *The State* v. *O'Blinis*, 24 Mo. 435, the Judge says:—

> It was never supposed in England at any time that this privilege was violated by the admission of a dying declaration, etc. He must be in Court, so must the accused. He shall not detail his knowledge of the facts in a dark or secret chamber in the absence of the accused, to be afterwards read against the accused before the jury.

Now if all these Judges are correct and the provision in the constitution of Hawaii and the common law are in effect the same the case of *Rex* v. *Ah Har* (1888), 7 Haw. 319, and *Republic of Hawaii* v. *Yamane*, 12 Haw. 189, have not been successfully distinguished by the learned Judge, Riddell, J.

I do not say that the proceedings are to be made wholly intelligible to a foreign prisoner if anything turns on that. They are not wholly intelligible to most English-speaking prisoners. That is simply because you cannot have perfection.

Now as to the fact of the prisoner having counsel. The prisoner here did have counsel and the counsel asked that the testimony given in English by one of the prisoners should be interpreted to them all. I suppose the other prisoners feared that he might try to exculpate himself at their expense. The interpreter gave them the purport of the evidence in chief but not the cross-examination. I mention this because it might be contended that counsel waived the prisoners' right. I think while the fact that, that there was counsel to represent the prisoners helps the case it cannot be said universally that wherever the prisoner has counsel he is not entitled to have the evidence rendered intelligible to the accused. Here it is not claimed that the counsel knew Italian or even the Calabrian dialect. The advantage to the prisoner is that if he knows what is testified to he may supply facts of the incident or suppressed facts to the counsel to cross-examine upon.

To say that the deaf man or the foreigner who does not understand the language of the proceedings has not the inherent right to have them made intelligible to him is to say that the privilege of being present during his trial and the privilege of hearing and cross-examining the witnesses against him was a mere form and that the common law was satisfied to have the letter of its requirement complied with while its spirit and substance went unfulfilled.

In *Commonwealth* v. *Lenousky*, 206 Pa. St. 277, referred to by Riddell, J., in a case in the Supreme Court of Pennsylvania, the deposition of an absent witness taken on the preliminary hearing before the magistrate was given in evidence against the accused on the trial and the objection urged to its admissibility was that there had not been full opportunity for cross-examination below. The accused was a foreigner. In that case it happened that he did understand the language of the witness,

also a foreigner, but he did not understand the proceedings in English.

The Judge said:—

This opportunity amounted to nothing. The prisoner was a foreigner acquainted with the language of the witness, but not with that in which the proceedings were conducted and ignorant of their nature and of his rights under them. There could be no waiver without knowledge and the circumstances all indicate that the prisoner did not know of his right. In admitting the testimony the Court went a step in advance of the rule established by our cases.

I have read the proceedings of the trial of two English officers in Germany the other day who were charged with obtaining secret information about a German fort. They were represented by German counsel. But the proceedings were translated into English until the officers begged they would not take the trouble as one of them understood the German language perfectly and the other had a sufficient knowledge of it. I hope that the Courts of this country will do as they would wish the German and Italian Courts to do in the case of British subjects tried there.

I do not understand the gloss that is being put upon the decision of Riddell, J., namely, that it is for the Judge to say whether there is to be for the benefit of the prisoner an interpretation of the proceedings or not, and that there need not be provided the prisoner has not been prejudiced. Who can tell whether the prisoner has been prejudiced or not. I say, in the administration of criminal law that the Crown relying on the argument that a prisoner has not been prejudiced by an irregularity must shew a statute or must shew affirmatively that the prisoner has not been prejudiced by the course that was taken. The learned Judge here does not say that the Crown satisfied that burden or that the non-interpretation was immaterial. It is quite possible that it was. But without that statement I will not infer that it was immaterial. It has been decided in this Court that we are not to find facts when a case has been reserved.

I think the conviction should be quashed on this ground as well.

DRYSDALE, J.:—The learned County Court Judge for District No. 7 sitting under the provisions of the Criminal Code for the speedy trial of indictable offences, after convicting the defendants of robbery and sentencing each of them to five years in Dorchester penitentiary reserved a case for the consideration of this Court in the words following:—

"One of the prisoners, Joseph Sylvester, was committed for trial on the charge of unlawfully assaulting one Frank Spagnola with the intent to rob the said Frank Spagnola. The other three were bound over for trial at the first sittings of the Crim-

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inal Court at Sydney on the same charge. Joseph Sylvester was brought before me, and the other three gave notice to the sheriff that they desired to elect for trial before me and all four appeared, and said charge was stated to them and they elected to be tried before me. November the 24th was named as the date of their trial.

When arraigned the prosecuting officer put in my hands an accusation charging them that they did on Frank Spagnola with and by means of violence then and there used by them to and against the person of the said Frank Spagnola to prevent resistance did unlawfully steal from the person of the said Frank Spagnola and against the said Frank Spagnola's will money of him the said Frank Spagnola amounting to the sum of $204.

My consent to prefer said charge was not asked for by the prosecuting officer, neither was it given. I called the attention of the prosecuting officer to the fact that the charge he was preferring against the prisoners was a new one and I said they would have to elect under it. The new accusation was then read to them and they elected to be tried and pleaded "not guilty" and were tried jointly.

And after hearing the evidence I convicted them and sentenced them to five years each in Dorchester penitentiary.

Each one of the accused gave evidence on his own behalf. Two of the prisoners could not understand English and the evidence given by their fellow prisoners was only partly interpreted to them.

After trial, Mr. Gunn, counsel for accused, asked for a case to be stated for the consideration of the Supreme Court in banco on the following grounds:—

(1) That it was necessary for the prosecuting officer to obtain my consent under section 834 of chapter 9 of the statutes of Canada, 1909, and the other provisions of the Criminal Code before the new accusation could be preferred.

(2) That the evidence of each one of the accused must be interpreted to the other accused who did not understand English.

(3) That an accusation that subjected the accused to a greater penalty could not be preferred against them before me without their express consent.

I granted the reserved case and reserve for the consideration of the Supreme Court in banco sitting as a Court for Crown cases reserved, the following points:—

(1) Was it necessary for the prosecuting officer to obtain my consent before preferring the new accusation in order to render the conviction valid?

(2) Was my pointing out of to the prosecuting officer the fact that he was preferring an accusation different from what the prisoner Joseph Sylvester was committed for, and the other three sent up for trial, a consent under said section 834?

(3) Should the evidence have been interpreted to the prisoner who did not understand the language in which it was given in order to make the conviction valid?

(4) Was it necessary that the prisoner should expressly consent to the new accusation which was for a greater crime than that for which they first elected to be tried in order to make the conviction valid?

(5) Was their consent given when they elected to be tried before me when the new accusation was read to them?

The main question argued before us arises over the course pursued by the said learned Judge in trying the prisoners for an offence other than the one for which they had been committed to jail or bound over, it being urged on behalf of the prisoners that the consent of the Judge necessary under section 834 of the Code was not given as it appeared from the case as stated that the Judge required the new charge to be read to the prisoners and their election to be had thereon and that thereafter they were formally arraigned and tried before him on such new or substituted charge. We were inclined to assume that what the learned Judge meant to ask in the stated case was whether his consent should be given in writing or evidenced in some formal manner in order to render valid proceedings on a new or substituted charge. In order that there should be no misunderstanding as to what took place before the said Judge this Court required from the learned County Court Judge a further statement touching the matters before him when the new or substituted charge was dealt with. Thereupon the said Judge furnished a further statement by way of an amended stated case. (The amended case is set out in full in the opinion of Graham, E.J.).

It is now made abundantly clear that the prosecuting officer with the Judge's knowledge decided to proceed against the prisoners on a new or substituted charge other than the one for which the prisoners were committed, that the Judge required that the prisoners elect as to such new charge, and upon their election decided to proceed with and hear such charge. That they were formally arraigned and pleaded to such charge and a trial duly had thereon.

In view of all this it is to my mind hard to understand an argument addressed to us to the effect that the Judge had not consented to the prosecuting officer preferring such new or substituted charge. But the point as now submitted is when a prosecuting officer desires to proceed on a new charge is he required in order to the conferring of jurisdiction formally to obtain the consent of the Judge to the preferring of such charge before proceeding therewith, or is it sufficient within the meaning of said section 834 for the Judge in order to evidence his consent to require an election on such new charge, have a regular and formal arraignment thereon, a day fixed for the trial

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and a trial thereon in due course before him. It is very obvious that the Judge was giving his consent to the preferring of the new charge before him when he required an election thereon and thereafter regularly proceeded therein with the trial. If he were not consenting to the prosecuting officer preferring such new charge one would naturally ask what he was doing in requiring an election, having an arraignment and proceeding with the trial. Surely his consent was involved in all this. I find nothing in the statute that requires the Judge's consent to be evidenced in any formal manner and if in fact his consent is had I am of opinion that the statute is complied with. Consent of the Judge to the prosecuting officer preferring a new or additional charge is under the statute necessary but no formality is required or necessary in obtaining such consent. And I am of opinion if such consent is obtained or necessarily involved in the regular proceedings before such Judge the regularity or validity of the trial cannot be impeached by reason of the absence of a formal or written consent to the preferring of the charge. We had cited on the argument the case of *The King* v. *Cohn*, decided in this Court and reported in 36 N.S.R. 240 (*R.* v. *Cohon*, 6 Can. Cr. Cas. 386), a case in which there was no consent obtained to the preferring of a new or different charge, and as I understand the case where there was no election and in fact no consent.

This Court in that case said the Judge's consent must be expressed in some way and does not I think say more than that.

I am of opinion that if the Judge's consent is in fact given in the due course of proceedings before him such a consent is all that the statute contemplates, and if such consent is oral or necessarily involved in his procedure and directions the record of the trial and proceedings duly made up and entered at the conclusion of the trial and sentence shewing amongst other things such consent is all the formality necessary in the way of a formal entry.

Another question was raised as to the regularity of the proceedings on the trial involved in or arising out of the fact that the prisoners were Italians and over allegations that a sufficient interpretation of the proceedings at the trial had not taken place.

It would seem from the case that the prisoners were Italians that the evidence for the prosecution was all given in Italian through an interpreter, that one of the prisoners gave evidence in English on behalf of the defence and that the trial Judge instructed the interpreter to interpret and give the purport of such evidence to the other prisoners, that this was done during the direct examination of such prisoner but omitted in regard to the cross-examination. I think that the trial Judge

must be held to be the Judge of the capacity of the interpreter and if he saw that the purport or substance of the evidence given by one of the prisoners for the defence was translated to the other prisoners it could not reasonably be said that anything occurred to their prejudice in the trial. It will be noted that the evidence for the prosecution was all in the prisoner's own tongue, that the evidence given by the prisoner for the defence was given in English, that the prisoners were represented at the trial by English-speaking counsel and the purport or substance of the direct examination of the prisoner examined translated by an interpreter to the other prisoners.

In the light of all this I do not think it can be reasonably said that anything occurred calculated to prejudice the prisoners or interfere with a fair trial on the charge preferred. I do not think there is any rule that requires a literal translation of everything that has taken place at a trial to be given to or furnished the prisoners, speaking a foreign language only and I am satisfied from the statement of the learned trial Judge here that all proper precautions were taken before him on the trial necessitated by reason of the prisoners or some of them speaking a foreign language only.

The prisoners understood the Crown's case inasmuch as it is made wholly by witnesses giving evidence in their own language. They with their counsel decide to put one of the prisoners on the witness stand for the defence. He speaks English and is examined in chief by their own counsel in English. The other prisoners we will assume do not understand English but their counsel does, and in addition to this the substance or purport of what their fellow prisoner says in the witness stand on his examination in chief, is translated to them. The Crown officer cross-examines the prisoner so giving evidence in English and counsel for the prisoners is alive to every point of such cross-examination.

Can it be said that because such cross-examination is not translated to the prisoners there was anything done calculated to prejudice their trial? They put him in the witness box on their behalf to be examined in English by their own counsel and it is to be assumed with full knowledge of what he would state. They hear from the interpreter the substance of his statement as made and their counsel hears the statement both direct and cross in detail, and in the light of this proceeding can it be said that because there was not a literal translation of direct examination and cross-examination in all its details the prisoners were or were likely to be prejudiced? I think not.

It seems to me that if a trial Judge takes care in such a case that prisoners have counsel that understand the language of a witness and that in addition to this course the substance

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or purport of the evidence of the witness to be furnished the prisoners he has done enough to safeguard the prisoners and to satisfy all reasonable requirements arising out of such a situation.

I would affirm the conviction herein.

Conviction affirmed.

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Affirmed.

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(4) Was it necessary that the prisoner should expressly consent to the new accusation which was for a greater crime than that for which they first elected to be tried in order to make the conviction valid?

(5) Was their consent given when they elected to be tried before me when the new accusation was read to them?

The main question argued before us arises over the course pursued by the said learned Judge in trying the prisoners for an offence other than the one for which they had been committed to jail or bound over, it being urged on behalf of the prisoners that the consent of the Judge necessary under section 834 of the Code was not given as it appeared from the case as stated that the Judge required the new charge to be read to the prisoners and their election to be had thereon and that thereafter they were formally arraigned and tried before him on such new or substituted charge. We were inclined to assume that what the learned Judge meant to ask in the stated case was whether his consent should be given in writing or evidenced in some formal manner in order to render valid proceedings on a new or substituted charge. In order that there should be no misunderstanding as to what took place before the said Judge this Court required from the learned County Court Judge a further statement touching the matters before him when the new or substituted charge was dealt with. Thereupon the said Judge furnished a further statement by way of an amended stated case. (The amended case is set out in full in the opinion of Graham, E.J.).

It is now made abundantly clear that the prosecuting officer with the Judge's knowledge decided to proceed against the prisoners on a new or substituted charge other than the one for which the prisoners were committed, that the Judge required that the prisoners elect as to such new charge, and upon their election decided to proceed with and hear such charge. That they were formally arraigned and pleaded to such charge and a trial duly had thereon.

In view of all this it is to my mind hard to understand an argument addressed to us to the effect that the Judge had not consented to the prosecuting officer preferring such new or substituted charge. But the point as now submitted is—when a prosecuting officer desires to proceed on a new charge is he required in order to the conferring of jurisdiction formally to obtain the consent of the Judge to the preferring of such charge before proceeding therewith, or is it sufficient within the meaning of said section 834 for the Judge in order to evidence his consent to require an election on such new charge, have a regular and formal arraignment thereon, a day fixed for the trial

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and a trial thereon in due course before him. It is very obvious that the Judge was giving his consent to the preferring of the new charge before him when he required an election thereon and thereafter regularly proceeded therein with the trial. If he were not consenting to the prosecuting officer preferring such new charge one would naturally ask what he was doing in requiring an election, having an arraignment and proceeding with the trial. Surely his consent was involved in all this. I find nothing in the statute that requires the Judge's consent to be evidenced in any formal manner and if in fact his consent is had I am of opinion that the statute is complied with. Consent of the Judge to the prosecuting officer preferring a new or additional charge is under the statute necessary but no formality is required or necessary in obtaining such consent. And I am of opinion if such consent is obtained or necessarily involved in the regular proceedings before such Judge the regularity or validity of the trial cannot be impeached by reason of the absence of a formal or written consent to the preferring of the charge. We had cited on the argument the case of *The King* v. *Cohn*, decided in this Court and reported in 36 N.S.R. 240 (*R.* v. *Cohon*, 6 Can. Cr. Cas. 386), a case in which there was no consent obtained to the preferring of a new or different charge, and as I understand the case where there was no election and in fact no consent.

This Court in that case said the Judge's consent must be expressed in some way and does not I think say more than that.

I am of opinion that if the Judge's consent is in fact given in the due course of proceedings before him such a consent is all that the statute contemplates, and if such consent is oral or necessarily involved in his procedure and directions, the record of the trial and proceedings duly made up and entered at the conclusion of the trial, and sentence shewing amongst other things such consent, is all the formality necessary in the way of a formal entry.

Another question was raised as to the regularity of the proceedings on the trial involved in or arising out of the fact that the prisoners were Italians and over allegations that a sufficient interpretation of the proceedings at the trial had not taken place.

It would seem from the case that the prisoners were Italians that the evidence for the prosecution was all given in Italian through an interpreter, that one of the prisoners gave evidence in English on behalf of the defence and that the trial Judge instructed the interpreter to interpret and give the purport of such evidence to the other prisoners, that this was done during the direct examination of such prisoner but omitted in regard to the cross-examination. I think that the trial Judge

must be held to be the Judge of the capacity of the interpreter and if he saw that the purport or substance of the evidence given by one of the prisoners for the defence was translated to the other prisoners it could not reasonably be said that anything occurred to their prejudice in the trial. It will be noted that the evidence for the prosecution was all in the prisoner's own tongue, that the evidence given by the prisoner for the defence was given in English, that the prisoners were represented at the trial by English-speaking counsel and the purport or substance of the direct examination of the prisoner examined translated by an interpreter to the other prisoners.

In the light of all this I do not think it can be reasonably said that anything occurred calculated to prejudice the prisoners or interfere with a fair trial on the charge preferred. I do not think there is any rule that requires a literal translation of everything that has taken place at a trial to be given to or furnished the prisoners, speaking a foreign language only and I am satisfied from the statement of the learned trial Judge here that all proper precautions were taken before him on the trial necessitated by reason of the prisoners or some of them speaking a foreign language only.

The prisoners understood the Crown's case inasmuch as it is made wholly by witnesses giving evidence in their own language. They with their counsel decide to put one of the prisoners on the witness stand for the defence. He speaks English and is examined in chief by their own counsel in English. The other prisoners we will assume do not understand English but their counsel does, and in addition to this the substance or purport of what their fellow prisoner says in the witness stand on his examination in chief, is translated to them. The Crown officer cross-examines the prisoner so giving evidence in English and counsel for the prisoners is alive to every point of such cross-examination.

Can it be said that because such cross-examination is not translated to the prisoners there was anything done calculated to prejudice their trial? They put him in the witness box on their behalf to be examined in English by their own counsel and it is to be assumed with full knowledge of what he would state. They hear from the interpreter the substance of his statement as made and their counsel hears the statement both direct and cross in detail, and in the light of this proceeding can it be said that because there was not a literal translation of direct examination and cross-examination in all its details the prisoners were or were likely to be prejudiced? I think not.

It seems to me that if a trial Judge takes care in such a case that prisoners have counsel that understand the language of a witness and that in addition to this course the substance

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or purport of the evidence of the witness to be furnished the prisoners he has done enough to safeguard the prisoners and to satisfy all reasonable requirements arising out of such a situation.

I would affirm the conviction herein.

Conviction affirmed.

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Jan. 30.

REPUBLIC OF FRANCE v. PEUGNET.

Saskatchewan Supreme Court, Brown, J., sitting as an Extradition Judge. January 30, 1912.

1. EVIDENCE (§ I A—8)—JUDICIAL NOTICE OF EXTRADITION TREATIES—CANADIAN ORDERS IN COUNCIL—EXTRADITION ACT (CAN.).

Judicial notice is to be taken under sec. 8 of the Extradition Act, R.S.C. 1906, ch. 155 of extradition treaties and extradition orders-in-council published in the *Canada Gazette*, the official paper of the Government of Canada, without production in evidence of a copy of the *Gazette*.

[See also sec. 1128 of the Criminal Code.]

2. EXTRADITION (§ I—4)—EVIDENCE FOR EXTRADITION ORDER—WHAT EVIDENCE JUSTIFIES COMMITTAL FOR TRIAL.

In determining whether the evidence upon a demand for extradition is sufficient for a commitment in extradition, the Judge or commissioner may order extradition if the evidence makes out a probable case of guilt by shewing circumstances which raise a presumption against the prisoner; but if, from the slender nature of the evidence, the unworthiness of the witnesses, or the conclusive proof of innocence produced in answer, the Judge or commissioner is satisfied that the charge is not sustained and that if the trial were within this jurisdiction, the accused must be acquitted, an order for extradition should be refused.

[*Girvin* v. *The King* (1911), 45 Can. S.C.R. 167, applied; 14 Halsbury's Laws of England, 412 approved.]

EXTRADITION proceedings against Emile Oscar dit Peugnet upon the information of an Inspector of the Royal North-West Mounted Police on charges of robbery and murder of one Adelaide Warnier Le Grande, at St. Leger, in France, on July 10, 1910.

The accused was ordered to be committed to gaol for extradition.

J. F. Bryant, for the Republic of France.

F. W. G. Haultain, K.C., for accused.

BROWN, J. (oral):—In this case the objection was raised at the outset that the information or complaint charged the accused with two offences; and I at that time decided, largely under the authority of the case of *Re Gaynor and Greene*, 10 Can. Cr. Cas. 154, that the two offences charged were of a cognate character, and that in consequence the information was not objectionable on that ground. The point, I might say, is not one altogether free from doubt; and if counsel for the accused thinks

the matter of sufficient importance, he can have my decision reviewed before the Court en banc by way of habeas corpus application.

It is also objected that there is no evidence of an extradition treaty with the Republic of France, or that the offences charged, namely, the offences of murder and robbery, are extraditable offences. It is not objected that there is no treaty, or that such treaty and the Order-in-Council with reference thereto were not published in the *Gazette*, but the objection is that there was no evidence offered of such treaty, that the *Gazette* should have been put in as evidence.

I am of opinion that, in view of section 8* of the Extradition Act, the publication of the treaty and of the Order-in-Council with reference thereto in the *Gazette*, is sufficient, and that it is not necessary for the prosecution to tender or produce the *Gazette* as evidence. It seems to me impossible to give the latter portion of section 8 an intelligent meaning at all unless it means that the Court can take judicial notice of the treaty and of the Order-in-Council without production of the *Gazette* to the Court. I may say further, that I am confirmed in that view of the section by the fact that I am unable to find in any reported case in our country that evidence in this respect was ever tendered, or that it was ever called for, or that it was ever held to be necessary.

The treaty with France and the Order-in-Council with reference thereto, both of which appear in the Statutes of Canada, 1879, at page 11, shew the two offences charged in this case to be extraditable.

It is also objected that the accused has already been before a Judge in connection with this matter and has been discharged. (*Re Peugnet* (1911), 17 W.L.R. 565.)

The information laid is slightly different from that laid in the previous charge, and the evidence offered is of a much more conclusive character; and under the authority of *Re Harsha* (No. 2), 11 Can. Cr. Cas. page 62, this proceeding is perfectly proper.

Now, as to the sufficiency of the evidence in this case. Section 18 of the Extradition Act stipulates that the evidence produced must be of such a character as would, according to the law of Canada, justify the committal of the accused for trial if the crime had been committed in Canada. Clarke, in his "Magistrates' Manual," 3rd edition, at page 92, lays down the

*8. The publication in the *Canada Gazette* of an extradition arrangement, or an order in council, shall be evidence of such arrangement or order, and of the terms thereof, and of the application of this part, pursuant and subject thereto; and the Court or Judge shall take judicial notice, without proof, of such arrangement or order, and the validity of the order and the application of this part, pursuant and subject thereto shall not be questioned.

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following as the duty of justices in disposing of a preliminary hearing:—

> Justices ought not to balance the evidence and decide according as it preponderates, for this would, in fact, be taking upon themselves the functions of the petty jury and be trying the case. They should consider whether or not the evidence makes out a probable case of guilt. If, however, from the slender nature of the evidence, the unworthiness of the witnesses, or the conclusive proof of innocence produced on the part of the accused, they feel that the case is not sustained, and that if they send it for trial he must be acquitted, they should discharge the accused.

Halsbury's Laws of England," vol. xiv., at page 412, lays down the following as the rule in a case of this character:—

> There must be prima facie proof of the guilt of the accused given before the magistrate according to the English rules of evidence, and he can only act upon evidence given before himself. This evidence may be partly in the form of depositions or statements on oath or affirmation taken in a foreign state, or copies thereof, and foreign certificates of, or judicial documents stating the fact of, conviction may, if duly authenticated, be received in evidence. If such evidence is produced as would, according to English law, justify the committal for trial of the prisoner if the crime of which he is accused had been committed in England, the magistrate is bound to commit him to prison. There must be some evidence that the prisoner committed the extradition crime within the jurisdiction of the country seeking extradition to justify the magistrate in committing the prisoner.

Then again, I would refer to the very recent decision in the Supreme Court of Canada, the case of *Girvin* v. *The King* (1911), 45 Can. S.C.R. 167, at page 169. I quote the words of the Chief Justice on this page, in which he says:—

> A careful perusal of the evidence here satisfied me that there is evidence quite sufficient to prove that the house was destroyed by a fire under circumstances which clearly pointed to incendiarism, and that the accused might fairly be presumed to have set the fire.

Now, if that is sufficient in a case such as *Girvin* v. *The King*, it is clearly sufficient in a case of this kind, where it is simply, as it were, a preliminary hearing. It may be that many of these witnesses whose depositions have been put in in this case, when cross-examined by proper counsel, will be found to fall down to some extent. There is unquestionably a great deal of matter in these depositions which according to the law is not evidence—matters of opinion, of inference, conclusions on the part of witnesses, and a great deal of hearsay evidence. But after leaving out and disregarding all that is objectionable, it seems to me that the evidence in this case brings it within the rule that I have quoted authority for, and requires me, certainly justifies me, in committing the accused for trial. In the first place there is no doubt in my mind that the party who

appears before me is the same person with reference to whom these depositions have been made. The warrant that has been put in as evidence, together with the evidence of the witness Leon Peugnet, the uncle of the accused, puts that matter, it seems to me, beyond any reasonable doubt. Again, there is no doubt, according to the evidence, that these offences were committed between 10.30 and 12 o'clock on the morning of the 10th of July, 1910. There is no direct evidence connecting the accused with the crime. There is evidence to shew that the accused had the opportunity of committing that crime. There is evidence which shews that he was seen that morning during those hours going towards this house in which the offence was committed, and that he was also shortly afterwards, and within those hours, seen coming from the direction of that house. The evidence shews also that the accused, on more than one occasion shortly before this Sunday, made some very remarkable statements predicting that something was going to take place on this Sunday which would bring him into possession of some money. It seems fairly conclusive from the evidence that the accused did not have but very little money, to say the most, for some considerable time prior to this Sunday; and immediately after the crime he seems to have had any amount of money. We find that he not only has sufficient money to bring him to Canada, but he has sufficient money to pay a great many debts that had been incurred, and to spend some days in what we might call riotous living. As a matter of fact, the amount of money which he did spend, and which has been fairly well accounted for, fairly well corresponds with the amount of money which the evidence pretty conclusively proves was stolen from this house at the time of this murder.

The accused himself has given several explanations, if the evidence of the witnesses is to be believed—and for the purpose of this hearing I believe them—as to where he got this money. According to one story he got it from some agricultural society, apparently some emigration society at Paris. Now, why these different accounts, if the money was obtained honestly? It was contended by his counsel that he got his money from his parents, or that he may have got it from his parents, or his grandparents, that the evidence shews he had stolen money from his grandparents. Well, if so, why these contradictory statements with reference to where he did get it? Now, if he got the money from Abbé Gaire, or from the emigration society, we might naturally, it seems to me, draw the inference that he would get what was sufficient for the purpose.

His object, his desire, was to come to Canada, and we would expect him to get sufficient money to bring him to Canada. But we find that he has in his possession, and that he spends a

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great deal more money than was sufficient to bring him to Canada. That, it seems to me, requires some explanation.

I think the evidence on the whole, therefore, not only justifies me, but requires that I put the accused upon his trial. It may be that he can explain everything satisfactorily. I hope he can. But I do not feel that I would be justified in allowing him his freedom under the circumstances. So that the order will go.

Commitment for extradition.

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Jan. 18.

WALTERS v. WYLIE.

Ontario Divisional Court, Clute, Latchford and Middleton, JJ. January 18, 1912.

1. LANDLORD AND TENANT (§ II D—33)—LEASE—FORFEITURE FOR BREACH OF COVENANT—POSITIVE AND NEGATIVE COVENANTS—ONTARIO STATUTE, 1 GEO. V. 1911, CH. 37.

A forfeiture for breach of covenant in a lease (except for payment of rent) cannot be enforced by action, or otherwise until after a notice has been served pursuant to section 20 (2) of the Ontario Landlord and Tenant Act; this provision is general and applies to both positive and negative covenants.

[*Harman* v. *Ainslie*, [1904] 1 K.B. 698, followed.]

2. LANDLORD AND TENANT (§ III E—116)—RELIEF FROM FORFEITURE—MONEY COMPENSATION.

In an action to enforce a forfeiture, the Court will upon proper terms grant relief even in the case of intentional breach of covenants, and substitute money compensation for forfeiture.

[See *Rose* v. *Spicer*, [1911] 2 K.B. 234.]

APPEAL by the defendant from the judgment of Britton, J., in favour of plaintiff, at the trial of an action brought by a tenant against his landlord for wrongful entry.

The judgment was varied by reducing the damages.

I. F. Hellmuth, K.C., for the defendant.

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

CLUTE, J.:—Upon a perusal of the evidence, I am of the opinion that the trial Judge was right in finding that the evidence did not amount to a forfeiture. There are undoubtedly many suspicious circumstances, but there is no evidence of liquor having been sold upon the premises, nor that the plaintiff kept a disorderly house.

The defendant should be charged for use and occupation of the premises. For this and his wrongful entry, I think $75 would be full compensation; and the verdict should be reduced to this amount. There was no conversion of the goods, in my opinion, nor was there ever a special demand for the goods; the demand was for the premises.

With the variation of the judgment here indicated, the appeal is dismissed. The appellant having failed upon the main issue, but having succeeded with respect to the question of damages, there should be no costs of this appeal.

MIDDLETON, J.:—The 13th section of the Act respecting Landlord and Tenant, R.S.O. 1897, ch. 170 (now sec. 20(2) of 1 Geo. V. ch. 37, if that applies), is fatal to this appeal:

> A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, [other than a proviso in respect of the payment of rent], shall not be enforceable, by action or otherwise, unless and until the lessor serves upon the lessee a notice specifying the particular breach complained of, and if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach.

This provision is general, and applies to both positive and negative covenants: *Harman* v. *Ainslie*, [1904] 1 K.B. 698.

It is the legislative intention to do away with forfeiture of leaseholds, which may be of great value, even in the case of intentional breach of covenants, and to substitute for forfeiture money compensation. This is not the case of an application for relief from forfeiture under sec. 13(2) (20(3)), where the landlord's right has become enforceable because an adequate notice has been given and the tenant has failed to comply—even then upon proper terms the Court might and probably would relieve: *Rose* v. *Spicer*, [1911] 2 K.B. 234.

The notice (exhibit 4) is clearly not a notice under the statute.

There has been no conversion of the goods, and the plaintiff ought to be at liberty to take them, and the damages should be reduced, as suggested, to $75.

The attention of the parties is drawn to 10 Edw. VII. ch. 30, sec. 22(*c*).*

I would give no costs of appeal.

LATCHFORD, J.:—I agree.

Damages reduced.

*The Ontario statute here referred to deals with the jurisdiction of County Courts in actions of trespass to land involving less than $500.

MAN.

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Jan. 24.

ZDAN v. HRUDEN.

Manitoba King's Bench. Trial before Macdonald, J. January 24, 1912.

1. DEEDS (§ II G—70)—PARTIAL FAILURE OF CONSIDERATION—COVENANT FOR MAINTENANCE FOR LIFE—FIXING AND CHARGING ITS VALUE ON DEFAULT.

Where a conveyance of land is made in part consideration of the support and maintenance for life of the grantor by the grantee at the latter's place of residence, and the grantee by denial of common necessaries and other wrongful acts makes it impracticable for the parties to live in the same house, the Court may fix the annual value of the maintenance and charge the amount as a lien upon the land in addition to an award of personal judgment against the wrong-doer.

[See also *Power* v. *Power*, 43 N.S.R. 412, 2 Can. Ten Year Digest, 3542.]

ACTION to enforce an agreement for the support of the plaintiff and his wife for the remainder of their lives made upon a conveyance of land by the plaintiff to the defendant, and to charge the value of such maintenance upon the lands by way of lien as upon a partial failure of consideration.

Judgment was given for the plaintiffs.

Messrs. *A. C. Williams*, and *J. S. Cameron*, for plaintiff.

Messrs. *W. J. Cooper*, K.C., and *A. Meighen*, for defendants.

MACDONALD, J.:—The plaintiff was on the 28th June, 1908, the owner of the north-east quarter of section thirty (30) in township eighteen (18) in range twelve (12) west of the principal meridian in the province of Manitoba, and on that date he executed a conveyance of the said lands to the defendant, and, although the deed of conveyance recites the consideration as being eleven hundred dollars, the plaintiff alleges that there was a further consideration that the defendant was to support him and his wife, who are both old and illiterate, for the rest of their natural lives. This further consideration is denied by the defendant, but the agreement subsequently entered into between the parties corroborates the plaintiff's evidence.

For two years after the conveyance of the lands the plaintiff and his wife resided with the defendant, and during that time were satisfied with the treatment received and assisted in providing material comforts from cattle and fowl owned by the plaintiff, and allowed to remain on what was then the defendant's farm without any arrangement with respect to the keep and housing of the said cattle and fowl. The plaintiff was also the owner of some farm implements and of the furniture in the house on the farm which was used by all the inmates of the house in common. Some differences arose between the plaintiff and the defendant as to the ownership of the cattle and implements, the defendant claiming a part as having passed to him in the conveyance of the land. These differences were settled by an agreement in writing entered into by them in March, 1909,

by which agreement the plaintiff surrendered to the defendant all his equity in the lands and also all his implements, cattle and fowl then possessed by the plaintiff, and in consideration thereof the defendant agreed to keep the plaintiff and his wife for the rest of their natural lives, and to provide all the necessaries of life for the plaintiff. The agreement further provides that the plaintiff is to live with the defendant.

It was further provided that in the event of the defendant selling the said described lands and not providing for the plaintiff, a settlement shall be made by arbitration, if possible.

After the execution of this agreement, the defendant became the owner of all the plaintiff's earthly possessions and the plaintiff was entirely at the mercy of the defendant upon whose treatment the peace of mind of the plaintiff and his wife depended.

Having thus become possessed, the defendant almost immediately began making matters disagreeable, differences became numerous, Police Court proceedings and counter proceedings were prosecuted until it became an utter impossibility for them to live under the same roof and although the plaintiff may not have been free from blame, yet the defendant was the chief aggressor. He denied the plaintiff and his wife the common ordinary necessaries of life, denying them even the indispensable item of fuel during the cold weather and otherwise behaving in a manner betraying his self-imposed duty of caring for the plaintiff and his wife in a manner fitting their lowly station in life.

I find that the defendant has by his conduct been the means of a breach of the agreement referred to and has made it impossible for the plaintiff and his wife to reside with him, but his legal duty still exists and the spirit of the agreement must be carried out. The defendant says that it cost him ten dollars a month to maintain the plaintiff and his wife in his own household. It cannot, therefore, be any hardship upon him to support them to a slight extent beyond that amount elsewhere than in his own household, and taking into account the station in life of the parties, I do order that the defendant pay the plaintiff one hundred and fifty dollars a year during the natural lives of the plaintiff and his wife, and on the death of either, the sum of one hundred dollars a year to the survivor during the term of his or her natural life, such annuity to be a charge upon the lands hereinbefore described, and payment thereof to be made on the 1st day of October in each year.

Costs to the plaintiff.

Judgment for plaintiff.

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Jan. 16.

TAYLOR v. PELOF.

Ontario High Court. Britton, J. January 16, 1912.

INJUNCTION (§ I E—40)—TRESPASS BY LANDLORD ON DEMISED PREMISES —ABSENCE OF ACTUAL DAMAGE.

An injunction will not be continued against a landlord for trespass on the demised premises where the plaintiff has not made out a case of actual damage, present or future, there being a sufficient remedy in an action for damages if any were sustained.

MOTION by the plaintiff to continue an interim injunction, granted, upon the application ex parte of the plaintiff, by one of the local Judges at Ottawa, restraining the defendant from excavating and carrying on building operations upon the premises No. 48 Muchmore street, in the city of Ottawa, said to be under lease from the defendant to the plaintiff.

J. F. Smellie, for the plaintiff.

F. B. Proctor, for the defendant.

BRITTON, J., said that the plaintiff did not make out a case of any actual damage, either present or future. Even assuming that the plaintiff's lease covered the land on which the defendant was doing work, that part of the land was not now of any advantage to the plaintiff; and the lease will expire on the 30th April next. On the whole facts, this seemed to be a case rather for damages, if the plaintiff was entitled to recover at all, than for an injunction. Stopping the defendant's work might be a serious matter for him; and what the defendant had done and proposed to do in the way of building could not seriously injure the plaintiff in any way. Injunction dissolved; costs to be in the discretion of the trial Judge.

Injunction dissolved.

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Jan.

WALLENBERG (appellant, defendant) v. MERSON et al. (respondents, plaintiffs).

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

1. MARKETS (§ I—4)—PRIVATE MARKET STALLS.

An aggregation of private market stalls does not constitute a public market so long as the individual tenants only may carry on their trade therein.

2. MARKETS (§ I—1)—WHAT CONSTITUTES A PUBLIC MARKET.

A public market is one to which any person whosoever may bring and offer for sale marketable articles subject only to municipal and police regulations.

3. LANDLORD AND TENANT (§ II B—15)—LEASE OF PRIVATE MARKET STALL —NO IMPLIED COVENANT THAT LANDLORD SHALL OBTAIN MUNICIPAL LICENSE.

A landlord who leases stalls in a private market erected by him is not bound to obtain for his tenants municipal licenses allowing such tenants to carry on their trade therein in the absence of any stipulation to that effect in the leases, but the tenants may compel the municipal authorities by mandamus to grant them such licenses.

4. LICENSE (§ II C—46)—MUNICIPAL MARKET LICENSES—LEASE OF PRIVATE MARKET STALLS WITHOUT LICENSE.

Leases of private market stalls are not invalid as based on an illegal consideration by reason of the fact that the municipal authorities have refused to grant the licenses for the stalls, and such leases will not be cancelled because the tenants allege they have been deprived of the enjoyment of the premises leased as a result of the city's refusal to grant them such license.

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WALLENBERG v. MERSON.

Statement

APPEAL from a judgment of the Court of Review of the 23rd of June, 1911 (Pagnuelo, Charbonneau and Dunlop, JJ.), reversing the judgment of the Superior Court for the district of Montreal (Davidson, J.), rendered on the 24th of February, 1911, which had dismissed with costs the action of the plaintiffs-respondents in resiliation of their lease with defendant-appellant.

Plaintiffs alleged a lease from defendant stipulating among other things:—

> Mr. A. Wallenberg of the city of Montreal, Province of Quebec, gives in rent to Mr. Merson herein known as tenant of the same place, with promise to permit the said tenant to peaceably enjoy for the space of two years and eight months, beginning the 1st day of September, 1910, till the 30th of April, 1913, the use of stall No. 22, situated in Wallenberg's Market. . . . also all that pertains thereto, without exception or reserve, the said tenant declaring himself fully cognizant of same and requiring no further designation thereof, and being satisfied therewith.

The tenant was "to satisfy all the requirements exacted by the police and corporation authorities for which tenants in general are responsible. This lease will be subject to the rules and by-laws of the market."

They took possession of the stall on November 1st, 1910, and occupied until November 30th. The city of Montreal in November protested defendant and all his tenants, threatening legal proceedings on the ground that the building was a public market. Plaintiffs therefore prayed for the cancellation of the lease as illegal being in contravention of the city by-laws and exposing plaintiffs to prosecutions.

Defendant pleaded that the building was not a public market in the sense of the law and of the municipal by-law; that if the city refused a license such refusal was unjust and plaintiffs could secure redress by mandamus; that the building inspector had approved of the plans before the building was put up; and that therefore plaintiffs' action should be dismissed.

The trial was held on the 19th and 23rd December, 1910, and on the 24th of February, the action was dismissed by the trial Judge in the Superior Court (Davidson, J.). This judgment was reversed by the Court of Review but restored by the decision of the Court of King's Bench, now reported.

The judgment of Davidson, J., now confirmed, was as follows:—

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"Considering that previous to the erection of said building, defendant applied to the building inspector for leave to erect the same; that in his application the purpose of the building was declared to be a 'Marché Wallenberg,' and that the building inspector granted leave;

"Considering that said building is more than 500 yards from any existing public market;

"Considering that the city has issued butchers' licenses to the departmental stores of Rea and Scroggie, and that others of like character have been issued;

"Considering that by said lease plaintiffs covenanted 'to satisfy all the requirements enacted by the police and corporation authorities for which tenants in general are responsible';

"Considering that plaintiffs rely on by-law 296 of the city of Montreal, sec. 14, and defendant, on sec. 52 thereof;

"Considering that by 37 Viet. (Q), ch. 51, sec. 123, the city may establish 'public markets' and that by-law 296, art. 1, sets forth what are the public markets in the city of Montreal;

"Considering that the expression 'public market' means a legally established market and not merely a de facto market: see *Benjamin* v. *Andrews*, 5 C.B.N.S., 299, 6 W.R. 692;

"Considering that said contract of lease was not a contract with an unlawful consideration, or prohibited by law or contrary to good morals or public order within the meaning of C.C. 989, 990; but that the business to be carried on in said stall was and is, like a great many others, subject to regulation and license by the municipal authority: see Laurent, vol. 25, No. 153, p. 167; by-law 223, arts. 50, 51 and by-law 296, arts. 52, 53;

"Considering that plaintiff expressly undertook to subject himself to all the requirements of the municipal authority;

"Considering that plaintiffs have not made it appear, that he has taken legal steps to compel the city to grant him a license, or to obtain a decision from competent authority on his rights in that respect;

"Doth dismiss plaintiff's action with costs."

Plaintiffs inscribed in Review from this judgment and their appeal was heard by Pagnuelo, Charbonneau, and Dunlop, JJ.

On June 23rd, 1911, the Court of Review reversed the judgment of the trial and maintained the action in cancellation.

The defendant then inscribed his case for hearing before the Court of King's Bench, appeal side; ARCHAMBEAULT, C.J., TRENHOLME, LAVERGNE, CARROLL, and GERVAIS, JJ., present, on November 17th, 1911.

Messrs. *E. Pélissier*, K.C., and *S. Beaudin*, K.C., for appellant:—The meat trade is a legal calling, it is not illicit, although

subject to police control like other trades. The city by its charter has only a right to control and tax private butcher stalls, provided they are not within a radius of 500 yards from the nearest public market, it has not the right of prohibiting. Power to regulate is not power to restrain; that power must not contravene common rights: Dillon, secs. 223, 235; *Hall* v. *City of Moose Jaw*, 3 Sask. R. 22. Par. 31 of sec. 300 of 62 Vict. ch. 58 (Quebec), the city charter, authorises the Montreal city council to pass by-laws for the granting of licenses to and the establishment of butcher stalls, and the sale, wholesale or retail, of meat and poultry; and par. 38 authorises by-laws for the establishment of markets and stalls, under license and regulations. Par. 58 of the same section provides for the establishment of private markets under licenses and regulations to be fixed by by-law. Now, by art. 1 of by-law No. 296 (26th January, 1903), the city council established 5 public markets and by sec. 52 of this same by-law the council reserved the right to grant a license to individuals for the sale of marketable articles provided the establishment seeking a license be distant not less than 500 yards from the nearest public market. It follows, therefore, that the Wallenberg market cannot be a public market. Plaintiff had another recourse; they should have compelled the city to grant this license by mandamus as defendant never assumed this obligation by his lease.

Messrs. *D. Brodeur*, K.C., and *Gustave Lamothe*, K.C., for respondents:—The city of Montreal has alone the exclusive right to establish and operate a public market within the city limits. Biggar, Municipal Corporations, p. 718, No. 580, secs. 299, 300 and 864 of City Charter shew clearly that the Provincial Legislature has granted the city the exclusive right to supervise, establish and operate public markets. It may allow private citizens to do so, but it never granted this right to appellant. The permission of the building inspector to build is not a permission to operate a market. The Wallenberg market is a public market as all articles sold in public markets are there offered for sale. See 5 Common Bench Reports, p. 299: "A public market is a legally established market, by grant from the Crown, and not merely a market de facto." It follows therefore that the lease of these premises is illegal and cannot produce any legal effect, being based on an illegal consideration. Civil Code, arts. 989 and 990; *Morel* v. *Morel*, (F. Rev. de Jur. 14, Court of Review); *Michaud* v. *Levasseur*, 19 R.L. 91; *Jacques-Cartier Bank* v. *Gagnon*, R.J.Q. 5 S.C. 499, and the French authorities Dalloz, V° Force Majeure, vol. 24, p. 757; Dalloz, 1875-2-204; Agnel No. 116.

Pélissier, in reply.

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On December 30th, 1911, the opinion of the Court of King's Bench was delivered unanimously reversing the judgment of the Court of Review and in pursuance thereof judgment was entered January, 1912, whereby the judgment of Davidson, J. was restored.

The unanimous judgment of the Court was rendered by

ARCHAMBEAULT, C.J.:—The respondents in this case pray for the resiliation of a lease as against appellant. Appellant has put up a building in Montreal which he calls "Wallenberg Market," and which he has divided in about thirty shops for the sale of meat, poultry, game, fish, eggs, butter, fruits, vegetables, etc. Respondents have leased one of the shops for the sale of poultry. They took possession of the premises leased on the first of November, 1910, and began to carry on their trade. But a few weeks later, on November 30th, the city of Montreal notified the appellant and all his lessees, including respondents, that they were contravening the charter and the by-laws of the city and put them en demeure to discontinue their operations, failing which they would be sued at law.

The city's contention is that the Wallenberg market is a public market; that it was opened without permission and that, for this reason, its existence is illegal.

The respondents rely on the city's protest for their demand in resiliation of the lease entered into between them and appellant. They allege that the city refused to grant them a license for a private stall; that they cannot occupy the premises leased for the purpose for which they were leased without incurring the risk of being fined; and that they have consequently the right to pray for the cancellation of the said lease.

Appellant answers by saying that respondents can carry on their trade in the premises leased; that the Wallenberg building is not a public market, but merely an agglomeration of private stalls; that the city has no right to prevent respondents from occupying the premises leased for the purposes of the lease; that the Wallenberg building is situated at a distance of at least 500 yards from any public market; and that the city can be compelled to grant respondents a license for a private stall for the sale of poultry in the premises leased to them by appellant.

The only question at issue, therefore, is as to whether or not appellant has fulfilled his obligation to give respondents peaceable enjoyment of the premises he has leased to them.

If the carrying on of the trade mentioned in the lease is impossible by reason of some enactment of the law or of a by-law of the city, it is evident that appellant cannot fulfil his obligation and respondents are entitled to pray for the cancellation of their lease.

It must be borne in mind that respondents cannot rest their demand in cancellation on the refusal of the city to grant them

a private stall license. This administrative authority is necessary to allow them to enjoy the premises leased, according to their destination, but appellant did not oblige himself to obtain this authorization for them nor to guarantee it to them during the period of the lease. He is therefore not a guarantor of an enjoyment he never promised.

Respondents knew when they leased from appellant that they could not carry on the trade mentioned in the stall without the authorization or permission of the city treasurer. They did not stipulate that appellant would be bound to obtain them this authorization. It would be ungracious on their part now to ask for the resiliation of the lease because the city refused them the necessary authorization.

But it would be otherwise if the exercise of the trade mentioned in the lease were absolutely impossible because illegal. In this case there is no longer any question of administrative authority. The treasurer himself could not give an authorization to carry on an illegal trade.

Let us see, therefore, whether the law or enactments of the law declare illegal the poultry trade, which respondents desire to carry on in the premises leased to them by appellant. Paragraph 38 of article 300 of the charter of the city of Montreal authorizes the city council to establish markets or to allow of their establishment, and paragraph 88 of the same article authorizes the council to pass by-laws forbidding the sale otherwise than in markets so established of the provisions and articles usually bought and sold in public markets. Nevertheless the city may grant licenses for the carrying on of this trade in private stalls, on such conditions as it may be pleased to fix.

In 1903 the city passed a by-law in accordance with these dispositions of its charter.

This by-law declares there shall be five public markets in Montreal: the Bonsecours Market, Saint James Market, St. Lawrence Market, Saint Antoine Market, and Saint Jean Baptiste Market. These markets are placed under the care and control of a superintendent and several assistants known as market clerks. They are to be open every day at certain stated hours, Sundays and certain holidays excepted. Every person may sell his goods and provisions therein by paying the fees fixed by tariff and going to the places designated by the superintendent or a market clerk. Stalls may be leased on the conditions fixed by the market committee. The by-law forbids the sale of goods and provisions usually brought to public markets and sold there at any other place unless a license therefor has been obtained from the city treasurer; and such licenses cannot be granted for places situated within a radius of five hundred yards from a public market. This by-law contains a great num-

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ber of other dispositions, but it is not necessary to enumerate them here.

The city and respondents contend, as already stated, that this by-law limits the number of public markets that may exist within the city limits; that no other public market may be established in Montreal; that the Wallenberg market is a public market; that it was established without the city's permission; and that, therefore, its existence is illegal.

In my opinion, this reasoning is based on false premises: the Wallenberg building is not a public market.

The Court of Review declares that as a matter of fact this market is the same thing as a public market; that the same goods are sold there as in public markets; that it is a "de facto" market; and that it could only be opened with the city's permission.

What constitutes a public market is not alone the fact that goods and provisions are sold therein. The very by-law of the city states that these may be sold in private stalls under license. Nor does an agglomeration of private stalls constitute a public market. For what number of shops would be necessary, in such a case, to allow the establishment to be considered a public market? If one shop does not constitute a public market, why should two of them transform the establishment into a public market? And if two are not enough, why should three suffice?

It follows, therefore, that it is impossible to find a rule enabling us to distinguish between a public market and private shop if we adopt the contentions of the city and of the respondents on this point.

The fact which characterizes the public market and differentiates it absolutely from private stalls, is the fact that anybody can bring to it and sell in it his goods and provisions under the conditions established by the municipal authorities.

A private stall, on the other hand, is a shop where only one person carries on the trade which he has been authorized to carry on.

At vol. 26, p. 818, verbo "Market," Cyc. says: —

> Market—a designated place in a town or city to which all persons can repair who wish to buy or sell articles there exposed for sale.

Am. and Eng. Encycl. of Law, v. Markets, 2nd ed. vol. 19, p. 1,139:

> A public market is a market conducted either by the municipality itself, or by private persons under municipal authority and control, and open to the general public for the sale of marketable articles upon the payment of certain rents or fees when these are prescribed. A private market is a market kept by an individual for his own personal use and advantage, without any letting out of stalls to others, and in which only certain articles of food are permitted to be offered for sale.

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The Wallenberg building is not a place where anybody may bring marketable articles or provisions and offer them for sale. Each shopkeeper is the only one who has the right to sell marketable articles or provisions. It is, therefore, a private establishment.

I do not say that the city could not prohibit such establishments. Paragraph 88 of article 300 of the charter authorizes it to enact and order that all marketable articles and provisions brought into the city for sale be brought to the public markets. The same paragraph adds that the council may authorize the sale of such marketable articles outside public markets under such conditions as it may see fit. And it is in virtue of this disposition that the city in 1903 passed a by-law authorizing private stalls, under license from the city treasurer, provided they were situated at least 500 yards away from any public market. The by-law could have gone further; it could have declared, for instance, that the treasurer could not grant more than one license in any one establishment. But it didn't. The only restriction imposed on private stalls is as regards their distance of 500 yards from public markets.

Under these circumstances I cannot come to the conclusion that the premises leased to respondents by appellant were leased for an illegal purpose.

The respondents are entitled to a private stall license. Appellant is not obliged to obtain it for them. If the city refuses to grant it, it is for respondents to take the necessary means to compel it to issue the same.

I am, therefore, of opinion that the judgment of the first Court, dismissing respondent's action, was well founded and that there is error in the judgment of the Court of Review, which reversed the same.

Appeal allowed; judgment of the Court of Review reversed, and that of Davidson, J., restored.

Appeal allowed.

Annotation

Landlord and tenant and license laws

Annotation—Landlord and tenant (§ II B—15)—Municipal regulations and license laws as affecting the tenancy—Quebec Civil Code.

The French law on the subject of municipal licenses is similar to the English law. Restrictive municipal by-laws or decrees must be interpreted *stricto sensu*. The rule is that commerce and trade is free and unrestricted. It has been held for instance that private individuals who allow the sale of goods in their stores do not contravene a public ordinance forbidding the offering of these goods for sale otherwhere than at the place destined to receive them. Dolloz, Périodique 1856-1-252; ibid. 1857-1-27; ibid. 1859-1-439; ibid. 1867-5-231.

Article 1612 of the Civil Code of the Province of Quebec says:—

"The lessor is obliged by the nature of the contract:

(1) To deliver to the lessee the thing leased;

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Annotation

Landlord and tenant and license laws

Annotation (*continued*) — **Landlord and tenant (§ II B—15) — Municipal regulations and license laws as affecting the tenancy—Quebec Civil Code.**

(2) To maintain the thing in a fit condition for the use for which it has been leased;

(3) To give peaceable enjoyment of the thing during the continuance of the lease."

By article 1616, the lessor is not obliged to warrant the lessee against disturbance by the mere trespass of a third party not pretending to have any right upon the thing leased; but article 1618 adds, that if the disturbance be in consequence of a claim concerning the right of property or other right in and upon the thing leased, the lessor is obliged to suffer reduction in the rent, proportionally to the diminution in the enjoyment of the thing, and to pay damages according to circumstances, provided the lessor be duly notified of the disturbance by the lessee.

In *Motz* v. *Holiwell*, 1 Q.L.R. 64, it was held, that work done by the corporation of the city of Quebec in lowering or altering the level of a street constituted partial expropriation as far as the riparian owners were concerned, giving to the lessees the right to obtain the diminution of rent or the cancellation of their lease.

In the case of *Charpentier* v. *The Quebec Bank*, R.J.Q. 21 S.C. 296, Fortin, J., held:—

> "That the lessee, who has had the peaceable enjoyment of an immovable leased to him cannot ask for the cancellation of the lease and damages on the ground that a third party, who has not disturbed his enjoyment, is proprietor of part of the immoveable."

Of course it follows that the obligation to deliver the thing leased comprises the obligation to deliver the accessories of the thing. *Myler* v. *Styles*, M.L.R. 4 Q.B. 113.

By article 1641, the leasee has the right of action to compel the lessor to make the repairs and ameliorations stipulated in the lease, or to which he is obliged by law, or to obtain authority to make the same at the expense of the lessor; or if the lessee so declare his option to obtain the resiliation of the lease, in default of such repairs or ameliorations made. (2) To resiliate the lease for failure on the part of the lessor to perform any other of the obligations arising from the lease, or devolving upon him by law, and (3) To recover damages for violation of the obligations arising from the lease or from the relation of lessor and lessee.

In *Ritchie* v. *Girard* (1898), R.J.Q. 15 S.C. 165, it was held that the lessee, who was disturbed in his enjoyment of the thing leased, by legitimate acts of the Crown, but who is not absolutely prevented from enjoying the same, has only a right to the diminution of rent, and cannot demand the cancellation of his lease; and it was further held that the lessor is not responsible in damages resulting from a disturbance which cannot be imputed to him.

Before the lessor can be compelled to make repairs he must be put in default to do so by the lessee.

By article 1629, when loss by fire occurs in premises leased, there is a legal presumption in favour of the lessor that it was caused by fault of the lessee, or by the persons for whom he is responsible; and unless he proves the contrary he is answerable to the lessor for such loss; but a contrary stipulation or renunciation by the landlord to the benefit of this article is quite legal, and of common occurrence.

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Feb. 5.

RE ST. BONIFACE BY-LAW (Action No. 1).

Manitoba King's Bench, Robson, J. February 5, 1912.

1. MUNICIPAL CORPORATIONS (§ II C 3—60)—BY-LAW OR ORDINANCE—PROCEEDINGS TO ATTACK AS INVALID—STATING GROUNDS.

Where legal proceedings are taken to set aside or declare invalid a proceeding taken by a municipal council in alleged exercise of its statutory powers, the party called upon to defend the impeached proceeding is entitled ex debito justitiæ to notice of the grounds of attack in due time to prepare the defence.

2. MOTIONS AND ORDERS (§ I—2)—SUMMONS TO QUASH MUNICIPAL BY-LAW—STATING GROUNDS—AMENDMENT.

It will be implied in a statute authorizing proceedings by summons to quash a municipal by-law or ordinance that the grounds for the motion are to be stated in the summons, but leave will be given to amend, if no statutory limitation interferes and the respondent is not prejudiced by the delay.

IN this matter a summons was issued calling upon the city of St. Boniface "to shew cause why by-law No. 800 of the said city of St. Boniface should not be quashed."

On the return of the summons, counsel for the city raised the objection that the summons for quashing the by-law did not set out in it any of the grounds on which it was proposed to ask that the by-law be quashed.

Leave was given to amend.

H. P. Blackwood, for the City of St. Boniface.

A. Dubuc, for the applicant.

ROBSON, J.:—There can be no question that a party whose proceeding is impeached for alleged illegality has an absolute right ex debito justitiæ to notice of the grounds of attack in due time to enable him to meet the attack.

To avoid injustice it should be implied in section 517* of the St. Boniface City Charter, that the grounds shall be stated in the summons. By inadvertence the summons in this case omits a statement of the grounds upon which the applicant proceeds.

In *Re Peck and Township of Ameliasburgh*, 12 P.R. (Ont.) 664, although there was an irregularity in the period of notice, Street, J., did not dismiss the application, but retained it and

*Section 517 of the Manitoba statute, known as "The St. Boniface Charter," 7 and 8 Edw. VII. (Man.) ch. 57 is as follows:—

517. In case a resident of the city or any other person interested in a by-law, order or resolution of the council thereof applies to a Judge of the Court of King's Bench sitting in Chambers, and produces to the Judge a copy of the by-law, order or resolution, certified under the hand of the clerk and under the corporate seal, and shews by affidavit that the same was received from the clerk, and that the applicant is a resident or interested as aforesaid, the Judge, after at least ten days' service on the corporation of the summons or rule to shew cause in this behalf, may quash the by-law, order or resolution, in whole or in part, for illegality and, according to the result of the application award costs for or against the corporation. The decision of such Judge may be appealed against to the full Court in the same manner as any other order made by said Judge.

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required that proper notice be given. It seems to me that in the present case I should, if the applicant alleges adequate grounds, amend the summons and require it to be re-served, making it returnable again at such a date as will allow of ten days' notice. This course may save the repetition of the work and expense of another application. There is no lapse of any limitation period, or other circumstance, to prejudice the respondent. Should adequate grounds not be suggested there would, of course, be the dismissal of the summons. The respondent must be protected in the matter of costs.

The objection was taken that the proceeding should not have been by summons, but by notice of motion, and the case mentioned was cited in support. That case, however, went upon a state of legislation which does not exist here. The objection is absolutely answered by the fact that the St. Boniface City Charter is later and special legislation, and, therefore, its directions must be followed in preference to those contained in the King's Bench Act.

Leave to amend.

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Jan. 12.

NASSAR v. EQUITY FIRE INSURANCE CO.

Divisional Court, Ontario. Boyd, C., Riddell, and Sutherland, JJ. January 12, 1912.

COSTS (§ I—19)—APPORTIONMENT—TWO ISSUES—SUCCESS OF PLAINTIFF ON ONE—REFERENCE AS TO THE OTHER.

In an action on a fire insurance policy where two issues are raised by the defence, one of fraud in overvaluation of the loss, as to which the plaintiff succeeds at the trial, and one of the quantum of damages as to which a reference is directed, the plaintiff is entitled to costs up to the hearing only so far as they have been incurred upon the issue in which he has succeeded; the costs of the other issue, and of the reference should be reserved until after the Master shall have made his report.

[See also *Calvert* v. *Canadian Northern Ry. Co.*, 18 Man. R. 307, 1 Can. Ten Year Digest 875.]

APPEAL by the defendants from the judgment of Mulock, C.J.Ex.D., at the trial, in favour of the plaintiff in an action upon a fire insurance policy.

The judgment was varied as to costs, but otherwise affirmed.

Messrs. *G. F. Shepley*, K.C., and *G. W. Mason*, for plaintiff.

W. E. Raney, K.C., for defendants.

BOYD, C.:—Having read the material parts of the evidence given for the plaintiff, I can find no ground on which to reverse the conclusion of the Chief Justice that no fraud was brought home to the plaintiff in the preparation of his claim papers. The estimates may be or may not be high; but the plaintiff has no knowledge of the billiard business; cannot read or write;

and has had to call in experts or others known as claim-adjusters who have skill and experience in the details of the different articles which were damaged by the water; and the plaintiff places himself in their hands, relying on their estimates as proper. There is no suggestion in the evidence to induce the belief that these people, most of them examined as witnesses, were conspiring to inflame the aggregate financial loss, or that the plaintiff was privy to any plot or conspiracy of that sort.

The defendants elected to call no witnesses, but to let the decision proceed on the evidence given; and on that there could be but one result, i.e., the one arrived at by the Chief Justice.

I would vary, however, his disposition of the costs—all the costs up to the hearing should not be given against the company, but only the costs up to the hearing so far as they have been incurred upon the issue of fraud or no fraud, upon which issue the plaintiff succeeds; but there are other issues which cannot be determined till the Master reports upon the proper sum to be paid by the company. Further directions and costs of reference and costs not now disposed of reserved till after report.

Judgment affirmed (with this variation as to costs occasioned by the charge of fraud) and affirmed with costs to the plaintiff.

SUTHERLAND, J.:—I agree.

RIDDELL, J.:—In this action, which is upon a fire insurance policy, the substantial defence is, overvaluation in the proofs of loss, and this from two points of view: (1) as indicating fraud, and so avoiding the policy; and (2) upon the quantum of damage.

Upon the trial, the Chief Justice of the Exchequer Division said again and again that he would not try the question of value—he found for the plaintiff on the question of fraud, ordered the defendants to pay the costs of the action down to and including the trial, and referred the quantum to the Master in Ordinary.

The defendants appeal.

It seems to me a most material matter, when considering whether there has been a fraudulent overvaluation, to come to a conclusion as to the actual amount of the loss—and, were there nothing more in the case, I should have thought there should be a new trial generally. But the defendants' counsel raised no objection to the course pursued; indeed, rather the reverse; for, when the trial Judge said, "I will give you my view as to the case if you like, and then you can determine on your own course of action"—and thereupon gave his view—the defendants' counsel did not offer any evidence.

The fullest latitude was allowed on the cross-examination of the plaintiff; and the defendants did not see fit to offer any evidence.

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I think it is now too late to complain, and that the question of fraud should not be opened up.

But the learned trial Judge should not have directed all the costs to be paid by the defendants—it does not yet appear whether they may not be entitled themselves to costs from the plaintiff. The proper course will be to set aside the award of costs, and let the costs of the action, of the reference, and of this appeal, be disposed of by a Judge after the Master shall have made his report. The order that the defendants pay to the plaintiff the amount found due by the Master should also be set aside, and the proper order to make be determined by the Judge disposing of the costs, and at the same time.

Judgment varied.

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Jan. 24.

WHALEY v. O'GRADY.

Manitoba King's Bench. Trial before Macdonald, J. January 24, 1912.

1. MASTER AND SERVANT (§ III A 2—290)—ACTS OF SERVANT OR AGENT—SCOPE OF AUTHORITY—SALES AGENT—AGREEMENT FOR FUTURE RE-PURCHASE OF SHARES AT ADVANCE.

Where an incorporated company is authorised to engage in the business of company promotion and of buying and selling corporate shares, its sales agent has no implied authority to bind the company to re-purchase at a premium the shares of another company which it is promoting, although such agreement is made as part of or collateral to the agreement of sale and forms a part of the consideration thereof.

2. CORPORATIONS AND COMPANIES (§ IV G 2—114)—POWERS OF OFFICERS AND AGENTS—CONTRACT WITHOUT SEAL BY VICE-PRESIDENT AND SALES AGENT WITH STRANGER.

An agreement by a company engaged in the business of company flotation and of selling shares in the companies promoted through its efforts, to give the buyer of corporate stock sold by its salesman the option of returning the shares within a limited time and of receiving back the purchase price with a premium added is not a transaction in the ordinary course of the company's business and will not be binding on the selling company although made by the authority of its vice-president if such contracts had been forbidden by the president and were neither made nor authorised by any document or record under the corporate seal.

3. CORPORATIONS AND COMPANIES (§ IV D 3—85)—FORMAL REQUISITES OF CONTRACT—AGREEMENTS OUT OF ORDINARY COURSE—CORPORATE SEAL.

Section 64 of the Manitoba Joint Stock Companies Act which dispenses with the necessity for the corporate seal upon a contract or agreement made for the company by its agent, officer or servant "in general accordance with his powers" does not apply to agreements made out of the ordinary course of the company's business, even by its vice-president in the company's name; and the person dealing with the company's officer or agent in respect of agreements of that nature is put upon inquiry to ascertain that the officer or agent has in fact been duly authorised to enter into them.

ACTION for damages for breach of an agreement in writing purporting to be made by the defendant company through its sales agent to re-purchase from the buyer certain shares of a traction company sold by defendant company to him, part of the consideration for the purchase being the agreement sued up-

on that the buyer should have the option of demanding the re-purchase by the defendant company from him of the shares at an advanced price within a time limited. The vice-president had purported to authorise the agreement in question but all agreements of that nature had been forbidden by the president before the closing of the sale to the plaintiff or the payment of the purchase money, but no notice of the president's course of action came to the knowledge of the plaintiff. Neither the agreement of re-purchase nor the vice-president's authorisation were under the corporate seal of defendant company. The defendant company repudiated liability to re-purchase at the advance as claimed by the plaintiff, and pleaded that the lack of the corporate seal or of any official action of the board of directors to warrant such an agreement.

The plaintiff relied upon the letter written in the company's name by the vice-president and upon sec. 64 of the Manitoba Joint Stock Companies Act. That section (R.S.M. 1902, ch. 30, sec. 64), is as follows:—

> 64. Every contract, agreement, engagement or bargain made and every bill of exchange drawn, accepted or indorsed, and every promissory note and cheque made, drawn or indorsed, on behalf of the company by any agent, officer or servant of the company, in general accordance with his powers as such agent, officer or servant under the by-laws of the company or otherwise, shall be binding upon the company; and in no case shall it be necessary to have the seal of the company affixed to any such contract, agreement, engagement, bargain, bill of exchange, promissory note or cheque, or to prove that the same was made, drawn, accepted or indorsed, as the case may be, in pursuance of any by-law or special vote or order; nor shall the party so acting as agent, officer or servant of the company be hereby subjected individually to any liability whatsoever to any third party therefor; provided always, that nothing herein contained shall be construed to authorise the company to issue any note payable to the bearer thereof, or any promissory note intended to be circulated as money or as the note of a bank, or to engage in the business of banking or insurance as aforesaid.

The action was dismissed.

Messrs. *W. J. Cooper*, K.C., and *A. Meighen*, for plaintiff.
A. M. S. Ross, for defendant company.

MACDONALD, J.:—The plaintiff purchased from the defendant company, ten shares of the Gas Traction Company, Limited, at one hundred dollars per share. The sale was made through one H. V. Lyon, a stock salesman in the employ of the defendant company.

At the time of the sale Lyon, acting on behalf of the defendant company, entered into the following agreement (Ex. 1) with and addressed to the plaintiff. "This is to certify that in consideration of Matthew Whaley taking 10 shares of Gas

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Traction Co. stock, we agree to re-purchase same from you 1st January, 1911, at $115 per share if you desire to sell same.

Yours truly,

O'GRADY ANDERSON & Co.
Per H. V. LYON."

In the margin of this agreement, is written the following: "If you are dissatisfied when you inspect factory in 10 days we will return your ck. & note and cancel subscription.

"H. V. LYON."

Mr. Lyon claims to have authority by a letter (Ex. 2) given him by Mr. Anderson as vice-president of the defendant company, which letter reads as follows: "H. V. Lyon, Esq., City.—Dear Sir:—In reference to your desire to guarantee to certain investors in stock of the Gas Traction Co., Ltd., that you will repurchase their stock at $125, in January, 1911, if such party desires to sell, we may say that we will stand behind you in this project providing we are given the dividend for the year 1909 if we are asked to buy.

Yours very truly,

O'GRADY, ANDERSON & Co., LTD.
V. Pres."

On the strength of this agreement to re-purchase (Ex. 1) the plaintiff gave his cheque to Mr. Lyon for one thousand dollars for the ten shares, which in due course was received by the defendant company; the plaintiff, however, stopped the payment of this cheque by telling his banker not to pay it until he had returned from Winnipeg. His banker at the time advised him that the defendant was a joint stock company and he, the plaintiff, was to see if the agreement executed by Mr. Lyon was authorized by the company.

The authority, Ex. 2, given by Mr. Anderson was given without the knowledge or consent of Mr. O'Grady, who was the president of the defendant company, nor does there appear from the evidence that any one connected with the company was consulted with respect to this authority given to Mr. Lyon; this latter gentleman, who claims to be a member of the legal profession, cannot very well be justified in saying that he took it for granted that everything was in proper order and his authority complete.

Sales of stock of the same company were made by Mr. Lyon to a number of others on terms similar to those upon which the stock it is claimed was sold to the plaintiff and which the defendant company re-purchased and as soon as the agreement (Ex. 1) came to the knowledge of Mr. O'Grady, the president of the defendant company, he took exception to it and ordered that

sales of stock on such a condition be stopped and the authority under which such an agreement was made be withdrawn. This action on the part of Mr. O'Grady was communicated by letter to Mr. Lyon, and received by him prior to the closing of the agreement with the plaintiff by payment for the stock purchased by him.

After the receipt by Lyon of this letter he, in company with the plaintiff called at the office of the defendant company in the city of Winnipeg and after having visited the factory of the Gas Traction Company had an interview with Mr. Anderson. What that interview was is not made clear, but whatever it was Mr. Anderson told the plaintiff he could take the stock or not and tore up the cheque which the plaintiff had first made out in payment of his stock. The plaintiff then expressed himself as satisfied to purchase the stock and a new cheque was made out and signed by him in payment of the stock, but he says it was on the understanding that the agreement to re-purchase (Ex. 1) would be adhered to, and in this he is corroborated by Lyon and although on this point the evidence of both plaintiff and Lyon is extremly weak and particularly in the face of the fact that at the very time Lyon had in his possession the letter forbidding further sales on the strength of agreement to re-purchase (Ex. 1), and said nothing to the plaintiff about it, either on his journey to Winnipeg or in Winnipeg, yet, as their evidence is not denied, I suppose I should accept it, but I hold without hesitation that Mr. O'Grady was not present and had no knowledge of, and was not a consenting party, to any such an agreement, and if such an agreement was made it was between Anderson and the plaintiff. The plaintiff brings this action for breach of the agreement to re-purchase (Ex. 1).

Assuming then, that the sale to the plaintiff was on the strength of the agreement (Ex. 1), is the defendant company which is a corporate body, incorporated under the Manitoba Joint Stock Companies Act, bound by this agreement?

It is a well understood and settled rule of law, subject to one or two exceptions, that a body corporate is not bound by any contract which is not under its corporate seal: Pollock on Contracts, 6th ed., p. 142. The seal is required as authenticating the concurrence of the whole body corporate. "If the legislature, in erecting a body corporate, invest any member of it, either expressly or impliedly with authority to bind the whole body by his mere signature or otherwise, then undoubtedly the adding a seal would be matter purely of form and not of substance." "In other cases the seal is the only authentic evidence of what the corporation has done or agreed to do." "Every member knows he is bound by what is done under the corporate seal and by nothing else": *Mayor of Ludlow* v. *Charlton*, 6 M. & W. p. 822.

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WHALEY v. O'GRADY.

Macdonald, J.

The plaintiff relies on section 64 of the Manitoba Joint Stock Companies Act as dispensing with the necessity of a seal. "Every contract, agreement, etc., made on behalf of the company by any agent, officer or servant of the company in general accordance with his powers as such agent, officer or servant under the by-laws of the company or otherwise, shall be binding upon the company; and in no case shall it be necessary to have the seal of the company affixed to any such contract," etc.

It cannot be successfully urged that Lyon was acting in general accordance with his powers, unless the letter given him by Mr. Anderson invested him with such powers.

There is nothing in the articles of incorporation investing Anderson, expressly or impliedly, with the authority of binding the company. Now, does this section 64 invest him with such authority. In my opinion it does not. It is not an act done by him in general accordance with his powers. There is nothing to shew that he had such authority even from the directors, and he did not, it is proved, have the authority of the president, and even if he had, this is not such a transaction in the ordinary course of the defendant company's business under its charter as could be binding upon the company unless the agreement was legally executed under its seal.

The plaintiff was warned before closing the matter that the company was a corporate body and he was to see if the company authorized the agreement. Had he taken proper precautions, he could readily have seen that the company could not be bound by Mr. Anderson's assurance that the agreement upon which he now depends would be carried out, nor would it be any more effective if that assurance was endorsed by Mr. O'Grady, the president.

The action must be dismissed with costs.

Action dismissed.

N.B.—An appeal from the above judgment is pending.

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Jan. 17.

BROWN v. BROWN.

Ontario Court of Appeal, Moss, C.J.O., Maclaren, Meredith, and Magee, JJ.A. January 17, 1912.

COVENANTS AND CONDITIONS (§ III C 1—37)—FULFILMENT PREVENTED BY CLAIMING PARTY.

A party to a contract cannot take advantage of the non-fulfilment of a condition the performance of which has been hindered by himself. [See also *Roberts* v. *Bury Commissioners*, L.R. 5 C.P. 310.]

APPEAL by the defendant from the judgment of Falconbridge, C.J.K.B., 2 O.W.N. 1242, in favour of the plaintiff, for the recovery of damages for breach of a contract for the sale

by the defendant to the plaintiff of an hotel equipment and business in the village of Massey.

The appeal was dismissed.

W. N. Ferguson, K.C., for plaintiff.

R. McKay, K.C., for defendant.

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The judgment of the Court was delivered by MEREDITH, J.A.:—In considering the agreement, regard must be had to the character of the thing being dealt with and the knowledge of the parties as to the only manner in which the thing to be done could be done.

The parties were contracting for a lease of a public house, and for the sale and purchase of the goods and chattels in it, as a going concern: and the license to sell liquor in it was an essential part of it: it was essential to both parties that the license should be maintained: that is expressed in the provision, contained in the agreement, that the license was to remain with the house and not to leave it: and both parties were, of course, well aware that that could not be effected without a transfer, in the manner required by the liquor license laws and regulations, of the license from the landlord to the intended tenant. The clause of the agreement providing that the contract was not to come into effect until the intended tenant obtained a satisfactory assurance from the license department that he would "secure" the license for the house, must be read in the light of these things.

The thing to be done, the thing which each of the parties intended should be effected, was a transfer of the existing license from the landlord to the intended tenant: and the intended tenant promptly took the proper means to fulfill the agreement, upon his part, in this respect; he applied to the proper officer, the local license inspector, and obtained from him the most satisfactory assurance possible, in such a case, that the license would be transferred in due course, as it undoubtedly would have been but for the misconduct of the landlord, who, though he made no sort of objection on this score, but, on the contrary, acknowledged in writing that it was then for him to make formal application for the transfer of the license, refuse to carry out his contract unless paid a greater price than he had agreed to take. The intended tenant had done all that he usefully could; the inspector had actively taken the matter up; all that was needed to procure the transfer of the license, so that it should remain with the house and not leave it, was, that the landlord should make the necessary formal application for the transfer of it to the intended tenant; and there was, I have no doubt, under the agreement, at least an implied obligation on his part to do that, as he substantially admitted in his letter of the 7th November, as I have already mentioned.

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Non-fulfilment of this condition is really the only defence to this action now seriously relied upon; there is nothing to support the defences pleaded and of which particulars were given.

In my opinion, the judgment which, at the trial, was directed to be entered, in the plaintiff's favour, was right, and ought to be affirmed, for more than one reason.

First: because the condition was substantially performed on the part of the intended tenant: a satisfactory assurance was, in substance, obtained: all that was possible on his part was done, and all that was needed was the consent of the landlord to effect the transfer of the license. No one can for a moment doubt that the transfer would have been effected if that consent had been given.

Second: because that which was done by the intended tenant was accepted by the landlord as a sufficient compliance with his obligation to procure the satisfactory assurance: this seems to me to be fully proved by the testimony at the trial, and the letter to which I have referred.

And third: because, if not fulfilled, the non-fulfilment was caused by the landlord's misconduct alone, of which he cannot take advantage: "it is a principle, very well established at common law, that no person can take advantage of the non-fulfilment of a condition the performance of which has been hindered by himself:" see *Roberts* v. *Bury Commissioners*, L. R. 5 C.P. 310.

Appeal dismissed with costs.

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Jan. 29.

KOKORUTZ v. IRWIN et al.

Manitoba King's Bench, Prendergast, J. January 29, 1912.

1. FRAUD AND DECEIT (§ IV—15)—TRANSACTION MISUNDERSTOOD BY ILLITERATE GRANTOR—UNCONSCIONABLE BARGAIN—LACK OF INDEPENDENT ADVICE.

A deed of land by which an illiterate person is alleged to have sold and conveyed a substantial interest or equity in a farm in return for a lease given back by the grantee upon a "half-crop" rental will be looked upon with suspicion, and the transaction may be annulled, if the circumstances shew that the grantor misunderstood the nature of the transaction which he had been induced by the grantee to enter into without opportunity for independent advice.

[See also Leake on Contracts, 6th ed. 291.]

TRIAL of action to set aside on the ground of fraud, a deed of land made by plaintiff to the defendant Irwin, a lease given back by him to the plaintiff and a deed from defendant Irwin to his co-defendant who had participated in the transaction impeached. Judgment was given for the plaintiff.

G. A. Eakins, for plaintiff.

H. F. Maulson, for defendants.

PRENDERGAST, J.:—The plaintiff and her husband are illiterate Galicians, having practically no knowledge of English, except such as can enable them to carry on the small transactions connected with the purchasing of necessaries and the selling of their farm produce.

On May 12th, 1911, the plaintiff had paid $900 on the agreement for sale, broken over 100 acres and erected buildings which I value at $1,000 at least. On that day, unattended by either counsel or friend, except her husband, the plaintiff executed, by putting her mark thereto, a quit claim of the property to defendant Irwin and was given in return by the latter a six year lease on half-crop rental, which could be terminated six months later or any subsequent fall or winter by the lessor. Both documents were prepared by Irwin and witnessed by Anderson, who bought the property from Irwin two days later. The transaction was carried on in the parlor of a hotel at Shoal Lake, and nobody was present but the two Kokorutzs and the two defendants.

Surely these circumstances are such that, even if, as the fact is, the plaintiff was in arrears in her payments under the agreement, the defendants' version should be strictly tested.

The plaintiff's husband says he was made to understand that the change which was meant to be effected, was that half-crop payments were substituted to the cash instalments provided by the original agreement. I believe this statement. He says that the quit claim and the lease were not read to him, and I accept his evidence against the flimsy statement of both defendants on that point. And even if they had been read over to them, what could the plaintiffs understand of it? Then, William Lamb, whose evidence I have no reason to discredit, contradicts the defendants on at least one most material point.

The Court cannot countenance such a transaction. It is one where the Kokorutzs, very far from being at arm's length, were morally bound up, blind and helpless.

Whitla v. *Riverview*, 19 Man. R. 746, and *Canadian-Fairbanks* v. *Johnston*, 18 Man. R. 589, have not the remotest bearing on the present case.

The quit claim from the plaintiff to Irwin, the lease from Irwin to the plaintiff, and the agreement for sale from Irwin to Anderson, will be declared null and void.

Judgment for plaintiff.

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Feb. 12.

GUNN v. CANADIAN PACIFIC RAILWAY CO.

Manitoba Court of Appeal, Richards, Perdue, and Cameron, JJ.A.
February 12, 1912.

1. NEGLIGENCE (§ I C 2—50)—DEFECTIVE FLOOR—DANGEROUS PREMISES —LIABILITY OF OWNER.

Where the owner or occupier of a stable, supplies stable accommodation and feed for horses at a fixed sum per day, but without giving the exclusive use of any part of the stable, he is under obligation to see that the stable is in a reasonably safe condition so far as the exercise of reasonable care and skill can make it so, and this obligation subsists notwithstanding that the horses were fed and cared for by their owner.

[*Francis* v. *Cockrell*, L.R. 5 Q.B. 501, and *Stewart* v. *Cobalt*, 19 O.L.R. 667, applied; see also Annotation to this case.]

2. BUILDINGS (§ II—15)—PRIVATE RIGHTS—OBLIGATION OF OCCUPIER TO LICENSEE.

The obligation resting upon the owner or occupier of a building to which the public is invited to commit themselves or their property is to have the structure in a reasonably safe condition so far as the exercise of reasonable care and skill can make it so.

[Pollock on Torts, 8th ed., pages 508, 512, referred to; see also Underhill on Torts, 9th ed., page 171.]

APPEAL from the County Court in an action for damages for injury to horses caused by a defective stable flooring.

The nonsuit at trial was set aside by the Court of Appeal (Richards, J.A., dissenting).

W. L. Garland, for plaintiffs.

W. H. Curle, for defendants.

RICHARDS, J.A. (dissenting):—The plaintiffs were contractors for building a subway and used a number of horses at that work.

The defendants owned a stable near where the subway was being built, and used it only for the purpose of stabling horses in transit on their railway. They are not livery, or boarding stable keepers, in any sense.

The plaintiffs, finding apparently that there would be room for their horses in the defendants' said stable, arranged with them to use such portion of the stable as they needed for their horses. They also were allowed by the defendants to have a telephone in the building and to use an office, apparently without charge for the office. It was agreed that the plaintiffs should furnish the bedding for their own horses, and should bed them and do all the work of looking after them, including feeding them; but they were to be at liberty to use feed which the defendants had on hand for their own purposes. They were to pay for this 50 cents per day for each horse. Bills were rendered from time to time by the defendants to the plaintiffs for the 50 cents a day per horse, and in those bills it is charged as "stabling" the horses. The above, however, were the facts as to how the horses were handled and fed.

There is no evidence that anyone remained in the building at night. The above arrangement began in May and went on until December. In December a heavy horse, owned by the plaintiffs while occupying a stall in the stable under the above arrangement, was injured by his foot going through the flooring of the stable. This floor was about three and a half feet above the ground. The horse was so injured from his leg going down through the break, and apparently from his struggles to extricate himself, that he died.

The plaintiffs brought this action in the County Court of Winnipeg, claiming that the defendants were boarding the horses for the plaintiffs and that, owing to a defect in the flooring and to the negligence of the defendants in allowing the stable to remain in an unsafe condition the flooring gave way and the horse fell through and died as a result. The action was tried before His Honour Judge Dawson, who nonsuited the plaintiffs. The plaintiffs then appealed to this Court.

The evidence is very vague in some respects in which it should be clear, and it is difficult to get at exactly what the facts were. No one was called on behalf of the plaintiffs to state what the original arrangement was. There seems to be no doubt that Mr. Dickson, the superintendent of the defendants' stock yards, who had supervision over the stable, was rather nervous about its condition. He says, however, that he informed Mr. "Ewart" Gunn fully as to the stable, but later he says that his recollection of having spoken to Mr. Gunn was not so very clear, but he knows that, when the horses were put in, he told the man who had charge of them for the plaintiffs, about the condition of the stable, and that he was nervous about it, and asked him, if at any time he noticed any defect in the floor, to report it to him, so that he could have it repaired. He says that this man did so report to him at times, and that, in every such case, repairs were made.

The man who had charge of the horses for the plaintiffs denies having reported the need of any repairs, or there having been any repairs required, while he was there. He does not, however, deny having been told by Mr. Dickson, his opinion of the floor, or that Dickson asked him to report defects.

It is very difficult to find a precedent for such a case as this. The law referring to livery stables, inn-keepers and agisters cannot apply, it seems to me, because the horses were not in any way entrusted to the defendants, but remained entirely under the control and care of the plaintiffs, and there was, therefore, no bailment.

It is not exactly similar to a case of letting lodgings, because the evidence apparently does not shew that any definite portion of the stable was constantly used by the plaintiffs, or was set apart for their use.

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The plaintiffs were apparently mere licensees. Whether they were licensees for hire or not, I find it difficult to understand; but it seems to me that the meaning of the evidence is that the 50 cents a day was a charge merely for the food eaten by the horses. I judge this from the fact that that is said to be what the railway company charged for feeding the horses which they stabled there while in transit. The fact that no charge was apparently made for the use of the office by the plaintiffs, I think, slightly corroborates this.

Perhaps the nearest position that one can think of to that which existed between the plaintiffs and the defendants, with regard to this stable, is that of a tenancy at will from day to day. If that were the position between them, I take it there would be no liability on the part of the defendants. But assuming it to be that the plaintiffs were not tenants at will but were licensees, whether for hire or not, the fact is that they occupied parts of this stable daily for some seven months, with differing numbers of horses, and I think they had ample time to see for themselves the condition of the stable. Then, too, there is the uncontradicted evidence of Dickson that he warned the man in charge to be careful and report to him if any repairs were needed. It seems to me that a man so put in charge by the plaintiffs was their agent to receive notice of matters affecting the stable. There is no evidence, too, that the plaintiffs themselves did not know its condition. I cannot but think that, before the accident occurred, they knew it and took all risks. If so, it seems to me immaterial whether they were, as to the use of the stable, licensees for hire or bare licensees. There is no evidence that the place, where the horse's leg went through, was, before the accident, known to either party to be weak, or that there was any reason, known to the defendants and not to the plaintiffs, to suspect that it was dangerous.

The limit of liability in such a case seems to me not greater than that stated by Mr. Justice Harlan in *Bennett* v. *Railroad Co.*, 102 U.S., at p. 580, where he says:—

> The owner or occupier of land who by invitation, express or implied, induces or leads others to come upon his premises for any lawful purpose, is liable in damage to such persons—they using due care—for injuries occasioned by the unsafe condition of the land or its approaches, *if such condition was known to him and not to them.*

If that is the limit, then there is no liability here, if I am right in the view that the plaintiffs should be held on the evidence to have known before December the condition of the stable.

In my opinion, the learned trial Judge was right in his finding. I would dismiss the appeal with costs.

PERDUE, J.A.:—The plaintiffs are contractors and were engaged in the construction of the McPhillips street subway in the city of Winnipeg. They used a number of horses upon the work and, by an arrangement made with the defendants, the horses were stabled in a stable belonging to the defendants, the latter charging the plaintiffs fifty cents per day per head for the stabling and feed of the horses. Although the defendants supplied stable accommodation and feed for the horses, the plaintiffs' men attended to and fed them, but there was no one on behalf of the plaintiffs in charge of the horses during the night. The stable in question was at the same time used by the defendants for horses in transit while the same were detained in Winnipeg during their shipment over the defendants' railway. After the plaintiffs had for some time stabled their horses in defendants' stable under the above arrangement, one of their horses broke through the flooring of the stall it occupied and received such injuries that it died. The present action was brought in the County Court of Winnipeg to recover damages for the loss of the horse and the learned County Court Judge entered a nonsuit.

The defendants, besides denying their liability, set up that the stable was leased to the plaintiffs who undertook to repair or to immediately notify the defendants of any repairs that might be required, that the plaintiffs did not keep the premises in repair and neglected to notify the defendants of any defect in the flooring.

It is clear that the relationship of landlord and tenant did not exist between the parties. During all the time the stable was made use of for the plaintiffs' horses the defendants were also using it for stabling other horses in their charge. The evidence shews that no particular stalls were set apart for plaintiffs' horses. The defendants' official in charge of the stable said that the defendants utilised every portion of it for horses in transit during the time plaintiffs' horses were there. The defendants remained in possession and occupation of the stable and merely supplied accommodation for the plaintiffs' horses.

An attempt was made to prove an agreement with the plaintiffs that they would report to defendants' agent in charge any defects noticed in the floor of the stable and that the agent would have them repaired. The evidence failed to prove any such agreement with the plaintiffs. The defendants' agent in charge of the stable requested the plaintiffs' stableman to report any defects he noticed, but there was nothing in the nature of an agreement to report defects shewn in the evidence.

I think the transaction between the parties in regard to the stabling of the horses was in the nature of a bailment for a reward. The fact that the plaintiffs had charge of the horses and fed them while in defendants' stable does not seem to me

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to be material in dealing with the question of the responsibility assumed by the defendants. They agreed, for a valuable consideration, to furnish stable accommodation and feed for the plaintiffs' horses. Whether we regard the arrangement as a bailment for a reward or as a license to the plaintiffs for a valuable consideration, the duties cast upon the defendants are very much alike.

If the defendants were bailees for hire they were bound to take reasonable care that the building in which the horses were stabled was in a proper state so that the animals might be reasonably safe: *Searle* v. *Laverick*, L.R. 9 Q.B. 122; *Brabant* v. *King*, [1895] A.C. 632, 640, 641.

If, upon the other hand, we regard the transaction as a license to the plaintiffs to make use of the defendants' stable and fodder for the purpose of sheltering and feeding their horses, in consideration of a money payment, the defendants impliedly warranted that the stable was reasonably fit and safe for the purpose: *Francis* v. *Cockrell*, L.R. 5 Q.B. 501; *Stewart* v. *Cobalt, etc., Association*, 19 O.L.R. 667. In these cases persons were injured owing to the unsafe condition of structures which they were invited to use and for the use of which they paid fees. But the rule laid down in *Francis* v. *Cockrell* by Montague Smith, J., that the structure has to be in a reasonably safe condition, so far as the exercise of reasonable care and skill can make it so, applies also as against the possessor of a structure to which it is intended that persons should entrust their property animate or inanimate: Pollock on Torts, 8th ed., 512; *Lax* v. *Corporation of Darlington*, 5 Ex. Div. 28; *The Moorcock*, 14 P.D. 64; *Searle* v. *Laverick*, supra, at page 129. The judgments in *Francis* v. *Cockrell* in the Exchequer Chamber shew that a case like the present may be based either upon a breach of an implied contract or upon a breach of a duty imposed on the defendant to have the building reasonably fit for its purpose: pp. 510, 511, 513, 514, 515.

The learned County Court Judge did not give a decision in writing or intimate upon what grounds he entered a nonsuit. It was stated by counsel upon the argument of this appeal that the learned Judge expressed, at the trial, a leaning towards the view that a tenancy had been created. If he decided the case upon that ground it was unnecessary for him to come to any conclusion upon the evidence as to the condition of the stable or the care taken by the defendants to keep it in a safe condition.

The evidence shews that the floor of the stable was constructed of a single layer of two-inch planks. Under the floor there was an open space of three or four feet. The horse in question was a heavy animal weighing some 1650 pounds. There is uncontradicted evidence that such a floor is not sufficient or safe

for a stable in which heavy horses are kept. The defendants' agent in charge of the building admitted that he knew the floor was not safe. He said: "I never felt very safe, heavy horses being continually in there, you know, wearing the plank, knowing that there was an opening underneath." He asked the plaintiffs' man to report to him any defects he noticed in the floor so that they might be repaired. Defects were reported and these were repaired by being planked over.

It was urged on behalf of the defendants that because the plaintiffs' man noticed and reported defects in the stable floor, the plaintiffs should be fixed with knowledge of its condition and should be taken to have assented to the risk. This contention is, I think, completely disposed of by the judgment in *Brabant* v. *King*, [1895] A.C., at page 641. Lord Watson, in giving the judgment of the Court, said: "It would be a very dangerous doctrine, for which there is not a vestige of authority, to hold that a depositor of goods for safe custody, who, by himself or his servants has had an opportunity of observing certain defects in the storehouse, must be taken to have agreed that any risk of injury to his goods which might possibly be occasioned by these defects should be borne by him, and not by his paid bailee. The authorities relating to the vexed maxim *volenti non fit injuria* have no bearing whatever upon the point."

It is reasonably certain from the evidence that a floor such as was put in this stable would, with the constant use to which it was subjected, develop, and that the floor in question did develop, defects and weaknesses which would endanger the horses placed in the stable. Upon the defects first becoming known to the defendants or their agent in charge, it was their duty to have put the floor in a safe condition and not to have waited for other defects to appear with the intention of patching them as they did appear. The defect which occasioned the death of the plaintiffs' horse made its first appearance when it actually caused the injury. The defendants through their agent in charge of the stable had had ample warning of the unsafe condition of the floor and should have taken steps to make it safe for the purpose for which it was used so that horses stabled therein, for the keep of which the owners were paying, might be reasonably safe.

I think the nonsuit should be set aside and a verdict entered for the plaintiffs for $250. The plaintiffs are entitled to the costs in the County Court, including the usual counsel fee, and to the costs of this appeal.

CAMERON, J.A.:—The plaintiffs bring this action to recover the value of a horse killed by injuries to its falling through the floor of a stable belonging to the defendants. According to one of the plaintiffs the contract was this: "We put the horses

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in there and they were to charge us 60 cents a day for them each, we were to do the feeding and they were to supply the feed." According to the bills rendered and paid the number of the horses varied from time to time and even from day to day. The plaintiffs had a man who looked after the horses and their feeding. They had also a time-keeper at the stables and a telephone. The man in charge of the horses says he fed the horses and cleaned out the stable and that he was there all the time during the day, but that no one was there at night. This occupation of the premises lasted several months. Dickson, the defendants' agent in charge of their stockyards, was examined for discovery and his examination was, in part, put in on behalf of the plaintiff. He said that he looked after the stables himself and that his understanding was that the plaintiffs looked after the horses themselves. Called for the defence he said that he fully informed Mr. Gunn as to the condition of the stable. He further stated in his examination for discovery and at the trial that he had told the man in charge that if he noticed any defects to report to him. He also stated that he made inspection of these stables and that he ordered repairs made during the plaintiffs' occupation. Portions of the stables not occupied by the plaintiffs' horses were used for horses in transit.

On these facts what was the relationship between the defendants and the plaintiffs? It seems to me that it was not that of landlord and tenant. No specific part or parts of the stables were reserved for the plaintiffs. It is impossible, therefore, to say that there was given to the plaintiffs exclusive possession of any part of the stables. It also seems to me that the relationship created between the parties was not that of bailee and bailor. The chief characteristic of a bailment is the intrusting of a chattel by a person called the bailor to another person called the bailee for some purpose upon a contract, express or implied:" Beal on Bailments, p. 7. There was here no intrusting of the horses by the plaintiffs to the defendants; on the contrary, the plaintiffs did not intrust the defendants with the care and custody of the horses, but undertook to take care of them, and did take care of them, themselves.

It seems to me that the relationship between the parties was akin to that of licensor and licensee, but whether these terms accurately determine the relationship is not important. The plaintiffs were, in effect, invited to come and stable their horses upon the defendants' premises, and the latter, thereupon assume an obligation to see to it that the premises were in a reasonably safe condition for that purpose: *Francis* v. *Cockrell*, L.R. 5 Q.B. 501; A. & E. Encyc. XVIII. 1137. Did the defendants fail to exercise ordinary care and diligence to construct and maintain these stables in a reasonably safe condition for

occupation by horses under the circumstances? The fact is that the horse was killed owing to a defect in the floor of the stall. *Res ipsa loquitur*, and the evidence having gone thus far, the burden of proof is shifted: *O'Brien* v. *Michigan Central*, 19 O.L.R. 345, 349. The inference can be drawn from the horse's injury and death under the circumstances, that the floor was defectively constructed or insufficiently maintained, and enough is proved to call for explanation by the defendants. Such explanation is not forthcoming. The defendants have not shewn that the flooring of this stall was constructed and maintained so as to be reasonably safe for the purpose of stabling horses. On the contrary, Dickson, when asked: "You were of the opinion that the stable needed repair?" answered: "I never felt very safe, heavy horses being continuously in there, you know, wearing the plank, knowing that there was an opening underneath."

In the recent case of *Stewart* v. *Cobalt*, 19 O.L.R. 667, the defendants, the owners of a rink, were held liable in damages for negligence in respect of injuries sustained by the plaintiff, who paid for a seat in the rink to see a hockey match, and who was injured by reason of the breaking of the railing of the gallery, in which he was seated, the railing not being so constructed as to resist the outward pressure of the spectators leaning forward to see what was going on below, which was to be expected and should have been guarded against. The defendants were not absolved because they had employed a competent architect. Chancellor Boyd, refers in his judgment to *Francis* v. *Cockrell*, supra, and mentions that Sir Frederick Pollock (on Torts, 8th ed., p. 508) points out that the obligation resting upon the owner of a building to which the public is invited is different from the ordinary law of negligence.

> The structure must be in a reasonably safe condition so far as the exercise of reasonable care and skill can make it so.

It is to be noted that Sir Frederick Pollock refers, at p. 508, to the rule as applicable to persons having control over buildings and other structures intended for human use and occupation. But the rule is not thus restricted, as he subsequently points out:—

> The possession of any structure to which human beings are intended to commit themselves or their property, animate or inanimate, entails this duty on the occupier or the controller: p. 512.

In these grand-stand cases the strain that should have been foreseen and provided against was, comparatively, a sudden one and confined to a brief period. In the present case the pressure was prolonged and continuous. But I see no reason why the rule, as above stated, should be varied merely because of this difference.

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Annotation

Negligence as to licensees

On the whole, therefore, I think the plaintiffs have established the liability of the defendants and are entitled to recover.

Judgment for plaintiffs.

Annotation—Negligence (§ I C 2—50)—Duty to licensees and trespassers—Obligation of owner or occupier.

The owner of a building in course of construction owes to those whom he invites into or upon it the duty of using reasonable care and skill in order to have the property and appliances upon it intended for use in the work fit for the purposes they are to be put to. Such duty is not discharged by the employment of a competent architect to prepare plans for the building and a competent contractor to attend to the work of construction; but the fact that the building is in an unfinished state may render the obligation of the owner towards a workman employed upon it less onerous in law than it would be in the case of a completed structure. (Judgment of the Court of Appeal, 12 O.L.R. 4, and of the Divisional Court, 9 O.L.R. 57, affirmed.) *Valiquette* v. *Fraser*, 39 Can. S.C.R. 1.

The owners of a rink were held liable in damages for negligence in respect of injuries sustained by the plaintiff, who paid for a seat in the rink to see a hockey match, and who was injured by reason of the breaking of the railing of the gallery, in which he was seated—the railing not being so constructed as to resist the outward pressure of the spectators leaning forward to see what was going on below, which was to be expected and should have been guarded against. The defendants were not absolved because they had employed a competent architect. *Stewart* v. *Cobalt Curling and Skating Association*, 19 O.L.R. 667.

Where a trail or way over a railway track is used by the public by invitation or license of the railway company, a person crossing the track upon the same is bound to observe reasonable precautions to avoid injury by trains; and where the evidence shews that he has not done so, he cannot recover from the company for such injuries without proving that they were immediately caused by the negligence of the company's servants only: *Weir* v. *C.P.R.* (1889), 16 A.R. 100, followed. *Royle* v. *Canadian Northern Railway Co.*, 14 Man. R. 275.

If the injured party was a mere licensee, who entered the car not as a passenger, but for the purpose of plying his trade there, and whose presence was simply tolerated, he would have no right to complain because the safety of the car was not improved by the addition of a step. *Blackmore* v. *Toronto Street Railway Co.*, 38 U.C.R. 172, 216.

The plaintiff's son was given leave by a yardmaster of the defendants to learn in the railway yards the duties of car-checker, with the expectation that if he became competent he would be taken into the employment of the defendants in that capacity, and he was free to devote as much or as little time to acquiring the necessary knowledge as he saw fit. While he was in the railway yard a few days after this permission had been given he was killed by an engine of the defendants which was running through the railway yard without the bell being rung though the rules of the defendants required this to be done. It was held that the deceased was a licensee and not a trespasser; that the defendants were bound to exercise reasonable care for his protection; and that the omission to give the warning was negligence which made them liable in damages for his

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Annotation

Negligence as to licensees

Annotation (*continued*)—**Negligence (§ I C 2—50)—Duty to licensees and trespassers—Obligation of owner or occupier.**

death. The Court being of opinion, however, that damages of $3,000 allowed by the jury were excessive, ordered that there should be a new trial unless the plaintiff should consent to accept $1,500. *Collier* v. *Michigan Central Railway Company*, 27 A.R. 630.

The general rules are thus stated in Underhill on Torts, 9th ed., page 171:—

> (1) An occupier of land, buildings or structures owes to persons resorting thereto in the course of business upon his invitation, express or implied, a duty to use reasonable care to prevent damage from unusual danger of which he knows or ought to know.
>
> (2) An occupier of land or buildings owes to bare licensees and guests a duty not to set a trap, *i.e.*, not to put any unexpected danger there without warning the licensee or guest: *Indermaur* v. *Dames*, L.R. 1 C.P. 274, affirmed (1867), L.R. 2 C.P. 311; and *Gautret* v. *Egerton*, L.R. 2 C.P. 371.

The duty owed to persons coming in the course of business by invitation applies to all persons who go on business which concerns the occupier, or in which he is even indirectly interested. There need not be an express invitation. An invitation is implied when the persons come in the ordinary course of business. It will be noticed that the rule of liability does not throw on the occupier an absolute duty to insure the safety of the premises. So he is not liable for some latent defect in a structure which he did not know of and could not have provided against by taking reasonable care. It is only a duty to use reasonable care to prevent damage from unusual danger, *i.e.*, from dangers which would not usually be found on premises of the kind. Persons cannot complain of dangers which they would expect to find on premises of the kind: Underhill on Torts, 9th ed., p. 172.

As between landlord and tenant the duty to repair the demised premises depends entirely on the contract between the parties, and apart from contract the landlord owes the tenant no duty to repair or not to let the premises in a dangerous condition. Hence, if a landlord lets a house in a dangerous condition, he is not liable to the tenant or to a person using the premises by invitation of the tenant for any injuries happening during the term owing to the defective state of the house: *Lane* v. *Cox*, [1897] 1 Q.B. 415 (C.A.). As to the implied warranty in the case of a letting of a furnished house, see *Smith* v. *Marrable*, 11 M. & W. 5; and *Wilson* v. *Finch Hatton*, 2 Ex.D. 336.

Accordingly when a landlord contracted with his tenant to repair a defective house, but failed to do so, and the wife of the tenant was injured by reason of the defective state of the house, it was held that she had no cause of action, as she was a stranger to the contract: *Cavalier* v. *Pope*, [1906] A.C. 428.

Bare licensees, *i.e.*, persons who come not for any business in which the occupier is interested, but merely by permission for their own purposes, and guests, are in a somewhat different position. Their position is analogous to that of a person who receives a gift. He is only entitled to use the place as he finds it, and cannot complain, unless there is some design to injure him or the occupier has done some wrongful act, such as digging a trench on the land or misrepresenting its condition or anything equivalent to laying a trap for the unwary. A giver of a gift is not responsible for the insecurity of the gift unless he knows its evil char-

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Annotation

Negligence as to licensees

Annotation (*continued*)—**Negligence (§ I C 2—50)—Duty to licensees and trespassers—Obligation of owner or occupier.**

acter at the time and omits to caution the donee. So, too, in the case of a person to whom permission to go on land is given, he cannot complain unless there is something like fraud in the gift. See the judgment of Willes, J., in *Gautret* v. *Egerton*, L.R. 2 C.P. 371.

Trespassers are at any rate in no better position than bare licensees, and, as no permission is given, there can be no duty to give warning of danger. But even a trespasser has a right of action if he is injured, whilst trespassing, by some wrongful act of the occupier, as for instance, if he is assaulted, or is injured by something which the occupier of the land has put there for the purpose of injuring him: *Bird* v. *Holbrook*, 4 Bing. 628. And if a person knows that others are in the habit of trespassing or are likely to trespass, he may be liable if he leaves about dangerous things which will act as allurements and so induce people to trespass, and does not take proper means to prevent consequent damage: *Cooke* v. *Midland Great Western Railway*, [1909] A.C. 229.

In *Francis* v. *Cockrell*, L.R. 5 Q.B. 184, the defendant engaged a contractor to erect a grand-stand for viewing races. The plaintiff paid for a seat on the grand-stand. Owing to the negligence of the contractor the stand was defective, and it fell and the plaintiff was injured. The defendant was liable, although neither he nor his servants were personally negligent. It was their duty to see that the stand was reasonably safe: *Francis* v. *Cockrell*, L.R. 5 Q.B. 501.

An owner of land had a private road for the use of persons coming to his house. He allowed a builder to use it, and the builder put on it a heap of slates. He left them there at night and did not light them. The plaintiff, who came along at night, drove into the heap and was injured. This amounted to a trap. The defendant held out the road as a safe and convenient access to his house and then placed (or allowed the builder to place) a dangerous obstruction in it: *Corby* v. *Hill*, 4 C.B.N.S. 556.

In *Lowery* v. *Walker*, [1911] A.C. 10, the defendant was a farmer who put in a field a horse which he knew to be savage. The defendant had tacit permission to cross the field, and whilst doing so was bitten by the horse. This was in effect setting a trap.

In *Cooke* v. *Midland Great Western Railway of Ireland*, [1909] A.C. 229, the defendants had a turntable on land adjoining a highway, and to which there was easy access by a gap in the hedge. They knew children were in the habit of trespassing. Children got through the gap and were injured whilst playing with the turntable, which was left in a dangerous condition. Even if the children were to be regarded as trespassers the company were liable. For they left an allurement near a highway by which the children were allured into trespassing and playing with the dangerous machine. Probably they would not have been liable if they had not left the gap so as to make trespassing easy and left an allurement to induce the children to trespass. This almost amounted to an invitation: Underhill on Torts, 9th ed., 176.

The rule was broadly declared in the celebrated case of *Heaven* v. *Pender*, where it was held that whenever one person is by circumstances placed in such a position with regard to another, that every one of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances

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Annotation

Negligence as to licensees

Annotation (*continued*)—**Negligence (§ I C 2—50)—Duty to licensees and trespassers—Obligation of owner or occupier.**

he would cause danger or injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger: *Heaven* v. *Pender*, 11 Q.B.D. 503, 49 L.T. 357, 47 J.P. 709, 52 L.J.Q.B. 702, C.A. (Reversing 30 W.R. 749).

In *Elliott* v. *Hall*, L.R. 15 Q.B.D. 315 (1885), it was held that owners of a colliery had such direct beneficial interest in the receipt and unloading of the coal by the consignee that they were liable to his servant who was injured by a defective car.

The doctrine was applied to railroad freight cars in *Roddy* v. *Mo. Pac. R.R.* 104 Mo. 234 (1891), where the interest of the railroad in carrying large shipments from a quarry was held to raise a duty to furnish safe cars. A railroad supplying cars "with the intention that people with whom it has business and their help shall work with, about or in the cars" must use ordinary care to avoid injury to the persons so using the cars: *Sykes* v. *R.R.*, 88 Mo. App. 193 (1904). The basis of liability is stated in another American case to be that the contract between the defendant company and the plaintiff's employer created the duty out of which the duty of the defendant to the plaintiff arose: *Hummel* v. *R.R.* 167 Fed. 89 (1909).

See also *R.R.* v. *Booth*, 98 Ga. 20 (1895); *Olson* v. *P. and O. Fuel Co.*, 77 Minn. 528 (1899); *R.R.* v. *Pritchard*, 168 Ind. 398 (1907); *White* v. *R.R.*, 25 R.I. 19 (1903); and Annotations 17 L.R.A. (N.S.) 916, 19 L.R.A. (N.S.) 1094.

CAN.

Ex. C. 1912

Feb. 14.

THE IMPERIAL SUPPLY COMPANY, LIMITED (plaintiffs) v. THE GRAND TRUNK RAILWAY COMPANY OF CANADA (defendants).

Exchequer Court of Canada. Cassels, J. February 14, 1912.

1. PATENTS (§ IV C—45)—LICENSE TO USE—EMPLOYER AND EMPLOYEE—INCOMPLETE NEGOTIATIONS.

Where a form of license to use a patented invention was signed by the employee in whose favour the patent had been issued, to license the employers, a railway company, to use the same for a nominal consideration of one dollar without royalty or further payments being thereby provided, and the railroad company objected to the inclusion of a clause in the license which purported to restrict the license so as to exclude the use of the invention by certain allied railway companies and gave notice of such objection to the proposed licensors, and the license was not executed by the company nor was anything done towards its acceptance further than the retention by the company of the copy so forwarded to them, such retention without registration thereof will not be held to be an acceptance of the agreement binding upon the company, if it appears that the alleged invention was perfected in the course of the employee's work for the company and that the licensors knew that the company always demanded from employees who invented a device under such circumstances an absolute license without cost to the company for the use of the invention on their own and all allied lines.

2. PLEADING (§ II M—265)—ACTION FOR INFRINGEMENT OF PATENT—CLAIMING ESTOPPEL AGAINST DISPUTING VALIDITY.

If the plaintiff in an action for infringement of patent, in which a defence of invalidity is pleaded, desires to shew at the trial that the defendant is estopped from disputing the validity of the patent, he must specifically plead the estoppel.

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EX. C.
1912

IMPERIAL SUPPLY CO., LTD. v. GRAND TRUNK R.W. CO.

3. CONTRACT (§ I C 1—17)—FAILURE OF CONSIDERATION—LICENSE TO USE PATENT—VALIDITY OF PATENT QUESTIONED.

A licensee of a patent of invention is not permitted during the term of such license to shew a failure of consideration therefor by reason of the alleged invalidity of the patent where there was no warranty of the patent and no fraud.

4. ESTOPPEL (§ III J 2—126)—ACCEPTING LICENSE TO USE PATENT—DISPUTING VALIDITY OF PATENT.

An estoppel of a person licensed to use a patent of invention against his disputing the validity of the patent may arise from the relative positions of the parties even without recital in the written license.

Statement

PRELIMINARY trial of certain questions and issues arising in an action for infringement of patent rights.

A statement of claim was filed on behalf of the plaintiffs who claimed to be assignees of two certain patents, one numbered 98330, bearing date the 3rd April, 1906, and the other numbered 129053, bearing date the 1st November, 1910.

When the case came on for trial before Mr. Justice Cassels in Montreal, it was adjourned with leave to the defendants to amend their pleadings so as to raise other defences. In their statement of claim the plaintiffs alleged that by an instrument in writing executed on the 2nd June, 1906, Thomas Akin Dalrymple and Robert Burnside, Jr., who were the patentees under the first patent, and who are alleged to be the inventors of the invention described in the second patent, licensed the Grand Trunk Railway Company for the consideration of one dollar, to use the inventions in question. That document was in the following terms:—

KNOW ALL MEN BY THESE PRESENTS, that we, Thomas Akin Dalrymple, and Robert Burnside, both of the city of Montreal, Province of Quebec, Dominion of Canada, machinists, for and in consideration of the premises and of the sum of one dollar ($1.00) to us paid by the Grand Trunk Railway Company of Canada (the receipt whereof is acknowledged) do hereby empower and license the said Grand Trunk Railway Company of Canada, their servants and agents and the servants or agents of any company whose line or lines of railway is or are known as part of the Grand Trunk Railway System, to manufacture at any of the shops or works of any of the said companies, for the use by the said companies, their servants or employees, and each of them, but not for sale, the articles and appliances; to wit:—a Triple Sight Feed Lubricator, letters patent for which have been applied for in the Dominion of Canada and the United States of America on the 12th and 13th day of December, 1905, respectively, together with any and all modifications and further improvements of which the said invention or improvement or any part thereof is susceptible. The said license and authority to continue to the full end of the terms for which the said patents in either Canada or United States, or any of them, covering the said invention or improvements, or patents for any and all modifications and further improvements thereof is, are or shall be granted renewed or extended.

And we, the said Thomas Akin Dalrymple and Robert Burnside, do hereby agree with the Grand Trunk Railway Company of Canada

that the right to manufacture and use the said improvements, articles and appliances and modifications or improvements thereof herein granted shall not be subject to any royalty or payment whatever by the said companies or any of them other than the said sum of one dollar ($1.00) hereby acknowledged.

And we further covenant and agree with the said company, that we will do all and every act and thing necessary to protect and preserve our interest in and right to the said inventions and the said letters patent when granted, and also in and to any patents hereafter granted for any modification or further improvement of said inventions, and will at all times fully protect the said companies and each of them in the enjoyment of the privileges hereby granted to manufacture and use the said inventions or improvement, or any modification and improvement thereof, and that any license or right to manufacture, use or sell the said invention or improvement or any modification or improvement thereof or any of them which shall at any time be granted by us to any other person or corporation shall be made expressly subject to the rights hereby conferred upon the said companies and each of them.

It is understood that the above agreement does not include the Grand Trunk Pacific Railway or the Central Vermont Railway.

WITNESS our hands and seals this second day of June, in the year of our Lord one thousand nine hundred and six.

Signed, sealed and delivered in presence of—

(Sgd.) JNO. A. DUFFIE.

(Sgd.) THOMAS AKIN DALRYMPLE. (Seal.)

(Sgd.) ROBERT BURNSIDE, JR. (Seal.)

The plaintiffs claimed that under this agreement the defendants became licensees under the patentees. They also claim that the Grand Trunk Railway Company had been making lubricators for the Grand Trunk Pacific Railway Company specially excepted by the agreement. The fact of making the lubricators for the Grand Trunk Pacific Railway Company was not disputed by the defendants.

The Grand Trunk Railway Company set up several defences. They first set up that the document of the 2nd June referred to, was never in fact so accepted, regarded, treated or acted upon by the defendants as to constitute an agreement. They further assert that if the document in question is an agreement binding upon the Grand Trunk Railway Company, the doctrine of estoppel cannot be held as applicable to the case in hand. They furthermore set up that the patentees obtained the patents in trust for the railway company, and in the alternative they allege that there was no invention disclosed by the patents, and in any event that these patents are void having regard to the state of the art, and for other reasons.

Messrs. *V. E. Mitchell*, K.C., and *Gilbert Stairs*, for plaintiffs.

Messrs. *E. Lafleur*, K.C., and *W. H. Biggar*, K.C., for defendants.

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EX. C.
1912

IMPERIAL SUPPLY CO., LTD.
v.
GRAND TRUNK R.W. CO.

CASSELS, J.

CASSELS, J.:—On the first hearing, I suggested to counsel that if the law of estoppel was not applicable to the case in hand, the Grand Trunk Railway Company would be in a better position if the document were held to be binding on them. If the document of the 2nd June, 1906, is as contended for by the Grand Trunk Railway Company, then the Grand Trunk Railway Company would become infringers of the patented inventions assuming the patents to be eventually upheld as valid patents. On the other hand, if it were held that the alleged agreement of the 2nd June, 1906, was valid, but that there was no estoppel preventing the Grand Trunk Railway Company from disputing the validity of the patents so far as their sales to the Grand Trunk Pacific are concerned, then the Grand Trunk Railway Company would have the right to attack the validity of the patents in this action, and if they failed they would still have the right under the alleged license to continue manufacturing for their own uses. I suggested to counsel at the trial that it would be better to determine the two points—First, is the alleged document of the 2nd June, 1906, an existing and valid license binding upon the Grand Trunk Railway Company; and, secondly, if it were held to be a valid and existing license, are the Grand Trunk Railway Company at liberty to endeavour to impeach the patents, or are they estopped from denying the validity of the patents?

If these two issues were held against the Grand Trunk Railway Company, then there would be nothing left but a reference as to the damages for the infringement of the patent; and in this latter event a prolonged litigation affecting the validity of the patents would be avoided. This course, subsequent to the hearing, seemed to meet with the approval of the counsel; and an order was made that these issues should be first tried. It was also directed that the issue as to whether or not the patentees were trustees for the Grand Trunk Railway should also be tried. At the subsequent trial which took place on the 11th January, 1912, both counsel for the plaintiffs and for the defendants agreed that it would be better that this last issue should be held over to be tried, if the case came down to trial, on the defences as to the validity of the patents.

I have considered carefully the question of estoppel, and have arrived at the conclusion that if the agreement of the 2nd June, 1906, be a valid and a binding agreement, the Grand Trunk Railway Company are estopped. In the view I take of the case, namely, that the agreement is not a binding agreement on the Grand Trunk Railway Company, it may be unnecessary to deal with the question of estoppel. Later on, however, I will deal with this question, as if I am in error in the conclusion I have arrived at in regard to the agreement being one not binding on the Grand Trunk Railway Company, then the question of whether there is estoppel or not may become material. The case

is a peculiar one, and I have been very much impressed by the able argument presented by Mr. Mitchell, K.C., in support of the plaintiffs' contention.

After the best consideration I can give to the case I have come to the conclusion that the agreement of the 2nd June, 1906, was never assented to, or accepted by the defendants, the Grand Trunk Railway Company. It must be borne in mind that the patentees, Robert Burnside, Jr., and Thomas Akin Dalrymple, were employees of the Grand Trunk Railway Company. It was admitted that Mr. Robb was the superintendent of motive power employed by the Grand Trunk Railway Company. Mr. Maver was the master mechanic.

I do not wish at the present stage of the proceedings to pass upon the question as to whether or not the invention was an invention by these two mechanics or whether the invention belonged to the Grand Trunk Railway Company. Two cases, one in the United States, and one in England, deal with the question when an invention becomes the property of the employer or when it becomes the property of the workman. See *Worthington Co.* v. *Moore*, 19 T.L.R. p. 84 (November, 1902); and *Hopwood* v. *Hewitt*, 119 U.S. p. 226.

It is material, however, in considering the evidence as to whether the alleged document of the 2nd June, 1906, was accepted by the Grand Trunk Railway Company, to take into account the facts as to how the alleged inventions were arrived at. Mr. Robb states that the lubricators that the Grand Trunk Railway Company were using were not satisfactory; and he told his master mechanic, Mr. Maver, "to get up a lubricator ourselves in our own shop."

> "Q. Which would be more satisfactory? A. A lubricator which would suit our requirements."

He goes on to say that

> "the lubricator we had was too small, and it was weak, and it lacked a bull's-eye glass. I told him to embody all these features, and have a lubricator which would hold more oil, which would take care of the larger engines, and which would have a bull's-eye glass. I told him to embody all these features from the old lubricators, and to make one that would be our own lubricator. These were the instructions I gave."

It appears that pursuant to these instructions the work in question was performed. It would appear also before or after the patents were granted, the account for the expenses of obtaining the patents, certainly the earlier patent, was sent to the Grand Trunk Railway Company. Mr. Robb refused to pay this on the ground that the patentees had declined to grant the license asked by the Grand Trunk Railway Company. It also appears that in cases where the Grand Trunk Railway permitted their workman to experiment at their expense, a form of

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Cassels, J.

license was always executed which permitted not merely the Grand Trunk Railway Company to use the inventions, but their allied lines; and the Grand Trunk Pacific was an allied line of the Grand Trunk Railway Company.

In the first place both Robert Burnside, Jr. and T. A. Dalrymple knew that Mr. Robb was the official representing the Grand Trunk Railway Company who had the authority to make agreements of this nature. Dalrymple in his evidence states as follows:—

THE COURT:—As I understand from your evidence, your previous communication between you and Mr. Robb for this license, was prior to this document being signed of the 2nd of June? A. Yes.

Q. Mr. Robb was insisting that the Grand Trunk Pacific should be included in the license? A. Yes.

Q. Did he ever recede from that position prior to this document being signed? A. He never told me if he did.

Q. And you knew that Mr. Robb was the senior man? A. Yes.

Q. And that the document in question was drawn by a junior in his office. As far as you know Mr. Robb had never changed his mind? A. As far as I know.

It would appear that the document in question was apparently drawn up under the instructions of Mr. Maver. The document itself is not signed by the Grand Trunk Railway Company. It was forwarded by Mr. Maver to Mr. Robb on the 4th June, 1906. Mr. Robb returned it at once to Mr. Maver in a letter of the 7th June, in which he states:—

"Referring to your letter of June 4th, and attached agreement. As I explained to Messrs. Dalrymple and Burnside while in my office, the right to manufacture and use this lubricator must apply to the Grand Trunk Pacific as well as the Grand Trunk . . . I shall be glad if you will have the papers made out and signed in this way."

This letter was communicated by Mr. Maver to Mr. Dalrymple by a letter of the 12th June, 1906,—and it is admitted that a copy of Mr. Robb's letter was sent with the letter of the 12th of June. Dalrymple and Burnside, who had previously been negotiating with Mr. Robb were aware of his position in the railway; they were aware that he had charge of that portion of the railway relating to the patents for invention; and they were aware that Mr. Robb had never receded from the position which he took, as shewn by the evidence of Dalrymple quoted above. They knew that Mr. Robb required that a new agreement should be drawn. It would have been better had the document in question been returned. It seems to have been filed away like other papers in the pigeon holes of the Grand Trunk Railway Company. It was not registered. Both Burnside and Dalrymple knew that Mr. Robb who represented the Grand Trunk Railway Company was the proper officer to accept it on behalf of the Grand Trunk Railway Company.

Ingenious arguments are based upon the examination of Mr. Robb for discovery and certain admissions said to have been made by him. I have no doubt whatever that Mr. Robb was truthfully relating the facts, as he understood them, when examined in the witness box in Montreal. And this is corroborated by his letter which I have quoted, to Mr. Maver of the 7th of June. I do not think that I can find that the agreement was ever accepted by the Grand Trunk Railway Company. Nor do I think that Burnside and Dalrymple were in any way misled by the act of Mr. Maver. At all events Maver had no power to bind the Grand Trunk Railway Company. I must therefore find this issue in favour of the Grand Trunk Railway Company.

On the question of estoppel as I have mentioned above, it may not be necessary for me to deal with this question; but as the parties argued the case at full length, and as it may be helpful to have my views in case a higher Court were of opinion that I have come to a wrong conclusion on the question as to whether the document is binding or not, I will give my views. The clause in the so-called agreement—"It is understood that the above agreement does not include the Grand Trunk Pacific Railway or the Central Vermont Railway" might as well have been omitted from the document. The license without these words, if it were in force, would have been sufficiently explicit. It is not a covenant on the part of the Grand Trunk Railway Co., nor as I have stated, have the Grand Trunk Railway Company signed the document. I have found no case where a form of license is identical with the one in question. The nearest case is the case of *The Magic Ruffle Company* v. *Elm City Co.*, reported in 13 Blatchford Circuit Court Reports (Second Circuit) at page 151. In that case the license was to manufacture portions of four patents. There was a covenant and there were recitals. The Court at page 156 concluded that the defendants might have been sued for breach of their contract. It also pointed out that the alternative remedy might have been adopted of treating them as infringers in an action for infringement brought. The facts are not the same.

I think, however, on principle, that if this document were a binding agreement on the Grand Trunk Railway Co., that estoppel would extend so as to prevent the Grand Trunk Railway Co. when being sued as infringers for manufacturing the patented inventions and selling to the Grand Trunk Pacific, from setting up as against the claim of the patentees the invalidity of the patents. I think there is a good deal of force also in the contention of Mr. Mitchell, that the latter part of the document which states,

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"And we further covenant and agree with the said company, that we will do all and every act and thing necessary to protect and preserve our interest in and right to the said inventions and the said letters patent when granted, and also in and to any patents hereafter granted for any modification or further improvement of said inventions, and will at all times fully protect the said companies and each of them in the enjoyment of the privileges hereby granted to manufacture and use the said inventions or improvements," etc.

adds strength to the contention put forward on behalf of the plaintiffs.

There is in this case no estoppel by recital unless that part of the document which I have just referred to would amount to it. But estoppel may exist from the relative positions of the parties even without recital. On this point I would refer to Terrell on Patents, 5th ed. 1909, p. 205; Fulton on Patents, 4th ed. 1910, pp. 280, 283; Nicolas on Patents, 1904, p. 99; Frost, 3rd ed. 1906, vol. 2, pp. 115 and 158; and Thornton on Patents British and Foreign, 1910, p. 324.

In these text books, nearly all the later cases have been considered. I have examined a large number of them, but find no case in which a license is similar to the terms of the one in question. In most cases the licensee had agreed to pay royalties.

In *Crossley* v. *Dixon*, 10 H.L. Cas. p. 293, it is pointed out that a license may be verbal and the licensee estopped from disputing the validity of the patents, so long as he uses them. *Clark* v. *Adie* (No. 2), 2 App. Cas. p. 425.

The question was raised by Mr. Lafleur at the trial that it would be open to the licensees to shew the invalidity of the patents in order to shew a failure of consideration. I think a consideration of the cases indicate that this could only be done where there was fraud in obtaining a license. There is no warranty of the validity of the patents. There is no contention of that nature under these pleadings. A case that might be looked at which discusses a considerable number of the cases, is *Vermilyea* v. *Caniff*, 12 Ont. R. p. 164. It is a decision that the Chancellor of Ontario gave in 1886, and deals with the question of attacking the patents.

Before closing the judgment I may say that as the case has been treated with considerable laxity, I would give leave to the plaintiffs to properly amend their pleadings and also their proof in one respect. I do not find in their proof of title as made at the trial any copy of the assignment from Herbert H. Bradfield and Charles A. Myers of the earlier patent. In the agreement of the 5th of October, 1910, it is recited that "Whereas the said Herbert H. Bradfield and Charles A. Myers by agreement in writing dated April 6th, 1910, did assign to the Imperial Supply Co., Limited," etc. This assignment of the 6th April, 1910, has not been put in. If the plaintiffs so

desire they are at liberty to put in a certified copy from the patent office of this assignment.

I also do not find on the record any plea of estoppel. It seems to me that the plaintiffs should have such plea upon the record, if it is their intention to rely upon it. Such a plea may also be filed.

The Grand Trunk Railway Co. set up by counterclaim that the patent is void. There is no defence to this counterclaim. As I understand it, the counterclaim is equivalent to a substantive action. Had the defendants applied for judgment on the counterclaim for default, it may be that they would have been entitled to judgment. If the plaintiffs so desire in order to make the record complete they can file whatever defence they deem necessary to the counterclaim. I would refer the solicitors of the parties to Rule 41 of the Exchequer Court, which has the force of a statute.

The costs of this portion of the trial are reserved to be dealt with when the case comes on subsequently to be tried, or if there is no further trial then they can be spoken to before me in Chambers.

Ruling that defendants not bound by alleged license.

JOHNSON BROS., J. McEWEN and ROBERT FERGUSON (Execution creditors of Thomas Hetherington) (plaintiffs) **v. HENRY HEWITT, JAMES HENRY ELLIOTT, HENRY SWAYZE, and INTERNATIONAL HARVESTER COMPANY OF AMERICA** (claimants).

Saskatchewan Supreme Court. Newlands, J. January 29, 1912.

JUDGMENT (§ II E 8—195)—RES JUDICATA—MORTGAGE SUBSEQUENT TO EXECUTION—DECISION REJECTING DEBTOR'S CLAIM TO HOMESTEAD EXEMPTION—EFFECT ON MORTGAGEE.

A decision given in favour of execution creditors against the execution debtor rejecting his claim that the lands seized under the execution were exempt from seizure under execution as being his homestead, is res judicata, as against a mortgagee of the lands from the execution debtor subsequent to the operation of the execution or judgment as a charge on the lands; but the mortgagee may apply for a rehearing of the case on the ground of the discovery of new evidence of a material character.

STATED case as to whether a prior judgment upon a homestead exemption claim is binding upon the mortgagee.

G. H. Barr, for claimants.

A. E. Vrooman, for plaintiffs, execution creditors.

NEWLANDS, J.:—This is a stated case, the question submitted for decision being, whether the decision of Mr. Justice Lamont, in the matter of the sale under execution of the south west quarter of section 14, township 6, range 22, west of the 1st meridian, that said land was not the homestead of the execution

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debtor Hetherington, is *res judicata*. The question arises the second time because of the claim of a mortgagee who was not a party to the interpleader issue in which the above decision was given, and the parties interested consented to an order to submit this special case for decision before anything further was done in the matter.

The claim made by the mortgagee is the same claim as was made by the execution debtor Hetherington, namely that the land under seizure is the homestead of Hetherington, and therefore exempt from seizure under execution. The mortgagee claims title through the execution debtor; and if the previous claim had been decided in favour of the execution debtor it would have inured to the benefit of the mortgagee.

Under these circumstances there is no question in my mind that this matter is *res judicata*, and that the only way in which it can be brought up again, other than on appeal, is on application by the mortgagee to Lamont, J., to re-hear the case on the ground of the discovery of new evidence which will have a material effect on the issue.

Judgment for execution creditors.

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Jan. 2.

RE WEST NISSOURI CONTINUATION SCHOOL.

Ontario High Court, Middleton, J. January 2, 1912.

1. SCHOOLS (§ I A—5)—POWERS OF SCHOOL BOARDS AND OF MUNICIPAL COUNCILS.

A school board is supreme within the limits of its own jurisdiction, and a municipal council has no right to review or render nugatory the action of a school board in the exercise of a power given by statute to the board.

2. SCHOOLS (§ I A—5)—RESPECTIVE POWERS OF SCHOOL BOARD AND OF MUNICIPAL COUNCIL—MANDAMUS.

The Court will prevent the invasion by a municipal council of the legislative territory assigned to a school board, and will compel by mandamus the discharge of a council's statutory duties which are merely ministerial and ancillary in their nature, and necessary for properly carrying out the lawful action of a school board. The fact that the ratepayers disapprove of the action of a school board is no excuse for interference by a municipal council.

3. SCHOOLS (§ IV—74)—BOARD'S APPLICATION TO MUNICIPAL COUNCIL FOR SCHOOL FUNDS—HIGH SCHOOLS ACT, 9 EDW. VII. (ONT.) (1909), CH. 91, SEC. 38—APPROVAL OF APPLICATION ONCE GIVEN—DUTY OF MUNICIPAL COUNCIL.

When the application of a school board for funds under section 38 of the Ontario High Schools Act has been once approved, by the municipal council to whom it is made, it is the duty of the council to pass a by-law and do all that is necessary for the raising of the money, and this duty cannot be evaded by a subsequent disapproval or by repealing the by-law that has been passed in compliance with that duty.

4. MUNICIPAL CORPORATIONS (§ II A—33)—POWER OVER SCHOOL FUNDS—REQUISITION BY SCHOOL BOARD—CONTINUATION SCHOOLS ACT, 9 EDW. VII. (ONT.) (1909), CH. 90, SEC. 7.

Under section 7 of the Continuation Schools Act of Ontario, a school board has the right of determining the amount to be raised for maintenance purposes for the current school year, and the municipal council is under an absolute obligation to comply with a requisition of the board in that behalf.

[See also *Canadian Pacific R.W. Co.* v. *City of Winnipeg*, 30 Can. S.C.R. 563.]

5. MANDAMUS (§ I D—31)—MUNICIPAL CORPORATION—TO WHOM DIRECTED.

A mandamus to a municipal council should be directed to the corporate body and not to the individuals composing it, although it is proper to notify the individuals.

[See also *Re Bolton and County of Wentworth*, 23 O.L.R. 390.]

6. MOTIONS AND ORDERS (§ I—4)—FILING AFFIDAVITS IN SUPPORT—WAIVER OF IRREGULARITY.

The objection that affidavits in support of a motion were not filed in the proper office or department of the Court although they were in fact filed and in the custody of the Court and, copies were supplied in pursuance of a demand, is waived if the motion was enlarged without objection being taken; under such circumstances, the Court will allow the affidavits to be re-filed in the proper office nunc pro tunc.

[See also Yearly Practice (1912), p. 1136.]

MOTION by the trustees of the West Nissouri continuation school for (1) a mandamus to compel the council of the township of West Nissouri to raise the sum of $7,000 and pay the same to the school treasurer, or to issue debentures for that amount under township by-law 208 and pay the proceeds to the treasurer; and (2) for a mandamus to compel the council to pay $1,000 for maintenance of the school.

A mandamus was ordered in each case.

The motion was heard at the London Weekly Court.

W. R. Meredith, for the applicants.

Sir George C. Gibbons, for the township corporation.

MIDDLETON, J.:—This is an unfortunate contest between a municipal council and a school board, in which the council, quite forgetting the limitation of its sphere, seeks to review the action of the school board and to protect the ratepayers from the action of that board. As put by the reeve: "A very large proportion of the ratepayers of the township are opposed to the establishment or maintenance of a continuation school in the said township, as I verily believe, and myself and other councillors opposed to the establishment of such school were elected by a large majority on that issue. . . . Knowing the feeling of the ratepayers in this regard, the majority of the councillors felt it to be their duty to prevent, if possible, the establishment of the said school against the will of the people who have to maintain the same."

Nothing can be more improper than this attitude on the

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part of the township council. In our complicated system of municipal government, each subordinate body is supreme within its own limits, and municipal government cannot be carried on if one of these subordinate bodies, not content with its own supremacy within the ambit of its own jurisdiction, seeks to interfere with matters outside its jurisdiction, and, sitting as a self-constituted Court of review, to render nugatory the action of other representative bodies with which it, in its wisdom, does not agree.

The reeve and his associates are quite wrong in seeking to answer this application by the assertion that they and the ratepayers do not approve of a continuation school. That question is one over which they have no voice or control. "The council of a county with the approval of the minister may establish in any township, town or village in the county one or more continuation schools:" sec. 5 of the Continuation Schools Act, 9 Edw. VII. ch. 90; and this action cannot be reviewed by the township.

It is the duty of the Court to prevent this invasion by one municipal body of the legislative territory assigned to another, and to compel the discharge by one municipal body of any duties which it may be called upon to discharge which are merely ministerial and ancillary in their nature.

The legislature has seen fit to provide that school affairs shall be in the hands of the school boards, and shall not be in the hands of the municipal council; and at the same time has provided that the municipal council shall be the hand by which the money required for school purposes shall be raised. "The council shall levy and collect in each year such amount as the board may deem necessary for the maintenance of the school:" sec. 7 (9 Edw. VII. ch. 90). "Where the sum required by a board for permanent improvements" (which includes the erection of a school house, sec. 2 (1) (k)) "the same shall be raised on the application of the board" (9 Edw. VII. ch. 91, sec. 38, made applicable to continuation schools by sec. 7 (3) of the Continuation Schools Act), unless the council exercise the special limited statutory rights given by sub-sec. 3 et seq. At the first meeting after the receipt of the requisition or so soon thereafter as possible, the council shall "consider and approve or disapprove the same;" and, if it disapproves, it shall, on the request of the board, submit the question to the ratepayers.

The question was considered by the council, and the council approved of the application, and it then became the duty of the council to pass a by-law in accordance with the requirements of sec. 38, and to issue and sell the debentures and pay over the proceeds to the school board.

In compliance with this duty, the by-law 208 was passed. On the attack upon its validity, the council properly enough did

nothing pending the litigation. In August last, a change having taken place in the views of the council, by-law No. 216 was passed, by which 208 was repealed. It is now said that this destroys the rights of the board. I think not. The right to approve or disapprove was one which the municipality was called on to exercise, once and for all, immediately after the receipt of the requisition, and, when approved, the council was bound then to do all necessary for the raising of the money. It may well be that by-law 208 does not contain provisions that are now suitable, and that its repeal is necessary to enable the financial problems to be worked out; but, it seems to me, I am not concerned in this in any way.

I think a mandamus should go directing the township to discharge the duty devolving upon them under sec. 38, in view of the approval of the application of the board by the issue of debentures, and by the passing of the necessary by-law therefor, and to pay over the proceeds to the school board when the debentures shall have been sold. The mandamus should direct the doing of this forthwith, but no motion of a punitive character should be made if reasonable diligence is shewn, and the matter is taken up and proceeded with at the first meeting of the new council in 1912.

The mandamus should be directed to the corporate body, and not to the individuals, though the individuals were properly notified. See *Re Bolton and County of Wentworth*, 23 O.L.R. 390.

Another motion for a mandamus is made, based upon a requisition for $1,000 for maintenance. This motion has been pending for some time, owing to the litigation between Henderson and the township, and the township now says that it has no money with which to pay.

Section 7(1) of 9 Edw. VII. ch. 90 makes it the duty of the council to levy the amount necessary for the maintenance of the school. The school year does not expire with the calendar year, and I can see no reason which will prevent the council from levying the sum necessary to enable the board to carry on its work for the current school year.

I am not concerned with any difficulty the township may be in by reason of its default, and leave it to work out the situation as best it can. The school trustees had the right of determining without question the amount to be raised for school purposes within the municipal limits and of authoritatively calling upon the municipal authorities to collect and hand over that amount, and the municipal authorities are under an absolute obligation to obey the behests in that regard of the school trustees. See per Sedgewick, J., in *Canadian Pacific R.W. Co.* v. *City of Winnipeg*, 30 Can. S.C.R. 563.

A preliminary objection was taken that the affidavits were

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not filed in the proper office. They were in fact filed and in the custody of the Court; copies were demanded, and they have been answered, and the motion was enlarged without any objection being taken. If this does not amount to a waiver (in my view it does), I think I have power to allow the affidavits to be marked by the proper officer *nunc pro tunc*.

The township must pay the costs of both motions.

Mandamus ordered.

N.B.—Appeal taken to the Divisional Court.

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K. B. 1912

Feb. 8.

THE KING v. MALI.

Manitoba King's Bench. Motion before Prendergast, J. February 8, 1912.

1. HABEAS CORPUS (§ I D—21)—STATING GROUNDS OF APPLICATION.

The grounds upon which a motion for a habeas corpus and certiorari in aid is founded must be stated in definite terms and a mere statement that the magistrate "exceeded his jurisdiction in convicting and sentencing said prisoner" is too vague and general to be dealt with, and may be ignored.

2. CRIMINAL LAW (§ II B—40)—ELECTING MODE OF TRIAL—CR. CODE SEC. 778.

When the prisoner consents to be tried summarily by a magistrate under the summary trials clauses of the Criminal Code and an entry of this appears on the record, it will be presumed on a habeas corpus motion, unless the contrary is shewn, that the consent of the prisoner to be tried summarily was regularly obtained and that his option to elect summary trial was exercised only after the magistrate had stated his right of election in the manner prescribed by Cr. Code sec. 778, and it is not essential that the magistrate's statement to the accused of the option in the statutory form should also be recited in the conviction or in the commitment.

[*Rex* v. *Howell*, 19 Man. R. 317; *Rex* v. *Walsh*, 7 O.L.R. 149; *Rex* v. *Crooks*, 17 W.L.R. 560, distinguished.]

3. EVIDENCE (§ II—I—303)—PRESUMPTION—CRIMINAL CODE, SEC. 778.

When it is proved that a prisoner consented that the charge against him should be summarily tried by a magistrate under the Criminal Code sec. 778, the presumption arises that the preliminary requirement of stating to the prisoner his option as prescribed by sec. 778 was complied with by the magistrate.

4. CRIMINAL LAW (§ IV—95)—COMMITMENT ON SUMMARY TRIAL—CERTIFIED COPY OF SENTENCE TO PENITENTIARY.

A sentence to a penitentiary imposed by a magistrate acting under the summary trials clauses of the Criminal Code is subject to the provisions of sec. 44 of the Penitentiary Act and a duly certified copy of the sentence is a sufficient warrant of commitment, without a recital of the preliminaries of the trial.

[See also *Reg.* v. *Peterson*, 6 Man. R. 311.]

MOTION on return of a summons for habeas corpus and certiorari in aid for an order discharging the prisoner from custody under a magistrate's commitment. The grounds on which application is made are set forth in the judgment.

The application was refused.

P. E. Hagel, for the prisoner.

R. B. Graham, Deputy Attorney-General, for Crown.

PRENDERGAST, J.:—Application on return of summons for habeas corpus and certiorari in aid.

The grounds urged for the applicant are:—

1. That the said magistrate exceeded his jurisdiction in convicting and sentencing said prisoner.

2. That the conviction does not shew on its face a strict compliance with the statute, section 778 of the Criminal Code of Canada, by shewing on the face of the said conviction that the magistrate imparted to the said prisoner the necessary information as required by said statute, to give the said magistrate jurisdiction to try and convict the said prisoner.

3. The warrant of commitment does not shew on its face a strict compliance with section 778 of the Criminal Code of Canada, by shewing on the face of the said warrant of commitment that the magistrate imparted to the said prisoner the necessary information as required by said statute, to give him jurisdiction to convict and sentence the said prisoner.

As to the first ground, it is too vague and general to be dealt with, and I dismiss it for that reason.

As to the second ground: The objection, which is directed to the conviction only, does not go far enough; it should be directed to the whole record. For if any part of the record shews that the section in question was complied with, that is sufficient and the conviction should stand. Even considering the matter conformably with the agreement between the parties, as if the writ of habeas corpus and that of certiorari in aid had issued and been returned, I should say that the conviction only was before me, as that is all that is attacked and not the rest of the record. I think that the application could well be dismissed on that ground alone—that the rest of the record, not before me, might shew that the section was complied with, although the conviction does not.

But, as a matter of fact, the record contains this entry: "The prisoner consents to be tried summarily." This consent of the prisoner to be tried summarily clearly refers to, and was evidently meant to be in compliance with, the requirements of section 778, sub-sec. 3. The consent is the essential thing; it is that which gives jurisdiction, and it is here stated to have been given. It is urged for the prisoner that the record does not state that before giving his consent, he was addressed by the magistrate in the words prescribed by sub-sec. 2 or words to the same effect. I do not think it is necessary that the record should state this. The magistrate should be presumed to have accepted the prisoner's consent in the proper manner and only after the necessary preliminary requirement of addressing him in the manner provided by the Code was complied with. That it is absolutely necessary that the magistrate should so address the prisoner, is over-abundantly established; but still, the fact

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remains that this is only a preliminary, leading to the prisoner's election which is the essential element, and on proper evidence of the consent having been given, a presumption is established that the preliminary was complied with as it should have been.

It is to be noted that the accused does not in any way allege that the said statutory requirements were not most strictly observed in every particular, but simply that the conviction (and I have allowed the objection to cover the whole record) does not so state. This distinguishes the present case from *Rex* v. *Howell*, 16 Can. Cr. Cas. 178, 19 Man. R. 317, and *Rex* v. *Walsh et al.* 8 Can. Cr. Cas. 101, 7 O.L.R. 149, which came up as stated cases shewing on their face what proceedings had actually been followed before the magistrates; and also from *Rex* v. *Crooks*, 17 W.L.R. 560 (Sask.), where the application was supported by affidavits that the said statutory provisions had not been followed.

As to the third ground, I will also dismiss the same for the reasons first set out herein, and also under section 44 of the Penitentiaries Act, with which the precept issued herein to serve as a warrant of commitment, strictly complies. The application is then dismissed.

Application dismissed.

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Jan. 25.

RE SHATTUCK.

Ontario High Court, Clute, J. January 25, 1912.

1. WILL (§ III G 9 *b*.—165)—CONSTRUCTION—DEVISE TO WIFE DURING WIDOWHOOD—REMAINDER TO YOUNGER SONS—TIME OF VESTING. Under a devise in a will in the following terms—"I give to my wife all my real and personal estate as long as she remains my widow. In case of my wife's death or marrying again, I wish my lands to be sold and also my personal property and the proceeds to be equally divided between my younger sons"—the sons took an interest which became vested on the death of the testator, and consequently the interest of one son who died in the lifetime of the widow passed by his will to his executors.

[*Packham* v. *Gregory*, 4 Hare 396; *Town* v. *Borden*, 1 O.R. 327; *Webster* v. *Leys*, 28 Gr. 475, followed. *Baird* v. *Baird*, 26 Gr. 367, distinguished.]

Application by the executors of the will of Joseph E. Shattuck, deceased, for an order determining three questions arising upon the construction of the will.

W. C. Brown, for the executors.

V. A. Sinclair, for S. Shattuck, William J. Shattuck, and the executors of Elmer L. Shattuck.

W. M. Douglas, K.C., for Lorenzo Shattuck and Edgar Marshall Shattuck.

CLUTE, J.:—The testator, after directing his executors to pay his debts, proceeds as follows: "I give to my wife Margaret all my real and personal estate as long as she remains my

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widow" (describing it). "In case of my wife's death or marrying again I wish my lands to be sold and also my personal property and the proceeds to be equally divided between my younger sons Angus Lorenzo Shattuck, Edgar Marshall, Noah Safford, Elmer Lincoln, and William Joseph Shattuck."

The widow, without having married, died on the 4th December, 1911. Elmer Lincoln Shattuck did not marry, and died in July, 1903, leaving a will, whereby he devised his estate to certain heirs.

The following questions are submitted:—

1. Does the wording of the will grant a life estate to the wife, with remainder over at her death or remarriage to the five children, younger sons, in equal shares, so that each of the said sons, upon the death of the testator, took a vested interest in the said lands?

2. Did the interest of Elmer Lincoln Shattuck lapse upon his death, or did it pass under the will of Elmer Lincoln Shattuck, deceased, to his executors?

3. Did Elmer Lincoln Shattuck, during his lifetime, have a vested interest in the estate of the said Joseph E. Shattuck?

It will be seen that in this will there is no gift over. It is clear, I think, that the intention of the testator was to make a gift to his children. The possession of the gift is delayed by keeping out a life estate for the widow; and, upon her death or remarriage, the real and personal estate is to be sold and divided between the five children.

This brings the case, I think, within the rule laid down in *Packham* v. *Gregory*, 4 Hare 396, where Sir James Wigram, V.-C. said: "But if, upon the whole will, it appears that the future gift is only postponed to let in some other interest, or, as the Court has commonly expressed it, for the benefit of the estate, the same reasoning has never been applied to the case. The interest is vested notwithstanding, although the enjoyment is postponed." See also Jarman on Wills, 6th ed., p. 1404; *Rogers* v. *Carmichael*, 21 O.R. 658. [Theobald on Wills, 7th ed., p. 575.]

In this last case, there was also a devise and bequest of real and personal estate to the wife for life or until marriage, with power of disposal; and, by a residuary clause, the testator devised the residue not specifically devised or bequeathed, and not sold or disposed of by his wife, immediately after her death or marriage to his executors to sell and convert the same into money, and out of the proceeds pay a specific sum to each of his five sons, and divide the balance, share and share alike, between his three daughters. One of the sons died prior to the widow, leaving no issue, and it was held that the legacy to him became vested on the testator's death, payable on the widow's death, and that his personal representatives were entitled thereto.

So in *Town* v. *Borden*, 1 O.R. 327, where a testator by his

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will gave to his wife the use of his personal property and his farm for the support of his children, "and at her decease the whole of the personal and real property to be equally divided between my six children," it was held that the shares of the children vested on the death of the testator. In this case reference is made to *Baird* v. *Baird*, 26 Gr. 367, referred to by Mr. Douglas; and Proudfoot, J., points out that the report in the Baird case is defective. In that case, an apportionment was to be made "to each of our children alive at the time," etc., which, of course, precluded the vesting of their interest at the time of the testator's death.

In *Webster* v. *Leys*, 28 Gr. 475, it was held by Proudfoot, V.-C., that a bequest in the form of a direction to pay or to pay and divide at a future period vests immediately, if the payment be postponed for the convenience of the estate or to let in some other interest.

Theobald on Wills, Canadian edition, gives the rule in these words (7th ed.), at p. 584: "If the postponement of division or payment is merely on account of the position of the property, if, for instance, there is a prior gift for life, or a bequest to trustees to pay debts, and a direction to pay upon the decease of the legatee for life, or after payment of the debts, the gift in remainder vests at once. But where the payment is deferred for reasons personal to the legatee, the gift will not vest till the appointed time." See also *Martin* v. *Leys*, 15 Gr. 114; *Kirby* v. *Bangs*, 27 A.R. 17.

I think in this case the gift of the testator, Joseph E. Shattuck, to his five sons vested upon his death, and that Elmer Lincoln Shattuck, during his lifetime, had a vested interest which passed by his will to his executors. Costs of all parties out of the estate.

Judgment accordingly.

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Jan. 13.

CAPITAL MANUFACTURING CO. v. BUFFALO SPECIALTY CO.

Ontario High Court, Middleton, J. January 13, 1912.

1. INJUNCTION (§ III—150)—INTERIM INJUNCTION—POWERS OF LOCAL JUDGE IN CASES OF EMERGENCY—EX PARTE MOTIONS.

A local Judge has no power under Ontario Con. Rule 46 to grant an interim injunction except in cases of emergency and on proof to his satisfaction that the delay required for an application to the High Court is likely to involve a failure of justice; and this power is not to be exercised without notice of the application being given, unless the Court is satisfied that the delay caused by proceeding by notice of motion might entail serious mischief.

2. INJUNCTION (§ II—150)—INTERIM INJUNCTION FOR EIGHT DAYS—LIMITED JURISDICTION OF LOCAL JUDGE—SECOND INJUNCTION.

An interim injunction for a period not exceeding eight days may be granted by a local Judge under Ontario Con. Rule 46, and after the expiry of an eight-day injunction granted by one local Judge a second eight-day injunction should not be granted by another local Judge to the same effect as the first injunction.

3. INJUNCTION (§ II—130)—EX PARTE INTERLOCUTORY INJUNCTION—NON-DISCLOSURE OF PRIOR INTERIM INJUNCTION.

On an ex parte application for an injunction, the fact that a prior interim injunction had been granted and that a motion made to continue same had been dismissed for irregularity, should be disclosed to the Judge to whom the second application for a similar injunction is made, and the fact of such disclosure should at least be evidenced in the order itself by a statement or recital that the prior orders had been read on the last application.

[See also 17 Halsbury's Laws of England, p. 278.]

4. INJUNCTION (§ II—130)—EX PARTE INTERIM INJUNCTION AFTER APPEARANCE—NON-DISCLOSURE BY APPLICANT OF THE FACT OF APPEARANCE.

It is not usual to grant an interim injunction ex parte after the defendant has entered an appearance in the action, although it may be done in pressing cases; and then the plaintiff applying ought to inform the Judge of the fact.

[*Mexican Co. of London*, v. *Maldonado*, [1890] W.N. 8, approved.]

5. COURTS (§ I B 4—42)—FOREIGN CORPORATION—ACTS DONE IN A FOREIGN COUNTRY—NO JURISDICTION IN ONTARIO TO RESTRAIN BY INJUNCTION.

Ontario Courts have no jurisdiction to restrain by injunction acts of a foreign corporation in the country of their origin, although the foreign corporation may transact business within Ontario in such a way as to enable Ontario process to be served in conformity with the Consolidated Rules of Practice in respect of business transactions within the jurisdiction.

[See Dicey on Conflict of Laws, 2nd ed., 160-163; 17 Halsbury's Laws of England, 204.]

6. INJUNCTION (§ I M—117)—TO PREVENT NOTICE OF INFRINGEMENT—CIRCULARS THREATENING INFRINGEMENT ACTIONS MAILED IN FOREIGN COUNTRY BY FOREIGN CORPORATION—JURISDICTION.

The fact that a foreign corporation has written letters from its head office in the foreign country addressed to and received by merchants in Ontario, threatening actions for damages for infringement of its Canadian trade mark in respect of sales of goods of plaintiff's manufacture bearing a similar name, does not alone bring the foreign corporation within the jurisdiction of an Ontario Court for the purposes of plaintiff's action for an injunction to restrain the continuance of such notices; nor will the jurisdiction attach in respect of such injunction action from the additional circumstance that the foreign corporation, while not maintaining any branch in Ontario, transacts business in the province in respect of which an order for service out of Ontario would be permissible under Ont. Consolidated Rule 162 in an action relating to such business.

[As to the statutory right in England to enjoin infringement notices, see 17 Halsbury's Laws of England, p. 258.]

MOTION by the defendants for an order setting aside an order made by one of the Local Judges at Ottawa, upon the ex parte application of the plaintiffs, purporting to restrain the defendants from unlawfully interfering with the plaintiffs' business by writing to or otherwise notifying customers of the plaintiffs that the sale by such customers of the plaintiffs' goods, known under the plaintiffs' registered trade mark as "Royal Gem" veneer, constitutes an infringement of an alleged trade mark of the defendants, and from threatening customers of the plaintiffs with actions for damages for such alleged infringement.

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The injunction was dissolved.

R. V. Sinclair, K.C., for plaintiffs.

R. C. H. Cassels, for defendants.

MIDDLETON, J.:—This is a striking instance of the abuse of the power of the Court to grant an interim injunction.

The defendants are an American company carrying on business at Buffalo. As part of their business they manufacture and sell a substance called "liquid veneer." This is a preparation used for cleaning varnished furniture, etc., and has been on the market for some time. The name was registered under the Trade Mark Act, on the 25th June, 1906.

The plaintiffs were incorporated on the 20th September, 1910, under the Dominion statute, and took over the assets of a company bearing a similar name which had carried on business for about a year. The plaintiffs are, therefore, clearly the junior concern. The plaintiffs and their predecessors have for a little over a year sold a similar preparation, or at least a preparation of somewhat similar appearance, to answer precisely the same purposes. This they call "veneer."

On the 20th July, 1911, the plaintiffs registered as a trade mark the words "Royal Gem," and have since been manufacturing and selling "Royal Gem Veneer."

I am not in any way concerned now with the merits of the controversy between the parties; but the unnatural use of this word "veneer" and the similar colour of the packages are enough to justify suspicion that the plaintiffs are close to the border line defined by the "fair trade" cases, of which *Edge* v. *Niccolls*, [1911] A.C. 693, is the latest.

In December last, the defendants, thinking that the plaintiffs had crossed the line, and that what was being done was infringing their rights, wrote to certain customers of the plaintiffs stating that an action was about to be brought against the plaintiffs for damages, and that the customers would be held liable in damages as infringers.

The latest date of any of these letters is the 19th December. The customers, or some of them, sent these letters to the plaintiffs, who on the 29th December began this action for an injunction against the mailing of such letters and a declaration that the trade mark "liquid veneer" is invalid. In view of *Partlo* v. *Todd*, 17 Can. S.C.R. 196, this latter is not of much moment.

Affidavits verifying two of these letters were obtained from two merchants in Ottawa on the 30th December; and on the 2nd January the plaintiffs' general manager made an affidavit. On the same day an ex parte injunction was obtained from Judge MacTavish (senior Local Judge at Ottawa) restraining the defendants from writing or otherwise notifying any of the

plaintiffs' customers that they claimed that the goods sold as "Royal Gem" veneer constituted an infringement of the "liquid veneer" trademark and threatening such customers with actions for infringement.

A motion was made to continue this injunction before the Judge presiding at the Ottawa sittings, under sec. 91* of the Ontario Judicature Act. This motion was dismissed, because it was not within the section.

On the same day another motion was made, ex parte, to Judge Gunn, the junior Local Judge at Ottawa, who granted a precisely similar order, on the same material, restraining the same acts until the 15th January.

The present motion is made to set aside this order. Several grounds were argued.

The statute now embodied in Con. Rule 46 confers power upon a Local Judge only "in cases of emergency," "on proof to the satisfaction of the Judge that the delay required for an application to the High Court is likely to involve a failure of justice." This cannot be said to be a "case of emergency," i.e., "a sudden or unexpected happening, an unforeseen occurrence or condition."

This Rule must be read in the light of Con. Rules 355 et seq.: every application to the Court for relief must be upon motion, and any person affected by the order must be notified. This is an elementary and fundamental principle, and the only exception recognised by the practice is that found in Con. Rule 357, where the Court is "satisfied that the delay caused by proceeding by notice of motion might entail serious mischief." This is what is necessary before any ex parte order should be made. Before the Local Judge has any jurisdiction, it is further required that there should be such a situation of emergency that a motion to a High Court Judge will, by reason of the delay incident to making the application at Toronto in the ordinary way, involve a failure of justice. The provisions of these Rules are daily ignored in practice, but they still exist and ought to be rigorously enforced. It has become a practice to apply ex parte to a Local Judge in every case; and ex parte injunctions are often granted practically on præcipe, frequently to the great injury of the defendant.

Lindley, J., *Anon.* ([1876] W.N. 12), says: "Primâ facie an injunction ought not to be granted ex parte. In cases of

*91. At the sittings of the High Court or Assizes in any county town there shall be a general docket in addition to the docket of cases entered for trial, and such general docket may include all motions, petitions, proceedings and other matters which may be heard by a Judge in Court or in Chambers in any case where the solicitors consent, or where the matter in controversy arose in the county or where the party opposing or shewing cause in the matter, or his solicitor, resides in the county. Such general docket shall be disposed of after the trial of causes.

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emergency it will be granted; but an injunction is very rarely granted without hearing both sides."

Then the fact that an injunction had already been obtained from one Local Judge completely exhausted the local jurisdiction. It is not contemplated that a Local Judge, whose power to restrain is limited to 8 days, should be able to restrain indefinitely by granting a series of 8-day injunctions. It is even more vicious when the plaintiff applies to a second Local Judge for his second ex parte injunction.

Then the injunction is objectionable for the non-disclosure of the prior injunction and its fate, upon the motion for the second injunction. It is said that the Judge was told. This probably is so, but this is not enough. The material used is recited, and it is not allowable to eke it out or supplement it by mere verbal statements to the Judge. The danger is obvious. The unfairness to the defendant is obvious,—he has no means of knowing upon what statements an ex parte judgment against him was obtained. The former proceedings, if before the Judge, might have been recited in the order as being read. Had they been, I think he would have hesitated to make the order ex parte. See *Fitchet* v. *Walton*, 22 O.L.R. 40.

The fact that the defendants had appeared in the action ought to have been disclosed. "It is not usual to grant an injunction ex parte after the appearance of the defendant, though it may be done in some pressing cases. But it is a rule without any exception that, if the defendant has appeared, the plaintiff, on applying for an ex parte injunction ought to inform the Judge of the fact:" North, J., in *Mexican Co. of London* v. *Maldonado*, [1890] W.N. 8, 88 L.T. Jour. 238.

But, quite apart from this, it is clear, on the plaintiffs' own affidavits, that they make out no case for an interim injunction, let alone an ex parte injunction.

To award an interim injunction, under the circumstances, would be contrary to all precedent. The rights of the plaintiffs are by no means admitted, nor are they free from doubt. The facts almost indicate that they, and not the defendants, are the wrongdoers; and there is very serious legal difficulty in their way, so far as an injunction is sought, which must be faced at a hearing. I abstain from discussing this legal aspect of the case lest I should prejudice the parties at a hearing.

In quite another aspect the injunction cannot be supported. The mailing of the circulars—the act complained of—took place out of the jurisdiction. The defendants are a foreign company. Their place of business is out of the jurisdiction; and, though they may transact business in Ontario in such a way as to enable process to be served under our Rules—yet they are still a foreign corporation, and our Courts have no kind of jurisdiction over their acts in the country of their origin.

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For these reasons, I think the motion should be granted, and the injunction dissolved, with costs to the defendants in any event.

I have no power over the costs of the proceedings before the Assize Judge, but this order may, unless the plaintiffs object, cover the costs of the motion to continue the injunction now set aside and vacated. This will save the making of a separate order on its return.

Injunction dissolved.

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Feb. 7.

Manitoba Court of Appeal. Perdue, J.A., in Chambers. February 7, 1912.

1. ELECTIONS (§ IV—91*a*)—PRELIMINARY OBJECTIONS—SECURITY FOR COSTS—RETURNING OFFICER A PARTY.

A Returning Officer, whose conduct is complained of and who is made a party to an election petition, is to be deemed, for most purposes of the Dominion Controverted Election Act, a respondent and the petitioners who have deposited the statutory sum ($1,000) as security have sufficiently complied with the statute, such deposit standing as security for the payment of the costs of both the member whose election is protested and the Returning Officer whose official action is attacked.

2. ELECTIONS (§ IV—90)—PROCEDURE—PETITIONER VERIFYING PETITION—KNOWLEDGE OF CONTENTS—SUFFICIENCY OF AFFIDAVIT.

Where an election petition under the Dominion Controverted Elections Act is presented by two petitioners and each makes an affidavit of belief in the charges laid, in the form required by the statute, the petition which would have been valid with one petitioner only will not be set aside on the ground that one of the petitioners on cross-examination admitted that he knew nothing of several of the charges, or that while he had information as to certain charges, his knowledge and understanding of the contents of the petition generally were very defective.

[*Lunenburg Election Case* (1897), 27 Can. S.C.R. 226, applied.]

3. ELECTIONS (§ IV—90)—PRELIMINARY OBJECTION—PUBLISHING NOTICE OF PETITION—FAILURE TO PAY EXPENSE OF PUBLISHING NOTICE.

It is not an objection to an election petition that notice of the petition was not forthwith published as required by sec. 16 of the Dominion Controverted Elections Act.

[Rogers on Elections, vol. II. (18th ed.), 678, and McPherson's Election Law, p. 1065, referred to.]

4. ELECTIONS (§ IV—90)—CONTEST—NOTICE OF PETITION TO BE ADVERTISED BY RETURNING OFFICER—DELAY—PREPAYMENT OF EXPENSE BY PETITIONER NOT AN ESSENTIAL PRELIMINARY.

While the petitioner is to bear the costs of the publication by the Returning Officer in a newspaper of notice of the election petition, neither the Dominion Controverted Elections Act nor the rules of Court thereunder in force in Manitoba, make prepayment by the petitioner a preliminary to the insertion of the notice by the returning officer and the officer's neglect or delay should not prejudice the petitioner, particularly where the non-payment of the money was not the cause of the delay.

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5. ELECTIONS (§ II A—19)—RIGHT TO VOTE—USE OF PROVINCIAL VOTERS' LISTS AT FEDERAL ELECTIONS.

The Court will not, on the hearing of preliminary objections, set aside an election petition filed by a person named in the authenticated list used in the election as an elector, upon the ground that the list so authenticated was invalid for alleged non-compliance with statutory formalities in the preparation and printing of same.

6. ELECTIONS (§ I B—10)—OFFICIAL VOTERS' LIST—NON-COMPLIANCE WITH DIRECTIONS OF STATUTE.

Where the provincial voters' list constituting the foundation of the list of voters for a Dominion election was not forwarded to the clerk of the Crown in Chancery at Ottawa, as required by the Dominion Elections Act, but was instead delivered at his request to the committee of Judges to fix the polling sub-divisions and was afterwards delivered to the person appointed by the King's Printer to receive the same, the fact that the list was not actually forwarded to Ottawa in the terms of the statute is not material to the validity of the list, nor does the fact that the King's Printer had the list printed elsewhere than at the Government printing office in Ottawa affect the validity of the list of voters certified by the committee of Judges which is the original and legal list of voters for the electoral district.

MOTION on behalf of respondent to dismiss a petition filed against the return of John Patrick Molloy, as member for the electoral district of Provencher, in the House of Commons of Canada, upon preliminary objections filed attacking the validity of the petition. The filing of the objections had been confirmed on a previous motion to strike them out. See *Re Provencher Election* (No. 1), 1 D.L.R. 84.

The preliminary objections were overruled with costs to the petitioners in any event of the cause.

Messrs. *H. P. Blackwood*, and *A. Bernier*, for petitioner.

A. B. Hudson, for respondent.

PERDUE, J.A.:—A petition was filed by John H. Barkwill and Paul Gagnon against the return of John Patrick Molloy as a member for the electoral district of Provencher in the House of Commons of Canada. A number of preliminary objections to the petition were filed, but on the argument these were all narrowed down to four, which may be briefly stated as follows:—

1. That the petitioners did not furnish the security for costs prescribed by the Dominion Controverted Elections Act, nor in the manner prescribed by the Act.

2. That the petitioners were not aware of the contents of the petition when they signed the same, nor were they when they made the affidavits filed therewith.

3. That the petitioners did not furnish or pay the registrar of the Court or the returning officer the costs, expenses and charges necessary for the publication of the notice of the petition by reason whereof the same was not published by the returning officer in the electoral district within the time or in the manner provided by the Act.

4. That the petitioners were not persons who had a right to vote at the election and were not candidates at the election.

In regard to the first point, it was argued that because the returning officer had been made a party to the petition and relief had been claimed against him, the petitioners should have furnished an additional $1,000 as security for the returning officer's costs. I think it is clear from section 14 of the Controverted Elections Act that the $1,000 deposited as security is for the purpose of securing payment of costs and expenses, not only of the member whose election or return is complained of, but also the costs of the returning officer, if his conduct is complained of. This, I think, clearly appears from paragraphs (*b*) and (*c*) of section 14. By section 9 of the Act a returning officer whose conduct is complained of, is, for all the purposes of the Act, except the admission of respondents in his place, to be deemed to be a respondent. I think that the security was sufficient and that the objection should be overruled.

The principal grounds upon which the second objection was based were that Gagnon, one of the petitioners, was not aware of the contents of the petition; had no knowledge of the facts alleged, and had no information in regard to them, and that, therefore, his affidavit was not true and was not in compliance with the Act. Counsel for the petitioners had put Gagnon in the witness box and had asked him questions as to his having read over the petition before making the affidavit, with the object of shewing that Gagnon knew the allegations in the petition at the time he made the affidavit and that when he made it he had reason to believe the allegations to be true. Counsel for the respondent was allowed to cross-examine the witness as to the fact of his having received information as to the truth of the allegations and that he believed them. The cross-examination shewed that Gagnon's information was very defective in regard to what the petition contained or the charges set forth in the various paragraphs, or even the meaning of what was charged. It cannot, however, be said that he was completely ignorant or without information as to the contents of the petition and he made statements as to his knowledge of some of the alleged corrupt acts charged in the petition.

I think that I must hold the affidavit was sufficient on the authority of the *Lunenburg case*, 27 Can. S.C.R. 226. In any event there was no such objection to the affidavit made by the other petitioner, Barkwill, and by section 5 of the Act a petition may be presented to the Court by one person who had a right to vote at the election to which the petition relates. I therefore overrule this objection.

Under the third objection it was urged on behalf of the respondent that the evidence shewed that the petitioners had not left with the registrar of the Court or forwarded to the returning officer money to pay the expense of inserting a notice in a newspaper published in the district that a petition had been presented against the return of the sitting member, pursuant

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to section 16 of the Controverted Elections Act. That section requires the clerk of the Court to send such a notice by mail to the returning officer and it is then the duty of the returning officer to insert the notice once in a newspaper published in the district. The costs of inserting such a notice must be borne by the petitioner: Imperial Election Petition Rules, No. 12; Rogers on Elections, vol. II., p. 678; McPherson's Election Law, p. 1065. There is nothing in the Act or in the rule which is in force here, compelling the payment to the returning officer of the expense of inserting the notice as a preliminary to the insertion of the notice by him. It would not be convenient that the rule should make such payment a condition precedent as the amount to be paid in such a case would be uncertain. The returning officer, as a matter of fact, did not forthwith insert the notice in a newspaper as required and such notice was not inserted until a considerable time after the election petition had been filed. In his evidence he explained that the cause of the delay was that he had met with an injury which rendered him incapable of performing his duties. He stated that the non-payment of the money had nothing to do with his neglect to insert the notice. I think, therefore, that this objection also fails.

In respect to the last objection, it was argued on behalf of the respondent that it appeared from the evidence that the voters' list upon which the election took place had not been prepared in accordance with the law, and that, therefore, the petitioners had failed to shew that they were persons who had a right to vote at the election to which the petition related, and that they were not nor was either of them a candidate at the election.

On behalf of the petitioners very much evidence was put in to prove the compiling, revising and bringing into force of the Provincial election lists, and a number of objections were urged by the respondent as to the regularity of these lists by reason, as it was alleged, of non-compliance with several statutory requirements.

The Dominion Elections Act makes the provincial lists the foundation of the Dominion lists: section 6. I do not think that, on an inquiry such as this, I would be justified in entertaining any objection as to the regularity of the provincial voters' lists. They were produced from the proper officer and were proved to be the official lists in force. I do not think I should go behind that.

It is contended by the respondent that in the preparation of the voters' lists for the purposes of the election in question the provisions of the Dominion Elections Act were not complied with in that there were several departures from the express requirements of the Act; that the voters' lists compiled for the electoral district of Provencher was therefore invalid.

and that the petitioners, who relied upon the list as establishing their right to vote, had failed to prove that they had a right to vote at the election. The following facts appeared from the evidence put in by the petitioners:—

In 1911, when it was learned that a general election was to take place, the clerk of the Crown in Chancery at Ottawa, in order to save time, requested the clerk of the executive council at Winnipeg to hand the certified copy of the provincial voters' list to Judge Myers, Judge of the County Court of Winnipeg, instead of transmitting them to the clerk of the Crown in Chancery in accordance with section 12 of the Dominion Elections Act. This was to enable the County Court Judges at once to proceed to define the polling divisions and distribute amongst the polling divisions the names of the voters entitled to vote in each electoral district, pursuant to section 9*a*, sub-section 9, of the Act, as amended by 7 & 8 Edw. VII. ch. 26. Judge Myers handed the certified copy to the committee of Judges appointed to define the polling places and to make the distribution of names. The committee completed their work and made a statement shewing the limits of the polling divisions, and a copy of the lists of electors as distributed amongst the polling divisions, all duly certified. But, instead of transmitting the lists to the clerk of the Crown in Chancery by registered mail as required by section 9*a*, sub-section 10, the committee acting on instructions from the clerk of the Crown in Chancery, handed them, in Winnipeg, to a Mr. McGrath, who had been sent from Ottawa by the King's Printer to take charge of the printing of the lists in Winnipeg. The lists were then printed in Winnipeg under Mr. McGrath's supervision, and in the month of October, following the holding of the elections, the certified copy of the list and the statement shewing the polling divisions came to the office of the clerk of the Crown in Chancery for the first time.

It is argued that sub-section 10 of section 9*a* is imperative, the words being:—

> It shall be the duty of each such committee forthwith after the completion of such distribution to transmit to the clerk of the Crown in Chancery by registered mail a statement and description shewing the limits of the polling divisions so defined and established, together with a copy of the lists of electors as so distributed among the said polling divisions certified under the hands of the members of the said committee and the provisions of sections 13 and 14 of the Dominion Elections Act shall apply to such certified copy.

It is urged that the list must be in the hands of the clerk of the Crown in Chancery before it becomes, under section 14, "the original and legal list of voters, etc."

A printed list of voters for the electoral district in which the petitioners reside was put in evidence. This purports to

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bear the imprint of the King's Printer, and the names of the petitioners appear upon it as voters. By section 18 of the Dominion Elections Act any voters' list purporting to bear such imprint "shall be deemed to be for all purposes an authentic copy of the original list of record in the office of the clerk of the Crown in Chancery." This makes the imprint prima facie evidence of authenticity. It is argued, however, that there was not, as the evidence shews, any original list of record in the office of the clerk of the Crown in Chancery when the list was printed, and therefore, that the printed list cannot be taken to be an authentic copy of something that did not exist when it was printed. A question might be raised as to whether, having regard to the facts of this case, the lists were printed under the superintendence of the King's Printer in accordance with the provisions of the Public Printing and Stationery Act, R.S.C. 1906, ch. 80, having particular regard to sections 16 and 32. The lists were not printed at the Government establishment at Ottawa, where, by section 16, the work is to be done. They were printed in Winnipeg under the supervision of a person sent by the King's Printer, not under the superintendence of the King's Printer himself. If the lists were not printed under the superintendence of the King's Printer in accordance with law then his imprint would not be sufficient authentication of them.

I think that the certified list made by the County Court Judges to be transmitted to the clerk of the Crown in Chancery is the original and legal list of voters for the electoral district. The fact that it was not transmitted by mail but was, at the request of the clerk of the Crown in Chancery, handed to Mr. McGrath, as his representative, and held by him for the purpose of being printed, does not detract from its validity as the actual list of voters for Dominion purposes compiled by the Judges from the Provincial lists. The fact that it was not actually in the hands of the clerk of the Crown in Chancery, but in the hands of his representative, does not appear to me to be material. There was nothing to be done to the list by the clerk of the Crown in Chancery. He could make no changes in it. He could not add anything to it or take anything from it. It was his duty on receiving it to deliver it to the King's Printer to be printed. That it was printed in Winnipeg instead of at Ottawa does not affect the list itself. I think the list compiled by the County Court Judges and produced from the possession of the clerk of the Crown in Chancery is a valid list of the voters entitled to vote in the electoral district. The names of the petitioners appear as voters on the list and this establishes the fact of their right to vote at the election.

All the preliminary objections should be overruled. The costs will be to the petitioners in any event of the cause.

Objections overruled.

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Jan. 25.

O'DONNELL v. TOWNSHIP OF WIDDIFIELD.

Ontario High Court. Trial before Kelly, J. January 25, 1912.

1. MUNICIPAL CORPORATIONS (§ II D—143)—CONTRACT FOR MUNICIPAL WORKS—NECESSITY FOR BY-LAW—MUNICIPAL ACT (ONT.) 1903, SEC. 325.

A contract by a municipal corporation for carrying out permanent improvements to streets and the construction of sewers and contemplating a large expenditure is within section 325 of the Municipal Act, 1903, and a by-law is essential to its validity.

[*Waterous Engine Works* v. *Township of Palmerston*, 21 Can. S.C.R. 556, followed.]

2. MUNICIPAL CORPORATIONS (§ III—285)—MEETING OF MUNICIPAL COUNCIL—REQUIREMENTS OF PROPERLY CONSTITUTED MEETING.

A meeting of a municipal council is not properly called or constituted if a member of the council, not in attendance thereat, has not been given any notice of it.

Action by a contractor for drainage and sewerage works against the municipal corporations of the township of Widdifield and the Town of North Bay for $10,000 damages for breach of contract by the defendants and for $200 for work performed.

The action was dismissed.

Peter White, K.C., for plaintiff.

Messrs. *G. H. Kilmer*, K.C., and *J. M. McNamara*, K.C., for defendants.

KELLY, J.:—By a proclamation issued by the Lieutenant-Governor of the Province of Ontario in Council, dated the 7th April, 1910, it was declared that certain parts therein particularly described of the township of Widdifield, in the district of Nipissing, should be withdrawn from that township and be annexed to the town of North Bay, and that such withdrawal and annexation should take effect on and after the 1st January, 1911.

On the 10th August, 1910, a by-law was passed by the municipal council of the township of Widdifield authorising the expenditure of $33,000 for the carrying out of the work of making certain permanent improvements for the purpose of opening, improving, grading, and gravelling certain streets, the opening, making, and constructing of certain storm sewers, and the constructing certain waterworks and watermains in that part of the township of Widdifield so to be annexed to the town of North Bay, and providing for the issue of debentures of the township for the purpose of raising these moneys.

On the 12th December, 1910, an application was made to the Court to quash this by-law, and the application was dismissed; but on appeal the by-law was quashed by a Divisional Court on the 23rd June, 1911: *Re Angus and Township of Widdifield*, 24 O.L.R. 318.

Some time prior to the 15th October, 1910, the council of the

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township proceeded to call for tenders for the construction of the storm sewers and works in connection therewith; and the plaintiff put in a tender for that work, and it is alleged that the council accepted his tender, following which what is alleged to be an agreement, dated the 15th October, 1910, was made between the plaintiff and the defendants the corporation of the township of Widdifield, for the carrying out of the work so tendered for by the plaintiff.

The municipal council of the township consisted of the reeve and four other members.

Prior to the opening and consideration of the tenders, there was evidently a difference of opinion amongst the members of the council as to the advisability of proceeding with the work, the reeve and two other members being in favour of it, while the other two disapproved of it.

When the time arrived for opening and considering the tenders, the reeve verbally notified three of the four councillors to attend a meeting of the council at his place of business on a certain day, on or about the 5th or 6th October, 1910. The other councillor, Overholt, was not notified, the explanation given by the reeve being that at a regular meeting of the council, held some time previously, Overholt had said he would not be satisfied with what the other members of the council would do. Overholt, on the other hand, referring to his not having received the notice of the meeting, said he was opposed to the by-law and the carrying out of the work, and was disgusted, and that he only heard of the meeting two or three days after it had taken place.

No business was done at the meeting on the day for which it was so called, and it was adjourned until the following day. It does not appear certain that any particular hour was named for the adjourned meeting, one of the members, McIntosh, saying that ten o'clock was named. His account of it is, that he attended at the reeve's place of business, the place named for the meeting, at 10 o'clock a.m. on the following day; that the reeve was not at home, his son stating that he had gone out to the country; that he (McIntosh), after waiting for a time, went away and returned at 12 o'clock; and, finding that the reeve had not yet returned and that there was no appearance of a meeting being held, again went away, and later on went out of town.

On the afternoon of that day, the reeve and two other members of the council, namely, Doyle and Irvine, met at the reeve's place of business, neither Overholt nor McIntosh being present, and decided upon accepting the plaintiff's tender, the only other person present at the meeting being the the township engineer.

As appears by the evidence, no by-law of the corporation was passed accepting the plaintiff's tender or awarding him the con-

tract or authorising the making or signing of any contract with him, the only action of the council thereon being a minute as follows: "Moved by Doyle, second Irvine, that P. O'Donald be awarded the contract for laying sewer." Signed "John Murphy."

The written record of what took place is of the most meagre kind, and, so far as the evidence shews, this record remained in possession of the engineer until the time of the trial, and no minute of what took place was entered in the books of the corporation, nor was the clerk of the municipality present at the meeting.

A term of the specifications of the work on which the plaintiff tendered was, that "the contractor shall commence actual operations on the construction of the work within fifteen days after the signing of the contract;" and, before the plaintiff signed the contract, there was added thereto, at the plaintiff's request, the following: "And satisfactory financial arrangements have been made by the corporation."

The defendants do not appear to have taken any other steps towards proceeding with the work or ordering or requiring the plaintiff to do so. The plaintiff, however, of his own account, did some work in December, 1910, the value of which he estimates to be about $38 or $40.

The evidence does not satisfy me that the meeting in question was properly called or properly constituted. All members were entitled to proper notice of the meeting and of the time and place of holding it; and it cannot be said that the manner in which this meeting was convened was in accordance with the necessary requirements in such cases. Even had it been properly convened, there was wanting an essential requisite to the making of the contract with the plaintiff, in that no by-law was passed awarding the contract to the plaintiff or authorising the making of it.

Section 325 of the Consolidated Municipal Act, 1903, provides that "the jurisdiction of every council shall be confined to the municipality which the council represents, except where authority beyond the same is expressly given; and the powers of the council shall be exercised by by-law, when not otherwise authorised or provided for."

This section is in the exact words of sec. 282 of ch. 184, R.S.O. 1887, which was well considered in the case of *Waterous Engine Works Co.* v. *Town of Palmerston*, 21 Can. S.C.R. 556, where it was held that a by-law is necessary in order that a municipal corporation shall make a valid contract, even where the contract is made under the seal of the corporation.

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Kelly, J.

This requirement was not complied with in the case now under consideration. The transaction was one of more than usual importance to the municipality, the proposed contract contemplating an expenditure of more than $20,000, according to the evidence both of the plaintiff and of the engineer for the township of Widdifield—a very substantial liability for a township to incur. One would have thought that the decision to make such an expenditure and to bind the municipality to an obligation of that extent was, to use the language of Mr. Justice Patterson, in *Waterous Engine Works Co.* v. *Town of Palmerston*, "a matter of sufficient importance to deserve whatever amount of deliberation and care the law aims at securing by requiring the action of the council to take the form of a by-law." (21 Can. S.C.R. at page 579.)

Nor can it be contended that the contract was an executed contract, or that the defendants in any way became bound by acceptance of the benefits thereof. The plaintiff admits that whatever work he did for the defendants was done to "test them out."

I can come to no other conclusion than that the plaintiff is not entitled to succeed; and I, therefore, dismiss his action. In view, however, of the circumstances surrounding the holding of what was intended as a meeting of the township council, and of the irregularity and want of care shewn in dealing with a matter of such importance to the municipality, the dismissal of the action is without costs.

It was contended by the defendants at the trial that the plaintiff's action should fail on other grounds shewn in the evidence, such as the quashing of the by-law authorising the issue of the debentures from the proceeds of which it was intended to pay the cost of the work tendered for by the plaintiff; that the plaintiff was not entitled to proceed with the work except at such time and place as the engineer of the defendants the corporation of the township of Widdifield should direct, and that the engineer did not give him any direction so to proceed; and that the defendants were bound only conditionally upon their making satisfactory financial arrangements, which they failed to make.

In view of the conclusion I have come to, for the reasons given above, I have not thought it necessary to consider these contentions.

Action dismissed.

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Saskatchewan Supreme Court, Brown, J., in Chambers. January 23, 1912.

1. HABEAS CORPUS (§ I C—10)—CERTIORARI IN AID—NOT AN "APPEAL"—RESTRICTION OF POWERS OF AMENDING CONVICTION—R.S.S. 1909, CH. 62, SEC. 8.

Neither a proceeding to quash a summary conviction by way of certiorari, nor a motion to discharge on habeas corpus with certiorari in aid constitutes an "appeal," and where the powers of amendment of a conviction under a provincial statute are limited to "appeals" from convictions and orders, a conviction which illegally imposed hard labour for an offence against the provincial liquor laws cannot be amended on the habeas corpus motion and the prisoner is entitled to be discharged.

[*The King* v. *Plante*, 40 C.L.J. 125, applied.]

2. HABEAS CORPUS (§ I D—21)—AFFIDAVITS IN SUPPORT—PROVING WARRANT BY AFFIDAVIT OF GAOLER INSTEAD OF AFFIDAVIT OF PRISONER.

On an application for a writ of habeas corpus with certiorari in aid, it is primâ facie sufficient that the warrant be proved by an affidavit of the gaoler, and that the fact that the applicant is not detained for any other cause be proved by an affidavit of the applicant instead of proving both by the affidavit of the prisoner.

[Compare *R.* v. *Skinner*, 9 Can. Cr. Cas. 558; see also Tremeear's Criminal Law and Evidence, 2nd ed., pp. 822, 823.]

3. HABEAS CORPUS (§ I D—21)—ENTITULING AFFIDAVITS ON APPLICATION—SASK. CR. PR. RULE 39.

Affidavits entituled in the Supreme Court of Saskatchewan and in the matter of the conviction, specifying the particulars of same, sufficiently set out a style of cause for the purpose of a habeas corpus application under Saskatchewan Crown Practice Rule 39.

[*Rex* v. *Harris*, 6 Terr. L.R. 376, followed.]

MOTIONS in two cases, heard together for writs of habeas corpus and certiorari in aid, in respect of two separate commitments and convictions under the British Columbia Liquor License Act and for discharge of the prisoner in each case.

The prisoners were discharged.

C. E. D. Wood, for applicants.
Alex. Ross, for the Attorney-General.

BROWN, J.:—These two cases are of an exactly similar character. I will deal with the case of Ching How, but my reasons for judgment will apply equally to the other case.

The applicant is a Chinaman, and was convicted by a justice of the peace of having sold liquor without a license, and was adjudicated to pay a fine and certain costs, and in default to be imprisoned for six months "with hard labour." An application is now made for a writ of habeas corpus and a writ of certiorari in aid thereof and for the discharge from custody without the actual issue of the writ. Mr. *Ross*, for the Attorney-General, has taken two preliminary objections. In the first place, he contends that the material is not properly styled in that it does not sufficiently comply with Crown Practice Rule Sask. 39. As a matter of fact it is styled as follows:—

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In the Supreme Court of Saskatchewan.
Judicial District of Regina.

In the matter of Ching How and the information and complaint of Charles A. Mahony, taken on the 5th day of October, 1911, and a certain conviction thereon bearing date the 12th day of October, 1911, made by Alcide Noel, one of His Majesty's justices of the peace in and for the Province of Saskatchewan, whereby the said Ching How was convicted for that, etc. (setting out the conviction).

This has already been held to be a sufficient compliance with this Rule, and I agree with that holding: *Rex* v. *Harris*, 6 Terr. L.R. 376.

It is also objected that proof of the warrant of commitment and the fact that the applicant is not detained for any other cause should be made by the gaoler and in the manner provided by the English practice. In this case the warrant of commitment is proved by affidavit of the gaoler, and the applicant himself in his affidavit states that he is not detained on any other charge or for any other reason. Both facts are proved by affidavit and by persons who are in a position to swear to such facts; and this, it seems to me, should be at least prima facie sufficient.

Several objections have been raised to the conviction by counsel for the applicant and as reasons for quashing the commitment, but in my view of the case it is only necessary to deal with one, and that is the objection that both the conviction and the warrant of commitment impose hard labour as part of the punishment.

The conviction is made under sec. 86 of ch. 130, R.S.S. 1909, being the Liquor License Act; and it is admitted by counsel for the Crown that the justice had no authority for imposing this as part of the penalty. But he contends that I have power to amend the conviction and warrant, deleting therefrom the words "with hard labour," and that I should so amend. The conviction having been made under a provincial statute, the powers of amendment are given, if at all, by sec. 8, ch. 62, R.S.S. 1909, which reads as follows:—

> Except it is otherwise especially provided all the provisions of Part XV. and Part XXII. of the Criminal Code shall apply to all proceedings before justices of the peace under and by virtue of any law in force in Saskatchewan or municipal by-laws and to appeals from convictions or orders made thereunder.

This section confers upon me the powers of amendment contained in Part XXII. of the Criminal Code only in cases of appeal. A proceeding to quash a conviction by way of certiorari has been held, in the case of *The King* v. *Plante*, 40 C.L.J., at p. 125, not to be an appeal; and the Criminal Code, in section 1122, seems clearly to contemplate a proceeding by way of certiorari

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as something other than an appeal, for by that section it is enacted that:—

> No writ of certiorari shall be allowed to remove any conviction or order had or made before a justice of the peace if the defendant has appealed from such conviction or order, etc.

That being so, *a fortiori* a proceeding by way of habeas corpus would not be an appeal. I am therefore of the opinion that I have no power to make the amendment asked for, even should I desire to do so, and that in consequence, the warrant of commitment in each case being illegal, the same must be quashed, and the applicants discharged from custody.

Prisoners discharged.

LEWIS v. BUCKNAM.

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Feb. 6.

Manitoba King's Bench. Trial before Macdonald, J. February 6. 1912.

1. BROKER (§ II B—10)—REAL ESTATE AGENT'S COMMISSION—LANDS TAKEN AS PART PAYMENT ON AN EXCHANGE OF PROPERTIES.

Where the owner of farm lands, authorises an agent to dispose of them and agrees to pay him the usual commission, and the latter succeeds in bringing about an agreement whereby the lands were taken as part payment in an exchange for city property, the owner of the farm lands is liable to the agent for commission on the sale.

2. ASSIGNMENT (§ I—14)—CLAIM FOR COMMISSION ON SALE OF REAL ESTATE—TRANSFER BY HUSBAND TO WIFE.

The claim of a real estate agent for commission due him on the disposal of property is assignable and where the claim is assigned to the wife of the agent she may sue in her own name.

AN action for commission on the sale of land brought by the assignee of the agent who brought about the agreement whereby the land was disposed of.

Judgment was given for the plaintiff.

Messrs. *M. G. Macneil* and *B. L. Deacon*, for plaintiff.

Messrs. *A. E. Hoskin*, K.C., and *G. Coulter*, for defendant.

MACDONALD, J.:—The plaintiff is the assignee of a claim of her husband Levi A. Lewis, a real estate agent, against the defendant, who is also a real estate agent, for commission on the sale of land.

The defendant was the owner of a quarter section of land near the village of Souris, and also owned an undivided one-third interest in the north west quarter of section 14, township 13, range 14, west of the second meridian in Manitoba, the remaining interest being owned by Banbury and McVicar of the town of Wolseley in the Province of Saskatchewan. The defendant and Lewis had, previous to the transaction leading to this action, discussed an exchange of these lands of the defendant for lands owned or controlled by Lewis, but failing in arriving at an agreement, the defendant agreed with Lewis to pay him the

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usual commission if he could dispose of his (the defendant's) lands.

Some time after this Lewis called upon the defendant and got from him a description of the farm lands, a commission on the sale of which is sought in this action.

There is some conflict as to how Lewis and the defendant entered into negotiations terminating with the disposal of the property. The latter says that Lewis first approached him with a list of the city properties and suggested making a sale, taking in exchange as part payment the farm lands referred to; whereas Lewis says that the defendant first gave him a description of the farm lands and that he then interviewed one Mark Faulkner, a real estate broker, who had the city properties for sale and suggested the agreement which was subsequently entered into.

The defendant seeks to avoid liability by claiming that Lewis first came to him with a description of the city properties, suggesting that he, Lewis, was acting as the agent for the owners of said properties, and would consequently earn his commission from that source.

Lewis is corroborated by Mr. Faulkner, who says that Lewis came to him with a description of the farm lands, and that he, Faulkner, then submitted the proposition to his principal Isenburg for a sale of the city properties which were owned by the latter to Lewis' principal, taking the farm lands as part payment. A description of the houses was then given to Lewis, who submitted it to the defendant, when the latter expressed approval of the proposal. A meeting of the principals was arranged by Lewis, resulting in an agreement being made whereby the defendant and the others interested in the farm lands purchased the city property, the vendor taking as part payment the said farm properties, and on the sale of the latter the plaintiff claims a commission.

The defendant admits liability for a commission on the sale of the lands which he himself owned, but resists the demand for a commission on the sale of the lands in his hands for sale for his co-vendors; he admits having been paid a commission of $300 by his co-vendors, but claims this for himself for his services in connection with the sale. Any services, however, that he could have performed would be necessary in connection with the disposal of his own interest in the farm property, and he had nothing to do with and was not instrumental in bringing about the agreement made.

The defendant after the agreement was completed called upon Mr. Faulkner and asked that the commission on both sides be divided in three parts, one-third to Lewis, one-third to Faulkner and one-third to himself; but this Faulkner would not entertain as he claimed the entire commission on the sale of the

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city properties. This conversation with Faulkner is denied by the defendant, but I think his memory must be defective. He did call upon Faulkner and it was not a casual meeting as he suggests, and the right of Lewis to a commission was mentioned.

The plaintiff, as the assignee of the claim of her husband, is entitled to a commission on the sale of the defendant's lands and one half the usual commission to which the defendant would be entitled on the sale of his co-vendors' lands. In all there will be judgment for the plaintiff for the sum of $450, and as I feel that the plaintiff was justified in bringing her action in this Court from the fact that it was not made clear to her that the defendant was not the sole owner of all the property, there will be costs to the plaintiff on the King's Bench scale.

Judgment for plaintiff.

THE KING on the Information of the Attorney-General of Canada (plaintiff) v. MONCTON LAND COMPANY, LTD., NAPOLEON J. GOVANG and PACIFIC D. BREAU (defendants).

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Ex. C.
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Feb. 14.

Exchequer Court of Canada. Cassels, J. February 14, 1912.

DAMAGES (§ III L 2—240)—EMINENT DOMAIN—VALUE OF EXPROPRIATED LANDS.

The value of lands expropriated for a public work is to be determined prima facie upon the basis of the market price, but the prospective capabilities of the property have to be taken into account in ascertaining the market price, and an additional allowance made for compulsory expropriation.

[*Brown* v. *The King*, 12 Ex. C.R. 463, and *Dodge* v. *The King*, 38 Can. S.C.R. 149, specially referred to.]

AN information filed on behalf of the Crown to have the value of certain lands expropriated for the use of the Intercolonial Railway ascertained.

Messrs. *H. A. Powell*, K.C., and *J. Friel*, for the Crown.

Messrs. *W. Nesbitt*, K.C., *M. G. Teed*, K.C., *C. W. Robinson*, and *Geo. L. Harris*, for the respective defendants.

CASSELS, J.:—The lands expropriated comprise 11½ acres situate in the city of Moncton. The trial lasted four days, and a great deal of evidence was adduced. Since the trial I have carefully analyzed the evidence. I do not propose to quote therefrom, as to do so would necessitate repeating a considerable part of it.

It is agreed that the date at which the expropriation took place and for ascertaining the compensation is the 23rd October, 1909. There is not room for much dispute as to the method of arriving at the compensation.

The company, whose lands are expropriated, are entitled to be fully compensated for the loss they have sustained by reason of the exercise of the right of eminent domain. I have had

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occasion to express my views in *Brown* v. *The King*, 12 Ex. C.R. 463, and other cases. *Dodge* v. *The King*, 38 Can. S.C.R. 149, is a guide. "Prospective capabilities" have to be taken into account. *Primâ facie* the market price governs. Usually the prospective capabilities form an element in fixing the market price. In the present case the lands are situate in the city of Moncton. They were, before the expropriation, divided by plan into building lots, and I propose in dealing with the question of compensation to deal with them as such, although I do not think it of much consequence whether they were so laid out on a plan or not. The real point is what method of realizing would yield the best return. I know of a recent sale of land within three miles of a large city used as a farm which realized $3,500 an acre. The purchaser acquired the lands to be retailed on the market for building lots. There is no magic in a plan. In the case before me the lands in question were treated as building lots by the Government valuators. The area taken by the railway comprised 11½ acres. It was assumed at the time that this was equivalent to sixty-one and one half lots.

It is hardly questioned that after the expropriation the best method of laying out the remaining lands north and south of the expropriated area is by laying out the two streets Essex and York running west to east as shewn on the plan. This method of utilizing the lands minimises as far as possible the damage caused by the severance of the lands, and is, I think, in case of the Crown.

There are said to be, as I have stated, sixty-one and a half lots expropriated. To the north there remain 289 lots; to the south 180 lots. Allowing for the cross streets Essex and York streets would each require 2.3 acres, or 4.6 acres for both.

Mr. Jones states, and it does not seem to be disputed, that allowing for streets of the width in question, each acre divides into 6-7/10 lots.

These 4.6 acres would yield 30.82 lots which have to be put into roadways. It was suggested at the trial by counsel that as Imperial avenue, which the company intended to lay out, would have been lost for building lots, therefore only one of the new streets should be allowed for, the other being in lieu of Imperial avenue, and this seems to have been the view of all concerned. It no doubt would be correct on that understanding. On analyzing the evidence I find, however, that Mr. Taylor, in arriving at the 61½ lots expropriated (called the 11½ acres) has deducted the area comprised in the proposed Imperial avenue, otherwise instead of there being 61½ lots there would be about 77 lots. I therefore propose to allow for the lots lost by the laying out of both York and Essex streets, one of the streets as mentioned having been deducted in reducing the 11½ acres to 61½ lots. The result is that the lands expropriated and the

lands necessitated for streets amount to 61½ plus 30.82 lots, or about 92 lots.

The lands north of the expropriated land comprise 289 lots, from which must be deducted 15.41 lots taken for Essex street, leaving 274.41 lots. The lands south of the expropriated land comprise 180 lots, and deducting 15.41 lots for York street, leaves 165.41 lots.

It is difficult to arrive at an exact sum as the fair value of the damage. There is no doubt the damage to the property both north and south of the lands expropriated caused by the severance and the closing of the streets is considerable. The damage to those lots south of the expropriated land is not so great as to those on the north, nor is the damage to the lots either north or south equal to the damage to those nearer to the railway which necessarily suffer more than those more remote. The land company claims $100,000; the Crown offers $15,889.

The fact of the discovery of natural gas at the works of the Transcontinental Railway, necessarily has to be considered. Moreover, it is apparent that some lots are more valuable than others.

I think I will be doing justice to all parties if I fix the value of the lots at $175 on the average.

Taking 92 lots expropriated at $175 would equal.....	$16,100
The injury to the lots north of the expropriated land, 274, averaging them, I would place at $20 a lot....	5,480
The injury to those south (180 lots) averaging them, I would place at $15 a lot	2,700
	$24,280

If to this amount the sum of $3,000 be added for compulsory expropriation and cost of grading one of the two cross streets and incidentals the total would amount to $27,280, and this amount I allow to the company. Interest should be allowed on the $16,100, and the company are entitled to their costs of action.

I had written my opinion several weeks ago, but have delayed delivering it until the undertaking offered by the Crown was settled upon and filed. This undertaking was filed to-day and should be embodied in the formal judgment. I think if the defendant Breau be allowed $150 for the land taken from him and the damage, he will be fully compensated, and I allow him his costs which I fix at $50.

Judgment accordingly.

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Jan. 19.

J. I. CASE THRESHING MACHINE COMPANY (plaintiffs) v. **HASLAM LAND AND INVESTMENT COMPANY, LTD.** (defendants).

Saskatchewan Supreme Court. Trial before Newlands, J. January 19, 1912.

ASSIGNMENT (§ III—27)—CLAIM FOR WORK AND LABOUR—PRICE NOT FIXED—QUANTUM MERUIT.

A claim for work done by the owner of a threshing outfit is assignable and where the work was ordered without an agreement as to the price to be charged the party for whom the work was done is liable to the assignee of the account for whatever sum the work is worth estimated at a fair price.

ACTION by the assignee of an account for the threshing of grain for the defendants.

Judgment was given for the plaintiffs.

T. S. McMorran, for plaintiffs.

W. J. Leahy, for defendants.

NEWLANDS, J.:—The plaintiffs' claim is for money due one S. F. Dodge for threshing done by him for the defendants, his claim having been assigned to the plaintiffs. There are two claims, one for $337.50, and the other for $210. Since the commencement of the action the claim for $210 has been paid to the plaintiffs. As to the claim for $337.50, the defendants say this work was to be done at the going rate, which they say was nine cents for wheat and six cents for oats but on account of the crop being a light one they are willing to pay ten cents for wheat and seven cents for oats. The plaintiffs claim $1.25 per acre to be a reasonable compensation. From the evidence I am of the opinion that no contract was entered into. The arrangement was that if Dodge was in the vicinity he was to thresh the crop at the going rates. The crop was a very poor one. The defendants examined it and then came to the conclusion that it was worth threshing. Dodge telephoned to the defendants that he would thresh for $1.25 per acre. They told him to go ahead according to his agreement. As I have said, there was no agreement. The question therefore is, what is the proper amount to be allowed for the work Dodge did? Even taking the plaintiffs' contention that they were to pay the going rate, that does not mean the regular price per bushel paid for a good crop. I am aware from experience of other cases of the same kind that when the crop is a poor one, like the one in question, the ordinary custom is to charge a definite amount, generally so much per day, and not so much per bushel. There was, however, no evidence given upon this point. The only evidence was that $1.25 per acre was a fair price, and as I agree with this evidence, I find for the plaintiffs for the amount claimed, with costs, the defendants to be credited with the amounts paid on the judgment.

Judgment for plaintiffs.

GAAR SCOTT v. MITCHELL.

MAN.

K. B.

1912

Feb. 6.

Manitoba King's Bench. Trial before Macdonald, J. February 6, 1912.

1. SALE (§ I C—15)—CONDITIONAL SALE OF MACHINERY—LOSS ON RE-SALE—LIABILITY.

Where a conditional sale of goods is made subject to an express stipulation that in case of possession being re-taken and the goods being re-sold on his default, he shall remain liable for any loss on a re-sale, the resumption of possession by the conditional vendor followed by a re-sale by him will not cancel or revoke the whole contract so as to relieve the conditional purchaser from the stipulation by which he became liable for the deficiency.

2. PLEADING (§ I L—80)—RELIEF UNDER PLEADINGS—FAILURE TO CLAIM ABATEMENT OF PRICE—RESERVATION OF RIGHTS FOR SEPARATE ACTION.

Where a conditional sale contract contains a stipulation that the conditional vendee shall upon his default be liable for any loss upon a re-sale, and the conditional vendor resumes possession and re-sells, the vendee if sued for the balance due without reference to the price realized upon the re-sale should plead the re-sale and his right to abatement in the price in order to enable the Court to take an account of the vendor's expenses upon the re-sale, otherwise the Court may award judgment for the amount claimed with a reservation to the vendee of his remedy in respect of the re-sale.

AN action to recover the balance due on two certain promissory notes given to the vendor of certain machinery the purchase price of which was payable in instalments, and also for a charge on certain land, said charge being created a further security for the purchase price of the said machinery.

Judgment was given for the plaintiff.

Messrs. *D. A. Stacpoole*, and *L. J. Elliott*, for plaintiffs.
E. L. Howell, for defendant.

MACDONALD, J.:—On the 28th July, 1906, the defendant, by an agreement in writing, (EX. 1), agreed to buy from the plaintiff, and the plaintiff agreed to sell to the defendant, certain machinery in said agreement fully described, for the price or sum of $3,700, payable in instalments as in said agreement set forth, and the defendant further agreed to collaterally secure the said payments by making his promissory notes in favour of the plaintiffs for the said sums.

The machinery was delivered to, and accepted by, the defendant, who gave his promissory notes as agreed, and paid four of the said notes, amounting to one half the purchase price of said machinery.

The agreement provided that in default of payment of the purchase price and obligations in full as they respectively mature, the vendor may resume possession of the said machinery and empowers the vendors to sell the said machinery or any part thereof on account of the purchaser, by public auction or private sale, crediting the net proceeds of such re-sale after deducting all expenses in resuming possession, etc., and the purchaser shall remain liable for the balance of such purchase money and interest and all obligations given therefor.

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The defendant, for the purpose of further securing to the plaintiff the payment of the purchase price, created a charge or lien upon the north-east quarter of section fourteen (14) in township thirty-seven (37) in range twenty-seven (27) west of the first principal meridian in Manitoba, for the sum of three thousand seven hundred dollars.

The defendant made default in payment of the two final instalments of purchase moneys represented by the two promissory notes sued on herein, with the exception of two hundred dollars paid on the note in the statement of claim firstly mentioned.

The plaintiffs further allege that they have endeavoured to resume possession of the said machinery pursuant to the provisions of the said agreement, but that the defendant has refused and still refuses to allow the plaintiff to resume possession of the same.

In his statement of defence it is alleged that the plaintiff did not deliver to the defendant certain articles, part of the machinery agreed to be sold, and it appears from the evidence that there were several articles omitted, but the defendant says that this and other differences were settled before this action was brought, so that the defendant does not rely or insist upon that fact as a defence in abatement of purchase price or otherwise.

The defendant further alleges that the plaintiff has resumed possession and taken from the defendant the machinery in question and claims that by reason thereof he has been released from all liability under the agreement and promissory notes referred to in the statement of claim.

I find, however, that the agreement has not that effect, as it provides that the plaintiffs may resume possession and re-sell, holding the purchaser liable for any loss on a re-sale.

There is no abatement of purchase price claimed in the defence to the action, although it appears from the evidence that the plaintiffs have since resuming possession made a sale of the machinery for the sum of one thousand nine hundred dollars, but as this is not raised by the pleadings I cannot give effect to it as the plaintiffs might be entitled to a possible reduction of that credit for costs incurred in resuming possession or repairs to the machinery to make it saleable. The defendant will, however, be left to his remedy in connection with this re-sale.

There will be judgment for the plaintiff for the amount sued for, together with costs, and they will be entitled to a charge or lien upon the lands described in paragraph eight of their statement of claim and to a sale of the defendant's interest in the said lands.

Judgment for plaintiff.

McGREEVY v. MURRAY.

MAN.

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Feb. 2.

Manitoba King's Bench. Motion before Prendergast, J. February 2, 1912.

1. MOTIONS AND ORDERS (§ I—5)—POWER TO SUMMARILY VACATE A CAVEAT REGISTERED AGAINST LANDS—CONFLICTING AFFIDAVITS.

A caveat based on a prima facie valid document will not be vacated on a summary application to a Judge in Chambers where the facts are involved and each party has denied by affidavit the principal allegations made on affidavit by the other party; the application might be entertained if the facts were undisputed and the issue rested on the interpretation or validity of the written document on which the caveat is founded.

2. DEPOSITIONS (§ I—1)—TRIAL ON CONTENTIOUS AFFIDAVITS.

Involved issues of fact will not ordinarily be determined by affidavit evidence.

AN application to discharge a caveat registered against lands. The application was refused.

J. F. Davidson, for caveator.

A. E. Dilts, for caveatee.

PRENDERGAST, J.:—Application on behalf of caveatee for order discharging caveat. The disputed facts are quite involved.

There is the matter of an extension of time, of the circumstances of the procuring or attempting to procure a tax certificate, of tender, of an alleged declaration by the caveatee that he would not go on with the deal, and of divers attendances or conversations of material importance, the averments concerning which on the one part are met by counter-assertions and denials on the other, and vice versa.

If the facts were practically undisputed or otherwise well established, and the issue rested mainly on the interpretation or validity of the written document on which the caveat is grounded, the application might be entertained.

But it is not the policy of the Court to vacate, on a Chamber application, a caveat based on a primâ facie valid document, when such intricate questions of fact are raised as in this case. Such an involved issue cannot be satisfactorily enquired into and determined on affidavit evidence.

I must refuse the application, with costs to the caveator.

Application refused.

THE KING v. JESSAMINE.

ONT.

C. A.
1912

Jan. 16.

Ontario Court of Appeal. Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A. January 16, 1912.

CRIMINAL LAW (§ I B—6)—INSANITY AS A DEFENCE—IRRESISTIBLE IMPULSE—KNOWLEDGE OF WRONG.

A person is not to be acquitted of a criminal charge on the ground of his insanity unless his mind is so affected by that insanity as that he is not capable of appreciating the nature and quality of his act and of knowing that such act was forbidden by law; it is not a sufficient defence that it may be proved that notwithstanding the existence of such appreciation and knowledge on the part of the accused, he had at the time of the offence lost the power of inhibition and had an impulse which he could not resist to commit the crime.

ONT.

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1912

THE KING
v.
JESSAMINE.

THE prisoner was tried on a charge of murder before Mr. Justice Riddell and a jury, at Toronto, November 13th, 1911.

It appeared that he had watched for one Lougheed upon the street and shot him several times, killing him almost instantly. The defence was insanity. The medical evidence was that the prisoner was insane, incurably so, that he understood the nature and quality of the act and that it was wrong in the sense that it was forbidden by the law, but he had lost the power of inhibition, and could not resist the impulse he had, to kill Lougheed.

RIDDELL, J., charged the jury:—It is not the law that an insane man may kill whom he will without being punished for it. It is not the law that an insane man may kill another and escape punishment simply because he is insane. There have been hundreds of insane persons who have killed others and who have been executed, both in England, whence we take our law, and in Canada in which we live. Life would not be safe under such circumstances. There is one in every three hundred persons in most countries of persons who are insane in one way or another, and it would never do if the law were such that one man out of every three hundred—that is, in Toronto, something over a thousand people—could go out and slay at will without being brought to task and punished by the strong arm of the law. A man is not to be acquitted on the ground of insanity unless his mind is so affected by that insanity as that he is not capable of appreciating the nature and quality of his act and of knowing that such act was wrong. It is not the law here, as it is said to be in some countries, that if an insane person who is capable of appreciating the nature and quality of the act and of knowing that it is forbidden by law—for that is the meaning in this connection of the word "wrong"—yet has what is called an impulse to do the act, which impulse he cannot resist, he is to be acquitted on the ground of insanity. I charge you as a matter of law that it is not enough for the prisoner to have proved for him that he had lost the power of inhibition—the power of preventing himself from doing what he knew was wrong. It is your duty to find a verdict of guilty if you find that the prisoner killed Lougheed, and at the same time it has not been proved to your satisfaction that the condition described by Dr. Bruce Smith was not his actual condition. In other words if he killed the man and it has not been proved that his condition was not as Dr. Bruce Smith says it was, he is guilty of murder and it is your duty to find so."

The prisoner was convicted and sentenced to death.

Mr. Justice Riddell reserved a case for the Court of Appeal upon this charge.

T. C. Robinette, K.C., for the prisoner.

Messrs. *J. R. Cartwright*, K.C., and *E. Bayly*, K.C., for the Crown.

The Court of Appeal without calling upon counsel for the Crown affirmed the conviction.

Conviction affirmed.

ONT.

C. A. 1912

THE KING v. JESSAMINE.

N.B.—Mr. Justice Riddell refused to reserve a case upon the question whether the prisoner being undoubtedly insane could be executed. The sentence of death was afterwards commuted by the executive upon the advice of the Minister of Justice to imprisonment for life.

Annotation—Criminal law (§ I B—6)—Insanity as a defence—Irresistible impulse—Knowledge of wrong.

Annotation

Insanity as a defence

The Canadian Criminal Code follows the doctrine of *MacNaghten's Case* (1843), 4 St. Tr. N.S. 847, as to the degree of insanity which must appear before criminal responsibility is avoided.

Section 19 of the Code is as follows:—

19. No person shall be convicted of an offence by reason of an act done or omitted by him when labouring under natural imbecility, or disease of the mind, to such an extent as to render him incapable of appreciating the nature and quality of the act or omission, and of knowing that such an act or omission was wrong.

(2) A person labouring under specific delusions, but in other respects sane, shall not be acquitted on the ground of insanity, under the provisions hereinafter contained, unless the delusions caused him to believe in the existence of some state of things which, if it existed, would justify or excuse his act or omission.

(3) Every one shall be presumed to be sane at the time of doing or omitting to do any act until the contrary is proved.

This section of the Code follows the draft Code prepared by the Imperial commissioners, which was never adopted by the British Parliament although largely declaratory of the common law.

The rule laid down by the Judges in reply to a question put to them by the House of Lords, in *McNaghten's Case* (1843), 4 St. Tr. N.S. 847, 10 Clark & F. 200, 1 Car. & K. 130, was as follows: "Notwithstanding the party accused did the act complained of, with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable, according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to law; by which expression we mean, the law of the land." And this rule was followed and applied in *R.* v. *Riel* (No. 2) (1885), 1 Terr. L.R. 23. Leave to appeal was refused by the Privy Council, *Riel* v. *The Queen*, 10 A.C. 675, 16 Cox C.C. 48.

The burden of proof of insanity is upon the defence. *McNaghten's Case*, 10 Cl. & F. 200; *Regina* v. *Stokes*, 3 Car. & K. 185; *Regina* v. *Layton*, 4 Cox C.C. 149. Without evidence to go to the jury, the prisoner cannot be acquitted upon the plea of insanity. If there is, in such a case, to be any appeal after a conviction, it must be on the ground that the evidence is so overwhelming in favour of the insanity of the prisoner that the Court will feel that there has been a miscarriage of justice—that a poor, deluded, irresponsible being has been adjudged guilty of that of which he could

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Annotation

Insanity as a defence

Annotation (*continued*)—**Criminal law (§ I B—6)—Insanity as a defence—Irresistible impulse—Knowledge of wrong.**

not be guilty if he were not deprived of the power to reason upon the act complained of, to determine by reason if it was right or wrong. A new trial should not be granted if the evidence were such that the jury could reasonably convict or acquit. Per Killam, J., in *R.* v. *Riel* (No. 2) (1895), 1 Terr. L.R., at p. 63.

The proper question to be put to the jury as to the prisoner's state of mind where the defence of insanity is raised is, whether the accused had a sufficient degree of reason to know that he was doing an act that was wrong, but this question should be accompanied with such observations and explanations as the circumstances of each particular case may require. *McNaghten's Case*, 4 St. Tr. N.S. 931. This is preferable to putting the question generally and in the abstract as to whether the accused at the time of doing the act knew the difference between right and wrong. Ibid.

Insanity may be proved without medical testimony, and may be inferred from the behaviour of the accused and facts proved: *R.* v. *Dart*, 14 Cox C.C. 143. If the accused was deranged shortly before committing the offence and there is no reason for believing that he had recovered his senses in the interim, he should be acquitted: *R.* v. *Hadfield*, cited in Collinson on Lunacy, p. 480.

In delivering the judgment of the Court dismissing an appeal from a conviction for murder, on the ground that the prisoner acted under an irresistible impulse and was therefore insane at the time he committed the crime, Mr. Justice Darling in the Court of Criminal Appeal (Eng.) in 1911, made some observations on the frequency of crimes of violence committed through motives of jealousy. The learned Judge pointed out that cases of impulsive mania leading to homicide were usually cases in which no motive for the crime could be found. The absence of motive is not, of course, of itself a ground for inferring an irresistible and insane impulse: *Reg.* v. *Haynes*, 1 F. & F. 666; but it is, as a rule, urged as evidence of insanity where that defence is set up. Much must depend upon the circumstances of each particular case, but the test laid down in *McNaghten's Case* still remains the leading principle upon which the question of insanity must be decided—namely "whether the accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong."

The Courts have held that it is no defence for the accused person to prove that he acted under an irresistible impulse, if it is shewn that he was in full possession of his reasoning powers: *Reg.* v. *Frances*, 4 Cox C.C. 57. It is quite clear that murder and crimes of violence committed from motives of jealousy do not come within these decisions. In the case before the Court of Criminal Appeal referred to above, jealousy was put forward as the motive for the crime, and for the defence it was suggested that the case was one of impulsive insanity caused through jealousy. The Court dismissed the application, holding that, under the circumstances, there was no evidence of insanity to go to the jury: 132 Law Times Jour. (1911), 13.

Oppenheimer on Criminal Responsibility of Lunatics, divides the United States of America into three groups according to the principles upon which the criminal liability of lunatics is determined in the respective States. He says:—

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Insanity as a defence

Annotation (*continued*)—Criminal law (§ I B—6)—Insanity as a defence—Irresistible impulse—Knowledge of wrong.

"The first group is composed of those States in which the answers of the Judges in *McNaghten's Case* have been adopted as law and as a complete statement of the law. The right and wrong test is recognised as the sole criterion of responsibility, or, in American phraseology, of sanity, in the United States Courts, as well as in the majority of State Courts, viz., in Arkansas, California, North Carolina, South Dakota, Delaware, Idaho, Louisiana, Maine, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Jersey, New York, Oklahoma, Oregon, Tennessee, Virginia, Wisconsin, and in the District of Columbia. In spite of some decisions in which the non-concurrence of a responsive will in a prisoner whose intellect was clear, or irresistible impulse was held to excuse, Georgia (but see *Flanagan* v. *State*, 103 Ga. 619), and Texas (but see *Harris* v. *State*, 18 Tex. App. 287) must still be reckoned in this group.

It must, however, further be observed that wrong, the knowledge of which is the standard of responsibility, is in many cases understood to mean morally wrong; thus, in the well-known case, *The United States* v. *Guiteau*, United States Court for the District of Columbia (1882), 10 Fed. Rep. 161, Cox, J., laid down the law in the following terms:—

"If you find from the whole evidence that, at the time of the commission of the homicide, the prisoner, in consequence of disease of mind, was incapable of understanding what he was doing or of understanding that it was wrong—as, for example, if he was under an insane delusion that the Almighty had commanded him to do the act, and in consequence of his delusion he was incapable of seeing that it was a wrong thing to do—then he was not in a responsible condition of mind, but was an object of compassion and not of justice, and he ought to be now acquitted."

Finally, the canon determining the relations of specific delusion to criminal responsibility has not found universal acceptance in those American Courts which, otherwise, follow the rules of the English law.

"To the second group belong those States in which the effect of mental disease upon the emotions and the will is recognised and the power of the accused to control his conduct is placed, as a second criterion, by the side of the knowledge test. Irresistible impulse was first admitted as a defence by the Supreme Court of Massachusetts, per Shaw, C.J., in *Commonwealth* v. *Rogers* (1844), 7 Met. 500; next in *Commonwealth* v. *Mosler* (1846), 4 Barr. 266; in Pennsylvania, by Gibson, C.J., and the example thus set by these two States has since been followed by Connecticut, Iowa, Kentucky, Montana, and Ohio. I may add that Iowa and Pennsylvania cling to the English rule relating to partial insanity.

"The third group has clustered round New Hampshire, where in the remarkable case, *State* v. *Jones*, 50 N.H. 369, Judge Ladd directed the jury that 'it is a question of fact whether any universal test exists, and it is also a question of fact what that test is, if any there be,' a ruling followed in the same State by the more definite directions of Perley, Chief Justice, in *State* v. *Pike*, that the jury must return a verdict of not guilty 'if the killing was the offspring of mental disease in the defendant; that all symptoms and all tests of mental disease are purely matters of fact to be determined by the jury."

Whilst thus apparently treating the criminal responsibility of lunatics as a mere question of fact, the Court of New Hampshire, by instructing

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Annotation

Insanity as a defence

Annotation (*continued*)—Criminal law (§ I B—6)—Insanity as a defence—Irresistible impulse—Knowledge of wrong.

the jury to acquit if they found that the accused was insane and that the act charged as criminal was the product of mental disease, has impliedly laid down a criterion of legal responsibility, viz., the existence or non-existence of a connection between mental disease and crime. Illinois, Indiana, Kansas, and Michigan have adopted this system of dealing with the problem, and Alabama, after the decision in *Parsons* v. *State*, 81 Alabama Reports 577, must probably also be reckoned among its converts, though in this State the cases are most conflicting: Oppenheimer on Criminal Responsibility (1909), pages 77 and 78.

Again, as to the onus probandi, the rules are not uniform throughout the United States. In many States the prisoner who sets up a defence of insanity must prove it; but there are others where once lunacy is pleaded the prosecution must establish that the prisoner is of sound mind; and others again seem to be in a state of transition from the former to the latter practice: Oppenheimer, page 79.

As to the English law, Dr. Oppenheimer says: "Apart from some obiter dicta of different Judges that an insane impulse should be admitted as a defence if proved to be really irresistible, I am acquainted with but two cases in which such a defence has been admitted in England. The one is *R.* v. *Jordan* (1872), where Martin, B., said: 'Under such circumstances it was for the jury to consider whether it was safe to convict the prisoner of murder. When such impulses came upon men, according to the medical evidence they were unable to resist them. It would be safe in such a case to acquit the accused on the ground of insanity. The other is *R.* v. *Gill* (1883), where Mr. Justice Kay appears to have taken a similar view. In charging the jury, he is reported to have told them that 'if a man's mind was in such a diseased condition that he was subject to uncontrollable impulse, they would be justified in finding him irresponsible for his actions; that what the jury had to ask themselves was, was the prisoner's mind subject to an uncontrollable impulse over which his will had no power? If so, they must acquit him on the ground of insanity.' But, on the whole, this view of the law taken by Baron Martin and Justice Kay is shared by very few other Judges. On the other hand, there is a long series of cases, from 1848 down to a recent date, in which it is clearly laid down that the English law knows no such defence. The most important decisions by which the plea of an irresistible impulse was rejected are *R.* v. *Stokes* (Rolfe, B., 3 C. & K. 185 (1848)); *R.* v. *Barton* (3 Cox C.C. 275 (1848)), where Baron Parke remarked that 'the excuse of an irresistible impulse co-existing with the full possession of the reasoning powers can find no countenance in the law of England'; *R.* v. *Pate* (1850), in which Baron Alderson said: 'The law does not acknowledge the doctrine of an uncontrollable impulse, if the person was aware that it was a wrong act he was about to commit'; *R.* v. *Haynes* (Bramwell, B., 1 F. & F. 666 (1859)); *R.* v. *Burton* (3 F. & F. 772 (1863)), in which Wightman, J., again laid down that 'a state of mind in which a man, perfectly aware that it was wrong to do so, kills another under an uncontrollable impulse is no defence for a crime'; *R.* v. *Leigh* (Erle, C.J., 4 F. & F. 915). It must also be remembered that when in 1878 an attempt was made to codify the criminal law of England and Sir James Stephen drafted a code in which he introduced

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Annotation

Insanity as a defence

Annotation (*continued*)—**Criminal law (§ I B—6)—Insanity as a defence—Irresistible impulse—Knowledge of wrong.**

the ground of exemption for which he contended, the commissioners erased from sec. 22 the provision by which an irresistible impulse was made to confer immunity, and the ground upon which they rejected this defence clearly shews that they considered it as an innovation, and as an undesirable innovation into the bargain."

Dealing with *MacNaghten's Case* (1843), 4 St. Tr. N.S. 847, 10 Cl. & F. 200, 1 C. & K. 130, Dr. Oppenheimer says: "It is preferable to make the legal character of the act the test, rather than its moral character, if the question of construction of the term 'wrong' in the Judges' answers can really be considered as an open one." He points out, however, that those colonial codes that embody the rules in *MacNaghten's Case*, have failed to decide in favour of the one or the other alternative; that the codes of Canada and New Zealand, as well as the codes of such of the American States as follow English law, use the term "wrong" without qualifications or explanation, and that the Gold Coast has sought to escape from the dilemma by speaking only of knowledge of "the nature or consequences of the act" and omitting knowledge of its wrongness altogether; whilst as Dr. Oppenheimer expresses it, "India and the Sudan have chosen the smoothest path by exempting from punishment a madman who is incapable of knowing 'that he is doing what is either wrong or contrary to law.'"

A review of the American cases will be found in the annotation of the case of *Smith* v. *State of Mississippi* (1909), 27 L.R.A. (N.S.) 461.

RE PHILLIPPS AND WHITLA, Solicitors.

MAN.

K. B.

1912

Feb. 14.

Manitoba King's Bench. Robson, J., in Chambers. February 14, 1912.

1. SOLICITOR (§ II C—30)—TAXATION OF COSTS AGAINST CLIENT—FEE ON SETTLEMENT—PERCENTAGE—APPEAL NOTWITHSTANDING FAILURE TO FILE WRITTEN OBJECTIONS.

Where the bill of costs of the solicitor against his client, brought in for taxation at the instance of the client, consists of a lump sum charged as a "fee on settlement," in addition to disbursements, and the amount allowed by the taxing officer in respect of such fee was based upon a percentage of the value recovered or preserved by the solicitor for the client, a question of the principle of taxation is raised and the client may appeal from such allowance although he has not carried in written objections for review before the taxing officer, the rules as to written objections (Manitoba King's Bench Rules 968 and 969) not being applicable to questions of principle.

[*Re Robinson*, 17 P.R. 137; *Re Mowat*, 17 P.R. 180, and *Clark* v. *Virgo*, 17 P.R. 260, specially referred to. *Sparrow* v. *Hill*, 7 Q.B.D. 362, and *Re Fletcher and Dyson*, [1903] 2 Ch. 688, applied.]

2. COSTS (§ II—20)—PRACTICE ON TAXATION—FILING OBJECTIONS FOR REVIEW—APPLICATION TO SOLICITOR AND CLIENT TAXATIONS.

The Manitoba King's Bench Rules 968 and 969 as to carrying in written objections to the ruling of the taxing officer, specifying the items objected to upon the taxation of any bill of costs has a general application to solicitor and client taxations as well as to taxations between party and party.

3. APPEAL (§ IV L—165)—FROM SOLICITOR AND CLIENT TAXATION—CERTIFICATE AS A MASTER'S REPORT.

An appeal from the certificate of a taxing officer on a taxation between a solicitor and his client is to be treated as an appeal from a Master's report, and is to be taken in conformity with Manitoba King's Bench Rule 682 rather than in pursuance of rules 684 and 685.

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RE PHILLIPPS AND WHITLA, SOLICITORS.

Robson, J.

HEARING of a preliminary objection taken on an appeal from the certificate of a taxing officer upon a taxation of the solicitor's bill at the instance of the client, that no objections had been carried in on behalf of the client before the taxing officer for review by him.

A. B. Hudson, for the solicitors.

G. W. Jameson, for the clients.

ROBSON, J.:—The solicitors rendered to their client John McGibbon a bill of costs of certain litigation and the settlement resulting therefrom. The client obtained a præcipe order for taxation under rule 967. The taxation proceeded and resulted in the allowance of a large sum to the solicitors. A formal certificate was signed by the taxing master and is with the papers in the matter. The client is dissatisfied and now seeks to appeal. No objections were carried in before the taxing officer, and there was, therefore, no review of the taxation under rules 968 and 969.*

The solicitors raise the preliminary objection to the appeal that, owing to the omission to observe these rules, there can be no appeal. By clause (*d*) of rule 965 it is declared that—The amount certified to be due shall forthwith after confirmation of the certificate by filing, as in the case of a Master's report, be paid by the party liable to pay such amount.

Our rules in this connection were modelled after the Ontario rules of 1888. In *Re Robinson*, 17 P.R. 137, the question was discussed in the Ontario Court of Appeal. Burton, and Maclennan, JJ.A., thought the carrying in of objections and review thereon prior to certificate a pre-requisite to the appeal. Osler, J.A., thought otherwise. Hagarty, C.J.O., reached the same result as Osler, J.A., but on a different ground. There was thus no decision. The previous practice had been to treat such a matter as a reference, as it in fact is, and to apply the rules for

*968. Any party who may be dissatisfied with the allowance or disallowance by the taxing officer, in any bill of costs taxed by him, of the whole or any part of any item or items, may at any time before the certificate is signed, deliver to the other party interested therein, and carry in before the taxing officer an objection in writing to such allowance or disallowance, specifying therein by a list, in a short and concise form, the item or items, or parts or part thereof, objected to, and may thereupon apply to the taxing officer to review the taxation in respect of the same. [Taken from former Ontario Consolidated Rule 1230, passed in 1888, now Ont. C.R. (1897) 1182, which originated in Ont. Judicature Rule (1881) 447.]

969. Upon such application the taxing officer shall reconsider and review his taxation upon such objections, and he may, if he thinks fit, receive further evidence in respect thereof; and if so required by either party, he shall state either in his certificate of taxation or by reference to such objections, the grounds and reasons of his decision thereon, and any special facts or circumstances relating thereto.

[Taken from former Ontario Consolidated Rule 1231 passed in 1888, afterwards Ont. C.R. (1897) 1183.]

an appeal from a Master's report and this practice was adhered to notwithstanding anything said in *Re Robinson*, 17 P.R. 137. See *Re Mowat*, 17 P.R. 180. The Ontario rules were subsequently amended so as to establish this latter practice. (See rule 773.) Applying the Ontario cases prior to this amendment the present objection would have to be disregarded. The subject was important there in an additional feature, *i.e.*, as to the forum for the appeal, appeals from taxations ordinarily going to Chambers while appeals from Master's reports went to a Court. Here all such appeals are taken to a Judge in Chambers. Before applying the practice in Ontario under the rules as they existed at the time of the cases above mentioned, and which resembled our present rules, it is necessary to look below the mere surface.

From *In re Robinson*, 17 P.R. 137, and earlier cases, it appears that in the Court of Chancery a Master's certificate of taxation between attorney and client was treated as a report and appealable as such, there being no such practice as review upon objections before certificate. Under the rules of the Judicature Act, 1881, the taxation of a solicitor and client bill was reviewed in the same way as the taxation of a bill between party and party. In 1887 clause (*d*), being in the same language as clause (*d*) of our rule 965† was introduced. See per Osler, J.A., 17 P.R. 147-148. That learned Judge held (149) that the effect of this was to withdraw a report or certificate on a solicitor and client taxation from the operation of the rule as to other taxations and to revert to the earlier practice. A perusal of the Ontario cases shews that that intention was carried out in practice there. With us the situation is different as clause (*d*) was in the original of 965, and rules 968 and 969 were enacted contemporaneously with it. (See Queen's Bench Act, 1895, rules 958-961-962.) In short, clause (*d*) was not inserted with the intention of changing a practice.

The general language of rules 968 and 969 is wide enough to apply to the reference of a solicitor's bill for taxation. The

†965. When a client or other person is entitled to the delivery of a solicitor's bill of fees, charges and disbursements, or a copy thereof, the bill or a copy thereof, as the case may be, is to be delivered within fourteen days from the service of the order.

(*a*) The bill delivered shall be referred to the proper taxing officer for taxation, and on the reference the solicitor is to give credit for all sums of money by him received from or on account of the client, and is to refund what, if anything, he may on such taxation appear to have been overpaid. . . .

(*d*) The amount certified to be due shall forthwith after confirmation of the certificate by filing, as in the case of a Master's report, be paid by the party liable to pay such amount. . . .

(*f*) The order shall be read as if it contained the above particulars, and shall not set forth the same, but may contain any variations therefrom and any other directions which the Court or Judge shall see fit to make or give.

[Taken from former Ontario Consolidated Rule 1226, passed in 1888, afterwards Ont. C.R. (1897) 1185.]

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1912

RE PHILLIPPS AND WHITLA, SOLICITORS.

Robson, J.

carrying in of objections and a review prior to certificate may be had on the reference of a solicitor's bill quite as readily as in the case of a party and party taxation.

Clause (*d*) still has its effect, which is that the appeal is to be treated as from a Master's report, and is to be taken in the method and within the time mentioned in our rule 682§ rather than in those prescribed in rules 684 and 685.

I would hold that rules 968 and 969 of the King's Bench rules apply to solicitor and client taxations, but that the appeal from the certificate is under rule 682 instead of under rule 684. Except as to time this may make little practical difference. Osler, J.A., in *Re Robinson*, 17 P.R. 137, thought the different method of appeal in solicitor and client cases was instituted advisedly. Maclennan, J.A., thought this was an anomaly. As was said by Mr. Justice Osler (p. 149 of the report) the questions which arise in the case of solicitor and client references are frequently of a larger and more important nature than in the case of party and party taxations. The similar rules have both in England and Ontario been held not to apply where the principle of taxation was involved, but merely upon a taxation of items only. See *Sparrow* v. *Hill*, 7 Q.B.D. 362; *Re Fletcher and Dyson*, [1903] 2 Ch. 688; *Re Robinson*, 17 P.R. 137, 148; *Clark* v. *Virgo*, 17 P.R. 260.

In the present case the bill consists of one large item for solicitors' work and a number of small items of disbursements. It is said that the solicitors forewent the items usually found in a solicitor's bill for litigious work and sought a lump fee, termed "fee on settlement." The amount allowed was based on a percentage of the value said to have been recovered or preserved for the client. It seems to me that there is a double question of principle involved here, viz., whether the remuneration of a solicitor on a percentage basis for the work of litigation is authorised, and whether the measure applied in this instance was a proper one. I, of course, express no opinion on these questions, but it is clear to me that they arise, and that I must hold that questions in principle were involved in this reference.

I must decline to give effect to the preliminary objection.

Preliminary objection overruled.

§682. Any person affected by any order or decision of the Referee in Chambers, a Master, a local Judge, or a local Master, may appeal therefrom to a Judge of the Court in Chambers.

(*b*) The appeal shall be by motion, on notice served within six days after the order or decision complained of, or, in case of a report, at any time before the report becomes absolute, or in any case within such further time as may be allowed by a Judge of the Court or by the officer aforesaid whose decision or order is complained of.

(*c*) The motion shall be made within sixteen days after the order or decision which is appealed against has been made, or given, or within such further time as may be allowed as aforesaid.

[Taken from former Ontario Consolidated Rule 846, passed in 1888, afterwards in amended form, Ont. C.R. (1897) 767.]

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Supreme Court of Nova Scotia. Motion before His Honour Judge MacGillivray, Master and County Judge. February 13, 1912.

CONSTITUTIONAL LAW (§ I D 5—117)—DELEGATION OF JUDICIAL POWER —APPOINTMENT OF MAGISTRATES—PROVINCIAL AUTHORITY.

It is within the legislative power of the Legislature of Nova Scotia to pass a statute empowering the Lieutenant-Governor in Council to appoint stipendiary magistrates for incorporated towns and municipalities throughout the Province of Nova Scotia.

MOTION for the discharge of the prisoner under the provisions of the Liberty of the Subject Act. Pursuant to an order in that behalf the keeper of the jail at Port Hood where the defendant was detained, duly returned the cause of his having been taken and detained; and a return was made by the stipendiary magistrate before whom he had been convicted of the papers in the Court below.

It appeared that the prisoner was convicted of unlawfully selling intoxicating liquors, and for his offence a pecuniary penalty was imposed, and for non-payment thereof imprisonment in the common jail at Port Hood in the county of Inverness for a term of three months, unless the said pecuniary penalty and costs were sooner paid. The defendant did not pay the fine and was, therefore, under warrant issued pursuant to the adjudication in the conviction, committed to the said jail. Counsel for the prisoner moved for his discharge; and the grounds on which the application was made were as follows:—

(1) Because there was no evidence adduced before the stipendiary magistrate who tried the information herein that the said James Basker was guilty of the charge preferred against him in said information.

(2) Because the said James Basker was adjudged of a first offence under the Nova Scotia Temperance Act, 1910, Part I., and in default of payment of fine and costs, to be imprisoned for the space of three months; whereas the extreme imprisonment for such an offence, provided in and by the said Act, is one month.

(3) Because the said stipendiary magistrate was appointed as such by the Government of the Province of Nova Scotia, and not by the Government of the Dominion of Canada.

(4) Because the Government of Nova Scotia has no authority or jurisdiction to appoint a stipendiary magistrate.

(5) Because the Government of the Dominion alone has such authority and jurisdiction.

(6) Because the said stipendiary magistrate appointed as such by the said Government of Nova Scotia, is not thereby vested with any ministerial or judicial functions whatever; and therefore his conviction herein is *ultra vires* and a nullity.

Daniel McNeil, K.C., for the prisoner.
Donald McLennan, for the Crown.

MACGILLIVRAY, Master:—As to the first ground there was evidence before the magistrate in the Court below, and with his

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decision upon the evidence I have no right to interfere in this application. Counsel at the argument admits that the imprisonment is in pursuance of the power to commit, subsidiary to enforcing payment of the fine, and not the alternative penalty provided by the Temperance Act.

The other grounds resolve themselves into one proposition, viz.:—

Was it *intra vires* the Legislature of Nova Scotia to pass the statute empowering the Governor in Council to appoint stipendiary magistrates for incorporated towns and municipalities throughout the Province?

The office of stipendiary magistrate—paid magistrate—was created by statute in England in 1839, when the Metropolitan Police Courts were established by the Act, 2 & 3 Viet. ch. 71. The provision of the law was extended to boroughs by the Municipal Corporations Act, 1882, by which municipal boroughs, on petition of their councils to the Secretary of State, could obtain the appointment of stipendiary magistrates, who to be qualified should be barristers of at least seven years' standing, and were given the jurisdiction of two justices of the peace.

Somewhat similar provisions were adopted by our own Legislature in the Towns Incorporation Act, 1888. By sections 182, 183 and 184 thereof, it was provided that there should be in each incorporated town a municipal Court to be presided over by a stipendiary magistrate for the trial of civil causes; and the town council were empowered to appoint a suitable person to the office, and also a recorder who should be a barrister of the Supreme Court of not less than two years' standing. The council might appoint the same person to be stipendiary magistrate and recorder.

By section 252 of the Act he was required to preside in the Police Court of the town; and being by virtue of his office a justice of the peace and clothed with jurisdiction of two justices of the peace, to dispose of the business brought before him as a justice of the peace or as a stipendiary magistrate or police magistrate."

He was invested with the necessary power and authority to convict and punish criminal offenders within the town, over which justices of the peace, stipendiary and police magistrates had jurisdiction. In amending and consolidating the Towns Incorporation Act, the power to appoint stipendiary magistrates for each town was vested in the Governor in Council (vide Acts, 1895, ch. 4, sec. 198 (1).

By sec. 3, ch. 18, Acts of 1900, "the Governor in Council may appoint one or more stipendiary magistrates for each municipality who shall hold office during pleasure."

The stipendiary magistrate so appointed by the Governor in Council has the jurisdiction of two justices of the peace to try

certain offences against the criminal law under the Summary Convictions Act of Canada. In prosecutions for offences against the Nova Scotia Temperance Act, 1910, and as to the magistrate before whom the same are authorised the provisions of said Summary Convictions Act are made applicable as if they were incorporated therein (vide sec. 37 of the Act).

The stipendiary magistrate who had tried the prisoner for the offence of which he was convicted and now detained in jail, was appointed by the Governor in Council under the power conferred by the Legislature of Nova Scotia by the provision of the section above cited. The simple question is: Is it within the competency of the Legislature to pass a law conferring such power on the executive of the Province? I am decidedly of opinion that it is.

By an order in council under instructions from the Crown, and dated the 20th of May, 1758, it was ordered "that the House of Representatives of the Inhabitants of this Province be the Civil Legislature thereof in conjunction with His Majesty's Governor or Commander-in-Chief for the time being, and His Majesty's council of the said Province." The Constitution of the House and mode of electing members were prescribed in the order; and the House was to be styled "The General Assembly." But it was not until 1848 that it can be said that free parliamentary government was established beyond dispute, by the granting of responsible government to the Province.

It is unquestioned that the Legislature as now constituted had as full and ample power to pass laws for the peace, order and good government of the Province from this period to the passing of the Confederation Act as the Imperial Parliament has to pass similar laws for the United Kingdom. Therefore the passing of the Act respecting stipendiary magistrates was within the competency of the Legislature of Nova Scotia up to the time of the Union. After the distribution of subjects assigned to the Parliament of Canada and the Legislatures of the Provinces by the British North America Act, the local Legislature retained the same power to legislate on all subjects exclusively assigned to it in as full and ample a manner as it had previously assigned.

The Judicial Committee of the Imperial Privy Council in *The Liquidators of the Maritime Bank of Canada* v. *The Receiver-General of New Brunswick*, [1892] A.C. 437, elucidates this point. At p. 441 Lord Watson delivering the judgment of their Lordships says:—

> The object of the Act was neither to weld the Provinces into one, nor to subordinate Provincial Governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each Province retaining its independence and

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autonomy. That object was accomplished by distributing between the Dominion and the Provinces all powers, executive and legislative, and all public property and revenues which had previously belonged to the Provinces, so that the Dominion Government should be vested with such of these powers, property and revenues as were necessary for the due performance of its constitutional functions; and that the remainder should be retained by the Provinces for the purpose of provincial government.

In *Hodge* v. *The Queen*, 9 App. Cas. 117, Lord Fitzgerald delivering the opinion of the Board, said:—

> When the British North America Act enacted that there should be a legislature for Ontario, and that its Legislative Assembly should have exclusive authority to make laws for the Province and for provincial purposes in relation to matters enumerated in sec. 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by sec. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subject and area the local Legislature is supreme, and has the same authority as the Imperial Parliament or the Parliament of the Dominion.

The Act places the constitution of all the Provinces on the same level; and what is true in respect to the Legislature of Ontario has equal application to the Legislature of Nova Scotia.

The first question to be decided on the point in controversy is, whether the Act impeached falls within any of the classes of subjects enumerated in section 92 of the British North America Act.

The Legislature of to-day is our inheritance from the Mother Country, conceded to us in Colonial days. The area of its jurisdiction is, however, circumscribed by the British North America Act, 1867. This Act—our written constitution so to speak—is only a skeleton to be clothed with flesh by the interpretation of its various sections by the Courts as they may from time to time come into question. On behalf of the prisoner it is contended that the Governor-General of the Dominion of Canada alone has authority and jurisdiction to appoint stipendiary magistrates, that they come within the functionaries to be appointed under the provisions of sec. 96 of the British North America Act which reads:—

> The Governor-General shall appoint the Judges of the Superior, District and County Courts in each Province except those of the Courts of Probate in Nova Scotia and New Brunswick.

The learned counsel in support of this motion submits that the exception as to the appointment of Judges of Probate in the two named Provinces to the general provisions of the clause just cited proves the rule that amongst the functionaries having judicial authority to administer the law in district Courts

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are included those of municipal Courts; and that therefore stipendiary magistrates who preside in municipal Courts should be appointed by the Governor-General. This point came up in *The Queen* v. *Horner* (2 Cartwright's Cases on the British North America Act 317) before the Queen's Bench in the Province of Quebec. The application for the defendant was on a petition for a writ of habeas corpus, who was convicted under the Quebec Liquor License Act, before a district magistrate under the provisions of the Acts of the Legislature of Quebec respecting district magistrates and magistrates' Courts in that Province. It was contended in that case as it is contended in the case under consideration, that the Legislature of the Province of Quebec had no authority to legislate on these matters, and that even if it had the Lieutenant-Governor has no right to appoint a district Judge, and that the Governor-General has alone the power to appoint such officers. Ramsay, J., delivering the judgment of the Court says:—

> The difficulty in this case arises from the partitioning of the legislative powers of the general and local Legislatures. The Criminal law is given to the Parliament of Canada as also procedure in Criminal matters, while the constitution, maintenance, and organization of Criminal Courts are given to the local Legislatures. Now where does the "constitution" of the Court end and where does "procedure" begin. The dividing line between these powers is not very distinct. . . . Whatever difficulty there may be as to the conflict of the powers as an abstract question, in the face of the case of *Coote* the learned counsel was fully justified in abandoning the first pretension. The case of *Coote* (*Reg.* v. *Coote*, L.R. 4 P.C. 599) decided in the Privy Council directly recognizes the power of the local Legislatures to create new Courts for the execution of the Criminal law, as also power to nominate magistrates to sit in such Courts. We have therefore the highest authority for holding that generally appointment of magistrates is within the powers of the local executives. So much being established almost all difficulties disappear. The Privy Council recognizes the general principle that the executive power is derived from the legislative power.

This brings us to the point raised on this motion, namely that the executive power is derived from the legislative power; but it is contended that legislation conferring this power on the executive is *ultra vires* the Legislature.

It has been seen that the origin and growth of parliamentary government in this Province gave us a Legislature having as ample powers as the Imperial Parliament has in matters concerning the peace, order and good government of the country. All Acts of the Legislature assented to by the Lieutenant-Governor in Council (and not disallowed by the Home Government) were within the competency of the Legislature. Previous to Confederation the Legislature providing for the establishing of police divisions in the Province passed legislation in that be-

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half and thereby conferred the power on the justices of the peace, at a duly constituted meeting, to select one or more of their number to be stipendiary justices for the newly created division (vide ch. 129, R.S. 3rd series (1864)). Numerous decisions since the passing of the B.N.A. Act have determined that the Legislature of this Province as well as the Legislature of the other Provinces of the Union have power to pass legislation for "the promotion of temperance and the protection of health and morals of the people and the preservation of the peace and good order of the community," which are matters of police regulation (vide *Keefe* v. *McLennan*, 11 N.S.R. 5). The exclusive power to make laws in relation to "the imposition of punishment by fine, penalty or imprisonment for enforcing laws made in relation to any matters coming within any of the classes of subjects enumerated in this section is in the Provincial Legislature" (sec. 92 (15) B.N.A. Act).

The term "property and civil rights" enumerated in sec. 92 (14) is very comprehensive; and it has been determined that legislation of a nature kindred with the provisions of the Temperance Act of Nova Scotia is within the scope of the above term, as well as within the provisions of sub-secs. 8 and 16 of sec. 92, "Municipal institutions in the Province" and "Matters merely of a local and private nature in the Province." Upon this point there are numerous decisions affirming the competency of the Legislatures of the other original Provinces of the Dominion: vide *Slavin* v. *Village of Orillia* (Ont.), 36 U.C.Q.B. 159; *Blouin* v. *City of Quebec*, 7 Que. L.R. 18; *De St. Aubin* v. *Lafranc*, 8 Que. L.R. 190; *Sulte* v. *Corporation Three Rivers*, 11 Can. S.C.R. 25; *Attorney-General of Ontario* v. *Attorney-General of Canada*, [1896] App. Cas. 348.

In the early years of Confederation the tendency was to place the Provincial Legislature in an inferior position—local municipal institutions—and that all executive authority centered in the Dominion Government. An Act to define the privileges, immunities and powers of the Legislative Assembly of Ontario passed in 1868 was disallowed on the report of the Minister of Justice of Canada. This Act was afterwards re-enacted by the Legislature of Ontario, and has not been interfered with since. In the judgment of the Supreme Court of Canada in *Lenoir* v. *Ritchie* (1879), 3 Can. S.C.R. 575, respecting the power of the Lieutenant-Governor of Nova Scotia to appoint Queen's Counsel, Gwynne, J., said (page 634):—

> The head of their executive government is not an officer appointed by Her Majesty, or holding any commission from her, or in any manner personally representing her, but an officer of the Dominion Government appointed by the Governor-General, acting under the advice of a council which the Act constitutes the Privy Council of the Dominion. . . . Nothing can be plainer, as it seems to me, than that

the several Provinces are subordinate to the Dominion Government, and that the Queen is no party to the laws made by those local Legislatures. . .

This illusion has since been dispelled by the decision in the *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick*, [1892] A.C. 437. In that case it was decided that "a Lieutenant-Governor when appointed is as much the representative of Her Majesty for all purposes of Provincial government as the Governor-General himself is for all purposes of Dominion government.

The competency of the Legislature of Ontario to pass an Act, empowering the Lieutenant-Governor to appoint King's Counsel within that Province has been since decided in *The Attorney-General for Canada* v. *The Attorney-General of Ontario*, [1898] App. Cas. 247. The Legislature of Nova Scotia has since re-enacted that the Lieutenant-Governor in Council may appoint King's Counsel from the Bar of the Province. The constitutionality of an Act of the Legislature of Nova Scotia respecting its composition, powers and privileges—similar to the Ontario Act above referred to—was also upheld by the Privy Council in *Fielding* v. *Thomas*, [1896] App. Cas. 600. In the judgment of the Privy Council it is pointed out that the British North America Act had to be amended to enable the House of Commons to define its privileges, immunities and powers, and they add:—

> There is no similar enactment in the British North America Act, 1867, relating to the House of Assembly of Nova Scotia, and it was argued therefore that it was not the intention of the Imperial Parliament to confer such power on that legislature. But it is to be observed that the House of Commons of Canada was a legislative body created for the first time by the British North America Act, and it may have been thought expedient to make express provision for the privileges and immunities of the body so created which was not necessary in the case of the existing Legislature of Nova Scotia.

The decision in *Attorney-General of Canada* v. *Attorney-General of Ontario*, [1898] A.C. 247, decides that the prerogative right of the Crown to appoint King's Counsel was validly committed to the Lieutenant-Governor by an Act of the Provincial Legislature (I may here remark that the prerogative right of the Crown to appoint justices of the peace has been committed by our own Legislature to the Lieutenant-Governor in Council under the provisions of chapter 38 R.S.N.S. 1900). The decision further confirms the jurisdiction of the Provincial Legislature to confer such powers upon the Lieutenant-Governor:—

> The next and only other point requiring to be considered in this case is whether the Legislature of Ontario had jurisdiction to confer upon the Lieutenant-Governor those powers which are now embodied in the revised statute of December, 1877. That is a question which can only be solved by reference to the provisions of the Imperial Act

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of 1867; and there are three of the enactments of section 92 which appear to their Lordships to have an immediate hearing upon it. The first head of that clause gives to the Legislature of each Province exclusive authority to make laws from time to time for the amendment of the constitution of the Province except as regards the office of Lieutenant-Governor; by (4) of the same clause, the establishment and tenure of provincial offices and payment of provincial officers. Again by the 14th head the Legislature is empowered to make laws in relation to the administration of justice in the Province, including the constitution, maintenance and organization of provincial Courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those Courts. By the combined effect of these enactments it is entirely within the discretion of the Provincial Legislature to determine by what officers the Crown, or in other words the executive government of the Province shall be represented in its Courts of law or elsewhere; and to define by Act of Parliament the duties, whether substantial or honorary, which are to be incumbent upon these officers, and the rights and privileges which they are to enjoy.

On the question of the competency of the Provincial Legislature to pass laws savouring of a criminal character for police regulation, the Privy Council in *The Citizens Insurance Company of Canada* v. *Parsons*, 45 L.T.N.S. 721, point out that it must have been foreseen that a sharp definite distinction has not been and could not be attained in the distribution of subjects assigned exclusively by secs. 91 and 92 of the B.N.A. Act; but that some of the classes of subjects so assigned unavoidably run into one another. Of this class are (27) of sec. 91 which deals with criminal law assigned to the Dominion Parliament, and (14) of sec. 92 of the administration of justice and the constitution of Courts, assigned to the Provincial Legislatures. This explains the apparent encroaching of the Provincial Legislatures on this particular subject assigned to the Dominion Parliament.

It is apparent from the precedents above cited and referred to that the Provincial Legislature has the power to make laws of a quasi-criminal character such as the Nova Scotia Temperance Act, the object of which is to promote the health and morals of the people, and the preservation of the peace and good order of the community, and to attach penalties for their violation; also to constitute Courts in which these laws are to be administered. Pursuant to the inherent power and right in the Legislature to complete the machinery of such Courts which includes the appointment of magistrates to execute the laws, it passed the Act respecting the "Appointment and remuneration of stipendiary magistrates" thereby conferring the power upon the Governor in Council to make such appointments. This Act was assented to by the Lieutenant-Governor who "is as much the representative of Her Majesty for all purposes of Provincial

Government as the Governor-General himself is for all purposes of Dominion Government:" *Liquidators of the Maritime Bank v. Receiver-General of New Brunswick*, [1892] A.C. 437. The constitutionality of the Act is also presumed from being "assented to in Her Majesty's name" and not questioned by the Governor-General of the Dominion of Canada acting under the advice of his constitutional advisers. This is a strong presumption, though not conclusive, in favour of the validity of the Act, besides that the power is shewn to reside, I think beyond question, in the Legislature to commit to its executive this power of appointment. My reason for referring to the origin and growth of parliamentary government in the Province, its plenary powers before confederation, and the powers retained by it in the distribution of subjects assigned the Parliament of the Dominion and the Legislatures of the Provinces respectively, is to put it beyond question that the Act impeached is *intra vires* the Legislature of the Province of Nova Scotia. The motion is refused.

Discharge refused.

SMITH v. MURRAY.

Manitoba King's Bench. Macdonald, J., in Chambers. February 6, 1912.

DEPOSITIONS (§ II—6)—COMMISSION TO TAKE TESTIMONY—APPLICATION FOR FOREIGN COMMISSION.

To obtain a commission to take the depositions of foreign witnesses to be used as evidence, it is not necessary to set out explicitly the nature of the evidence nor the facts intended to be proved by the witnesses sought to be examined, if the Court is satisfied that the application is bona fide and that the evidence is material and cannot be obtained within the jurisdiction.

THIS was an appeal from an order of the Referee granting a Commission for the examination of witnesses in the United States of America on behalf of the plaintiff.

The principal grounds of objection were:

1. That the evidence proposed to be obtained is not material to the issue.

2. That there was not sufficient material before the Court to shew what evidence was proposed to be given.

The appeal was dismissed.

N. F. Hagel, K.C., for plaintiff.

E. A. Cohen, for defendant.

MACDONALD, J.:—On the first objection it is urged that the statement of claim discloses the fact that the agreement to pay the commission sought to be recovered was made on the 10th day of November, 1909, and that all previous services rendered by

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the plaintiff were voluntary and not under any arrangement or understanding with the defendants, and that the only material evidence that can be had is such as relates to the agreement of the 10th November, 1909, to pay the commission.

Although the statement of claim might be more explicit, I think it is fair to assume that the plaintiff was endeavouring to effect a sale as agent for the defendants for some time prior to the 10th November, 1909, and that on the latter date the prospects of his success being bright, the agreement as to the amount of the commission to which he was to be entitled was entered into.

In his affidavit in support of his motion for a commission the plaintiff says:—

> Arthur H. W. Eckstein, John A. Todd and George L. Wertman, as well as John Mack and William Mack, resident at or near the city of Minneapolis in the United States of America are as I believe and am advised by my solicitor material and necessary witnesses for me in this action and without their testimony I cannot safely proceed to the trial of this action. The said witnesses can prove according to the best of my information and knowledge, and according to a large extent to my present knowledge, can prove facts and circumstances which will shew that the sale and purchase of the property, being real estate referred to in the statement of claim and for the sale and purchase of which commission is claimed in this action, were made by and through the instrumentality of me, the plaintiff, and of other persons who claim an individual commission as I do in respect of such sale and purchase pursuant to the terms of the agreement by which each of us was to have such individual commission in respect of such sale and purchase.

It is urged that it is not sufficiently explicit as to what the facts and circumstances are which these witnesses can prove, but it seems to me the facts and circumstances which will establish the fact that the plaintiff was instrumental in bringing about the sale are most material, as he would have to prove this to entitle him to the commission, the amount of which he claims was agreed upon at the later date, and furthermore it is not necessary that the nature of the evidence or facts intended to be proved should be shewn on an application of this nature.

From a perusal of the statement of claim and affidavit of the plaintiff in support of his motion, I am of the opinion that there is a sufficient case made out to entitle the plaintiff to a commission and I dismiss the appeal with costs in the cause to the plaintiff in any event.

Appeal dismissed.

HUGGARD (claimant, plaintiff) **v. BENNETTO** (execution creditor, defendant.)

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Manitoba Court of Appeal. Richards, Perdue, and Cameron, JJ.A. February 19, 1912.

GIFT (§ III—16)—VALIDITY—ACTUAL OR CONSTRUCTIVE DELIVERY—AUTOMOBILE.

A claim made by the wife of the debtor as against her husband's execution creditors to an automobile bought with the husband's money but which she claims was verbally given to her by him, is not substantiated as against the seizure under execution if there was not a bill of sale or other written evidence of the transfer by the husband to the wife, nor proof either of actual delivery to her or of constructive delivery by words of present gift accompanied by change of possession.

[*Kilpin* v. *Ratley*, [1892] 1 Q.B. 583, distinguished. See also Annotation to this case.]

THIS was an appeal by the defendant, execution creditor, from the judgment at trial in favour of the claimant in an interpleader issue in which the present plaintiff is the claimant of the chattel seized, and the defendant is the execution creditor. The defendant had obtained judgment and issued execution against J. T. Huggard, the husband of the plaintiff in the issue. Under this execution the sheriff had seized an automobile. Mrs. Huggard claimed that the automobile was her property, and the interpleader issue was directed to try the ownership of the machine.

The appeal was allowed and judgment entered for the defendant, execution creditor.

M. G. Macneil, for plaintiff.

Messrs. *C. P. Fullerton*, K.C., and *J. P. Foley*, for defendant.

The judgment of the Court was delivered by

PERDUE, J.A.:—The plaintiff's alleged ownership of the property seized rests wholly upon a verbal gift of it which she claims was made by her husband to her. The automobile was bought by J. T. Huggard with his own money. There was no bill of sale or other writing evidencing a transfer of it to the claimant.

In order to transfer a chattel by a verbal gift only, there must be an actual delivery of the thing to the donee: *Cochrane* v. *Moore*, 25 Q.B.D. 57, approving *Irons* v. *Smallpiece*, 2 B. & Ald. 551; *Hardy* v. *Atkinson*, 18 Man. R. 351; *Re Bolin*, 136 N.Y. 180. If manual delivery is not feasible, words of present gift accompanied by change of possession might constitute delivery: *Kilpin* v. *Ratley*, [1892] 1 Q.B. 583. In Ontario it was held by the Divisional Court (Ont.) in *Thompson* v. *Doyle*, 16 C.L.T. 286, that in an action where a wife claimed certain articles as a gift from her husband, the delivery of the articles as a donation should be clearly proved and that the uncorroborated evidence of the donee was insufficient. Boyd, C., said:—

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If the facts proved were equally consistent with the idea that he intended to deliver so as to be her property, and with the idea that he intended to keep as his own property, then the wife failed to make out her case.

The evidence fails to shew anything in the nature of a delivery of the article in question by the husband to his wife. Regarding the evidence in the most favourable light, as supporting the claimant's contention, all that is proved is that Mr. Huggard bought the machine because his wife had been ill and was not in a condition to walk, that he intended that she and the family should use it and intended to make a gift of it to her. After it had been purchased it was sent to a garage and kept there when not in use. It was registered in accordance with the provisions of the Motor Vehicle Act, Mr. Huggard being the registered owner. After it was purchased the machine was used not only by the claimant but by her husband, and the family. There is no pretence that at any time an actual delivery of the machine was made to the claimant, or that any words of gift were addressed by Mr. Huggard to his wife after he had bought the machine.

The cases of *Tellier* v. *Dujardin*, 16 Man. R. 423, and *Kilpin* v. *Ratley*, [1892] 1 Q.B. 583, referred to by the learned trial Judge, do not support the plaintiff's case. In each of those cases an actual gift was proved. In the first case the article in dispute, a piano, was proved to have been given to the claimant by her father as a birthday gift and to have been always treated as her property thereafter. In *Kilpin* v. *Ratley*, the claimant's father being present with her in a room where some of the furniture in question was, verbally gave her the furniture by words of present gift. He then left the house, leaving the claimant in the room and in possession of the furniture. In that case there were words of present gift and the donee was left in possession. This was held to take the place of a manual delivery. In the present case there were no words of present gift and no change of possession.

I think the claimant has failed to establish any property in the article in question. The appeal should be allowed with costs and verdict should be entered for the defendant in the issue.

Defendant's appeal allowed.

Annotation

Gift of chattels: delivery

Annotation—Gift (§ III—16)—Necessity for delivery and acceptance of chattel.

To constitute a valid gift there must have been the intent to give and a delivery of the thing. The evidence must shew that the donor intended to divest himself of the possession of the property, and it should be inconsistent with any other intention or purpose. A person's intent to divest himself of his title without consideration in favour of a stranger

Annotation (*continued*)—Gift (§ III—16)—Necessity for delivery and acceptance of chattel.

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Annotation

Gift of chattels; delivery

must appear by evidence inconsistent with any other purpose before he can be held to have parted with his ownership: *Hardy* v. *Atkinson*, 18 Man. R. 351, at p. 357, per Phippen, J.A.

In another Manitoba case, the father of the plaintiff in his lifetime had purchased a piano, which, after delivery, at his home he gave to his daughter, the plaintiff, then living with him. She accepted the gift and it was afterwards treated as her property. It was held that the title to the piano was complete in the plaintiff, and she was entitled to recover it from the defendant in spite of an alleged subsequent sale by the father to the latter: *Tellier* v. *Dujardin*, 16 Man. R. 423.

Halsbury (Laws of England, vol. 15, page 412), says:—Gifts of chattels are more often made by delivery than by deed. It is well settled that, if there is no deed, a gift of chattels is not complete unless accompanied by delivery. A verbal gift of chattels without delivery passes no property to the donee and is not a gift at all: *Shower* v. *Pilck* (1849), 4 Exch. 478; *Bourne* v. *Fosbrooke* (1865), 18 C.B. (N.S.) 515; *Cochrane* v. *Moore* (1890), 25 Q.B.D. 57, C.A. The last case establishes the law as correctly laid down by the Court of King's Bench in *Irons* v. *Smallpiece* (1819), 2 B. & Ald. 551, and overrules the statements of the law on this point by Pollock, B., in *Re Harcourt, Danby* v. *Tucker* (1883), 31 W.R. 578; and by Cave J., in *Re Ridgway, ex parte Ridgway* (1885), 15 Q.B.D. 447.

"If the gift does not take effect by delivery of immediate possession, it is then not properly a gift, but a contract" (2 Bl. Com. 441). Actual delivery is not mere evidence of the gift but is part of the gift itself. In ordinary English language and in legal effect there cannot be a gift without a giving and taking. The giving and taking are the two contemporaneous and reciprocal acts which constitute a gift. They are a necessary part of the proposition that there has been a gift: *Cochrane* v. *Moore*, 25 Q.B.D., per Lord Esher, M.R., at p. 76.

Actual manual delivery by the donor to the donee of a chattel is not, however, essential to complete the gift thereof. It is sufficient if the donee be put by the donor in possession of the chattel: *Winter* v. *Winter* (1861), 4 L.T. 639, where a barge was given to the donor's servant, who had previously been in possession thereof as such servant, and kept possession of it afterwards: *Kilpin* v. *Ratley*, [1892] 1 Q.B. 582, where a father to whom the furniture in the house of his daughter had been assigned by a duly registered bill of sale, came to the house and verbally gave the furniture to his daughter and left her in the room with it; see too *Re Alderson, Alderson* v. *Peel* (1891), 64 L.T.N.S. 645, but possibly this last case is not consistent with *Cochrane* v. *Moore* (1890), 25 Q.B.D. 57, C.A., see *Kilpin* v. *Ratley*, [1892] 1 Q.B. 582, per Wills, J.; compare *Richer* v. *Voyer* (1874), L.R. 5 P.C. 461, and *Cain* v. *Moon*, [1896] 2 Q.B. 283.

Where chattels cannot be actually delivered owing to their bulk, they can be constructively delivered, *e.g.*, by the delivery of the key of a warehouse in which they are stored: *Ryall* v. *Rowles* (1750), 1 Ves. Sen. 348. On the same principle the property in a church organ has been held to pass by symbolical delivery: *Rawlinson* v. *Mort* (1905), 93 L.T.N.S. 555. The question has been raised whether a gift of an undivided fourth part of

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Annotation

Gift of chattels; delivery

Annotation (*continued*)—**Gift (§ III—16)—Necessity for delivery and acceptance of chattel.**

a horse admitted of delivery, or whether, it was to be regarded as incorporeal and incapable of delivery. The point was, however, left undecided, the Court holding that what took place between the parties amounted to a declaration of trust: *Cochrane* v. *Moore*, 25 Q.B.D. at p. 73; 15 Halsbury's Laws of England, p. 413. For a form of deed for such a gift, see Encyclopædia of Forms and Precedents, vol. VI., p. 132.

The delivery need not be made at the time of the gift. Delivery first and gift afterwards is as effectual as gift first and delivery afterwards: *Cochrane* v. *Moore*, 25 Q.B.D. 57, at p. 70; *Cain* v. *Moon*, [1896] 2 Q.B. 283.

It seems also that where a chattel of one person is already in the possession of another, though not for the purpose of an intended gift, an effectual verbal gift of it to the latter may be made without any further delivery to him: *Kilpin* v. *Ratley*, [1892] 1 Q.B. 582, at p. 585; *Cain* v. *Moon*, supra, per Wills, J., at p. 289. But see contra, *Shower* v. *Pilck* (1849), 4 Exch. 478, and see the observations on the last mentioned case in *Cochrane* v. *Moore*, 25 Q.B.D. 57, at p. 61. The decision, however, in *Shower* v. *Pilck*, supra, can be supported on the ground that there were no words of present gift: 15 Halsbury's Laws of England, p. 413.

A gift to one for a third person's use is a sufficient delivery to vest the property in the third person: *Lucas* v. *Lucas* (1738), 1 Atk. 270.

The general principles relative to the validity of gifts, and their application to donations of stock, are well stated by Judge Sanborn in *Allen West Commission Co.* v. *Grumbles*, 63 C.C.A. 401, 129 Fed. 287. He says: "Among the indispensable conditions of a valid gift are the intention of the donor to absolutely and irrevocably divest himself of the title, dominion and control of the subject of the gift in præsenti at the very time he undertakes to make the gift . . . the irrevocable transfer of the present title, dominion, and control of the thing given to the donee, so that the donor can exercise no further act of dominion or control over it; . . . and the delivery by the donor to the donee of the subject of the gift or of the most effectual means of commanding the dominion of it. This delivery must be an actual one so far as the subject is capable of it. It must be secundum subjectam materiam, and be the true and effectual way of obtaining the command and dominion of the subject": 2 Kent, Com. 439. If the subject of the gift is a chose in action, such as a bond, a note or stock in a corporation, the delivery of the most effectual means of reducing the chose to possession or use, such as the delivery of the bond, or the note, or the certificate of stock, if present and capable of delivery, is indispensible to the completion of the gift."

For other American cases, see Annotation 29 L.R.A. N.S. (1911), p. 166.

WINDSOR, ESSEX AND LAKE SHORE RAPID RAILWAY CO. (defendants, appellants) v. **NELLES** et al. (plaintiffs, respondents).

(DECISION No. 2.)

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Idington, Duff, Anglin and Brodeur, JJ. February 22, 1912.

1. APPEAL (§ VI A—281)—JURISDICTION OF SUPREME COURT OF CANADA—WHETHER ORDER BELOW FINAL OR INTERLOCUTORY—PRELIMINARY MOTION TO AFFIRM JURISDICTION.

A preliminary motion to affirm the jurisdiction on an appeal to the Supreme Court of Canada will be dismissed and the parties left to their rights on the hearing, if the facts shewn on the preliminary motion are insufficient to enable the Court to finally determine whether the judgment or order appealed from was final and so subject to appeal or was interlocutory only and, therefore, not subject to appeal.

[*Clark* v. *Goodall*, 44 Can. S.C.R. 284; *Crown Life* v. *Skinner*, 44 Can. S.C.R. 616 and *McDonald* v. *Belcher*, [1904] A.C. 429, specially referred to.]

2. APPEAL (§ III F—98)—EXTENSION OF TIME—APPEALS TO SUPREME COURT OF CANADA.

The limitation of sixty days for appealing to the Supreme Court of Canada under sec. 69 of the Supreme Court Act, R.S.C. (1906), ch. 139, may under sec. 71 of that Act be extended by the Court appealed from, but not by the Supreme Court of Canada.

[*Windsor, Essex & L. S. Rapid Ry. Co.* v. *Nelles* (1912), 1 D.L.R. 156, affirmed on this point.]

APPEAL to the Supreme Court of Canada from the decision of the Registrar (*Windsor, etc., Co.* v. *Nelles*, 1 D.L.R. 156) in so far as it declined to affirm the jurisdiction to appeal from a judgment of the Court of Appeal for Ontario of 21st April, 1908, which affirmed with a variation the judgment directing a reference as to damages made by Clute, J., at the trial.

An extension of time for making such appeal was also asked, the statutory period of limitation under sec. 69 of the Supreme Court Act, R.S.C. (1906) ch. 139, having long since expired. After the decision of 21st April, 1908, the reference had been proceeded with and the applicants had then appealed to the Court of Appeal both from the order made by Chief Justice Sir William Meredith (January 23, 1911), varying the report in certain respects and from the judgment afterwards given by Boyd, C., upon further directions and disposing of the question of costs. The order of the Registrar appealed from had declined to affirm the jurisdiction or to grant leave in respect of the judgment of the Court of Appeal affirming the direction of the reference (April 21, 1908). The Registrar had also declined to affirm the jurisdiction as to that part of the judgment of the Court of Appeal delivered on 28th September, 1911, upon the consolidated appeal to that Court (referred to, ante pp. 156-160) which had affirmed the order of Chief Justice Sir William Meredith varying the Master's report on an appeal therefrom.

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The order of the Registrar had, however, affirmed the jurisdiction as to the proposed appeal from the judgment of the Court of Appeal of 28th September, 1911, in respect of the judgment on further directions in the action.

The appellant's appeal from the Registrar's order was dismissed by the Court sitting en banc.

G. F. Henderson, K.C., for appellant.

C. J. Holman, K.C., for respondent.

The judgment of the Court was delivered by

IDINGTON, J.:—It does not appear to me that we can properly aid the appellant by assenting to his motion. Without a more intimate knowledge of the questions involved than is to be obtained on such a motion and argument properly relevant thereto, it does not appear to me that we can satisfactorily deal with the matter in an absolutely final manner.

However, nothing advanced in argument (and I think all was said) relative to the nature of the facts and legal issues raised in the pleadings and to the nature and intention of the first judgment and of the judgment on appeal therefrom seemed to me to furnish ground for holding out much hope of our being ever able to find that judgment reviewable on the proposed appeal.

Besides the cases of *Clark* v. *Goodall*, 44 Can. S.C.R. 284, and *Crown Life* v. *Skinner*, 44 Can. S.C.R. 616, cited in argument, does not the principle upon which the judgment in the case of *McDonald* v. *Belcher*, [1904] A.C. 429,* proceeded, stand as an impassable barrier? See the approving reference therein, page 436, to the case of *International Financial Society* v. *City of Moscow Co.*, 7 Ch. D. 241 and 247.

Does not the law in Ontario "in such cases confer a most important right on one of the litigants by ordering that there shall be an end to the litigation," so far as concerns the field of dispute such a judgment covers. Why should a man spend thousands of dollars, as sometimes happens, on a reference with a basis to rest on as shifting as the sands? I think the motion must be dismissed with costs.

If a right of appeal here is a desirable thing in such cases,

*The head-note of the case here referred to is as follows:—

In an action by executors against the appellant to recover certain sums of money due to their estate, the Judge of the Territorial Court, at the request of the plaintiffs, selected one of the items, and adjudicated on the evidence taken that the action in respect thereof be dismissed: *Held*, that this was within the meaning of the Yukon Territorial Act, 1899, sec. 8, a final judgment in respect thereof, notwithstanding that the remaining items in suit were referred and the costs were reserved. No appeal therefrom to the British Columbia Court lay after the expiration of twenty days. Special leave to appeal having been granted from a decree of the Supreme Court of Canada on a petition stating that the construction of the said statute was a matter of general public importance, without stating that it had been repealed, held, also, that as the omission was immaterial and bonâ fide the appellant should not be deprived of his costs.

McDonald v. *Belcher*, [1904] A.C. 429, reversing 33 Can. S.C.R. 321.

there are three ways of getting it. One is to have the learned trial Judge so frame his judgment as to enable it, and then litigants will know what is in store for them. Another is an application to the Court of Appeal for leave to come here; and the third is to induce Parliament to say so, if it will. All these Courts may answer—there is such a thing as too much of a good thing.

Registrar's order affirmed.

TIMMONS v. BROWN.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, and Cameron, JJ.A. February 22, 1912.

1. APPEAL (§ VI B—286)—VERDICT ENTERED BY DEFENDANT'S CONSENT FOR LESS THAN CLAIM—PLAINTIFF TAKING BENEFIT—CONSENT JUDGMENT NOT APPEALABLE.

Where a verdict for an amount less than the claim is given with the consent of the defendant and is so entered on the record, the plaintiff, who took the benefit of it and took no objection although represented by counsel, must be taken to have also consented; the judgment so entered is a consent judgment and as such is not appealable under the Manitoba County Courts Act, R.S.M. 1902, ch. 38.

THE plaintiff brought this action in the Winnipeg County Court to recover $500, which he claimed as commission for having effected a sale of the King Edward Hotel at Winnipeg Beach. Judge Dawson, before whom the action was tried, entered a verdict for Timmons as follows:—

Leave to plaintiff to add count for "work done and services performed." Verdict for plaintiff for $50 without costs, defendant consenting.

A. DAWSON, J.C.C.

Plaintiff appealed asking to be allowed the full amount of the commission as claimed in the action.

A. Haggart, K.C., for the defendant took the preliminary objection that no appeal would lie as the judgment was a consent one: Bicknell & Seager's Division Court Act, 2nd ed., 298.

B. L. Deacon, for plaintiff, contended that the consent given by the plaintiff, if any, must appear on the record: *Sun Life* v. *Elliott,* 31 Can. S.C.R. 91; *Aldam* v. *Brown,* 89 L.T. Jour. 116; *Re Justin,* 18 P.R. 125; Holmested & Langton's Jud. Act, 3rd ed., 124; Annual Practice, 1912, vol. 2, p. 62.

THE COURT OF APPEAL allowed the preliminary objection, and dismissed the appeal, holding that according to the entry on the record and the fact that counsel for plaintiff was present when it was made, and took the benefit of it, the judgment must be considered to have been a consent judgment and therefore not appealable.

Appeal quashed.

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GEERS v. NESTMAN.

Saskatchewan Supreme Court (Moose Jaw Judicial District). Trial before Wetmore, C.J. February 15, 1912.

1. MALICIOUS PROSECUTION (§ II A—6)—WANT OF PROBABLE CAUSE—EFFECT OF DEFENDANT'S ADMISSION UNDER OATH OF NON-BELIEF IN CHARGE—CONCLUSIVENESS.

A belief upon which the private prosecutor has acted is essential to the existence of reasonable and probable cause as it affects an action against him for malicious prosecution; so, where the prosecutor, when examined at the trial in the latter action, denied ever having had a belief that the plaintiff was guilty and also denied having laid any charge against the plaintiff, but is proved to have laid the charge, his denial of belief in the plaintiff's guilt is conclusive proof of want of reasonable and probable cause in favour of the plaintiff who had been acquitted on the criminal trial and who also denied his guilt on the civil trial, although it may further appear that there were grounds of suspicion which would have sustained a defence of reasonable and probable cause had the defendant admitted that he had believed them.

[*Haddrick* v. *Heslop* (1848), 12 Q.B. 267, and *Shrosbery* v. *Osmaston* (1877), 37 L.T. 793, applied. See also *Chapman* v. *Heslop* (1853), 2 C.L.R. 139; *Johnson* v. *Emerson* (1871), L.R. 6 Ex. 351.]

2. EVIDENCE (§ II E 6—181)—MALICIOUS PROSECUTION—MALICE—PRESUMPTION FROM WANT OF PROBABLE CAUSE.

Malice in laying the criminal charge may be inferred from the want of reasonable and probable cause in laying the information and proceeding with the prosecution.

[See also 19 Halsbury's Laws of England, p. 684.]

3. EVIDENCE (§ X C—696)—PARTY'S OWN ACTS AND DECLARATIONS—ADMISSION UNDER OATH AGAINST INTEREST—ATTEMPT TO MISLEAD JUSTICE BY FALSE ADMISSION.

Where the defendant sued for damages for malicious prosecution is called as a witness on his own behalf, and with a mistaken notion of benefiting his own defence denies ever having entertained any belief of the plaintiff's guilt, a Judge trying the case without a jury is bound to give effect to his denial as proving for the plaintiff that there was a want of reasonable and probable cause for the prosecution, although he may be of opinion that there was reasonable and probable cause and that the defendant did believe in the charge he laid and that his contradiction of such belief, under oath, was falsely made with a mistaken view of evading responsibility such as might be attributed to a very ignorant and stupid man acting from motives of low cunning.

TRIAL of an action for malicious prosecution. The defendant charged the plaintiff before a justice of the peace with stealing a quantity of flax from him. The plaintiff was arrested upon such charge, brought before a justice of the peace, committed for trial, and was tried by a Judge with a jury at the sittings of the Supreme Court held at Moose Jaw in March, 1911, and acquitted. He was held in prison for some time after his committal by the justice, but was released on bail.

The facts relating to the alleged theft and the conduct of the defendant in respect to the prosecution of the plaintiff as found by the learned trial Judge were as follows:—

The flax was owned by the defendant and was stored in bags in the kitchen of a house in his possession. It had been emptied out of the bags and carried away, presumably in a loose state. There were tracks of a horse and waggon and of a person or

persons about the door of the place where the flax had been stored, and the tracks of the waggon indicated that it had been backed up to this door, and there were tracks of apparently this same waggon going south from the door. The defendant went to a constable of the Royal North-West Mounted Police force and stated the facts to him, who instructed him to take two persons with him to the place from which the flax was stolen and follow the tracks going south. This was done. These tracks went south on a trail which ran practically parallel with, and on the west side of, and close by the road allowance there for a considerable distance, until it joined the road allowance, and along that allowance until it came opposite to the plaintiff's yard, and turned off into that yard.

Judgment was given for the plaintiff.

N. R. Craig, for plaintiff.

J. A. Cross, for defendant.

WETMORE, C.J.:—The trackers did not follow the tracks any further, because they had some impression that in view of what they were doing it would be improper for them to do so; from which I gathered they were actuated by some sentiment that it would not shew a proper sense of delicacy to go on the plaintiff's land or into his yard. It may be as well to say here that the plaintiff's house and yard were on the east side of the road allowance. When tracing these waggon tracks, they found on the trail from time to time places where some grains of flax had fallen; and this was observable all the way until the tracks came to the road allowance. The tracks of apparently two other waggons were observed coming from the plaintiff's yard which went north along the road enclosure until they came where a trail branched off to go east towards Rouleau; and these tracks went east on that road. They were not followed any further. The defendant's flax was of a much superior quality to the general sample of flax raised in that neighbourhood. But at the same time, as the sequel will shew, there must have been other flax in or about the vicinity equal to it in quality. On the morning of the day the defendant missed the flax, the plaintiff, and one Frand Sicard together took into Rouleau two loads of flax of a quality exactly the same as that lost by the defendant, and sold it at the elevator there; and the defendant was informed of that fact by the police constable. As a matter of fact, the plaintiff and Sicard arrived at Rouleau about six o'clock in the morning, which must at that time of the year have been before daylight, or possibly about the dawn of the day, and immediately aroused the elevator man to buy it and take delivery of it, which he did. These men must have been travelling several hours before dawn. Sicard lived close to the plaintiff on the west side of the road allowance.

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The reason given for so travelling at night was that one of them wanted to catch the train to go to Moose Jaw. As a matter of fact he did not go to Moose Jaw on that occasion, although the train went through more than two hours after they had disposed of the flax. The quantity of flax hauled into Rouleau on this occasion by Sicard and the plaintiff, was almost twice as much as the defendant had lost. The police constable directed the plaintiff to go into Drinkwater, and he did so, and laid the charge in question before a justice there, with the results before stated. It was proved at the trial that there was a light trail running east across the country south of the plaintiff's house. I do not know whether this trail was much travelled at that time. I am inclined to think it was not. Passler, one of the trackers, at the time of the tracking went south along the road allowance to a point south-west of the plaintiff's house. He saw no trace of any trail going east, but he admits that later on in the spring or summer he observed that there was such a trail.

Of course, the theory set up by the plaintiff is that if the trackers did so trace a track from the place where the flax was stolen leading into his yard, it went on through his yard and joined this trail going east; and that the trackers fell short of making a sufficient search to establish reasonable and probable cause against the plaintiff, because they did not follow the trail into his yard and ascertain whether or not it had gone to that trail and so east. The plaintiff denied stealing the wheat.

I do not feel justified under the evidence in finding contrary to the verdict acquitting the plaintiff in March, even supposing it to be open to me to do so. But the facts which I do find, and which are before set forth, are sufficient to lead me to the conclusion that—as an abstract proposition—there was not a want of reasonable and probable cause on the part of the defendant in bringing the prosecution in question. Had it not been for the testimony of the defendant given on his examination for discovery, I would have dismissed this action instantly.

The defendant swore on that occasion, that he never charged the plaintiff with stealing the flax, that he never believed he stole it, and that he never had any reason to believe he stole it, and that at the time of the examination he did not believe that he stole it. In face of the facts, it is almost incredible that he should swear that way; and I may frankly state that I do not believe him. The defendant's counsel attempted to account for it by stating that his client is a very ignorant and stupid man. I entirely agree with him, but that will not account for what he swore to. His evidence in that respect is either true, or he, in my opinion, endeavoured to mislead the Court by false testimony; and reading between the lines, that is the conclusion I have in my mind reached. He know that this action was brought

against him because he was charged with having accused the plaintiff of stealing the flax, and he conceived the idea that if he could impress the Court with the fact that he did not believe, and never believed, that the plaintiff stole the flax, and never accused him of doing so, he would score a great point and would succeed in the action; in fact, I think he swore as he did from the low cunning of a very stupid man.

But what I believe, under the circumstances of this case, cannot be given effect to (it is only a surmise anyway, but a very strong one); I must accept what he says, and has sworn to. I must therefore hold that in his mind there was want of reasonable and probable cause in bringing and proceeding with the prosecution in question.

In *Haddrick* v. *Heslop* (1848), 12 Q.B. 267, which was an action for malicious prosecution, Denman, C.J., is reported at p. 274 as follows:—

> It would be quite outrageous if, where a party is proved to believe that a charge is unfounded, it were to be held that he could have reasonable and probable cause . . . I think that belief is essential to the existence of reasonable and probable cause; I do not mean abstract belief, but belief on which a party acts. Where there is no such belief, to hold that the party had reasonable and probable cause would be destructive of common sense.

And Erle, J., is reported in the same case at p. 276 as follows:—

> The defendant made the charge upon information given to him; it was left to the jury whether he believed that information; and they found that he did not. It would be monstrous to say he had reasonable and probable cause.

That case seems to me exactly in point. In this case the defendant makes the point stronger because he swears in effect that he did not believe, and never believed, that the plaintiff was guilty.

Shrosbery v. *Osmaston* (1877), 37 L.T. 793, is along the same lines as what I have cited from *Haddrick* v. *Heslop*, 12 Q.B. 267.

This testimony has a further effect. I cannot in the face of it see my way clear to find that the defendant did not act maliciously. Believing as he says he did, what motive was there for laying the information and proceeding with the prosecution? He must have laid it from some improper motive. I therefore find there was malice on the part of the defendant.

I find the damages for legal and other expenses incurred by the plaintiff in his defence (this amount was sworn to, and not disputed) $500; general damages $200.

There will be judgment for the plaintiff for $700 and costs.

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If my surmise is correct, the defendant testified falsely in the matters referred to; perhaps it may serve to impress upon him, if unfortunately he becomes involved in another lawsuit, not to give false testimony, especially when the truth will serve his purpose better.

Judgment for plaintiff.

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K. B.
1912

Feb. 21.

Re WINNIPEG HEDGE AND WIRE FENCE COMPANY, LIMITED.

Manitoba King's Bench. Robson, J. February 21, 1912.

1. CORPORATIONS AND COMPANIES (§ IV D 3—85)—REQUISITES OF CORPORATE CONTRACT—ADOPTION OF OFFICER'S REPORT OF ASSETS.

The fact that the financial statement of a company submitted by its treasurer and adopted by its directors enumerated as one of the assets of the company, an item as follows: "Patent $20,000" is not, in the absence of a by-law or other document under the corporate seal or of assumption or user of the patent rights by the company, sufficient evidence of a contract binding the company to take over at that price from the incorporators acting as a syndicate a patent right for the transfer of which to the company negotiations had been pending between the syndicate and the company.

2. CORPORATION AND COMPANIES (§ V F 1—242)—SHAREHOLDER AS TRUSTEE FOR SYNDICATE—PERSONAL LIABILITY FOR UNPAID SHARES.

A member of a syndicate in whose name, with the addition of the words "Trustee for syndicate" share certificates are issued for stock in a trading corporation organised by the members of the syndicate for the purpose of taking over the syndicate business is not exempt from personal liability as a contributory in respect of unpaid shares included in his stock holding by the addition of the words "trustee for syndicate" upon the face of the certificate.

[See also Hamilton's Company Law, 3rd ed., p. 161.]

3. CORPORATIONS AND COMPANIES (§ V F 1—242)—SHARE CERTIFICATE DESCRIBING SHAREHOLDER AS TRUSTEE FOR SYNDICATE—STATUTORY EXEMPTION FROM LIABILITY OF CERTAIN TRUSTEES NOT APPLICABLE.

Section 48 of the Manitoba Joint Stock Companies Act, R.S.M. 1902, ch. 30, sec. 48, declaring that no person holding stock in a company incorporated thereunder as an executor, administrator, tutor, curator, guardian, or trustee shall be personally subject to liability as a shareholder, but that the trust estate and funds shall be liable, does not apply to protect from personal liability a member of a trading association or syndicate who accepts as trustee for himself and associates shares of stock in a company incorporated under that statute.

4. CORPORATIONS AND COMPANIES (§ IV H—164)—SALES BY PROMOTORS TO THE COMPANY—GROSSLY INADEQUATE CONSIDERATION FOR PAID UP SHARES—FRAUD.

Where shares in an incorporated company are issued to one of the promotors of the company in alleged consideration of the transfer to the company of patent rights which were already known to be of no real value to the company, the transaction may be declared a fraud upon the company and the promotor in whose name the shares remain may be held liable as a contributory upon a liquidation proceeding under the Winding-up Act, R.S.C. 1906, ch. 144.

5. CORPORATIONS AND COMPANIES (§ VI F 3—270)—LIABILITY OF SHAREHOLDERS—WINDING UP—CONTRIBUTION ON SHARES ALTHOUGH ISSUED AS PAID UP—ULTRA VIRES ACCEPTANCE BY COMPANY OF COVENANT OR PROMISE IN LIEU OF VALUE.

A covenant or agreement with the company to perform some future act still unperformed in consideration for paid up shares in an incorporated company cannot be pleaded in set-off to a claim by the liquidator of the company against the shareholder as a contributory in a winding-up proceeding for the amount of the shares issued to and accepted by the shareholder and remaining registered in his name upon the stock register although the shares may be described as fully paid up.

[*Re Jones and Moore Electric Co.*, 18 Man. R. 549, 571, approved.]

6. CORPORATIONS AND COMPANIES (§ IV D—1)—POWER TO CONTRACT—ISSUE OF PAID UP SHARES—INSUFFICIENT CONSIDERATION—EXCHANGE FOR SHAREHOLDER'S COVENANT AND LIABILITY IN DAMAGES.

A company incorporated under the Manitoba Joint Stock Companies Act has no power to bargain away paid up shares in the company for a mere covenant or agreement by the subscriber to do certain future acts as to which upon non-performance the company's rights would lie only in damages.

[*Re Jones and Moore Electric Co.*, 18 Man. R. 549, 571, approved; and see *Elkington's Case*, L.R. 2 Ch. 511.]

7. CORPORATIONS AND COMPANIES (§ V F 2—252)—SHAREHOLDERS—TRANSFER OF SHARES—LIABILITY OF TRANSFEROR.

The general rule is that a shareholder who has duly transferred his shares on the books of the company, and whose transferee has been registered as a shareholder in his stead, is discharged as between himself and the company from all liability upon such transferred shares as well in respect of past as of future transactions, and he is not liable to be put on the list of shareholder contributories on the insolvency and winding-up of the company except under the terms of statutory enactments making past shareholders liable.

[*Re Wiarton Beet Sugar Co., Freeman's Case* (1906), 12 O.L.R. 149, followed.]

8. CORPORATIONS AND COMPANIES (§ V F 3—267)—SHAREHOLDERS—UNPAID STOCK—SURRENDER OF SHARES INEFFECTIVE TO RELIEVE FROM LIABILITY.

Where the person to whom a share certificate has been issued has regularly become a shareholder of a company incorporated under the Manitoba Joint Stock Companies Act, the company cannot re-acquire the title to its own shares by a transfer or surrender thereof from the shareholder apart from the remedies it is authorized to enforce for non-payment of calls; and the shareholder surrendering the shares remains liable as a contributory in a compulsory liquidation in respect of the amount not paid up, although uncalled thereon.

[*Smith* v. *Gow-Ganda Mines*, 44 Can. S.C.R. 621, applied.]

MOTION to settle the list of contributories on the liquidation and winding-up of the company under the Winding-up Act (Can.).

The company was incorporated under the Manitoba Joint Stock Companies Act, and questions as to the personal liability for shares of a shareholder described as a trustee in the stock certificate arose upon the construction of the Manitoba statute as well as questions involving the liabilities of promotors and incorporators generally in respect of the allotment of and payment for shares in the company.

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Judgment was given for the liquidator against the contesting shareholder.

Messrs. *W. J. Cooper*, K.C., and *J. W. E. Armstrong*, for the liquidator of the company.

A. Haggart, K.C., for B. D. Wallace, the objecting shareholder.

ROBSON, J.:—This company is in course of winding up under the Winding-up Act (Dominion). B. D. Wallace was, on the application of the liquidator, called upon to shew cause why his name should not be settled on the list of contributories in respect of two allotments of 10 and 200 shares respectively, the nominal value of each share being $100. The company was incorporated by letters patent granted by the Lieutenant-Governor of this Province on the 24th day of March, 1902.

In or prior to January, 1902, being before the incorporation of the company, Wallace and certain other gentlemen who are referred to as the syndicate, agreed to purchase from the Stratford Hedge Fence Company, Limited, the right in respect of a certain portion of Manitoba, to the benefit of a patent issued by the Government of Canada for improvements in hedge fences. The price was to be $10,000. A formal agreement expressing this transaction was filed. It is said that this sum was subsequently paid and apparently that fact cannot be questioned. It was contemplated that a company should be formed and that the rights so acquired should be assigned by Wallace et al., to that company at a price to be agreed on. The present company was subsequently formed.

The members of the syndicate were the sole incorporators and became the first directors of the company. The petition for incorporation sets forth that the applicants, of whom Wallace was one, had each subscribed for one thousand dollars of the capital stock (being 10 shares of one hundred dollars) and had paid the amount in cash. With the petition was filed a declaration by Wallace that the facts alleged in it were to the best of his knowledge and belief true and correct. In fact the sums subscribed were not so paid. The explanation is that the amount paid for the patent right amounting to $10,000, constitutes the $10,000 in the petition stated to have been paid.

There is no indication of the company's acceptance of the patent right in satisfaction of the $10,000 subscribed by the original applicants, supposing that to have been within its powers.

In the minute book of the company is inserted a memo. purporting to be a record of a resolution of the shareholders of the company of 14th December, 1903, authorising the preparation of an agreement whereby the members of the syndicate should assign the patent right to the company for $20,000 of the capital stock of the company.

There is no other written indication of there having been a meeting of the company on 14th December, 1903, than the memo. above mentioned. It is very doubtful whether there was such a meeting. The resolution also provided that the syndicate were to be allowed shares to the amount of $10,000 as remuneration for their expenses and outlay in connection with the promotion of the company, together with the costs of selling capital stock and nursery stock and other expenses up to that date. The agreement was to be prepared before the date of the annual meeting on 30th December, 1903, and it was to date back to 7th January, 1902.

A formal document apparently in execution of this intention was signed by nine of the ten members of the syndicate. The resolution and the document merely shew what the syndicate desired. As it was to be read as of a date before incorporation, it had no effect on the company.

In a treasurer's statement dated 30th December, 1903, the "assets" contain an item "Patent, $20,000." That statement was adopted, but that is not, to my mind, to be taken as sufficient evidence of a contract by the company to take over the patent right at $20,000 if it is any evidence at all of any such undertaking.

It does not appear that there was at the meeting of 30th December, 1903, any attempt to procure the company to enter into any arrangement such as was in that resolution foreshadowed. The syndicate themselves carried on the enterprise till August, 1904 and perhaps later. Before that month it had been the experience of those here concerned that the invention was not likely to prove successful in this country.

On 3rd August, 1904, by-law No. 8 of the company was passed whereby it was enacted that the company enter into an agreement with Wallace and associates for the purchase of the patent right and for the repayment to them of all expenses of every kind incurred by them in the interest of the company and for the purchase of all assets belonging to them, the purchase to be made by the transfer to Wallace of 300 shares of paid up stock.

There was produced a document purporting to be Articles of Agreement, dated October, 1904, between the company and the syndicate, drawn apparently in pursuance of by-law No. 8. By this it was provided that the patent rights be assigned to the company in consideration of 300 paid up shares, *i.e.*, $30,000. This document was signed by seven members of the syndicate and by a person who had succeeded one of them. Thus the signatures of two members were lacking. The document is sealed with the company's seal and signed by its secretary as such, but not by the president or other officer.

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There is no satisfactory evidence that there was at any time a formal assignment of the patent rights to the company.

While the supposed resolution of 14th December, 1903, would lead one to think that it was then in the minds of the parties that $20,000 stock was to be issued for the patent rights and $10,000 for the outlays, the *viva voce* evidence would indicate that the patent was to be paid for by the $10,000 originally subscribed in the application for charter and that the $20,000 was for outlays, etc.

On 23rd November, 1904, there was issued to Wallace a certificate for ten shares, *i.e.*, $1,000, and a certificate to him for the syndicate for 200 shares, *i.e.*, $20,000. I take it that this $1,000 was his one-tenth of the original $10,000, that a similar issue was made to each of his associates, and that he received the $20,000 certificate for the syndicate's alleged outlays, thus making the $30,000 mentioned in by-law No. 8. Ten shares of the 200 were transferred by Wallace to W. P. Rundle on the date of the certificate and on 26th November, 1904, a new certificate was issued to Wallace for 190 shares.

Matters came to such a pass that at a meeting on February 16, 1907, the company's officers were instructed to request the return for cancellation of such of the 200 shares as had not been sold or transferred, with such notes as had been taken for shares sold.

Nothing seems to have been done, however, till September 2, 1908, when at a meeting the opinion was again expressed that the unsold balance of the $20,000 stock which was supposed to be $12,600 should be re-assigned to the company and the officers were authorised to request the return from members of the syndicate of shares in all $19,600, though a total of $20,000 was expressed.

On November 2nd, 1908, a transfer of 117 of the shares to the company was signed by Wallace. That this was entirely ineffectual, see *Smith* v. *Gowganda Mines, Limited*, 44 Can. S.C.R. 621.

The inference is that the issue to Wallace of the certificates of 10 and 200 shares respectively, with the nine like issues of 10 shares to the others, made up the 300 shares mentioned in by-law No. 8. This being so, strictly speaking it leaves the original subscription without any pretence of payment. But I am, in his favour, imputing the certificate of 10 shares to the original subscription.

On these recited facts, can it be said that the shareholder's liability upon these shares has been satisfied?

As has been stated, I cannot find that there has been an assignment of the patent. From the evidence before me it did not appear that there had been such an assumption or user of

these patent rights by the company that an obligation to pay for it in any manner could be implied against the company. If the company got anything at all for the orginal subscription, it was merely a verbal undertaking to assign the patent, though there is no record of the company having received even that.

A plea of set-off of the $10,000 supposing that to be the price of the patent, obviously could not be maintained. The language of Howell, C.J.A., in *Re Jones and Moore Electric Company*, 18 Man. R. 549 (at top of page 571)* fits the case exactly.

But, treating the transaction as if the whole 300 shares of the company were being dealt with by by-law No. 8, which was the first corporate action regarding the patent, and the supposed outlays, the agreement prepared to carry that out was not executed. Under the circumstances of this company, with the syndicate managing it, I am not disposed to infer from the mere issue of the certificate that the execution of the agreement had been dispensed with and that the transfer of the patent had been made. Suggestions of the loss of papers do not help the matter.

As to the considerations, apart from the patents, for the issue of 300 shares, no very definte statement was fortheoming at the hearing. It was expected that a good deal should be taken for granted. A shareholder who had got his shares in some method other than by the payment of cash ought to be ready, when called on, to shew that consideration passed to the company.

The statement given by Wallace himself as to this consideration must be examined. It was put under four heads:—

First. It appears, as above remarked, that until the stock issued in 1904 the syndicate carried on the venture themselves. The amount spent by the syndicate in that connection in the years 1902, 1903, and 1904, is part of the consideration for the

*The following are the extracts from the opinion of Chief Justice Howell in *Re Jones and Moore* (1909), 18 Man. R. 549, at page 571, referred to in the text:—

"The execution of the agreement in its terms entitled the appellants to paid up stock. If those covenants for the performance of future acts had not been compiled with the only rights which the company would have would be an action for damages. It is argued that, because a document under the seal of the company was produced, shewing a right to paid up stock, the value in the transaction could not be entered into, but the opposite course was taken in *Re Eddystone*, [1893] 3 Ch. 20. I cannot think that, pursuant to our Act, a shareholder can pay up stock by promising to do something in the future. If the creditor sued him he could not plead set-off, for a covenant to do something would certainly not support that plea. To defend himself he must prove payment, not release even under seal. I think *Elkington's Case*, L.R. 2 Ch. 511, is an authority that the company had not the power to bargain away paid up stock for a covenant."

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200 shares. But that there ever was a liability on the company to assume that amount has not been disclosed to me.

Second. The consideration included the nursery stock the syndicate had on hand.

Third. Certain orders for work or materials, which orders the syndicate had on hand.

Fourth. A lease of a piece of land which had been planted out, and on which some small buildings had been erected.

No details of any of these items are given, but it was said that with interest they represented about $20,000, which statement I cannot credit. I am given no idea of what the stock was worth or what it cost to get the orders mentioned, nor is there the slightest hint as to the value of the lease. Some figures were given and the best I can make of them is that the syndicate (apart from the cost of the patent) spent about $3,750, but how much of that the company either expressly or impliedly assumed I know not.

Then, as already said, before by-law No. 8 was passed, the patent had been demonstrated to be of no value to the company. The transaction as to that feature can only be dealt with as of that date, and it seems that the $10,000 stock issued for the patent was, as I must also hold, the rest of the consideration for the 300 shares, illusory, and I add that the procuring of such an issue for considerations grossly inadequate was a fraud on the company.

There can be no doubt as to the liquidator's right to question the transaction. The position of the liquidator here is, as to the 10 shares, stronger than that of the liquidator in *Re Jones and Moore Electric Co.*, 18 Man. R. 549. Here there was no completed transaction as to the patent. The contributory simply fails in proving consideration for the 10 shares. As to the other alleged considerations, the case is in line with *Re Jones and Moore Electric Company*, and the liquidator's position is the same.

The certificate for the 200 shares is to "B. D. Wallace, trustee for syndicate."

The personal liability of a certain class of trustees is excluded by section 48 of the Manitoba Joint Stock Companies Act, R.S.M. 1902, ch. 30, sec. 48;* but a perusal of that section

*Section 48 of the Manitoba Joint Stock Companies Act, R.S.M. 1902, ch. 30, sec. 48, is as follows:—

48. No person holding stock in the company as an executor, administrator, tutor, curator, guardian or trustee shall be personally subject to liability as a shareholder; but the estate and funds in the hands of such person shall be liable in like manner and to the same extent, as the testator or intestate, or the minor, ward, or other interested person in such trust fund, would be, if competent to act and holding such stock in his own name; and no person holding such stock as collateral security shall be personally subject to such liability, but the person pledging such stock shall be considered as holding the same and shall be liable as a shareholder accordingly.

shews that the trustee protected is one who represents an estate. I do not think Wallace is protected by that section. The words "trustee for syndicate" merely earmark the shares. As regards the company, Wallace is, for all purposes, the shareholder. The persons to whom he may be accountable would have no status in the company. The subject is dealt with in Masten's Company Law, at p. 136.

Moreover, Wallace was a member of the syndicate and so beneficially interested. His name could not be struck off on this ground. Possibly he would have the right to have the others added jointly with him, but that is another matter.

No stock book or register of shares was produced. While it was said that there have been dealings with the 200 shares beyond the transfer of 10 to Rundle there does not appear to have been any formal transfer, and from the evidence adduced, Wallace must be considered shareholder for 190 of the 200 shares. Having made the transfer of the 10 he cannot be held liable as a shareholder in respect of them, see *In re Wiarton Beet Sugar Co., Freeman's Case*, 12 O.L.R. 149. Liability in this proceeding under section 123 of the Winding-up Act, has not been suggested. It does not seem to me that that section can be invoked on an application to settle a list of contributories.

In the result, the name of the contributory, B. D. Wallace, must remain on the list in respect of the 10 shares and in respect of 190 of the 200 shares, and the list will be varied accordingly. He must pay the liquidator's costs of this proceeding.

Judgment for liquidator.

NARGANG v. NARGANG.

Saskatchewan Supreme Court (Regina Judicial District). Trial before Wetmore, C.J. February 14, 1912.

1. DIVORCE AND SEPARATION (§ VIII A—81)—AGREEMENT FOR SUPPORT AND MAINTENANCE UPON FUTURE SEPARATION—STIPULATION IF WIFE "COMPELLED TO LEAVE"—DESERTION BY HUSBAND.

Where an alimony action has been settled and the husband and wife resumed cohabitation under an agreement stipulating that in the event of his wife being at any time "compelled for good cause to leave and live separate and apart from him" certain monetary benefits should be charged on his landed property in her favour, the charge will be enforced as upon a breach of the condition if the husband leaves the wife under circumstances which justify her in refusing to go where he is living and in refusing to cohabit with him further.

2. EVIDENCE (§ XI D—776)—KNOWLEDGE OR NOTICE OF INFIDELITY—CONDITIONAL SEPARATION AGREEMENT—STIPULATION FOR PAYMENT IF WIFE COMPELLED TO LEAVE.

In an action to enforce a separation agreement evidence is admissible to prove when and how the plaintiff became aware of the adul-

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tery of the other party relied upon as a cause of separation, provided that the adultery itself is regularly proved.

[See also Wigmore on Evidence, vol. 1, sec. 261.]

ACTION to enforce a conditional separation agreement brought by the wife against her husband and other defendants, the others, defendants, who offered no defence having been joined in respect of caveats registered by them against the lands charged after the registration of the agreement sued upon.

The plaintiff set up a breach of the agreement by the desertion and adultery of her husband who had left her and taken up his abode elsewhere. The agreement provided certain monetary benefits in favour of the plaintiff should she at any time "be compelled for good cause to leave and live separate and apart" from her husband. These monetary benefits were also charged by the agreement upon certain landed property belonging to the husband.

Judgment was given for the plaintiff.

J. F. Bryant, for plaintiff.

G. F. Blair, for defendants.

WETMORE, C.J.:—The defendant Nargang and the plaintiff are husband and wife. The others, defendants, lodged a caveat with the registrar of land titles against the property sought to be charged herein subsequent to the registration of the plaintiff's charge, which she is seeking to enforce. All the defendants appeared, but only the defendant Nargang filed a statement of defence. As appears by a portion of the statement of claim which is admitted by the defence to be true, the plaintiff brought an action for alimony against the defendant Nargang. This action was settled on the 25th April, 1911, and in pursuance of such settlement the parties entered into an agreement under seal, the portions of which that are material to this action are as follows:—

> This indenture made in triplicate this 25th day of April, A.D. 1911. Between Henry Nargang, of the city of Regina, in the province of Saskatchewan, farmer, hereinafter called the party of the first part; and Mary Nargang, of the same place, married woman, hereinafter called the party of the second part;
>
> Whereas there have arisen unhappy differences between the parties of the first and second parts, between whom there exists the relationship of husband and wife, which said differences have resulted in an action for alimony being brought by the party of the second part against the party of the first part.
>
> And whereas the parties of the first and second parts have settled their difficulties in the manner and on the conditions hereinafter provided.
>
> Now therefore this indenture witnesseth that in consideration of the premises, of the mutual covenants hereinafter contained and of

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the sum of one dollar of lawful money of Canada, now paid by the party of the first part to the party of the second part (the receipt whereof is hereby by her acknowledged) the party of the second part covenants and agrees to and with the party of the first part that she will on the execution of this indenture, withdraw and discontinue the action now pending in the Supreme Court of Saskatchewan, wherein the party of the second part is plaintiff and the party of the first part is defendant.

That she will return to the home of the party of the first part and assume and discharge the duties of a wife to him, and act and comport herself at all times as a wife should.

That she will release and hereby does release the party of the first part from all claims that she now has against him, arising out of the marriage relationship, or otherwise, and hereby agrees to accept and does accept the provision made for her in and by this indenture as in full satisfaction of all claims that she now has to support or maintenance from the party of the first part, or her right to a share or interest in his estate, real and personal or to the lands and personal properties now in his name or in his possession, either during his life or after his decease should she survive him. . . .

The party of the first part covenants and agrees to and with the party of the second part that in consideration of the foregoing covenants of the party of the second part, that he will receive the party of the second part back and will restore and continue to her all her rights and privileges as his wife and will support and maintain her as such and in accordance with his means and station in life.

That he will in the event of the party of the second part being at any time *compelled for good cause to leave and live separate and apart from him*, provide her during the term of her natural life, with a suitable living room in the city of Regina, sufficiently furnished, and will pay to her in lieu of alimony or maintenance, the yearly sum of four hundred dollars, payable quarterly, the first payment to be made at the end of three months from the date on which the party of the second part shall be compelled to leave as aforesaid. . . .

That he will pay the taxed costs of the party of the second part in said action for alimony, up to the date of this indenture, and the costs of preparing and registering this indenture as herein provided.

And the party of the first part further covenants and agrees to and with the party of the second part that for the better securing of the provision herein made for the party of the second part, that this indenture shall be registered against the following lands of which the party of the first part is the registered owner, namely, all and singular those certain parcels or tracts of land and premises situate, lying and being in the city of Regina, in the province of Saskatchewan, and being composed of lots numbers twenty-seven (27), twenty-eight (28), twenty-nine (29), thirty (30), and thirty-one (31) in block number two hundred and forty-eight (248) in the city of Regina in the Province of Saskatchewan, according to plan No. (old) 33.

Provided that should the party of the first part make default for

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a period of thirty days in any of the terms of this agreement, in maintaining the party of the second part, either in his home as his wife, or while she is living separate from him for good cause, or should provision not be made for her out of the estate of the party of the first part, in the event of her surviving him, then the party of the second part shall have all the rights under said agreement of a mortgagee under a mortgage against the said lands, and may distrain, sue for and recover said annuity, or may proceed by way of sale or foreclosure under the terms of said agreement as though same were a mortgage.

Provided further that should the party of the second part at any time hereinafter leave the home of the party of the first part without good cause, or should she neglect or refuse to discharge her duties as the wife of the party of the first part to the extent of her strength and ability, or act otherwise than as the true and lawful wife of the party of the first part, then she shall surrender, release and forfeit all her rights under this agreement and also all the rights which by the terms hereof she now releases.

The plaintiff brings this action alleging that owing to the defendant Nargang (whom I will hereafter call the defendant) having left and deserted her and to his living in adultery with one Mollie Nargang, she was compelled to live separate and apart from him, and claims to have the agreement enforced as a charge against the land, both in respect of the annuity and living room referred to, and for the recovery of the taxed costs of the first action. Some portions of the plaintiff's testimony must be entirely wrong in minor particulars, but enough essential facts are established to my satisfaction to warrant my granting the relief prayed for. The plaintiff is evidently a very ignorant woman, and she has the misfortune to be united in marriage to a husband, who, I am sorry to say, cannot command very much respect. That is abundantly clear. Taking what is admitted by the pleadings and the evidence together it is established that immediately after the execution of the agreement sued on, the defendant resided for about six days up to the 1st May with the plaintiff in a house in Regina, in which she had been for some time previous, and up to the time of the settlement, residing. Just about the expiration of this time Mollie Nargang came to Regina, and the plaintiff saw the defendant with her in a bedroom in the house of a Mrs. Ritter. She was crying, and the plaintiff said: "You crying for my husband. I have cried before; now you can cry." The defendant the day after this left the plaintiff. Previous to his going he suggested that she live in a room or apartment in his building, being the Nargang block, the premises charged by the agreement in question. She went up to look at the room indicated, and there was no furniture or conveniences in it, and she told him so, and she said to him, "If you pay rent where I am living, I might

as well stay where I am." He consented to that. The defendant never did pay this rent or any part of it. He never after that gave her any supplies or necessaries, or provided her with a place to reside. He came back once afterwards when she was sick and offered to take her to the hospital, and he came back afterwards and offered to take her to his house on his farm. She refused to go, and for a very good reason. As a matter of fact he was all this time residing with Mollie Nargang. I hold, therefore, that the defendant did not support and maintain the plaintiff in accordance with his means and station in life, or at all, since he left her as hereinbefore stated.

The fact which entirely justifies the plaintiff in refusing to go to the house or to live with him is his adulterous relations with Mollie Nargang. I feel somewhat handicapped in dealing with this branch of the case, because I do not know upon what grounds the action for alimony which was settled was based. I may surmise, but I cannot give effect to any mere surmise. I must say that I think that the learned counsel for the plaintiff was possibly misled by a ruling by me in the early stage of the trial, and therefore did not prove the grounds of the first action. The testimony of the plaintiff was the first offered; and he proceeded to establish by her the reason why she left the defendant before the first action was commenced. This was objected to, and I held that he must start with the agreement on which the present action was based. I never intended by that ruling to hold that in no stage of the case and under no circumstances could he shew the state of matters between the parties or the grounds on which the first action was founded. As a matter of fact, I was of opinion that as the evidence developed it was altogether likely that all this might be received in evidence. It was never tendered. However, enough is established to satisfy me that for fifteen months, at any rate, prior to the settlement of 25th April last, the defendant had been living in open adultery with Mollie Nargang, his aunt by marriage and immediately after he left his wife on the 1st May he went back to Mollie Nargang and resumed his adulterous relationship with her. That was good cause to compel the plaintiff to leave the defendant and to live separate and apart from him. No woman who had any respect for herself would submit to such treatment unless it was under such circumstances that she could not help herself.

It was urged that the defendant is not bound under his covenant to pay the annuity provided for therein or to provide her with a suitable room because she never left him since the agreement—that he left her. I am of opinion that within the spirit of the agreement she did leave him; that is, she refused and ceased to cohabit with him.

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It is also urged that there is no evidence that the plaintiff was at the time aware of the relations between the defendant and Mollie Nargang. I am inclined to think that that was not necessary. However, she had notice of their relations. Evidence was given on the part of the plaintiff that her daughter had informed her of these relations. On objection being taken I ordered this evidence to be struck out. I am of opinion that I was wrong in doing so. How would a woman under ordinary circumstances, situated as she as, obtain knowledge otherwise? If she acted on it, however, it would be at her risk; if it turned out incorrect, that is, was not established by sworn testimony, it would avail her nothing. If, however, it was established to be true, she would be justified in acting under it. The fact that I struck this testimony out, however, was cured, because counsel for the defendant brought it out in cross-examination. The defendant has not paid the taxed costs of the first action as agreed. He has not supplied the plaintiff with a suitable living room, as provided. The first action was not formally discontinued until after this action was commenced, but no proceedings were ever taken in it after the settlement, and it was formally discontinued on 17th November, 1911. The formal discontinuance was not a condition precedent to the right of the plaintiff to bring this action.

I find that the defendant is indebted to the plaintiff in respect of the annuity mentioned in the third paragraph of the statement of claim, being, for nine months thereof, from 1st May, 1911, to 1st February, 1912. $300.00

For an amount required to provide a suitable living room for her as set out in the same paragraph, for the said period of 9 months 135.00

For the taxed costs mentioned in the eighth paragraph of the statement of claim..... 116.12

$551.12

Declare that the plaintiff is entitled to a charge upon the lands mentioned in the second paragraph of the statement of claim for the payment of the monies so found due to her order; that the defendant pay into Court to the credit of this cause within one month from this date the amount so found due as above, with the costs of this action to be taxed; on default, that he be foreclosed and barred of all right and title in said lands, and that the title thereto be vested in the plaintiff, subject, however, to any rights registered prior to the registration of the said agreement of 25th April, 1911.

Declare that the annuity above mentioned, as well as the amount to provide the plaintiff with a suitable living room are

payable by instalments; and that the plaintiff have liberty to apply in Chambers in respect to future instalments as they fall due.

Judgment for plaintiff.

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Re SISTERS OF THE CONGREGATION OF NOTRE DAME and CITY OF OTTAWA.

ONT.

Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, Meredith and Magee, JJ.A. February 1, 1912.

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TAXES (§ I F 3—86)—EXEMPTION—EDUCATIONAL AND RELIGIOUS INSTITUTIONS—CONDITION AS TO USE AND OCCUPATION—LETTING OUT ROOMS.

Where a statute provides for exemption from taxation of buildings used as a seminary of learning maintained for religious or educational purposes only when the whole profits are applied to such purposes and when the buildings are actually used and occupied by such seminary, the letting of rooms to persons other than students of the seminary in one of the buildings belonging to and used by that seminary for its ordinary purposes does not render either the whole of the buildings and property of such seminary, or the whole of the building in which the rooms are let, liable to taxation if the whole income derived from the room rents is used for seminary purposes.

[See also Weir's Law of Assessment p. 30; *Ottawa Y.M.C.A.* v. *City of Ottawa*, 20 O.L.R. 567; *Sisters of Charity* v. *Vancouver*, 44 Can. S.C.R. 29.]

CASE referred to a Judge of the Court of Appeal by the Lieutenant-Governor, by orders in council dated respectively the 27th September and the 21st November, 1911, pursuant to the provisions of sec. 77 of the Assessment Act, 4 Edw. VII. ch. 23.

The questions referred arose upon an appeal to the Judge of the County Court of the County of Carleton, by the Sisters of the Congregation of Nôtre Dame, from the decision of the Court of Revision of the City of Ottawa in respect to an assessment under the Assessment Act.

Section 5 of the Assessment Act, 4 Edw. VII. (Ont.) ch. 23, as amended by 10 Edw. VII. (Ont.) ch. 88, sec. 1, provides for the following exemption from taxation (*inter alia*).

(3*a*.) The buildings and grounds of, and attached to, or otherwise bona fide used in connection with, and for the purposes of every seminary of learning maintained for philanthropic, religious, or educational purposes, the whole profits from which are devoted or applied to such purposes only, but such grounds and buildings shall be exempt only while actually used and occupied by such seminary.

The facts were stated as follows:—

The Sisters of the Congregation of Nôtre Dame are the owners of a property on Gloucester street, in the city of Ottawa, used as a seminary of learning for educational purposes, known as "The Gloucester Street Convent." In 1909, the Sisters acquired an adjoining property, known as No. 50 Nepean street, on which

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is a building, formerly occupied as a dwelling-house. This building has been attached to the main convent premises by a covered passage-way. Two of the large rooms on the ground-floor have been made into one, which is used as the primary class-room of the Convent. Another large room in the third storey is used as the art studio of the Convent. Of the bed-rooms, five are occupied by Sisters of the Congregation, and nine are occupied by lady students of the Normal School at Ottawa, who take their meals in the main building of the Convent, and some of whom take tuition in art, music, and French at the Convent. These lady students use the primary class-rooms for their general purposes after school-hours. The revenue derived from them is entirely devoted to the purposes of the seminary.

The following questions of law were submitted for the opinion of the Court of Appeal:—

1. Does the letting of rooms to persons other than students of a seminary of learning, in one of the buildings belonging to and used by that seminary for its ordinary purposes—the whole of the income so derived from the building being used for the purposes of the seminary—render the whole of the buildings and property of such seminary liable to taxation?

2. If question No. 1 is answered in the negative, does the letting of rooms to persons other than students of a seminary of learning, in one of the buildings belonging to and used by that seminary for its ordinary purposes—the whole of the income so derived from the building being used for the purposes of the seminary—render the whole of such building in which rooms are let liable to taxation?

3. If questions Nos. 1 and 2 are both answered in the negative, then according to what method should the building in which such rooms are let be taxed?

The case was referred by a Judge of the Court of Appeal to the full Court, and was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

E. Bayly, K.C., for Attorney-General.

D. J. McDougal, for the Sisters of the Congregation of Notre Dame.

J. T. White, for the Corporation of the City of Ottawa.

MOSS, C.J.O., said that the Court, having considered the case and the questions submitted, was of opinion that, upon the facts stated in the case, the questions should be answered as follows:—

1. The first question in the negative.

2. The second question in the affirmative.

3. Having regard to the foregoing answers, no answer to the third question is called for.

Exemption sustained.

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Alberta Supreme Court, Harvey, C.J., Scott, Stuart and Beck, C.J. February 3, 1912.

1. CONTRACT (§ I E 5—100)—SALE OF LAND—FORM AND REQUISITES—STATUTE OF FRAUDS—RECITAL OF "CASH" PAYMENT NOT MADE.

Where the real estate agent obtained on the owner's behalf a deposit on the purchase of land and gave a receipt therefor specifying as the terms of the sale that a portion of the price (including the deposit) should be "cash" and balance in instalments, and a formal agreement to the like effect was afterwards signed and delivered by both the vendor and purchaser, the latter agreement is evidence in writing of the contract under the Statute of Frauds although the cash payment, the receipt whereof it purported to acknowledge, was not actually paid, if the agreement was not delivered conditionally upon such payment being made.

[*Re Hoyle, Hoyle* v. *Hoyle*, [1893] 1 Ch. 98, specially referred to.]

2. CONTRACTS (§ I D—46)—MISTAKE—EFFECT ON CONTRACT—INACCURACY OF WRITING—SUBMISSION TO CORRECT ERROR.

A memorandum in writing otherwise sufficient under the Statute of Frauds is not vitiated by reason of the insertion of an incorrect admission of payment of the cash portion of the price, if the party in whose favour the admission is made admits the error and submits to the correction of same.

[*Gillatley* v. *White*, 18 Gr. (Ont.) 1; *Martin* v. *Pycroft*, 2 DeG. M. & G. 785, applied. *McLaughlin* v. *Mayhew*, 6 O.L.R. 174 and *Vandercoort* v. *Hall*, 18 Man. R. 682, specially referred to.]

3. VENDOR AND PURCHASER (§ I C—13)—DEFECT IN TITLE—INCUMBRANCE—PRIVILEGE OF PRE-PAYMENT.

Where a contract of sale of real estate provided as terms of payment a specified sum "cash," and balance on deferred payments with privilege of paying the whole amount off at any time, the last of the deferred payments being intended to correspond with the maturity of an existing mortgage on the property, the fact that the mortgage was not subject to a like stipulation or privilege of advance payment and that in consequence the vendor could not fulfil his contract in respect of such privilege, constitutes a defect in title justifying the purchaser in withholding the payment not only of the intermediate deferred payments under the contract but of the portion stipulated as "cash," until the vendor shall provide an indemnity or equitable adjustment to protect the purchaser from having to pay more than his contract calls for because of the mortgagee's refusal to accept pre-payment.

[*Gamble* v. *Gummerson*, 9 Gr. 199; *Cameron* v. *Carter*, 9 O.R. 431; *Armstrong* v. *Anger*, 21 O.R. 100, followed. *Graves* v. *Mason*, 2 Alta. L.R. 179, specially referred to.]

4. SPECIFIC PERFORMANCE (§ I E 2—35)—INCUMBRANCE DIFFERING FROM TERMS OF SALE—COMPLETION AT PURCHASER'S OPTION WITH INDEMNITY—LOSS OF PRIVILEGE OF PRE-PAYMENT.

Where the vendor has contracted to sell subject to an unmatured incumbrance or charge which by the terms of the contract he represents to be subject to a privilege of pre-payment at any time, not however contained in the mortgage, and the contract does not reserve to the vendor the right to rescind if he shall be unable or unwilling to remove an objection to title, the vendor is not entitled to rescind on the purchaser insisting on specific performance of the contract under the best conditions procurable; the vendor in such case must either obtain the mortgagee's consent to pre-payment or give some equitable indemnity securing the purchaser against loss in respect of the refusal of the privilege guaranteed under the contract.

[*Wilson* v. *Williams* (1857), 3 Jur. N.S. 810 and *Nimmons* v. *Stewart*, 1 Alta. L.R. 384, followed. See also Dart on Vendors and Purchasers, 7th ed., vol. 2, p. 1079.]

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ACTION for specific performance brought by the purchaser to enforce a contract for the sale of land by defendant to him. The action was dismissed at the trial before Simmons, J., from whose judgment the present appeal was taken by the plaintiff to the Court *en banc*.

The appeal was allowed.

Messrs. *C. C. McCaul*, K.C., and *W. B. S. Craig*, for the plaintiff.

Messrs. *W. L. Walsh*, K.C., and *A. F. Ewing*, for the defendants.

BECK, J.:—The property in question is in Edmonton. It consists of parts of two lots—a corner lot and the adjoining lot. They front on Elizabeth street, with a frontage of 50 feet each and a depth of 150 feet each. The parcel, composed of the two lots, was bisected so as to make two lots fronting on First street, with a frontage of 75 feet each and a depth consequently of 100 feet each. It is the northerly of these two latter lots which is the subject-matter of the action. Rolfe & Kenwood, a firm of real estate brokers, had the property listed for sale on behalf of the defendants, the owners. This firm arranged a sale of the property to the plaintiff for $33,750. The terms of payment appear further on. There was a mortgage upon the two lots for $15,000.

This action was occasioned by a dispute which arose respecting this mortgage. Kenwood, the member of the firm who conducted the business, knew of this mortgage, and that it had some four years to run. He did not know whether, by its terms, it could be paid off before its maturity, but he says that one of the defendants, from whom he received his authority and his instructions, guaranteed that the property in question would be discharged from it, when necessary. The plaintiff in his evidence says:—

> The first time he (Kenwood) was (*ie.*, came) to see me, he told me there was a $15,000 mortgage against the property; and, when he came to see me with the final instructions, he told me that the first cash payment would be $10,000, and that the second payment would be . . . $10,750, and the third payment was $8,000, and the balance, $5,000, was for the mortgage that would be against my portion of the property.

The learned trial Judge was, therefore, quite correct in saying that the plaintiff, when buying, "knew of the existence of the mortgage and amount thereof," but he was incorrect in saying that he knew of the terms of payment; for, though he may have known of the periods at which payment of instalments might be called for, he was not aware that payment of these instalments could not be anticipated—the contrary of which he was led to believe was the case, by reason of the term of the

agreement, presently referred to, that he could pay the whole balance of his purchase-price at any time. It was with this information regarding the mortgage that Kenwood, acting for the defendants, the owners, and the plaintiff, came to terms which were first expressed in a receipt signed by one of the defendants as follows:—

> Received from Rolfe & Kenwood the sum of one hundred dollars ($100) being deposit on the north half of lots 61 & 60, river lot 5 of the city of Edmonton. Price to be $33,750. Terms: $10,000 cash; $10,750 in one year; $8,000 in two years; and $5,000 in four years from date hereof; with interest at 7% per annum. With privilege of paying the whole amount off at any time. A. T. Cushing.

This represents the real and complete agreement between Kenwood, on behalf of the defendants, and the plaintiff. All question of Kenwood's authority disappears, inasmuch as the memorandum is signed by one of the defendants in person.

The receipt bears no date, but was in fact signed a day or two before the 12th September, 1910. It was undoubtedly contemplated between Kenwood and the plaintiff that, as a matter of course, a formal agreement should be drawn up and executed, both by the plaintiff, as purchaser, and the two defendants, as owners and vendors. There is nothing, however, to indicate that the execution of the formal agreement was a condition precedent to the agreement being binding. It seems to me that it is not important to inquire whether this receipt constituted a sufficient memorandum to satisfy the Statute of Frauds, inasmuch as a formal agreement was in fact drawn up, embodying exactly the same terms, together with some other usual provisions. This formal agreement, dated the 12th September, was executed by the defendants, and then handed by Kenwood to the plaintiff, who executed it in his presence. The agreement was in duplicate. It acknowledged the receipt of the down payment of $10,000. This was not paid, because, although the plaintiff was quite satisfied with the form of the agreement, and consequently actually executed it, he wished his solicitor, Mr. Wallbridge, to examine the title, and from that point of view approve of his making the down payment.

The evidence is quite clear in my mind that the plaintiff had no objection whatever to the terms of the formal agreement, but wanted advice solely on the state of the title, including the question of arrears of taxes. The plaintiff says this distinctly. His letter written immediately to his solicitor, enclosing a cheque for the down payment of $10,000, is to this effect. Kenwood's evidence on this point appears to me to be not inconsistent but quite consistent with that of the plaintiff. Both copies of the agreement were, consequently, with Kenwood's approval, handed to Mr. Wallbridge.

I think this formal agreement is sufficient evidence of the

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contract to meet the defence of the Statute of Frauds. I do not think it was handed over in escrow. It was handed over to the plaintiff as a party to the agreement, and so prima facie at all events not in escrow: 16 Cyc. 571. It was handed over on no condition that it should not be binding until the $10,000 down payment should be paid or on other condition. Kenwood was undoubtedly quite satisfied that the plaintiff would pay the $10,000 if he found the title satisfactory. Even if it had been delivered in escrow, I think that, inasmuch as the writing evidenced the complete agreement, it satisfied the Statute of Frauds. I refer to *Gillatley* v. *White*, 18 Gr. 1, notwithstanding the comments made upon that case in *McLaughlin* v. *Mayhew*, 6 O.L.R. 174, and *Vanderwoort* v. *Hall*, 18 Man. R. 682.

It is true that the formal agreement acknowledges the receipt of the $10,000, but the plaintiff admits that it was not paid. A memorandum, otherwise sufficient under the statute, is not vitiated by reason of the insertion of a term disadvantageous or the omission of a term advantageous to the defendant if the plaintiff admits the improper insertion, and submits to forego it, or the improper omission and submits to be bound by the omitted term: *Gillatley* v. *White*, 18 Gr. 1; *Martin* v. *Pycroft*, 2 DeG. M. & G. 785.

Mr. Wallbridge, upon searching the title for the plaintiff, discovered that the mortgage contained no provision permitting its being paid off before its maturity; and, therefore, that the defendants' agreement to accept payment of the purchase-price in full at any time before maturity could not be fulfilled. He insisted, on the plaintiff's behalf, on being protected in some way. Until this should be done, he declined to make the down payment. The dispute between the parties continued for some length of time. Then the plaintiff brought this action.

The defendants contend that the contract is off, by reason of their notice to that effect, on account of the non-payment of the $10,000. The plaintiff contended and still contends that he is entitled to be indemnified in some way against liability for the $15,000 mortgage, and also that the defendants are bound to make a bona fide effort to effect an arrangement with the mortgagees which will enable the defendants to give effect, if called upon, to the privilege to the plaintiff of prepayment. The mortgage, being one which could not be immediately paid off and discharged, constituted a defect in title, and not merely a cloud upon the title which would come within what are called matters of conveyance. The plaintiff had the right, therefore, to repudiate the contract. See *Simmons* v. *Stewart*, 1 Alta. L.R. 384. He had, however, in my opinion, alternatively the right to take the title, not necessarily in the condition in which he actually found it, that is, a title under which he could not take advantage of the privilege, which the agreement purported to give

him, of paying up the whole purchase-price at any time, but in the best condition the defendants could reasonably procure it to be put: *Wilson* v. *Williams*, 3 Jur. N.S. 810; Dart, 7th ed., pp. 1079-1081.

The absence of this right of prepayment was made specially important to the plaintiff by the circumstance, of which he was aware, that the mortgage covered other property, and that as between him and the defendants only was the amount severed.

Then, as to the plaintiff's rights upon adopting this course, I am strongly of opinion that the practice and procedure should be followed in this jurisdiction which was established many years ago in the province of Ontario, whence this province and the former territories have drawn much of our legislation and jurisprudence, and whose usage in adopting agreements for sale in which the purchase-price is payable by instalments prevails so widely here. That practice is indicated by the cases of *Gamble* v. *Gummerson*, 9 Gr. 199; *Cameron* v. *Carter*, 9 O.R. 431; *Armstrong* v. *Auger*, 21 O.R. 100; and these cases have already been followed and applied in cases in this Court, some of which are not reported. See *Graves* v. *Mason*, 2 Alta. L.R. 179.

These cases shew that a purchaser of incumbered property is entitled to indemnity, by some means reasonable and equitable under the circumstances, against the liability to be called upon to pay more than the agreed purchase-price in order to obtain a clear title. In considering what, in the circumstances of any particular case, would be a reasonable and equitable adjustment, it seems to me that no consideration should be given to the financial worth of the vendor—that regard should be had only to the property itself and the incumbrance against it. Here the total purchase-price is $33,750; the incumbrance on this and the adjacent property together is $15,000.

Though I think, the wise course for Mr. Wallbridge, acting for the plaintiff, and a quite safe one under the circumstances, was to have made the down payment of $10,000, leaving the question of indemnity until the first deferred instalment fell due, I am of opinion that the payment of the $10,000 was not a condition precedent to the agreement becoming effective, and that the plaintiff had the strict right to insist upon the best adjustment of the title reasonably procurable before making even that payment; and that, taking this view, Mr. Wallbridge's suggestions as to the means of doing this were reasonable; and it is quite clear that there was not the slightest intention on the plaintiff's part to abandon the agreement; and, the delay which has taken place having arisen out of a bona fide dispute as to title, for which the defendants are in a large measure responsible, it is not sufficient to deprive the plaintiff of his right to specific performance, to which I now think him entitled upon such terms as the Court, in view of the author-

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ities I have cited, thinks just and equitable under the circumstances.

I think the plaintiff will have reasonable protection if an order be made as follows: Direct the plaintiff to pay to the defendants forthwith the $10,000 without interest. Direct the plaintiff to pay into Court the first deferred payment with interest as called for by the agreement. Reserve leave to the defendants to move in this action before a Judge in Chambers for an order for payment out; the other deferred payments to be paid into Court as they mature, with like leave reserved, unless a Judge shall otherwise order. The defendants will have in the meantime an opportunity of making an arrangement with the mortgagees, and of asking the plaintiff to become a party to any reasonable arrangement with them for the severance of the mortgage and the right of prepayment of the part thrown upon the land in question, all matters which would affect the disposition of the plaintiff's application. And I think that, on any such application, the Judge should, if the question arises, charge the plaintiff with a share of any bonus the defendants may pay, as suggested by my brother Stuart.

I agree that the costs of the action and of the appeal should go to the plaintiff.

SCOTT, J.:—I am of opinion that this appeal should be allowed with costs.

In my view, the provision in the agreement of the 12th September, 1910, that the down payment of $10,000 should be paid on the signing thereof, should not be construed as a stipulation that the agreement should not be effective between the parties until the payment was made, or as anything more than that there should be a down payment to that amount. I cannot conceive that it was the defendants' intention that the plaintiff should pay the money irrespective of whether they had any title to the property or the right to convey, and I cannot read that intention into the agreement.

Assuming that the agreement providing that part only of the price should be paid on the signing of it, had provided that the whole price should be paid at that time, I think it would be unreasonable to hold that the plaintiff would have been bound to pay the price without inquiry as to the title or as to the defendants' right to convey; and, I cannot see that that position is altered by the fact that only part of the price is required to be paid down.

In England, a vendor generally reserves the right to rescind the contract if the purchaser insists upon any requisition or objection which he shall be unable or unwilling to remove or comply with (see Williams on Vendors and Purchasers, 2nd ed., p. 64). There is no such express reservation in the agreement now

under consideration; but, if the construction sought to be placed by the defendants upon it should be upheld, it would be much more favourable to the vendors than the expression of such a reservation. The plaintiff appears to have been ready and willing to pay the down payment; but he ascertained that, owing to a mortgage upon the property, the defendants were not in a position to perform the agreement in the manner in which he was entitled to have it performed, unless they obtained the concurrence of the mortgagees.

The agreement provides for the payment of the price by instalments, subject to the right of the plaintiff to pay the whole price at any time; but, even if he did not avail himself of that right, the last instalment of the price becomes due before the maturity of the mortgage. The plaintiff's objection to the mortgage was, that it included other property than that agreed to be conveyed; and that fact in itself would prevent him selling the property purchased.

I see nothing unreasonable in his seeking before making the down payment to have that obstacle removed or arranged in such manner as would enable him to deal freely with the property in the manner he was entitled to. One of the defendants admits that he told his selling agent to explain to the purchaser that he proposed to divide the payments, that is, the responsibility in connection with the mortgage, between the two parts of the property, applying a named proportion to the property in question; and the agent communicated this to the plaintiff during the negotiations for the purchase. If the defendants were willing to make this arrangement, I see no reason why they should not be called upon to obtain the assent of the mortgagees before calling for the down payment. In fact, one of the defendants expressed to the plaintiff's solicitor their willingness to do so, and asked the solicitor to draft for him a letter to the mortgagees asking their concurrence in the arrangement. Upon receipt of the draft, however, he refused to make the application; and, influenced apparently by the increase in the value of the property after the date of the agreement, he notified the plaintiff that the deal would be cancelled unless the down payment were made at once.

In Williams on Vendors and Purchasers, 2nd ed., p. 165, the following is stated:—

> And, if the land sold be subject to mortgages, the vendor has none the less shewn a good title on the abstract, provided that the mortgages be immediately redeemable by him. . . . Here we notice that the general rule of equity that a mortgagee must give six months' notice of his intention to pay off the mortgage is no bar to the immediate exercise of the right of redemption, for the mortgagor is entitled to pay the mortgagee six months' interest in advance in lieu of notice . . . but it is, of course, a different thing if the land

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sold be subject to a mortgage, which is not to be called in or paid off during a certain term. In such case the discharge of the incumbrance is not a matter resting with the mortgagor alone; as the mortgagee cannot be obligated to receive back his money during the term.

Again, at p. 1179.

If the interest of the other person is such that the vendor is entitled, either absolutely or upon the terms of paying him off, to direct him to concur in the conveyance to the purchaser, the purchaser should require the vendor to obtain such concurrence. If the vendor should have no such right to direct the other person to convey, the purchaser would be entitled to object to the title; but, he might, instead of repudiating the contract, require the vendor to procure the other person's concurrence in the sale.

The amount secured by the mortgage on the property in question was less than the whole purchase-money which the plaintiff was to pay, and it may be said that, without its removal, he would be amply secure in making the down payment while it was outstanding; but I see no reason why a different principle should apply in such case to that which would be applicable where the incumbrance exceeds the amount of the purchase-money, viz., that the purchaser is entitled to object that the incumbrance will prevent his dealing with the property in the manner in which he is entitled to deal with it.

STUART, J.:—There are three distinct questions to be considered in this case.

First, was there ever an agreement arrived at between the parties with regard to the sale of the property and the terms upon which it was to be sold?

Second, was that agreement, if one existed, evidenced by a memorandum sufficient to satisfy the Statute of Frauds?

Third, assuming these two questions to be answered in the affirmative, were the defendants justified, in the circumstances, in cancelling the contract and resisting specific performance?

It is obviously convenient to deal with these questions in the order mentioned.

Upon the first question, it appears to me that it will in this case be particularly helpful to bear in mind that an agreement as to the purchase and sale of the property in question and as to the terms of such purchase and sale may well have been and very probably was arrived at before any document was signed at all. It does not very clearly appear from the evidence whether Rolfe and Kenwood were authorised to sell, i.e., to make a bargain binding on the defendants, or merely to find a purchaser. The defendant A. T. Cushing says in his examination for discovery that he "instructed them to sell the north half of the lots and instructed them in regard to the price."

If it could be inferred from the evidence that Rolfe and Ken-

wood had been given the wider authority, then it would have been quite possible that a real agreement was reached simply by the oral communications which passed between that firm and the plaintiff. I do not think it necessary, however, to inquire very minutely into this point, because, even assuming that Rolfe and Kenwood were merely empowered, in the first instance, to find a purchaser willing to make an agreement of purchase on certain stated terms, it is still quite possible that a real agreement may have been arrived at (and I am speaking now quite aside from any question of the necessary evidence of such an agreement prescribed by the Statute of Frauds), even though Cushing and Knight never personally met at all. Messrs. Rolfe and Kenwood, although not empowered by either party to buy or sell, may well have been empowered by both to convey oral communications by which an agreement could be arrived at between them. Rolfe and Kenwood were, no doubt, told by Cushing, "See if you can get us a purchaser on these terms"—setting them forth. They then, no doubt, said to Knight, "Will you buy this property from Cushing on these terms?"—setting them forth. Knight, no doubt, said, "Yes, I will, and tell him I will take it on those terms, and give him a deposit for me." Rolfe and Kenwood, no doubt, then saw Cushing and said, "Knight offers to buy on your terms, will you sell to him?" And Cushing possibly said to Rolfe and Kenwood, "Yes, I will sell, and you may tell him so." Then, if Rolfe and Kenwood conveyed this message to Knight, it seems to me clear that an agreement was arrived at.

Aside from the requirements of the statute it can make no difference how that consensus ad idem, that meeting of minds, was brought about. The medium of communication may be a letter or it may be an oral message conveyed by a messenger. Now, the evidence taken at the trial does not seem to have been directed very particularly towards proving the occurrence of any such verbal communications as I have referred to—no doubt, because it was considered that the documentary evidence was sufficient, as well as necessary, under the statute, in any case.

But, taking the evidence as to oral communications, as far as it goes, along with the documentary evidence, I am of opinion that the inference can and should be drawn that an agreement had in fact been arrived at as to the property sold, the price, the terms of payment, and the parties selling and buying. Knight tells of his interview with Kenwood when he instructed him to pay Cushing a deposit of $100 on the property; and it is, in my opinion, abundantly clear that Knight then told Kenwood, Cushing's agent, that he would buy the property upon the terms mentioned; that Kenwood communicated this fact to Cushing at the time of the signing of the memorandum of the

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12th September; and that Cushing then assented to the sale to Knight, upon the terms mentioned in that memorandum.

It is true that Knight's name is not mentioned in the memorandum as being the purchaser, and that, for that reason, the memorandum is not sufficient (unless it could be held that Rolfe and Kenwood were in some sense his agents as well, which is doubtful) to satisfy the statute. But that is another question. Cushing knew that Knight was the proposed purchaser a few days before the memorandum was signed, as he so states himself. It does not appear from the evidence whether Kenwood ever in fact returned to Knight and conveyed to him the fact that Cushing had agreed to sell to him, on the terms mentioned, at any time prior to the delivery of the signed agreements. Such a communication was, no doubt, necessary before there could be a concluded agreement.

It is possible that the fact that Knight instructed Kenwood to pay $100 as a deposit on his behalf might be sufficient to justify the inference that Knight had constituted Kenwood his agent to receive Cushing's reply, and that, upon Kenwood's so receiving it, the consensus ad idem had been completed. In that case the situation would be that the parties had agreed upon a bargain, but that the intention was that this bargain should be evidenced by a proper written document, and that the cash payment of $10,000 should be made, not forthwith at the conclusion of the agreement, but at a time shortly deferred, namely, when the written document should have been prepared and executed. But it is not necessary, I think, to rest anything upon this, because it is clear that the fact that Cushing had agreed to the sale upon the terms arranged was communicated to Knight when the duplicate agreement was delivered to Knight by Kenwood. But it is contended that the payment by Knight of the sum of $10,000 in cash upon the execution of the agreement was a condition precedent; that Cushing's assent to the terms was conditional upon this payment being made; and, that, inasmuch as it never was made, there was never really any agreement arrived at at all. Let us examine this contention and see what it means.

Take the case where there is a sale for cash, where the whole purchase-price is going to be paid at once. Two parties agree upon a purchase and sale for $10,000 cash. They go to a solicitor to draw the transfer. He does so. The transfer discloses all the terms and expresses the receipt of the $10,000. The vendor signs it and turns to the purchaser and says: "Here is your transfer. Give me your $10,000." The purchaser says, "But I must look at the title first." Can the vendor say: "No, this sale was for cash on the execution of the transfer; and, if you don't pay forthwith, the deal is off?" It is obvious that he cannot. He has made his bargain. It is evidenced in writing,

signed by him. He must give the purchaser an opportunity to examine title. Then go a step farther. Supposing that in this case Knight and Cushing had met personally and had arranged the terms of their bargain, as they were in fact arranged through Kenwood; and suppose they had gone to Mr. Wallbridge, as a solicitor, to have the agreement drawn. Suppose the exact agreement had been drawn by Mr. Wallbridge that was in fact drawn; and suppose they had both executed that agreement at the desk of Mr. Wallbridge. (For the purpose of illustration I leave the second Cushing out of the case.) Then, when Cushing had signed and Knight had signed, when the bargain had been made, and its terms evidenced by a valid memorandum, suppose Cushing had said, "Now, Mr. Knight, give me your $10,000 cheque."

Suppose Mr. Knight had replied: "I will in a moment, in a few minutes, in half an hour, but I want Mr. Wallbridge to see that you have title first. Ten thousand dollars is a large sum. Before I pay that over, I, of course, must inquire as to the position of your title." Could Cushing in such a case have said: "No, our agreement was that you pay $10,000 cash on the execution of this document. If you do not pay the $10,000 cash forthwith, then there is no agreement at all, there never was one?" And, if Knight had insisted on having Mr. Wallbridge look at the title first before payment, could it be said that, owing to the delay for this purpose only, there never was any agreement arrived at between the parties at all?

I am of opinion that such a contention cannot be sustained. In the first place, there does not appear, either in the evidence as to the oral communications or in the written agreement itself, any stipulation that the payment of the $10,000 should be a condition precedent to the existence of an agreement. Assuming that the written document correctly records the agreement arrived at between the parties, then it is clear that what was agreed upon was not that the payment of the $10,000 should be a condition precedent to the existence of the agreement, so that, in the absence of such payment, there was no agreement at all, which really amounts to a contradiction in terms—but that the time for the payment of $10,000 out of the total purchase-money should be the time when the written document was executed.

In the second place, inasmuch as the agreement merely fixed a definite time for the payment of the $10,000, viz., the moment of the execution of the document, I think that the purchaser had as much right to ask for time to look at the title as he would have in the case I first put, where the whole purchase-price is to be paid at once. When once an agreement is arrived at for the sale of real estate and is evidenced by a proper memorandum, a purchaser is never bound, in my opinion, to make the cash payment until he has had a chance to look at the title. Other-

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wise purchasers negotiating for the acquisition of real estate would be forced to go to the expense of investigating the title before making an agreement at all, and so before they knew whether the proposed vendor was really going to agree to sell.

I think it desirable that it should be clearly understood by dealers in real estate (and I desire to make my words as emphatic as possible) that, when an agreement is once made, even though there be but a small cash payment stipulated for, and the balance is payable by instalments, the purchaser has absolutely as much right to inquire into the title at the beginning, and before making any payment at all, as he would have if he were paying all cash down. He has a right to know that the vendor can make title, if not forthwith, at any rate when the time comes to do so.

It must be remembered that, until his solicitor had examined the title, Knight had no independent means of knowing whether Cushing had a title at all or not. It might well have been disclosed by a search at the land titles office that there were other incumbrances besides that already spoken of in the negotiations, or that Cushing had in fact a title defective in other ways—although, of course, Cushing was not likely to agree to sell property he did not own. But a purchaser must protect himself; and, once it is established that Knight had a right to withhold the $10,000 until the title could be examined, which it is surely abundantly clear that he had, then the contention that the payment of the $10,000 was a condition precedent to the existence of any agreement at all falls entirely to the ground.

It was contended by counsel for the respondent that, because the learned trial Judge had found "that the agreement in duplicate was given to Kenwood by the vendor on the understanding that it should only be delivered on the payment of $10,000 cash payment, and there was no delivery of this agreement to the purchaser other than for the purpose of examination and inspection," therefore the appellant cannot rely upon this agreement.

I am of opinion, however, that this finding of fact does no harm to the appellant's case. Even if Cushing did not intend it to be delivered except on payment of the $10,000 cash, that does not prevent its delivery, in escrow if you will, from being evidence of a communication to Knight by Cushing that Cushing agreed to sell upon the terms mentioned in it, which were in fact the terms offered by Knight. The fact of Cushing's assent to the bargain would have been just as effectually communicated to Knight, if Kenwood had merely shewn the agreements to him, and had merely said, as he did in fact say, "Here are the agreements signed by Cushing Brothers." In my opinion, the minds of the parties met, and agreement was concluded, at least when

this delivery was made, if not before, just as much as if Cushing had written a letter to Kenwood stating the same things as were contained in the agreement and Kenwood had taken and read such letter to the plaintiff.

It is true that, in certain circumstances, an offer of sale may be made of which acceptance can only be indicated by payment or deposit of a sum of money, as in the case of *Charlton* v. *Rediger* (not reported), recently decided in this Court. But it is, in my view, impossible to look upon Cushing's signature of the agreements, their delivery to Kenwood, and the subsequent exhibition of them by Kenwood to Knight, as merely an offer by Cushing.

It was the acceptance by Cushing of an offer previously made by Knight; and, for the reasons given, I do not think the acceptance was conditional upon payment of the $10,000. There was an unconditional acceptance which constituted an agreement, one term of which was that $10,000 was to be paid in cash. But that would not prevent the question of title being at once raised by Knight. Moreover, we have the finding of the trial Judge that an agreement was in fact reached—a conclusion abundantly justified by the evidence.

The second question is, was there a sufficient memorandum in writing to satisfy the Statute of Frauds? I am of opinion that there was. I do not think it is necessary to consider the question whether or not the first receipt was sufficient, because it seems to me to be clear that the agreement itself constitutes a sufficient memorandum, even if it were never properly delivered. The memorandum required by the statute is not a deed of which delivery is essential to make it effective. The whole question is merely one of evidence; and, even if Cushing had never parted with the agreement at all, but had retained it in his possession, or his agent Kenwood had retained it, still its production in evidence at the trial would be sufficient to satisfy the statute, although, of course, the actual making of the agreement itself must then have been proved aliunde, in some such way as I have already suggested. See *Gibson* v. *Holland*, L.R. 1 C.P. 1; *In re Hoyle*, [1893] 1 Ch., at pp. 99, 100.

It was suggested, however, that, inasmuch as it was an essential term of the agreement that the title should be accepted subject to the mortgage, with the right to the plaintiff to insist upon its discharge if he should at any time exercise the right reserved to him of paying the purchase-money in full before its maturity, and inasmuch as the agreement contains no such term, therefore the memorandum is insufficient as not containing all the terms of the agreement. I am unable to give effect to this contention. The fact is, that the mortgage money falls due on the 1st November, 1914, while the last payment under the agreement of sale is payable on the 12th Sep-

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tember, 1914. Under the terms of the mortgage, Cushing has no right to pay it off at any earlier time than the dates mentioned. It is clear from the evidence that, although Knight knew of the existence of the mortgage, he was not made aware of its exact terms nor of the fact that Cushing had no legal right to redeem it in advance of the date mentioned. It is true that the evidence of Kenwood shews that it was agreed by him on behalf of Cushing that Knight might pay all the purchase-money up at any time, and that Cushing would, on such payment being made, secure a discharge of the mortgage. But this is covered by the agreement, because Cushing stipulates therein that Knight may pay in full at any time, and that he will give a good title upon such payment being made. The evidence does not disclose any other agreement on Knight's part with regard to the mortgage.

I can find nothing to justify any inference that Knight specifically agreed that he would pay the $10,000 without looking into the title at all, without any further examination of the mortgage, and without raising any further question in regard to it. It would be extremely unlikely that he would make any such agreement, when he had nothing more than Cushing's and Kenwood's word as to the terms of the mortgage.

There was no verbal agreement made in regard to the mortgage other than that embodied in the written agreement. A doubt has, indeed, occurred to me as to the sufficiency of the memorandum upon a point which was not raised by the defendants at the hearing in appeal, nor apparently in the Court below. Kenwood's evidence disclosed the fact that Knight verbally agreed to pay one-third of any bonus that might be found necessary to be paid to the mortgagees in order to secure a discharge of the mortgage, and there is no reference to this in the agreement signed. It is clear, however, that this does not constitute an insurmountable obstacle to the plaintiff, and would not have done so, even if the defendant had actually raised the point, which he did not. The plaintiff has not refused to observe this undertaking.

The point seems to be well covered by the decisions in *Martin* v. *Pycroft*, 2 DeG. M. & G. 785, and in *Ramsbottom* v. *Gosden*, 12 R.R. 207, 1 Ves. & B. 165. In the former case, Lord Justice Knight Bruce, said:—

> Our opinion is, that, where persons sign a written agreement upon a subject which is obnoxious or not obnoxious to the statute that has been so particularly referred to, and there has been no circumvention, no fraud nor (in the sense in which the term "mistake" must be considered as used for this purpose) mistake, the written agreement binds at law and in equity according to its terms, although verbally a provision was agreed to which has not been inserted in the document; subject to this, that either of the parties sued in equity

upon it may perhaps be entitled in general to ask the Court to be neutral unless the plaintiff will consent to the performance of the omitted term.

There has here not only been no allegation by the defendants of fraud or mistake upon the point in question, but, as I have said, the matter was never raised at all. The verbal agreement as to the bonus seems to me to have been merely a subsidiary arrangement as to the expenses of making title, such as occurred in *Ramsbottom* v. *Gosden*, above cited [12 R.R. 207]. The plaintiff may, under certain conditions to which I shall again refer, be bound to observe his verbal undertaking, even though not contained in the written agreement, but it cannot be used any further against him. The memorandum is, in my opinion, therefore, sufficient to satisfy the Statute of Frauds.

The remaining question is, whether Cushing was justified, in the circumstances, in cancelling the contract and in resisting specific performance.

Upon this point the learned trial Judge held that Knight had no right to refuse to pay the $10,000 in the way he did, and that Cushing was justified in cancelling the contract. With great respect, I am unable to concur in this view. When Cushing agreed to give title free of incumbrance whenever Knight paid the purchase-price in full, it seems to me that Knight was justified in assuming that Cushing had the legal right under the mortgage to do this. Yet it turned out, when Mr. Wallbridge examined the title for Knight, that no such right existed. There is evidence that Cushing talked to Kenwood about a bonus being paid to the mortgagees, but the mortgage makes no mention of a bonus, and as yet there is nothing to shew that they would accept a bonus and give a discharge. Furthermore, there is no evidence that Knight was aware that the mortgage could not be paid off until some six weeks after the date of the last payment under the agreement of sale. Therefore, if Knight had waited and paid only according to the agreement, Cushing could not necessarily give a good title until that further period had elapsed, although it may be that, upon payment of interest in full, the mortgagee would be willing to discharge. But we as yet have no evidence that this can be arranged. This difficulty is also something discovered by Mr. Wallbridge of which Knight was not aware, and which might be of the greatest possible importance to him when the time came when he was entitled to his transfer.

In England, an agreement for the sale and purchase of real estate usually includes a clause giving the vendor a right to rescind, if the purchaser makes any requisition as to title with which the vendor is unable or unwilling to comply.

Such a clause is not usual in our agreements of sale in Alberta, and is not contained in the agreement in question here.

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We are left, therefore, to the general rules as to the right of one party to a contract to cancel or rescind it. I am not aware that any peculiar rights are given to a vendor of real estate different from those enjoyed by any other contracting party. If one party to a contract either announces directly that he does not intend to do his part, or so conducts himself as to justify the other in believing that he has renounced it and does not intend to carry it out, then the other may accept the express or implied refusal, and may refuse to be bound any longer himself, thus cancelling the contract. It is for this reason that a purchaser of real estate under an agreement of sale, who fails to pay the purchase-price when due, and who fails after the agreed or reasonable notice to remedy his default, is taken in many cases to have renounced the contract so that the vendor is justified in cancelling it. So, also, if a purchaser insists, before consenting to pay, upon the vendor's doing something which under the contract he is not bound to do, *i.e.*, where he insists upon adding, practically, a new term to the contract which was not agreed upon, and persists in this attitude, the vendor is, no doubt, justified in refusing to be bound any longer himself, and, therefore, in declaring the contract at an end. In the present case, however, it is perfectly obvious that Knight always intended to carry out the contract. Nothing that he did could justify any one in believing that he did not intend to do his part as agreed. His solicitor actually handed a copy of the agreement signed by Knight back to Cushing.

The whole point in the case seems to be, whether Knight was justified in withholding the cash payment of $10,000 until his demands in regard to the mortgage were complied with. I think we must put aside any consideration of what the position would have been if the mortgage had been redeemable at the option of the vendor at any time, or if it had been finally repayable within the currency of the agreement of sale. This situation is what Knight was led to believe existed, or at any rate he knew nothing to the contrary. If it had been the real situation, and he had refused the payment of the $10,000, although knowing of the existence of the mortgage, I do not wish to be taken as expressing any opinion as to what his rights would have been. But I think that, when Knight's solicitor found what the facts were, he was clearly within his rights in asking that some arrangement be made about the mortgage.

In *Thompson* v. *Brunskill*, 7 Gr. 547, this matter is discussed by Vice-Chancellor Spragge. At the page given, he says:—

> It appears to me upon such a contract a purchaser is not bound to pay one shilling of the purchase money or interest unless a good title is shewn; and that he stands upon the same footing in that respect as if the whole purchase-money were payable in hand.

Where the purchaser knows of the existence of a mortgage, and is correctly informed of its terms before making his agreement, and still enters into the agreement in the face of the mortgage, his rights may possibly be considerably modified; but, where he either knows nothing of the existence of a mortgage or has not been sufficiently informed of its terms, he has, I think, a right to assume that the vendor is able to give title according to the terms of the agreement into which he enters, at any rate where the information tendered shews nothing to the contrary.

I do not take Wallbridge's demand as meaning that Cushing must procure an immediate discharge of the mortgage. His demand went no further than that Cushing should procure from the mortgagees such an agreement as would enable him, Cushing, to give a good title free of incumbrance, whenever Knight choose to pay up in full. I am not sure that it should, indeed, be interpreted as going that far, but it certainly went no further, and that far Knight was certainly entitled to go. He was not, therefore, insisting on Cushing doing something which he was not bound to do, but was in reality simply asking Cushing to fulfill what is an implied term of every contract of sale of land. That being so, I think Cushing had no right to annul the contract, and that Knight is entitled to specific performance of it.

It is said that, when Knight discovered the defect in the title, he was bound to say either one of two things, either that he repudiated the contract altogether, or that he accepted the title as it stood. I confess that I cannot understand this contention. Cushing was not then merely offering a contract to Knight. The contract had been made, and Cushing had assumed certain obligations under it. Certainly Knight had a right to ask for some assurances that those obligations could be fulfilled, not before making his contract, for it was already made, but before risking his money. I cannot see why he should be precluded from getting specific performance of a contract on which he always insisted, merely because he anticipated, not before making the contract, but before starting to carry it out, an objection which he could quite properly raise on a reference as to title.

The appeal should be allowed with costs, and the judgment below set aside and judgment should be entered for the plaintiff with costs.

The ordinary decree for specific performance should be made. The plaintiff should be directed to pay the $10,000 into Court. If and when the defendants are able to prove, to the satisfaction of a Judge, that they have an agreement with the mortgagees by which they bind themselves to discharge the mortgage upon reasonable notice, then I think the defendants

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should be at liberty to apply to a Judge for payment out of Court to them of so much of the purchase-money as a Judge may think may safely be paid, without prejudice to the purchaser, and upon such terms as the Judge may deem proper. The second instalment of $10,750 being now overdue, the plaintiff should pay this into Court as well.

If the defendants shew that they are able to secure a discharge upon payment of a bonus, I think the plaintiff should be required to pay one-third of it, as he verbally agreed to do, provided the Judge is of opinion that the bonus demanded is a reasonable one. The amount of the bonus was never mentioned; and, that being so, I think the plaintiff can only be held to have agreed to pay what would be reasonable in the circumstances.

If the defendants cannot secure a discharge at all until the mortgage-money is formally payable, or only upon payment of an unreasonable bonus, I think that the plaintiff would be at liberty either to withdraw from the agreement altogether and have an order cancelling it, or to take the best he can get, and wait till the mortgage matures. If, at any time before that, he pays the whole purchase-money into Court and has to wait for his title, I think he is also entitled to a judgment for damages for the delay, and to a reference to fix the amount of the same.

A further question as to interest will also arise. The plaintiff has, of course, not been in possession, and he has properly withheld payment of the $10,000 until title could be shewn. The delay has been due to the default of the vendor, and there should be no interest payable upon this sum. With respect to the second payment, which fell due on the 12th September, 1911, my view is, that the interest agreed upon should, subject to what I shall say as to possession, be paid up to that date.

The purchaser was entitled to raise the question of title every time he was called upon to make a payment and to withhold a payment until title was shewn. The $10,750 was not withheld during the year because of defect in title, but because the agreement deferred the payment of it. The purchaser was entitled to immediate possession, however; and if he can shew that he has lost any rents and profits during the year, I think he should be relieved also of the interest upon that instalment during the period of such loss. See Dart, 7th ed., vol. 1, pp. 650, 651. The loss of interest for over a year on $10,000 and for four months or more on $10,750 may seem a serious hardship upon the defendants, but I shall have no regret over that, if the result of this case is to impress upon vendors who sell land on the instalment plan the fact that they cannot call upon a purchaser to pay money to them for their land unless they can shew that the purchaser is safe in regard to title, and will

be able to get it beyond question when the time comes to demand it.

The above judgment was written without my having the advantage of consultation with the other members of the Court; and, although I still think that the details of the judgment should be as I have stated, I defer to the opinion of Scott and Beck, JJ., and assent to the judgment being entered as they have stated.

HARVEY, C.J. (dissenting):—I am prepared to assume, though without expressing any opinion on the point, that there was a concluded agreement between the parties, and that the particulars of it are set out in the formal document dated the 12th September, 1910, and signed by the parties. It becomes unnecessary, in this view, to consider any question of compliance with the Statute of Frauds.

The inference I draw from the evidence is exactly that which the learned trial Judge drew, viz., that the plaintiff knew all of the particulars of the mortgage, that are at all material. In the letter of one of the defendants to him of the 22nd September, which was put in evidence, is the statement: "At the time negotiations were entered into, you were informed as to the condition of the title." Kenwood, the defendants' agent, also says that he was instructed by his principals to inform the plaintiff and that he did inform him of the mortgage, the amount, the name of the mortgagees, and the due date, though later he says he did not know whether the plaintiff knew that the mortgage did not fall due till 1914. He says he also told him that, if he, the plaintiff, wished to pay up on the agreement at any time before its maturity, the defendants would endeavour to get the mortgage discharged, but that, if any bonus had to be paid for so doing, the plaintiff would have to pay his proportion. The plaintiff, who gave evidence on his own behalf, does not suggest that there was any fact about this mortgage that he was not aware of at the time he signed the agreement, and he specifically states that he knew that the mortgage covered the whole of the two lots, and that the final payment under the agreement of $5,000 "was for any mortgage that would be against my portion of the property." In view of his knowledge that the only mortgage there could be was the one then existing, this must mean that the $5,000 was the portion of the mortgage which, as between himself and the vendors, he was to assume.

The plaintiff, without communicating to his solicitor the extent of his knowledge, instructed him to search the title and pay over the $10,000, if the title were found satisfactory. Mr. Wallbridge, the solicitor, did not consider the title satisfactory, and consequently did not pay over the $10,000, but, in-

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stead, commenced negotiating with the defendants to have some satisfactory arrangement made, so that as between the mortgagees and the purchaser, a definite portion of the mortgage should be charged against the property being purchased. He states his objections as follows:—

A. I explained to him that the mortgage of $15,000 covered the whole of the property; that the portion he was selling to Mr. Knight was subject to the whole of that mortgage, the same as the other portion; that, if Mr. Knight wanted to sell that property, he would have difficulty in having a purchaser pass title, in view of the fact that there was a mortgage of $15,000 against his property and another property, which was so mixed up that he could not sever it without the consent of the mortgage company. I told him that I had no instructions to pass title of that kind. I suggested to him that, if he would agree to procure a discharge of that mortgage, or if he would agree to have the mortgage company enter into an arrangement by which they would make a severance of the amount of the mortgage so that a portion would be secured by the north part and a portion by the south part, I would pass title.

Q. What proportion? A. I told him it was immaterial as long as it was definitely ascertained. Five thousand was the amount that was suggested in some manner or other, I am not exactly certain, but I told him it didn't matter whether it was five thousand or some other amount, as long as it was an ascertained amount; and if it was different from $5,000 we could make an amendment of the agreement to cover it.

Q. You could make an arrangement accordingly? A. We could make an arrangement accordingly.

Q. And what else? Did you make any further suggestion? A. I suggested that he communicate with the Independent Order of Foresters, the mortgagee, and try to fix up some such arrangement. I suggested that, either at the first telephone conversation or at the verbal conversation in my office, I am not sure which. It was at the second conversation he called me up and asked me if I would write him a letter to the Independent Order of Foresters, draft a letter for him, covering the suggestions to them, that they would enter into such an arrangement.

These objections were eminently such as a wise man should consider before entering into an agreement, but the question is, whether, having entered into the agreement, they could be insisted on.

It may be noted that no objection whatever is made to the fact that the mortgage would not fall due until after the last payment under the agreement, and that they only relate to the fact that the mortgage covered more property than the plaintiff was purchasing, which fact was known to the purchaser at the time he signed the agreement, as he himself distinctly admits. Mr. Cushing, while offering no objection to trying to satisfy Mr. Wallbridge, insisted on the $10,000 being paid in the meantime, which Mr. Wallbridge refused. Four days later, on the

22nd September, the draft letter having been prepared in the meantime, Mr. Cushing writes stating that, though it is no part of the agreement, he will do what he can to meet Mr. Wallbridge's views if the $10,000 is paid, but that, if it is not paid by the 26th inst., he will consider all arrangements cancelled. On the same day, he writes to the plaintiff, pointing out, as indicated above, that the plaintiff knew the state of the title when the negotiations were entered into, and that he will consider the deal cancelled if payment as provided in the agreement is not made by the 26th inst.

The money was not paid, but on the 26th Mr. Wallbridge writes, stating that he has discussed the matter fully with the plaintiff, and says: "All that he requires is, that the title be put in some shape so that he will not be hampered in dealing with the property. He cannot accept it as it is at present, however, as he could hardly hope to find any purchaser to accept it from him." He goes on to say that he will make the payment if Mr. Cushing will give a "covenant to have the mortgage severed, say within ninety days," intimating that, if Mr. Cushing finds himself unable to do what he covenants to do, he can probably arrange for pre-payment on favourable terms. Mr. Cushing replies that, as payment has not been made as agreed, he considers all arrangements cancelled.

The plaintiff by his statement of claim asks for: (1) specific performance; (2) liberty to pay into Court the purchase-moneys under the said agreement to an amount sufficient to indemnify the plaintiff against the principal and interest due or accruing due under the said mortgage; (3) specific performance to the extent that the defendants are able to carry out this said agreement of sale with the plaintiff, with an abatement of the purchase-money sufficient to indemnify the plaintiff against the principal and interest due or to accrue due under the said mortgage; and, in the alternative, damages.

It is perhaps, not insignificant that the plaintiff has not asked in his claim for what he demanded before action, but something entirely different. It is not improbable that his reason for this was, that in the innumerable reported cases of specific performance, he was unable to find any similar claim not merely recognised, but even suggested.

There are, however, cases in which the purchaser has been permitted to pay instalments of the purchase-money into Court for his protection when the title was incumbranced or defective; see *Armstrong* v. *Auger*, 21 O.R. 98, and cases referred to; but my attention has not been called to any such case in which the plaintiff has not been the vendor seeking to enforce payment of the instalments, and it has been permitted simply on the principle that the purchaser should not be required to put himself in the position where he might have to pay more than the purchase-money for his title.

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In the present case, the remaining payments under the agreement were several thousand dollars more than the amount of the mortgage, in addition to the fact that the mortgagee had for security other lands against which the plaintiff could have recourse if he were called on to pay it off, the value of which was several times the amount of the mortgage.

The principle of these cases, therefore, has no application to the present. In *Wilson* v. *Williams*, 3 Jur. N.S. 810, at the time the contract was entered into, the vendor distinctly assured the purchaser that his wife would bar her dower. She, however, refused; and, in the plaintiff's action for specific performance, Wood, V.-C., permitted a sufficient portion of the purchase-money to be set aside to meet the claim for dower, the vendor being permitted to draw the interest during the joint lives of himself and wife. In that case, however, there was the distinct assurance that the dower would be barred, while in the present the representation made by the defendants, according to the evidence of Kenwood, was, that, if the plaintiff wished to pay up in full, the defendants would endeavour to procure a discharge of the mortgage, in which event the plaintiff would be called on to pay his proportion of the bonus demanded. There was, however, no suggestion of procuring any arrangement with the mortgagee to sever this security, as subsequently demanded by the plaintiff, though he admits that he knew that it covered all of the lots.

In Fry, on Specific Performance, 5th ed., par. 1271, it is stated:—

> If the purchaser is, from the first, aware of the vendor's incapacity to convey the whole of what he contracts for, he cannot, generally, insist on having, at an abated price, what the vendor can convey.

Consequently, even if the plaintiff had performed his part of the contract and were in no way in default, his right to have anything but what the defendants can convey at the agreed price seems doubtful; but, in my opinion, his case is much weaker than that.

Under the English authorities, a claim for damages, when a vendor cannot convey by reason of defect of title, is limited to the amount of the purchase-price which has been paid, which is nothing in this case. The plaintiff, therefore, is limited to an appeal to the equitable jurisdiction of the Court; and must, therefore, shew that he has done what he agreed to do, and is entitled, therefore, to call on the defendants to do what they agreed to do. In this he fails at the threshhold, for he has not merely failed, but positively refused, to do what he agreed to do. The terms of the agreement as to payment, viz., $10,000 cash on the signing of this agreement, "the receipt of which is hereby acknowledged," leave no room for doubt that the intention was,

that, at the time the defendant's signature to the agreement was to become effective, the $10,000 should be in his hands.

It would undoubtedly be the part of prudence for any purchaser to ascertain the state of the title before paying any portion of his purchase-money; but, if he intends to act like a prudent man, he should not agree to pay it before he can have an opportunity of investigating the title if he has not done so before; and, if he does agree to pay it before investigating the title, then it is the duty of the Court, not to make an agreement which it thinks a wise man in his own interest should have made, but to enforce the agreement which the parties have actually made.

In *Gamble* v. *Gummerson*, 9 Gr. 193, at p. 198, Esten, Vice-Chancellor of Upper Canada, said:—

> A purchaser, in the absence of a special agreement, is not bound to pay, except as a deposit, a particle of the purchase-money, until a good title is shewn, and the estate is discharged from incumbrance.

The present case falls within the exception specified of a special agreement to pay, on the signing of the agreement. The agent had instructions not to deliver up the agreement until the plaintiff paid the $10,000; but, on the plaintiff asking him to let him shew it to his solicitor, he gave him not one only but both duplicates. Whether, after the solicitor had learned of the defect of title, the plaintiff could have repudiated the contract on that ground, in view of his prior knowledge, need not be considered, for the defendants did not seek to bind him by it. He himself deliberately repudiated it, by refusing to observe its terms; and, on that ground alone, it appears to me that the Court cannot grant his claim for specific performance. In Mr. Wallbridge's letter, which is in part quoted above, he stated that the plaintiff refused to accept the defendants' title, and that he must have something which had not been agreed on which he then demanded, but which he does not ask for in this action. The plaintiff, no doubt, did nothing to lead one to suppose that he did not want the property; but, in my opinion, that is not the material point. It surely could not be contended that, if a purchaser of property for $10,000 absolutely refused to pay $10,000, but insisted on his wish to have the property for $5,000, he could be considered as maintaining an agreement to purchase for $10,000.

The plaintiff absolutely refused to carry out the agreement he had entered into; and it can hardly be said that he did not repudiate it because he was willing to do something else which had not been agreed. When one considers the equities, leaving aside the bare rights, I admit that the plaintiff's position does not appeal to me with any force. As pointed out, the payment of the $10,000 would in no way put him in any danger of having

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Coming to the conclusions I have, for the reasons stated, it is not necessary to consider the effect of the provisions of the agreement giving the vendors power to cancel, on notice, on the purchaser's default, and the notice given, nor, since nothing has been asked for in the claim such as was asked before action, is it necessary to consider how a judgment could be given directing the defendants to do something which there can be no assurance can be accomplished.

I would dismiss the appeal with costs.

Appeal allowed; HARVEY, C.J., *dissenting.*

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Specific Performance

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The 4th section of the Statute of Frauds does not avoid the agreement, but only prevents it being proved; and notwithstanding the provisions of the statutes, equity will decree specific performance of a parol agreement in the four following cases, on the ground that it would be wrong to allow the statute to be set up as a bar to relief:—

(1) Where the sale is by the direction of the Court;

(2) Where it is fully set forth by the plaintiff in his statement of claim, and admitted by the defendant in his defence, and the defendant does not set up the statute as a bar.

(3) Where it was intended to be reduced into writing, but this has been prevented by the fraud of the defendant.

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CASES REPORTED, VOL. I., PART 3.

that, at the time the defendant's signature to the agreement was to become effective, the $10,000 should be in his hands.

It would undoubtedly be the part of prudence for any purchaser to ascertain the state of the title before paying any portion of his purchase-money; but, if he intends to act like a prudent man, he should not agree to pay it before he can have an opportunity of investigating the title if he has not done so before; and, if he does agree to pay it before investigating the title, then it is the duty of the Court, not to make an agreement which it thinks a wise man in his own interest should have made, but to enforce the agreement which the parties have actually made.

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Mar. 7.

WARD v. SANDERSON.

Ontario Divisional Court, Falconbridge, C.J.K.B., Britton and Middleton, JJ. March 7, 1912.

1. ENCROACHMENT (§ I—10)—WALL OF BUILDING—MISTAKE OF TITLE—STATUTORY POWER TO MAKE VESTING ORDER AND DIRECT COMPENSATION.

On an action for encroachment in constructing the wall of a building partly over the boundary line upon adjoining lands, the Court has a discretion under Ontario statute 1 Geo. V. ch. 25, sec. 33, to award a money compensation for the encroachment if made under the belief that the land encroached upon was within his own boundaries, and in such case the judgment should decree that upon paying the compensation awarded the portion of the land which it represents should be vested in the encroaching party.

2. ENCROACHMENT (§ 1—10)—IMPROVEMENTS IN MISTAKE OF TITLE—COMPENSATION FOR LAND TAKEN—PAYMENT TO MORTGAGEE.

If the land upon which lasting improvements have been made under mistake of title such as the wall of a building encroaching upon neighbouring land, is subject to a mortgage the compensation money awarded on vesting the land in the trespasser under Ontario statute 1 Geo. V. ch. 25, sec. 33, must be paid to the mortgagee and not to the owner of the equity of redemption unless the consent of the mortgagee to the adoption of the latter course is filed.

AN appeal by the defendant from the judgment of Denton, Jun. J.C. Co. York, which was partly in favour of the defendant upon her counterclaim.

The judgment below was varied on the appeal.

W. Proudfoot, K.C., for the plaintiff.

N. F. Davidson, K.C., for the defendant.

The judgment of the Court was delivered by

MIDDLETON, J.:—The defendant is the owner of the house known as No. 32 on the north side of Oxford street, and adjoining lands forming the westerly portion of lot No. 3 on the north side of Oxford street, in the city of Toronto. The plaintiff is the owner of the rear part of the lands immediately to the east.

Early in 1909, the plaintiff contemplated the erection of a warehouse, several storeys in height, upon his land. At this time the defendant had a quantity of earth upon the rear portion of her lot, which could not conveniently be removed, by reason of there being no way of access. An agreement was made by which advantage was taken of the situation, and the plaintiff agreed to remove this earth across his land before his building was completed. The earth was removed, but some dispute arose as to the price to be charged for its removal; and the action was brought to recover the plaintiff's claim in respect thereof.

The action was commenced on the 11th July, 1911, and at this time no counterclaim was filed; but on the 21st November, 1911, leave was obtained, pursuant to which the counterclaim was delivered, claiming damages for injury done to certain

trees and vines during the course of the erection of the warehouse, and also alleging that the wall of the warehouse trespassed upon and occupied four inches of the defendant's land, and that an excavation had been made beyond this four inches during the construction of the wall, which had been filled up with broken brick and rubbish.

At the trial it clearly appeared that the defendant's claim was much exaggerated. For the injury to the shrubs, trees, and vines, the Judge allowed $35. Upon the argument of the appeal we thought the amount allowed was ample. The Judge also found that the wall encroached slightly upon the defendant's land; and, pursuant to the statute 1 Geo. V. ch. 25, sec. 33, he allowed to her $10 as the value of the land encroached upon, which he permitted the plaintiff to retain.

Upon the appeal the defendant contends that the case is not brought within the provisions of the statute in question, and that the amount awarded is entirely inadequate. She also asks leave to adduce further evidence for the purpose of shewing that the footing of the wall and some weeping tiles encroach further upon her land.

The statute provides that, "where a person makes lasting improvements on land under the belief that the land is his own," the Court may direct that person to retain the land, making compensation therefor, if, in the opinion of the Court, this is just.

The principle governing the interpretation of the statute is indicated in *Chandler* v. *Gibson*, 2 O.L.R. 442; where it is said that it is "a question in each case for the tribunal to determine whether the person claiming for the improvements made them under the bonâ fide belief that the land was his own."

In this case, the boundary between the land of the plaintiff and the land of the defendant was a fence that had been standing for some thirty years. This fence was probably not upon the true boundary line. The evidence of the plaintiff is, that he intended to recognise this fence as correctly defining the boundary; that he took the fence down—or at any rate removed the boards from the posts—thinking that the wall of his building would supersede it; that he marked the location of the fence by a line; and that his intention was to build up to the boundary; and he believes that he has not in any way encroached on the defendant's land.

No complaint was made for more than two years, although the defendant was residing in her house during the erection of the building.

The County Court Judge has found that there was a bonâ fide belief on the part of the plaintiff that the land was his own.

It is not very clear, from the reasons given by the learned Judge, what the exact extent of the encroachment found by him

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was. We are inclined to the view that it was somewhat greater than he thought.

According to a survey made in 1891, the defendant's lot had a frontage of 26 feet 2 inches, and a width at the rear of 26 feet 4 inches. Her deed calls for 26 feet only. According to recent surveys, the width at the rear is 25 feet 9 inches; and, as the old western fence is still in the same place, this indicates an encroachment of 8 inches, although in the action an encroachment of 4 inches only is charged; the discrepancy possibly arising from a comparison of the recent survey with the requirements of the deed.

We do not think that we should interfere with the finding of the learned Judge that the plaintiff acted in good faith. It is in the first place unlikely that he would erect the wall of a four-storey warehouse upon property to which he knew he had no claim; but we think the amount to be allowed for the land occupied ought to be increased. Leave should be given to the defendant to amend her counterclaim so as to claim an encroachment of 8 inches instead of 4 inches; and the title to this 8 inches is to be vested in the plaintiff, upon payment of $50 as the price of the land. But, as this amendment is an indulgence to the defendant, and as she has failed in the branch of her appeal relating to the value of the fruit trees, we think that there should be no costs of the appeal.

We, therefore, direct that the judgment below be varied as indicated, and that, save as aforesaid, the appeal be dismissed without costs.

We draw attention to the form of the judgment in the Court below. Where the trespasser is allowed to retain the lands encroached upon, he making compensation, the judgment should direct that the land be vested in the trespasser.

At the trial, no inquiry appears to have been made whether the defendant's lands are free from mortgage. If there is an incumbrance, the allowance by way of compensation should be paid to the mortgagee, unless his consent to payment to the defendant is filed.

Judgment below varied.

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Feb. 29.

POIRIER v. ARCHAMBAULT.

Superior Court, Province of Quebec (Montreal District). Trial before Demers, J. February 29, 1912.

1. CONTRACT (§ I D 3—55)—DEFINITENESS—TIME FOR PAYMENT.

In cases of sale a contract or agreement is complete and susceptible of being executed when the parties have agreed as to the object sold and the amount of the price; absence of a stipulated term for payment of the balance of purchase price is no bar to the enforcement of such contract.

2. VENDOR AND PURCHASER (§ I A—4)—TENDER OF DEED.

Before a vendor of lands under Quebec law can put the purchaser in default, he must tender him the deed and a certificate of search from the registry office shewing what encumbrances exist on the property.

3. CONTRACT (§ II D 2—174)—AS TO EVIDENCE OF TITLE TO LAND SOLD.

A stipulation in a promise to sell to the effect that the vendor will not be obliged to furnish copies of title deeds under which the property was sold to him, but that same may be inspected in the hands of a named custodian, does not release him from the obligation of giving communication of his own deed of acquisition which had not been in the same custody.

THIS was an action for specific performance of an agreement for sale of land.

The action was maintained.

G. Lamothe, K.C., for plaintiff.

Messrs. *S. Beaudin*, K.C., and *C. A. Archambault*, for defendant.

(*Translated.*)

DEMERS, J.:—On the 27th of October, 1910, the defendant signed the following letter:—

Montreal, 27th October, 1910.

Mr. Ferdinand Poirier,
Outremont.

Dear Sir:—

I consent to sell you my Outremont property (50 x 150) at Cote St. Catherine, for the price offered, to wit, 70c. a foot; measured according to the measure appearing in my deed of acquisition, and also according to the conditions of my deed of acquisition, payable one-half cash and one-half with interest at 6%; the whole to be computed from this day.

Please answer immediately.

(Sgd.) A. M. Archambault.

On the same day defendant answered:—

I accept the offer that you have made me this day of buying your Outremont property (50 x 150) at Cote St. Catherine, for the price and at the conditions therein mentioned. Please send over your titles and certificate to my notary, J. H. Olivier, with whom I have deposited my cheque for payment.

Plaintiff now sues his vendor to compel him to sign the deed of sale. The first plea of the defendant is under a condition of his deed of acquisition, which was as follows: Not to call upon the vendor to furnish him title deeds or certificate of search, which title deeds and certificate will remain in the office of William H. Cox, notary, where they may be seen by the purchaser or assigns of the buyer.

The second point raised by the plea is that when the parties met at the office of Notary Olivier on the 29th of October, 1910, the defendant told plaintiff that he was ready to agree to and pass a deed of sale agreeable to the conditions of his writing of the 27th October, 1910; that the said deed of sale had to be passed immediately, and the amount to be paid under the said writing had to be paid immediately; that plaintiff refused to pass the said deed unless the defendant furnished him with his title and certificate from the registry office; that the defendant then

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declared to plaintiff that he was not obliged to shew any certificate of the registry office, or any deeds, with the exception of his own deed of acquisition; and that the *pour parlers* of sale between plaintiff and defendant then came to an end.

Thirdly, defendant pleads that as a result of a notice of protest served on plaintiff on the 3rd of November, 1910, the writing of the 27th of October, 1910, became null.

Fourthly, the defendant maintains that the protest and tender made at plaintiff's instance are not in conformity with the writing of the 22nd of October, 1910; that in any event this protest is without effect as being too late, defendant having, by his own protest of the 3rd of November, withdrawn his offer of sale; and that, besides, the tender was insufficient, as plaintiff did not tender the interest on the whole purchase price, and more particularly, on that part of it which was payable cash, as well as the taxes and assessments paid since the 27th of October, 1910, by the defendant.

Fifthly, that the deed of sale which plaintiff required defendants to sign was not in accordance with the writing of the 27th of October.

Let us examine each one of these grounds separately.

As to the first plea. The clause in the deed of acquisition which is invoked did not apply to the title from Walsh to Archambault. It did not apply to the title under which Archambault acquired himself, this deed not being one of those which were deposited with Notary Cox; nor did it apply to the certificate of search since the purchase by Archambault, and, besides, it is evident that Archambault was obliged to furnish his deed to the plaintiff in order that the latter might discover that the previous deeds were on deposit with Notary Cox and were to remain there. This ground raised by the defendant appears to me to be unfounded.

On the second point: as soon as a promise to sell and to buy has been entered into, the parties having agreed that the price shall be paid cash and that a deed shall be drawn up, either party may take the initiative, and put the other party in default. If the vendor wishes to be paid the purchase-money he must tender his deed of sale and the title which he is obliged to furnish. If, on the other hand, the purchaser desires to hasten matters, then he must tender the price.

What occurred on the 29th of October, 1910, according to Archambault's own version, does not, to my mind, justify him repudiating his bargain. The Court allowed, under reserve of defendant's objection, parol evidence, which contradicts absolutely the version of Archambault; but the Court can dispose of the case without taking this evidence into account. If this evidence be taken into account the version of Archambault is con-

tradicted. If this evidence be left aside, then, no proof having been offered by the defendant on these allegations, we have to come to the conclusion that there is no evidence in support thereof.

Thirdly, the protest of the defendant is of no effect, because, as we have seen, there was a contract between the parties, which contract the defendant could not resiliate without having previously tendered to the plaintiff a deed of sale, his deed of acquisition and his certificate of search.

Fourthly, the foregoing remarks dispose of this additional objection of the defendant, to wit, that plaintiff's protest was tardy and of no effect.

As to the question of interest on that portion of the purchase price payable cash, Archambault, having refused to deliver, has no right to the interest on the cash payment. The protest acknowledges his right to the interest from the 27th of October, 1910, agreeably to the contract.

At the hearing defendant raised another point. He argued that there was no convention or agreement between the parties. The defendant cited in support Guillouard, vol. 1, No. 10; Duverger, No. 128.

In support of the contrary proposition, however, I find Pothier, No. 482, and especially Beaudry-Lacantinerie Nos. 23, 24 and 24(1).

There is no doubt that if the parties had stipulated that, at the time of the signing of the deed of sale, the terms of payment would be arranged, then their first agreement would not be definitive; but as Beaudry-Lacantinerie explains very clearly at No. 24, when, as in a case of this kind, the agreement is made in writing, and there is no discussion as to the term, then the contract must be held to exist. The reason given by the learned author is that the law requires in matters of sale an object and a price. There is no doubt that if there was no agreement as to price, the Courts under our modern law (which on this point differs from Pothier), should have to refuse to intervene. Thus, in cases where the price is to be determined by an expert the Courts have held that on the refusal of the expert to act they cannot intervene, and the reason of this is that to arrange contracts between parties is not one of the attributes of the Courts, but the Courts have within their province the enforcement of the execution of contracts once they are entered into.

Now, in the present case, the parties agreed on the two essential elements of a sale; object and price. The parties did not discuss the method of execution of part thereof. This often happens, as for example, in cases where a person obliges himself to pay when he will be able, and then in such cases the Courts fix the term at which the contract will be executed. To

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justify me in holding that there was no contract I should have to find that the parties have failed to agree on some essential element, and not merely on an accessory. See Cassation, *Sirey* 87-1-67. The doctrine of Beaudry-Lacantinerie seems to me absolutely in accord with this decision. In the present case there appears to have been no discussion as to the term of the balance of the payment, neither in the protest nor in the plea.

It is quite true that Notary Olivier in his evidence stated that the balance was to be paid in two years. But this point is not in issue in the case, and the witness explains that if this delay was not inserted in the protest it is because he wanted to follow strictly the original writing, and that he had been so advised by his attorney.

As the defendant wished to go back on his offer there was grave danger that, had such a delay been inserted in the protest, the defendant would have replied that that was not a condition agreed upon between the parties, and parol evidence on this point would have been illegal, seeing the agreement was in writing.

I cannot arrive, therefore, to the conclusion prayed for by defendant (especially in the absence of a special plea on this point), that this was an essential stipulation without which the contract could not have come into existence. In brief, the parties are silent only as to the method of execution of part of an obligation. If instead of two letters we had an authentic deed comprising the substance of these two letters only, and describing the property and mentioning that one-half of the purchase price was payable cash, and the other half at a later date with interest, which authentic act the vendor would have registered, it seems to me that it would be impossible to argue that there had been no valid sale.

I, therefore, come to the conclusion that the pretensions of the defendant are unfounded, and the plaintiff's action must be maintained with costs. The defendant is given eight days to sign the deed tendered, and failing his so doing the judgment will avail as a deed of sale.

Judgment for plaintiff.

N.B.—The defendant has inscribed the case in Review on appeal from the above decision.

Re FALSE CREEK FLATS ARBITRATION.

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Supreme Court of British Columbia, Gregory, J. February 28, 1912.

1. EMINENT DOMAIN (§ III E 2—176*a*)—OBSTRUCTING ACCESS TO WATER —SETTING OFF BENEFITS AGAINST DAMAGES.

Where arbitrators dealing with an objection to the admissibility of evidence of increased value to set off against damage in eminent domain proceedings under the Railway Act (Can.) stated that they would take the evidence, but would specify separately in their award the increased value and the gross amount of damages against which it was set-off, and thereby enable the objecting party to have reviewed by the Courts the application of the "set-off" provisions of the Railway Act, but no two of the three arbitrators could agree on the amounts on the basis of excluding the benefits, but concurred in awarding one dollar damages for lands injuriously affected but not expropriated, but without specifying how the amount was arrived at, the arbitrators' statement as to separate findings will be held to be equivalent to a promise to exercise their discretionary power to state a case for the opinion of the Court, a reliance upon which may have prejudiced the objecting party in the conduct of his case, and the arbitrators' non-fulfilment, although unintentional, of the promise given is such misconduct on their part as will justify setting aside the award.

2. DAMAGES (§ III L 6—284)—EMINENT DOMAIN—SETTING OFF SPECIAL BENEFITS—RAILWAY.

Upon an arbitration in eminent domain proceedings in reference to damage to land by railway construction, in cases in which sec. 198 of the Railway Act (Can.) requires the amount of benefit to be "set-off" against the amount of damage it is necessary that the arbitrators should specify the amount of each in their award.

3. ARBITRATION (§ III—17)—REVIEW AND SETTING ASIDE—FAILURE TO DECIDE ALL MATTERS REFERRED.

If an award of arbitrators fails to decide on all matters referred to them, the award will be set aside by the Court, whether the omission appears on the face of the award or by affidavit.

[*Re Marshall and Dresser*, 12 L.J.Q.B. 104, followed; see also Russell on Arbitration, 9th ed., p. 370.]

4. ARBITRATION (§ II—12)—MISCONDUCT OF ARBITRATORS—IRREGULAR PROCEEDINGS—MOTIVE.

Misconduct of arbitrators, in its legal sense as regards the power of the Court to set aside an award, does not necessarily imply any improper motive to the arbitrators.

APPLICATION to set aside the awards of arbitrators in a number of cases under the provisions of the Railway Act whereby one dollar compensation or damages, was awarded in each case for damage to lands through the exercise by the company of the powers conferred upon it, whereby access to the sea was cut off from the lands by the building of the railway in the river bed of False Creek which adjoined these lands and belonged to the municipal corporation. The lands in question were not taken by the railway.

Messrs. *A. D. Taylor*, K.C., *D. Armour*, and *J. R. Grant*, for the application.

A. H. MacNeill, K.C., contra.

GREGORY, J.:—It is contended that the arbitrators so conducted the arbitration as to be guilty of legal misconduct.

While the Railway Act only gives the right of appeal when

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the award exceeds six hundred dollars, sub-section 4 of section 209 of that Act provides that the existing law or practice in any province as to setting aside awards shall not be affected. The Arbitration Act of British Columbia, being ch. 9, R.S. 1897, declares by sub-sec. 2 of sec. 12 that

> Where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the Court may set the award aside.

During the arbitration the railway company offered evidence of the increased value which the applicant's lands acquired by reason of the construction of the railway, contending that the same should, under the authority of sec. 198 of the Railway Act, be set-off against the damage suffered. The applicants urged that that provision did not apply in the circumstances as the railway did not pass "through or over" their lands, etc., the injury to them being caused solely by their being deprived of their access to the sea—the railway being built in the bed of False Creek (beyond low water) on lands belonging to the city of Vancouver. This raised a very nice legal question, and, although counsel, unfortunately, do not exactly agree as to what took place, I think their disagreement is more one of language than of substance and, on the material before me, it seems clear that the arbitrators agreed to take the evidence and to make alternative awards or to set out in their award the amount they found as damage and also the amount they found as benefit or increased value, and to make an award for the difference for I do not see how they could make effective alternative awards. An award in the alternative would be no award at all. The chairman of the board acted as spokesman, but as neither of his co-arbitrators raised any objection it seems to me that it must be taken as he spoke for them all.

The arbitrators did not do as they agreed to for the reason that no two of them could agree as to the amounts—if the benefit was not to be taken into consideration. Had both the benefit and damage been set out in the award, and an award made for the difference in case the damages were the greater, the award would have been bad on the face of it provided the benefit should not be considered under a true interpretation of sec. 198 of the Railway Act, and if the award was bad on its face it could have been set aside by the Courts.

It seems clear to me that the arbitrators agreed to leave the matter in such a position that their ruling on the disputed evidence could be reviewed and the applicants relying upon that, very likely conducted their case in an entirely different manner than they would have done otherwise. The arbitrators' statement was equivalent to a promise to state a case for the opinion of the Court, which it is admitted, they had power but were not obliged to do.

The applicants having full confidence in their contention would naturally pay little or no further attention to the evidence directed to shew the increased value of the lands by reason of the construction of the railway. In the result the arbitrators apparently took this increased value into their consideration, but no two of them ever agreed as to the amount of damage or the amount of increased value but considered that the increase more than off-set the damage and at the request of the company gave an award of $1 for damages.

If their award stands the applicants are deprived of the opportunity to obtain the opinion of the Court as to the admissibility of the disputed evidence which the arbitrators in effect told them should be preserved to them by the form in which the award would be given.

In other words the applicants have been misled—unintentionally of course—by the arbitrators and I think that amounts to such misconduct as enables the Court to set their award aside. If the company's present contention is accepted, the applicants have no remedy whatever no matter how great an injustice has been done to them, and the letters of His Honour Judge Lampman, who was the third arbitrator, indicate that there was no intention of doing this.

There may be ample misconduct in a legal sense to permit the Court to set aside an award, even when there is no ground for imputing the slightest improper motive to the arbitrators, and illustrations of this are to be found in Russell on Awards, 9th ed., p. 367. See also 1 Halsbury's Laws of England, 466, sec. 979, where under the English Arbitration Act, 1889, it has been held to be misconduct for an arbitrator to make an award after he has been asked to state a special case.

It may be added that in order to comply with sec. 198 of the Railway Act [R.S.C. 1906, ch. 37], it appears that the arbitrators should ascertain the amount of damage and the amount of benefit, otherwise how can they "set-off" as the statute requires "such increased value" against the damage.

If the award fail to decide on all matters referred for arbitration, whether such omission appears on the face of the award or by affidavit, the Court will set the award aside: Russell on Arbitration, 9th ed., p. 370 and cases there cited; see also *In re Marshall and Dresser*, 12 L.J.Q.B. 104, where a disputed amount of money was left unascertained.

Had it not been for the arbitrators' promise there would have been no redress for there would have been no legal misconduct and the parties would be bound by their findings of fact and rulings of law.

Mr. MacNeill referred to a great many cases and particularly *In re Doborer and Megaw Arbitration*, 34 Can. S.C.R. 125, but more fully dealt with in the judgment of Mr. Justice Martin

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in the Court appealed from, 10 B.C.R. 48; also *Duke of Buccleuch* v. *Metropolitan Board*, L.R. 5 H.L. 418, but these cases are, I think, quite different in principle from that before me.

As there does not appear to be any authority to refer the matter back to the arbitrators, there will be an order setting aside the awards in all the cases.

Awards set aside.

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Re ST. BONIFACE BY-LAW.

(DECISION No. 2.)

Manitoba King's Bench, Robson, J., in Chambers. February 20, 1912.

1. MUNICIPAL CORPORATIONS (§ II C 3—60)—PROCEEDINGS TO QUASH A CITY BY-LAW—AFFIDAVIT STATING GROUNDS ON INFORMATION AND BELIEF ONLY—INQUIRY.

Where a city charter makes provision for a judicial inquiry as to the probable grounds for a motion to quash a by-law of the municipality, the order for an inquiry may be made upon an affidavit of information and belief, if it seems likely that facts will be elicited on the inquiry bearing upon the facts alleged.

2. ELECTIONS (§ II B 2—47)—SECRECY OF BALLOT—VOTING ON CITY BY-LAW—INQUIRY ON PROCEEDINGS TO QUASH.

Where a judicial inquiry as to the probable grounds for quashing a municipal by-law is authorised under a city charter and provision is made by the same charter for voting on the by-law by ballot and that no person shall be compelled to say how he voted, the inquiry must take place subject to the like restriction.

[*Re Orangeville*, 20 O.L.R. 476; *Reg.* v. *Saunders*, 11 Man. R. 563; *Re Shoal Lake*, 20 Man. R. 36, specially referred to.]

APPLICATION for an order for an inquiry to be made before the County Court Judge of St. Boniface, concerning any probable grounds that may exist for an application to quash by-law No. 800 passed by the council of St. Boniface. For the previous decision in this case, see *Re St. Boniface By-law (decision No.* 1), 1 D.L.R. 221.

The order was granted.

A. Dubec, for applicant, Theo. Bertrand.

H. P. Blackwood, for city of St. Boniface.

ROBSON, J.:—There is now pending an application by Theophane Bertrand, under section 517 of the St. Boniface city charter to quash by-law No. 800, passed by the council of that city. The city has opposed the application. I am asked by the applicant to direct, under section 521 of the charter, that there be an order for an inquiry before the County Court Judge of St. Boniface concerning any probable grounds that may appear to exist for the motion.

It is objected on behalf of the city that no such grounds have been so far shewn in that the only material is an affidavit of the applicant as to certain of those grounds, based on information and belief. But the very reason for the investigation is

that direct proof of the facts may not be otherwise available. It is, I think, sufficient for the purpose that it appear reasonable to suppose that the inquiry will elicit facts bearing upon probable grounds alleged in support of the application.

The inquiry will be directed as to all the grounds mentioned in clauses (*b*), (*c*), (*d*), (*e*), (*f*), (*g*), (*h*), of the applicant's affidavit* but section 154 of the charter must be observed—that is to say, no person shall be asked how he voted. See *Re Orangeville*, 20 O.L.R. 476; *Reg.* v. *Saunders*, 11 Man. R. 563; *Re Shoal Lake*, 20 Man. R. 36, at p. 40.

The costs of the investigation shall be costs in this proceeding, and the inquiry is ordered on the applicant's request only on that condition, to which he will assent by taking the order.

The order will provide as to notice of the inquiry and otherwise as in section 521 mentioned.

Order for inquiry.

*The grounds mentioned in the affidavit of the applicant and referred to in the above judgment are as follows:—

(*b*) Because it has not received the assent of the legal qualified electors of the said city in accordance with the provisions of the said city charter.

(*c*) That the passing of said by-law has been procured through and by violation of the provisions of the several sections of the city charter.

(*d*) That several electors in number sufficient to change the result of the said voting have, as I am informed and verily believe, voted at a poll different from the poll at which they were entitled to vote on said by-law contrary to the provisions of said city charter.

(*e*) Because several electors in numbers sufficient to change the result of the said polling, as I am informed, and verily believe, voted more than once upon the said by-law.

(*f*) Because the deputy returning officers of Polls Numbers 2 and 3 did not as required by the said city charter immediately after the close of their respective polls count the ballots cast thereat.

(*g*) That the total of votes returned is largely in excess of the vote recorded in the poll book.

(*h*) That the return of the deputy returning officers for polls numbers 2 and 3 to the returning officer or the certificates of said returns to the returning officer are incorrect and from inquiries I have made I verily believe that the thirty-nine electors qualified to vote thereat voted against the by-law in poll No. 2, instead of nine as certified by the returning officer, and in poll No. 3 at least fifty-five instead of thirty-one as certified by the returning officer.

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H. C. J. 1912

Mar. 1.

GOODFRIEND v. GOODFRIEND.

Ontario High Court. Trial before Middleton, J. March 1, 1912.

1. DIVORCE AND SEPARATION (§ V A—45)—ACTION FOR ALIMONY—DESERTION BY HUSBAND.

The conduct of the husband in removing and taking up his residence with some of his own relatives with whom his wife is not on good terms and cannot reasonably be expected to reside, amounts to desertion on his part sufficient to found an independent action for alimony if he fails to provide for her maintenance.

[See also Eversley on Domestic Relations, 3rd ed. p. 466.]

2. DIVORCE AND SEPARATION (§ V C—55)—ALIMONY—ALLOWANCE PROPORTIONATE TO HUSBAND'S INCOME—WIFE'S SEPARATE EARNINGS.

The general rule in fixing permanent alimony in an alimony action is that the wife is entitled to one-third of the husband's income subject to deduction in respect of any independent separate income the wife may have apart from her own earnings.

3. DIVORCE AND SEPARATION (§ V C—58)—ALIMONY ACTION—FIXING PERMANENT ALLOWANCE—HUSBAND'S EARNING POWER SUSPENDED THROUGH ILLNESS.

Where the husband is incapacitated by illness from earning anything, the wife's right of action for alimony is not to be based upon his former increased income which included earnings during health, but upon his present income from any source; nor can the corpus of his estate be charged with the deficiency required for the wife's maintenance.

ACTION for alimony, tried at Kingston on the 28th February. Judgment was given for the plaintiff.

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

J. L. Whiting, K.C., for the defendant.

MIDDLETON, J.:—The plaintiff and defendant were married on the 28th October, 1907. The plaintiff is thirty-six years of age and her husband forty-eight. There is no issue of the marriage. The husband owns a farm worth $3,500, unincumbered, and the usual stock and cattle.

In the spring of 1909, the defendant was attacked by paralysis. He became, and still remains, utterly unable to work. His condition is said to be slightly improving, but it is as yet uncertain whether he will ever be able to do anything.

The plaintiff did her best to face the situation in which she found herself with her invalid husband, but in the fall of 1909 she realised that it was impossible to continue farming, as she had not the physical strength and could not afford help. Some of the farm chattels had been sold in the meantime, and she made up her mind that the best thing was to sell the remaining stock, etc., and move to the village of Gananoque, where she would rent a house and take in boarders. In this way she hoped to be able, with the assistance of the rent of the farm, to maintain herself and her husband. The husband's condition at this time prevented him from taking any active part, but he appears to have concurred in all that his wife was doing.

A house was rented in the village, the farm was rented, and when the time for moving came the furniture was taken to

Gananoque. The husband desired to remain for a few days with his father, mother and sister, who lived on an adjoining farm; and the wife left him, understanding that he would follow her in a few days. He did not come, and she has made various attempts to induce him to move to the village, but he prefers to stay where he is. It is said that he is induced to adopt this course by his relatives, and that in his enfeebled condition he has become subject to their domination. On his behalf it is said by his counsel that he prefers to stay upon a farm, that he has been brought up and lived all his life upon a farm, and that he does not think his chance for recovery would be as good if compelled to live in the village.

There is no evidence to indicate that the husband and wife cannot live happily together. It does appear that the wife and her sister-in-law cannot agree. It is entirely out of the question for the wife to live with her husband where he now is.

At the trial I went out of my way to try and bring about a settlement; but neither party would give way, and each asserted his or her right; so that I am compelled to deal with the problem thus presented, in accordance with the strict rights of the parties, trusting that in the end good sense may prevent what I feel would be a disastrous result.

At the time of the removal to Gananoque, all outstanding liabilities were paid, and the wife then found herself in possession of $376, which included $90 rent of the farm for the first year. She used a portion of this $376 in furnishing the house; and she has from time to time encroached upon what remained, so that now this fund is entirely exhausted. She has been keeping four boarders, and has not been able to make sufficient to maintain herself without resorting to the capital fund. The husband has received the second year's rent of the farm, $140, and apart from this he has been maintained by the charity of his relatives.

When asked her plans for the future, the plaintiff said that she desired to have her husband live with her in the village. This would necessitate getting rid of two of the boarders. She thinks that with the rental of the farm and the profit from the two remaining boarders she would be able to maintain her husband, who can do nothing for his own maintenance. It is quite obvious that she is mistaken in this, and that the result will be that the farm will be sold or incumbered and will ultimately be lost. It seemed to me that she would have been wiser if she allowed her husband to be maintained by his father until it could be ascertained whether he would ever be able to take up farming again; but she is not ready to assent to this.

I think that the plaintiff has done nothing to disentitle her to her rights, and that she has a right to be maintained by her

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husband. I think his conduct amounts to a desertion, and that he has no right to take up his own residence in a place where his wife cannot go, and then tell her to maintain herself.

I have not been referred to any case at all like this in its circumstances, and I have not been able to find any. The general rule is, that the wife is entitled to one-third of the income of the husband. His income will, of course, include his earnings. If the wife has an independent income, then this is to be taken into account in making her allowance; but I can find nothing to warrant the statement that the wife's share of the income is to be cut down by reason of her own earning capacity. Nor can I find anything that indicates that where the husband is by illness incapacitated from earning, the wife is entitled to resort to the corpus of his estate for her maintenance. I, therefore, conclude that the most I can give the wife, under the circumstances, is one-third of the rental of the farm, say, $50 per annum. This should be paid to her quarterly. I do not think that any allowance should be made for arrears, because since the separation she has received and spent $376, while her husband has only received $140.

The wife is also entitled to her costs; but I am told that the litigation has been conducted very inexpensively, and I feel sure that the plaintiff's solicitor will not feel himself aggrieved when I fix the costs at $75—a sum which is quite inadequate as indicating the value of his services rendered, but which will, I fear, bear all too heavily upon the unfortunate defendant.

I do not desire that there should be any proceeding taken which would bring about a sale of the farm. That at the present time would be disastrous to both parties. I will, therefore, listen favourably to any application for a temporary stay of execution for these costs if payment cannot be arranged between the parties. It goes without saying that this allowance to the wife must be regarded as in the nature of a temporary arrangement only; and that, if the husband recovers and does not then make adequate provision for his wife, she will be at liberty to apply to a Judge in Chambers for an increased allowance. At present, there is nothing to indicate that, if the husband is fortunately restored to health, he will not make a home for his wife.

Judgment for plaintiff.

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Feb. 28.

Province of Quebec, Court of Review, Sir Melbourne Tait, C.J., Tellier and Dunlop, JJ. February 28, 1912.

BROKER (§ II B—16)—REAL ESTATE AGENT—COMMISSION—DEFAULT OF PRINCIPAL TO COMPLETE SALE.

Where a real estate agent procures a written offer of purchase made in good faith by a person able and willing to carry out the same of which written offer the owner signs an acceptance and the offer contains a stipulation that the owner shall pay a certain percentage "provided he accepts the offer," the agent's mandate is fulfilled and the commission earned, although the owner declines to carry out the sale; so far as concerns the agent's right of action for his commission, the signing of the agreement under private signature is an acceptance of the offer although his principal refuses to complete the sale.

[*Lighthall* v. *Caffrey*, 6 L.N. 202; *Thomas* v. *Merkley*, 32 L.C. Jur. 207; *Gohier* v. *Villeneuve*, R.J.Q., 6 S.C. 219; *Brown* v. *McDonald*, R.J.Q. 6 S.C. 491; and *Massicotte* v. *Laroie*, R.J.Q. 40 S.C. 258, specially referred to.]

THIS was an appeal from the decision of Guerin, J., dismissing plaintiffs' action for commission with costs.

The appeal was allowed.

Messrs. *S. W. Jacobs*, K.C., and *R. G. DeLorimier*, K.C., for plaintiffs, appellant.

Paul St. Germain, for defendant, respondent.

The opinion of the majority of the Court was delivered by DUNLOP, J.:—This case is inscribed in review by the plaintiffs from the judgment of the Superior Court rendered on the 1st December, 1910, dismissing plaintiffs' action with costs.

The plaintiffs by their declaration in substance allege: that they claim $330.50; that, on the 21st January, 1909, by writing *sous seing privé* (under private signature) (plaintiffs exhibit No. 1)—the defendant authorized the plaintiffs to sell his property, No. 12 Park Avenue, at Montreal, for the price of $13,500, the defendant to pay plaintiffs a commission of 2½%; that, by another writing *sous seing privé*, dated 12th February, 1909, Ex. P. 2, a person called N. Banks agreed to purchase the said property for the price of $13,500; that the defendant wrote at the foot of the writing signed by Banks the following words: "I accept this offer with these conditions;" that defendant now refuses to give a title to Banks, without cause; that on the 15th, and 17th February, 1909, the defendant acknowledged to owe and promised to pay this sum of $330.50, which the plaintiffs deserve and which they have legitimately earned.

The defendant pleads in substance that he admits having signed the writing, Ex. P. 1., that the said Banks was never a serious purchaser and that to the knowledge of plaintiffs, but the plaintiffs had gotten him to sign the writing, Ex. P. 2, on the pretence that they had found a purchaser and for the purpose of obtaining the payment of their commission; that it is false

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that defendant refuses to pass a title to Banks without cause; that Banks has never offered to defendant to pay or to pass a title; that, on the contrary, on the 17th February, 1909, he declared in writing that he was incapable of carrying out his obligations—Ex. D. 1., and he denied having promised to pay on the 15th and 17th February, 1909, the sum claimed, and in other respects he denies the allegations of the plaintiffs' declaration.

The proof establishes that, by the writing of the 21st January, Ex. P. 1., the defendant authorized the plaintiff to sell his house, No. 12 Park Ave., in the city of Montreal. This authorization to sell has on its face the following obligations:

(*a*) Price, $13,500;

(*b*) The assumption of the mortgages amounting to $9,500.

(*c*) To pay cash $4,000, the balance of the price of sale.

(*d*) To assume all the taxes and other obligations mentioned in the deed of sale from Berlind to Meyer, the defendant;

(*e*) To pay a commission of 2½% provided the offer of the plaintiffs should be accepted.

This authorization was given for a period of three months.

On the 12th February, 1909, about 20 days after the said authorization had been given by the defendant to plaintiffs, the latter brought to the defendant an offer made by N. Banks, one of their clients, to purchase the property in question from the defendant on the following conditions:

(*a*) Price, $13,500.

(*b*) To assume the mortgage $9,500;

(*c*) To pay cash $1,000 on the passing of the title;

(*d*) To pay the balance of the price of sale in instalments of $150.00 per annum with interest.

Now it will be seen that this offer was duly accepted by defendant the same day in the following terms:

Montreal, 12th Feb., 1909.

I accept this offer with this condition.

(Signed) W. Meyer.

It appears to me after a careful consideration of the evidence, that the offer made by Banks had been accepted and that the commission of 2½% mentioned in the authorization to sell, of date the 20th January, 1909, became due. The following terms as to the commission:—

The commission to be 2½%, provided I accept their offer.

do not seem to be susceptible of any other interpretation. It was not plaintiffs' business to see to the completion of the transaction between defendant and Banks, and if the defendant has deemed fit, without the knowledge of plaintiffs, to rescind the acceptance made by him on the 12th February, 1909, this cannot, in my opinion, free him from the obligation to pay the

commission of 2½%, which he had promised to pay on the acceptance of any offer, made through the plaintiffs, to purchase his property on Park Avenue.

The evidence discloses that both the defendant and the purchaser Banks were trying from the first to get out of the sale, and finally, without the knowledge of plaintiffs, to rescind the acceptance made by the defendant on the 12th February, 1909. This cannot, in my opinion, affect plaintiffs' right to collect their commission on the sale in question. Moreover, the evidence shews that defendant was willing to pay the commission in instalments one time, but subsequently he refused so to do and repudiated plaintiffs' claim in toto.

In my opinion, the sale was completed by the acceptance of the offer brought by plaintiffs to defendant. The purchaser Banks admits that he purchased the property in question and that he was able to pay the $1,000 which was payable in cash. If there were no sale, what was the necessity of rescinding it? Why does defendant say in his letter to Banks of 17th Feb.: "I hereby take back the property in question . . ." if he had never parted with it?

In support of the conclusion I have arrived at—that the sale of the property was completed by the acceptance of the offer brought by plaintiffs to defendant—in addition to the authorities referred to in plaintiffs' factum, I would refer to the case of *Lighthall* v. *Caffrey*, 6 Legal News 202, decided by the Honourable Mr. Justice Taschereau in the Superior Court on the 26th June, 1883, where it was held:

> Where a broker or agent has negotiated a sale of property between his principal and a purchaser whom he has procured, and an agreement for carrying out the transaction is entered into between the parties, he is entitled to his commission, notwithstanding that the agreement may fall through by reason of bad faith in one or other of the parties to the contract.

In rendering judgment, the Honourable Mr. Justice Taschereau held that there was no proof that Cameron was not in a position to deliver his property as agreed upon, or any of the things complained of, and even if there were, that, according to the well-established jurisprudence of this country, and according to article 1722 of the Code above cited, the commission of the plaintiff was earned when the parties whom he had brought together entered into the agreement and the amount was fixed by the acknowledgment of the defendant himself.

The agreement referred to reads as follows:—

> Montreal, 15th September, 1878.
>
> Having to-day made arrangements to sell the mines to the said J. A. Cameron, for $20,000 upon the deed being completed, I am to settle with you for $5,000.00 as your commission, the thousand dollars to be arranged with Mr. Constant out of that sum.

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This, to my mind, is a very similar case to the present one. Numerous authorities in this case were cited by counsel for the plaintiff and are found at page 203 of this report.

I would also refer to the case of *Thomas* v. *Merkley*, 32 Lower Canada Jurist, page 207. In this case, as appears by the report, M. employed T. to sell a certain property belonging to M. T. advertised the property and negotiated with several persons, one of whom, G., he sent to M. M. shortly afterwards notified T. that they could not agree on a price and that he wished to withdraw the property from T.'s hands and occupy it himself. T. thereupon rendered him his account for advertising his property for sale, which M. paid. Two days afterwards, M. sold the property to G., upon which T. brought an action to recover his commission of 2½% on the price. Held, that M. was liable to T. for the said commission on the price of sale. This judgment was given by the Hon. Mr. Justice Jetté, and the formal judgment of the Court, cited at pages 208 and 209, strongly supports the opinion that I have formed—that a party is entitled to his commission when he furnishes a purchaser willing to pay the price agreed on for the property between defendant and him.

I would refer also to article 1722 and 1472 of the Civil Code.

As I said before, I am of opinion that the plaintiffs have established their right to a commission and that they were the effective and efficient cause of the sale, and that, under the circumstances of this case, the relations of buyer and seller had been brought about between Banks and the defendant through the efforts of plaintiffs.

In addition to the cases I have already cited I would refer to the case of *Gohier* v. *Villeneuve*, R.J.Q. 6 S.C. 219, decided in the Court of Review on the 19th day of September, 1894.

It will be seen from the report of this case, that the defendant inscribed in review from the judgment of the Superior Court granting plaintiff the amount of his commission sued for, and by his factum contended that there had been no sale within the meaning of the agreement, but merely a promise of sale to Mr. E. M. St. John, of date 16 February, 1893, and that, at the date of the institution of the action, the defendant was still proprietor, there being no deed passed and defendant had not received the price.

It will be seen that this pretension is very similar to the one raised by the defendant in the present case. But the judgment of the Court of Review unanimously confirmed the judgment of the Superior Court granting the plaintiff his commission.

I would also refer to the case of *Brown* v. *McDonald*, R.J.Q. 6 S.C. 491, where it was held:

> Where real estate agents effect the sale of the property placed in their hands but the sale is not carried out owing to a defect in the title, they are entitled to their usual commission.

I would also refer to the case of *Massicotte* v. *Lavoie*, R.J.Q. 40 S.C. 258, decided in the Court of Review, where it was held:

> That, in an agreement between the owner and an agent for sale of a business for a commission to be paid out of the first money received after completion of the bargain, a covenant "that the right (exclusive)" is given for eight days, it does not mean that the sale must be effected, but that the purchaser be found within that delay. So if the agent, within two or three days, finds a purchaser who afterwards buys and acquaints him with the willingness of the owner to sell, he is entitled to his commission, though the principal parties only meet and perfect the transaction after the expiration of the delay.

In my opinion, the evidence clearly shews that plaintiffs have established their claim and the material allegations of their declaration, and that the defendant has failed to prove his defence. I am, therefore, of opinion that there was error in the judgment of the Superior Court dismissing plaintiffs' action, and that the judgment of the Superior Court should be reversed and plaintiffs' action maintained and judgment given against defendant for the full amount sued for, to wit $330.50, and interest and costs in both Courts.

TELLIER, J., dissented on the ground that plaintiffs had obligated themselves to sell the property, whereas they had contented themselves with obtaining a promise to buy and sell. Under art. 1476 of the Civil Code, which differs on this point from art. 1589 of the Code Napoleon, "a simple promise of sale is not equivalent to a sale, but the creditor may demand that the debtor shall execute a deed of sale in his favour according to the terms of the promise, and in default of so doing, that the judgment shall be equivalent to such deed and have all its legal effects; or he may recover damages according to the rules contained in the title of "Obligations." He held that plaintiffs could be entitled to a commission only in the event of a sale. There never was a sale. There should be no commission.

JUDGMENT OF THE COURT.

The appeal is allowed and plaintiffs' action sustained, Tellier, J., dissenting.

Appeal allowed.

ONT.

H. C. J.

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Jan. 11.

NORTHERN CROWN BANK v. NATIONAL MATZO AND BISCUIT CO.

Ontario High Court, Middleton, J., in Chambers. January 11, 1912.

TRIAL (§ VII—340)—PRELIMINARY ISSUE—EXISTENCE AND VALIDITY OF SETTLEMENT AGREEMENT PLEADED IN BAR—DISCRETION TO ORDER PRELIMINARY TRIAL.

Where a settlement between the parties is pleaded in bar to the action and the remaining issues would involve the taking of depositions under commission in a distant country at very large expense, the Court will exercise its discretionary power to order a preliminary trial of the issue as to the agreement of settlement alleged.

MOTION by the defendant Garfunkel for an order directing a preliminary trial of an issue as to whether there has been a settlement or not, and whether the same should be given effect to in bar of the action.

Ont. Consolidated Rule 531 of 1897, is as follows:—

Subject to the provisions of the Judicature Act, 1895, and of these Rules, the Court or a Judge may order that different questions of fact be tried by different modes, or that one or more questions of fact be tried before the others, and may appoint the place or places for trial.

The order was made.

W. J. McWhinney, K.C., for the defendant Garfunkel.

F. Arnoldi, K.C., for the plaintiffs.

MIDDLETON, J.:—The circumstances in this case are very unusual, and, I think, justify the very exceptional order sought.

The issue as to the settlement is quite distinct, and is one as to which an appeal is not likely, and the burden and expense of a commission to Syria are serious, quite apart from the delay.

At the hearing of the motion I suggested a course that still commends itself to me. The defendant was ready to agree to this; and, if the plaintiffs now assent, an order can be made in accordance with this suggestion.

I think the action should go to trial, and the issue as to settlement should be first dealt with; and, if this does not end the action, the remaining issues should then be tried, reserving to the defendant the right to have a commission to take the evidence of Weinstock before judgment is pronounced—if, in the light of the facts as they develop at the hearing, his evidence appears to be material. I suggest this because there are three contingencies which may make his evidence unnecessary: a finding in the defendant's favour on the issue as to the settlement; a finding in his favour on the legal question as to the form of the document; or the evidence may so shape itself that Weinstock cannot help by his testimony.

Whichever order is taken, costs will be in the cause.

I may say that I have discussed the matter with the Chief Justice of the King's Bench, and he agrees with what is proposed.

Motion allowed.

HAM v. CANADIAN NORTHERN RAILWAY CO.

MAN.

K. B. 1912

Mar. 1.

Manitoba King's Bench. Trial before Prendergast, J. March 1, 1912.

DAMAGES (§ III O—306)—MEASURE OF COMPENSATION—COLLISION OF CARS —COMBINED PHYSICAL AND MENTAL SHOCK—NEURASTHENIA.

Where as a result of a collision between a railway train and a street car due to negligent operation of the train a passenger on the street car was thrown into a subway, a verdict for substantial damages may be given against the railway company whose negligence caused the injury, although the only substantial injury proved was that the plaintiff had in consequence suffered from traumatic neurasthenia and caused the plaintiff to be subject to insomnia and nerve troubles incapacitating him for his usual occupation, although such result is attributable to the mental shock as well as to the physical.

[*Victorian Railways Commissioners* v. *Coultas* (1888), 13 A.C. 222, and *Dulieu* v. *White*, [1901] 2 K.B. 669, considered. *Geiger* v. *G.T.R. Co.*, 10 O.L.R. 511, and *Henderson* v. *Canada Atlantic*, 25 O.A.R. 437, specially referred to.]

TRIAL of action for damages for personal injuries charged as being due to defendant's negligence in the operation of a railway.

Judgment was given for the plaintiff.

Messrs. *P. C. Locke* and *C. H. Locke*, for plaintiff.

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

PRENDERGAST, J.:—The plaintiff alleges that he received personal injuries as a result of the defendants' negligence in running one of their trains, and claims $10,000.

The particulars filed of those injuries, besides stating that the plaintiff was bruised and shocked, set out further that "since the date of the accident the plaintiff has been a nervous wreck, suffering from traumatic neurasthenia, being unable to sleep at night, and being unable to carry on any business or do any work."

The defendants, by their statement of defence and admissions filed later, take the position that while they were negligent as alleged, such negligence did not occasion the plaintiff any bodily injury, and that as to the nervous injury complained of they are not liable at law for the same.

On the day of the accident, the plaintiff was seated to the right at the rear end of an open trailer propelled by a motor car of the Winnipeg Electric Railway Company moving southward on that company's tracks on Pembina Street, when having reached the intersection of Rosser Avenue, which is a point where the street railway track is diagonally crossed by a line of the defendants, a train of the latter moving westward at a rate of 15 to 20 miles an hour ran into the said street railway motor car—the circumstances of the accident being such (as admitted by the defendants) as to constitute negligence on their part. A subway was then being excavated at that place for the purpose of allowing the street railway to run underneath Rosser Avenue and the Canadian Northern Railway line; but at the time, the street railway track which had been deflected pending the prosecution

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of the work, was kept running on the street level along and quite close to the east edge of the excavation which was at that point about 14 feet deep. The sides of this excavation were cut almost perpendicularly, but were supported by timbers set at an angle of about thirty-five degrees to prevent in the meantime the earth from caving in.

By the force of the collision, the street railway motor car, which was struck square, was wrenched from the trailer, carried some distance forward of the engine and crushed to pieces—which resulted in the loss of one life and injuries to others; while the trailer, receiving the impact at its forward end where it was coupled to the motor car, was swerved around on its hind wheels and fell or slid head-first along the timbers to the bottom of the excavation, where it remained rear end upwards and in a practically vertical position, except for the incline of the timbers.

The plaintiff who, as stated, was to the right on the last seat of the open trailer, says that the last he remembers before the collision is that he was watching a pile-driver working down in the subway, and that the first that he realized after this was that he was at the bottom of the excavation. He must have been thrown out of his seat to the right by the swerving of the trailer and then have fallen or slid down along the car and timbers to the bottom. The length of the car was given as 24 or 26 feet, but the plaintiff says that his fall was about 20 feet. It does not appear how many passengers were with the plaintiff on the trailer, but he says that the conductor and a boy were also hurt.

The plaintiff at all events got on his feet, called out, looked up and saw the train. He says he felt all shaken up, sore and nervous, and that it had "kind of knocked the senses out of" him. He, however, crawled up the bank along the side of the trailer, looked around and realized the nature and extent of the accident. The motor car was all smashed by the defendants' train. There was the dead body of a lady wedged in under the pony trucks of the engine, and a man very seriously injured was lying in the debris. The plaintiff apparently looked on this scene for an hour or three-quarters of an hour; then he took a street car and went to his home which was less than a mile further south.

After arriving home, the plaintiff had supper with his wife and related to her the circumstances of the collision, but does not seem to have complained of any special injury except that he had been shaken up. In the evening, upon retiring he realized that there was an abrasion on his right leg and a sore spot on his head; but these were the only marks or visible wounds if they may be so called, and the evidence shews that they were of no gravity whatsoever in themselves.

The plaintiff says that he had but little sleep that first night, and still less the following; that he felt more and more uneasy and nervous; that on the third day, twitching and shooting pains

down his back became so violent that he went to consult a medical practitioner (Dr. Clark); that notwithstanding medical aid, he steadily grew worse; that he lost 40 lbs. of flesh and grew weaker every day; that he suffered from insomnia and impaired memory; that he became unable to exert himself physically; that his walking has become so uncertain that he has to use a cane; that he is unable to work at his trade, which is that of a printer, as he cannot raise his hands without starting violent pains down his spine.

At the time of the trial, which was about six months after the accident, he was still under treatment of Dr. Clark, who had then attended on him forty or fifty times. Two months after the accident, he was also examined by Dr. Lehmann acting under instructions from the defendants, and, a few days before trial, by Dr. Stevenson, at his own request. These three medical practitioners gave evidence at the trial, being called by the plaintiff. No evidence was tendered for the defendants.

The plaintiff's contention is that he suffers from traumatic neurasthenia—that is, neurasthenia caused by shock either purely mental or both physical and mental.

I think the plaintiff has fully established that he suffers from that form of disease, whatever may be said later as to whether the shock that caused it was purely mental or both physical and mental.

Of course, as shewn in evidence, where there are no visible wounds or apparent lesions of tissue, or practically none as in this case, the medical practitioner must depend very largely, and at times almost wholly, upon the patient's history of the case for his diagnosis of the disease.

The defendants contend in this respect that the plaintiff has been malingering, and that all that he says of his condition and its connection with the accident is invention on his part. But the medical evidence establishes that although there are certain objective symptoms of the disease which can be simulated, there are others that cannot, to the eye of the experienced practitioner. Among the latter is the neurasthenic tremor, quite distinguishable from the alcoholic tremor which the defendants say the plaintiff may have been suffering from. There are also the exaggerated reflexes which lack the usual response and spontaneity when shammed, and the characteristic appearance resulting from the general condition. The plaintiff exhibited all those essential and unmistakable symptoms, besides others less conclusive, especially when taken singly, but also very material as a whole.

Dr. Clark, who saw him forty or fifty times as stated, says that he watched him very closely, and that he is convinced that the symptoms could not be simulated. And Dr. Lehmann says,

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not only that he suffers from neurasthenia, but also that he is rather a severe type and a marked case of this ailment.

I find then that the plaintiff suffers from neurasthenia caused by shock; and from the plaintiff's uncontradicted evidence of the collision and his falling down the subway, and that of Dr. Clark shewing his condition three days after, together with the defendants' admissions as far as they go, the conclusion is unavoidably reached that the disease was the direct result of the accident.

The defendants urge further that as the only visible physical injuries (abrasion of the leg and swollen spot on the head) were altogether insignificant, the shock which caused the neurasthenic condition was purely mental as more probably brought on by fright and the horror of the scene of destruction near which he stayed for three-quarters of an hour after the accident, and that the plaintiff cannot recover in law for injuries resulting from a purely mental shock.

The defendants rely as to this upon *Victorian Railways Commissioners* v. *Coultas* (1888), 13 A.C. 222, 57 L.J.P.C. 69, 58 L.T. 390, heard by the Privy Council, and which seems to support the proposition. This case has been the subject of considerable, and generally unfavourable, comment. It is reviewed at length in Beven on Negligence, 2nd ed., p. 67. [Beven on Negligence, 3rd ed., pp. 66-75.] In *Dulieu* v. *White*, [1901] 2 K.B. 669, the Court refused to follow it; and in *Pugh* v. *London B. & S. C. Ry.*, [1896] 2 Q.B. 248, and *Wilkinson* v. *Downton*, [1897] 2 Q.B. 57, it is clear that the Court, although basing its judgments on distinctions, discountenances the decision.

It was also disapproved in the Irish case of *Bell* v. *G. N. Ry. Co.*, 26 Ir. L.R. 428.

In Canada, it has generally been considered binding, as in *Geiger* v. *G. T. Ry. Co.*, 10 O.L.R. 511, and *Henderson* v. *Canada Atlantic*, 25 O.A.R. 437, and I should equally feel bound by that decision of the highest Court of Appeal for this country.

This is, however, not material in my opinion. The proposition of law there stated does not seem to me to have any application in the present case, as the expert evidence is to the effect that although the visible wounds or injuries were insignificant in themselves, still the shock which caused the neurasthenic condition was not only mental, but also physical.

I have detailed at length the circumstances of the accident: the collision of the engine with the motor car, the swerving of the latter, its being precipitated down the embankment and the plaintiff's fall to the bottom of the subway. It is plain that in such circumstances, the violence of the physical shock cannot be measured alone by the gravity or insignificance of the superficial marks or abrasions. At all events, with what personal knowledge they had from attending and observing the plaintiff, and

the circumstances of the accident being fully laid before them, the three medical experts (one of whom examined the plaintiff on the defendants' behalf, although appearing as a witness for the plaintiff) all give it as their opinion that the shock which caused the diseased condition was both physical and mental, and beyond this I do not see that it is necessary or incumbent for me to go.

The plaintiff should then recover.

He is fifty years old, and his health was apparently good before the accident. He is a printer. He says he has of late years been earning about $85 a month, but there is evidence that his habits as a bread-earner have not been steady. One doctor said that his condition has not improved during the six months that elapsed between the accident and the trial, although it has not become worse; and another doctor said that while he is rather a severe type of traumatic neurasthenia, still in favourable surroundings, that is with rest, his nervous system would likely recuperate. There is also the costs of medical attendance to be taken into account.

On the whole, I would fix the damages at $2,000 for which there will be judgment for plaintiff, with interest since July 8th, 1910, and costs.

Judgment for plaintiff.

CRUCIBLE STEEL CO v. FFOLKES.

Ontario High Court, J. S. Cartwright, K.C., Master in Chambers.
February 21, 1912.

1. DEPOSITIONS (§ V—25)—EXAMINATION OF TRANSFEREES OF JUDGMENT DEBTOR—LANDS EX JURIS—ONT. C.R. 903.

Under the summary power conferred by Ont. Consolidated Rule 903 for discovery in aid of execution, an examination under oath may be ordered of a person to whom the judgment debtor has made a transfer of his property or effects "exigible under execution" but the rule is not to be interpreted as extending to an examination of the transferee as to a conveyance made by the debtor to him of lands situate in another province although such lands may be exigible under execution in that province.

2. EXECUTION (§ II—15)—EXAMINATION OF TRANSFEREE OF JUDGMENT DEBTOR—PROPERTY "EXIGIBLE UNDER EXECUTION"—ONT. C.R. 903.

Ontario Consolidated Rule 903 does not extend to authorize the summary examination of the transferee of a judgment debtor, although the transferee is within the jurisdiction if the sole property transfered was land outside of the jurisdiction and consequently not exigible under execution in Ontario.

[*Gowans* v. *Barnet*, 12 P.R. (Ont.) 330, specially referred to. See also *Canadian Mining and Investment Co.* v. *Wheeler*, 3 O.L.R. 210; *British Can. Loan and Investment Co.* v. *Britnell*, 13 P.R. (Ont.) 310.]

THE plaintiffs, as judgment creditors of the defendant, ob-

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tained an order under Con. Rule 903* for the examination of an alleged transferee from the defendant. On examination it appeared that the only transfer was of land in Manitoba. As to this the transferee declined to give any evidence, alleging that it is not "exigible under execution," within the meaning of the Rule. The plaintiffs moved to have him ordered to make full discovery.

Harcourt Ferguson, for plaintiffs.

J. H. Spence, for the alleged transferee.

THE MASTER said there was no contention that land in Manitoba is exigible under an execution issued in Ontario; nor was there any evidence that it is exigible in such a case under the laws of Manitoba. On this short ground, the motion fails and must be dismissed with costs, fixed at $20. See *Canadian Mining and Investment Co.* v. *Wheeler*, 3 O.L.R. 210. While Con. Rule 903 is, no doubt, to be construed so as to advance the remedy (see *Gowans* v. *Barnet*, 12 P.R. 330), yet this is only to be done so far as the fair meaning of the words will permit. To carry it to the length now suggested would be legislation, and not merely interpretation.

Motion dismissed.

*903. Where judgment has been obtained as aforesaid, the Court or a Judge, on the application of the judgment creditor, may order any clerk or employee or former clerk or employee of the judgment debtor, or any person, or the officer or officers of any corporation, to whom the debtor has made a transfer of his property or effects, exigible under execution, since the date when the liability or debt which was the subject of the action in which judgment was obtained was incurred, (or where the judgment is for costs only, since the commencement of the cause or matter) to attend at the county town of the county in which such person resides, before a Judge or officer authorized to take an examination under Rule 900, and to submit to be examined upon oath as to the estate and effects of the debtor, and as to the property and means he had when the debt or liability aforesaid was incurred, (or in the case of a judgment for costs only, at the date of the commencement of the cause or matter) and as to the property or means he still has of discharging the judgment, and as to the disposal he has made of any property since contracting the debt or incurring the liability, and as to any debts are owing to him. The examination shall be for the purpose of discovery only, and no order shall be made on the evidence given on such examination.

STERLING BANK OF CANADA v. LAUGHLIN.

ONT.

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Feb. 6.

Ontario Divisional Court, Boyd, C., Latchford, and Middleton, JJ.
February 6, 1912.

1. BILLS AND NOTES (§ III C—75)—DISCHARGE OF ENDORSER—ENDORSEMENT ON SALE OF BANK DRAFT—NOVATION ON PASSING CLEARING-HOUSE NOTWITHSTANDING SUSPENSION OF PAYING BANK.

When a bank draft is purchased from the holder by another bank which forwarded it to the place of payment and delivered it to the paying bank and permitted the latter bank to stamp it as their property in the course of settling balances at the clearing-house, the purchasing bank has, by so dealing with it, lost recourse against the party from whom it purchased the draft upon his endorsation thereof, and will be held to have surrendered the draft and to have accepted the liability of the paying bank for the clearing-house adjustment, although such liability was not in fact met by reason of the insolvency of and suspension of payment by the paying bank on the same day on which the draft was cleared through the clearing-house.

2. BANKS (§ IV D—120)—CLEARING-HOUSE BUSINESS—NOTICE TO PUBLIC.

The method of clearing-house dealings between banks whereby they form a voluntary association to adjust balances in lieu of separate presentation of maturing securities is not one of which notice is to be imputed to the public dealing with the bank, and unless there is evidence that the customer dealt with the bank subject to the usages of the clearing-house, such usages will not *per se* affect the customer's rights against the bank.

An appeal by the plaintiffs from the judgment of the Third Division Court in the County of Peel dismissing an action to recover the amount of a draft for $115.50 upon the Farmers Bank of Canada, in favour of the defendant, and indorsed by her to the plaintiffs. The plaintiffs paid the amount to the defendant; but, owing to the Farmers Bank of Canada stopping payment, the draft was not honoured when presented for payment through the Toronto clearing-house.

The appeal was dismissed.

Casey Wood, for the plaintiffs.

B. F. Justin, K.C., for the defendant.

The judgment of the Court was delivered by

BOYD, C.:—I think the judgment should not be disturbed. Treating this as an isolated transaction, the defendant is not in any way to blame. She sells the draft from the Farmers Bank and indorses it to the plaintiffs at Alton in order to receive its value. She knows nothing more of the transaction, and funds were then in the Farmers Bank available for its payment: but the plaintiffs failed to collect the amount from the Farmers Bank because of their failure to pay on the 19th December. She received the money on the 16th December, and the draft was forwarded to the Toronto office of the Sterling Bank on the same day, and was received at 8.30 a.m. on the morning of the 17th, too late to be sent to the clearing-house that day, which was Saturday. It went through the clearing-house at 10 a.m. on

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Monday, and was received by the Farmers Bank and stamped as their property on the 19th. This indicated a change in the relations of the two banks, which, I think, may be properly considered as exonerating the defendant from any liability to refund the money to the Sterling Bank. There is no evidence given that she is or was aware of or is to be bound by the dealings sanctioned as between the banks by their voluntary association in the clearing-house system. That is a matter not binding per se on the public unless it can be assumed or proved that the party sought to be charged has been dealing with the bank subject to the usages of the clearing-house. No such evidence was given in this case, and the inference to be drawn from what was in evidence was, that the Farmers Bank had become debtor to the plaintiffs for this instrument.

Appeal dismissed.

B.C.

C. A.
1912

Jan. 9.

TAYLOR (plaintiff, respondent) v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED (defendant, appellant).

British Columbia Court of Appeal, Macdonald, C.J.A., Irving and Galliher, JJ.A. January 9, 1912.

1. APPEAL (§ VII L 2—480)—REVIEW OF SECOND EXCESSIVE VERDICT—DAMAGES REDUCED ON APPEAL.

Where the damages awarded by the jury at the first trial were held to be excessive and the Court of Appeal had ordered a new trial and the result of the new trial was a verdict for a still larger sum, the Court of Appeal, upon an appeal from the second verdict, may itself fix the amount of damages instead of sending the case back for a third trial before a jury by virtue of its statutory powers.

[See Annotation to this case.]

2. APPEAL (§ VII L 2—475)—SETTING ASIDE VERDICT—EXCESSIVE DAMAGES.

To justify the setting aside of a verdict on the ground of excessive damages, the appellate Court must find that the damages are so excessive that twelve reasonable men could not have given them, or that the jury have disregarded some direction of the Judge or have considered topics which they ought not to have considered or have applied a wrong measure of damages.

[*Praed* v. *Graham*, 24 Q.B.D. 53 and *Johnston* v. *Great Western Ry.*, [1904] 2 K.B. 250, 73 L.J.K.B. 568, 20 Times L.R. 455, applied.]

APPEAL from the judgment on the second trial of the action with a jury on the ground of excessive damages.

The appeal was allowed and the damages reduced to a sum fixed by the Court of Appeal.

L. G. McPhillips, K.C., for appellants.

Messrs. *G. E. McCrossan* and *A. M. Harper*, for respondent.

The judgment of the Court was delivered by GALLIHER, J.A.:—This case came before us on appeal at the sittings held in Vancouver on November 24th, 1910. *Taylor* v. *British Columbia Electric Ry. Co.* (1911), 16 B.C.R. 109.

The jury at the trial awarded $15,000 damages which a majority of this Court held excessive, and the case was sent back for a new trial.

Upon the second trial, the evidence disclosed that the plaintiff was in practically the same condition as at the first trial, and that little or no improvement had taken place and that the chances for improvement in the future were slight. Upon this evidence the second jury awarded $17,500 damages.

From this verdict the defendants appeal, and the appeal was argued before us on the 27th of November, 1911.

In my opinion these damages are excessive, and as the case has already been twice tried it seems to me the better course to pursue is to proceed under marginal rule 869a of our Supreme Court Rules and reduce the damages instead of sending the case back for a new trial.

The plaintiff's age was 51 or 52 at the time of the accident, and he was employed as a blacksmith at $80 per month, and there is some evidence of a more or less unsatisfactory nature of his making extra money after hours, buying and selling cattle and waggons. There can be no doubt whatever from the evidence that the plaintiff was very seriously injured and can never fully recover and that he has suffered great mental and physical pain.

This is a case where no money compensation which a jury might award, could fully compensate the plaintiff for the injuries received, but it is not upon that principle juries should proceed in awarding damages.

I think we may assume from the evidence that there is not much probability of the plaintiff ever being able to earn anything in the future, and assuming that the jury took that view of the case, they would be entitled to take into consideration (in arriving at the amount of damages) the cost of medical attendance; the pain and suffering endured by the plaintiff (both mental and physical) the impairment of faculties; the probable length of time the plaintiff would have lived; the loss of earning power; and the burden of maintaining himself, having regard to his station in life.

In this view, and upon the evidence before us, I do not think that the jury could reasonably have awarded $17,500 damages.

I come to this conclusion after fully considering and approving of the rule laid down by Lord Esher in *Praed* v. *Graham*, 59 L.J.Q.B. 230, 24 Q.B.D. 53, considered and approved of in *Johnston* v. *Great Western Ry.* (1904), 73 L.J.K.B. 568.*

I would reduce the damages to $12,000.

Order reducing damages.

*See head-note 2 to this case summarizing the rule of law here referred to.

B.C.

Annotation

Reducing excessive verdict

Annotation—Appeal (§ VII L 2—480)—Appellate jurisdiction to reduce excessive verdict.

The statute establishing the British Columbia Court of Appeal transferred and vested in that Court all jurisdiction and powers civil and criminal of the Supreme Court of British Columbia and the Judges thereof sitting as a full Court. 7 Edw. VII. (B.C.), ch. 10, sec. 6.

The Supreme Court of British Columbia prior to the establishment of the Court of Appeal had original and appellate jurisdiction both civil and criminal for the province. 3 & 4 Edw. VII. (B.C.), ch. 15, sec. 9.

Every appeal from a final judgment, order or decree, is deemed to include a motion for a new trial, unless the notice of appeal expressly states otherwise. 3 & 4 Edw. VII. (B.C.), ch. 15, sec. 87(3).

Appeals are subject as to the notice and conditions thereof, to the Rules of Court for the time being in force. 3 & 4 Edw. VII. (B.C.), ch. 15, secs. 88, 108.

All appeals "shall be by way of *re-hearing* and shall be brought by notice of motion which shall specify the grounds of appeal. B.C. Rules (1906) 865.

The Court on appeal is declared by Rule 868 (B.C. Rules of 1906) to have power to draw inferences of fact and to give any judgment and make any order which "ought to have been made," and to make such further or other order as the case may require.

These powers may be exercised by the Court notwithstanding that the notice of appeal may be that part only of the decision may be reversed or varied, and such powers may also be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have appealed from or complained of the decision. B.C. Rules (1906), No. 868.

If upon the hearing of an appeal it appears that a new trial ought to be had, the Court may order the verdict and judgment to be set aside, and that a new trial shall be had. B.C. Rule No. 869 of 1906.

A special clause 5*a* to Order 58, marginal rule 869*a*, deals with appellate power in respect of excessive damages and is as follows:—

"5A. (869*a*.) Where excessive damages have been awarded by a jury, if the full Court is of the opinion that the verdict is not otherwise unreasonable, it may reduce the damages without the consent of either party instead of ordering a new trial."

This rule is to be considered as a departure from the doctrine of English law enunciated in *Jones* v. *Hough*, 5 Ex. D. 122, approved in *Prentice* v. *Consolidated Bank*, 13 O.A.R. 74, that where the jury find the facts the Court cannot be substituted for them because the parties have agreed that the facts shall be decided by a jury; but that where the trial is by a Judge alone the appellate Court has the same jurisdiction that he has and can find the facts whatever way they like. *Jones* v. *Hough*, 5 Ex. D. 122; *Read* v. *Anderson*, 13 Q.B.D. 781; *North British Co.* v. *Tourville*, 25 Can. S.C.R. 177; *Coghlan* v. *Cumberland*, [1898] 1 Ch. 704, 78 L.T. 540.

In *Belt* v. *Lawes* (1884), 12 Q.B.D. 356 (C.A.), it was held that the Court of Appeal had power, with plaintiff's consent, without ordering a new trial, to reduce the damages to such a sum as the Court would consider not excessive, and this decision was frequently acted upon by the Court of Appeal, but it was overruled by the House of Lords. *Watt* v.

Annotation *(continued)*—**Appeal (§ VII L 2—480)—Appellate jurisdiction to reduce excessive verdict.**

B.C.

Annotation

Reducing excessive verdict

Watt, [1905] A.C. 115. The latter tribunal held that this course cannot be adopted unless both plaintiff and defendant consent to it.

It was held in *Praed* v. *Graham* (1889), 24 Q.B.D. 53, that a new trial will not be granted on the ground that the verdict is for excessive damages unless having regard to all the circumstances of the case, the Court is of opinion that the amount is so large that no twelve men could reasonably have given it. But in *Johnston* v. *G. W. Ry. Co.*, [1904] 2 K.B. 259, it was held this rule must now be construed in the light of other decisions of the English Court of Appeal, the effect of which is that a verdict may be set aside and a new trial granted if the Court, without imputing perversity to the jury, comes to the conclusion from the amount of the damages and the other circumstances, that the jury must have taken into consideration matters which they ought not to have considered or applied a wrong measure of damages.

In libel actions where justification is pleaded and malice has been proved, though the jury may take into consideration all the circumstances going to prove malice, whether these circumstances were before or after the publication of the libel sued upon, it is not open to them to give damages for any separate or independent cause of action. *Anderson* v. *Calvert* (1908), 24 T.L.R. 399.

If the damages are so small as to shew that the jury must have omitted to take into consideration some of the elements of damage, a new trial will be granted. *Phillips* v. *L. & S. W. Ry. Co.* (1879), 5 Q.B.D. 78 (C.A.).

HANEY v. WINNIPEG AND NORTHERN RAILWAY CO.

MAN.

K. B.

1912

Mar. 8.

Manitoba King's Bench. Motion before Prendergast, J. March 8, 1912.

1. EVIDENCE (§ II K—330)—STATUS OF PARTY ATTACKING PROCEEDINGS IN EMINENT DOMAIN—SERVICE OF NOTICE—TITLE.

On an application to the Court to restrain expropriation proceedings taken by a railway company on the ground that the company had agreed upon a price with plaintiff, the plaintiff's status is proved *primâ facie* by shewing that he had been served as owner with notice of arbitration proceedings by the company without his further shewing his title or interest in the land.

2. CONTRACTS (§ I E 6—121)—REQUISITES—SALE OF LAND—EFFECT OF TAKING POSSESSION.

A contract to purchase is not established as against a railway company entitled to take lands by eminent domain proceedings, by the fact of the company having taken possession of same after notice from the owner naming his price and stating that if they took possession he would construe their action as an acceptance of his terms.

APPLICATION for an injunction restraining defendant company from proceeding with an arbitration upon expropriation proceedings by a railway company.

The motion was dismissed.

J. B. Coyne, for plaintiff.

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

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Prendergast, J.

PRENDERGAST, J.:—Plaintiff need not shew his interest in the land; his having been served by defendants with notice of arbitration proceedings gives him his status on this application.

The application is based on an alleged contract whereby the defendants are said to have agreed to pay plaintiff a stated price for the land, followed by their taking possession of same.

I should probably hold that a *primâ facie* case is made that defendants have taken possession. But as to the defendants agreeing to pay any particular price, there is really nothing shewn except an intimation by the plaintiff that he would not sell for less than so much, and that he would consider the defendants taking possession as an agreement on their part to pay that price. This taking possession surely does not constitute an agreement to pay the price asked, even if plaintiff intimated that he would put that construction on defendants' action. There is not the least evidence of an agreement as to price.

The application is dismissed with costs.

Injunction refused.

ONT.

D. C.

1912

Jan. 10.

WILLS v. BROWNE.

Ontario Divisional Court, Boyd, C., Riddell and Sutherland, JJ. January 10, 1912.

1. BAILMENT (§ I—3)—MANDATORY BAILMENT—PERSONAL SERVICE—NON-DELEGATION.

Where the contract of bailment calls for more than mere passive performance of a duty, i.e., where the idea of service and labour dominates that of the mere custody of the chattel, the personal element in the bailment distinguishes it from ordinary bailment so that the rule as to a gratuitous bailee's liability only extending to acts of gross negligence does not apply; but the rule *delegatus non delegari* does apply and the mandatory bailee is liable as for breach of trust if he contravenes it.

2. BAILMENT (§ III—17)—GRATUITOUS UNDERTAKING—CUSTODY OF MONEY.

Where in bailment the principal objects sought in the contract are service and labour and the custody of the chattel in bailment is merely incidental, the ordinary rule that in cases of gratuitous bailment the bailee is only liable for acts of gross negligence, does not apply; the element of personal trust dominates that of mere custody, and the custodian of money will be liable as for breach of trust in case of loss due to the negligence or misconduct of another person to whom he delegated the custody of the money without the owner's consent where a right of delegation is inconsistent with the gratuitous service which the bailee undertook.

APPEAL by defendant from the judgment of Judge Denton, Junior Judge of the County Court of York County at Toronto, in favour of the plaintiff in respect of a loss sustained through the embezzlement by defendant's clerk of certain moneys belonging to the plaintiff.

The appeal was dismissed.

The judgment appealed from was as follows:—

DENTON, Jun.Co.C.J.:—The plaintiff is a real estate agent, having an office in College street, Toronto; the defendant is a grocer, his firm having its store close to the plaintiff's place of business. The plaintiff and defendant had had business dealings before the transaction in question occurred, the plaintiff having collected the defendant's rents, and the defendant having borrowed money from the plaintiff from time to time on the security of these rents. On Saturday the 22nd July, 1911, between 11 and 11.30 in the morning, the plaintiff went to the defendant's store and asked him if he had time to go down to the city hall and buy for him $500 worth of tickets of admission to the Canadian National Exhibition. These tickets could then be bought at a discount of 10 per cent.; in other words, $450 would buy $500 worth of tickets. The defendant said that he had the time, and that he would get the tickets, whereupon the plaintiff handed the defendant $450 in cash. The Exhibition offices at the city hall closed at 12 o'clock, so that there was no time to be lost. Shortly after the plaintiff and defendant separated, something came up in the store to prevent the defendant going in person. The defendant then called in one Innes, a clerk, and handed him the money, with instructions to go down and get the tickets. Now, Innes was a young man about 21 years of age, who had been employed from time to time by the defendant, to deliver goods. Innes had been intrusted with the work, not only of delivering goods, but of collecting cash for the goods, when occasion called for it. Frequently he would collect as much as $10 and occasionally as much as $40 or $50 before paying it in. The defendant swore, and it is not contradicted, that up to this time he had always found Innes an honest boy, and had every reason to believe that he would execute properly and honestly the business intrusted to him. Innes took the money and started off for the city hall, where these tickets were to be bought. He did not buy them, but, instead, got drunk with the money, and, when found, had only $150 in his possession. The defendant, his employer, laid a criminal charge against Innes, who was found guilty and sent to prison. The $150 recovered by the police was paid over to the plaintiff on account. The plaintiff now sues the defendant to recover the remaining $300.

The argument of the defendant's counsel is, that the defendant, at most, was an ordinary gratuitous bailee of this money, and can be held liable only in case it is shewn that the act of intrusting the money to Innes amounted to gross negligence. It is also contended that there was no binding contract on the part of the defendant to get these tickets for the plaintiff, because there was no consideration for the promise. But there are different kinds of gratuitous bailments; and what might be

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considered gross negligence in one class might not be so considered in the other. This case comes under that class of gratuitous bailments called mandates. This is an obligation which arises where there is a delivery of money or goods to somebody who is to carry them or do something about them without any reward. The difference between this class and the ordinary class of gratuitous bailments is, that in the one class the principal object of the parties is the custody of the thing delivered, and the service and labour are merely incidental; while in the other the labour and services are the principal objects of the parties, and the custody of the thing is merely incidental. It has been held time and again that the mere acceptance of the goods by the mandatory is a sufficient consideration for his promise to render service in respect of them; in other words, that the owner's trusting him with the goods is a sufficient consideration to oblige him to do without negligence what he agreed to do. See *Wheatley* v. *Low*, Cro. Jac. 668; *Shillibeer* v. *Glyn*, 2 M. & W. 143; *Coggs* v. *Bernard*, 2 Ld. Raym. 909; *Whitehead* v. *Greetham*, 2 Bing. at p. 468; *Hart* v. *Miles*, 4 C.B.N.S. 371; Beal on Bailments, p. 105.

There was, therefore, in this case, a contract entered into between the defendant and the plaintiff whereby the defendant agreed that he would take the money down to the city hall and buy the tickets. There was no thought or suggestion, at the time, that any one else should do it for the defendant; and, I think, the nature of the services to be rendered necessarily imports into the contract a promise that what was to be done was to be done by the defendant personally. The plaintiff handed the money to the defendant because he knew him and had business relations with him, and the commission was one which called for honesty and care.

The plaintiff is, I think, entitled to judgment on two grounds. First, there being a contract, the defendant is responsible for any breach of that contract. The question on this branch of the case is not whether the defendant was negligent in handing the money over to Innes and asking him to undertake the commission, but whether the defendant, through his agent or employee, Innes, was guilty of misconduct or dishonesty or gross negligence. In this particular case, the defendant must be held responsible for Innes's acts. Innes's negligence or misconduct is the defendant's negligence or misconduct, so far as the determination of this case is concerned.

Then, I think, the plaintiff is entitled to judgment on another ground. Even if it be necessary to shew that the defendant was grossly negligent in handing the money to Innes, I have reached the conclusion that, inasmuch as the defendant knew that the plaintiff was trusting him only and relying upon

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his personal honesty, the handing the money over, without the plaintiff's knowledge or consent, to a young man who had not been doing work of that kind or importance, and who had not been intrusted with any large sums of money at one time, and who was a mere errand or delivery boy, was, in the circumstances, such negligence on the part of the defendant as makes him responsible for the money.

Judge Denton.

Mr. Macdonald referred to the case of *Tindall* v. *Hayward*, 7 U.C.L.J.O.S. 243, which in some respects is akin to this, and in which the defendant was held not liable. I think that case can be distinguished; but, even if it cannot, it is not a decision that I am obliged to follow.

In cases like this, the question whether there is actionable negligence must be determined in the light of all the circumstances of the particular case in hand; and it does not follow, because in one case there was found to be no actionable negligence, that in another case resembling it, though not in all respects similar, the same conclusion must be reached.

No doubt, this is a hard case on the defendant; but, in my opinion, there must be judgment for the plaintiff for the $300 and the costs of the action.

The defendant appealed from the judgment of DENTON, Jun. Co. C.J.

H. C. Macdonald, for the defendant, argued that the defendant was a gratuitous bailee, and so only liable for gross negligence, which his handing over of the money to Innes did not amount to: *Tindall* v. *Hayward*, 7 U.C.L.J. O.S. 243; *Brown* v. *Livingstone*, 21 U.C.R. 438; *Palin* v. *Reid*, 10 A.R. 63; *Whitechurch, Limited* v. *Cavanagh*, [1902] A.C. 117. To render the defendant liable, in the circumstances, Innes must have acted within the scope of his authority, which he did not do: *Coll* v. *Toronto R.W. Co.*, 25 A.R. 55. There was no contract binding on the defendant to procure the tickets for the plaintiff, as there was no consideration for the promise.

W. D. McPherson, K.C., for the plaintiff, was not called upon.

Per Curiam.

The judgment of the Court was delivered by BOYD, C.:— While commending the assiduity of counsel for the appellant, we must state that the law is against him. We believe the judgment of the trial Judge is right. A personal trust was contemplated here. The defendant should have notified the plaintiff before delegating the trust to another, if he wished to escape liability. He did not do this, so he took the risk. The personal element differentiates this case from ordinary bailment.

The appeal must be dismissed with costs.

Appeal dismissed.

ONT.

H. C. J.

1912

Jan. 4.

CARTWRIGHT v. WHARTON.

Ontario High Court. Trial before Teetzel, J. January 4, 1912.

1. COPYRIGHT (§ I—1)—METHOD OR SYSTEM OF INDEXING.

Copyright does not extend to mere ideas or methods apart from their expression and there is no infringement unless the printed matter itself is copied; consequently a copyrighted "legal directory" in which a cross-reference is given to the names of the law agents of solicitors listed therein by allocating to each agent a special number and placing the same number opposite the name of the solicitor, is not infringed by another directory adopting the same plan, but using a distinct set of numbers, provided that the information is obtained from original sources.

[*Hollinrake* v. *Truswell*, [1894] 3 Ch. 420, followed; see also MacGillivray on Copyright, 1st ed., p. 15.]

2. COPYRIGHT (§ I—4) — DIRECTORY — USE OF COPYRIGHTED WORK IN CHECKING AND VERIFYING.

It is an infringement of a copyright to make use of the copyrighted original matter of a professional directory as the basis for an opposition directory, although such use is made only after making substantial corrections and alterations due to changed conditions, the information for which was obtained from original sources by the publisher of the later book.

[Compare *Bain* v. *Henderson* (1911), 16 B.C.R. 318.]

3. EVIDENCE (§ IV P—471)—INFRINGEMENT OF COPYRIGHT—COMPARISON TO PROVE AUTHORSHIP.

The presence of lexicographical errors common both to the copyright book and to the later publication, alleged to be an infringement thereof is *primâ facie* evidence that the later publication was copied from the other.

[*Murray* v. *Bogue*, 1 Drew. 353; *Kelly* v. *Morris* (1866), L.R. 1 Eq. 697; *Pike* v. *Nicholas* (1869), L.R. 5 Ch. 251, and *Cox* v. *Land and Water Journal Co.* (1869), L.R. 9 Eq. 324, specially referred to; see also *Cadieux* v. *Beauchemin* (1901), 31 Can. S.C.R. 370.]

4. INJUNCTION (§ I M—118)—PROTECTION OF COPYRIGHT—MIXING PIRATED MATTER WITH OTHER LITERARY WORK—SCOPE OF INJUNCTION.

An injunction will be granted to protect a copyright and to restrain infringement although in the infringing work the protected literary matter has been inseparably mixed up with the defendant's own compilation so that the injunction will have the indirect effect of restraining the publication of both.

[*Mawman* v. *Tegg* (1826), 2 Russ. 385, followed; see also MacGillivray on Copyright, 1st ed., p. 88; Kerr on Injunctions, 4th ed., p. 290.]

ACTION for damages and an injunction for the alleged infringement by the defendant of the plaintiff's copyright, under the Dominion Copyright Act, in the Canadian Law List (Hardy's), 1910.

A perpetual injunction was granted, and a reference ordered as to damages.

J. H. Moss, K.C., for the plaintiff.

D. T. Symons, K.C., for the defendant.

January 4, 1912. TEETZEL, J.:—The plaintiff and defendant had for some years been in partnership, and had published a number of former editions of the Law List, and were joint

owners of the copyright. The partnership was dissolved early in August, 1910, and the plaintiff purchased the defendant's interest in the copyright. By the terms of the agreement of dissolution, the defendant was expressly permitted to engage in a rival business, and he immediately began preparations to publish another Law List for 1911, which was published in February, 1911, and is called "The Canada Legal Directory, 1911;" and the plaintiff charges that this publication constitutes an infringement of his copyright in the 1910 edition of his Law List.

The particulars of the charge chiefly relied upon are:—

(1) The system of indexing the Toronto agents of Ontario solicitors in use in the plaintiff's publication has been copied in the defendant's publication from the plaintiff's publication.

(2) All that part of the defendant's publication which consists of lists and tables of Courts, Judges, Court and other legal officials, barristers and solicitors, is copied, either directly or indirectly, from the plaintiff's publication.

As to the first particular, it is not disputed that the defendant in his book has adopted the system used by the plaintiff to indicate the Toronto agent of each solicitor in the Ontario list who has a Toronto agent, which is, by placing a number to the right of the name of such solicitor, which corresponds with the number to the left of the name of another solicitor or firm appearing in the list for Toronto; but, while the defendant had adopted this system, he has not used the numbers appearing in the plaintiff's book.

If the plaintiff's case depended solely upon this charge, I think his action would fail, because, as held by Lindley, L.J., in *Hollinrake* v. *Truswell*, [1894] 3 Ch. 420, at p. 427, copyright does not extend to ideas, or schemes, or systems, or methods, but is confined to their expression; and, if their expression is not copied, the copyright is not infringed. As illustrating this, the learned Lord Justice refers to *Baker* v. *Selden* (1879), 101 U. S. (11 Otto) 99, wherein it was held that the author of a system of bookkeeping was not entitled to any monopoly in the system, but was only entitled to prevent other persons from copying his description of it.

As to the second particular of charge, a comparison of the two publications discloses a strikingly similar arrangement of the lists of barristers, solicitors, and Court officials. The presence in the defendant's publication of a large number of common errors in spelling and in alphabetical sequence of names in the lists forcibly suggests that the defendant's lists, where these common errors appear, were copied from the plaintiff's lists.

It is laid down in many authorities that the presence of common errors is one of the surest tests of copying: *Kelly* v. *Morris* (1866), L.R. 1 Eq. 697; *Pike* v. *Nicholas* (1869), L.R. 5 Ch. 251; *Cox* v. *Land and Water Journal Co.* (1869), L.R. 9 Eq. 324.

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In *Murray* v. *Bogue* (1852), 1 Drew. 353, where instances were stated in the bill and at the Bar in which the defendant had the plaintiff's errors, Vice-Chancellor Kindersley said (p. 367): "Now the use of shewing the same errors in both is, that where the defendant says he has got his information, not from the plaintiff, but from some other sources, if the evidence is unsatisfactory on the question, whether the defendant did use the plaintiff's work or not, to shew the same errors in the subsequent work that are contained in the original, is a strong argument to shew copying." See also Copinger on Copyright, 4th ed., p. 171.

The plaintiff, however, is not in this case driven to depend solely on the evidence of common errors, because, while the defendant says he got much of his material from other sources—and no doubt he did—he admits that he got much of it from the plaintiff's publication. He says that the first thing he did in preparing his material was to send to each barrister and solicitor in the Dominion what he called a correction slip, which contains the solicitor's name, and, in the case of a firm, the name of each member. With each slip was sent a circular stating that the defendant was preparing an improved Law List for 1911, and requesting the person to whom it was sent to return the slip with any suggested corrections. The defendant took the names of most, if not all, of those to whom he sent these correction slips from the plaintiff's publication. Many, but not nearly all, of these correction slips were returned to the defendant in due course. From these and from the plaintiff's lists, which he also used for that purpose, he prepared for the Registrar or other official of the Court at the county town of each county in the Dominion a list of the barristers and solicitors in that county, requesting the official to correct the list and return it to him with any alterations in or additions thereto.

These several lists, when returned, were used as the basis for completing the lists for the respective provinces as they appear in the defendant's publication.

With regard to the lists of Court officials contained in the defendant's book, it clearly appears, with reference to Nova Scotia and New Brunswick, that the defendant copied all the material which appeared in those lists from the plaintiff's book and sent the same to the proper Court official for revision and correction, and for the addition of some other information not appearing in the plaintiff's book.

While the evidence is not so satisfactory as to other provinces, I think the fair inference is, that a similar practice was adopted as to them.

As to the list of officials at Osgoode Hall, this inference is strongly supported by the presence of two striking errors, one in the spelling of the Christian name of a Chief Justice, and the

other in the initial of an official, which are common to both the plaintiff's and the defendant's list.

I, therefore, find as a fact that, both in the preparation of the lists of barristers and solicitors throughout the Dominion, and of the Judges and Court officials, the defendant, for the purpose of getting his original information and for the preparation of the lists for the printer, copied from the plaintiff's book substantially all the names found in the plaintiff's book.

I also find that the defendant, as the result of independent efforts and inquiry, collected many additional names and much material and information of value for a Law List; and I also find that, while the defendant adopted much of the method of arrangement of the material, he also adopted many changes in the arrangement which may be claimed to be improvements on the plaintiff's methods.

The defendant's summary of the Laws of the Provinces is the result of independent effort, which, with much other information in his book, has not infringed upon the plaintiff's rights.

I think, however, that, under the authorities, it must be adjudged that the defendant has, in respect of the lists of barristers and solicitors and Judges and Court officials, substantially availed himself of the labour of the plaintiff, and has been guilty of an infringement of the plaintiff's copyright, being his exclusive right, under the law, of printing or otherwise multiplying copies of his original work, as contained in his Law List of 1910.

There was, of course, nothing to prevent the defendant preparing a rival Law List, provided the material collected for the same was the product of his own original effort, or was obtained from sources not copyrighted.

It is not necessary for me to decide whether the defendant would have escaped liability in respect of the barristers and solicitors' lists, if he had got replies from all the persons to whom he sent correction slips; because, in very many cases, he did not get replies, and in those cases he copied the names as he found them in the plaintiff's lists, after revision by the local Court officials.

Garland v. *Gemmill* (1887), 14 Can. S.C.R. 321, was a case of piracy of contents of the Parliamentary Companion, and it was held that the publisher of a work containing biographical sketches cannot copy them from a copyrighted work, even where he has applied to the subjects of such sketches and been referred to the copyrighted work therefor; and that in works of this nature, where so much must be taken by different publishers from common sources, and the information given must be in the same words, the Courts will be careful not to restrict the right of one publisher to publish a work similar to that of an-

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other, if he obtains the information from common sources, and does not, to save himself labour, merely copy from the work of the other that which has been the result of the latter's skill and diligence.

Nor is it necessary to decide what would have been the consequence if the defendant had got the original information from the local Registrars as to the Judges and Court officials, if it had chanced to have been the same as appeared in the plaintiff's lists; because the defendant admits that in two cases, at least, he copied the material out of the plaintiff's book, and submitted it to the Local Registrars for revision and correction, and thus appropriated to himself the results of the plaintiff's diligence and labour.

In *Lewis* v. *Fullarton* (1839), 2 Beav. 6, at p. 8, Lord Langdale, M.R., said: "Any man is entitled to write and publish a topographical dictionary, and to avail himself of the labours of all former writers whose works are not subject to copyright, and of all public sources of information; but, whilst all are entitled to resort to common sources of information, none are entitled to save themselves trouble and expense by availing themselves, for their own profit, of other men's works still subject to copyright and entitled to protection."

In *Hotten* v. *Arthur* (1863), 1 H. & M. 603, Page Wood, V.-C., said (p. 609): "The only fair use you can make of the work of another of this kind" (descriptive catalogue) "is where you take a number of such works: catalogues, dictionaries, digests, etc., and look over them all and then compile an original work of your own, founded on the information you have extracted from each and all of them; but it is of vital importance that such new work shall have no mere copying, no merely colourable alterations, no blind repetition of obvious errors."

In *Kelly* v. *Morris*, L.R. 1 Eq. 697, which was a directory case, the same learned Judge says (p. 701): "In the case of a dictionary, map, guide-book, or directory, when there are certain common objects of information which must, if described correctly, be described in the same words, a subsequent compiler is bound to set about doing for himself that which the first compiler has done. In case of a road-book, he must count the milestones for himself. In the case of a map of a newly-discovered island . . . he must go through the whole process of triangulation just as if he had never seen any former map; and, generally, he is not entitled to take one word of the information previously published without independently working out the matter for himself, so as to arrive at the same result from the same common sources of information, and the only use he can legitimately make of a previous publication is to verify his own calculations and results when obtained. So in the present case the defendant could not take a single line of the plaintiff's direc-

tory for the purpose of saving himself labour and trouble in getting his information. . . . What he has done has been just to copy the plaintiff's book and then to send out canvassers to see if the information so copied was correct. . . . The work of the defendant has clearly not been compiled by the legitimate application of independent personal labour."

And in *Scott* v. *Stanford* (1867), L.R. 3 Eq. 718, the same learned Judge says (p. 724): "The defendant, after collecting the information for himself, might have checked his results by the plaintiff's tables, but that is a widely different thing from this wholesale extraction of the vital part of his work. No man is entitled to avail himself of the previous labours of another for the purpose of conveying to the public the same information, although he may append additional information to that already published."

In *Morris* v. *Ashbee* (1868), L.R. 7 Eq. 34, Giffard, V.-C., says (p. 41): "It is plain that it could not be lawful for the defendants simply to cut the slips which they have cut from the plaintiff's directory and insert them in theirs. Can it be lawful to do so because, in addition to doing this, they sent persons with the slips to ascertain their correctness? I say, clearly not. Then, again, would their acts be rendered lawful because they got payment and authority for the insertion of the names from each individual whose name appeared in the slips? And to this I again answer, clearly not. . . . They had no right to make the results arrived at by the plaintiff the foundation of their work or any material part of it, and this they have done."

See, also, *Morris* v. *Wright* (1870), L.R. 5 Ch. 279.

In referring to the above cases, Sir Charles Hall, V.-C., in *Hogg* v. *Scott* (1874), L.R. 18 Eq. 444, at p. 458, says: "The true principle in all these cases is, that the defendant is not at liberty to use or avail himself of the labour which the plaintiff has been at for the purpose of producing his work—that is, in fact, merely to take away the result of another man's labour, or, in other words, his property."

In my opinion, the evidence here clearly brings this case within that principle; and, although the defendant has, in the lists contained in his book, inserted a considerable amount of original information which probably does not infringe on the plaintiff's right, it is not practicable, upon the evidence, to separate it from the pirated matter so as to leave the original material of any value or use for publication.

Upon this aspect of the case I adopt, as strikingly applicable, the terse language of Lord Eldon in *Mawman* v. *Tegg* (1826), 2 Russ. 385, at pp. 390-1: "As to the hard consequences which would follow from granting an injunction, when a very large proportion of the work is unquestionably original, I can only say, that, if the parts which have been copied cannot be separ-

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ated from those which are original, without destroying the use and value of the original matter, he who has made an improper use of that which did not belong to him must suffer the consequences of so doing. If a man mixes what belongs to him with what belongs to me, and the mixture be forbidden by the law, he must again separate them, and he must bear all the mischief and loss which the separation may occasion. If an individual chooses in any work to mix my literary matter with his own, he must be restrained from publishing the literary matter which belongs to me; and if the parts of the work cannot be separated, and if by that means the injunction, which restrained the publication of my literary matter, prevents also the publication of his own literary matter, he has only himself to blame."

I think, therefore, the proper judgment to be entered is, that the defendant's publication known as the "Canada Legal Directory, 1911," is, in respect of the lists of barristers and solicitors and of Judges and Court officials therein contained, an infringement of the plaintiff's copyright in respect of the Canadian Law List, 1910; and that the defendant be restrained from further printing, publishing, or selling the said "Canada Legal Directory, 1911," or any reprint or future edition thereof, containing any of the said lists; and that it be referred to the Master in Ordinary to ascertain the plaintiff's damages; and that the defendant pay to the plaintiff the costs of action up to and including this judgment; costs of reference and further directions reserved until after the Master's report.

Judgment for plaintiff.

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THE KING ex rel. The Attorney-General of Quebec (defendant, appellant) v. **CHARLES S. COTTON** et al., és qualité (plaintiffs, respondents).

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin and Brodeur, JJ. February 20, 1912.

1. TAXES (§ V C—198)—SUCCESSION DUTY ON TRANSMISSION—SITUS OF PROPERTY—STATUTORY LIMITATION TO PROPERTY "IN THE PROVINCE."

The words "moveable and immoveable property in the province" in a succession tax statute declaring subject to certain tax duties all transmissions thereof owing to death, are to be construed, when taken alone, as limiting the tax to the transmission of property having its *situs* within the province at the date of the death. (*Per* Fitzpatrick, C.J., Davies and Anglin, JJ., confirming on an equal division the opinion appealed from on this point.)

2. TAXES (§ V C—198)—SUCCESSION DUTY ON TRANSMISSION BY DEATH—SUCCESSION AS TO PERSONAL SECURITY HAVING FOREIGN SITUS BUT DEPENDENT ON PROVINCIAL LAW FOR TITLE.

Where transmissions of property owing to death are declared to be subject to succession tax in respect of moveable and immoveable property in the province and by another clause of the same statute [art. 1191(*c*) enacted by 6 Edw. VII. (Que.), ch. 11] it is provided that

the word "property" shall include (*inter alia*) all moveables, *wherever situate*, of persons having their domicile or residing in the province at the time of their death, and the statute further provides that payment of the succession duty shall be a condition of the transfer of the properties in any estate or succession, then if the right or title of the executors to bonds and other moveables locally situate in a foreign country as regards the claim of the executors to title thereto is dependent upon the provincial law, the legal transmission by death is subject to the provincial succession duty. (*Per* Fitzpatrick, C.J., Idington, Duff and Brodeur, JJ., reversing on this point the decision appealed from.)

[*Lambe* v. *Manuel*, [1903] A.C. 68; *Bank of Toronto* v. *Lambe*, 12 A.C. 575; *Blackwood* v. *Regina*, 8 A.C. 82; *Winans* v. *Attorney-General*, [1904] A.C. 287; *Woodruff* v. *Attorney-General*, [1908] A.C. 508, and *R.* v. *Lovitt*, [1912] A.C. 212, 28 Times L.R. 41, specially referred to.]

APPEAL from the judgment of the Court of King's Bench (appeal side) in an action by the respondents against the Crown to recover certain succession duties exacted by the Province of Quebec from the estates of H. H. Cotton and of his wife, Charlotte Cotton, both deceased, in respect of bonds and other moveables locally situate in the United States of America. Mrs. Cotton died in 1902 and her husband in 1906, both domiciled in the Province of Quebec.

In the interval the succession duty law of Quebec had been amended by an interpretation clause, article 1191(*c*), in the Succession Duties Act, 6 Edw. VII. (Que.), ch. 11, amending and consolidating the previous statutes in the following terms:—

1191(*c*). The word "property" within the meaning of this section, shall include all property, whether moveable or immoveable, actually situate or owing within the province, whether the deceased at the time of his death had his domicile within or without the province, or whether the debt is payable within or without the province, or whether the transmission takes place within or without the province, and all moveables, wherever situate, of persons having their domicile, or residing, in the Province of Quebec at the time of their death.

Notwithstanding this amendment, the preceding section 1191(*b*), embodying the succession duty schedules, referred to "moveable and immoveable property *in the province*" in like manner as in the prior law; 55-56 Vict. (Que.), ch. 17, as amended by 57 Vict. (Que.), ch. 16, 58 Vict. (Que.), ch. 16, and 59 Vict. ch. 17.

The Court of King's Bench in appeal held that the United States property of Mrs. Cotton's estate was not subject on her death to succession duty under the Quebec Succession Duties Act, R.S.Q., 1888, articles 1191(*a*) *et seq.* and that her husband's property in the United States was not subject to succession duty under the later consolidation contained in the statute 6 Edw. VII. (Que.), ch. 11. [See also the subsequent consolidation, R.S.Q., 1909, articles 1374 *et seq.*]

The Court of King's Bench had also directed that the debts of the estate within the Province of Quebec should be deducted

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from the total assets and not from the assets within the province only in ascertaining the amount of the estate upon which succession duty should be paid.

The appeal was allowed in part as to H. H. Cotton's estate.

As to Charlotte Cotton's estate the judgment of the King's Bench appealed from stood confirmed on an equal division of opinion in the Supreme Court of Canada and the cross-appeal also failing on an equal division the dismissal of the cross-appeal being consequent upon the conclusions of the three members of the Court who would allow the main appeal.

Aimé Geoffrion, K.C., for the Crown, supported the appeal.

T. Chase-Casgrain, K.C., for Charles S. Cotton and others, respondents.

FITZPATRICK, C.J.:—The question for the opinion of the Court in this case is: If a person domiciled in the Province of Quebec dies leaving movable property such as bonds and debentures "locally situate" in Boston, Massachusetts, one of the United States of America, can that part of the estate be considered or taken into account in calculating the amount of the duty to be levied on the transmission of his estate under the succession duty law of that province? For the meaning of the term "locally situate" see Dicey, Conflict of Laws, 2nd edition, p. 309; Hanson, Death Duties, 6th edition, pp. 108-109; and notes of my brother Anglin.

There are in fact two estates in connection with which this question arises here: that of Mrs. Cotton and that of her husband H. H. Cotton, and the action is to recover from the Government the amounts paid as succession duty on both estates through error of law, as is alleged. Each of the cases presents a different state of facts for consideration and the statutes relied on by the Crown as applicable to the two successions are not in terms identical.

Dealing first with the succession of Mrs. Cotton, it appears that she died in Boston on the 11th April, 1902, having made her will there on the 17th of April, 1900, disposing of a fairly large estate in bonds and debentures, the bulk of which was at the time of her death situate in Boston.

In the interval between the making of the will and the death, the deceased's husband, who was born in Canada, bought a house at Cowansville in the Province of Quebec, and he had actually taken up his residence at his domicile of origin, although some of the winter months were spent in Boston. After his wife's death, the husband continued to reside at Cowansville, to which place he brought her body for interment and there he died. I accept the finding of the Courts below that Mrs. Cotton was at the time of her death domiciled in the Province of Quebec and that her estate devolved under the law of that domicile; but, in

my opinion, the statute imposing the duty levied by the Crown does not extend to that portion of her estate which was locally situate beyond the limits of the province. The statute reads:—

> All transmissions, owing to death, of the property in, usufruct or enjoyment of moveable and immoveable property in the province, shall be liable to the following taxes, calculated upon the value of the property transmitted, after deducting debts and charges existing at the time of the death: . . . [6 Edw. VII. (Que.), ch. 11, sec. 1.]

Taken in their strict and literal meaning the words "moveable and immoveable property *in the province*" relate *primâ facie* to property locally situate within the limits of the province and, as my brother Anglin says, that such was the intention of the Legislature is made superabundantly clear by reference to the French version of the statute where the words used are "toute transmission par décés, etc., de biens mobiliers ou immobiliers situés dans la province, etc." If these words "situés dans la province" had been omitted and the language of the French law (art. 4, L. 22, Frim. An. VII.) from which the Quebec Act is taken adhered to, then all the French authors say that by application of the maxim "*mobilia sequuntur personam*" the meaning of the word "moveable" might be enlarged so as to include all personal estate wherever it might be; but if effect is to be given to the language of the legislature, the result must be to say that by inserting the qualifying words "in the province" after the words "movable and immovable property" it was intended to exclude the application of that maxim and limit the impost to such moveable property as at the date of the death would be found within the jurisdiction. The question on this branch of the case is not as to the power, but as to the intention of the legislature.

Acts imposing death duties, like all other taxing statutes must be construed strictly and in favour of the subject. Hanson's Death Duties, 6th ed., p. 78. I do not overlook the fact that in the declaration to be furnished the Collector of Provincial Revenue the description and real value of all the property transmitted, whether movable or immovable and wherever situate, is to be supplied to that official; but no inference is deducible from this obligation which would extend the meaning to be given the section imposing the tax.

Dealing now with the estate of the husband who died on December 26th, 1906, at Cowansville in the Province of Quebec, having by his will made there in notarial form instituted the respondents his testamentary executors, a large amount of bonds and debentures physically situate in the United States formed part of that estate at its devolution. In the interval between the death of the wife and that of the husband, the law of Quebec was amended so as to subject to succession duty all movable pro-

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perty transmitted "wherever situate, of persons having their domicile (or residing) in the Province of Quebec at the time of their death."

Mr. Justice White speaking for the Court in *Knowlton v. Moore*, 178 U.S.R. 41, at p. 56, after making a careful review of the law concerning death duties in ancient and modern times, says:

> Tax laws of this nature in all countries rest in their essence upon the principle that death is the generating source from which the particular taxing power takes its being and that it is the power to transmit or the transmission from the dead to the living on which such taxes are immediately rested.

And Fuzier-Herman, vbo. Successions, No. 1899, says:

> Il suit de là que le droit de succession est dû chaque fois qu'il y a mutation, c'est-à-dire dessaisissement par mort, sans qu'il y ait à se préoccuper du titre en vertu duquel l'hérédité est dévolue. C'est donc le décès qui est le fait générateur du droit proportionnel. De même que, en droit civil (art. 718) les successions s'ouvrent par la mort, de même, en droit fiscal, c'est le décès qui, en opérant la mutation des biens, donne overture à la créance du Trésor. Ainsi que l'exprime un arrêt de la Cour de Cassation, l'impôt de mutation par décès a le caractère d'une dette naissant avec l'ouverture de la succession et inhérente dès ce moment à tous les biens qui la composent.

In France, and the Quebec statute is an adaptation of the law of that country, it is universally accepted that the power to transmit or the transmission or receipt of property by death is the subject levied upon by all death duties. Fuzier-Herman, vbo. Successions, No. 2028. The duty is not levied upon individual items of property which together make up the estate, but upon the transmission or devolution of the succession. The civil law of Quebec, in the light of which this statute must be read, is based upon the 'old Roman legal theory of universal succession or succession as a unit by means of which the legal personality of the deceased passed over to his heir."

Article 596 of the Code says that succession means "the universality of the things transmitted" and that universality devolves at the domicile of the deceased (600 C.C.). By the law of that domicile, the title under which the heirs receive the estate, the moveable property of the deceased, wherever situate, is governed. In such a case the maxim of *mobilia ossibus inharunt* finds its application, as my brother Duff clearly demonstrates in his notes, to which I would venture to add two authorities taken from the French law. In a note to Dalloz, 1897, 1, 139. M. Sarrut says:—

> En vertu de la fiction *mobilia ossibus inhaerunt* l'universalité juridique d'une succession mobilière est censée adherente à la personne du défunt; or le défunt était, en droit, au lieu de son domicile légal.

See Pothier, Introduction, générale, vol. 1, p. 7, No. 24.

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To sum up briefly, I am of opinion that the right or title to the bonds and debentures situate in Boston passed on his death from the deceased to his heirs in the Province of Quebec by virtue of the law of that province and all the movable property transmitted by that title is subject to the duty which the legislation which creates the title chooses to attach as a condition of the transmission on those who claim title by virtue of our law: Halsbury, vol. 13, p. 273, No. 373.

Let me test the soundness of this construction of the law by reference to section 6 of the Act we are now considering. That section is in these words:—

> 6. No transfer of the properties of any estate or succession shall be valid, nor shall any title vest in any person, if the taxes payable under this section have not been paid, and no executor, trustee, administrator, curator, heir, or legatee shall consent to any transfers or payments of legacies, unless the said duties have been paid.

Payment of the duty is a condition of the transfer and no title is vested until it is paid. If the executors or legatees sought to enforce their title to the bonds in Boston, it would be a good answer to their claim that not having paid the succession duty they had no title to the bonds. In which case, where would the title to that portion of the deceased's estate vest? If therefore the heirs must invoke the Quebec Act as their title, the condition subject to which that Act transmits the property to them —payment of legacy duties—must be fulfilled. It is necessary to say that, in my opinion, this case is clearly distinguishable from the case of *Woodruff* (*Woodruff* v. *Attorney-General of Ontario*, [1908] A.C. 508, reversing *Attorney-General* v. *Woodruff*, 15 O.L.R. 416).

There is no question here of an attempt to tax property situate beyond the jurisdiction; the Quebec statute merely fixes the conditions subject to which it gives a good title to the property of the deceased. In a word, the tax is imposed as a condition of the devolution, a condition subject to which the heirs take title. The amount of the tax is fixed by reference to the aggregate value of the property and the degree of relationship of the successors to the deceased; but there is nothing in the law which prevents a government from taxing its own subjects as in this case on the basis of their foreign possessions. I would allow the main appeal as to the estate of H. H. Cotton.

As to the cross-appeals, the necessary result will be their dismissal because that is the conclusion to which the opinions of the three members of the Court who would allow the main appeal in the case of Mrs. Cotton would necessarily lead and it therefore becomes unnecessary for me to express any opinion on the merits of these cross-appeals.

The conclusion therefore to which I have come is that as

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to the estate of Mrs. Cotton the appeal should be dismissed and that it should be allowed as to the estate of Mr. H. H. Cotton.

As to costs, the costs of the Superior Court should be paid by the Crown; the costs in appeal and here should be paid by the estate of Cotton, as also the costs on the cross-appeals.

DAVIES, J.:—In the case of *Woodruff* v. *Attorney-General for Ontario*, [1908] A.C., p. 508, the Judicial Committee held that there was no sound distinction in point of law between the two transactions or assignments of property in question in that case. As said in their judgment:—

> They were both concerned with movable property locally situate outside the province and the delivery under which the transferees took title was equally in both cases made in the State of New York.

Had the judgment stopped there it would seem reasonably clear that the ground of their lordships' decision that the Ontario succession duties were not recoverable in that case, was the local situation of the property outside the province, coupled with a delivery of the property under which the transferees took title also in the State of New York. Under these facts and circumstances they did not agree with the Court of Appeal for Ontario which held that the assignment of 1902 fell within the Ontario Act imposing succession duties because it was, as that Court held, a transfer of property made in contemplation of death to take effect only on and after the death of the transferor.

As I understand the judgment of the Privy Council up to this point, it did not matter whether the assignment so made was or was not made in contemplation of death and only to take effect on and after death. These facts, as found by the Court of Appeal, were immaterial in their judgment because, as they go on to say: "The pith of the matter" was the limitation in Canada's Constitutional Act of the powers of taxation given to the local legislatures, which limitation they said made "any attempt to levy a tax on property locally situate outside the province beyond their competence."

This broad general statement it will be seen takes no account of the fact that such property may have been transferred abroad by the testator or intestate in his lifetime in contemplation of death and so as to avoid the succession duties. Such a factor as the transfer of the property abroad, which is given prominence to in the preceding part of the judgment, has no room in this part, where the Judicial Committee is apparently pointedly stating their opinion of the limitation placed upon the powers of the local legislatures in the grant to them of the power of "direct taxation within the province." The fact of there having been an assignment of such property made abroad

by the deceased in his lifetime in contemplation of death is in this statement of the limited character of the powers conferred on the local legislatures absolutely ignored as irrelevant, and the general proposition laid down that "any attempt to levy a tax on property locally situate outside the province is beyond their jurisdiction," that is the jurisdiction of the local legislatures.

But the Judicial Committee do not stop there. If they had it might be contended that the language of their judgment, though broad and general enough to cover other cases, must be construed as applicable only to such facts as they were in that case dealing with, namely, where moveable property was "locally situate outside the province and the delivery under which the transferees took title was also made outside the province."

The latter words, however, of their judgment seem to render it impossible to attach such a limited meaning to the judgment, because they go on to deal with the arguments advanced by Sir Robert Finlay for the Attorney-General of Ontario. His argument, as reported, was to the effect that the legislation was *intra vires* the legislature because the tax was not a tax on property but one on the devolution or succession, that it was imposed on persons beneficially entitled by virtue of the will of the deceased or by virtue of the testamentary transfers made by him in his lifetime to take effect at his death. That these persons taxed were resident in the province and were directly liable for the duty.

Dealing with this argument the single remark the Judicial Committee make is:—

> Directly or indirectly, the contention of the Attorney-General involves the very thing which the legislature had forbidden to the province, taxation of property not within the province.

Such a remark would be pointless if they had held the transaction of 1902 to have been a bonâ fide absolute assignment and not to have been of the character contended for by Sir Robert Finlay and found by the judgment in appeal before their Lordships, namely, one made in contemplation of death and only to take effect on and after death. The latter construction of the transfer had to be reached, otherwise there was no ground for discussion as to the property being taxable under the Act. The limitation upon the powers of the provincial legislatures to levy direct taxation within the province, rendered it unnecessary for their Lordships as they said "to discuss the effect of the various sub-sections of sec. 4 of the Succession Duty Act on which so much stress had been laid in the argument before them."

It is, therefore, evident to me that the judgment of the Privy Council in this case of *Woodruff* (*Woodruff* v. *Attorney-General of Ontario*, [1908] A.C. 508) is of a wider and broader

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application than contended for by the appellant in this appeal, and that it is conclusive upon us in the appeal now before us. The distinction attempted to be made by Mr. Dorion* between the two statutes of Quebec and Ontario levying these succession duties, namely, that the former expressly makes the taxation payable upon the transmission of the property, while the latter places it upon the property itself, is not a substantial distinction.

In my judgment under both statutes the tax is not one on the property but on its devolution or succession (see *Lovitt* v. *Attorney-General of Nova Scotia*, 33 Can. S.C.R. 350). But no such distinction can be successfully invoked to take this appeal out of the binding effect of the judgment of the Privy Council in the *Woodruff Case* (*Woodruff* v. *Attorney-General of Ontario*, [1908] A.C. 508). That judgment was not based upon the mode in which the legislature of Ontario attempted to levy the succession duties there in dispute, but upon the denial of the existence of any constitutional power in the legislature either directly or indirectly to impose such duties upon property not within the province. The headnote of the case correctly sums up what it really did decide, namely, that:—

> It is *ultra vires* the legislature of the province to tax property not within the province:—Held, accordingly, that the Succession Duty Act R.S.O. 1897, ch. 24) does not include within its scope movable properties locally situate outside the Province of Ontario which *it was alleged* that the testator, a domiciled inhabitant of the province, had transferred in his lifetime with intent that the transfers should only take effect after his death.

If I am right in my construction of this *Woodruff* decision, it is binding in this appeal, as the foreign bonds, stocks and other securities owned at her death by Mrs. Cotton, and at his death by Henry H. Cotton, and upon which, or the transmission of which, it was contended by the Crown in right of the Province of Quebec succession duties were payable under the provincial statute, were at the times of the respective deaths of Mrs. Cotton and Henry H. Cotton, situate in Boston, Massachusetts, and not in the Province of Quebec, and had never been, so far as the record shews, physically situate in that province. The appeal should therefore be dismissed.

As regards the cross-appeal, I think this should be allowed. The Court of King's Bench modified the judgment of the Superior Court by deducting the debts of the estate from all the assets and not from the assets in the province only. I think the Superior Court was right in holding that the debts owing by the estate in the province should be deducted from the assets in the province only. In estimating the amount upon which succession duties should be paid, the executor or the Courts have nothing to do with assets outside of the province which were beyond their jurisdiction, and which it is *ultra vires* of the

*At the first hearing of the case.

legislature to tax. The statute says, sec. 1191 (*b*), that these succession duties are to be calculated "upon the value of the property transmitted after deducting debts and charges existing at the time of the death."

What the legislature was dealing with and all that it had power to deal with was the property within the province—just as the reference to debts had to do exclusively with debts due in the province. If I am correct in my construction of *Woodruff's Case*, [1908] A.C. 508, in holding that property "locally situate outside of the province" was not liable to the succession duties, then it must, I think, be held that words "property transmitted" in sec. 1191 (*b*) had no reference to property outside of the province, but had exclusive reference to the property within the province which, and which alone, the legislature in the matter of these duties had power to deal with. I would therefore allow the cross-appeal and restore the judgment of the Superior Court.

As regards costs, the respondent should be allowed costs in all the Courts and costs upon his cross-appeal in this Court. The judgment in the Court of Appeal not allowing him costs in that Court was based upon the assumption, wrongful to my mind, that the judgment of the Superior Court should be substantially modified. As I think the Court of King's Bench wrong upon that point, I would allow the respondent his costs of the appeal in that Court as well as in this Court, and also his costs in the cross-appeal.

IDINGTON, J.:—The issue raised herein is of very great importance. It involves the question of the interpretation and construction of the British North America Act, section 92, subsection 2, assigning to the exclusive power of the provincial legislatures "direct taxation within the province in order to the raising of a revenue for provincial purposes"; and of the interpretation and construction of an Act of the Quebec Legislature professedly acting within said power enacting that "all transmissions, owing to death, of the property in, or the usufruct or enjoyment of, moveable and immoveable property in the province, shall be liable to the following taxes, calculated upon the value of the property transmitted, after deducting debts and charges existing at the time of the death" as it now stands amended in 6 Edw. VII. ch. 11 (1906) (of Quebec).

[A schedule of succession duties here follows in the statute referred to.]

The first question thus raised is whether or not this enactment is a competent exercise of the power given by the preceding enactment.

Before passing to the solution of this question, I wish to consider and dispose of the suggestions made by counsel for the

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respondent relative to the bearing of the amending section 1191 (c) and three or four following sections of said Quebec statute. The contention set up is that these several later sections shew that it is not the transmission of property that is taxed but the property itself.

Inasmuch as section 1191 (c) of the Quebec Act is a declaration of the meaning of the word "property" where it occurs in the Quebec Act above referred to and quoted from, I am unable to see how it can affect the question at all if the act of transmission within the province is the subject of taxation and a proper basis therefor. And still less can the following sections thereof affect the question raised here, for it is frankly admitted by counsel that none of the property now in question here is of any of the kinds covered by these later sections.

Of course it may be a fair argument that finding these sections in the Act taxing the transmission of property, stated in the terms they respectively are stated, it is in truth a taxation of property that is involved. Whatever weight may be given thereto it seems to me impossible to read such express language as quoted above as imposing taxation on anything but the transmission.

The case of *Lambe* v. *Manuel*, [1903] A.C. 68, seems conclusive upon that point. In the language of Lord Macnaghten therein, page 72, "the taxes imposed by those Acts"—this being one—"on moveable property are imposed only on property which the successor claims under and by virtue of Quebec law."

Another argument to support this contention of property being the subject of the tax was made for appellant in this that immediately after transmission or granting of probate the personal representative is to be recouped in a specified way varying according to the distinction or character of each legacy. It seems to me this argument is more plausible than sound. It is the first transmission that is in question and not the later transmission taking effect abroad as the result thereof. I infer from the evidence adduced that it was erroneously supposed to be contended that the later transmission was had in view by the statute.

Neither the requirements of the rules of corporate bodies in which stock may have been held by deceased, nor those of a foreign State relative to the enforcing of claims therein are what is meant by the transmission named in the statute. It is that transmission, and only that, which vests any right, whatever it may be, in him getting by force of the law of Quebec title to the property of deceased, that is meant by the use of the word in this statute. The purview of the Act shews that, if any doubt could otherwise exist.

I, with deference, doubt what Mr. Geoffrion seemed to con-

cede, resting upon the decision of Mr. Justice Pagnuelo in the *Donoon Case*, 15 Que. S.C. 567. The words of the Act are strong and the legislature competent to change the old law or keep its operative effect in suspense.

In another point of view the argument is met by the case of *Bank of Toronto* v. *Lambe*, 12 App. Cas. 575, 56 L.J. P.C. 87, 57 L.T. 377, where an analogous argument was put up. The tax there had to be determined by the paid up capital of the bank and the number of offices or places of business it had in the province. There as here the questions of direct or indirect taxation, the power over banks as such resting with the Dominion, and their rights to carry on business independently of provincial authority, and a foreign head office owning and controlling everything were all relied upon. The tax was held to be direct and the mode of fixing it was but the measure to be applied for ascertaining what the tax would be.

Here the tax is measured by the amount of property to be transmitted under certain conditions varying in each case just as in the cases of banks and other companies in that case.

Counsel for appellant then invokes the authority of the case of *Woodruff* v. *The Attorney-General of Ontario*, [1908] A.C., page 508, to shew that personal property actually situated in a foreign state cannot be taxed by a provincial legislature.

The Ontario Act, R.S.O., ch. 24, is as fundamentally different from the Quebec Act we are called upon herein to consider, as such Acts can well be from each other. Section 4, sub-section (*a*) of the former is as follows:—

> 4. (*a*) All property situate within this province, and any interest therein or income therefrom, whether the deceased person owning or entitled thereto was domiciled in Ontario at the time of his death or was domiciled elsewhere, passing either by will or intestacy.

Let anyone compare the two for a moment and what I have just stated seems clear.

Before proceeding further it is proper to enquire whether notwithstanding the radical differences between the two Acts it has, as is contended, in truth been decided by the Privy Council in the said *Woodruff* case, that the provincial legislature cannot tax a transmission in and by Quebec law of personal property outside the province, and that the maxim *mobilia sequuntur personam* so much relied upon relative to the laws of other countries, cannot avail in this case.

If that was the real issue raised in that case, and it has been therein definitely decided, there is an end of the matter. If it was not the real issue, and the decision did not necessarily involve the decision of such issue, then it cannot bind us.

I may at once say that the statement of fact in the following sentence of the judgment seems to me to dispose of the question of the fundamental grounds the judgment proceeds upon:—

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> They (*i.e.*, the two transactions there in question) both were concerned with moveable property locally situate outside the province and the delivery under which the transferees took title was equally in both cases made in the State of New York.

Surely that is as wide apart from what is involved here as can well be. The title upon which the attempted taxation herein rests arose in Quebec by virtue of the transmission its laws gave validity to. It is upon the act of giving force and validity thereto that the taxation is imposed; whether such transmission is taxable or not and the legal ambit thereof is entirely another question. But it is not involved in the denial of a right by virtue of such a statute as the Ontario Act to tax the property itself when in, or after taken to, a foreign country, and has been in the lifetime of the deceased there transferred to another, and thenceforward remains in the foreign State the property of such transferee.

The Ontario Act was so framed that it did not give rise to the very question raised here. When the interpretation of that Act was called for, in said case, the first subject calling for consideration was the scope of legislation whereof the keynote was the sub-section I have just quoted. It purports to tax property situate within the province and in taxing property, not the owner in respect thereof, or the transmission thereof, lies the radical difference between the Acts there in question and what we have to pass upon. In trying to arrive at the correct interpretation naturally the taxing power of the province was referred to, as obiter dictum appears relative thereto that read in relation to the situation of the property there in question and the facts relative thereto might well be attributed thereto. But it by no means proves it is to be taken in the wide sense now contended for here, in relation to another set of facts giving rise to other legal considerations. The judgment reached does not need its support nor does it seem the basis thereof.

And that is made abundantly clear when the judgment expressly refers to the case of *Blackwood* v. *Regina*, 8 A.C. 82, as containing the reasoning which covers the case and I infer was in fact adopted in disposing of it.

If ever a case was decided on what was supposed by the Court to have been the intention of the legislature, as expressed in its enactment, that was the case of *Blackwood* v. *Regina*, 8 A.C. 82. The entire reasoning of the judgment was elaborated in order to the making of that clear. The conclusion is thus summed up therein:—

> All these things, the person to pay, the occasion for payment, and the time for payment, point to the Victorian assets as the sole subject of the tax.

Whilst impliedly admitting the power of the colony of Victoria to go much further by using language shewing such a

purpose, it would have been idle to elaborate as was done if the power in Victoria did not exist. All the case called for in such event was, if so, to declare accordingly.

The Court adds that the reasons which led English Courts to confine probate duty to the property directly affected by the probate, notwithstanding the sweeping general words of the statute which imposed it, apply in full force to the Victoria statute and the case arising upon it; yet the Court made it quite clear that said reasons were only illustrative of how such Acts had been treated and their interpretation might form a guide for reaching the meaning of the Victorian statute.

For in the early part of the judgment the Court points out that the discussion relative to the terms "probate duty" and "legacy duty" could only be used as descriptive of two classes of statutes familiar to English lawyers and adds: "If used for any more exact application they are misleading."

Now, passing that, we have the following declaration in the Quebec Act as amended which clears all this up if doubt ever existed. The amending clause was apparently designed to clear it up whether needed or not.

The clause in section 1191*c*, as follows:—

> 1191c. The word "property" within the meaning of this section shall include all property, whether moveable or immoveable, actually situate or owing within the province, whether the deceased at the time of his death had his domicile within or without the province, or whether the debt is payable within or without the province, or whether the transmission takes place within or without the province, and all moveables, wherever situate, of persons having their domicile (or residing) in the Province of Quebec at the time of their death.

This is most explicit as to what is to be covered by the transmission to be taxed and most comprehensive. Perhaps it comprehends too much, but as to that we are not concerned here, for the case now in hand of the transmission of the estate of the late Mr. H. H. Cotton who was domiciled at his death in the province, falls within the latter part of the clause just quoted and is preceded by language evidently intended to reach as far as the powers possessed might go to express the intention not found in the Victoria Act or the Ontario Act.

Nor are we concerned with the amendment since made to rectify what were possibly too extensive claims. Neither of these amendments is retrospective.

The clause should be held good for that which the legislature had the power to enact when the excess of authority, if any, was as here easily severable from what was *ultra vires* or capable of being read as expressing only what was *intra vires*.

I am only concerned thus far to see if there was an expression of intention such as was sought for but could not be found

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in the Victorian Act. For the present I assume, but by no means say, the language needed clarification.

It seems to me there can in regard to this Act thus amended be no doubt of its intention to impose a tax on the transmission in Quebec by force of its law of the personal estate wherever situate.

The next and most important question which arises here is this: does such express intention limited within what is necessary to cover the case of the transmission of the late Mr. H. H. Cotton's estate wheresoever situate, come within what is competent for the legislature of Quebec to enact?

This question starts several others—in the first place the taxability of any transmission of property in any case; the principle upon which it can be rested; and the kind of property respecting which its transmission may be taxed. I cannot think any doubt can exist as to the right to tax the transmission. The basis of such right is well expressed in the *Winans Case* (*Winans* v. *Attorney-General*, [1910] A.C. 27, by Lord Loreburn, page 30:

> In both cases the property received the full protection of British laws, which is a constant basis of taxation, and can only be transferred from the deceased to other persons by a British Court.

The basis of taxation and for transfer from the deceased to others is not exactly in the same way here in evidence, as there, but as to transfer is fully more so. The deceased had property in the province for which his executor could get no title or reach it without probate or authentic will (whichever happened to be the case) and that could only be got upon the conditions determined by law. Even if one of these conditions happened in the event to be most onerous, and probably uncollectable by an action taken by the Crown, I fail to see how the respondents can now and here attack it.

Again the *Lambe* v. *Manuel Case* (*Lambe* v. *Manuel*, [1903] A.C. 68, 17 L.J. P.C. 17, 19 Times L.R. 68), the converse of this upon the same statute before the amendments referred to, proceeds upon the recognition of the title got by the transfer or transmission involved in the grant of probate in another province where the deceased had his domicile at death. It seems to me to give impliedly just that recognition of the grant relative to goods in another province which I have already suggested. It may at least *primâ facie* be here given, in a limited sense, to the *mobilia sequuntur personam* rule.

In the next place arises the question of the power of the Quebec legislature confined as already mentioned within the limits assigned by the British North America Act regarding direct tax and its imposition within the province.

Great stress is laid upon a passage in the judgment in the

Woodruff Case (*Woodruff* v. *Attorney-General*, [1908] A.C. 508), apparently denying the power of taxation of property beyond the province.

If I am right in pointing out as above that the Court was proceeding upon the statement of facts quoted above, and the peculiarity of these facts, then the expression can only fairly be held to relate to the position of affairs at the death of the testator in that case.

The property had been passed in a foreign State to others and the maxim *mobilia sequuntur personam* could not on such a state of facts be applied in any of the various ways it has been made applicable in law.

The language of the Ontario Act did not permit of that being done on the facts dealt with in that case. And as already suggested the expression relied upon might have a relevancy thereto but cannot be fairly extended to something else not needed for the disposal of that case. I cannot think the expression was intended to mean more, but if so it was *obiter dicta*.

Everything else aside from that partakes of *obiter dicta*, which, of course, must be given that respectful consideration due at all times to eminent authority. And giving that it is our duty, if an examination of the principles of law to be applied, do not seem to us to permit of the application of what is expressed in *obiter dicta* to say so, or at all events not feel bound thereby

With great respect, I cannot assent to the said *obiter dicta* or its apparent assumption that "direct taxation within the province" necessarily means only taxation in respect of property physically within the province. Counsel for respondents in his argument relied so much upon these observations it seemed as if his whole hope rested therein and the Courts below have gone thereon entirely.

A man may be domiciled within a province and be made answerable for taxes imposed upon him in respect of property outside the province but over which the laws of the province may have given him the only foundation he can have for dominion or legal possession.

For example, a man domiciled within a province may build railway cars and lease them to one of the railway companies running into the United States, and sometimes have them at home and sometimes abroad. Can he not be taxable in respect of such property?

The Canadian farmer may use land on each side of the line between this country and the United States and his flocks or herds may be driven from his house and farm steading in any one province to the end of his farm and pasture in the foreign State. Can he not be taxed for or in respect of such personal property?

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Is the right of taxation to be determined by the mere accident of where these cars, flocks or herds may be at a given time? Is the income derivable therefrom to depend also on such accident? Reason seems to say no. It is his domicile in the province that gives the power of taxation in his case validity.

Yet in taxing such property or the man in respect of such property, there is, in a sense, taxation of property which may be outside the province. The man is taxed and may be made to pay in respect of property abroad.

Is it conceivable that the right of taxation of a multitude of other and especially commercial properties can depend on anything else than the domicile of the man answerable for the tax and who is enjoying all his rights or property therein by virtue of the legislation of his province and the contracts he has formed therein? And for the protection of such rights should he not share part of the common expenses of such protection?

There are no doubt cases of personal property within a province owned by someone outside the province which can be taxed also.

Then we have the income tax which forms no mean part of the aggregate municipal taxation. Yet it often rests upon no other foundation in law than the domicile of the man taxed.

The income tax has never been questioned. Yet the sources from which the income flows may be in every quarter of the globe. The legislature of the province, where he thus earning it is domiciled, having had committed to it the exclusive power over property and civil rights and imposed upon it the duty of protecting him therein, has also the power of direct taxation to meet the expenses of discharging such duty. Surely the fact that the income may never have reached home and may be left abroad to earn more, is not to determine the power of imposing such a tax.

Lest it may be said taxation of income is indirect, I submit what was said in *Bank of Toronto* v. *Lambe*, 12 A.C. 575, at page 582, in the course of the judgment dealing with the power of direct taxation given the provinces. It is as follows:—

> It would deny the character of a direct tax to the income tax of this country, which is always spoken of as such, and is generally looked upon as a direct tax of the most obvious kind; and it would run counter to the common understanding of men on this subject, which is one main clue to the meaning of the legislature.

If, therefore, we may safely assume an income tax derivable from foreign ventures and not necessarily reaped and brought into the home custody of him liable to such tax, why should we in this case be confined to the test of the particular thing being physically within the province as the true limit of the power of taxation within a province?

It is to be observed also that the same Court in *Blackwood* v. *Regina*, 8 A.C. 82, thus expressed its views in reference to the power of taxation. It is said, at page 96:—

> There is nothing in the law of nations which prevents a Government from taxing its own subjects on the basis of their foreign possessions. It may be inconvenient to do so. The reasons against doing so may apply more strongly to real than to personal estate. But the question is one of discretion, and is to be answered by the statutes under which each state levies its taxes, and not by mere reference to the laws which regulate successions to real and personal property.

This power I submit is that of direct taxation. It is not said that the extreme exercise suggested as possible would be a proper exercise of such power. It could not be exercised over anyone domiciled in another country or province. But, by every principle of convenience and reason relative to the partition of the powers thus existing and being apportioned between the respective jurisdictions of Dominion and provinces, there is nothing that forbids, and much that leads to the conclusion, that it was intended to assign to the provinces whatever powers of direct taxation a province or State could properly exercise and usually exercised or had the power to exercise.

Direct taxation except for local purposes had never been resorted to by the Province of Old Canada, and, so far as I am aware and as it is generally understood by the term, has not yet been resorted to by the Dominion, save possibly by the excise duties.

The Dominion quite consistently therewith might also by virtue of the power assigned it possibly resort thereto. But when the conditions existent relative to direct taxation were such as to induce the belief that a resort thereto by the Dominion might only be in a very remote contingency, why should we assume that the usual and general power was not that assigned to the provinces which alone were likely to exercise it; and that it was not intended to enable them to exercise it in their respective dealings with their own citizens.

There is nothing to indicate that the general power declared as above to be possible, was reserved for the Dominion only, or that some implied limitation was intended, reserving and preserving part of it in a dormant condition, only to be exercised on extreme occasions, or for special purposes. In contradistinction to the power extending over all persons and given the dominion to resort to any mode of taxation, it was quite natural in assigning direct taxation to express it as appears.

I submit, what was intended was that which the language indicates, when we have regard to the nature of the Act which consists of a concise description of a number of enumerated powers.

It is an extremely improbable thing that for the mere pur-

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poses of raising a revenue for provincial purposes by direct taxation, any abuse such a power may be in this particular regard susceptible of, was dreamed of as a thing to be guarded against by anyone. If it had, we would likely have found other expression given thereto.

Moreover we must bear in mind that of those federated provinces, Nova Scotia and New Brunswick had long enjoyed just as complete powers in this regard as the colony of Victoria, of which the legislation was in question in the judgment I have referred to. It does not seem to have occurred to the Court in making the remarks I have quoted that any distinction then existed between the powers of that colony relative to such taxation and those of any other country.

Are we to assume that these other provinces surrendered in this regard what in theory they had enjoyed up to Confederation? The same is true of the old Province of Canada; but as it was divided into two provinces, the illustration drawn therefrom is not so direct.

"Direct taxation within a province" and "direct taxation of property within a province" are, I submit, not interchangeable terms. It is the former term that is used and if the meaning of the latter term was what it purposed surely it would have been so expressed.

And when we find that the Privy Council has not adhered to the literal expression of the same power by limiting it to the "revenue for provincial purposes" but has heretofore found in that, despite the words used, power to delegate it to corporate municipal and school boards, I do not think we should seek in another spirit of interpretation, relative to words in the same sentence, to restrict the power by something not expressed and to something quite unusual. Parliament was not accurately defining the powers of a petty corporation to be created, but designing in general terms where that line was to be drawn in dividing the legislative powers of a great state.

It must be borne in mind that the legacy duty had long been in force in England and that the Succession Duty Act had been passed some twelve years before the British North America Act, and that both, within the memory of those transacting affairs, had been the subject of judicial construction whereby the line was drawn at where the rule *mobilia sequuntur personam* would put it. See *Thomson* v. *The Advocate General*, 12 Cl. & F. 1; and *Wallace* v. *Attorney-General*, L.R. 1 Ch. 1; each dealing with the respective acts referred to. And to this day the rule said maxim implies has been applied in the *Manuel Case* (*Lambe* v. *Manuel*, [1903] A.C. 68, 17 L.J.P.C. 17, 19 Times L.R. 68), I have referred to, to govern in one way the construction of this very Act now in question before its amendment. The principle being so declared the converse case surely must be held and applied herein.

Or is this interpretation in the *Manuel Case* (*Lambe* v. *Manuel*, [1903] A.C. 68), when restrictive in its operation to be all right, and in the converse case all wrong? The view held in the *Wallace Case* (*Wallace* v. *Attorney-General*, L.R. 1 Ch. 1), may since have varied by statute, but that does not affect the line of argument I suggest. Again, I shall not readily impute to the framers of the British North America Act the purpose of so limiting the powers of a province in this regard that the economic results of such limitations inevitably would be, by so limiting its taxing power, to drive a large portion of capital owned by those domiciled in a province to use it in a foreign country.

In conclusion it seems to me the man domiciled in a province is liable to such direct taxation for the specified purposes of provincial revenue as may be usually exercised over him for the like purpose in any other state.

When living he is liable to taxation upon his income derivable from his investments abroad, and, if the legislature sees fit, all else he has abroad, and when he is dead the transmission of his estate, in so far as it requires the protection and support of the law (as in Quebec under the principles of the Civil Law or Code), the sanction or authority of the province exercised in or through the ordinary channels it has created for the purpose can only be obtained upon the terms the province has seen fit to enact as to the condition of giving that legal support or needed sanction or authority.

However much all I have advanced by way of illustration relative to the taxing power may be subject to limitation or reservation, I am unable to see how or by what process it is possible to compel a province to give that sanction save on its own terms.

The will of the late Mr. Cotton was made in Quebec, where he undoubtedly was domiciled when it was made and at his death, and his will rested for its validity on the laws of Quebec, and was expressly made subject to the conditions imposed by this statute before it could obtain any force or effect.

The respondents have not shewn that in respect of this estate there was any mistake made in that regard or that the securities in respect of which, or upon the basis of the value of which, they paid this tax did not, or rather respondents in order to acquire title thereto did not, require this sanction.

I can conceive of a case wherein a foreign state or another province may have expressly provided for a statutory or other representative of a deceased person who in life was domiciled elsewhere, getting his personal property situate within its jurisdiction without any evidence of what had taken place in the jurisdiction of his late domicile. This, however, is not in

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accord with the known international law relative to personal property.

Primâ facie his personal property had according to the legal maxim, *mobilia sequuntur personam*, its location in the province where he was in life domiciled at the time of his death. And fully agreeing in and duly observing all that has been said in the case of *Blackwood* v. *Regina*, 8 A.C. 82, relative to the interpretation of legislation which deals with personal property or estate, by an Act of this kind not warranting the application of the said maxim, to interpret the statute which does not make clear a purpose of its covering by the application of the said maxim all beyond the state of his domicile, I yet think when the legislature has expressed a clear intention to cover all that, then the maxim may well be taken as a starting point of presumption which the plaintiff, in a case to recover back, such as this, must rebut if it can be rebutted.

Whether or not because of another form of law (and another mode of thought than ruled the minds of the framers of the Victoria Act, dealt with in that case), the word transmission is used and a more direct and comprehensive result is reached. Those enjoying the benefits of the transmission by virtue of Quebec law and Quebec Courts must pay for or upon the transmission.

We had *The Attorney-General* v. *Reed*, 10 A.C. 141, in the first, but not on the second argument pressed upon us, but the respondents' factum still presents it as covering the alternative argument that if it was not property that was being taxed, then it was not direct but indirect taxation.

In a like case I would feel bound to follow this authority, but fortunately the reasoning it proceeded upon and ground given in support thereof, have since been revised in *The Bank of Toronto* v. *Lambe*, 12 A.C. 575, by the same Court and relieves from any embarrassment which otherwise might have been felt.

I would add that to my mind if we imposed no taxes but those which would not fall in part at least on someone else than him first paying, we never would be troubled with taxes. No one possessing clearness of vision can imagine that a single tax upon land is not in part borne by others than the land owner who pays it. Its payment or the burden of its payment has to be reckoned with and met by every member of society. Its simplicity is attractive.

It is admitted the probate of the late Mrs. Cotton's will executed in Boston was first applied for and got in Quebec. And her husband as the executor of her will obeyed that law, concluded he was, and consequently his wife must be held to have been, domiciled in Quebec at the time of her death.

I am unable to see how in face of the proceedings at the time the declarations made then and upon which the Court of Probate,

if the will was probated as admitted, can be overturned by such evidence as now adduced. The amending section 1191(*c*) defining the word "property" is not applicable to her case, but as already suggested the statute did not, in my opinion, or my reading of the *Lambe* v. *Manuel* case, [1903] A.C. 68, need it.

The law of Quebec operated on each estate, was recognized as having so operated, and I fail to see how his representatives can now claim to defeat the law in either case.

The appeal should be allowed with costs, and doing so seems to render consideration of the cross-appeal needless.

DUFF, J.:—This appeal raises the question whether an Act of the Legislature of Quebec imposing certain duties described as "Succession Duties," in respect of transmissions of property under the law of that province in consequence of death is within the competence of that legislature in so far as such transmissions affect movable property locally situate outside that province.

The Court below held the Act to be in that respect ultra vires conceiving itself to be governed in the determination of the point in question by the decision of their Lordships of the Privy Council in *Woodruff* v. *Attorney-General of Ontario*, [1908] A.C. 508, 24 Times L.R. 912.

In that case their Lordships had to pass upon the power of the Legislature of Ontario to impose a tax in respect of particular items of property locally situate outside the province on the occasion of transfer of that property inter vivos effected by delivery of it in the State of New York.

The two cases seem to be clearly distinguishable; and I do not think we are relieved from considering the points raised on this appeal either by the decision itself in *Woodruff's* case or by any of the observations of the distinguished and lamented Judge who delivered their Lordships' judgment. The learned Judges in the Courts below appear, if I may say so with the greatest respect, to have overlooked (in its bearing on this case) the fundamental difference in point of law between the devolution under the law of a province of a moveable succession comprising moveables having an extra-provincial *situs* and a transfer *inter vivos* of the title to particular moveables (having such a *situs*) effected by delivery of them outside the province; and thus, as I conceive, to have missed the broad distinction between the question presented in this case and that pronounced upon in the decision by which they considered themselves to be governed.

It is a principle now generally recognized in countries where either the common law or the civil law prevails that as regards movables (wherever they may be situated in fact) a testate or intestate succession is for many purposes considered as an integer devolving under and governed by a single law—namely, that

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which was the personal law of the decedent at the time of his death. "The logical consequences of this general principle," says Dr. von Bar [Bar's Private International Law, 2nd ed., sec. 362], "are kept intact by the application of the fiction mobilia ossibus inhærent."

The principle is recognized by articles 6, 599 and 600 of the Civil Code of Quebec, the latter of which in effect adopts in this connection the English rule that the "personal law" is the law of the territory in which the decujus had his domicile.

This principle has never, by the law of England at all events, been regarded as excluding the authority of the law of the *situs* in respect of the particular moveable items comprised in a succession; but it does involve the regulation by the law of the domicile of the distribution of the beneficial surplus belonging to the succession after the satisfaction of such claims as debts and expenses of administration. By that law then is determined the extent to which the property is subject to testamentary disposition and the conditions upon which the beneficiaries become entitled to accede to a share of the estate through such disposition or by operation of law; and among the generally recognized logical consequences of this principle (preserved as above mentioned by the maxim *mobilia ossibus inhærunt*) is that the legislative authority of the domicile is acting within its proper sphere in assuming for public purposes a share of the surplus as a toll exacted from the beneficiaries by way of condition upon or as an incident of the accession to the benefits of the transmission. Von Bar, Conflict of Laws, 2nd ed., pp. 254, 255; Wharton, Conflict of Laws, 3rd ed., pp. 183, 184, 185; Dicey, Conflict of Laws, 2nd ed., pp. 751, 752, 753; *Eidman* v. *Martinez*, 184 U.S., at 591; *State of Maryland* v. *Dalrymple*, 3 L.R.A. 372, at p. 374, West Inheritance Tax.

In the fiscal legislation of the United Kingdom these principles have for nearly a century had full play. The enactments of the statute (55 Geo. III. ch. 184) imposing legacy duty were expressed in general terms comprehensive enough in themselves to apply to all persons and to all bequests of or payable out of personal property wherever situate. It was held in a well-known series of cases that the statute must be construed in accordance with the principle expressed in the maxim quoted above.

In 1842 in *Thomson* v. *Advocate General*, 12 Cl. & F. 1, all the Lords (accepting the unanimous opinion of the Judges) affirmed that the Legislature must be supposed to have been legislating with reference to the principle *mobilia sequuntur personam*. In 1865 (in *Wallace* v. *Attorney-General*, L.R. 1 Ch. 1) Lord Cranworth in construing the general words found in the Succession Duty Act of 1853 said that the incidence of legacy duties was regulated by the principle that such imposts

should be charged upon benefits accruing under "the laws of this country."

Nobody doubts, of course, the competence of the Imperial Parliament to pass legislation obligatory upon the Courts of the Empire professing directly to affect property situate in foreign countries whatever the ownership under which it is held. But there are certain recognized principles of international conduct which the Courts of the Empire in the absence of a clear indication to the contrary will assume Parliament has not disregarded.

It was in these cases considered to be no infringement of these rules that Parliament should impose legacy duties in respect of a succession composed in part of movables having an actual situs in a foreign country, provided the decedent had at the time of his death a domicile within the United Kingdom. This restriction of the duty to the estates of persons so domiciled was sufficient, as Lord Herschell said in *Colquhoun* v. *Brooks*, 14 A.C. 493, at p. 503, to "bring the matter dealt with within our territorial jurisdiction."

In this recognition of the law of the domicile in the matter of successions no distinction has been drawn between the legislative authority of a colony invested with powers of self-government or of a state or province which is the member of a Federation and that of a Parliament exercising or possessing unrestricted sovereign powers. In the numerous cases which have come before the Privy Council from the Australasian colonies touching the scope of enactments imposing death duties the constitutional competence of the legislatures of those colonies to proceed on the principle *mobilia sequuntur personam* seems never to have been doubted. *Harding* v. *Comrs. of Stamps for Queensland*, [1898] A.C. 769. Indeed, as Mr. Dicey has pointed out, since the Treaty of Independence with the American colonies in 1783, the policy of the Parliament of the United Kingdom has been to treat the colonies as in the matter of such taxation possessing fiscal independence. In the United States, it is perhaps superfluous to observe, in this respect the several States have been regarded as exercising an independent sovereignty.

Is the taxing authority of a province of Canada affected by any restriction which makes such a province incompetent to apply these principles in framing its plan of taxation in respect of successions? Nobody can doubt that prior to Confederation the Province of Nova Scotia (let us say) possessed such authority. How far then was this authority curtailed by the British North America Act? I make no apology for quoting once again what one may perhaps call the classic passage in Lord Watson's judgment in *Liquidator of the Maritime Bank* v. *Receiver-General of N. B.*, [1892] A.C. 441 and 442, where he explains the

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constitutional relation in which the provinces stand to the Canadian Union:—

> Their Lordships do not think it necessary to examine, in minute detail, the provisions of the Act of 1867, which nowhere profess to curtail in any respect the rights and privileges of the Crown, or to disturb the relations then subsisting between the Sovereign and the provinces. The object of the Act was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy. That object was accomplished by distributing between the Dominion and the provinces, all powers executive and legislative, and all public property and revenues which had previously belonged to the provinces; so that the Dominion government should be vested with such of these powers as were necessary for the due performance of its constitutional functions, and that the remainder should be retained by the provinces for the purpose of provincial governments. But, in so far as regards these matters which, by sec. 92, are specially reserved for provincial legislation, the legislation of each province continues to be free from the control of the Dominion, and as supreme as it was before the passing of the Act.

The subject of taxation was not under the Act exclusively assigned as a domain of legislation to either the Dominion or the provinces. The Dominion in that field is given unrestricted authority; the provinces have a concurrent, but more limited authority. The scope of this provincial authority is defined by the words "Direct taxation within the province for the raising of a revenue for provincial purposes." In this case we are concerned only with the condition that the taxation shall be "within the province."

Some point, it is true, was raised on the words "direct taxation;" but since the decisions of the Privy Council in *Bank of Toronto* v. *Lambe*, 12 A.C. 575, and in *Brewers and Maltsters Association* v. *Attorney-General of Ontario*, [1897] A.C. 231, it does not appear to be any longer open to question that duties imposed upon or in respect of benefits acquired under a will or intestacy are direct taxes within the meaning of the provision under discussion.

The point for consideration then is this: Was the authority (which the provinces unquestionably possessed before Confederation) to impose duties upon or in respect of the benefits acquired under a succession comprising in part extra-territorial movables abrogated by the provision of the British North America Act, which limits the provincial power of taxation to "taxation within the province"?

The question at issue cannot, I think, be fully appreciated without taking into account the authority of the province to legislate upon the subject of "Property and Civil Rights in the

Province." It is of course settled that the Dominion in the exercise of its authority relating to the subjects of legislation mentioned in sec. 91 may while acting within its own proper sphere legitimately pass laws which in their operation affect property and civil rights within the provinces; but it is equally well settled that over property and civil rights regarded as subjects of legislation in themselves the Dominion (except when acting under the specific provisions of that section) possesses no legislative authority. *Citizens* v. *Parsons*, 7 A.C. 96, at pages 110 and 111. The subject of successions, the decujus being domiciled in Quebec, is one of those subjects which is within the exclusive authority of the legislature of Quebec—in respect of which the authority of that legislature is in Lord Watson's phrase "as supreme" as before the passing of the Act.

The right of a beneficiary entitled to share under such a succession is regulated by that legislature alone. In the Courts of any country, which accept the law of the domicile as prescribing the rules of succession, the right of a person claiming to share in the benefit of such a succession would fall to be determined by the application of such rules as that legislature prescribes as applicable to such a case. In accordance with the principles already indicated the "logical consequences" of this control of such successions by the Province of Quebec "kept intact by the application of the fiction *mobilia ossibus inhaerunt* seem to involve this—the succession may be deemed for the purpose among others of determining the incidence of duties upon benefits accruing from the devolution of it.

On what ground, then, are we so to restrict the words "taxation within the province" as to exclude such successions from the taxing authority of that province? There appears to be no ground for doing so. The possibility of those words being so restricted does not appear to have occurred to the Judicial Committee when considering the case of *Lovitt* v. *The King*, 33 Can. S.C.R. 350; *The King* v. *Lovitt* (1911), 28 Times L.R. 41, 105 L.T. 650 (P.C.). [Since reported, [1912] A.C. 212.]

I have not been able to discover anything in the *Woodruff* case (*Woodruff* v. *Attorney-General*, [1908] A.C. 508), which affects the force of these considerations. There was in that case no question of a testamentary or intestate succession. The Province of Ontario had attempted to exact duties in respect of transfers made *inter vivos* though in contemplation of death of movables having at the time the transfers were made a situs in the State of New York according to both the law of Ontario and the law of New York. It is argued, however, that a passage in the judgment of Lord Collins lays down two propositions, first, that taxation of property locally situated outside the province is *ultra vires;* and, second, succession duties levied upon benefits accruing from a succession composed in part of

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movables locally situate outside the province are taxes imposed on extra-provincial property within this rule. It is needless to say that if such were the sense of a passage which forms the ground of the judgment it is not for this Court to refuse to follow it or to seek to fritter it away by insubstantial distinctions. I think this is a misreading of their Lordships' judgment. It is not without some bearing upon the point of the meaning of the judgment that the case before the Privy Council did not involve the consideration of the validity of taxes imposed upon a succession such as we have here and that their Lordships' judgment does not in terms mention such a succession.

Indeed it seems to me that the second of the above mentioned propositions can be deduced from the judgment only through an assumption that it follows as a logical consequence from the first. A moment's consideration will shew that this is not the case. Such benefits are generally recognized as being subject to the taxing power of the province as we have seen upon the principle that the totality of objects constituting a succession is subject to the personal law of the decujus and consequently that the rights of persons claiming such benefits are governed by this personal law and are regarded as having their seat in the territory subject to it.

There is, however, no general recognition that transactions *inter vivos* respecting particular movable objects are governed by the *lex domicilii*. The more generally accepted view is that the maxim *mobilia sequuntur personam* does not make the *lex domicilii* applicable to such transactions as those which were in question in *Attorney-General* v. *Woodruff*, [1908] A.C. 508; Westlake, pp. 181, 182, 191-195; Savigny (Guthrie's translation) 176 note (2); Wharton, Conflict of Laws, 3rd ed., vol. 2, pp. 680-684; von Bar, 488-491; Foelix, paragraphs 61 and 62. 1 Aubrey et Rau, p. 103, 1 Demolombe, pp. 110, 111.

According to the law of Ontario (which is the law of England) there seems to be no room for doubt that the transactions in question in that case were governed by the law of New York. The cases are fully reviewed by Mr. Westlake (Private International Law, 4th ed., pp. 191-195) and his argument leaves no doubt on the point.

The donees consequently derived nothing through the law of Ontario. That was the view presented by Mr. Danckwerts in his argument on behalf of the appellants and that apparently was the view upon which their Lordships acted.

It is perhaps not to be expected that statutes such as that before us—which impose duties in respect of transmissions of estates, including property situate abroad, and at the same time upon all property within the jurisdiction transmitted by death, wherever the domicile of the decedent may be—could escape criticism as putting into operation two seemingly incompatible principles. Strictly we are concerned in this case only with the

question of the power of the legislature in respect of the first mentioned class of duties; and constitutionally the legislature's action in imposing such duties, so far as it is constitutional, cannot be affected by the circumstance that it has also professed to exact them (if it have done so) in circumstances to which its authority does not apply.

The truth is, however, that the practice very widely prevails of taxing all personal property having a situs within the territorial jurisdiction of the taxing power on the occasion of a transmission of title by or in consequence of death.

The law of England, for example, is strict in requiring the title to moveable items of a foreign succession to be made in accordance with the law of the situs, and the estate duty applies to all such items having an actual local *situs* in the United Kingdom.

Mr. Justice Holmes, delivering the judgment of the Supreme Court of the United States in *Blackstone* v. *Miller*, 188 U.S. at 204, says:—

> No one doubts that succession to a tangible chattel may be taxed wherever the property is found, and none the less that the law of the situs accepts its rules of succession from the law of the domicil, or that by the law of the domicil the chattel is part of a *universitas* and is taken into account again in the succession tax there. *Eidman* v. *Martinez*, 184 U.S. 578, 586, 587, 592. See *Mager* v. *Grima*, 8 How. 490, 493; *Coe* v. *Errol*, 116 U.S. 517, 524; *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U.S. 18, 22; *Magoun* v. *Illinois Trust and Savings Bank*, 170 U.S. 283; *New Orleans* v. *Stempel*, 175 U.S. 309; *Bristol* v. *Washington County*, 177 U.S. 133; and for State decisions, *Matter of Estate of Romaine*, 127 N.Y. 80; *Callahan* v. *Woodbridge*, 171 Massachusetts, 593; *Greves* v. *Shaw*, 173 Massachusetts, 205; *Allen* v. *National State Bank*, 92 Maryland, 509.
>
> No doubt this power on the part of two States to tax on different and more or less inconsistent principles, leads to some hardship. It may be regretted also, that one and the same State should be seen taxing on the one hand according to the fact of powers, and on the other, at the same time, according to the fiction that, in successions after death, *mobilia sequuntur personam* and domicil governs the whole. But these inconsistencies infringe no rule of constitutional law: *Coe* v. *Errol*, 116 U.S. 517, 524; *Knowlton* v. *Moore*, 178 U.S. 41.

There is certainly nothing in the British North America Act pointing to the conclusion that a Canadian province is confined to either one or the other of these principles of taxation. One province may adopt that which gives special prominence to the circumstances that the succession is regulated by the law of the domicile, another to the fact that the title to particular items of moveable property is controlled by the local law of the situs. Toll may be exacted as an incident of the accrual of the benefit or as a condition of the passing of the title. And since either is valid when acted upon to the exclusion of the other, I do not see upon what ground it can be said that both principles may

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not be brought so to speak under the same roof and combined in a single system. The decision of the Judicial Committee in *Lovitt* v. *The King* (1911), 28 Times L.R. 41, 105 L.T. 650, appears to support this view. [Since reported, [1912] A.C. 212.]

This disposes of the question of the duties charged against the benefits under the will of Henry Cotton.

It is not without some hesitation that I have concluded that duties imposed by the earlier statute must be held to be leviable in respect of Mrs. Cotton's estate as a whole. As to the question of domicile, Henry Cotton's admission creates a presumption which has not been displaced and the point now relied upon appears to have been taken for the first time in this Court. The question upon which I have had some doubt relates to the construction of the statute itself. The provision to be considered is:—

> 1191 *b*. All transmissions, owing to death, of the property in, usufruct or enjoyment of, moveable and immoveable property in the province (*situé dans le province*) shall be liable to the following taxes: . . .

That is the English version; and if the French version had been the same I should have had no difficulty whatever in holding on the authority of *Lambe* v. *Manuel*, [1903] A.C. 68, that the taxes imposed by the enactment apply to all movable property constituting part of the estate of a decedent domiciled in the Province of Quebec at the time of his death. In the French version instead of the words "property in the province" we have "*propriété situé dans le province.*" The contention is that these words shew the legislature to have been aiming at transmission only of property having an actual physical situs within the province, or property which considered apart altogether from the fact of its constituting part of a succession devolving under the law of the province has a situs within the province by construction of law. After a most careful examination of the judgments in the case of *Lambe* v. *Manuel*, [1903] A.C. 68, I think the decision in that case relieves us from considering the construction of the statute in this aspect.

I think the effect of that decision is that the situs indicated by the phrase above quoted from the French version is the situs as determined in the case of movables by the fact that such movables form part of the succession devolving under the law of Quebec and by the application to such circumstances of the maxim *mobilia sequuntur personam*.

The question which arose in *Lambe* v. *Manuel* was whether certain moveables which formed part of the patrimony of a person who had died domiciled in the Province of Ontario, but which admittedly, if that circumstance were to be left out of consideration, had a situs within the Province of Quebec were dutiable under the enactment referred to. It was held they were not dutiable and on the ground as it appears to me that in the

application of the phrase above quoted "*situés dans le province*" the principle *mobilia sequuntur personam* must govern. In that case the contention on behalf of the Attorney-General was the contention which is now made on behalf of the respondents, viz: that the principle upon which the legislature had proceeded was that all property (irrespective of the operation of the maxim *mobilia sequuntur personam*) having a local situation in the province should be subject to the duties imposed by the Act. That construction was rejected by the Superior Court, the Court of Appeals and by the Judicial Committee successively. The ground upon which the Superior Court proceeded as appears by the judgment of Sir Melbourne Tait was that the legislature had acted upon the principle consistently adopted by the English Courts in construing the Legacy Duty Acts, viz., that for the purpose of determining the incidence of duties imposed upon transmission of benefits in consequence of death the situation of the property is to be determined by the maxim referred to. His views are summed up in the last paragraph of his judgment which is in the following words:—

> I have come to the conclusion that I should interpret Article 1191*b* in accordance with the rule of our law and of the English law regarding moveable property above stated and held that it means all transmissions of such property in the province, belonging to persons domiciled therein at the time of their death; in other words, transmissions resulting from a succession devolving here and that in the eye of the law *the moveable property in question is not situated in this province* and is not subject to the tax sought to be imposed. This construction will not only be consistent with such rule, but also with the other provisions of the Act.

In the Court of Appeals the judgment of Mr. Justice Bossé is to the same effect as appears by the following passages:—

> Il nous faut donc déclarer que, lors du décés, les biens dont il s'agit avaient leur assiette dans la Province d'Ontario et qu'ils doivent être considéres comme situés dans Ontario, lieu du domicile du *decujus*. Ils échappent partent, au droit de fisc de la Province de Quebec.
>
> Notre statut rend le chose encore plus claire en imposants un droit sur les seuls biens situés dans la Province de Quebec.
>
> Il n'était pas, d'ailleurs, nécessaire de faire cette restriction; nous ne pouvons pas taxer les biens situés à l'étranger.

The view indicated by this passage is emphasized by the citations made by Bossé, J., from the judgment of Lord Hobhouse in *Harding* v. *Commissioners of Queensland*, [1898] A.C. at p. 773.

The judgment of the Judicial Committee [*Lambe* v. *Manuel*, [1903] A.C. 68] was delivered by Lord Macnaghten and in the course of that judgment His Lordship says, referring to the reasons given by Sir Melbourne Tait and Mr. Justice Bossé:—

> The decisions of the Quebec Courts are, in their Lordships' opinion, entirely in consonance with well-established principles, which have

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been recognized in England in the well-known cases of *Thomson* v. *Advocate-General*, 12 Cl. & F. 1, and *Wallace* v. *Attorney-General*, L.R. 1 Ch. 1, and by this Board in the case of *Harding* v. *Commissioners of Stamps for Queensland*, [1898] A.C. 769.

Now what are the principles established in the cases to which His Lordship refers? These principles can best be stated in the *ipsissima verba* of the learned Judges by whom those cases were decided. In *Thomson* v. *Advocate-General*, 12 Cl. & F. 1, the Lord Chancellor, Lord Cottenham, said at p. 21:—

> An Englishman made his will in England; he had foreign stock in Russia, in America, in France, and in Austria. The question was whether the legacy duty attached to that foreign stock, which was given as part of the residue, the estate being administered in England; and it was contended, I believe, in the course of the argument by my noble and learned friend who argued the case, in the first place, that it was real property, but, finding that that distinction could not be maintained, the next question was whether it came within the operation of the Act, and although the property was all abroad, it was decided to be within the operation of the Act as personal property, on this ground, and this ground only, that as it was personal property, it must in point of law, be considered as following the domicile of the testator which domicile was England.
>
> Now, my Lords, if you apply that principle, which has never been quarrelled with, which is a known principle of our law, to the present case, it decides the whole point in controversy. The property, personal property, being in this country at the time of the death, you must take the principle laid down in the case of *In re Ewin* (1 Cr. and Jerv. 151), and it must be considered as property within the domicile of the testator, which domicile was Demarara. It is admitted that if it was property within the domicile of the testator in Demarara, it cannot be subject to legacy duty. Now, my Lords, that is the principle upon which this case is to be decided. The only distinction is that to which I have referred, and which distinction is decided by the case *In re Ewin*, to be immaterial.

At p. 26 Lord Brougham said:—

> The rule of law, indeed, is quite general that in such cases the domicile governs the personal property, not the real; but the personal property is in contemplation of the law, whatever may be the fact, supposed to be within the domicile of the testator or intestate.

And finally, at p. 29 these words are attributed by the report to Lord Campbell:—

> If a testator has died out of Great Britain with a domicile abroad, although he may have personal property that is in Great Britain at the time of his death, in contemplation of law that property is supposed to be situate where he was domiciled, and, therefore, does not come within the Act; this seems to be the most reasonable construction to be put upon the Act of Parliament.

The effect of the other two cases mentioned by His Lordship may be stated in the language of Lord Hobhouse, in *Harding* v. *Commissioners for Queensland*, [1898] A.C. 769, at p. 774:—

The matter appears to be well summed up in Mr. Dicey's work on the Conflict of Laws, at p. 785, in which he paraphrases Lord Cranworth's application of the principle *mobilia sequuntur personam* by saying that the law of domicile prevails over that of situation.

In *Attorney-General* v. *Napier*, 6 Exch. 217—it may be added—Parke, B., thus refers to the decision in *Thomson* v. *The Advocate-General*, 12 Cl. & F. 1:—

> In the case of *Re Ewin*, 1 Cr. & Jerv. 151, the doctrine was first broached that the true criterion whether the parties were liable to legacy duty depended upon the fact whether the testator at his death was domiciled in England; and that is the rule adopted by the learned Judges in their decision in the case of *Thomson* v. *The Advocate-General*, 12 Cl. & F. 1; and Lords Lyndhurst, Brougham and Campbell put it upon the great principle that personal property is to be considered as situate in the place where the owner of it is domiciled at the time of his death.

For these reasons I have been unable to escape the conclusion that the effect of the decision in *Lambe* v. *Manuel*, [1903] A.C. 68, is to require us to hold that for the purpose of applying this enactment the situs of movables forming part of a succession devolving under the law of Quebec must be taken to follow the domicile of the decedent.

ANGLIN, J.:—The Crown appeals against the judgment of the Court of King's Bench of the Province of Quebec, disaffirming its right to retain succession duties levied against the estates of the late Charlotte Cotton and her husband Henry H. Cotton, in respect of movable property consisting of bonds, stocks, promissory notes, jewelry and pictures actually situate in the United States of America at the date of the demise of each decedent.

That the actual situs of the tangible portion of this property was foreign is of course unquestionable. According to the rules stated in *Commissioners of Stamps* v. *Hope*, [1891] A.C. 476, 481-2, and accepted in *Payne* v. *Rex*, [1902] A.C. 552, 559-60, the intangible portion also had a "local existence"—was "actually situate," or, as put in the cases (*Thomson* v. *Advocate-General*, 12 Cl. & F. 1, 17; *Winans* v. *Atty.-Gen.*, [1910] A.C. 27, 29; *Woodruff* v. *Atty.-Gen. of Ont.*, [1908] A.C. 508, 573) "locally situate" and, as far as property of that class can be, was "physically situated" (*Winans* v. *Atty.-Gen.*, [1910] A.C. 27, 31) either at Boston or elsewhere in the United States—certainly not in the Province of Quebec.

No reason was advanced in argument, and I know of none, why those rules should not obtain in that province.

Although in many of the cases property so situate is described as "locally situate" I am unable to appreciate the force of the word "locally" in this phrase; (*Inland Revenue Commissioners* v. *Muller Co.'s Margarine*, [1901] A.C. 217, per Lord

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James of Hereford at p. 228; *Treasurer of Ont.* v. *Pattin*, 22 O.L.R. 184, 191); unless, indeed, it is used in a sense which makes it interchangeable with the word "actually"—in the case of tangible property as the equivalent of "physically" and in the case of intangible property to denote that attribute of locality which it possesses according to such rules as those laid down in *Hope's* case in *Commissioners of Stamps* v. *Salting*, [1907] A.C. 449, and in *Re Hoyles*, 27 T.L.R. 131. To signify property thus situate, as well as property having a physical situs, within or without the territorial limits of the taxing province or state, I shall in this opinion employ the phrase "actually situate."

Charlotte Cotton died on the 11th of April, 1902; Henry H. Cotton on the 28th of December, 1906. Both dates are important because the Quebec succession duties law was materially amended and was consolidated in the interval.

It is admitted that Henry H. Cotton was domiciled in the Province of Quebec when he died. The respondents allege that his domicile, which of course was also that of Mrs. Cotton, was at the time of her death in the State of Massachusetts. In the view of the case taken by the provincial Courts it was unnecessary to pass upon the question of Mrs. Cotton's domicile, and it was left undetermined.

Henry Cotton made two solemn declarations respecting his wife's domicile which were filed with the provincial revenue officers. In the first, made in 1902, he stated that Mrs. Cotton's domicile at the time of her death was in the State of Massachusetts; in the second, made in 1904, that it was in the Province of Quebec. The decision of the Privy Council in *Lamb* v. *Manuel*, [1903] A.C. 68, is put forward as the reason for his change of view. But the bearing of that decision on the question as to the domicile of Mrs. Cotton is scarcely apparent.

When sixteen years of age Henry Cotton left the Province of Quebec and went to reside in Boston. He lived and carried on business there for thirty-six years. He became a naturalized American citizen. He married a lady born and brought up in the State of Massachusetts. During the summer he often paid visits with his wife to Cowansville, Quebec, where his mother resided. In 1901 he appears to have decided to retire from business. He came as usual to Cowansville that summer. During this visit he and his wife resided, as had been customary, with his mother. He, however, then bought a property in Cowansville and proceeded to improve it with a view to making it his future permanent residence. In the autumn he returned as usual with his wife to Boston. They both appear to have remained there until Mrs. Cotton died in April, 1902. In his second declaration filed with the revenue officers he swore that he believed his domicile was at Boston when he married.

Notwithstanding the difficulty of establishing that a domicile of origin has been changed (*Winans* v. *Atty-Gen.*, [1904] A.C. 287), I have no doubt upon these facts that Henry Cotton had acquired a domicile in the Commonwealth of Massachusetts. It may require less cogent evidence to make out a case of change or loss of an acquired domicile, or domicile of choice, but upon the facts in evidence, notwithstanding the second declaration of Henry Cotton, my conclusion would be that, although he had, sometime before his wife died, formed an intention of abandoning his Massachusetts domicile and of again acquiring a domicile in the Province of Quebec, he had not up to the time of her death actually carried out that intention; that, although he had taken some preliminary steps with that end in view, the actual change of domicile had not been made and he still retained his domicile in the State of Massachusetts, as well as his American citizenship.

The respondents, however, did not allege in their pleadings that Mrs. Cotton died domiciled in Boston. On the contrary, by claiming the return only of duties paid on her foreign assets they appear to admit and to base their action on her domicile being in Quebec. Moreover, in their factum in the Court of King's Bench, and again in their factum in this Court, they state that Henry Cotton's wife died in Boston, where he had returned to live temporarily. It would be regrettable if a misapprehension of counsel as to the proper inference to be drawn from, or as to the legal effect of the facts established, should prevent the appellants asserting their legal rights. Fortunately, so far as it affects Mrs. Cotton's estate, this case may be disposed of on another ground which leads to the same result as if she were held to have been domiciled at Boston where she died.

The provincial Courts have held that, although the Quebec Succession Duties Act in terms imposes a tax on the transmission of the inheritance, the legislature intended that that tax should in fact be fastened on the property itself which passes from the decedent to his heirs or legatees; and that, in so far as it imposes this tax on movable property actually situate outside the province, the Act is *ultra vires* and unconstitutional, this case being in their opinion ruled by the decision of the Judicial Committee in *Woodruff* v. *Attorney-General of Ontario*, [1908] A.C. 508. Upon this ground the plaintiffs have been awarded judgment for the repayment by the Crown of the succession duties which it received from both estates in respect of the property in question.

The respondents, in support of the judgment in their favour, also assert that, upon its proper construction, the Quebec Succession Duties Act applicable to the estate of Mrs. Cotton did not purport to impose a tax in respect of movable property of domi-

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ciled decedents, which was actually situate outside the province. Because before considering the constitutionality of any statute it is desirable, if possible, to appreciate its precise scope and purview and also because it seems fitting that a Court should not determine an issue as to the constitutionality of a statute unless the cause before it cannot otherwise be satisfactorily disposed of, it will be proper first to deal with the contention of the respondents that the Quebec statutes in force in 1902 did not purport to impose succession duties on movable property actually situate abroad. It will be convenient at the same time to consider whether the intention of the legislature was to impose a tax upon the transmission of the property or upon the property itself. Counsel for both parties rejected a suggestion that the tax might be regarded as imposed on the beneficiaries, that upon a proper construction of the Act only beneficiaries within the province would be subject to it and that it should on that ground be held *intra vires*.

When Mrs. Cotton died the Act in force was the statute 55-56 Viet. ch. 17, amended by 57 Viet. ch. 16; 58 Viet. ch. 16, and 59 Viet. c. 17. Section 1191(*b*) (57 Viet. ch. 16, sec. 2), so far as material, reads as follows:—

> 1191 *b*. All transmissions, owing to death, of the property in usufruct or enjoyment of, moveable and immoveable property in the province, shall be liable to the following taxes, calculated upon the value of the property transmitted, after deducting debts and charges existing at the time of the death.

There followed a table of rates varying according to the value of the estate and the degree of relationship borne by the several beneficiaries to the decedent. The statute then contained no definition of the word "property."

In the form in which it stood at the time of Mrs. Cotton's death—except for an immaterial amendment (59 Viet. ch. 17)—the Quebec succession duties law was considered by the Privy Council in *Lambe* v. *Manuel*, [1903] A.C. 68. In that case the question presented was whether certain bank stocks, registered and transferable at Montreal, P.Q., and a mortgage debt secured by hypothec on land in Montreal, which formed part of the estate of a decedent domiciled in the Province of Ontario, were liable to succession duties in Quebec. All this property was held not to be taxable because—

> According to their true construction the Quebec Succession Duties Acts only apply in the case of moveable property to transmissions of property resulting from the devolution of a succession in the Province of Quebec.

That the transmission of the property took place outside Quebec and not under Quebec law was the ground on which it was held that the Quebec statutes did not purport to authorize the imposi-

tion of the succession duties claimed. This judgment proceeds upon the view that by section 1191(*b*) the legislature intended to impose a tax on the transmission of the property passing and not on the property itself. The statute in express terms declares that "all transmissions owing to death . . . shall be liable"—"*toute transmission par décés . . . est frappée.*" Notwithstanding that the value of the property determines the rate of taxation and that in several sub-sections the duty appears to be treated as charged upon and as payable out of the estate, it must, I think, be assumed that the legislature intended what it said when it expressly imposed the tax on the transmission. The decision in *Lambe* v. *Manuel*, [1903] A.C. 68, appears to me to be conclusive upon that point, although it does not determine what is the real incidence or subject of the tax imposed. That question was not before the Board. I am, therefore, with respect, of the opinion that, whatever may be in fact their ultimate incidence, the Quebec succession duties were intended to be imposed directly and primarily not upon the property of the succession, but upon its transmission.

In *Lambe* v. *Manuel*, [1903] A.C. 68, the Judicial Committee proceeds upon a well-known principle of construction in determining that the word "transmissions" though not expressly qualified or restricted, should be held to include only transmissions taking place under the law of the province. Lord Macnaghten makes this abundantly clear, when he says that the decision is

> Entirely in consonance with well-established principles which have been recognized in England in the well-known cases of *Thomson* v. *Advocate-General*, 12 Cl. & F. 1, and *Wallace* v. *Attorney-General*, L.R. 1 Ch. 1, and by this Board in the case of *Harding* v. *Commissioners of Stamps of Queensland*, [1898] A.C. 769.

Their Lordships did not, as was contended at bar by counsel for the present appellants upon the first argument of this appeal, treat the words "in the province" found in section 1191(*b*) as qualifying or restrictive of the word "transmissions." The phrase 'in the province" is referred to only in the statement of the object of the action in the earlier part of the judgment, where it is applied to the subject "moveable or immoveable property." If there could be any doubt upon the point—I have none—a glance at the French version of section 1191(*b*) makes it certain that this is its proper application:—

> 1191 *b*. Toute transmission, par décés, de propriété, d'usufruit ou de jouissance de biens meubliers ou immobiliers, *situés dans la province*, est frappée des droits suivants, sur la valeur du bien transmis, déduction faite des dettes et charges existant au moment du décés.

But for the appellants it is urged that by the words "in the province"—"*situés dans la province*"—the legislature meant to

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include not only property actually situate in Quebec, but also movable property which, though actually situate elsewhere, is for purposes of succession and enjoyment, according to the maxim *mobilia sequuntur personam* (*Blackwood* v. *The Queen*, 8 A.C. 82, 93) governed by the law of the testator's domicile, which has been assumed to be in the Province of Quebec. I am unable to accede to that view. *Primâ facie* the expressions "in the province"—"*situés dans la province*"—refer to property actually situate in Quebec. They are applied in the statute to immovable as well as movable property. To immovables the maxim invoked has, of course, no application. The force of the expressions is restrictive, not expansive. Had the legislature meant to include all movable property passing under the law of Quebec—all property of which the transmission occurs in Quebec or is governed by Quebec law wherever actually situate, I cannot conceive that it would have employed the terms "situés dans la province." In another section of the same Act (55 & 56 Vict. ch. 17) 1191(*a*), we find the expression "situés dans la province"—"within the province." There it clearly means physically or actually situated in Quebec. This affords "one of the safest guides to the construction" of the same words in section 1191(*b*), which immediately follows. *Blackwood* v. *The Queen*, 8 A.C. 82, 94. If we may consider the subsequent action of the legislature in defining the word "property" as including all property whether movable or immovable, actually situate within the province (3 Edw. VII. ch. 20) in afterwards extending this definition so that by express terms "property" was made to include all the movable property wherever situate of a domiciled decedent (6 Edw. VII. ch. 11, sec. 1191(*c*)) and in finally removing entirely the words "in the province"—"situés dans la province"—from section 1191(*b*) (7 Edw. VII. ch. 14, sec. 2) the view which I have taken of the proper construction of that section as it stood in 1902 would appear to be fortified.

If by an application of the maxim *mobilia sequuntur personam* the words "situés dans la province" should be construed as including the movables actually situated abroad of a domiciled decedent, the concluding clause of the definition of the word "property" introduced in 1906 was quite unnecessary. *Winans* v. *Attorney-General*, [1910] A.C. 27, 34.

Comparing the Quebec Succession Duty Acts and their development with the corresponding Acts of the Province of Ontario, 57 Vict. ch. 6, sec. 4, R.S.O. 1897, ch. 24, sec. 4(*a*) and their development (1 Edw. VII. ch. 8, sec. 6; 7 Edw. VII. ch. 10, sec. 6, it appears to me that, probably actuated by fears that a tax imposed upon or in respect of property not actually situate within the province would not be "taxation within the province" (British North America Act, sec. 92(2)), the authorities of both provinces, in order to ensure the constitutionality of their legis-

lation, at first advisedly confined themselves to the imposition of succession duties in respect of property actually situate within the province. Perhaps grown bolder as the needs of revenue became more pressing, or it may be more grasping and prepared to risk a contest upon the constitutionality of a mere severable amendment, or, possibly, having had their fears and doubts as to their jurisdiction allayed, both provinces later on sought to extend the scope of this taxation so that they might obtain succession duty revenue in respect of movable property of domiciled decedents actually situate abroad.

I am convinced that as the law stood in the Province of Quebec at the time of Mrs. Cotton's death only so much of her estate as was actually situate in that province was liable to the succession duties imposed by section 1191(*b*) above quoted. In respect of her foreign bonds, etc., her estate was not liable to Quebec succession duties, because, whatever may have been the power of the legislature in that respect, the statute as it then stood, did not purport to impose a tax upon the transmission of property actually situate outside the province.

But when Henry Cotton died the consolidated succession duties provisions of the Act, 6 Edw. VII. ch. 11, were in force. By that statute the portion of section 1191(*b*) above quoted was re-enacted in the same terms, except that the words "or the" were inserted before the word "usufruct." There was added, however, section 1191(*c*):—

> 1191*c*. The word "property" within the meaning of this section shall include all property, whether moveable or immoveable, actually situate or owing within the province, whether the deceased at the time of his death had his domicile within or without the province, or whether the debt is payable within or without the province, or whether the transmission takes place within or without the province, and all moveables, wherever situate, of persons having their domicile, or residing, in the Province of Quebec at the time of their death.

The words "in the province"—"situés dans la province"—still remained in section 1191(*b*), being stricken out after Mr. Cotton's death by the Act 7 Edw. VII. ch. 14.

There is a manifest repugnancy arising from the presence in the same Act (6 Edw. VII. ch. 11) of the words "in the province" found in section 1191(*b*), and the definition of the word "property" in section 1191(*c*). By the former the tax is confined to transmissions of property which is within the province; by the latter it is extended to property without the province. The two provisions are irreconcilable.

Having regard, however, to the history of this legislation and to the manifest intention of the legislature to extend the application of succession duties, first, in 1903, to all property of non-domiciled decedents actually situate within the province—obvi-

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ously in order to meet the decision in *Lambe* v. *Manuel*, [1903] A.C. 68,—and again, in 1906, to movable property of domiciled decedents actually situate outside the province, I am of the opinion that in the consolidation of 1906 the words "in the province" —"*situés dans la province*"—should be deemed to have been allowed to remain in section 1191(*b*) *per incuriam*. Their deletion in the following year tends to confirm this view. Moreover, a construction which rejects them accords with the rule that if two sections of the same Act are repugnant the latter must prevail. *Wood* v. *Riley*, L.R. 3 C.P. 26, 27, *per* Keating, J.; *The King* v. *Justices of Middlesex*, 2 B. & Ad. 818, 821, 1 Dowl. P.C. 117, 1 L.J.M.C. 5.

The principles of statutory construction are, I think, the same in the Province of Quebec as in the other provinces of Canada where the English common law prevails.

It follows that at the time of the death of Henry Cotton, who was then admittedly domiciled in Quebec, his movable property actually situate abroad was subject to succession duties under the statutes of that province, if its legislature had the power to impose such taxation.

In determining the question of provincial legislative jurisdiction in Canada, decisions upon the proper construction, the scope, purview and effect of statutes enacted by Parliament or legislatures whose powers of taxation are unrestricted are of little, if any, practical value. A consideration of them rather tends to confuse the issue.

In the matter of taxation, as in other matters, our provincial legislatures possess only such powers as the British North America Act confers upon them. By section 92 they are empowered—

> To make laws in relation to . . .
> (2) Direct taxation within the province in order to the raising of a revenue for provincial purposes.

These words clearly confer not a general power of taxation, but a power subject to a triple limitation. The taxation must be direct, it must be within the province; it must be imposed in order to the raising of a revenue for provincial purposes. The taxation in question is admittedly imposed "in order to the raising of a revenue for provincial purposes."

But the respondents contend that it is neither "direct" nor "within the province." Of these two restrictions the first is obviously concerned with the delimitation of the line between provincial and Dominion powers, saving to the Dominion the field of indirect taxation; whereas the second appears to be designed to prevent encroachment by one province upon the domain of another, or of a foreign state. The latter limitation seems to me to present the more formidable objection to the constitutionality of the taxation here in question. The conclusion

which I have reached upon it renders it unnecessary for me to consider the question whether a tax in terms imposed upon the transmission of property, but in its ultimate incidence falling upon the property transmitted, is direct or indirect taxation.

That the words "within the province" were introduced either as declaratory of a restriction on the provincial power of taxation which would have been implied, or in order to impose such a restriction, admits of no question. But the precise nature and extent of the limitation which is thus expressed as it affects the right to pass death duty legislation has been a subject of much debate.

If these duties could be regarded as imposed upon the transmission only and not at all upon the property transmitted, in the case of the domiciled decedent the taxation in respect of his movable property abroad as well as at home might be "within the province;" if they should be regarded as imposed on the property transmitted, the taxation in respect of movable property of a non-domiciled decedent situate in the province, although the transmission of it takes place, usually, but not always (Dicey on Conflict of Laws, 2nd ed., p. 753) under foreign law, would be "within the province."

Can it be that a provincial legislature empowered to levy taxation only within the province may validly impose death duties in respect of movable property actually situate abroad under the guise of a tax upon transmission, invoking the maxim *mobilia sequuntur personam* to bring such property constructively within the province, and at the same time repudiating that maxim, may legitimately exercise the same taxing power in respect of movables which under it would be constructively situate abroad though actually situate within the borders of the province?

That it has the latter power is definitely established by the recent decision of the Privy Council in *The King* v. *Lovitt*, 28 Times L.R. 41.* Has it also the former? I cannot believe that it has under the restrictive words of the British North America Act with which we are now dealing. I adhere to the view which I expressed in *Lovitt* v. *The King*, 43 Can. S.C.R. 106, at p. 161, which is not affected by the disposition of that case by the Judicial Committee, that if the legislature of a Canadian province can—

> By legislative declaration make anything property "within the province" which would not be such according to the recognised principles of English law . . this constitutional limitation upon its power (of taxation) would be a mere dead letter.

Could such a legislature validly enact that, as a condition of obtaining from its Courts letters probate or of administration required for the reduction into possession and administration of

*The case of *The King* v. *Lovitt* has since been reported in *The Law Reports*, [1912] A.C. 212.

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vincial borders, a tax must be paid based on the value of the entire estate of the decedent, including movables (and in that case perhaps immovables also) actually situate elsewhere and in respect of the administration and collection of which such letters were wholly unnecessary—a tax which, however, or by whomsoever payable in the first instance, would in most cases ultimately have the effect of reducing the value to the beneficiary of such foreign assets passing to him by succession? There is nothing in the law of nations which forbids the legislature of a sovereign state imposing such a tax. *Blackwood* v. *The Queen*, 8 A.C. 82, 96. But, if the legislature of a Canadian province may do so, the restriction upon the provincial taxing power under the words "within the province" would, in the case of succession to movables, seem to be illusory.

In construing the restrictive words of the British North America Act, "within the province," we must, I think, ascribe to the Imperial Parliament the intention that the restriction thereby placed upon the provincial power of taxation would be definite and certain and should be the same in every province. *The Queen* v. *Commissioners of Income Tax*, 22 Q.B.D. 296, 310; *Lord Saltoun* v. *Advocate General*, 3 Macq. 659, 677, 678, 684.

This excludes the idea that, confining itself to one or the other, each province may in this matter select its own basis of taxation—transmission and constructive *situs* according to the maxim *mobilia sequuntur personam*, or property and actual *situs*. If some provinces adopting the maxim *mobilia sequuntur personam*, should impose a tax in respect of the movable property of their domiciled decedents "actually situate" abroad and others should declare dutiable all property actually situate within their respective local areas regardless of the domiciliation of the deceased owners, double taxation of some movables and entire exemption of others would result. Uncertainty, inconvenience and confusion would ensue; and the sanctity of the legislative domain of one province might be successfully invaded by the legislation of another.

It may be urged that such consequence could be obviated if the provinces would agree amongst themselves upon the basis of this taxation. But there is no assurance that all would concur in such an arrangement; and the jurisdiction conferred by subsection 2 of section 92, of the British North America Act, does not depend upon and cannot be determined by an agreement between provincial governments.

In order that a provincial tax should be valid under the British North America Act, in my opinion the subject of taxation must be within the province. To determine what is the real subject of taxation the substantial result and not the mere form of the taxing Act must be considered. The ultimate effect of

succession duties such as are provided for by the Quebec statutes, whether imposed directly upon the transmission or directly upon the property, is to reduce the amount of the estate to which the beneficiaries succeed (Cooley on Taxation, 3rd ed., p. 32). Whether paid by the personal representative or secured by his bond before he obtains probate or letters of administration, or paid by him before handing over the property to the beneficiaries, or by the beneficiaries themselves prior to, or upon receipt of the property to which they succeed, the substantial result is the same—they come out of, or lessen the value of that which passes by the succession. The tangible thing affected by the tax is the property which passes. In substance the taxing state takes for itself directly or indirectly a part of the property transmitted from the decedent to his beneficiary.

Where a testator by his will provides that his legacies shall be exempted from death duties, he in effect adds to each bequest the amount of the duty which it would otherwise have borne. In such a case, therefore, although—it may be for the advantage of the beneficiary, or it may be for the convenience of the estate—the testator has provided that payment of the tax shall be made out of the residuary estate and not out of the property bequeathed to each individual beneficiary, the tax is none the less imposed in respect of that property and is in substance a tax upon it. In whatever form of words—tax upon transmission, tax upon succession to property devolving under the law of the province, or tax upon probate—the duty may be imposed, if the beneficiary ultimately has to pay it as a condition of receiving his share of the estate or has to accept that share reduced by its amount, or if the tax is paid out of the residuary estate in exoneration of the specific or pecuniary legatee, the result is that the real incidence of the tax is upon the property of the succession.

This is always the case where taxation is levied in respect of particular property of whatever nature, whether the taxing Act constitutes the tax a lien or charge upon such property and provides for its seizure and sale if necessary to satisfy the impost or the remedy prescribed for the recovery of the tax is by personal action or proceedings against the persons required to pay it.

That the property so to be affected should itself be within the province at the time when the taxation attaches in respect of it seems to me to be *primâ facie* the restriction which the Imperial Parliament intended to impose upon the provincial power of taxation in respect of property. Under the Quebec law the duties attach upon the transmission of the property—that is at the moment of the decedent's demise. Its situation at that time determines its liability to provincial taxation. That the *status* of the subject of taxation is the test by which provincial

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jurisdiction to tax it should be settled seems to be undisputed in the case of immovable property. In the case of movable property the large portion of it which is tangible has an actual physical *situs* equally with immovables. It is only intangible personalty which must of necessity be given a *situs* by fiction of law. If the maxim *mobilia sequuntur personam* be applied for the purpose of determining in respect of what property a Canadian province is by the British North America Act given the power of direct taxation all movable property, tangible and intangible alike, will be given a fictitious *situs* notwithstanding that tangible movables have in contemplation of law an equally well-established actual *situs*—and that for purposes of taxation. *Commissioners of Stamps* v. *Hope*, [1891] A.C. 476; *Payne* v. *The King*, [1902] A.C. 552; *Inland Revenue Commissioners* v. *Muller*, [1901] A.C. 217; *Commissioner of Stamps* v. *Salting*, [1907] A.C. 449. In fact movables actually situate outside the borders of the province are as far beyond the "direct power" of the Quebec Legislature as immovables similarly situate. *Blackwood* v. *The Queen*, 8 A.C. 82, 96.

It is contended that to hold that, where provincial taxation is levied in respect of property, the property must be within the province is in effect to insert the words "on property" before the words "within the province" in sub-section 2 of section 92, of the British North America Act: *Treasurer of Ontario* v. *Pattin*, 22 O.L.R. 184, 191, and that the insertion of these words would exclude the imposition of many purely personal direct taxes—such as a poll tax—which it was certainly intended that the provinces should have the power to impose. But the view which I take of the British North America Act provision is that it should be read as authorizing direct taxation only where the real subject of the tax—whether person, business or property—is within the province. In testing the validity under this construction of any particular provincial tax it would, of course, be necessary to determine what is the real subject of taxation.

Under the Quebec Act imposing death duties for the reasons I have stated I am of the opinion that the real subject of taxation is the property passing, notwithstanding the clearly expressed intention of the legislature to fasten the tax upon the transmission. I think it improbable that the Imperial Parliament meant to confer on the provincial legislatures the right to tax any property real or personal beyond their "direct power" (*Blackwood* v. *The Queen*, 8 A.C. 82, 96). The Lovitt decision* has established that it was not intended that a province should be denied the power to tax property actually situate within its borders merely because for some other purposes (*Blackwood* case, at page 93) such property is in law deemed to be constructively elsewhere.

*The King v. Lovitt, 28 Times L.R. 41, [1912] A.C. 212.

Apart from authority I would for the foregoing reasons hold that the Quebec Legislature in attempting to impose death duties in respect of property actually situate outside the province exceeded its constitutional powers.

But I also think the matter concluded by the authority of the decision of the Privy Council in *Woodruff* v. *Attorney-General for Ontario*, [1908] A.C. 508. I concede that the facts in that case are readily distinguishable from those before us. It may also be said that *Woodruff's* case might have been disposed of, without determining the constitutional question now under consideration, on the ground that there a complete transfer of the property had taken place in a foreign state by an act *inter vivos* and the property itself was actually situated without the province, and the Ontario statute, therefore, had no application. But their Lordships of the Judicial Committee did not see fit to rest their decision upon that ground. On the contrary they say:—

> The pith of the matter seems to be that the powers of the provincial legislature being strictly limited to "direct taxation within the province" (B.N.A. Act, 30 & 31 Vict. ch. 3, sec. 92, sub-sec. 2) any attempt to levy a tax on property locally situate outside the province is beyond their competence. This consideration renders it unnecessary to discuss the effect of the various sub-sections of sec. 4 of the Succession Duty Act, on which so much stress was laid in argument. Directly or indirectly, the contention of the Attorney-General involves the very thing which the legislature has forbidden to the province—taxation of property not within the province.
>
> The reasoning of this Board in *Blackwood* v. *Reg.*, 8 A.C. 82 seems to cover this case.

"The contention of the Attorney-General" referred to can scarcely have been aught else than the reported argument of counsel representing him that the transfers were testamentary in substance; "the duty claimed was not a tax on property, but a tax on the devolution or succession; the duty was imposed on persons beneficially entitled . . . ; the persons taxed were resident in the province."

It is to this argument that Lord Collins makes reply that directly or indirectly—although the transfers should be deemed testamentary and although the tax should be regarded as primarily imposed on the transmission, or on the beneficiaries—it involves the very thing forbidden—taxation of property not within the province. Not content with expressly basing his judgment on this ground, His Lordship emphasizes its importance by the statement that it is "the pith of the matter."

Woodruff's Case (*Woodruff* v. *Attorney-General*, [1908] A.C. 508) cannot be brushed aside by the familiar observation that the language used must be read in the light of and confined to the facts of that case, and is applicable only to legislation couched in the form of that then before the Court. Their Lord-

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ships have anticipated and precluded such an argument in their statement that the contention of the Attorney-General—directly or indirectly—*i.e.*, either upon assumptions that the transfers were really testamentary and that the Ontario Legislature should be deemed to have imposed its tax not on the property, but on the succession or devolution or on the persons beneficially entitled, or upon contrary assumptions—involved taxation of property not within the province; and "any attempt to levy a tax on property locally situate outside the province" is *ultra vires* of a provincial legislature.

Neither may this portion of their Lordships' judgment be regarded as *obiter dicta*. As put by Lord Macnaghten, in delivering the judgment of the Judicial Committee, in *New South Wales Taxation Commissioners* v. *Palmer*, [1907] A.C. 179, at p. 184:—

> It is impossible to treat a proposition which the Court declares to be a distinct and sufficient ground for its decision as a mere dictum, simply because there is also another ground stated upon which, standing alone, the case might have been determined.

See also *Membery* v. *G. W. R. Co.*, 14 A.C. 179, per Lord Bramwell, at p. 187.

As I understand the judgment of their Lordships of the Judicial Committee in *The King* v. *Lovitt*, 28 Times L.R. 41, it determines nothing inconsistent with the view I have expressed. Their actual decision turns upon the construction of a deposit receipt which they held to be primarily payable at St. John. The asset which it represented being a simple contract debt, therefore, had a local *situs* in New Brunswick. As property locally situate in that province their Lordships held that it might be made subject to the succession duty taxation of New Brunswick, notwithstanding that the testator died domiciled in Nova Scotia; and, the legislature having clearly expressed its intention to impose succession duties upon such property, their Lordships decided that those duties must be paid. Although in the course of the judgment passing reference is made to section 92 of the British North America Act, and in the discussion of the maxim *mobilia sequuntur personam* invoked by the respondent some expressions occur which are perhaps consistent with a view contrary to that which I hold, the right of a provincial legislature to impose taxation in respect of movable property locally situate outside the province, and the double taxation of the same estate by two different provinces which might ensue are aspects of the case now before us which the *Lovitt* case did not present and as to which the absence from their judgment of all allusion to *Woodruff's Case* (*Woodruff* v. *Attorney-General*, [1908] A.C. 508) would seem to warrant the conclusion that their Lordships did not express an opinion.

For these reasons I conclude that in the case of Henry Cotton the taxation in question was *ultra vires* of the provincial legislature and that on that ground the plaintiffs are entitled to succeed. In the case of Mrs. Cotton, the plaintiffs would be entitled to succeed upon the same ground if the Quebec statutes in force when she died purported to tax movables of a decedent actually situate abroad; but they are, in my opinion, entitled to judgment in her case because the Quebec Succession Duties Act as they stood at the time of her death did not purport to impose a tax in respect of movable property not actually situate within the province and possibly also because Mrs. Cotton was not domiciled in Quebec at the time of her death.

I should perhaps note that, as the statute was amended in 1903 and consolidated in 1906, although the tax purports to be imposed upon the transmission it is extended to the Quebec movables of a non-domiciled decedent the transmission of which takes place abroad and under the law of the decedent's foreign domicile. By further amendment made in the consolidation of 1906 the legislature sought to render dutiable the foreign movables not only of the domiciled decedent, but also of the decedent who is resident, though not domiciled, in the Province of Quebec. I allude to these peculiar features of the legislation to make it clear that they have not been overlooked and also because they indicate how far the legislature was prepared to go.

It was not urged on behalf of the appellants that the monies claimed by the plaintiffs could not be recovered because they were paid voluntarily and not in mistake of fact, but in mistake of law. Counsel, no doubt, refrained from presenting this contention because it appears to be well established under the system of law which obtains in the Province of Quebec that where a person voluntarily makes a payment because he erroneously believes he is compelled by law so to do, he may successfully maintain an action *en répétition de l'indû*. Arts. 1047 and 1048, C.C. In that case the error is in that which was the principal consideration for making the payment (art. 992, C.C.), and, though voluntarily paid, the monies may be recovered. *Leprohon* v. *Montreal Corporation*, 2 L.C.R. 180; *Boston* v. *Leriger*, 4 L.C.R. 404; *Leclerc* v. *Leclerc*, R.J.Q. 6 B.R. 325; *Bain* v. *City of Montreal*, 8 Can. S.C.R. 252, *per* Strong, J., p. 265, *per* Taschereau, J., p. 285.

The main appeal should, therefore, be dismissed with costs.

I agree in the disposition made of the cross-appeals on the ground indicated in the opinion of my Lord the Chief Justice.

BRODEUR, J.:—This case, it seems to me, should be decided according to the principles laid down by the Privy Council in the case of *Lambe* v. *Manuel*, [1903] A.C. 68, and the decision

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of *Woodruff* v. *Attorney-General of Ontario*, [1908] A.C. 508, cannot be successfully invoked.

There is a vast difference between the two statutes that were submitted to the Courts in those two cases.

In the case of *Manuel*, the Succession Duty Act of Quebec was at issue and in the matter of *Woodruff*, the Ontario Death Duty Act had to be interpreted.

The Quebec law imposes a succession duty on the transmission or devolution of the estate.

In the Ontario statute, on the contrary, the property itself is taxed.

Let me quote the two statutes side by side and we will easily see the difference that exists between those two enactments:—

Quebec Law.

All transmissions, owing to death, of the property, in usufruct or enjoyment of moveable and immoveable property in the province shall be liable to the following taxes calculated upon the value of the property transmitted.

The word "property" within the meaning of this section shall include all property, whether moveable or immoveable, actually situate or owing within the province, whether the deceased at the time of his death had his domicile within or without the province, or whether the transmission takes place within or without the province, and all moveables wherever situate, of persons having their domicile (or residing) in the Province of Quebec at the time of their death.

Ontario Law.

Save as aforesaid, the following property shall be subject to a succession duty as hereinafter provided to be paid for the use of the province over and above the fee payable under the Surrogate Courts Act: (*a*) all property situate within this province, etc. . . . passing either by will or intestacy.

The word "property" in this Act includes real and personal property of every description, and every estate or interest therein capable of being devised or bequeathed by will or of passing on the death of the owner to his heirs or personal representatives.

We are asked to decide whether movable property, consisting of bonds and shares of foreign companies belonging to a deceased person domiciled in Quebec is liable to death duties.

The Privy Council in the case of *Woodruff* (*Woodruff* v. *Attorney-General*, [1908] A.C. 508), had to deal, as I have already said, with a statute taxing the property itself. As the bonds in question in that case were due by foreign corporations, were in a foreign country and had not passed by will or intestacy, it is no wonder that applying the provisions of the sec. 92, subsec. 2 of the British North America Act they have declared that under such a statute the Attorney-General of that province could not reach movable property whose situs were not in Ontario.

The Ontario law does tax movable property situate in the province and belonging to an outsider but it does not affect any such property situate in another country.

The Quebec law, on the contrary, as interpreted by the Privy Council in the case of *Lambe* v. *Manuel*, [1903] A.C. 68, 17 L.J. P.C. 17, 19 Times L.R. 68, cannot reach movable property situate in the province, because the duty that was authorized was not a duty on the property itself but on the transmission of the property.

The testator in the case of *Lambe* v. *Manuel*, [1903] A.C. 68, 17 L.J. P.C. 17, 19 Times L.R. 68, was domiciled outside of Quebec and left shares of banks having their place of business in Quebec.

The Privy Council confirmed the decision of the provincial Courts and adopted the views expressed by Sir Melbourne Tait and Mr. Justice Bossé that the Quebec Succession Duty Act only applies, in the case of movables, to transmissions of property resulting from the devolution of a succession in the Province of Quebec; or, in other words, that the taxes imposed on movable property are imposed only on property which the successor claims under, or by virtue of, the Quebec law.

It was declared that in order to reach those securities, they should be transmitted according to the laws of Quebec and that what was taxed was the right to inherit.

Applying those broad principles of *Lambe* v. *Manuel*, [1903] A.C. 68, to the facts of this case, I come to the conclusion that Mr. & Mrs. Cotton's representatives are liable because the transmission of shares and bonds has been made according to the laws of Quebec, and that the duty is imposed upon the devolution or upon the privilege for their successors to take or receive property under their wills. By fiction of the law, movable property is considered to be suitable wherever the owner resides. It is referred to the domicile of the owner and governed by the law of that domicile (art. 6 C.C.). It becomes subject to the law governing the person of the owner.

Relying upon the following decisions in England, where the maxim *mobilia sequuntur personam*, has been adopted, *Thomson* v. *Advocate-General*, 12 Cl. & F. p. 1; *Wallace* v. *Attorney-General*, L.R. 1 Ch. page 1; *Harding* v. *Commissioners of Stamps for Queensland*, [1898] A.C. p. 769, I have come to the conclusion that the government had rightly collected duties on those securities and shares and that the action *en répétition de deniers* instituted by the respondents should be dismissed.

In order to fortify my opinion, I may quote Hanson, "Legacy and Succession Duties," where he says:—

> It has already been pointed out that in order to render personal property liable to duty it is necessary that it should be situate within this country, and that as property of a moveable nature accompanies

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in construction of law the person of its owner the situation of the owner's domicile at the time of his death and not the actual local situation of the property itself is the true test of the liability to duty.

I had some doubts however as to whether Mrs. Cotton's estate was liable to duty. The statute in force at her death did not contain a definition of the word "property" as quoted above.

That definition was made after the judgment in the case of *Lambe* v. *Manuel*, [1903] A.C. 68. But the Quebec Judges, in their decision as affirmed by the Privy Council, were so strong in their idea that what the statute contemplated was to tax any transmission resulting from a succession devolving here under the laws of the province, that my doubts were removed.

We must not forget that under our laws in Quebec the transmission of a succession takes place instantaneously at the death. "Le mort saisit le vif," is the old saying, and in that regard the laws of the two provinces of Ontario and Quebec shew a difference (arts. 596-599 and 600 C.C.).

The respondents have claimed before this Court that Mrs. Cotton was not domiciled in Quebec when she died in Boston in 1902. That question was not raised by the pleadings. On the contrary, it is there implicitly admitted that her domicile was in that province, when they acknowledged that her moveable property locally situate there was duly taxed. According to the judgment of *Lambe* v. *Manuel*, [1903] A.C. 68, her moveable property even situate in Quebec was not subject to duty if she was domiciled elsewhere. The respondents in admitting by their pleadings that Mrs. Cotton's moveable property in Quebec was liable to taxation admitted virtually that she was domiciled here.

Besides her husband has stated in his affidavit of the 10th Feb., 1904:—

> I have examined again that difficult question of domicile, and all the facts and circumstances of the case and I have come to the conclusion and admit that since the month of April, 1901, and therefore at the time of the death of my wife, my domicile (which was of course, her domicile) was at Cowansville in the said district.

The question of domicile, when a person does not reside all the time at the same place, is determined by his own intention; and if the person whose domicile is in question comes and declares that his domicile is in a certain country, I believe that his legal representatives are bound by his extra-judicial admission, and such an admission can be successfully invoked against them.

I am of opinion then that the domicile of Mrs. Cotton at her death was in Quebec and that the respondents could not successfully raise that issue. A cross-appeal has been made by the respondents by which they claim that the Court of King's Bench

should not have reduced the amount of the judgment rendered by the Superior Court.

They claim by this cross-appeal that the debts of a succession should be entirely deducted from the part of the accounts situate in this province when there is one part of the estate not liable to duty and situate elsewhere. As I am of opinion that, in this case, all the assets of the succession had to pay succession duty, I am not called upon to discuss the point raised. The cross-appeal then should be dismissed and the appeal allowed with costs of this Court and of the Courts below.

JUDGMENT OF THE COURT—

In the result the appeal was allowed in part, Davies and Anglin, JJ., dissenting. As to Mrs. Cotton's estate the Court was equally divided in opinion. Costs in Superior Court allowed to plaintiff, and in Court of Appeal and Supreme Court of Canada to the Crown. The cross-appeal dismissed with costs.

Judgment below varied.

CHARLES KANE (plaintiff, appellant) **v. THE SHIP "JOHN IRWIN"** (defendant, respondent).

Exchequer Court of Canada, Cassels, J. January, 1912.

1. ADMIRALTY (§ I—4b)—SUING IN REM—CREDIT GIVEN SHIP OR OWNERS—MASTER'S LIABILITY.

Where the master of a ship, which is in its home port, acting under instructions from the owners' manager, purchased certain supplies for repairing the ship prior to her sailing, which, following the customary practice of the firms furnishing the goods, were charged to the ship or to its owners, the credit will be presumed to have been given to the owners and not to the master, and the master having incurred no personal liability, is not entitled to enforce a maritime lien for such supplies.

[*The Ripon City*, [1897] P. 226, distinguished.]

2. ADMIRALTY (§ I—2)—WRONGFUL DISMISSAL OF SHIP'S MASTER—ACTION IN REM—WAGES IN LIEU OF NOTICE.

The master of a ship is only entitled to a reasonable notice terminating his contract of employment; what is reasonable notice is a question of fact for the trial Judge, who in an action *in rem* for wages in lieu of notice of dismissal may condemn the ship or its bail for such wages in the nature of damages for wrongful dismissal.

[See also 1 Halsbury's Laws of England, p. 69; *The Great Eastern* (1867)), L.R. 1 A. & E. 384.]

AN appeal by plaintiff from the judgment of the Local Judge in Admiralty for the Nova Scotia Admiralty District, the action being brought *in rem* by the master of the ship "John Irwin" for supplies furnished the ship and for wages in lieu of notice. The Local Judge dismissed the action in respect of the supplies, holding that the master had not become personally liable for them and was, therefore, disentitled to sue. The com-

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pany which owned the ship had become insolvent and the ship itself had been lost after her release from seizure in this action and recourse for the supplies could be made effective only in case her bail in the action were held liable on the bond.

As to the claim for wages it appeared that the plaintiff was engaged as master at $75 per month in addition to his maintenance on the ship.

The trial Judge allowed to him $50 for wages in lieu of notice on the wrongful dismissal. It further appeared that the master obtained re-employment in another capacity at $15 per week after the lapse of one week from the date of dismissal.

The appeal to the Judge of the Exchequer Court at Ottawa was dismissed.

The judgment appealed from was as follows:—

THE LOCAL JUDGE:—There are two questions here:—first, can the captain recover wages or damages for wrongful dismissal, and secondly, can he recover as for liabilities incurred by himself to Crowell Bros. and Mitchell & Shaffner. The two last named firms supplied goods to the ship and charged them in the case of Mitchell & Shaffner to the owners, and in the case of Crowell Bros. to the ship "John Irwin." The goods were supplied in the home port of the ship, the master having ordered the stuff after being directed by the manager of the owners to get the goods. The master was a new hand, he apparently inquired of the engineer where the owners were accustomed to deal, and being given the names of the said merchants ordered the supplies. The manager of the company, the ship's owners, admits he told the captain to order the goods and charge them to the ship and this is apparently what was done. Under these circumstances can it be said the master has incurred a personal liability for the goods that enables him to enforce a statutory liability therefor. I ask myself to whom was the credit given when I come to test this question. The goods were charged in one case to the ship and owners and in the other case to the ship. A charge to the ship in a home port where there is no lien for supplies means a charge to the owners, it cannot, I think, be fairly said to mean anything else. The merchants were not examined and no evidence given to establish a liability on the part of the master personally.

It seems the firms mentioned drew directly on the company (the owners) for the amount. As to Crowell's bills the master states they were paid for by a note. Whose note or when it was given or any of the circumstances connected therewith are not stated, and I think that under the case as presented I am left to determine the question of the captain's liability on the state of facts as shewn, viz.: That the captain had authority to order

the goods for the owners, that he did so, that they were charged to the owners by the merchants and not to the captain at the home port, and where the merchants had been accustomed to furnish supplies to the owners. Under these circumstances I see no personal liability incurred by the master and I feel obliged to hold that he has failed to shew that these two bills are matters as to which he incurred a personal liability and by reason of such a position can enforce a lien therefor.

On the other point in the case I am of opinion that the master was improperly dismissed.

Taking his own story of the grounding of the vessel it may have been a matter so slight that he innocently and properly did not think it a matter worth mentioning to his owners. He seems to have so treated it and I cannot say he was wrong.

Considering the fact that he got other employment in a week or so at fifteen dollars a week he has not suffered much. I think fifty dollars ($50) would amply compensate him and fix the damages at that sum.

The question of accounts on the crew's supplies I did not go into inasmuch as any small balance in the captain's hands in respect to the daily supplies would seem to about square the money shortage which on the whole evidence he may, I think, be entitled to.

The decree will condemn the bail in $50 and costs.

James Terrell, for plaintiff, appellant.
H. Mellish, K.C., for defendant, respondent.

CASSELS, J.:—I have carefully considered the evidence adduced before the learned Judge who tried this case, and I have also considered the factums of the appellants and respondents. After the best consideration I can give to the case, I am of the opinion that the learned trial Judge could have come to no other conclusion so far as the claims of Mitchell & Shaffner and of Crowell Brothers are concerned. I have perused all of the authorities cited by the appellants in the factum. In this particular case the facts are so strong in favour of the view that the credit was given to the ship or the ship owners and not to the master, that if this were not so the plaintiff should have proved his case. It would have been quite easy to have produced the note which I am asked to assume was drawn by the master.

In the case of *The Ripon City*, [1897] P. 226, the ship was in a foreign port, and it was proved as a fact that the bills had been drawn by the master. In the case under review it is shewn that the note was drawn on the owners. The master was directed by the agent of the owners to procure the goods on the credit of the ship. The inference from the facts is that he did what he was told. It is quite true that there may be a liability

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both against the owners and the master, but this depends entirely upon the facts. Here, according to Mr. Law's evidence, the master was directed to purchase what he needed in the cheapest way, and to charge the ship in the usual way. This was the master's first venture in the ship. The goods in question were obtained prior to the ship sailing and for the purposes of repairs. The course of business down to the period when the master took charge was to have the goods purchased and charged to the vessel. The master having received these instructions naturally went to the engineer to ascertain from him from whom they were in the habit of purchasing goods, no doubt following Mr. Law's instructions. The goods are furnished, the ship is charged in the usual way, and no claim has been put forward upon the part of these two parties who furnished the goods against the master. It would have been very easy for the plaintiff had the facts been otherwise and any liability existed as against him to have proved affirmatively this fact, but in the face of all that took place it seems to me that the onus was shifted to him. The proper inference is that he did what he was told and incurred no personal liability.

In regard to the claim for wages, all that the captain was entitled to was reasonable notice. The Judge in his discretion has allowed the sum of fifty dollars and costs. It is quite evident from the learned Judge's reasons for judgment that he was desirous as far as he properly could to assist the plaintiff. The appeal is dismissed with costs.

Appeal dismissed.

Annotation
Admiralty jurisdiction as to necessaries

Annotation—Admiralty (I—46)—Liability of a ship or its owners for necessaries supplied.

According to the laws of England and Canada ships are personal property, and the common law relating to personal property is in general applicable to them; but there are many statutory enactments and customary laws exclusively relating thereto, which have developed the special branch of law commonly referred to as maritime law.

The English Court of Admiralty enforced from the earliest period, a maritime lien not created by written agreement in connection with seaman's wages, salvage and damage by collision, thus affording a ready remedy against the ship itself.

In England the present jurisdiction of the Admiralty Division of the High Court of Justice, is derived partly from statute and partly from the inherent and statutory jurisdiction of the High Court of Admiralty, which by the Judicature Acts was transferred to the Admiralty Division.

In Canada, the Exchequer Court is established as a Colonial Court of Admiralty under the provisions of the Colonial Courts of Admiralty Act (1890), Imperial, 53 and 54 Vict. ch. 27, and has and exercises within Canada all the jurisdiction, powers and authority conferred by the said Act. See the Admiralty Act, R.S.C. 1906, ch. 141, sec. 3.

The Exchequer Court of Canada thus possesses a statutory jurisdic-

Annotation (*continued*)—Admiralty (I—46)—Liability of a ship or its owners for necessaries supplied.

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Annotation

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tion *in rem* and *in personam* over certain claims for necessaries supplied in certain places to ships. This jurisdiction extends over claims for necessaries supplied to foreign ships, when such ships are in a Canadian port. The Admiralty Division in England has jurisdiction, although the supplies were furnished the foreign ship while in a British or Colonial port or on the high seas, or in a foreign port on the high seas: *The "Mecca,"* [1895] P. 95 at 108-115; *The "India"* (1863), 32 L.J. Adm. 185; *The "Ocean"* (1845), 2 W. Rob. 368; Halsbury's Laws of England, vol. 1, p. 67.

The Exchequer Court of Canada has a like jurisdiction to that of the High Court of Admiralty in England, and therefore, in an action between the co-owners for an account the ship may be arrested: *Cope* v. *88. "Raven,"* 11 B.C.R. 486.

Even where there is no owner or part owner domiciled in England or Wales, the Admiralty Division has jurisdiction *in rem* and *in personam* over claims against any British or foreign ship, for necessaries supplied elsewhere than in the home port of the ship, that is the port of registry pursuant to the Merchants Shipping Act (1894), Imperial, 57-58 Vict. ch. 60, sec. 13: *The "Mecca,"* [1895] P. 95, overruling *The "India"* (1863), 32 L.J. Adm. 185.

Where the owner or part owner of a ship is domiciled in England or Wales the Admiralty Division has no jurisdiction *in rem* for necessaries supplied. A mere temporary absence, however, will not enable the Court to proceed *in rem*, but in order to deprive the Court of jurisdiction it must be shewn that the owner or part owner is domiciled in England or Wales: *Ex parte Michael* (1872), L.R. 7 Q.B. 658.

An action *in rem* for necessaries will not lie against a ship if supplied to a charterer, in a port other than her home port, if it is shewn at the time the writ issued that an owner or part owner was domiciled in Canada. *Rochester & Pittsburg Coal Co.* v. *The Garden City*, 7 Can. Exch. R. 34, affirmed 7 Can. Exch. R. 94.

The Admiralty Act of 1861, sec. 5 (Imp.), enacts:—

> "That the High Court of Admiralty shall have jurisdiction over any claim for necessaries supplied to any ship elsewhere than in the port to which the ship belongs, unless it is shewn to the satisfaction of the Court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales."

The Admiralty Act of 1861 is brought into force in Canada by the Colonial Courts of Admiralty Act 1890 (Imp.), and the Canada Admiralty Act of 1891, now consolidated as R.S.C. 1906, ch. 141. This consolidation was approved by the Crown pursuant to sec. 4 of the Colonial Courts of Admiralty Act.

McDougall, L.J., in *The Rochester and Pittsburg Coal Co.* v. *The "Garden City,"* 7 Can. Exch. R. 94 defined the word "owner" to mean the "registered owner" or a person entitled to be registered as owner, and not a pro hâc vice owner. In the same case it was decided that the word "Canada" is to be read into section 5 of the Admiralty Act of 1861 in place of "England and Wales," and that the word "domicile" is to be understood in its ordinary legal sense, it would appear that wherever a maritime lien is created in favour of anyone against the ship, it is not essential to further establish personal liability against the owner.

The Courts will not, under the provisions of the Admiralty Courts

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Annotation

Admiralty jurisdiction as to necessaries

Annotation (*continued*)—**Admiralty (I—46)—Liability of a ship or its owners for necessaries supplied.**

Acts, 1840 (3 & 4 Vict. ch. 65), sec. 6, and 1861 (24 & 25 Vict. ch. 10), sec. 5, exercise its power to enforce payment of a claim for necessaries when these are merely items forming part of a general mercantile account between a shipowner and a supplier: *The "Comtesse de Frégeville"* (Lush. 329), followed; *The "El Salto,"* 25 Times L.R. 99.

In considering what are necessaries, care must be taken not to include anything which a prudent man would not deem reasonable and proper to be done or supplied for the purposes of the particular voyage on which the vessel is engaged: *Webster* v. *Seekamp* (1821), 4 B. & Ald. 352, *per* Abbott, C.J.; *The "Riga"* (1872), L.R. 3 Adm. 516, and case cited in Maclachlan's Law of Merchant Shipping, 5th ed., p. 154.

Necessaries include repairs and equipment: *The "Two Ellens"* (1871), L.R. 3 Ad. 345; money advanced to procure necessaries; *The "Anna"* (1876), 1 P.D. 253, C.A.; dock dues: *The "St. Lawrence"* (1880), 5 P.D. 250; money to obtain the release of the vessel from the shipwright's possessory lien, so as to enable her to prosecute her voyage: *The "Albert Crosby"* (1870), L.R. 3 Ad. 37.

Necessaries do not include money advanced to obtain the release of a master who had been arrested for a debt incurred for necessaries: *The "N. R. Gosfabrick"* (1858), 4 Jur. N.S. 742; nor a broker's commission for procuring charter parties: *The "Marianne,"* [1891] P. 180. It has been held that the premium on insurance on the ship is not a necessary: *The "Henrich Bjorn"* (1883), 8 P.D. 151; *The "André Theodore"* (1905), 10 Asp. M.C. 94; but an insurance on freight was held to be a necessary in *The "Riga"* (1872), L.R. 3 Ad. 516.

The rule has been laid down by Dr. Lushington that the right to proceed *in rem* against the ship under sec. 6 of the Act of 1840, for necessaries is only available when the property proceeded against belongs to the parties who would be personally liable at common law for the necessaries: *The "Alexander"* (1842), 1 W. Rob. 346, 360; *The "Sophie"* (1842), 1 W. Rob. 369.

A later rule was laid down by Dr. Lushington as follows: "When goods are furnished for the use and benefit of a ship the presumption is that the ship is liable; and to rebut this presumption it must be distinctly proved that credit was given to the individual only, whoever he may be": *The "Perla"* (1858), Swab. 353, see also *The "Onni"* (1860), Lush. 154.

Sir R. Phillimore considered that in order to support an action *in rem* for necessaries, they must have been supplied on the order of some one who either had authority from the owners to contract on their behalf or was held out by them as having such authority: *The "Great Eastern"* (1868), L.R. 2 Ad. 88. See also *The "Wellgunde"* (1902), 18 Times L.R. 719.

The distinction between the supply of necessaries on the credit of the ship and on the personal credit of the owners is dealt with in a recent Privy Council case: *Foong Tai Co.* v. *Buchheister Co.*, [1908] A.C. 458, 469. In *Webster* v. *Seekamp*, 4 B. & Ald. 352, Lord Tenterden outlined what the term necessaries meant and Sir R. Phillimore in *The "Riga"* (1872), L.R. 3 Ad. 516, reviewed the different cases touching the matter of necessaries and adopted the definition as laid down by Lord Tenterden.

Parties having claims for necessaries have not maritime liens in respect to their claims: *The "Two Ellens"* (1872), L.R. 4 P.C. 161; *The "Henrich Bjorn"* (1886), 11 A.C. 270.

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Annotation

Admiralty jurisdiction as to necessaries

Annotation (*continued*)—Admiralty (I—46)—Liability of a ship or its owners for necessaries supplied.

But the proceedings *in rem* which they are entitled to institute gives them the right to arrest the ship, and obtain in this way a statutory lien for their claims.

A master or seaman of a ship may proceed either *in rem* or *in personam* for wages due them in respect to work performed on board the ship, and the master also may proceed in the same way for disbursements made by him on account of the ship.

Masters and seamen now have a maritime lien for their wages and masters, and any one acting as master, on the death of the regular master, has now a maritime lien for disbursements as liabilities incurred by them on account of the ship: Merchants Shipping Act (1894), Imperial, 57 & 58 Vict. ch. 60, sec. 167; *The "Tagus,"* [1903] P. 44; *The "Ripon City,"* [1897] P. 226; *The "Cairo," Watson and Parker* v. *Gregory* (1908), W.N. 328.

These maritime liens may be lost by negligence or delay if the rights of third parties may be thereby compromised, but when reasonable diligence is used and the proceedings are taken in good faith, the lien travels with the *res* into whosesoever possession it may come: Halsbury's Laws of England, vol. 1, p. 69, referring to *The "Fairport"* (1882), 8 P.D. 48.

The master of a ship is always personally bound by a contract for necessaries or repairs, unless he by express terms confines the credit to the owners only: *Rich* v. *Coe* (1777), 2 Cowp. 636; *Hussey* v. *Christie* (1808), 9 East 426, but when the contract is made by the owners themselves, or under circumstances that shew that the credit was given to them alone, there is then no right of action against the master: *Farmer* v. *Davies* (1786), 1 T.R. 108. Usually, however, the creditor is in the position that he has a right to elect whether to proceed against the owners or the master, but he cannot proceed against one, after he has obtained judgment against the other: *Priestley* v. *Fernie* (1865), 34 L.J. Ex. 172.

The master has an implied authority to bind the owners for all that is necessary to safely and successfully navigate the ship. This rule rests on the legal maxim—*quando aliquid mandatur, mandatur et omne per quod perveniture ad illud*—this authority subject to certain limits covers all such repairs and supplies and other things as are necessary to the due prosecution of the voyage and extends to the borrowing of money when ready money is required for the purposes of the voyage: *Beldon* v. *Campbell* (1851), 6 Exch. 886; see *Specrman* v. *Degrave* (1709), 2 Vern. 643.

The rule as to the master's authority to pledge the owner's credit has been stated as follows:—

> "In cases where the owner or his agent is at the port of the ship's anchorage, or so near to it as to be reasonably expected to interfere personally, the master cannot, without special authority for the purpose, pledge the owner's credit for the ship's necessities . . . It is obvious, however, that the limits of this rule cannot be described by any fixed geographical radius, since cases arise, where, as the necessity is pressing, the delay of communication with the owner, though comparatively near, would be prejudicial to his interests.

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Admiralty jurisdiction as to necessaries

Annotation (*continued*)—Admiralty (I—46)—Liability of a ship or its owners for necessaries supplied.

> "It is therefore laid down, as a general rule, that there is authority to borrow money on the ship, or pledge the owner's credit, whenever the power of communication is not correspondent with the existing necessity.
>
> "The question in these cases, then, is, whether the master's position was such as to constitute him the authorized agent of the owner for that purpose; and that is entirely a question for the jury": Maclachlan's Law of Merchant Shipping, 5th ed., p. 153.

It would seem that a merchant furnishing necessaries has a two-fold remedy, *i.e.*, either against the master or owner: *Kendal* v. *Hamilton* (1879), 4 App. Cas. 514, following *Priestley* v. *Fernie*, 3 H. & C. 977, 34 L.J. Ex. 172. Both owner and master may be included in the same writ if claim is made in the alternative. As to how far a creditor may proceed against one without having to elect, see *Curtis* v. *Williamson* (1874), L.R. 10 Q.B. 60. When repairs have been made or necessaries furnished, and there was no prior stipulation to be paid in ready money, the master of a ship has no authority to borrow for the purpose of discharging such debt: *Beldon* v. *Campbell* (1851), 6 Exch. 886; *per* Martin, B., cited by Lord Campbell in *Frost* v. *Oliver* (1853), 2 E.B. 301; see, however, as to the rule in equity: *Ashmall* v. *Wood* (1857), 3 Jur. N.S. 232.

In *Halifax Graving Dock Co.* v. *Magliulo*, 43 N.S.R. 174, it was held that under stress of necessity, the master, being a foreigner, had a right to borrow money to make repairs and to give for the money borrowed a first charge on any money to come to him from the owners in respect to advanced freights, general average, or upon bottomry bonds or other security, and express authority from the owners to do this may be inferred.

The master of a ship contracting in his own name to supply the needs of the ship and its navigation at a place where neither the owner nor its agent are present, binds himself, the ship and its owner, and the ship may be seized for the debt contracted, for the objects of the voyage, or for a consul's fee: *Frechette* v. *Martin*, 21 Que. S.C. 417

Where the owners having transferred the possession and control of the ship to charterers, who appoint the master and crew, and pay their wages, the master in incurring a debt for necessaries is the agent or servant of the charterers and not of the owners, the owners in the case are not the debtors and an action for the necessaries cannot be brought against the ship where the claimant knew that the vessel was under charter, although he did not know the terms of the charter-party: *The Baumwoll Manufactur von Carl Scheibler* v. *Furness*, [1893] A.C., p. 19-21, followed. *The Barge "David Wallace"* v. *Bain*, 8 Can. Exch. R. 205.

Where a ship is chartered, and supplies are furnished to the charterers with a knowledge of their position with regard to the ship, no maritime lien attaches to the ship, and the orders of a foreman of the charterers, not being the master cannot create a maritime lien against such vessel: *Upson Walton Company* v. *The Ship "Brian Boru,"* 10 Can. Exch. R. 176.

Article 2391 of the Civil Code, Quebec, and 931 of the Code of Civil Procedure, do not render a ship liable to seizure for personal debts of the hirers and the ship cannot be attached therefor by saisie-arret: *Inverness Ry. and Coal Co.* v. *Jones*, 16 Que. K.B. 16, affirmed 40 Can. S.C.R. 45.

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Annotation

Admiralty jurisdiction as to necessaries

Annotation (*continued*)—Admiralty (I—46)—Liability of a ship or its owners for necessaries supplied.

The master of a ship is liable on a bill of exchange drawn by himself while in a foreign port on the owners of the vessel, in favour of the suppliers of coal: *The "Ripon City,"* [1897] P. 226, referred to; *The "Elmville,"* [1904] P. 319.

Where the master was sued on such a bill, the onus of defending the action not being on him as master he has no lien for the costs incurred by him in unsuccessfully defending the action: *The "Elmville"* (2), [1904] P. 422.

Where necessaries are supplied on the credit of a ship, the registered owner of which is trustee for the purchaser of the vessel, an action *in rem* will lie, and where the purchaser intervenes and claims the ship, the parties claiming for the necessaries are entitled to recover, their claim being paramount to that of the purchasers. *Foong Tai & Co.* v. *Buchheister and Co.*, [1908] A.C. 458.

In an action to enforce a maritime lien, where the defendants appear, not only to obtain the release of the ship which happens to have been arrested, upon giving sufficient bail, but also to contest their liability, and to endeavour to exonerate themselves from any claim for damages, and further to put forward, by counterclaim, and try to establish a claim for damages against the plaintiffs, they submit themselves to the jurisdiction of the Court, and thereby become liable personally for the full damages: *The "Dupleix,"* [1912] P. 14.

The obligation of owners of a ship to third parties has been stated as follows:—

> "If they hold the ship as partners, they are all jointly liable on the contract of each made in the name and for the purposes of the partnership. If they are part owners and not partners, as is much more commonly the case, the law is that they are severally liable, each upon his own contract, made by himself, or by a duly authorised agent on his behalf. Between partners the relation of principal and agent is implied by law: *Cox* v. *Hickman* (1860), 8 H. L.C. 268; between part owners it remains to be proved in fact."

The American rule modifies the general rule above stated. Chancellor Kent (3 Kent's Comm. 155, citing Holt's Law of Shipping), says referring to co-owners:—

> "They are analogous to partners, and liable under that implied authority, for necessary repairs and stores ordered by one of themselves; and this is the principle and limit of the liability of part owners."

In England since the decision of Lord Hardwicke, in *Doddington* v. *Hallet* (1750), 1 Ves. Sen. 497, was overruled, we have no such doctrine. Lord Eldon overruled the decision in *Doddington* v. *Hallet* more than once: *Ex parte Harrison* (1814), 2 Rose 76; *Ex parte Young* (1815), 2 V. & B. 242. See *Green* v. *Briggs* (1847), 6 Hare 395.

The mere fact that a person appears on the register as an owner does not make him liable for necessaries supplied on the order of the ship's husband or managing owner, *primâ facie* the ship's husband is the agent of all the owners of the ship, with the requisite authority for that pur-

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Annotation

Admiralty jurisdiction as to necessaries

Annotation (*continued*)—**Admiralty (I—46)—Liability of a ship or its owners for necessaries supplied.**

pose, but he only has implied authority to bind the owners who have intrusted him with the management of the ship, by contracts which are proper and necessary for the ship: *Coulthurst* v. *Sweet* (1866), L.R. 1 C.P. 649; see also Maclachlan's Law of Merchant Shipping, 5th ed., p. 100, *et seq.*

Where parties in a foreign port made disbursements on the authority of the managing owner in respect of a ship and obtained judgment against the owner of one share of the ship, said owner of one share is entitled to contribution from the persons who had entered into contracts with the managing owner to purchase shares in the ship. The decision of Phillimore, J. (75 L.J.K.B. 359) was reversed: *Von Freeden* v. *Hull, Blyth & Co.* (1907), 76 L.J.K.B. 715.

An alleged custom to discharge masters of small coasting vessels on the British Columbia coast was negatived in *Roberts* v. *Tartar*, 13 B.C.R. 474.

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Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A. January 17, 1912.

1. WILLS (§ I F—60)—CODICILS—NET RESULT—CONSTRUCTION.

Where a testator leaves a will and several codicils it is the net result of the testamentary writings that is to be construed as his last will.

[*Douglas-Menzies* v. *Umphelby*, [1908] A.C. 224, followed.]

2. WILLS (§ III A—75)—LEGACY—CONFIRMATORY CLAUSE IN CODICIL.

The effect of a confirmatory clause in a codicil not specifically referring to the original will by date or otherwise, but purporting to be a codicil to the testator's last will, is to bring the will down to the date of the codicil and to effect the same disposal of the property as if the testator had at that date made a new will containing the same dispositions as the original will, but with the alterations introduced not only by the last codicil, but by the intermediate codicils, if any, so far as they remain unrevoked.

[*Re Fraser, Lowther* v. *Fraser*, [1904] 1 Ch. 726 and *Re Champion, Dudley* v. *Champion*, [1893] 1 Ch. 101, followed].

3. WILLS (§ III M—198)—DIVISION OF RESIDUE—WILL AND CODICILS—INTERPRETATION.

Where the scheme of a will apart from specific devises and bequests is to give pecuniary legacies of fixed sums to different legatees and then to divide the residue amongst some of them in proportion to the pecuniary bequests which each is to receive, a substitution by codicil of a different sum to one of them, will take effect so as to cause a distribution of the residue in different proportions conforming to the amended legacies unless a contrary intention appears from the will.

[*Re Courtauld's Estate, Courtauld* v. *Cawston* 1882), 47 L.T.R. 647, (1882), W.N. 185, discussed.]

4. WILLS (§ I F—60)—EFFECT OF CODICIL—BEQUEST "IN PLACE AND STEAD" OF ANOTHER—SUBSTITUTION FOR ALL PURPOSES.

Where a codicil directs that a stated pecuniary legacy is bequeathed in the "place and stead" of a stated pecuniary legacy in the will, the effect is as if the amount specified in the codicil were inserted in the will for all purposes, even to the change of the mode of division of the residuary estate which by the original will was to be divided

amongst the testator's children "in proportion to the personal property *herein* bequeathed to my said children."

[See also Theobald on Wills, 7th ed., p. 668 and Annotation to this case.]

APPEAL by H. A. Hunter and D. J. Hunter from an order of a Divisional Court affirming an order of MIDDLETON, J., declaring the construction of the will of William Henry Hunter, deceased on a summary application by the executor. The decision appealed from is reported, *Re Hunter* (1911), 24 O.L.R. 5.

The appeal was allowed and the judgment of the Divisional Court reversed.

E. D. Armour, K.C., for the appellants (with him, *R. B. Beaumont*, for H. A. Hunter, and *W. C. MacKay*, for D. J. Hunter), relied upon the reasons and cases cited in the previous argument before the Divisional Court, 24 O.L.R. at p. 10, and in particular upon *In re Courtauld's Estate, Courtauld* v. *Cawston* (1882), 47 L.T.R. 647, [1882] W.N. 185, a case which was not cited before Middleton, J., in the Weekly Court, and which is submitted to be on all fours with the case at bar. *In re Gibson Trusts* (1862), 2 J. & H. 656, which is relied on by the respondents, was cited on the argument before Kay, J., in the *Courtauld* case. The following cases were also referred to: *In re Maybee* (1904), 8 O.L.R. 601; *Dungannon* v. *Smith* (1845), 12 Cl. & F. 546; *In re Boddington, Boddington* v. *Clairat* (1884), 25 Ch. D. 685, *per* Earl of Selborne, L.C., at p. 689; *In re Boden, Boden* v. *Boden*, [1907] 1 Ch. 132, at pp. 149, 155; *Cooper* v. *Day* (1817), 3 Mer. 154; *Carrington* v. *Payne* (1800), 5 Ves. 404, 422. The cases of *Bonner* v. *Bonner* (1807), 13 Ves. 379, *Henwood* v. *Overend* (1815), 1 Mer. 23, and *Early* v. *Benbow* (1846), 2 Coll. 342, cited in the judgment of the Divisional Court, are distinguishable on their facts from the present case.

Shirley Denison, K.C., for the widow of the testator, relied upon the judgments appealed from, and upon the reasons and authorities cited therein, and in his previous argument before the Divisional Court, 24 O.L.R. at p. 10. He also referred to *In re Joseph; Pain* v. *Joseph*, [1908] 2 Ch. 507, which is cited in the judgment of Teetzel, J.; *Creswell* v. *Cheslyn* (1762), 2 Eden 123; *Sykes* v. *Sykes* (1867-8), L.R. 4 Eq. 200, 206, L.R. 3 Ch. 301, *per* Lord Cairns, L.C., at p. 303.

J. R. Meredith, for the infants, adopted the argument made on behalf of the widow.

C. R. McKeown, K.C., for the executor.

Armour, in reply.

January 17, 1912. MOSS, C.J.O.:—This is an appeal from a judgment of a Divisional Court, reported 24 O.L.R. 5, affirming a judgment pronounced by Middleton, J., upon one of several

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questions submitted upon originating motion as to the construction of the last will and testament of William Henry Hunter.

A number of questions were submitted and disposed of, but the appeal to the Divisional Court was in respect of one question only, viz., as to the respective shares or interests of two of the testator's sons, Henry Alfred Hunter and David John Hunter, in his residuary estate.

The testator, who describes himself in the will and codicils thereto as a farmer, was evidently a man of very considerable wealth. Judging from the many parcels of land and the quantity of personal property disposed of in specie, as well as the numerous pecuniary gifts and legacies (amounting to over $40,000) bestowed upon children, relatives, and others, it is safe to say that the will and codicils disposed of an estate the value of which probably exceeded $150,000.

It is evident that the disposition of his estate had been the subject of careful deliberation, and that his desire was to fully express his wishes and intentions in regard to the interest or share in his estate to be taken by each beneficiary named by him.

A period of more than two years elapsed between the execution of the original will and the first codicil, but the latter shews the same care, deliberation, and fullness of expression.

And the final codicil, executed nearly three years after the first, displays similar characteristics. It may fairly be assumed that, in the changed circumstances, the testator gave full consideration and attached due weight to the position and claims of each of the beneficiaries affected by them, and made his subsequent dispositions with all these matters before him. Neither the original will, nor his ultimate testamentary disposition of his estate, appears to indicate equality of division as the governing consideration. Rather does it indicate careful consideration of all the circumstances.

It is to be borne in mind that the ultimate wishes of the testator are to be ascertained, if possible, by a proper construction of the language in which he has expressed them; and these wishes, when so ascertained, constitute his last will and testament.

In *Douglas-Menzies* v. *Umphelby*, [1908] A.C. 224, their Lordships of the Judicial Committee say (p. 233):—

> Whether a man leaves one testamentary writing or several testamentary writings, it is the aggregate or the net result that constitutes his will, or in other words, the expression of his testamentary wishes. The law, on a man's death, finds out what are the instruments which express his last will. If some extant writing be revoked, or is inconsistent with a later testamentary writing, it is discarded. But all that survive this scrutiny form parts of the ultimate will or effective expression of his wishes about his estate. In this sense it is inaccurate to speak of a man leaving two wills; he does leave, and can leave, but one will.

In connection with these principles, it is to be borne in mind that, as enacted by sec. 26 of the Wills Act, R.S.O. 1897, ch. 128—now sec. 27 of 10 Edw. VII. ch. 57—every will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the will.

Further, as regards the last will and testament in question here, it is not unimportant to note that the final codicil concludes with the following declaration by the testator: "In all other respects I confirm my said will." Up to the time of the execution of this codicil, what constituted the testator's will? It cannot be said that the original will did, for the testamentary desires therein expressed had been modified, altered, and varied by the first codicil, and the testator's will expressed up to that time could only be gathered from the original will and the first codicil. That codicil is expressed to be a codicil to the will dated the 13th February, 1904. The final codicil is described as a codicil to the last will and testament of the testator, but makes no reference to date. It is manifest that this codicil was intended to take effect as against preceding testamentary dispositions, whether found in the original will or in the first codicil.

In the case of *In re Fraser, Lowther* v. *Fraser*, [1904] 1 Ch. 726, the effect of a confirmatory clause in a codicil, as well since the first passing of the provision contained in sec. 27 of the present Wills Act as under the old law, is thus stated by the Court of Appeal (p. 734):—

> The effect . . . is to bring the will down to the date of the codicil, and effect the same disposition of the testator's estate as if the testator had at that date made a new will, containing the same dispositions as the original will, but with the alterations introduced by the various codicils.

For this proposition several authorities are cited, and amongst them the case of *In re Champion, Dudley* v. *Champion*, [1893] 1 Ch. 101, wherein North, J., says (p. 111): "The codicil makes the will take effect as if it had been executed at the date of the codicil."

What is to be ascertained in the present case is the position and rights of the appellants, Henry Alfred Hunter and David John Hunter, under the residuary clause contained in what is the last will and testament of the testator, as executed and declared on the 24th March, 1909. There is only the one residuary clause, and of course it can only become effective after all the specific devises, bequests, and dispositions made by the will as a whole have been satisfied or provided for. It is not necessary to repeat the words of the residuary clause. The directions are very simple: (*a*) the whole residue of every nature and kind

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is given to the testator's children; (*b*) they are to share in it in proportion to the personal property "herein" (that is in the will of which this is the residuary disposition) bequeathed to his children; but (*c*) in calculating the proportions, the personal property bequeathed to W. H. Earl Hunter is fixed at $2,000.

In order to ascertain the proportions in which the residuary estate is distributed, it is only necessary to find what personal property each child is entitled to receive under the bequests to them to be found in the will as it stood at the testator's death. In seeking to do so, it is of course proper to apply the usual rules of construction and find out what the testator has done, by ascertaining the meaning of the words he has used and the connection in which he has used them.

Where, as here, the meaning has to be ascertained by bringing down to the date of the last codicil what remains of all the preceding testamentary instruments, there does not appear to be any objection to looking at the original testamentary directions. But it cannot be a correct method of dealing with the will to accept the original dispositions as guides to the influences giving rise to changes. The fact of changes in the dispositions formerly made is *primâ facie* an indication of change of intention. But as to what may have led to or induced the change of intention, unless the testator has manifested it either by express statement or very clear inference, it is unsafe to seek to enter into his mind, or speculate as to the grounds which have influenced him. All that can safely be done is to take the latter directions, apply them to the earlier, and ascertain the result.

The observations of Fletcher Moulton, L.J., in the case of *In re Boden, Boden* v. *Boden*, [1907] 1 Ch. 132, though used in a dissenting judgment, are weighty and well worthy of attention. He says (p. 145):—

> Our law gives full liberty of testamentary disposition, and testators avail themselves of this liberty to the full. Courts are therefore treading on dangerous ground when they leave the actual wording of the document and permit themselves to speculate on what is a probable disposition in a will.

Dealing in the light of the foregoing principles with the provisions applicable to Henry Alfred Hunter, we find that, apart from the residuary clause, the only provision relating to him is a bequest included among a number of bequests which the testator desires his executors to pay as soon as convenient after his decease. The bequest is in these words: "To my son Henry Alfred Hunter I give the sum of two thousand dollars." Thus stood the will as to him until the execution of the first codicil, which contained a direction as follows: "I hereby order and direct that the sum of seven thousand dollars shall be paid to my son Henry Alfred Hunter in the place and stead of the sum

of two thousand dollars bequeathed to him in my said will." If the testator had died while his testamentary dispositions were in this form, the amount of personal property bequeathed to Henry Alfred Hunter would, beyond question, be $7,000, and the language of the residuary clause would have applied to the $7,000 and not to the $2,000, for the latter bequest was no longer to be found in the will.

It serves no useful purpose, and, as Fletcher Moulton, L.J., observed (*supra*), it may be dangerous, to speculate as to the testator's reasons for increasing the amount of the bequest. He may have thought this sum, together with the greater proportionate share under the residuary clause, would place Henry Alfred on a par with his brothers and sisters; or he may have decided, for reasons that appeared good to him, that Henry Alfred should take a greater share than his brothers. That, at all events, was the expression of his will. The only operative bequest was one of $7,000. And nothing was said or indicated to alter the residuary clause, as, for instance, by the introduction of a provision resembling the restriction placed upon the proportion to be taken by W. H. Earl Hunter.

But, when the testator dealt once more with Henry Alfred's interests, as we find he did in the final codicil, while he revokes the bequest of $7,000, that being the only one then extant, he expressly provides that the revocation of the bequest is not to apply to Henry Alfred's share of the testator's estate as set forth in the residuary clause. What at this time was Henry Alfred's share *in posse* in the testator's estate, reading the first codicil in connection with the residuary clause? They together formed the expression of the testator's will, which, as expressed, gave Henry Alfred $7,000. Is there anything to be found in modification of that position?

Again, it is vain to speculate as to grounds or reasons. But there is nothing unreasonable in supposing that the testator deliberately concluded that the lands devised to Henry Alfred, and his share of the residuary personal estate, based on the proportion of $7,000 as before, would be equivalent to the sum of $7,000 cash and the share of the residuary personal estate. In other words, that the lands would be the equivalent of the $7,000, and the proportion of the residuary estate might be left as it was under the operation of the will and first codicil. But, whatever may have been his motive, he chose that Henry Alfred should remain in the same position with regard to the residue of the estate as he was when he was to receive a bequest of $7,000, out of the personal property. That was the only bequest in Henry Alfred's favour contained in what was then the testator's will, as gathered from the two papers then constituting it.

As to David John Hunter, the case appears to be even

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stronger. When the language of the residuary clause is applied to his case, the personal property bequeathed to him must be looked for, and that is found to be $7,000. That is the only sum bequeathed to him, and the only other benefit he is to receive is his proportion of the residue, of which the only measure is the bequest of $7,000.

It is said that the original will indicated a scheme in the mind of the testator that each of his sons should receive personal estate to the extent of $2,000, and the distribution of the residue in proportion to that sum, and that this scheme will be disturbed if the provisions of the codicils as respects Henry Alfred and David John Hunter are given effect to. It may be that the testator, when making the dispositions contained in the original will, had some such design in view; but it is evident that, if he had, it was based upon a view of all the provisions he had then made.

But the first codicil introduced at once a change, not only as respects David John, to whom lands had been given, but as respects Henry Alfred, to whom no lands and nothing except $2,000 had been given by the original will.

If the testator had desired to preserve the proportions mentioned in the original will, he could easily have done so by a process similar to that used in the case of W. H. Earl Hunter.

The appeal should be allowed, and it should be declared that Henry Alfred and David John Hunter are entitled to share in the residue in the proportion that the sum of $7,000 bears to the total of the bequests of personal property, with the consequent directions.

The costs of the litigation have hitherto been directed to be borne by the estate; and, in view of all the circumstances, it is proper to continue that direction, including the costs of this appeal—the executors' costs between solicitor and client.

MACLAREN, J.A., concurred.

MAGEE, J.A.:—The will in this case is dated the 13th February, 1904. The testator died on the 24th May, 1910. In those six years there was opportunity for change, not only in the amount and items of his estate, but in the circumstances of his children and his views of their reasonable expectation or need of benefits or further benefits at his hands. And we find him making changes in the disposition of his estate. The first codicil is dated the 22nd June, 1906, and was evidently made partly in consequence of some alterations in his estate by sale and purchase, and partly because of the death of some beneficiaries, and partly on reconsideration of the claims of his children. The second codicil is dated the 24th March, 1909, and affected only his children.

The testator had considerable landed and personal property. He had been twice married. He mentions in his will six sons—David, Henry, Earl, James, Gordon, and Bryson—and four daughters, of whom two were married, and a son of another daughter. Of the six sons, the last-mentioned four were evidently minors. They are said to be children of the second marriage. He expressly devises among five of the sons nineteen farm half-lots, two quarter-lots, and fifty acres more, and then directs all the balance of his real estate to be sold. In the division of the specified lots among his sons, there is apparently great inequality, if one might say so without having values. Some are given absolutely, some with restraint on selling, and some only for life with remainder only to sons of the devisee. One son, Henry, gets none at all except a remote possibility of a life estate. David and his family only get two half-lots, and in the case of each of the six sons, if he leaves no son surviving, some of the property goes over to one of his brothers, and not to his daughters. In the chances to arise out of failure of sons there is no equality. James would get Earl's share and his own. Gordon would get all three, Bryson all four, and Henry the same four, without the other brother or brothers sharing. Then he makes six bequests of $2,000 each, one to each of his six sons. Then to his daughters he gave no land, but to one unmarried daughter $5,000 and a piano; to another, also unmarried, $5,000; a married one, $3,500; and to another, a life interest in the income from $3,000, the principal of which would go to her children; and he gives to the son of another daughter $1,500. These pecuniary legacies to his sons, daughters, and grandson amount to $30,000. Among his own brothers and sisters, nephews and nieces, he gave $9,000, in varying sums; and he bequeathed $2,000 in fifteen other legacies of sundry amounts. Beside these, he gave $10,000 to the children by the second marriage upon their mother's death, she having the income therefrom during her life. He directed that "the sums herein bequeathed" to the children of his first marriage were to take precedence of all other legatees "herein mentioned" as to the time of payment.

Beside making these pecuniary bequests, which foot up to $51,000, and giving specific legacies of chattels and some income from Earl's land to his wife, he gave for or to Earl at his majority a quantity of farm stock, implements, and provender, evidently worth over $2,000, on the homestead farm. Then he puts in a proviso that, in the event of his personal property being insufficient to pay all the legacies "herein mentioned," they should abate proportionately. Finally, he adds the clause now in question: "All the rest residue and remainder of my estate both real and personal not hereinbefore disposed of I give devise and bequeath to my children they to share in said residue in pro-

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portion to the personal property herein bequeathed to my said children but in calculating the said proportions the personal property bequeathed to my son W. H. Earl Hunter is fixed at two thousand dollars." Evidently this last sentence was intended to prevent Earl ranking on the residue in respect of the other personal property bequeathed to him.

Here, then, we have legacies among the ten children varying from the income for life of $3,000 to $2,000, $3,500, $5,000, $5,000 with a piano, and $2,000 with a postponed interest in $10,000, and one getting that with chattels worth over $2,000 as well. And the residue was, except as limited in the case of Earl, to be divided in those unequal proportions.

Looking at the provision for possible insufficiency, it would seem that in 1904 the testator considered his personal estate not specifically bequeathed would be about $51,000. If one may hazard a conjecture, where conjectures are dangerous, he was in effect saying: "I have about $51,000 outside of my goods and lands which I have devised specifically. I will give $11,000 outside of my wife and children. I will give my wife the income from $10,000, but subject to the postponement of that $10,000; the other $40,000 I divide among my children in these varying amounts; and I doubt if there will be any balance, but, if there should be, let them divide it, not equally, but in the same proportions in which they get the $40,000."

Then comes the first codicil. He had purchased some other properties, disposed of part of the lands devised to David and part of those devised to Bryson; so he cancels the devises of the parcels so disposed of; without giving any reason, he takes away the remainder of David's land, and adds it to Bryson's devise, and adds a quarter-lot to Gordon's, giving him a life estate with remainder to his sons. Legatees of $1,050 had died, so he cancels those bequests, reduces another by $50, and makes a change in the bequest to a sister. Then he makes a bequest to David in these words: "I hereby order and direct that the sum of seven thousand dollars shall be paid to my son David John Hunter in the place and stead of the sum of two thousand dollars bequeathed to him by my said will." And he made another bequest of like amount to Henry, in similar words. He cancels the clause as to priority between the children of the two marriages, but the clause as to insufficiency of his estate is not disturbed.

This bequest to David, though it may have been given to him to make up for the land taken from him, is not stated to be in lieu of the land, but in the place and stead of the $2,000 of money. Henry, who had practically got no land, was not losing anything, and so the increase of $5,000 was a direct benefit.

Here, then, we find the testator rearranging his estate, in view of the changed conditions and change of mind, but again

with no sign of equality. Two sons get $7,000 each, but no land; two daughters, $5,000 each; another $3,500; another with her children $3,000; and four sons, $2,000, beside the specific legacies to one son and one daughter, and beside the remainder in $10,000 to the children of the second marriage only.

This first codicil raised the whole question which is here for decision. That question is—did the testator, by this substitution of $7,000 for $2,000 to David and Henry, intend that they should share in any possible residue in that increased proportion?

But we are not left to it alone. Comes the second codicil, in which he gives his daughter Sarah a life interest in a half-lot, with remainder to one of three brothers if living, and he revokes "the bequest in my said will in favour of my son Henry Albert Hunter and in lieu thereof" gives him a section of land in Alberta and gives him another section there. The codicil proceeds: "This revocation of the bequest in my said will in favour of my said son Henry Albert is not to apply to his share of my estate as set forth in the residuary paragraph of my said will. In all other respects I do confirm my said will."

This second codicil is of importance as shewing that he considered the will and first codicil as being his will. It clearly was not the $2,000 which he was taking away from Henry, but the $7,000, and he speaks of it as being "the bequest in my said will." But the codicil shews more. The testator evidently feared that by this revocation there would be no personal property bequeathed to Henry, and therefore Henry would not even get a share of any surplus, and so he guards against that by saying that Henry shall still share in the residue. That, I think, shews that he considered that the division would be in proportion to their legacies, as settled not merely by the original will standing alone, but by the will and codicils taken together, as he himself took them as being his will; and that, if the legacy were cancelled, the share in the residue would go with it, unless he provided otherwise. Then he goes on to confirm "my said will." What will? Certainly not the original will, but the will and codicil, which together he made his will.

I think this second codicil is strong evidence that he had by his will given David and Henry each $7,000, and that those legacies stood, as indeed the second codicil said they stood, "in the place and stead" of the $2,000, and as if written and "herein bequeathed" in the original will, which should be read with that substitution.

It was pressed upon us that the will evidenced an intention of equality among the sons, a simple principle of levelling which the testator had in mind and which should not be lightly disturbed. But there is no basis for that argument. The facts are to the contrary. I have summarised the effect of the will

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with a view to that assertion. True, he gave each son $2,000; and it may incidentally be noticed that he did not put them all in one clause, but mentions each separately, as if giving each separate consideration. But he does not make the residue divisible upon the basis of that equality of those six legacies. He divides it on the basis of the whole personalty given to them respectively. He had present to his mind the effect of doing so, for he limits Earl to a basis of $2,000, but does not limit his brothers of the second marriage, who would also share in the $10,000 after their mother's death. So that, among the six brothers, we are in the will itself getting three different rankings. Where is the sign of equality? Leaving aside the very unequal division of the realty, we look for it in vain. As between the daughters, no two alike. As between the daughters and sons, palpable inequality. As between the sons of the first marriage and those of the second, $10,000 more given to the latter by the will, somewhat equalized by the first codicil, and again made unequal by the second; and, as between the latter themselves, Earl is given more and ranks for less than his brothers. And, as regards all the children, they are to share in the residue, not in proportion to the total property each gets, but only the personal property. It is not often one meets with a will with more apparent inequality. Had we found in the original will the legacies of $7,000 to David and Henry, instead of the $2,000, one would not be surprised or have felt it unjust. Henry was getting practically nothing else. It might or might not have been unjust; but, for all that appears, it would have been more just than the $2,000. No argument can be based on injustice or inequality as regards either David or Henry, and under the wording of the first codicil the rights of both are on the same footing as to the residue. In view of the care taken in the second codicil as to the residue, it is evident that the testator had chosen his words in the first codicil and still approved of them. He could as readily have given David and John each a further $5,000, but he gave the $7,000 "in the place and stead" of the $2,000, indicating, as I think, that it should be read into his will as if originally so written.

In my opinion, the true deduction from the will and codicil is this. The testator was directing his unspecified real estate to be sold, and thereby turned into personalty, and had from time to time his own idea of the value of his estate. He inserted and left standing in his will the provision for its possible insufficiency. By the codicils he was adapting his dispositions to the varied conditions of his estate. In effect he was saying at each of the three stages: "On the assumption that my estate is so much, I specify the amount my children will get out of that total. There may not be enough, but there may be more; and, if so, let them take it in the same proportions and not equally." That

seems to me to be the substantial intention throughout, and the one which he meant to give effect to, and the wording of both the first and second codicils seems to me to support it and shew that he was at each stage considering the case of each child by itself and not attempting any general system of equality. Such a scheme is a reasonable one; and I do not think any argument against the appellants can be drawn upon the ground that the construction put forward by them would be an obvious interference with an equality plan which never existed.

In connection with the deductions which are, as I think, to be drawn from the codicils, another fact is worthy of note. By the will the sums "herein bequeathed" to the children of the first marriage were to be paid first. But, so soon as he makes their bequests $10,000 more by the first codicil, he cancels that direction. The inference most obviously suggested, though not perhaps a very strong one, would seem to be, that he considered the $14,000 was to be looked on as "herein bequeathed," and it would be unfair to have priority for so much.

The case of *In re Courtauld's Estate, Courtauld* v. *Cawston*, 47 L.T.R. 647, does not seem to me so strong as the present one in its indication of the testator's intention. Of course, each testamentary document must be considered upon itself and its surroundings. Seldom are two alike. In the *Courtauld* case the legacy was actually revoked, and then the larger one given "in substitution." Those words are certainly not more indicative of intention than "in the place and stead of," which we find here, and which effect the substitution without revocation. Then, in the case referred to, the words "in the same manner as if they were here repeated" did not apply to the gift, but to the "trusts and provisions" which were to govern it, and which were indeed thus there repeated in short form as if it were necessary to repeat them in the codicil, instead of treating them as being stated in the will, and still applicable, because it was only a substitution of one amount for another. It appears to me that the testator's understanding of his own words is more clearly indicated by the codicils here, which shew that he treated the words of the codicil as written in the will, and not the words of the will as written in the codicil.

I fully agree with the views and reasons of my Lord the Chief Justice, and would allow the appeal.

GARROW, J.A. (dissenting):—Appeal by two legatees from the judgment of a Divisional Court, affirming the judgment of Middleton, J., construing the will and codicils of the late William Henry Hunter.

I agree with the judgment of the Divisional Court. The several questions originally involved appear to be now narrowed

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into one, concerning the proper construction of the residuary bequest contained in the will, which is in these words:—

"All the rest residue and remainder of my estate both real and personal not hereinbefore disposed of I give devise and bequeath to my children they to share in said residue in proportion to the personal property herein bequeathed to my said children but in calculating the said proportions the personal property bequeathed to my son W. H. Earl Hunter is fixed at two thousand dollars."

There is no difficulty in understanding this language. It is perfectly plain and simple, as every one admits, and I am unable to see any justification or excuse for not applying it fully, exactly as it is expressed.

It was certainly not expressly revoked by anything appearing in the codicils. Nor, in my opinion, was any implied revocation or alteration effected by the circumstance, so much relied on, that the testator by the codicils has varied the legacies given in the will upon which originally it was intended that the shares in the residue should be ascertained. A codicil, in the absence of express words, only varies a will to the extent that may be necessary to give full effect to the codicil. It by no means seems to follow that, because the testator by a codicil substituted a larger pecuniary legacy than that given in the will, he also intended to increase the legatee's share, in competition with the other legatees, in the residue.

Such a result might, of course, follow as the result of language indicating such an intention, as was apparently the case in *In re Courtauld's Estate, Courtauld* v. *Cawston*, 47 L.T.R. 647, where, in a case in some respects not unlike this, Kay, J., found in the language of the will and codicil enough to justify him in his carefully considered opinion in reaching such a conclusion. But, from a perusal of the case, it is quite obvious that, while there is a general similarity in the two cases, there are also material differences. There the testator had said in the codicil that he revoked the former legacies in question, and, in substitution for and not in addition, gave the new and larger legacies, "subject nevertheless to such trusts and provisions as were declared in the will . . . and in the same manner as if they were repeated." These words, and particularly those which I have put in quotation marks, Kay, J., regarded as very material. And, from them and the general scope of the will, concluded that the proper construction was to read the substitution as intended to be a substitution for all purposes, including the ascertainment of the shares of the legatees in the residue. There are no words of similar purport in this case. All we find here is a bare cancellation of the former legacy, and in its "place and stead" a new and larger legacy given. So that I agree with

Teetzel, J., that the *Courtauld* case is not an authority in favour of the appellants' contention.

I would dismiss the appeal.

MEREDITH, J.A. (dissenting):—It is better, in all such cases as this, to proceed, in the first place, upon the fundamental principle and cardinal rule of construction; that is, to find out what the testator meant from the words which he has used; and that is from all the words, viewing the whole surrounding material circumstances, as much as possible, from the testator's point of view at the time when the will was made: not to begin by studying other wills, and interpretations of them, but leaving that to be done thoroughly when the will in question has been first studied; if for no other reason, because there is sometimes some danger of a disposition to fit one case into another, though one may be round and the other square, too much anxiety to find a case in point, even though we may all know that it is said that there are no two blades of grass alike, and there are undoubtedly very few wills here that are quite alike—mutual wills, which would have such a tendency, never having been much in vogue in this Province; and, when one comes to think of it, it is apparent that there must be great danger of a misfit in applying the mind of one man expressed in his will in other times to control the will of another made in the present day, and the more so when we cannot be sure that it is the will of the one man, when really it may be the will of him, or of them, who interpreted such will. Cases, and rules of construction, may, and indeed must, be of great assistance; but they can, and must be, very dangerous guides if we forget the governing principle, that it is not the meaning of some other will, but is the meaning of that in question, which must be learned and to which effect must be given.

We have here to deal only with the gift of the residue to the testator's sons; but, if we were to close our eyes to all else that is contained in the will and codicils in question, and to the surrounding circumstances, we would run much danger of taking the road how not to construe, rather than the road how to construe, the will. It does not, however, seem to me to be necessary to refer to context, or to circumstances, to any great extent, in order to grasp the meaning of the will, and the real mind of the testator in respect of the matters here in question.

The general scheme of them, in respect of the testator's children, was, first, an equitable division of his lands among his sons; and it does not disprove that scheme merely because one of his sons seems, in his eyes, to have worn a coat of many colours, nor because another was not counted among those among whom the division was made: such circumstances may only the more draw attention to the equity, which was in his mind, as well as elsewhere, equality.

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The next noticeable feature, in this respect, is, that there was absolute equality provided for between his sons, in the pecuniary legacies given to them, and in the residuary bequest. That was, I think, clearly, the reason for the limitation of his "Benjamin's" share in the residue: this son was, under the will, to take other personal property than money; the other sons were not; the provision fixing the measure of the gifts of the residue was "in proportion to the personal property," not to the pecuniary legacies; so that, to put them all on quite the same footing, it was necessary to provide that the favoured son's proportion should be based upon the same sum as that of each of the others. I can find no warrant for the contention made in the 4th paragraph of the reasons for this appeal; on the contrary, this circumstance makes against the appellants.

Under the will, the son David was to get his specified share of the real estate, his equal legacy of $2,000, and his share of the residue, if any—for the will provides for a deficit as well as for a residue—with the same complete equality.

By the first codicil, the only alteration of the will affecting this appellant, was a revocation of the devise to him, contained in the will, for reasons expressed in the codicil—one of them being that the testator had, after the making of the will, disposed of part of the land comprised in this devise—and the gift to him of the sum of $7,000 in "the place and stead" of the $2,000 legacy.

It was contended, for the appellants, that a rule of construction requires that when one legacy is given as a mere substitution for another, it must be held to be subject to all the incidents of the first gift; and the Divisional Court expressly recognised such a general rule; but I would much prefer to put it, in the words of the present Master of the Rolls, that "on general principles" in a simple case, the later gift is subject to the incidents of the earlier gift: it all depends upon the will of the testator to be ascertained on the fundamental principle.

The rule, as stated in the Divisional Court, would be quite too narrow an one: it could not apply to this case, because no one could say that the residuary bequest was an incident of the pecuniary legacy; it is an entirely separate gift, even though its measure depends on the amount of the pecuniary legacy.

One can readily suggest many cases in which the character of the gift in the first place would govern it in the second place, as well as many in which it would not, but all, I think, simply because the intention sufficiently appeared.

The broader way of putting it would include the appellants' cases: if, by the cardinal rule of construction, it can be found that that which they contend for was that which the testator meant, effect should be given to their contentions.

But, to adopt a somewhat hackneyed mode of expression,

there are substitutions and substitutions; and though it may not be "as plain as the nose in your face"—in some instances—I cannot think that any one can reasonably doubt that the additional $5,000 was given in "substitution" for the land devised to David in the will, and by the codicil taken away from him in the revocation of that devise, land which in no case was to affect the amount of the residuary bequest: and I can imagine no good reason for holding, and I cannot believe, dealing with the case on the fundamental principle, that it was the intention of the testator, that the $5,000 thus given, was to effect the exactly even division of the residue as far as the sons were concerned.

For some reason, not in any way made apparent, the other appellant—the son Henry—was devised nothing by the will; whether it was because he was the opposite of a Benjamin, or whatever the reason may have been, we get no aid from it; but, when the first codicil was made, that was repaired; immediately after readjusting David as I have mentioned, the testator gave to Henry, in the same words, exactly the same as that which was thus given to David. All the circumstances point unerringly to equality; the taking away of the land from David was made good by the $5,000; and the lack of a devise to Henry was made good by the $5,000 more coming to him under this codicil. I cannot think that the most contentious mind would contend that, by this codicil, these two sons were not to be put upon an absolute equality; and so, if I am right as to the one, I am right as to both.

But that is not all; in the second codicil Henry, at last, is given land; but of course with a withdrawal of corresponding money gifts; as the codicil expresses it, the lands are given "in lieu" of the bequest, adding further evidence to the already very evident scheme of the testator of equality as to lands and equality as to money; the residue to be affected only by the even shares of the moneys, as far as the sons were concerned, the lands, and that which stood in place of lands, to have no effect upon it.

The last codicil reserves Henry's right to his share under the residuary bequest contained in "my said will;" the "said" will being "the last will and testament of me" the testator. The reference to the residuary bequest is, of course, a reference to the original will; the only residuary bequest of the testator is contained in that document. The words "my said will" may, of course, have been employed by the testator to describe the will itself in one place, and the will and codicil in another; such inaccuracies, from the strictly accurate point of view, are by no means unknown. I would not grasp at literary straws where the outstanding and controlling features are so plain, and in documents not overflowing with grammatical accuracy or literary elegance. If these lesser things were alone to be considered,

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it might follow that no judgment could be given in this case for want of grammatical accuracy. I do not think that these words "my said will," contained in the last codicil, help, or hurt, either side very much.

Nor do I put much weight upon the word "herein," contained in the residuary bequest; though like words seem to have had much weight in the decision of the case of *Hall* v. *Severne* (1839), 9 Sim. 515, adversely to a contention such as the appellants make here: see also *Early* v. *Benbow*, 2 Coll. 342; and *Radburn* v. *Jervis* (1840), 3 Beav. 450: but, again, there are cases and cases; and it may be true that none of the cases is as much like this case as two blades of grass are like one another: and yet they are something in the respondents' favour.

The contention that the original pecuniary bequests to the appellants cannot be looked at for any purpose, being in effect revoked by the first codicil, could not help them if it were right, because the codicil, upon which their present rights depend, must, of course, be looked at, and it proclaims what such original bequests were: but I would be very sorry to think that in no case can a revoked part of a will be looked at with a view to finding the testator's meaning; that the Courts must blind themselves to that which cannot but be, in some cases, of great aid in the due performance of their tasks in such cases as this; as a like method is in the interpretation of the statute-law and in other cases.

I decline to give to the codicils any greater revocatory effect than their words make necessary. I also decline to look only at two sets of figures, one in the will and the other in the codicils, in seeking the testator's intention upon the questions involved in this appeal—to bring my mind to the dead level of a mere "computing machine." To look at the whole will is anything but guessing at the testator's state of mind; disregarding anything in the will or codicil that throws light upon the subject, and concentrating the mind upon one provision only, is, in cases of doubt, likely to lead to error. If we would see and understand this will-picture, and all it was intended to convey, we must not be captivated, like the savage, by primary colours, only, but must give to all tones their due weight in the whole scheme.

I would dismiss the appeal: though, if this case were *Courtauld's* case, I would probably likewise dismiss the appeal: neither can, by reason of their differences, control the other.

Appeal allowed; GARROW and MEREDITH, JJ.A., *dissenting.*

Annotation
Substitutional legacies

Annotation—Wills (§ III M—198)—Substitutional legacies—Variation of original distributive scheme by codicil.

Substitutional legacies fall into two classes, namely, where there is a gift over upon a certain event, as upon the death of the original legatee

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Annotation

Substitutional legacies

Annotation (*continued*) — **Wills** (§ III M—198) — **Substitutional legacies— Variation of original distributive scheme by codicil.**

before the death of the testator, and where there is a gift by a subsequent testamentary instrument substituted for a gift in the original will. It is with this latter class that it is intended to deal in this discussion. Into the same class fall legacies which are given in "addition to" the original legacy, where the legacy in the subsequent instrument is not intended to absolutely revoke the earlier legacy, but only to substitute an augmented amount for the original legacy, and to leave the original will in other respects unchanged. In Hawkins on Wills, cases of this description are considered under the head of Added or Substituted Legacies, and it is convenient for the present to refer to them generally as substituted legacies.

Substituted legacies are subject to the rule of construction that they are payable out of the same fund, and subject to the same conditions and incidents, as the original legacies, unless a contrary intention is expressed in the will. *Leacroft* v. *Maynard*, 3 Bro. C.C. 232; *Crowder* v. *Clowes*, 2 Ves. Jun. 449; *Johnstone* v. *Lord Harrowby*, Johns. 425, 1 DeG. F. & J. 183. This is a rule of construction which is invariably adopted, whether for the advantage of the legatee or not, and parol evidence is not admissible to rebut it.

Thus, where a legacy of £500 is bequeathed free of legacy duty, and, by a codicil, a legacy of £1,000 is bequeathed to the same person "in lieu of" or "in addition to" the original legacy, the subsequent legacy is also free of legacy duty. *Cooper* v. *Day*, 3 Mer. 154; *Earl of Shaftsbury* v. *Duke of Marlborough*, 7 Sim. 237; *Scott* v. *Gohn*, 4 O.R. 457.

And so when the original legacy is void under the statutes of mortmain, the substituted legacy fails. *Bristow* v. *Bristow*, 5 Beav. 289; *In re Boddington, Boddington* v. *Clairat*, 25 Ch. D. 685.

Even where the legacies are cumulative, the subsequent legacy will fail if the original legacy is void, when the two legacies are given for the same purpose and are to become blended in one fund. *Johnstone* v. *Earl of Harrowby*, Johns. 425, 1 DeG. F. & J. 183. So, where the original legacy is intended to form part of the separate estate of a married woman, the substituted or augmented legacy is impressed with the same trust. *Russell* v. *Dickson*, 2 D. & War. 133, 17 Jur. 307; *Martin* v. *Drinkwater*, 2 Beav. 215; *Day* v. *Croft*, 4 Beav. 561; *Warwick* v. *Hawkins*, 5 DeG. & S. 481, and where the original legacy is payable out of a particular fund, the substituted legacy is payable out of the same fund. *Burrell* v. *Earl of Egremont*, 7 Beav. 205.

In the following cases the subsequent legacies were "in lieu of" or "in substitution for," etc. *Cooper* v. *Day*, 3 Mer. 154; *Russell* v. *Dickson*, 2 D. & War. 133; *Martin* v. *Drinkwater*, 2 Beav. 215; *Bristow* v. *Bristow*, 5 Beav. 289; *Earl of Shaftesbury* v. *Duke of Marlborough*, 7 Sim. 237; *Fenton* v. *Farington*, 2 Jur. N.S. 1120; *Knowles* v. *Sadler* (1879), W.N. 20; *Re Boddington, Boddington* v. *Clairat*, 25 C.D. 685; *Re Colyer, Milliken* v. *Snelling* (1886), W.N., p. 159, 55 L.T. 344.

In *Re Courtauld, Courtauld* v. *Cawston*, 47 L.T.N.S. 647, (1882) W.N., p. 185; the testator gave £70,000 free of legacy duty, unto his trustees, to invest the same and to pay the income thereof unto his adopted daughter, Sarah Ann Cawston, for life, without power of anticipation, and after her death to pay, transfer and divide the trust fund amongst such persons as she should by will or codicil appoint, and in default of appointment in

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Substitutional legacies

Annotation (*continued*)—Wills (§ III M—198)—Substitutional legacies—Variation of original distributive scheme by codicil.

trust for her next of kin. After giving other legacies payable out of his general residuary personal estate, the testator declared that the term "the said residuary legatees" thereinafter used should be considered to designate all persons thereinbefore named as pecuniary legatees. He then bequeathed his personal estate not otherwise disposed of to his trustees for conversion and declared that his trustees should stand possessed of his general residuary personal estate upon trust for the payment of funeral and testamentary expenses, debts, legacies, etc., and subject thereto, to be possessed thereof in trust for, and to be divided among, the said residuary legatees pro rata in proportion to the amounts of the legacies thereinbefore bequeathed to the said residuary legatees respectively. By a codicil, after reciting the gift in the will of £70,000, the testator revoked the legacy of £70,000 and in substitution for, and not in addition to, the said sum of £70,000, he gave unto his trustees the sum of £80,000 free of legacy duty upon trust to invest in their names in conformity with the provision for investment contained in his will respecting the said revoked legacy of £70,000, and upon further trust to pay the income of the £80,000 unto Sarah Ann Cawston for life, subject, nevertheless, to such trusts and provisions as were declared in his will respecting the said revoked legacy of £70,000 and in the same manner as if they were repeated. Kay, J., at p. 650, says: "I think, on the whole, in the absence of authority, I am bound to give the word 'substitution' its largest meaning, and to read the will and codicil, as one is bound to do, as one document, and to treat the words of the testator as if he had said: 'I direct that these increased legacies shall be read as if inserted in the will for all purposes,' in which case the residue must be divided amongst the legatees as if their original legacies had been the amounts mentioned in the codicil, and not in the will." The learned Judge considered that the words "in the same manner as if they were here repeated" had no greater effect than the words "in substitution."

When the testator states in a codicil that he has no time to alter his will, and gives a legacy of greater amount without revoking the legacy in the will, the later legacy is held to be substitutional. *Russell* v. *Dickson*, 2 D. & War. 133, 17 Jur. 307. Another gift written in the margin of the will opposite the name of the legatee has been held to be substitutional. *Martin* v. *Drinkwater*, 2 Beav. 215.

The substituted legacy need not be to the same person as in the will if the subsequent legacy is connected with the legacy in the will. As where a testator bequeathed £1,000 to the hospital in the county of L., to be raised out of his real estate. By a codicil, he revoked the legacy of £1,000 and "instead thereof" he gave the sum of £500 to the hospital in the county of N., without mentioning any particular fund out of which the same was to be paid. It was held that the subsequent legacy was "substituted," and, therefore, void under the statutes of mortmain. *Lowcroft* v. *Maynard*, 3 Bro. C.C. 233. But where between the date of the will and the codicil, there has been a change of circumstances inducing the testator to change his will, and the subsequent legacy is to another person and is an independent, distinct, substantive bequest, given by the codicil only, and without reference to the will, the subsequent legacy is not substituted, and is not subject to the incidents of the original legacy. *Chatteris* v. *Young*, 2 Russ. 183; *In re Gibson's Trusts*, 2 J. & H. 657.

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Annotation

Substitutional legacies

Annotation (*continued*) — **Wills** (§ III M—198) — **Substitutional legacies—Variation of original distributive scheme by codicil.**

The test as to whether a legacy given in a codicil or other separate testamentary instrument "in addition to" the legacy given in the will is subject to the same incidents and accidents as the original legacy, is, whether the original legacy is totally revoked, or whether the amount of the first legacy is to be augmented without altering the circumstances. In the former case the second legacy is absolute and unconditional. *Cooper* v. *Day*, 3 Mer. 154; *Alexander* v. *Alexander*, 5 Beav. 518.

The following cases are examples of added legacies: *Croft* v. *Day*, 4 Beav. 561; *Burrell* v. *Earl of Egremont*, 7 Beav. 205; *Cator* v. *Cator*, 14 Beav. 463; *Warwick* v. *Hawkins*, 5 DeG. & S. 481; *Duffield* v. *Currie*, 29 Beav. 284.

The rule as to both substituted and added legacies yields to the intention of the testator evident upon the face of the will, as where subsequent legacies are directed to be raised by trustees out of a fund, after a prior enjoyment by a life-tenant who takes at the same time as the prior legacies are vested in possession. *Overend* v. *Gurney*, 7 Sim. 128; *King* v. *Tootel*, 25 Beav. 23.

The rule is never extended so as to cut down an absolute subsequent gift to one person and give other persons entitled under limitations of the original legacy an interest in the subsequent legacy. Thus, where there is a gift to A. for life and after his death to B.; and in a codicil there is a legacy to A. "in addition to" what he has already been given, the subsequent gift to A. is absolute, and B. takes no interest therein. *Re More's Trusts*, 10 Hare 171; *Mann* v. *Fuller*, Kay 624; *Hill* v. *Jones*, 37 L.J. Ch. 465.

BANK OF HAMILTON v. KRAMER-IRWIN CO.

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Ontario High Court, J. S. Cartwright, K.C., Master in Chambers. January 20, 1912.

1. CORPORATIONS AND COMPANIES (§ VI A—313)—EFFECT OF WINDING-UP ORDER—RETROACTIVE OPERATION—R.S.C. 1906, CH. 144, SEC. 5.

The winding up of a company when ordered under the Winding-up Act, R.S.C. 1906, ch. 144, takes effect retroactively as of the date of service of the notice of motion so that the winding up of the business of the company is to be deemed to commence at that time.

[*Fuches* v. *Hamilton Tribune Co.*, 10 P.R. (Ont.) 409, followed.]

2. CORPORATIONS AND COMPANIES (§ VI D—336)—WINDING UP—APPLICATION TO SET ASIDE JUDGMENT AGAINST COMPANY.

A liquidator of a company in winding-up proceedings must obtain leave from the Court or referee exercising the powers of the Court under the Winding-up Act, R.S.C. 1906, ch. 144, before instituting proceedings to set aside a consent judgment obtained against the company between the service of notice of motion for winding up and the pronouncement of the order on the ground that the winding-up order took effect as from the date of service of the notice and that the solicitors who had given the consent had, therefore, no authority to bind the company.

MOTION by the liquidator of the defendant company to set aside a consent judgment entered on the 19th January, 1905. On the 24th January, 1905, an order was made for

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the winding-up of the company, upon a petition dated the 4th January, returnable on the 10th, on which day it was moved before the Judge in Chambers. By sec. 5 of R.S.C. 1906, ch. 144, "The winding-up of the business of a company shall be deemed to commence at the time of the service of the notice of presentation of the petition for winding-up."

H. E. Rose, K.C., for the plaintiffs.

G. H. Kilmer, K.C., for the liquidator.

The Master said that the winding-up began on the day of service of the notice: *Fuches* v. *Hamilton Tribune Co.*, 10 P.R. 409; and, whatever might be the effect of the difference in the language of sec. 5 and sec. 22 of the Act, it might well be that on the 19th January, 1905, there were no solicitors authorised to give the consent on which the judgment now attacked was pronounced. That was reserved for further consideration.

It was objected by Mr. Rose that the motion was made *coram non judice*. He argued that a consent judgment could be set aside only in an action brought for that purpose, citing Holmested and Langton's Judicature Act, 3rd ed., pp. 838-840.

Mr. Rose also urged that the liquidator must obtain leave from the Official Referee named in the winding-up order before such an action can be brought.

The Master agreed with this contention, and directed the present motion to stand for a week to enable an application to be made to the Referee, notice of which should be given to the plaintiffs.

N. S.

S. C.

March 12.

THE KING v. SWEENEY.

Supreme Court of Nova Scotia, Sir Charles Townshend, Kt., C.J., Meagher, Russell and Drysdale, JJ. March 12, 1912.

1. JUSTICE OF THE PEACE (§ II—12) — MAGISTRATE — JURISDICTION — OFFENCE PRIOR TO APPOINTMENT.

A stipendiary magistrate has power to try and to convict for an offence committed before the date of his appointment.

[*Regina* v. *Bachelor*, 15 O.R. 641, distinguished.]

2. SUMMARY CONVICTIONS (§ III—30)—PROCEDURE BEFORE SUMMONS OR WARRANT.

The provisions of Cr. Code, sec. 655 as to a preliminary hearing of the allegations of "the complainant and his witnesses" apply only to cases of indictable offences and not to cases punishable on summary conviction.

[*R.* v. *Neilson*, 44 N.S.R. 488, followed.]

3. CONSTITUTIONAL LAW (§ I D 5—117)—APPOINTMENT OF MAGISTRATES.

The power of the provincial legislature, under the British North America Act, to legislate on the subject of the administration of justice, including the constitution, maintenance and organization of Courts, and with respect to the appointment of provincial officers.

extends to the appointment of stipendiary magistrates, although the power to appoint Judges of superior, district and county Courts is reserved to the Governor-General of Canada.

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MOTION for a writ of *certiorari* to set aside a conviction under the Canada Temperance Act made on November the 10th, 1911 (the information for which was laid October 26th, 1911), by a stipendiary magistrate for the town of Yarmouth against Walter D. Sweeney, for having at Yarmouth on July 29th, 1911, unlawfully sold intoxicating liquor contrary to Part II. of the Canada Temperance Act on the following grounds:—

1. Because section 655 of the Criminal Code was not complied with.

2. Because the offence was committed on July the 29th, 1911, and the convicting justice was not appointed to office until October 23rd, 1911.

3. Because the Act authorizing the appointment of stipendiary magistrates by Lieutenant-Governor is *ultra vires* the Provincial Legislature.

The lack of qualification by reason of the omission of the convicting justice to take the oath of allegiance along with the oath of office, as such stipendiary magistrate, was not pressed, but was reserved for a subsequent motion for a *quo warranto* against him: *Rex* v. *MacKay* (*post*), 1 D.L.R. 481.

J. J. Power, K.C., and *E. N. Clements*, for the motion. There was no jurisdiction either over the offence or person, as sec. 655 of the Code, as amended by Acts (*d*) 1909, ch. 9, has not been complied with, because by R.S.C. ch. 152, secs. 131, 135, Code sec. 710, the information involves only one mental act on the part of the complainant, viz., information (*i.e.*, from others) and belief; the Code sec. 654 requires two mental acts, viz., suspicion and belief; the form "P" to the Canada Temperance Act in that respect is not sufficient. Endlich on Statutes, p. 92; *Sleeth* v. *Hurlbert*, 25 Can. S.C.R. 620, 3 Can. Cr. Cas. 197; *R.* v. *Ettinger*, 32 N.S.R. 176, 3 Can. Cr. Cas. 387 (Ritchie, J.).

The depositions contemplated by the Code were not taken and section 655 being procedure is imperative: *R.* v. *Salter*, 20 N.S.R. 210, *per* Townshend, J.; *Johnston* v. *McDougall*, 44 N.S.R. 265, 268, *per* Graham, E.J., after amendment of 1909; *R.* v. *McDonald*, 29 N.S.R. 35; *R.* v. *McNutt*, 28 N.S.R. 378, *per* Graham, E.J.; *R.* v. *Ettinger*, 32 N.S.R. 176; *R.* v. *Lorrimer*, 14 Can. Cr. Cas. 430, R.S.C. ch. 1, section 34(24).

Where the complaint is based on positive knowledge, no depositions are required: *Ex p. Madden*, 38 N.B.R. 358 (before amendment of 1909). It is otherwise, and depositions are required where the complaint, as here, is based on suspicion or information and belief: *Ex p. Coffon*, 11 Can. Cr. Cas. 48, 37 N.B.R. 122; *Ex p. Grundy*, 37 N.B.R. 389, 12 Can. Cr. Cas.

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65. This makes the New Brunswick decisions in accordance with the Nova Scotia case of *Johnston* v. *McDougall*, 44 N.S.R. 265. On the lowest ground, sec. 655 of the Code must apply, and not sec. 710 which is ruled out by the express words and curious misplacement of Code sec. 711. When *R.* v. *McDonald*, 29 N.S.R. 35, was decided, sec. 711 as 843 was in place of 710 as 845. *R.* v. *Neilson*, 44 N.S.R. 488, is wrongly decided, as 710 cannot apply if an information was at all necessary. Informations of all kinds in summary cases must therefore be based on 655 or nothing. The plea "not guilty" amounts to nothing. *R.* v. *McNutt*, 28 N.S.R. 378, 3 Can. Cr. Cas. 184, *per* Graham, E.J., as to the defendant's inability to leave Court-room. The proper course for the magistrate lies in Code sections 721, 668, and 714. As to the necessity of an oath of allegiance, this will be discussed in the *quo warranto* application: *Wilcox* v. *Smith*, 5 Wend. 235; *Drew* v. *The King*, 33 Can. S.C. R. 228.

The stipendiary magistrate was appointed 2 months and 24 days after the offence was committed. Under the language of section 653 of the Code, read with R.S.C. 152, sec. 131, the commission of the offence and presence within the jurisdiction of the justice of the offender must concur in point of time: *R.* v. *Bachelor*, 15 O.R. 641; *Ex p. Donovan*, 3 Can. Cr. Cas. 286, 32 N.B.R. 374. The present legislation is exactly parallel with R.S.C. (1886), 106, sec. 103 (*c*) and ch. 178, sec. 13, when *Bachelor's Case*, 15 O.R. 641, was decided. In both statutes, at both times the section in the Canada Temperance Act deals with jurisdiction as to locality and the other statute deals with jurisdiction as to the time of the commission of the offence. This, it is submitted, is the *ratio decidendi* in *Bachelor's Case*, 15 O.R. 268. The Provincial Legislatures cannot authorize the appointment of any Judges including stipendiary magistrates or justices of the peace. As to the power of such appointments, in England—Chitty's Prerogative of the Crown, 6, 75 and 79, and in Canada, since 1867; see Governor-General's commission in Clement on the Can. Constitution, 1st ed., p. 631, par. 3; Acts (*d*) 1907, p. 56. In the absence of B.N.A. Act, sec. 96, the Governor-General, under this commission, would appoint all Judges and the B.N.A. Act, sec. 92 (14), would not confer this power, as it does not expressly part with the prerogative expressed in the commission. In Nova Scotia before 1867, see Bourinot's Parlty. Govt., 2nd ed., p. 71. Journal of the House of Assembly, 1862, App. 34, p. 1. Doutre, Can. Con., p. 57; Chitty, Prerog. 383. Sir John Thompson leaned against the power of the provinces; see Dominion and Provincial Legislation, pp. 752, 581. His opinion is induced by the consideration that conceding the power to appoint a Judge in the Provincial Government, if the Provincial Legislatures gave to such Judges

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civil jurisdiction co-extensive with the Supreme Court—as was proposed in the Tax Act then under consideration—this with the then already or further enlarged criminal jurisdiction (Code secs. 582, 777) would make such provincial justices in effect Supreme Court Judges, whereas the power of such appointments is by the Governor-General by B.N.A. Act, sec. 96.

As to the propriety of citing State Papers on a judicial argument, see *Mercer* v. *Attorney-General*, 5 Can. S.C.R. 671. On the constitutional point, 8 Can. Law Times, page 97, the dissenting judgments of Allan, C.J., and Duff, J., in *Ganong* v. *Bailey*, 17 N.B.R. 324, and in *Burk* v. *Tunstall*, 2 B.C.R. 12. The following are the provincial decisions bearing on the subject: In Ontario, *R.* v. *Reno* (1868), 4 P.R. 281, Draper, C.J.; *R.* v. *Bennett* (1882), 1 O.R. 458, Cameron, C.J.; *Wilson* v. *McGuire* (1882), 2 O.R. 118; *Gibson* v. *McDonald* (1884), 7 O.R. 401, Wilson, J., *dub.*; *Richardson* v. *Ransom* (1885), 10 O.R. 387, Robertson, J.; *R.* v. *Bush* (1888), 15 O.R. 398.

From the second conclusion in the last-mentioned case, Sir John Thompson strongly dissented in his above opinion in Dominion and Provincial Legislation, p. 752.

In Quebec, *R.* v. *Coote*, L.R. 4 P.C. 58, 599, though, as Mr. Marsh pointed out, in 8 Can. Law Times 97, the appointment of such a Judge involved no exercise of the Royal prerogative. In Nova Scotia, *Johnston* v. *Pointz*, 2 R. & G. 195; *Gardner* v. *Parr*, 2 R. & G. 226; *R.* v. *Bakin*, 18 Can. Law Journal 63, Savery, C.J. In New Brunswick, *Ganong* v. *Bailey* (1877), 17 N.B.R. 324; *Ex p. Williamson*, 24 N.B.R. 64; *Ex p. Perkins*, 24 N.B.R. 66. In British Columbia, *Burk* v. *Tunstall*, 2 B.C.R. 12; *In re Small Debts Court*, 5 B.C.R. 255.

J. J. Ritchie, K.C., *contra*. The exclusive power of appointment is given to the local legislature by B.N.A. Act, sec. 92, sub-section 14: *Regina* v. *Bush*, 15 O.R. 398; *Citizens Ins. Co.* v. *Parsons*, L.R. 7 A.C. 96, 116; *Rex* v. *Neilson*, 44 N.S.R. 488.

Power, K.C., in reply. There is full and ample power to arrest in all cases without waiting for a warrant, so that compliance with sec. 655 of the Code will work no miscarriage of justice. Code sections 30 to 52, and secs. 646 to 652; *Ex p. Krans*, 1 B. & C. 258. Section 655 of the Code sets in motion a judicial officer, and a complainant under section 33 of the Code can arrest at once without even waiting to go to a justice and swear to a formula in the shape of an information as in this case.

The judgment of the Court was delivered by

RUSSELL, J.:—The defendant was convicted by a stipendiary magistrate in Yarmouth of an offence against the Canada Temperance Act, committed before the appointment of the

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stipendiary magistrate, as such, and because the offence was committed before the magistrate was appointed, it is attacked as invalid. The case cited in support of this contention is *R.* v. *Bachelor*, 15 O.R. 641. That case decided that a justice had jurisdiction to try a case where an offence was committed by a person who at the time of committing it was within the jurisdiction of the justice. Unfortunately the decision is not printed and there is nothing to shew by what reasoning the justice was upheld in proceeding against a person who was beyond his jurisdiction at the date of the information. Probably the Court proceeded under section 22 of chapter 178, R.S.C. 1886, and the defendant "not being found" within the magistrate's jurisdiction, the warrant was endorsed.

The case does not seem to touch the point of the objection now made, which if it were valid would lead to the consequences that should a stipendiary magistrate die, all the criminals who committed offences before the appointment of his successor must go unwhipt of justice, so far as the jurisdiction to punish them was exclusively in the stipendiary magistrate. The statement of such a proposition seems a sufficient refutation of it.

The second objection that the stipendiary magistrate did not take the oath of allegiance before proceeding with the case, has made the subject of a motion for leave to exhibit an information in the nature of a *quo warranto* and was not present in this case. It is dealt with in the case *Rex* v. *MacKay* (*post*) [1 D.L.R. 481].

The first objection was that the provisions of section 655 of the Code were not complied with. But it has been decided in *Rex* v. *Neilson*, 44 N.S.R. 488, that the provisions of this section apply only to the case of indictable offences, and do not apply to offences punishable on summary convictions as this case is. The conviction is also attacked on the ground that there is no power in the provincial legislature to legislate with reference to the appointment of stipendiary magistrates. The power thus to legislate has been practically unquestioned for twenty years or more and no serious objection has been taken to such legislation on the part of the Dominion authorities for many years, although questions were raised at one time when the constitution of the country was not so well understood as at present. The Provincial Legislature has the authority to legislate on the subject of the administration of justice including the constitution, maintenance, and organization of provincial Courts, etc., and also with reference to the appointment of judicial officers. Under these provisions I see no reason why it would not be able to legislate with reference to the appointment of stipendiary magistrates. The only part of this general legislative authority, that cannot be exercised by the provincial legislatures, is that which relates to the appointment

of Superior, District, and County Court Judges. These being appointed by the Governor-General, of course, the conditions of their appointment could not be prescribed by provincial legislation. But stipendiary magistrates do not come within any of these classes.

The result is that the certiorari will be refused with costs.

Certiorari refused.

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Supreme Court of Nova Scotia, Sir Charles Townshend, Kt., C.J., Meagher, Russell and Drysdale, JJ. March 12, 1912.

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March 12.

QUO WARRANTO (§ III—37)—LEAVE FOR INFORMATION—STATUS OF MAGISTRATE.

A motion for leave to file an information in the nature of a *quo warranto* against a stipendiary magistrate on the ground that he had not taken the oath of allegiance will be dismissed if the oath of allegiance has been since taken by him, although he had acted as a magistrate in the meantime; and the motion is properly refused without considering whether or not the oath is essential.

MOTION on behalf of Walter D. Sweeney, as a private relator for leave to exhibit an information in the nature of *quo warranto* against C. Curtis MacKay to shew by what authority he claims to exercise the office or franchise of an additional stipendiary magistrate in and for the town of Yarmouth, to which he was appointed on October 23rd, 1911, on the ground that he was not qualified to act as such on the hearing of an information laid October 26th, 1911, under the Canada Temperance Act against Walter D. Sweeney (see *R.* v. *Sweeney* (1912), 1 D.L.R. 476) by reason of his omission when taking the oath of office as such stipendiary magistrate to take the oath of allegiance. On the same day, Nov. 16th, 1911, the notice of motion for a *quo warranto* was served and the stipendiary magistrate took and subscribed the oath of allegiance on the same day.

J. J. Power, K.C., and *E. N. Clements*, for motion. The information lies against a justice of the peace: *Rex* v. ——— Chitty 368, note (a); *Rex* v. *Patteson*, 4 B. & Adol. 9; *Grant* v. *Chambers*, 34 Texas 573, 19 A. & E. Ency. of Law (1st ed.), 663, or against a County Court Judge: *R.* v. *Parham*, 13 Q.B. 858. In such cases this is the proper remedy. *R.* v. *Cambridge*, 12 A. & E. 712, *per* Denman, C.J. For history of the oath of allegiance, Anson on the Constitution, vol. 1., p. 224, vol. 2, p. 70, 3 Kent 511, R.S.C., ch. 78, secs. 3 and 4, first enacted in Canada in 1868 (ch. 36) presumably under British North America Act, sec. 91—"Peace, order and good government of Canada." The oath of allegiance must be taken as a prerequisite to the lawful exercise of all public functions, administrative, executive, parliamentary and judicial. *Ex p. Mainville*, 1 Can. Cr. Cas. 528,

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Wurtele, J. Instructions to Governor-General Acts, 1907 (D.) p. 59, pars. 2 and 3. The commission from the Governor-General to the Provincial Lieutenant-Governor, contains exactly similar language. R.S.C. ch. 78; British North America Act, secs. 61 and 128. Statutes-at-large, vol. 1, pp. 236, 239-241, shews the oath in force since the reign of Edward III. 6 Chitty on Statutes, Tit. "Justice," p. 2, notes; 8 Chitty on Statutes, Tit. "Oath," p. 8, note. Acts of Nova Scotia, 1866, ch. 19, though repealed by Rev. Stat. Can. (1886), pp. 2258 and 2347. The other provinces of Canada have by provincial legislation since 1867 prescribed as indispensable the taking of the oath of allegiance, along with the oath of office, R.S.O. ch. 86, secs. 12 and 13; R.S.O. ch. 87, secs. 31 and 32; R.S.N.B. ch. 118, sec. 8; R.S. (Que.) Art. 607; R.S. (Man.), ch. 140, secs. 8 to 12; R.S.B.C., ch. 157, sec. 10.

A local legislature could not constitutionally pass an Act, dispensing with taking the oath of allegiance as a qualification for an office within its gift: R.S.C. ch. 78, secs. 3 and 4. While there is at present no local statute in force since 1886 in Nova Scotia, apart from the Dominion Act above cited, directing such oath to be taken, the obligation to take it is, as pointed out in *Mainville's* case, a part of the general public law, and as regards justices of the peace, etc., see Stephen's Commentaries, vol 2, 402; Marshall's N.S., Justice, p. 302. Apart from 9 Anne ch. 20, sec. 4 (Acts, N.S. 1905, ch. 11, sec. 2), it is a doubtful question of law as to whether the information in this case is only available to the Attorney-General at common law *ex officio*, or whether it depends on the Statute of Anne. The case of *R.* v. ————, 2 Chitty 368, note (*a*), would seem to make for the contention, that the Statute of Anne applies, and that this stipendiary magistrate under it can be fined and ordered to pay costs, for his unlawful execution of, if not intrusion into the office of stipendiary magistrate, 9 Anne ch. 20, secs. 4 and 5, in the appendix to High on Extraordinary Remedies; and see pp. 433-4-5 of the same book for the common law doctrine before the statute of Anne. The Court should allow this information to settle the law, especially as the relator has to give security (Crown Rule 41) and the point is new. Shortt & Mellor, C.O.P. (ed. 1890), 298. Even if this motion were put on the lowest ground, "the law of ceremony," still such a law occupies a prominent place in the government of the country: Lefroy on Legislative Power, 101-2; Acts, (D.), 1880, p. 22. *The Great Seal Case, Re Ritchie*, 11 N.S.R. 450, 2 R. & C. 450, *Lenoir* v. *Ritchie*, 3 Can. S.C.R. 575. Necessity of taking judicial oath on Bible: *Flynn* v. *Gillies*, 33 Can. Law Journal 402, *per* Meagher, J.

J. J. Ritchie, K.C., *contra*. The oath of office for a stipendiary magistrate is provided for in R.S.N.S. 1900, ch. 33, p.

297. The appellants are not asking for a fine, only by what authority the respondent holds office. As to discretion see *R.* v. *Parry*, 6 A. & E. 820; *Regina* v. *Cousins*, 28 L.T.R. 117; *The Queen* v. *Ward*, L.R. 8 Q.B. 215; *Ex parte Richards*, 3 Q.B.D. 368; 12 Encyp. of England 118; 2 Spelling on Quo Warranto Relief 448.

Power, K.C., in reply. It is quite irrelevant and does not absolve the magistrate from the penalties referred to in section 4 of the Dominion Oath of Allegiance Act and 9 Anne ch. 20, as 4 and 5, that he subsequently took the oath of allegiance. *R.* v. *Warlow*, 2 N. & S. 75; *R.* v. *Patteson*, 4 B. & Adol. 9; *R.* v. *Merton*, 4 Q.B. 146; *R.* v. *Sidney*, 2 L.M. & P. 149; *R.* v. *Robertson*, 35 N.S.R. at page 370, *per* Graham, E.J.

The judgment of the Court was delivered by

RUSSELL, J.:—The relator seeks leave to exhibit an information in the nature of a *quo warranto* against the defendant, not because he was unqualified for appointment as a stipendiary magistrate, but because he did not take the oath of allegiance before acting as such in the conviction of the relator for violation of the Canada Temperance Act. The defendant having taken the oath of allegiance on several previous occasions, took it again a week later than the date of his so acting as stipendiary magistrate, and on the same date of his so acting as stipendiary magistrate, he was served with the notice of motion for the *quo warranto*. He is therefore now legally acting in his office, whatever questions could have been raised as to his position before he took the oath.

This seems to me to be a complete answer to the motion for a writ of *quo warranto*, and that being the case it would perhaps be wiser not to indulge in any *obiter dicta* on the subject. But if it were necessary to decide, I should think it likely that the defendant had sworn as much as was necessary when he took the oath provided for by R.S. chapter 33, section 11, which is an oath that he will well and truly serve the sovereign in the office to which he has been appointed. No statute was cited requiring the oath of allegiance, and the Court was not referred to any authority as to such a requirement by common law. Quite possibly there will be found to be some such requirement, but it is not necessary to await its production, because in any case it would not be a sensible exercise of the discretion of the Court to authorize an information under the circumstances of this case. The defendant may be liable to a penalty for acting without having first taken the oath, but there is nothing in the notice of motion about penalty and no statute was cited imposing a penalty. Application dismissed with costs.

Leave for quo warranto information refused.

MAN.

K. B.

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March 16.

THE KING v. MALI.

(Decision No. 2.)

Manitoba King's Bench. Motion before Robson, J. March 16, 1912.

1. CRIMINAL LAW (§ II B—40)—ELECTING MODE OF TRIAL—CR. CODE, SEC. 778.

The recital of consent contained in Code form 55 is the method prescribed by law of shewing a magistrate's jurisdiction to summarily try for an indictable offence under Part XVI. of the Criminal Code 1906, and where such a recital is contained in the conviction there is, in the absence of anything to impeach such record, a necessary implication that conditions precedent were observed.

2. COURTS (§ II A 6—177)—CRIMINAL LAW—SUMMARY TRIAL BY CONSENT—CR. CODE 778.

A defendant's consent to summary trial by a magistrate as an alternative to a jury trial should be a specific consent in the statutory form and not a mere consent to the "jurisdiction" of the magistrate which might have reference only to the territorial jurisdiction of the magistrate as to summary convictions for minor offences apart from his special jurisdiction to try certain indictable offences with the consent of the accused.

[*R.* v. *Crooks*, 17 W.L.R. 560, explained; see also Tremeear's Crim. Code, 2nd ed., p. 635.]

3. HABEAS CORPUS (§ I D—23)—ONUS—DISPROVING RECITAL OF CONSENT TO SUMMARY TRIAL.

The onus is upon the defendant on a *habeas corpus* application to disprove a recital of his consent to summary trial contained in a conviction following Code form 55 (Criminal Code 1906, sec. 799).

MOTION for *habeas corpus*, following a conviction by a magistrate, for an indictable offence upon a summary trial, under Part XVI. of the Criminal Code, 1906. For report of a previous unsuccessful application to Prendergast, J., see *The King* v. *Mali* (1912), 1 D.L.R. 256.

The present motion was refused.

P. E. Hagel, for the prisoner.

R. B. Graham, Deputy Attorney-General, for the Crown.

ROBSON, J.:—Peter Mali was convicted on 28th September, 1911, by D. M. Walker, Esq., police magistrate, upon a charge of arson. He was sentenced to seven years' imprisonment in Manitoba Penitentiary.

The form of conviction proceeds thus:—

> Be it remembered that on the twenty-eighth day of September, 1911, at the City of Winnipeg aforesaid, Peter Mali was charged before me the undersigned one of, etc. (*and consenting to my trying the charge summarily*) is convicted, etc.

A summons was granted by me, on application of counsel for the accused, calling on the magistrate to shew cause why a writ of *habeas corpus* should not issue for the discharge of the prisoner upon the ground that the conviction does not shew that the magistrate imparted to the prisoner the necessary information as required by section 778 of the Criminal Code prior to his election to consent to summary trial.

It is not suggested that in fact section 778 was not strictly followed. The objection merely is that the proceedings do not shew that the necessary words were addressed to the accused by the magistrate.

Counsel for accused referred to *Rex* v. *Crooks*, 17 W.L.R. 560, a Saskatchewan case. There it was noted in a memorandum of the magistrate that, being charged, the accused "does consent to jurisdiction and pleads not guilty." The conviction recited "having consented to jurisdiction." These were not the words of the statutory form (see section 799 and form 55). The expression used may not, for anything that appears on the conviction, have meant any more than that accused admitted that the presiding officer was a magistrate for that locality. What must appear by the record, according to the statutory form, is that the accused consented to the magistrate's trying the charge summarily. It may seem to be refinement of language, but I think that specific consent to such a trial is quite different from a consent to some undefined jurisdiction.

In the present case the statutory form was strictly followed. No provision of law was disclosed to me that there must be a written record of full and literal compliance with section 778, as well as the record of consent prescribed by form 55. The recital of consent contained in form 55 is the method prescribed by law, of shewing jurisdiction, and such mode being adopted by the magistrate, there is, in the absence of anything to impeach such record, a necessary implication that conditions precedent were observed. Were the result otherwise, it would simply mean that the Courts would be deciding that the statutory form was defective. I discharge the summons.

Habeas corpus refused.

ONTARIO AND WESTERN CO-OPERATIVE FRUIT CO. v. HAMILTON, G. & B. R. CO., C.P.R. CO. and G.T.R. CO.

Ontario High Court, Clute, J. January 25, 1912.

DISCOVERY (§ IV—20)—OBTAINING INFORMATION FROM FORMER AGENT—DUTY TO MAKE INQUIRIES.

Where relevant information for discovery to the opposite party in a damage action is specially within the knowledge of the plaintiff company's former agent and not of their present manager, the Court may direct that the plaintiffs shall either produce the former agent for discovery or, in the alternative, that the plaintiff company's manager attend for further examination for discovery after having applied to the former agent for the information and thereupon disclose the information so obtained.

[*Bolckow* v. *Fisher*, 10 Q.B.D. 161, distinguished.]

APPEAL by the plaintiffs from an order of the Master in Chambers allowing the defendants to examine one Griffin, agent of the plaintiffs, for discovery, or for the further examination of McAllum, the plaintiffs' manager, for discovery.

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ONTARIO AND WESTERN CO-OPERATIVE FRUIT CO. v. HAMILTON, G. & B. R. CO., C.P.R. CO. AND G.T.R. CO.

Clute, J.

Glyn Osler, for the plaintiffs.

Angus MacMurchy, K.C., for the defendants the Canadian Pacific Railway Company.

Frank McCarthy, for the defendants the Grand Trunk Railway Company.

CLUTE, J.:—The question arose out of certain transactions in which the plaintiffs shipped fruit from Beamsville to Winnipeg. The action was brought for damages for not shipping the fruit within the time agreed upon and for damages for loss of fruit by want of care on the part of the defendants.

Griffin entered into an agreement with the plaintiffs, dated the 6th August, 1910, whereby he agreed to market for the plaintiffs shipments of fruit and vegetables during the season of 1910 to Winnipeg and points west. McAllum was examined for discovery; and, his examination being considered by the defendants insufficient, the application to the Master was made. The Master made an order: (1) that the plaintiffs produce Griffin for examination for discovery, or, in the alternative, that McAllum attend for further examination for discovery, after having applied to Griffin for information touching the matters in question in the action; and (2) that, after the examination of Griffin or further examination of McAllum, the plaintiffs may issue a commission to examine witnesses.

It was contended on behalf of the plaintiffs that, inasmuch as the arrangement between the plaintiffs and Griffin had expired and their accounts had been closed, the defendants had no right to have Griffin examined, nor were they entitled to call upon McAllum for further examination after he had obtained the information from Griffin.

Mr. Osler chiefly relied upon *Bolckow* v. *Fisher*, 10 Q.B.D. 161, to support his contention that the plaintiffs were not bound to inquire from Griffin what the facts were in regard to the disposal of the fruit, nor were they entitled to examine Griffin for discovery. In that case the servants were still in the employ of the defendants; and, as I read the case, it was not necessary to decide, and the Court did not decide, that information which the defendants might obtain by the asking could not be obtained simply because the persons to be inquired of had ceased to be their servants. It might indeed be that such person would refuse to give the information because he had ceased to be in the defendants' employment; but, if such information could reasonably be obtained after he ceased to be in such employment, I can see no reason why it should not be obtained for the purpose of discovery: *Rasbotham* v. *Shropshire Union Railways and Canal Co.*, 24 Ch. D. 110; *Anderson* v. *Bank of British Columbia*, 2 Ch. D. 645, 657; *Earl of Glengall* v. *Frazer*, 2 Hare 99.

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Clute, J.

In the present case, the information asked is relevant and reasonable. The damages claimed are by reason of the loss to the plaintiffs in having to sell the fruit at a less price than the fruit had in fact been sold for and rejected. To whom was it sold, and why was it rejected, and by whom? Questions of this kind, which form the basis of the plaintiffs' claim, ought to be within the knowledge of the plaintiffs or their agents who had charge of the transaction; and I cannot doubt that, if the request was made, Griffin would give such information as he had from his books and otherwise as to what took place in the transaction, both as to the alleged prior sale and the subsequent disposition of the fruit. At all events, there should be an honest endeavour on the part of the plaintiffs to obtain this information.

The order made by the Master appears to me reasonable and within the recognised practice of the Court. The appeal is dismissed with costs.

Appeal dismissed.

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Jan. 15.

BAILEY v. DAWSON.

Ontario High Court. Trial before Meredith, C.J.C.P. January 15, 1912.

1. CONTRACT (§ I E—106)—SALE OF LAND—STATUTE OF FRAUDS—DESCRIPTION OF PARTIES—SEPARATE WRITINGS.

The particulars required to make a complete memorandum for the purposes of the Statute of Frauds need not all be contained in one document. The signed writing may incorporate others by reference, but taken together they must identify the parties and subject-matter.

[*Clergue* v. *Preston* (1904), 8 O.L.R. 84, distinguished.]

2. EVIDENCE (§ VI J—572)—STATUTE OF FRAUDS—SEPARATE WRITINGS—DESCRIPTION OF PARTIES.

Parol evidence is admissible in proof of the connection of separate writings so as to form a complete memorandum to satisfy the Statute of Frauds.

[*Maybury* v. *O'Brien* (1911), 3 O.W.N. 393, 25 O.L.R. 229, and *Martin* v. *Haubner*, 26 Can. S.C.R. 142, specially referred to.]

3. SUNDAY (§ IV—25)—CONTRACTS—NEGOTIATIONS AND PART PAYMENT.

The fact that the initial payment on account of purchase money for lands was made on a Sunday and that the receipt therefor was also signed on Sunday will not nullify the formal contract of purchase made on the following day in furtherance of the negotiations of which such initial payment formed a part.

THE plaintiff sued for specific performance of an agreement between her husband and the defendant for the sale by him to the husband of lots 1, 2, and 3 according to a plan registered in the registry office of the county of York as number 1508.

November 6, 1911. The action was tried by MEREDITH, C.J.C.P., without a jury at Toronto.

W. N. Tilley (*A. J. Williams*, with him), for the plaintiff.

W. Mulock, for the defendant.

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January 15, 1912. MEREDITH, C.J.:—The defendant was the owner of the land in question, and placed it in the hands of a land agent named George H. Hemming, limiting the price at which he was to sell to not less than $20 per foot of the frontage.

The plaintiff's husband entered into negotiations with Hemming for the purchase of the land, and these negotiations resulted in an agreement that the land should be sold to the plaintiff's husband at $20 per foot. The agreement appears to have been reached on the 14th May, 1911, when the plaintiff's husband paid to Hemming, on account of the purchase-money, $5, and received from him a receipt in the following words:—

> No. 41. May 14, 1911.
> Received from Mr. Bailey the sum of five dollars re option on the Mr. Dawson land north west of Bloor—Willard.
> $5. Geo. H. Hemming.

What I take to be the option is contained in the following letter from Hemming to Bailey:—

> 288 Jane Street, West Toronto, May 9, 1911.
> H. F. Bailey, Esq.
> Dear Sir:—Yours to hand in reference to land on Bloor St. I have 156 feet to sell on Bloor. It is a good corner. My client is asking $20 per foot, about $1,700 cash, the balance payable at $30 per month. He would like to sell it *en bloc*, if not would prefer to keep corner lot. Would be pleased to hear further from you.
> Yours truly,
> GEO. H. HEMMING.

After receiving this letter, Bailey saw Hemming and endeavoured to get him to make the price $19.50 per foot; and, upon his refusing to do so, Bailey agreed to take the land at $20 per foot, paid the $5, and received from Hemming the receipt of the 14th May, 1911.

On the Monday following, Hemming saw the defendant and told him what he had done, and the defendant then said that a $5 deposit was not enough; but, as Hemming had sold, he would let the sale go through.

According to the defendant's testimony on his examination in chief, Hemming was to submit any offer he should receive to the defendant, and the two were to talk it over; but on cross-examination he admitted that he would have been satisfied if Hemming had sold for $19 per foot, and that if he could not get that price he was to submit any offer he might receive to the defendant.

The defendant's action on the Monday, after the payment of $5 was made, amounted to a ratification of what Hemming had assumed to do as his agent, even if the authority given to Hemming did not authorize him to enter into a contract for the sale of the land to a purchaser who was willing to pay the $19 per foot.

On the 15th May, 1911, Bailey paid to the defendant $25 and received from him the following receipt:—

Toronto, Ont., May 15, 1911.

Received from Mr. H. T. Bailey thirty dollars to apply on purchase of lots 1, 2, and 3 Lady Mulock estate on Bloor St. West, this transaction to be closed within ten days.

This amount to be returned in the event of title not being clear.

A. Dawson.

Lots on N.W. corner
Bloor & Willard Sts.
A.D.

On the 20th May, 1911, the plaintiff's solicitors, Messrs. Montgomery, Fleury, & Montgomery, wrote to the defendant the following letter:—

May 20th, 1911.

A. Dawson, Esq.,
c/o Fairbanks-Morse Canadian Manufacturing Company,
1379-1387 Bloor Street West,
Toronto, Ont.

Dear Sir:—We are acting for Mr. H. T. Bailey in the purchase of certain lands at the corner of Bloor and Willard streets. We would be much obliged if you would send us a draft deed, so as to enable us to search the correct lots. We have searched certain lots which we suppose is the property agreed to be sold, but we do not see any deed to you.

Please give this your attention, as the time for closing the matter is fast expiring, and we would like to have a survey, but cannot order the same until we are sure of the property.

Yours very truly,

Montgomery, Fleury, & Montgomery.

To this letter the defendant replied as follows:—

May 22, 1911.

Messrs. Montgomery, Fleury, & Montgomery,
Canada Life Buildings.

Gentlemen:—In reply to yours of the 20th regarding lands at N.W. corner of Bloor & Willard Sts. The lots to be transferred are known as Nos. 1-2-3, frontage 158′ 7″ according to a plan on file in Robins office, being resubdivision of plan 448. These lots are being purchased by me from Lady Mulock under agreement, which provides that deed will not be furnished until full amount is paid. My agreement will, of course, be surrendered on payment of the purchase-price less amount still due Lady Mulock. Copies of agreement will, no doubt, be on file in office of Mulock, Lee, M. & C.

If you require any additional information will be glad to furnish same.

Yours truly,

A. Dawson.

The plaintiff's solicitors wrote letters to the defendant on the 26th and 29th May, 1911, urging the completion of the sale,

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and in the earlier one telling him that they had a cheque from Bailey payable to his order, which they would deliver to him when they were satisfied with the title.

To these letters the defendant replied as follows:—

Toronto, Ont., May 30, 1911.

Messrs. Montgomery, Fleury, & Montgomery,
46 West King St., City.

Gentlemen:—Your letters of the 26th and 29th received. In reply have to say that the agreement I had with Mr. Bailey dated May 15th expired on the 25th, and therefore there will be no object in forwarding you the document requested in your letter of the 29th. While not recognizing that Mr. Bailey is entitled to a refund of his deposit, I am enclosing cheque for twenty-five dollars ($25.00) being the amount received from him, and the five dollars ($5.00) which he paid to Mr. Hemming will, no doubt, also be returned upon request.

If Mr. Bailey still desires to purchase the property, I will be very glad to consider any proposition he may make.

Yours truly,
A. Dawson.

The last letter from the defendant to the plaintiff's solicitors is dated the 2nd June, 1911, and is as follows:—

June 2nd, 1911.

Messrs. Montgomery, Fleury, & Montgomery,
46 West King St., City.

Gentlemen:—Your letter of the 1st received and contents noted. At the time of writing this letter you were, no doubt, in receipt of my letter of May 30th, but appear to have overlooked making any reference to this letter or to the enclosure.

If you will refer to your letter of the 20th ult., you will observe that at that time you considered "time" a very essential part of the agreement which I had with Mr. Bailey.

The agreement was not repudiated. It elapsed through the failure of Mr. Bailey to carry out his part of the agreement within the time stipulated.

Yours truly,
A. Dawson.

This letter is a reply to a letter of the plaintiff's solicitors to the defendant of the 1st June, 1911, in which they acknowledged his letter of the 20th May, and called his attention to the fact that, it being an open contract, time was not of the essence of the contract.

The defendant relies on the Statute of Frauds as a defence to the action.

In my opinion, these letters and the two receipts constitute or afford evidence of a contract sufficient to satisfy the provisions of the Statute of Frauds.

Granting, as was contended by Mr. Mulock, on the authority of *Harvey* v. *Facey*, [1893] A.C. 552, that Hemming's letter of the 9th May, 1911, was in itself not an offer to sell on the terms mentioned in it, which, when accepted by Bailey,

would have constituted a contract to sell on those terms, it was evidently treated by both parties, as the receipt of the 14th May, 1911, shews, as an offer to sell; and I do not see why the contracting parties were not at liberty to so treat it. A fair test of the correctness of this view would be afforded if it be assumed that Hemming, instead of being the agent of the owner, was himself the owner of the land; and, that assumption being made, I cannot doubt that, coupled with the receipt which he gave, the letter would at least amount to an offer to sell on the terms mentioned in it, which would have become a binding contract on the verbal acceptance of it by Bailey.

If I am right in this view, and in the opinion I have expressed that the defendant subsequently ratified what Hemming had assumed to do as his agent, it follows that the defendant is bound.

In addition to this, the receipt given by the defendant on the 15th May, 1911, is for the $30 "to apply on the purchase of lots, 1, 2, 3, Lady Mulock estate on Bloor St. West"—and the receipt goes on to say, "This transaction to be closed . . ." To what purchase and to what transaction does this receipt refer? Manifestly, I think, to the transaction which had been entered into by Hemming, as the defendant's agent, with Bailey; and, if this be the case, there is here also the necessary connection between the writing signed by the defendant and the letter of Hemming of the 14th May, 1911; and the two together set forth the terms of the contract in such a way as to satisfy the provisions of the Statute of Frauds.

Besides this, the defendant's letter of the 30th May, 1911, contains this statement: "In reply have to say that the agreement I had with Mr. Bailey dated May 15th expired on the 25th." This, it appears to me, is a sufficient reference to the agreement to connect the previous writings—the letter of Hemming of the 9th May, 1911, his receipt of the 14th of the same month, and the defendant's receipt of the following day—to warrant all of them being used for spelling out from them an agreement in writing sufficient to satisfy the provisions of the statute.

Still further, the defendant's letter of the 2nd June, 1911, contains this statement: "If you will refer to your letter of the 20th ult., you will observe that at that time you considered 'time' a very essential part of the agreement which I had with Mr. Bailey. The agreement was not repudiated. It elapsed through the failure of Mr. Bailey to carry out his part of the agreement within the time stipulated."

I do not think that, if Hemming's letter to Bailey of the 9th May, 1911, and the receipt of the 14th of the same month, had been the only writings, a contract sufficiently evidenced to satisfy the Statute of Frauds would have been made out.

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Neither of these documents mentions the name of the vendor, and the reference in the letter to Hemming's "client" is not sufficient: *per* Lord Cairns, *Rossiter* v. *Miller* (1878), 3 App. Cas. 1124, 1141; *Jarrett* v. *Hunter* (1886), 34 Ch. D. 182, 184, 185.

Clergue v. *Preston* (1904), 8 O.L.R. 84, is distinguishable. There the reference to the vendor, in a written offer by the agent to sell, was, "a client of ours who owns an undivided two-thirds . . ." of the land offered for sale, which was treated as a statement that the offer was made on behalf of the "owner" of the land, which is a sufficient description of the vendor: *Rossiter* v. *Miller* (1878), 3 App. Cas. 1124.

The missing link is, however, supplied by the letters of the defendant, which shew that he was the vendor.

That the particulars required to make a complete memorandum for the purposes of the statute need not be all contained in one document, and that the signed document may incorporate others by reference, is well settled: Pollock on Contracts, 5th ed., p. 162; but there is more difficulty in determining what is a sufficient reference for this purpose. The rule laid down in the earlier cases, of which *Boydell* v. *Drummond* (1809), 11 East 142, cited by Mr. Mulock, is an example, has been relaxed in the later cases; and, as Sir Frederick Pollock says, in note (*f*) on p. 162 of his book, "No doubt the modern tendency is to be astute to relax rules of this kind," referring to the statement in the text that "the reference must appear from the writing itself and not have to be made out by oral evidence."

In *Ridgway* v. *Wharton* (1857), 6 H.L.C. 238, the reference was in these words, "Mr. Wharton's solicitor had instructions from me long since to prepare the agreement," and the Law Lords were all of opinion that parol evidence was admissible for the purpose of identifying as the "instructions" a memorandum of the terms of a proposed lease which a man named Crawter, who was alleged to have been the agent of the defendant, had sent to the defendant's solicitors as instructions for the preparation of a formal lease.

In *Baumann* v. *James* (1868), L.R. 3 Ch. 508, the facts were, that the plaintiff, who was a tenant to the defendant of the premises in question, had written to the defendant's solicitors as to the renewal of his lease. The solicitor sent him a report of a surveyor, who recommended the granting of a lease for fourteen years at a given rent, if certain repairs were made by the plaintiff; the plaintiff wrote back assenting to the repairs and rent, but asking for a term of twenty-one years. No final agreement was come to, but, some months afterwards, a negotiation having proceeded between the plaintiff and the defendant without the intervention of the solicitors, the defendant, on the 21st March, 1865, wrote a letter promising the plaintiff

a lease for fourteen years "at the rent and terms agreed upon," to which the tenant wrote back, on the following day, an unqualified acceptance; and it was held by the Lords Justices, affirming Stuart, V.-C., that parol evidence was admissible to connect the report and the tenant's previous letter with the subsequent letters; and that, it being conclusively established that there had never been any other rent or terms agreed upon than those mentioned in the report, there was a sufficient memorandum in writing to satisfy the Statute of Frauds. In delivering judgment, Sir W. Page Wood, L.J., pp. 511, 512, after saying that it struck him at first as a question of some difficulty whether the later letters, which only mention "the rent and terms agreed upon," could be connected with the report and the letter accepting some of its terms so as to make up an agreement in writing embodying the terms, referred to *Ridgway* v. *Wharton*, 6 H.L.C. 238, and said that it, to some extent, removed that difficulty, and then proceeded as follows: "In that case 'instructions' were referred to. Now, instructions might be either by parol or in writing; but it was held that it might be shewn by parol evidence that instructions had been given in writing, and that there had been no other instructions than the written document which was produced. . . . I take a similar view of the present case. Here is a reference to 'rent and terms agreed upon.' Now, . . . written report contained terms which, with the exception of that relating to the length of the lease, were acceded to by the letter . . . The letter of the 21st of March itself defines the length of the term, and we have a previous written document containing terms which the plaintiffs had agreed to in writing, and it is not suggested that there ever were any terms agreed to by parol, nor that there ever were any terms agreed to at all except those contained in the report . . . and the partial acceptance of . . . I say partial, because the question as to the length of the term was left open, so that there was not a concluded agreement. I am of opinion therefore that the report and the letter of the . . . are sufficiently connected with the letters of the 21st and 22nd of March, and that there is an agreement in writing within the meaning of the Statute of Frauds."

In *Long* v. *Millar* (1879), 4 C.P.D. 450, the defendant, an estate agent, was employed by the owner of three plots of land at Hammersmith to sell them for £310. The plaintiff agreed with the defendant to buy for that price, and to pay a deposit of £31, and he signed a document agreeing to purchase, which contained all the particulars required to make a complete memorandum, except the name of the vendor, the land being described in it as "the three plots (40 feet frontage) of freehold land in Rickford street, Hammersmith," and the defend-

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ant gave a receipt for the £31, stating that it was a deposit on the purchase of three plots of land at Hammersmith. The defendant, among other defences, relied upon the Statute of Frauds, but it was held that, although the receipt signed by the defendant was not sufficient if taken by itself, the words "purchase of three plots of land" sufficiently referred to the document signed by the plaintiff. Bramwell, L.J., said, p. 454: "The plaintiff has signed a document containing all the terms necessary to constitute a binding agreement . . . But the point to be established by the plaintiff is that the defendant has bound himself, and a receipt was put in evidence signed by him, and containing the name of the plaintiff, the amount of the deposit, and some description of the land sold. The receipt uses also the word 'purchase;' which must mean an agreement to purchase, and it becomes apparent that the agreement alluded to is the agreement signed by the plaintiff, so soon as the two documents are placed side by side. The agreement referred to may be identified by parol evidence."

In *Cave* v. *Hastings* (1881), 7 Q.B.D. 125, the plaintiff had signed a memorandum setting forth the terms of a contract by which he had agreed to let a carriage to the defendant for a year. The defendant, in a subsequent letter to the plaintiff, referred to "our arrangement for the use of your carriage." There was no other arrangement for the hire of a carriage than that the terms of which were contained in the memorandum signed by the plaintiff, and it was held that the defendant's letter sufficiently referred to the document containing the terms of the contract, to constitute a good memorandum of the contract within the Statute of Frauds, sec. 4.

In *Studds* v. *Watson* (1884), 28 Ch. D. 305, the facts were, that the defendant had verbally agreed with the plaintiff to sell him her share in certain property for £200, and had signed and given him the following receipt: "Sept. 22nd, 1882. Received of J. Studds one pound of my share in the Barrett's Grove property the sum of two hundred pounds." No time was fixed for completion, and no abstract was delivered, and on the 19th March, 1883, the defendant wrote to the plaintiff: "Mr. Studds,—Sir,—If the balance of £199 on account of the purchase of my share of the property be not paid on or before the 22nd instant I shall consider the agreement (made 22nd of Sept., 1882), not any longer binding;" and it was held by North, J., that the word "balance" in the letter sufficiently referred to the receipt to enable the two documents to be read together, and that they constituted a sufficient memorandum within the Statute of Frauds, sec. 4; and that, even if the word "balance" was not sufficient to connect the two documents, yet, as they both referred to the same parol contract, all the terms of which were contained in one or other of them, they could be read to-

gether, and, read together, constituted a good memorandum within the statute.

In *Wylson* v. *Dunn* (1887), 34 Ch. D. 569, the facts were, that a proposal had been made that the two plaintiffs should buy a triangular field of about three acres, and that the defendant should buy one-half an acre of it from them. One of the plaintiffs and the defendant met on the field; the defendant wished to have a piece in one of the angles, and the plaintiff stepped so as to mark out where a base line would cut off half an acre. Some days afterwards, the same plaintiff wrote to the defendant asking her to let them have a letter agreeing to purchase the half acre she had selected for £350. She wrote back, not expressly referring to the other letter, that she was willing to take half an acre as agreed upon for £350. The plaintiffs did not obtain a contract with the owner of the land for the purchase until the 4th November, which was three months afterwards. On the 13th November, the defendant threatened to withdraw, and on the 20th November, her solicitors wrote that she did withdraw from the contract; and it was held by Kekewich, J., that the second letter contained a sufficient reference to the first; and that the two letters formed a valid contract within the Statute of Frauds. The learned Judge (p. 575), dealing with the reference necessary to connect the documents, said: "Therefore the reference may be a matter of inference—that is a matter of fair and reasonable inference—but there need not be an express reference from one letter to the other."

In *Oliver* v. *Hunting* (1890), 44 Ch. D. 205, the defendant agreed to sell to the plaintiff a freehold property known as the Fletton Manor House for £2,375, and signed a memorandum which contained all the essentials of the contract, except that it omitted to mention or refer to the property agreed to be sold. Two days afterwards, the plaintiff, pursuant to the contract, sent the defendant a cheque for £375 as a deposit and in part payment of the £2,375, and the defendant replied by letter: "I beg to acknowledge receipt of cheque, value £375, on account of the purchase money for the Fletton Manor House estate;" and it was held by Kekewich, J., that parol evidence was admissible to explain the circumstances under which the defendant's letter was written; and that, as such evidence connected the letter and the memorandum, the two documents, read together, constituted a sufficient memorandum within the Statute of Frauds. Referring to the rule stated in Blackburn on Sales, the learned Judge said: "The old case of *Boydell* v. *Drummond*, 11 East 142, and some other cases might be consistent with that rule; but certainly of late a different rule has been introduced, and it is a rule, to say the least, consistent with the convenience of mankind, because if you were to exclude parol evidence to explain such a

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doubtful reference as 'the letter of the 14th instant,' or it might be simply 'your letter,' the result might in a large number of cases be gross injustice. Now, I take it to be quite settled that in a case of that kind you may give parol evidence to shew what the document referred to was. I take it that you may go further than that, and that if you find a reference to something, which may be a conversation, or may be a written document, you may give evidence to shew whether it was a conversation or a written document; and having proved that it was a written document, you may put that written document in evidence, and so connect it with the one already admitted or proved. . . . If that is sound, which I take it to be, according to other cases, and according to the convictions of Judges in older cases which are introduced into the old law, it is difficult, perhaps, to say where parol evidence is to stop; but substantially it never stops short of this, that wherever parol evidence is required to connect two written documents together, then that parol evidence is admissible. You are entitled to rely upon a written document, which requires explanation. Perhaps the real principle upon which that is based is, that you are always entitled in regarding the construction and meaning of a written document to inquire into the circumstances under which it was written, not in order to find an interpretation by the writer of the language, but to ascertain from the surrounding facts and circumstances with reference to what, and with what intent, it must have been written. I think myself that must be the principle on which parol evidence of this kind is admitted:" pp. 208 to 210.

There are other cases that might be referred to; but, without multiplying citations, I refer to *Buxton* v. *Rust* (1872), L.R. 7 Ex. 279; *Haubner* v. *Martin* (1895), 22 A.R. 468; *Martin* v. *Haubner* (1896), 26 Can. S.C.R. 142; *Maybury* v. *O'Brien* (1911), 3 O.W.N. 393, 25 O.L.R. 229.

Applying the principle of these cases to the facts of the case at bar, I am of opinion that the reference in the receipt given by the defendant for the $30 to the purchase of lots 1-2-3 Lady Mulock's estate on Bloor street west (lots on N.W. corner Bloor and Willard streets) is to the option contained in Hemming's letter of the 9th May and his receipt of the 14th May.

The parol evidence shews that the only purchase that had been arranged or agreed to was that evidenced by Hemming's letter and receipt, and these, with the defendant's receipt, and at all events together with his subsequent letters, contain all the essentials of a memorandum sufficient to satisfy the Statute of Frauds, sec. 4.

It was further objected by Mr. Mulock that the subject-matter of the contract was not sufficiently identified. Apart from the defendant's letters, I think that it is; but these letters make it abundantly clear what land was being dealt with—*i.e.*, the land

which was the subject of the written contract between Lady Mulock and the defendant.

It was also objected that, as the receipt of the 14th May appears to have been signed on a Sunday, the contract was, under the Lord's Day Act, void; but this objection is also untenable, as there was, in the view I have taken, no completed contract until the following day.

There will be the usual judgment for specific performance, with a reference, if the plaintiff desires it, to the Master in Ordinary; and the defendant must pay the costs of the action.

Judgment for plaintiff.

Re CASWELL ESTATE.

Saskatchewan Supreme Court, Brown, J., in Chambers. March 5, 1912.

EXECUTORS (§ II A—28)—POSTPONING SALE AND DISTRIBUTION—INTERPRETATION OF SPECIAL POWER IN WILL.

Notwithstanding a clause in the will declaring that the trustees may postpone the sale and conversion of any part of the estate so long as they deem proper, it is their duty to sell and convert into money as soon as they reasonably can to realise a fund which would be immediately distributable in cash, using the power of postponement to obtain a better return but not for mere purposes of accumulation where there is no direction for accumulation in the will.

[See Theobald on Wills, 7th ed., p. 461.]

HEARING of summary application by the trustees to the Court to construe the will of S. H. Caswell, upon disputed points.

P. H. Gordon, for trustees.

A. L. Gordon, for E. E. Harding, the widow.

J. F. Frame, for S. H. Caswell, Jun.

T. S. McMorran, for Kathleen L. Caswell and Anna S. Caswell.

Norman Mackenzie, K.C., official guardian.

BROWN, J.:—The trustees of the will of the late Stephen Howard Caswell have applied for an order determining the construction to be placed upon the will. The following is a copy of the provisions thereof, and I have for convenience numbered the paragraphs:—

1. I hereby revoke all former or other wills codicils or testamentary dispositions by me at any time heretofore made.

2. I direct that all my just debts, funeral and testamentary expenses be paid by my executors hereinafter named as soon as may be after my decease.

3. I give, devise and bequeath unto my wife, Emma Elizabeth Caswell, all my horses, carriages, jewelry, personal ornaments, wearing apparel, plate, linen, china, books, furniture, and other household effects whatsoever for her own use absolutely.

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4. All the rest and residue of my estate and effects both real and personal and wheresoever situate, I give, devise and bequeath unto my said wife, Emma Elizabeth Caswell, my father, James Caswell, Albert Alfred Mitchell Dale, farmer, Thomas A. Grigg, farmer, all of the town of Qu'Appelle in the district of Assiniboia, and Douglas Alexander Clark, of the city of Winnipeg, in the Province of Manitoba, wholesale stationer, their heirs, executors and administrators upon trust, that they or the survivor of them or the executors and administrators of such survivor shall do and execute the trusts hereinafter set forth.

5. I desire that the business in which I am engaged shall be continued and carried on after my decease as nearly as may be in accordance with the provisions of the partnership agreement made between myself and William Atkinson Caswell, dated the 25th day of June, 1895, until my son Stephen Howard Caswell shall have attained the full age of twenty-one years, and for such purpose my said trustees may do all that may be requisite and necessary in the usual course of business.

6. The income and proceeds arising from such business during the period hereinbefore mentioned shall be applied by my said trustees as far as may be necessary in or towards the maintenance and support of my said wife, Emma Elizabeth Caswell, my father, James Caswell, and my children, and any surplus of such income remaining after supplying such maintenance and support shall be invested from time to time by my said trustees according to the terms of the partnership agreement hereinbefore mentioned. Provided that if my said wife should in the meantime marry again, she shall thereupon cease to have any right or interest whatsoever under this my will or in my said residuary estate.

7. It is my wish and desire that my said son Stephen Howard Caswell should after my decease, take and supply my place as nearly as may be towards my said father, wife, and my children, after he shall have attained the full age of twenty-one years, provided that he shall have proved himself to the satisfaction of my said trustees to be capable and worthy of such a trust, and as to this my said trustees or a majority of them shall have full and absolute power and authority to determine and decide.

8. Upon my said son Stephen Howard Caswell attaining the said age of twenty-one years, if in their discretion as aforesaid they shall consider that he is to be trusted to continue my business in the manner I desire and to carry out my wishes as I have herein indicated my said trustees shall transfer and assure to my said son Stephen Howard Caswell by whatever conveyance or conveyances may be necessary and with all proper provisions therein for preserving the trust hereinafter mentioned the whole of my said residuary estate subject to and charged with the following trusts and conditions, namely:

9. That my said son shall well and sufficiently maintain and support my said wife Emma Elizabeth Caswell during her natural life or until she may marry again, and shall also maintain and support my said father James Caswell, during his natural life, and shall also pay annually to my two daughters, Anna Sarah Caswell and Kathleen Lyn Caswell, the sum of six hundred dollars each until they shall respectively marry. And upon the performance of the said

trusts my said son Stephen Howard Caswell shall take the whole of my residuary estate for his own sole use absolutely.

10. And if upon my said son Stephen Howard Caswell attaining the said age of twenty-one years, my said trustees shall in their discretion conclude that my said son will not in all probability carry out my desire and fulfil my wishes as hereinbefore expressed, or in case my said son should die before attaining said age, or if it should during his minority become impossible for any reason which my said trustees shall in their discretion consider good and sufficient, to carry on the said business, then my said trustees shall sell and convert into money such parts of the said trust estate as shall not consist of money (but they may in their discretion leave unconverted any real estate) and invest the same in the names of my said trustees for the time being in such manner as my said trustees shall deem advisable and from and out of the income arising from such investment or investments and from the unconverted real estate pay or apply yearly the sum of six hundred dollars in or towards the maintenance and support of each of my children and that of my said father, James Caswell (that is to say $600.00 for each) and the balance of such income shall be paid to my said wife, Emma Elizabeth Caswell, during her life or until her marriage.

11. And upon the death or second marriage of my said wife my said trustees shall stand possessed of my said residuary estate in trust for all my children equally, share and share alike, provided always that I hereby declare that no son or sons of mine who shall previously to his or their majority have settled in the United States of America, shall be or become entitled to any share or interest whatsoever under this my will or in my estate.

12. And I further declare that my said trustees may postpone the sale and conversion of any part or parts of my real and personal estate so long as they deem proper, with power, to manage let or lease or otherwise, or cultivate my real or leasehold estate and expend such money as they think proper for improvements, repairs, insurance or otherwise.

13. And I declare that in the event of my said trustees or any of them dying or desiring to be discharged, or becoming incapable to act, the surviving or continuing trustees may appoint a new trustee or trustees, provided that at no time if possible there shall be less than three trustees of this my will, irrespective of my said wife and said father.

14. And I appoint my said wife during her life and after her death my said trustees, guardian and guardians of my infant children.

15. And I appoint the said Emma Elizabeth Caswell, James Caswell, Albert Alfred Mitchell Dale, Thomas A. Grigg and Douglas Alexander Clark to be the executors of this my will.

16. And I give, devise and bequeath to each of them the said Emma Elizabeth Caswell, James Caswell, Albert Alfred Mitchell Dale, Thomas A. Grigg and Douglas Alexander Clark in the event of their severally proving this my will, the sum of one hundred dollars.

The material filed shews that the widow of the deceased has re-married, that the son Stephen Howard Caswell has attained the age of twenty-one years, and that the trustees have decided

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that he is not, by reason of inexperience, capable of taking over the management of the business of the deceased. It is contended on behalf of the widow that the provisos with reference to her re-marriage should be treated as void as being in general restraint of marriage, and that in any event the will is so uncertain as to the method of distribution contemplated that it should be treated as a nullity and the widow given one-third of the estate as if no will had been executed at all. I cannot accede to either of these contentions. By paragraph (3) the widow is given certain property absolutely, and the subsequent provisions as to re-marriage cannot, under the authorities, be held to affect that gift. Notwithstanding her re-marriage she is entitled to the goods referred to in that paragraph, but so far as the balance of the provisions are concerned, the property given is limited to the period while she remains unmarried, and they must be given their full effect. *Morley* v. *Rennoldson*, 2 Hare 571; *Heath* v. *Lewis*, 22 L.J. Ch. 721.

Nor can the will be said to be uncertain in its terms. It is clear that the testator looked forward to the time when his son Stephen Howard Caswell would become twenty-one years of age, and in making the will he definitely provides for the conditions arising before and after that time. By paragraphs (5) and (6) he requires the business continued until his son becomes twenty-one years of age, and stipulates how the proceeds shall during that time be applied. The provisions contained in paragraphs 7, 8, and 9 become applicable immediately the son attains the age of twenty-one years, if at that time the trustees regard him as being capable and worthy. But the trustees have decided that he is not capable; and it is not contended that they have reached that conclusion on any wrong principle. Consequently, under the existing state of facts, we are brought to a consideration of paragraphs 10, 11, and 12. Paragraph 10 stipulates what shall be done in the event of the trustees reaching the conclusion which they have reached, and until the re-marriage or death of the widow. It therefore does not apply to the existing state of facts, because the widow has married again.

The provisions contained in paragraph 11 are therefore, in my opinion, the ones that are applicable to the existing state of facts and which should govern the trustees in the distribution of the estate. By that paragraph the residuary estate goes to all the children, share and share alike. Neither the widow nor the father is entitled to any share thereof. It is contended that the testator could never have meant to disinherit the father; but I can only look to the will in gathering the intention, and I fail to see wherein the will is at all ambiguous.

It was stated by counsel, and generally assented to, that the father, in any event, would be amply protected, and it is pleas-

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ing to know that such will be the case. I am further of opinion that it is the duty of the trustees to sell and convert the estate into money as soon as they can reasonably do so, having in view the necessity of realizing the best possible returns therefor. That, it seems to me, is the reasonable interpretation to be put upon paragraphs 10, 11, and 12 when read together. I am also of opinion that distribution should have taken place when and so often as the estate or any portion thereof is so converted into money. The trustees have an offer from William A. Caswell to purchase the business at seventy-five cents on the dollar, and ask to have such sale approved. This offer appears, from the material filed, to be a good one from the point of view of the estate, and as all parties consent, I have no hesitation in approving of same. The costs of this application to all parties will be paid out of the estate.

Order accordingly.

SWALE v. CANADIAN PACIFIC RY. CO.

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Jan. 19.

Ontario High Court, J. S. Cartwright, K.C., Master in Chambers.
January 19, 1912.

1. PARTIES (§ III—124)—BRINGING IN THIRD PARTY—INDEMNITY CLAIM—DELAYED APPLICATION.

A third party notice served pursuant to an *ex parte order* got after issue joined is irregular and will be set aside as it is equivalent to commencing a new action.

[*Parent* v. *Cook*, 2 O.L.R. 709, 3 O.L.R. 350, followed.]

2. PARTIES (§ III—124)—THIRD PARTY NOTICE—SETTING ASIDE—IRREGULAR EX PARTE ORDER AFTER ISSUE JOINED.

Where full discovery has been had between plaintiff and defendant, and issue joined, a third party notice for indemnity would be permitted only upon terms by which the defendant seeking to bring in a third party at that stage would be ordered to pay the additional costs, and a notice served under an ex parte order made after the proceedings had reached that stage, was set aside on motion.

MOTION by the third party to set aside the third party notice served by the defendants under an order made *ex parte* on the 2nd December, 1911. The action was begun on the 1st February, 1910. The statement of claim was delivered on the 21st March, 1910, and was never amended. The statement of defence and counterclaim was delivered on the 8th April, 1910, and was amended on the 9th October, 1911. The cause was for a long time at issue, and was even set down for trial. The trial was delayed by a commission on the part of the defendants to take evidence in England, which had never been executed. The plaintiff was not objecting to the delay, but submitted to any order that might be made. The counsel for the third party strongly pressed his motion, and relied mainly on *Parent* v. *Cook*, 2 O.L.R. 709, and cases there cited. *Parent* v. *Cook* was affirmed by a Divisional Court, 3 O.L.R. 350.

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W. M. Hall, for the plaintiff.
Angus MacMurchy, K.C., for the defendants.
W. Laidlaw, K.C., for the third party.

The Master said that, in these circumstances, the order should not have been made, and must now be set aside. It was not by any means clear whether, even if the defendants had moved promptly, it was a proper case for an order under Con. Rule 209.* The claim would have to be maintainable on the ground of indemnity. If based on the contract between the defendants and the third party, who, as an auctioneer, sold the goods for which the action was brought, then it would not be a case for the third party procedure. See *Birmingham and District Land Co.* v. *London and North Western R.W. Co.*, 34 Ch. D. 261 (C.A.). Another reason was, that the third party should have full discovery both from the plaintiff and the defendants, if so desired. This had been fully gone into already between the plaintiff and defendants, and to add a third party at this stage would be almost equivalent to a new action, the expense of which would, as between the plaintiff and defendants, as well as between the defendants and the third party, have to be costs against the defendants in any event. The third party had been asked to join in the action, and had refused to do so or to undertake the defence. It would, therefore, seem that he would be bound by the result. See *Parent* v. *Cook*, 2 O.L.R. at p. 712. These two latter grounds were only mentioned as shewing that little, if any, benefit would result to the defendants if the order was sustained. But, in setting it aside, the Master acted on the authority of *Parent* v. *Cook*, *supra*. The order must, therefore, be set aside with costs to the plaintiff in any event; and costs to the third party forthwith after taxation, unless the defendants would agree to their being fixed at $25.

Third party notice set aside.

The Ontario rule referred to is No. 209 Consol. Rules of 1897 as follows:—

209. Where a defendant claims to be entitled to contribution, or indemnity from or any other relief over against any person not a party to the action, he may by leave of the Court or a Judge issue a notice (hereinafter called the third party notice) which shall be sealed in the same manner as the writ of summons, and shall state the nature and grounds of the claim and be according to Form No. 49. A copy of the notice shall be filed in the office in which the action was commenced, and a copy, together with copy of the statement of claim, or, if there be no statement of claim, of the writ, shall be served by the defendant within the time limited for the delivery of his defence, and according to the Rules relating to the service of writs of summons.

MANSFIELD v. TORONTO GENERAL TRUSTS CORPORATION.

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Feb. 22.

Manitoba King's Bench. Trial before Prendergast, J. February 22, 1912.

1. CONTRACTS (§ I D—5)—CORRESPONDENCE—STATUTE OF FRAUDS.

A contract of purchase and sale of real estate may be proved by the exchange of letters and where an offer made by letter is accepted by letter, the agreement is completed, and such a contract is sufficient to satisfy the requirements of the Statute of Frauds.

2. SPECIFIC PERFORMANCE (§ I E 2—35)—DOUBTFUL TITLE—PROPERTY HELD IN TRUST.

Specific performance of a contract to sell real estate will not be ordered where the prospective vendors are executors and trustees of the individual estate of their testator who held the property as a trustee only if the Court considers the will was insufficient in form to constitute the vendors trustees with power to convey the trust estate, although it was stipulated by the contract that the purchaser would accept a transfer from the vendors as executors and trustees on their having the probate re-sealed under Manitoba laws.

[See Fry on Specific Performance, 5th ed., p. 431, and *Re Baker and Selmon*, [1907] 1 Ch. 238.]

3. COSTS (§ I—10)—DISMISSAL ON GROUNDS NOT RAISED BY DEFENDANT'S PLEADING—COSTS AGAINST SUCCESSFUL DEFENDANT.

Where an action is dismissed solely on grounds not raised in the statement of defence, the Court has a discretion to order payment of plaintiff's costs by the defendant.

[See Manitoba Statutes, 7-8 Edw. VII. ch. 12, sec. 3.]

AN action by the purchaser for specific performance of an agreement to purchase land.

The action was dismissed, the plaintiff, however, to have his costs as the dismissal was solely on grounds not raised by defendant's pleading.*

H. F. Maulson, for plaintiff.

A. E. Hoskin, K.C., for defendants.

PRENDERGAST, J.:—This is an action brought on by the purchaser for specific performance of an agreement for the sale of land.

The plaintiff's contention is that certain letters, which were exchanged between the parties, constitute a complete agreement of purchase and sale. The defendants, on the other hand, contend that it was made by them an essential part of the agreement or negotiations leading to the agreement, that the plaintiff should make his offer according to a special printed form, and that the same, if so made, was never accepted.

I find that when the defendants first made mention of an

*By the Manitoba Statute 7-8 Edw. VII. ch. 12, sec. 3, amending the King's Bench Act which embodies the rules of Court applicable to the Court of King's Bench, the following provision was made as to costs:—

3. In all actions, suits, and proceedings, in either of said Courts, the awarding of costs and the apportionment of same between the parties on the same or adverse sides shall, subject to this Act, be in the absolute discretion of the Court or Judge, and the Court or Judge shall have jurisdiction to order the payment of costs personally by any solicitor or counsel for any party in any such action, suit, or proceeding in case the Court or Judge shall see fit to make such order.

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"offer form," which was in their letter of July 21st, the only conditions of sale not yet agreed upon in the correspondence carried on till then, were: as to commission, as to hay grown that year, and as to what form of title plaintiff would accept, and what costs defendants would bear in perfecting same.

Now, all those matters were agreed upon in subsequent correspondence, which—assuming for the moment the "offer form" not to be an essential or necessary part in the negotiations—fully meets, in my opinion, the requirements of the Statute of Frauds.

As to the formal offer, it does not go, and was not intended to go, beyond what was already agreed; it says nothing of commission or hay; and with respect to title and costs of same, the printed clause therein is not as favourable to the defendants as the condition set out in their letter above referred to and accepted by the plaintiff, namely: "provided the purchaser will accept transfer from the corporation as executors and trustees, the only expense to be borne by the estate being the proving or re-sealing of the will in Manitoba."

I hold on those grounds, that the so-called "formal offer" was not really the offer in the transaction; that is, was only required by the defendants as a matter of convenience and uniformity in the keeping of their sale records; that the parties intended to be bound in the usual way by their correspondence, irrespective of such offer, and that the agreement was completed by Mr. Maulson making his letter of July 28th to the defendants.

I hold, however, that specific performance is not in order here, as the defendants, in my opinion, have no power to convey. I do not think that the will (Ex. 3) under which Thomas Robertson appointed the defendants executors and trustees of his individual property, has the effect of making them executors and trustees with power to convey as to the property in question, which he (the testator) himself held in trust.

Nor do I think that I should entertain the plaintiff's application, made at the close of the argument, to be allowed to amend so as to include in his prayer a claim for damages. The defendants were not prepared to meet that without notice.

I will then dismiss the action. But as the only ground on which I do so is not set out in the statement of defence, and it also appears that the only reason why an honest effort was not made to carry out the agreement was simply that the land is rapidly increasing in value, the plaintiff will have his costs of suit.

Action dismissed.

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THE KING, on the information of the Attorney-General of Canada (plaintiff) v. E. A. RIVERS and J. E. TAGGART (defendants).

(Cases 2257 and 2258.)

Exchequer Court of Canada, Cassels, J. March 16, 1912.

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Mar. 16.

1. DAMAGES (§ III L 2—250)—EMINENT DOMAIN—VALUE FOR SPECIAL USE.

The market price of lands expropriated by the Crown for public works is *primâ facie* the basis of valuation in eminent domain proceedings but where a use for a special purpose is shewn on the part of the owner a reasonable allowance must be added in respect thereof.

[*Dodge* v. *The Queen*, 38 Can. S.C.R. 149 applied; and see Annotation to this case.]

EXPROPRIATION by the Crown of certain lands belonging to the respective defendants and proceedings in eminent domain for assessment of compensation to them.

John Thompson, K.C., for the Crown.

Andrew Haydon, for the defendants.

CASSELS, J.:—These two cases were tried together, the evidence as to values being common to both parcels of land expropriated, with the exception that Rivers puts forward a claim for special damage which I will deal with hereafter. The total land expropriated contains an area of 3.09 acres. The date of the expropriation, and the time at which the compensation has to be assessed, is the 18th May, 1911. Of the 3.09 acres, Taggart on April 6th, 1911, sold Rivers about half an acre abutting on Division Street. It comprises property shewn on the plan, plaintiff's exhibit number 2, of lots 15, 16, 17 and 18 on Division Street, and 14 and 13 on a proposed street shewn on the map. The balance of the property consisting of lots from 1 to 30 is the property retained by Taggart. The Crown offers Rivers the sum of $3,000 for his lots expropriated for public purposes. Taggart is offered $6,350. Rivers claims the sum of $17,769. Taggart claims the sum of $15,000. I am of opinion that the parties have grossly exaggerated their damage.

While owners of land whose property in the public interest is expropriated for public works, are entitled to full compensation, they are not entitled through the instrumentality of Court procedure to obtain excessive amounts. It is no doubt often distressing to owners of properties to have to give up their property which they would prefer not to sell, nevertheless public interest requires that people should submit, and all that the owners can claim is that they should be fully compensated.

There is no question on the evidence but that the block in question is in one of the poorest districts of Ottawa for residential purposes. The property itself irrespective of the locality is of a nature that makes it undesirable even for residential purposes of the class described in the evidence. A part of it on Rochester Street has been shewn to consist of a high bluff of rock.

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I credit Doctor Taggart when he says that that rock might be removed for the value of the rock, and so have the land levelled off to the level of Rochester Street. Another portion of the land in the centre is low land that would require to be filled in. It is said that the land is suitable for factory sites. I have no evidence before me of there being any factories in the neighbourhood of the land. Any compact block of land of sufficient size with a railway approach is unquestionably suitable for factory sites; but the suitability of a piece of land for factory sites is one thing, but whether it would be ever purchased for a factory site is another thing. Doctor Taggart prepared his plan intending, as he states, to register it. This plan shews small building lots. It is quite true that any person desiring to purchase it for factory purposes might buy several lots, but such a thing might happen as lots being sold here and there and built upon which would leave the balance unsuitable for factory purposes. I think also the evidence of the witnesses who placed the value for factory purposes as about the same as for building lots is to be accepted. In my view the offer made to Doctor Taggart of $6,350 is ample and fair compensation. The evidence offered on behalf of Doctor Taggart is mere matter of opinion not based upon sales in the neighbourhood. The salient facts are as follows:—

Taggart purchased the whole block containing 3.09 acres in July of 1910 for $4,480.56. His own witness Pratt states that the general increase in the value of properties between the 1st July, 1910, and the 18th May, 1911, would be from 25 to 33 per cent. I very much doubt if the property in question, having regard to its surroundings and the nature of the property itself, would have increased to that extent. It is a mere matter of surmise. But even assuming Pratt's statement to be correct, and allowing an increase of 33 per cent. it would bring the value of the property from $4,480 to about $6,000. The Crown is offering for this same property the sum of $9,350.

In August of 1908, the property immediately to the north of the property owned by Rivers, and which is said to comprise an acre, was purchased by the government from the Ogilvy estate at $2,000. It is clear on the evidence that this piece of land was a better block than the land now owned by Rivers, and considerably better than the balance of the land retained by Taggart.

I will allow Doctor Taggart the sum offered by the Crown, namely $6,350, which, in my opinion, fully compensates him. I think that Taggart must pay the costs of the action so far as his case is concerned.

Rivers stands in a different position. Rivers purchased the property in question, namely, half an acre on the 6th April, 1911. The expropriation was on the 18th May, 1911. The pur-

chase price, namely $3,000, was not paid in cash—it was made up of an exchange of lands. Rivers conveyed to Taggart some lands on Nelson Street, and in exchange Taggart conveyed to Rivers the land in question. It is stated that the lands on Nelson Street have since been sold at an increased price. I think as far as the value of the lands alone is concerned that the sum tendered to Rivers, namely, $3,000, would be full compensation.

Rivers makes up his claim as follows: He places the value of the half acre in question as land for building purposes at $6,000. He places the profit from the stone on the land, which I will deal with presently, at $5,230. He then goes on to state that by reason of the expropriation of the land in question he had to purchase other land for which he paid $6,000. This last claim for the value of the land purchased by Rivers was but faintly urged by his counsel. In regard to the claim for the value of the stone it is put forward in this manner. Rivers states that he is in the contracting building business. He states that on the property in question there is stone suitable for the purposes of his building trade. He states that by excavating the half acre to a depth of 20 feet about 17,643 yards of stone could be procured. His claim is that he could quarry and haul this stone and utilize it toward his building purposes. That the carts used in the haulage of this stone could return loaded with the clay or sand excavated from the land upon which the works that he was contractor for were being built, and that in that way the pit or hole made by the quarrying to a depth of 20 feet would be sufficiently filled in so as to leave the lot adapted for building purposes. The law is summarized in *Dodge* v. *The Queen*, in the judgment of the Court—38 Can S.C.R. 149, 155—as follows:—

> "The market price of lands taken ought to be the *primâ facie* basis of valuation in awarding compensation for land expropriated. The compensation for land used for a special purpose by the owner, must usually have added to the usual market price of such land a reasonable allowance measured by possibly the value of such use, and at all events the value thereof to the using owner."

There are, of course, numerous other authorities. Now, while I think that Rivers is entitled to some compensation for the loss of the stone and the consequent loss of the profit to him by reason of the expropriation, I am unable to arrive at the conclusion that he is entitled to the number of yards claimed, namely, the 17,643 and the profit thereon of $5,230 claimed in his evidence. There is no evidence before me of the nature of the works which he is contracting to perform. Such buildings as he is at present constructing would no doubt be considerably above the foundations. The earth removed from these buildings would have been placed elsewhere. It is only for future contracts that the stone would be available and the necessary filling obtainable. For all I know it may be years before the product

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of the whole pit would be required. In the meantime the property would be lying idle, and interest and taxes would be accumulating. Taggart states in regard to his lot, that when desired to level the land to the level of Rochester Street, parties would be willing to do the levelling for the value of the stone. If the stone on Rivers' lot were excavated to a depth of 20 feet by some one not able to utilize it in his own business, the cost of filling it up to a sufficient level for building purposes would probably equal the value of the stone. While I think Rivers entitled to some compensation, I am not prepared to allow the full amount of the claim made before me. I think if he were allowed the sum of $3,000 offered by the Crown and an additional sum of $2,000 for his loss in connection with the stone he would be amply compensated. Judgment will go in favour of Rivers for $5,000. Rivers is entitled to his costs of the action. He is also entitled to interest from the date of the expropriation to judgment.

Judgment for Rivers, $5,000.
Judgment for Taggart, $6,350.

Annotation
Damages upon Expropriation

Annotation—Damages (§ III L 2—240)—Property expropriated in eminent domain proceedings—Measure of compensation.

Compensation generally.—The principle of compensation is indemnity to the owner, and the basis on which all compensation for lands required or taken should be assessed, is their value to the owner as at the date of the notice to treat, and not their value, when taken, to the promoters. The question is not what the persons who take the land will gain by taking it, but what the person from whom it is taken will lose by having it taken from him. Cripps on Compensation, 5th ed., p. 102; *Stebbing* v. *Metropolitan Board of Works* (1870), L.R. 6 Q.B. 37, 40 L.J.Q.B. 1; cf. *Secretary of State* v. *Charlesworth*, [1901] A.C. 373, 70 L.J.P.C. 25; *City and S. London Ry.* v. *St. Mary Woolnoth*, [1905] A.C. 1, 74 L.J.K.B. 147.

In assessing compensation in a case of expropriation of land, the sales of adjoining properties affords a safe *primâ facie* basis of valuation. *The King* v. *Murphy*, 12 Can. Exch. R. 401. The market price of the lands is *primâ facie* the basis of valuation. *Dodge* v. *The King*, 38 Can. S.C.R. 149; *The King* v. *Condon*, 12 Can. Exch. R. 275.

In estimating the value of an immovable and the damages caused by expropriation, the revenues of such immovable and the nature of sales made in the neighbourhood should be taken into account. *City of Montreal* v. *Gauthier*, Q.R. 26 S.C. 351 (Ct. Rev.). The assessed value is not the basis of compensation, but may be looked at in arriving at a fair valuation. *The King* v. *Turnbull Real Estate Co.*, 8 Can. Exch. R. 163.

In assessing the amount of compensation payable when land is taken, the *probable* use to which such land may be put is necessarily an element to be taken into consideration. Land which may probably be used for building purposes cannot be valued on the same basis as merely agricultural land. *R.* v. *Brown* (1867), L.R. 2 Q.B. 630, 36 L.J.Q.B. 322.

The cost of lands does not, of course, determine their value, but may be a relevant consideration in the assessment of compensation; and so, too,

CAN.

Annotation

Damages upon Expropriation

Annotation (*continued*)—Damages (§ III L 2—240)—Property expropriated in eminent domain proceedings—Measure of compensation.

may be money *bonâ fide* spent in improvements by the owner, *Streatham, etc., Estates Co.* v. *Public Works Commissioners* (1888), 52 J.P. 615, 4 Times L.R. 766; affirmed on appeal, not reported; followed in *The King* v. *Inverness Ry. & Coal Co.*, 12 Can. Ex. R. 383; cf. *Ex parte Cooper, In re North London R. Co.* (1865), 34 L.J. Ch. 373, 2 Dr. & Sm. 312.

The assessment of damages by taking the average of estimates of the witnesses examined is wrong in principle. *Grand Trunk R. Co.* v. *Coupal*, 28 Can. S.C.R. 531; *Fairman* v. *City of Montreal*, 31 Can. S.C.R. 210.

Loss in consequence of eviction.—The loss to an owner, whose lands are required or have been taken, omitting all questions of injury to adjoining lands, includes not only the actual value of such lands, but all damage directly consequent on the taking thereof under statutory powers.

In *Rickett* v. *Metropolitan R. Co.* (1865), 34 L.J.Q.B. 257, 13 W.R. 455, there is a dictum of Erle, C.J., which expresses this principle: "As to the argument that compensation is in practice allowed for the profits of trade where the land is taken, the distinction is obvious. The company, claiming to take lands by compulsory powers, expel the owner from his property and are bound to compensate him for all the loss incurred by the expulsion, and the principle of compensation then is the same as in trespass for expulsion, and so it has been determined in *Jubb* v. *Hull Dock Co.* (1846), 9 Q.B. 443, 15 L.J.Q.B. 403."

If the owner is in occupation of premises, he is entitled to compensation for damages incurred through the necessity of removal since these are losses consequent on the taking of his property under statutory powers. Such damages include the value of those fixtures which are attached to the freehold. Care must be taken, especially in the case of trade fixtures, that compensation is given to the right claimant, or the promoters may have to pay both the landlord and the tenant in respect of the same fixtures. This may be an important item, if a manufactory is carried on upon the premises in question. *Gibson* v. *Hammersmith R. Co.* (1863), 2 Dr. & Sm. 603, 32 L.J. Ch. 337; and it is always desirable where possible to agree and schedule the fixtures to be taken into account on the assessment of the compensation due to any particular claimant. Mere chattels as distinguished from fixtures are not the subject for compensation, and their value should not be included. Cripps on Compensation, 5th ed., 106.

Such damages also include the cost of the removal by the owner of his furniture and goods, and the consequent depreciation in the value of furniture which has been specially fitted, but which is not a fixture attached to the freehold. If the claimant is a trader, they will also include any diminution in the value of his stock consequent on its removal, or, in the alternative, on a forced sale, if such is shewn to be the only practicable course. *Ibid.*

Increased rental.—Where the claimant incurs a liability to an increased rental or other reasonable expenses in taking equally convenient new premises for the purpose of carrying on his business, such increased rental and other expenses should be taken into account in the assessment of compensation, and this principle applies though the business is not being carried on at a profit. *R.* v. *Burrow* (1884), *The Times*, 24th Jan., 1884 (C.A.); affirmed, H.L. sub nom. *Metropolitan and Metropolitan District R. Cos.* v. *Burrow*, *The Times*, 22nd Nov., 1884, cited in Cripps on Compensation, 5th ed., 107.

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Annotation (*continued*)—**Damages (§ III L 2—240)—Property expropriated in eminent domain proceedings—Measure of compensation.**

A yearly tenant, who received notice from the promoters of an undertaking to give up possession in six months, has been held entitled to compensation for any expenses to which he had been put by the notice, including, it would seem, any expense incurred by *bonâ fide* preparations to leave the premises, notwithstanding that the company subsequently informed the tenant that they should not take possession at the end of the six months, *R.* v. *Rochdale Improvement Commissioners* (1856), 2 Jur. N.S. 861.

Goodwill and loss of trade.—Compensation for loss of trade may be awarded, although the claimant has no legal interest in the premises in which the trade is carried on, *Ex parte Cooper, In re North London Railway Co.* (1865), 34 L.J. Ch. 373, 375, 2 Dr. & Sm. 312; but in such a case the insecurity of his tenure would be a relevant matter in considering the amount due. The fact that business is being carried on at a loss does not disentitle the owner from claiming for trade loss on the ground that if he had not been expropriated he would have had an opportunity of making his business profitable, *R.* v. *Burrow* (1884), *The Times*, 24th Jan., 1884 (C.A.); affirmed, H. L. sub nom. *Metropolitan and Metropolitan District R. Cos.* v. *Burrow*, *The Times*, 22nd Nov., 1884, cited in Cripps on Compensation, 5th ed., p. 108. The amount of such compensation would be a simple question of fact for the assessing tribunal.

In addition to full and fair compensation for the value of lands and premises expropriated, the owner carrying on business thereon is entitled to compensation for the goodwill of such business. *The King* v. *Condon*, 12 Can. Exch. R. 275.

Compensation payable to owner in possession.—Where no special principle has to be applied the purchase-money payable to an owner of an estate in fee simple, for lands of which he is in possession, is ascertained by multiplying the highest annual value which he might expect to obtain from such land by the number of years' purchase which the special circumstances require. The number of years' purchase depends on the interest which the property should yield to a purchaser, and should be taken from the recognized tables. Thus, if property should yield to a purchaser four per cent., the number of years' purchase would be twenty-five. Cripps on Compensation, 5th ed., p. 109.

Compensation payable to a tenant or lessee.—The purchase-money payable to a lessee or tenant, as the value of his term or tenancy, depends on the difference between the actual rental paid by him and the improved annual rental that the property is worth. This difference must be multiplied by the number of years' purchase at which the tenant's interest should be valued. This will be determined by the character of the property and by the length of the term of tenancy. If the actual rental of property is £90, and its improved annual rental is £100, and the property is such that it should be purchased to pay six per cent., and the length of the term is ten years, then the recognized tables would give 7.360 as the number of years' purchase to be taken, and the capitalized value of the tenant's interest would be ascertained by multiplying £10 by 7.360. Cripps on Compensation, 5th ed., 109.

Allowance for compulsory purchase.—The fact that lands have been taken under compulsory process does not alter the principle of valuation,

Annotation (*continued*)—Damages (§ III L 2—240)—Property expropriated in eminent domain proceedings—Measure of compensation.

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and the customary addition of 10% can only be justified as a part of the valuation and not as an addition thereto. In practice the 10% is applied to the value of lands only, and not to incidental damage; this percentage may be taken to cover various incidental costs and charges to which an owner is subject whose land has been taken, and if no percentage were added such incidental costs and charges would have to be considered in assessing the amount of compensation. Cripps on Compensation, 5th ed., 111.

Potential value of lands and special adaptability.—The value of lands to an owner is enhanced by the probability of a more profitable future use, and this element must be taken into consideration in the assessment of compensation. When lands used for agriculture are suitable for building purposes, this is necessarily an important element in their value, and a matter for which the owner should be compensated. *R.* v. *Brown* (1867), L.R. 2 Q.B. 630, 36 L.J.Q.B. 322. The same principle applies to lands suitable for any special purpose. *Ripley* v. *Great Northern R. Co.* (1875), L.R. 10 Ch. 435, 31 L.T. 869.

The value of an owner's interest is not properly compensated by assessing the amount of pecuniary benefits obtained by past user in disregard of possible benefits in the future. *Trent-Stoughton* v. *Barbados Water Supply Co.*, [1893] A.C. 502, 62 L.J.P.C. 123. This general principle has been applied in a certain number of particular cases under the name of special adaptability. It must, however, be clearly understood that special adaptability does not imply any deviation from the principles to be applied in all compensation cases. An owner is entitled to have the price of his land fixed in reference to the probable use which will give him the best return and the term special adaptability only denotes that the probable use from which the best return may be expected is special in its character. Cripps on Compensation, 5th ed., p. 117.

Where lands *at the time of the expropriation* had a prospective value for residential purposes beyond that which then attached to them as lands used for farming or dairy purposes such prospective value was taken into consideration in assessing compensation. *The King* v. *Turnbull Real Estate Company*, 8 Can. Exch. R. 163.

In finding the value of a wharf, land and premises taken by the Crown for a public work, the referee is to exclude from his consideration the value of the same to the Crown in the way of saving expense in the construction of the public work, or otherwise, and to determine its value at that time to the owner, or any other person, for any purpose to which in the ordinary course of events it could be put. In finding that value the referee may take into account the condition, situation, and prospects of the property taken; but such value should be one that the property had *at the time it was taken*, and not one that the referee might think that it might have at some future time by reason of its condition, situation or prospects. *The King* v. *Shives*, 9 Can. Exch. R. 200.

Certain premises situated on a city street were expropriated by the Crown for the erection thereon of public buildings. The house, although not a new one, was well and solidly built, and the owner claimed that it possessed special adaptability for the purpose of being used as apartments or flats. It was held that the compensation for the property was to be

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Annotation (*continued*)—**Damages (§ III L 2—240)—Property expropriated in eminent domain proceedings—Measure of compensation.**

assessed in respect of its market value, and that upon the facts the alleged special adaptability was not an element of such value. *The King* v. *Hayes*, 12 Can. Exch. R. 395.

Certain lands which fronted on a public harbour owned by the Crown in right of the Dominion of Canada were expropriated for the purpose of forming the shore end of a wharf extending out into such harbour. The suppliants had no grant and claimed no title to the beach or the land covered with water at medium high tide. The suppliants claimed that the special adaptability of the lands for wharf purposes should be considered as adding a very large value to the same in assessing compensation. It was held, however, that as the suppliants did not own the land covered by water and did not own the beach, that such special adaptability was not to be considered. *Gillespie* v. *The King*, 12 Can. Exch. R. 406.

For American cases as to right to compensation as regards the special value of the property for the purpose for which it is taken, see 11 L.R.A. (N.S.) 996; and as to setting off benefits against damages see 9 L.R.A. (N.S.) 781 and 809.

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Superior Court 1912

Mar. 8.

NURNBERGER (petitioner) v. **CHOQUET** et al. es qual. (respondents) and **ROBERTS** (mis-en-cause).

Quebec Superior Court, Charbonneau, J. March 8, 1912.

1. INTOXICATING LIQUORS (§ II C—46)—LICENSES—OPPOSITION TO RENEWAL — TRIAL.

The License Commissioners for the Province of Quebec although endowed with ministerial functions, yet, in cases of oppositions to renewals of license certificates, exercise judicial duties, and such contestations must be heard and tried as any other case brought into Court.

2. INTOXICATING LIQUOR (§ II C—46)—APPLICATION TO RENEW LICENSE—LICENSE-HOLDER ENTITLED TO ADDUCE EVIDENCE.

The holder of a liquor license, the renewal of which is opposed, has the right to be heard in support of his claim for a renewal and to submit evidence in respect thereof, and a judgment rendered by license commissioners refusing a renewal to the license holder, but without his having been called upon to defend himself is radically null and will be quashed on *certiorari*.

The License Commissioners sitting at Montreal had refused to confirm the license certificate of the petitioner on opposition filed by the Dominion Alliance. Petitioner not having been afforded the opportunity of submitting evidence on his behalf petitioned the Superior Court for a writ of *certiorari*. The writ was ordered to issue, and on the merits thereof was held well founded.

D. R. Murphy, K.C., for petitioner.

G. Désaulniers, K.C., for respondent.

(Translated.)

CHARBONNEAU, J.:—The Court having heard the parties on the writ of *certiorari* issued in this case, praying that the de-

cision of the respondents of the 19th December, 1911, which refused to confirm the license certificate of the petitioner, be declared illegal, *ultra vires* and be quashed, renders the following judgment:—

The functions of the License Commissioners for the City of Montreal should be purely ministerial just as those of municipal councillors who are entrusted with the same task. But as a certain portion of the public was desirous of helping the Commissioners in the exercise of the powers conferred upon them, the law was drafted so as to allow of the filing of oppositions to the confirmation of license certificates. Associations formed with a view to safeguarding the proper enforcement of the license law were authorized to file oppositions, they were even granted a judicial status, although not constituted into corporations under the civil law, and what is more, they were authorized to plead through duly accredited representatives—a favour absolutely at variance with the fundamental principles of our civil procedure. In fairness, it must be added that the same privileges were allowed the Licensed Victuallers' Associations in order that they might plead in favour of the confirmation of the certificates. In a word, we find in our present-day law everything requisite to a splendid law suit between two powerful associations, necessarily bitter foes, and both without any civil responsibility. The introduction of this new element into our law is now to be found in paragraphs 12, 13 and 14 of article 939 of the Revised Statutes of Quebec. In virtue of these three paragraphs and of paragraphs 15, 19 and 20 the application for a certificate and the opposition to this application constitute a case at law. Paragraph 15 says that the commissioners must hear the opposants and the applicant within eight days from the filing of the opposition, and adjourn the hearing from time to time until a "decision" has been rendered. Paragraph 17 authorizes them to hear evidence; paragraph 20 shews that a majority judgment may be rendered, but that the three Commissioners must hear the "case."

Although other paragraphs of the same article confer upon the Commissioners powers which seem to lay stress upon the purely ministerial character of their functions—Para. 17, which authorizes them to receive evidence simply on affirmation, para. 18, which empowers them to make personally all enquiries which they may deem fit, para. 19, which allows them to take into consideration information which they may receive privately as well as publicly, para. 22, which obliges them to disclose the reasons of their refusal to the applicant—it is nevertheless impossible to refuse to look upon them as judges when an opposition has been filed to an application for confirmation presented by a licensed petitioner. And they have always been considered in

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this light in our jurisprudence: *Kearney* v. *Desnoyers* (Davidson, J., 19 Que. S.C. 279; confirmed in appeal, 10 Que. K.B. 436); *Garièpy* v. *Choquet & Turgeon* (Mathieu and Tellier, JJ., 16 Rev. de Jurisprudence 314); *Demers* v. *Choquet*, (12 Que. P.R. 411, Greenshields, J., confirmed in appeal, 18 Rev. de Jurisprudence 14.)

Respondents are, therefore, to be considered as ministerial officers who exercise incidentally judicial functions as regards the confirmation of a license certificate whenever there is an opposition produced against this confirmation. This two-fold function, if not absolutely incompatible, yet places them in a most awkward position, and it is not surprising that they should have attempted to get rid of it.

Now what happened in the case was this: On November 2nd, 1911, an application for confirmation was filed; on November 16th, an opposition by J. H. Roberts on behalf of the Dominion Alliance; on November 24th, notice that the application and opposition would be heard on November 28th was served on applicant and opposant. On this day the applicant appeared by attorney and his case was continued to December 5th; on December 5th it was continued *sine die;* on December 19th the application of petitioner, who had made no proof and who had not been put in default in any way, was rejected.

One of the judges-commissioner states that petitioner's establishment is an eyesore. This may be true as a fact, and, considering the extraordinary powers conferred upon the Commissioners, I should not be prepared to say that the Superior Court could on a *certiorari* overrule their discretionary power to render a bad judgment, but before they render this judgment they must submit to the essential formality of every judicial proceeding as enunciated in art. 82 of our Code of Civil Procedure, which forbids the adjudicating on any judicial demand unless the party against whom it is made has been heard or duly summoned. This is the fundamental and basic principle of all procedure and no one may ignore it without perpetrating a denial of justice.

Another Commissioner says that he and his colleagues had decided to hold no more trials; that they led to disorder and embarrassment, without any practical result. He is right, absolutely right. Although one may not have been present at these hearings, it is easy to understand that no good can come of them, nothing that can enlighten the conscience of the Commissioners; but we must not forget that the foregoing articles compel the Commissioners to receive these oppositions, to "hear" the opposants and applicants on a fixed day, of which notice is given them. Under these conditions, these trials appear unavoidable so long as the law allows oppositions.

The decision of the Commissioners, respondents, of the 19th of December, 1911, refusing to confirm the license certificate of the petitioner is, therefore, quashed and the proceedings are placed back to where they were on December 5th, 1911, that respondents may give a new notice of hearing both to petitioner and to opposant and without costs against respondents, seeing they are not the really interested parties in the proceedings moved before this Court.

Commissioners' decision set aside.

THE KING v. DEMETRIO.

Ontario High Court. Motion before Middleton, J., in Chambers. January 19, 1912.

1. SUMMARY CONVICTION (§ VII B—80) — AMENDMENT ON MOTION TO QUASH—STATUTORY POWER—CR. CODE SEC. 1124.

The intention of sec. 1124 of the Criminal Code, 1906, in giving the power to amend a summary conviction on a motion to quash is, that, when guilt appears upon the evidence which has been believed by the magistrate, the accused should not escape by defects in form occasioned either by the error or by the stupidity of the magistrate.

2. APPEAL (§ I C—25) — CRIMINAL LAW — ORDER REFUSING MOTION TO QUASH SUMMARY CONVICTION.

Where a motion to quash a summary conviction has been dismissed and the conviction ordered to be amended under Code sec. 1124 as to a defect in form leave to appeal from the dismissal should be refused, if the evidence warranted all the amendments necessary to make a good conviction.

MOTION by the defendant for leave to appeal from the order of Sutherland, J., *R.* v. *Demetrio*, 3 O.W.N. 313, 20 O.W.R. 524, dismissing a motion to quash a conviction made by the police magistrate of Porcupine for keeping a disorderly house.

One of the objections taken on the motion before Sutherland, J., was that the conviction was bad as the alleged disorderly house was not designated other than by a general statement that it was kept in the township of Whitney. The evidence, however, disclosed that the place in question was the house of the accused called and known as the "Nugget Saloon," and Sutherland, J., held that he had the power to amend under sec. 1124 of the Criminal Code, 1906, and directed that the conviction be amended by adding the words following the name of the township "at his house there known as the Nugget Saloon."

F. Arnoldi, K.C., for the defendant.

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

MIDDLETON, J., said that he thought the case was concluded by authority. On the evidence, the offence was proved, and enough was shewn to warrant all the amendments necessary to make a perfect conviction. The intention of Par-

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liament in giving the power to amend is, that, when guilt appears upon the evidence which has been believed by the magistrate, the accused should not escape by the defects in form occasioned by the error, or even stupidity, of the magistrate. Motion dismissed with costs.

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Jan. 11.

NOBLE v. NOBLE.

Divisional Court Ontario, Boyd, C., Riddell and Sutherland, JJ. January 11, 1912.

1. ADVERSE POSSESSION (§ II—61)—TENANT AT WILL—PRIOR MORTGAGEE.

A person admitted into possession as tenant at will and remaining in possession without acknowledgment for ten years after the lapse of one year from being placed in possession will not acquire a title by adverse possession against the mortgagee of the lands claiming under a mortgage made prior to the tenancy at will unless a ten year period has elapsed under the statute, 10 Edw. VII. (Ont.), ch. 34, sec. 23, from the last payment of any part of the principal money or interest secured by the mortgage.

2. ADVERSE POSSESSION (§ II—61)—TENANT AT WILL—DISCHARGE OF PRIOR MORTGAGE—STATUTORY EFFECT.

Where a mortgage registered under the Ontario Registry Act, 10 Edw. VII. ch. 60, is paid off by the mortgagor, and a discharge thereof is registered in the statutory form, the effect is not to discharge the mortgage as against a person claiming title by adverse possession against the mortgagor since the making of the mortgage but to reconvey to the mortgagor his original title in fee with the right to possession as from the date of the repayment.

[*Lawlor* v. *Lawlor*, 10 Can. S.C.R. 194; *Henderson* v. *Henderson*, 23 A.R. 577, and *Ludbrook* v. *Ludbrook*, [1901] 2 K.B. 96, applied.]

3. LIMITATION OF ACTIONS (§ I D—25)—TENANT AT WILL WITHOUT RENT —NEW TENANCY—ACKNOWLEDGEMENT.

Where a person becomes tenant at will of another's lands without paying rent therefor, the Statute of Limitations, 10 Edw. VII. (Ont.) ch. 34, sec. 6, begins to run in his favour as against the owner only at the expiration of one year after being let into possession; but a new tenancy at will may be implied from the acts and conduct of the parties if there has been a definite acknowledgment by the occupant that he holds by the permission of the owner.

[*Jayman* v. *Hale*, [1899] 1 Q.B. 994, and *Foster* v. *Emerson*, 5 Gr. 135, applied; *Keffer* v. *Keffer*, 27 U.C.C.P. 257, distinguished.]

APPEAL from the judgment at trial.

Action by Thomas A. Noble to recover possession of certain lands in the city of Brantford. The action was begun on the 31st August, 1911.

October 5, 1911. The action was tried before MULOCK, C.J. Ex.D., without a jury, at Brantford.

The judgment appealed from and reversed was as follows:—

October 23, 1911. MULOCK, C.J.:—On the 8th day of September, 1894, the plaintiff's son, Frank Noble, married the defendant; and the plaintiff, desiring to provide them with a home, on the 20th February, 1895, purchased the lands in question, which

consisted of a house and grounds in Brantford; and on the same day executed a mortgage thereon to secure the sum of $650 and interest. On the 1st April, 1895, Frank Noble, with the defendant, his wife, took possession, and, with his father's consent, remained in undisturbed possession until the month of April, 1907, when he became insane and was removed to an asylum, where he remained until he died intestate on the 24th April, 1908, leaving him surviving his widow, the defendant, and one child, Grace, aged fourteen years. No administrator of his estate has been appointed.

When Frank Noble was removed to the asylum, his wife and child continued to occupy the premises as a home, and were in such possession on Frank Noble's death, and remained in possession until about the 30th May, 1908, when the property was rented by the defendant to one Frank Smith, who occupied it as tenant from the 17th June, 1908, until the 17th October, 1909, when he vacated, giving the key to the defendant, who retained it, and about a month thereafter resumed possession, and has so remained ever since.

There is a slight discrepancy between the evidence of the plaintiff and the defendant as to the circumstances under which the premises were rented to Frank Smith; but I think that the plaintiff, in the transaction, acted as agent for the defendant.

The plaintiff, from 1895 until 1910, each half-year paid interest accruing on the mortgage in question, and on the 29th February, 1910, paid off the principal and interest owing, and obtained a statutory discharge thereof, which, on the 11th day of January, 1911, was duly registered in the registry office.

On the 1st April, 1895, Frank Noble, on taking possession, became tenant at will of the plaintiff: *Keffer* v. *Keffer* (1877), 27 C.P. 257; and at the expiration of one year, *viz.*, on the 1st April, 1896, the statute began to run in his favour.

From that date until the 1st April, 1906, he remained in undisturbed possession, not paying rent or in any way recognizing the plaintiff's title; so that the plaintiff became barred on the 1st April, 1906, unless the circumstance of his having made payments on the mortgage prevented the statute running against him.

The language of the section of the statute relied upon by the plaintiff is as follows: "Any person entitled to or claiming under a mortgage of land, may make an entry or bring an action to recover such land, at any time within ten years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than ten years have elapsed since the time at which the right to make such entry or bring such action first accrued:" 10 Edw. VII. ch. 34, sec. 23 (O.)

The object of the statute was not to benefit mortgagors, but mortgagees, by making "mortgages an available security, where

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they were good and valid in their inception, and the mortgagee, having received payment of his interest, cannot be charged with laches:" *Doe d. Palmer* v. *Eyre* (1851), 17 Q.B. 366, 371.

In *Henderson* v. *Henderson* (1896), 23 A.R. 577, Maclennan, J.A., expressed the opinion, concurred in by Burton, J.A., that a mortgagor, on the registration of a certificate of discharge, became a "person entitled to or claiming under" the mortgage; but this opinion was not adopted by the majority of the Court. With great respect, the view of Maclennan, J.A., does not commend itself to me. Where the owner of lands mortgages the same, he remains in equity the owner subject to the mortgage charge; and, when it is discharged and the certificate thereof registered, the substantial result is, that the mortgage transaction has been wiped out as effectually as if the mortgage had never existed; and the owner continues as owner by reason of his original title, the mortgage never having in fact been a link in his chain of title. I, therefore, fail to see how here the mortgagor can be said to be a person entitled to or claiming under a mortgage made by himself.

The point came up for consideration in *Thornton* v. *France*, [1897] 2 Q.B. 143, and the view of the Court was, that the owner of land who pays off a mortgage thereon does not thereby become "a person claiming under a mortgage" within the meaning of the statute.

Following that case, I think the plaintiff must fail, unless saved by the Registry Act, 10 Edw. VII. ch. 60, sec. 62 (O.) That section declares that "the certificate when registered shall be a discharge of the mortgage, and shall be as valid and effectual in law as a release of the mortgage, and as a conveyance to the mortgagor, his heirs, executors, administrators, or assigns, or any person lawfully claiming by, through or under him or them, of the original estate of the mortgagor."

The object of that section is to enable a registered certificate to operate as a release of the mortgage and as a conveyance of the legal estate to the mortgagor or other parties entitled thereto, but not so as to defeat the rights acquired against the mortgagor after the making of the mortgage. Further, the "original estate," mentioned in the section, means the estate granted to the mortgagee, and in the present case does not include the right to possession of the mortgaged lands. That right was reserved to the mortgagor, and at no time during the currency of the mortgage was the mortgagee in possession.

In the meantime Frank Noble had, as against the mortgagor, acquired title by possession, but the mortgagor's estate in the lands did not thereby pass to Frank Noble, but remained in the mortgagor—the statute, while barring the owner from recovering possession, not transferring to the party in possession any title or estate in the land: *Tichborne* v. *Weir* (1892), 8 Times

L.R. 713. Thus, the registered certificate, operating as a reconveyance to the mortgagor of the "original estate" held by the mortgagee, does not include the right of possession; and, consequently, does not affect or disturb any right of possession acquired by Frank Noble.

Mr. Brewster contended that, in the event of the plaintiff failing to recover possession, he was entitled to a lien on the land to the extent of the mortgage debt paid off by him. This contention raises an entirely new issue, not open to the plaintiff on the present pleadings and as the action is at present constituted. In the trial of such an issue, a representative of the estate of Frank Noble would be a necessary party. For such purposes, his widow, the defendant, does not represent the estate. She may ultimately have a beneficial interest in the property; but at present, as the party in possession, she is simply defending her possession against the claim of the plaintiff, who has no right to dispossess her.

For these reasons, I am unable to deal with the question thus raised by Mr. Brewster.

The action fails, and should be dismissed, but without costs.

The plaintiff appealed from the judgment of MULOCK, C.J. Ex.D.

W. S. Brewster, K.C., for the plaintiff, argued that the learned trial Judge had erred in holding that the plaintiff was barred by the Statute of Limitations from recovering the property in question. It was not by any means certain that the son, Frank Noble, had had possession for ten years. During the whole time of the son's occupation, the lot had been assessed to the father as freeholder, and to the son as tenant, and the taxes had been always paid by the father; and the son had not objected to this arrangement: *Foster* v. *Emerson* (1854), 5 Gr. 135; *Turner* v. *Doe d. Bennett* (1842), 9 M. & W. 643. The father having paid off the mortgage, the discharge acted as a reconveyance to him of his original title in fee, with right of reentry from the date of repayment: *Lawlor* v. *Lawlor* (1882), 10 S.C.R. 194; *Cameron* v. *Walker* (1890), 19 O.R. 212; *Henderson* v. *Henderson*, 23 A.R. 577. At all events, the plaintiff had a lien upon the property for the incumbrances paid off by him, and his right was not affected by the taking or registering of the discharge: *Currie* v. *Currie* (1910), 20 O.L.R. 375. He referred also to R.S.O. 1887, ch. 102, sec. 2.

M. K. Cowan, K.C., for the defendant, contended that the judgment appealed from was right. The plaintiff became barred on the 1st April, 1906. The fact of his having made payments on the mortgage did not prevent the Statute of Limitations running against him: *Fisher* v. *Spohn* (1883), 4 C.L.T. 446; *Brown* v. *McLean* (1889), 18 O.R. 533.

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Brewster, in reply, referred to *Thornton* v. *France*, [1897] 2 Q.B. 143, at p. 158, where *Doe d. Baddeley* v. *Massey* (1851), 17 Q.B. 373, is cited.

January 11. The judgment of the Court was delivered by BOYD, C.:—The legal effect of the Statute of Limitations, when one is let into possession of land as in this case, is, that he becomes a tenant at will, and the right of entry to the owner accrues at the expiration of one year thereafter. The continuation of the possession is regarded as a tenancy at sufferance, unless evidence be given that a fresh tenancy has been created. A new tenancy at will is to be implied from acts and conduct of the parties which ought to satisfy a jury (or the Court) that there is such an agreement. As tersely put by Mr. Justice Channell in *Jarman* v. *Hale*, [1899] 1 Q.B. 994, 999, "If you find a definite acknowledgment from the tenant that he is holding by permission of the other, that is all you want." Even slight evidence would be sufficient to satisfy the Court on this head, as said by Parke, B., in *Doe d. Bennett* v. *Turner* (1840), 7 M. & W. 226, 235.

In *Doe d. Groves* v. *Groves* (1847), 10 Q.B. 486, Patteson, J., said, that, though a man has been in possession twenty years as apparent owner, yet "his acts may well amount to an admission that, during the period in question, he was in fact tenant to another."

In *Foster* v. *Emerson*, 5 Gr. 135, 152, Esten, V.-C., says that it is settled by the decisions that the tenancy may be shewn to have continued beyond the end of the year, by evidence of any facts or circumstances indicating a good understanding (*i.e.*, as to a subsisting tenancy) between the parties relative to the land.

In *Turner* v. *Doe d. Bennett*, 9 M. & W. 643 (the same case as already cited after a new trial), it appeared that the defendant, being one of the assessors for the land-tax in the parish, signed an assessment in which he was named as the occupier of the farm in question, and the lessor of the plaintiff was named as the proprietor. And the Court said: "The defendant signs an assessment in a form which can hardly be reconciled to any state of things except a rightful tenancy of some sort, and none other appearing, and no rent being paid, there must be a tenancy at will. At all events, that document was evidence to go to a jury as to the creation of a new tenancy:" pp. 645, 646.

In the present case, during the whole period of the son's occupation and after his death, the lot has been assessed to the plaintiff as freeholder and to the son as tenant, and the taxes have been uniformly paid by the father. This appears to me to present an act *in pais* respecting the property, which manifests the very truth that the father was from year to year recognized

as the owner and the son as the occupier or tenant; and this with the express assent and acceptance of the son.

The judgment in appeal proceeds upon the authority of *Keffer* v. *Keffer*, 27 U.C.C.P. 257, in which one of the Judges discredits the authority of a very carefully considered decision of a very strong Court in *Foster* v. *Emerson*, 5 Gr. 135. But this latter case is far from being overruled, and it is much more in point in its circumstances to this case than is *Keffer* v. *Keffer*. In *Keffer's* case, the son was entitled to hold the land apart from the Statute of Limitations. The whole conduct of the father indicated that the son was to be the owner of the farm. He entered by the direction of his father upon a wild lot, cleared the greater part of it, erected two dwelling-houses and a barn and other structures upon it, expending $500 of his wife's money in so doing, lived on it as his home, was assessed in his own name, and paid all the taxes, without any claim for rent or interference on the part of the father for nearly twenty years; whereas in *Foster* v. *Emerson* the father had merely expressed an intention to devise the property by will to the son, and, while allowing the son the possession and usufruct of the property, retained in his own hands the ultimate control. In that case, as in this, to give effect to the statute would be to frustrate the clear intention of the owner to hold it in his own hands as the proprietor. The utmost that can be said is, that Noble bought the lot for his son, but kept the deed of it, and the defendant (the son's wife) understood that he did so because he did not want Frank (the son and her husband) to do away with the house, on account of his drinking. The father paid wages to the son for work done in the father's business, and allowed him to live rent-free on the land—the father paying the taxes and supplying materials for any repairs and outlay needed in the house. The father paid frequent visits to the place. The father, after the son's death, leased the place without objection, or rather with the assent of the wife, and let her have the rent. This was done after the expiration of the statutory ten years; and this, though done after the ten years' limit, was inconsistent with her husband being the owner, and reflects light on the real nature of the son's occupation, for the reasons fully given by Blake, C., and Esten, V.-C., in *Foster* v. *Emerson*, 5 Gr. 135, at pp. 148, 154.

Upon another ground also, I think the judgment in appeal cannot stand. The father purchased the lot on the 20th February, 1895, and gave a mortgage in fee for part of the purchase-money on the same day. The son went into possession in April, 1895, taking subject to the mortgage. Payments were made during the series of years by the father to the mortgagee till the mortgage was paid off in February, 1910, and the discharge registered in January, 1911. Had the son acquired a title under the

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statute as against the father, yet, according to *Henderson* v. *Henderson*, 23 A.R. 577, the execution and registration of the discharge gave a new starting-point for the statute. And the same point was decided by the Court of Appeal in *Ludbrook* v. *Ludbrook*, [1901] 2 K.B. 96, where Romer, L.J., says (p. 100): "If the mortgage be an existing one, and was executed before the commencement of the possession of the person claiming to have acquired a title by such possession under the Statute of Limitations, then the statute . . . undoubtedly applies in favour of the mortgagee, although the person in possession may have acquired a good title as against the mortgagor and those claiming under the mortgagor." The mortgage in this case being paid off by the mortgagor, the effect is not to discharge the mortgage as against the assumed statutory owner, but to reconvey to the mortgagor his original title in fee, with the right to possession as from the date of the repayment: *Lawlor* v. *Lawlor*, 10 Can. S.C.R. 194.

The judgment should be reversed; but I assume that no costs are asked, as the plaintiff stated during the argument that he was willing to allow the widow to get the balance of the price of the land, which the plaintiff has sold, after deducting the amount paid on the mortgage.

Appeal allowed.

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McINNES v. McINNES.

Prince Edward Island Supreme Court, Sullivan, C.J., Fitzgerald and Haszard, JJ. January 26, 1912.

1. WILLS (§ I D—37)—TESTAMENTARY CAPACITY—DELUSIONS—UNDERSTANDING NATURE OF ACT AND EXTENT OF PROPERTY.

A testator has sufficient capacity to make a will whose mind and memory are sufficiently sound to enable him to understand its nature and effect, who has a comprehension of the extent of the property he was possessed of and the objects of his proposed bounty, and this notwithstanding that he periodically suffered from melancholia and incident delusions, brought about by the deaths of relatives or by domestic trouble and that on the date of the execution of the will he was about to go voluntarily for treatment to an institution for mentally weak persons at the request of a friend.

[*Banks* v. *Goodfellow*, L.R. 5 Q.B. 549, and *Skinner* v. *Farquharson*, 32 Can. S.C.R. 58, applied.]

AN appeal from the judgment of Judge Reddin, Judge of Probate, admitting to probate the will of Augustine McInnes, deceased.

The appeal was dismissed.

Messrs. *D. C. McLeod*, K.C., and *W. E. Bentley*, for appellant.

Messrs. *Neil McQuarrie*, K.C., and *J. J. Johnston*, K.C., for respondents.

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SULLIVAN, C.J.:—We are dealing here with a holograph will drawn by an intelligent man, his own act, unaided by any one. On the face of it there is no delusion apparent. On the contrary, it appears to be a rational act, rationally done, with, as it and the evidence discloses, an understanding of its nature and its effect, a complete comprehension of the extent of his property and an appreciation of the claims upon him: so far the testator "must be held to have been mentally capable of conceiving the purpose of expressing it in distinct language, and of foreseeing and understanding its legal consequences and effects." *Cartwright* v. *Cartwright*, 1 Phil. 90, *Banks* v. *Goodfellow*, L.R. 5 Q.B. 549, *Hope* v. *Campbell*, [1899] A.C. 1.

It is quite true, however, that notwithstanding this apparent mental capacity the testator may have been actuated by an insane delusion. It is contended that he had such a delusion in relation to his brother Frank, to whom the deceased devised 30 acres of land valued at $600, out of a total estate valued at $14,000: otherwise the will is not attacked.

That the testator had at times delusions as to his future state may be admitted. But that he had any delusions as to his due and proper division of his father's estate, particularly in relation to his brother, has not been established to our satisfaction. The testator's conduct in paying this brother further and considerable sums out of his father's estate years after he had obtained from him a receipt in full of all demands thereon, and his especial desire to aid him as he had not succeeded in life, shew rather a sane recognition of his brother's possible claims on him, and of the testator's desire affectionately to remember him in his will.

How far the testator's conscience induced him thus to remember his brother we are not concerned to enquire. It is only because it has not been established to the satisfaction of this Court that he had any delusions upon the subject that we think the decision of the Judge of Probate is right and ought to be upheld. This appeal will therefore be dismissed with costs.

FITZGERALD, J., concurred.

HASZARD, J.:—This is an appeal from a judgment of Judge of Probate, Reddin, admitting to probate the will of Augustine McInnes dated 23rd November, A.D. 1906. Practically the only question raised is as to whether or not the testator was of sufficient testamentary capacity at the time of the execution of the will of 23rd November, 1906.

The facts of the case are as follows:—The testator was a farmer, who lived at Ernscliffe in this province, possessed of considerable means and property and generally looked upon as a shrewd and keen business man. His father, who had predeceased him many years, was also possessed of considerable pro-

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perty which he disposed of by will amongst the various members of his family including the testator—by his will he (the father, Michael McInnes) had appointed three executors, and in addition he appointed the said Augustine McInnes his agent and empowered him to collect all outstanding debts.

The will of said Michael McInnes was proved by one only of the executors, but beyond proving the will the executor appears to have taken no further part—apparently leaving the collecting in, management and distribution of said estate to the said testator (Augustine McInnes).

Michael McInnes died in the year 1873, and the said Augustine McInnes proceeded to collect in all debts due the estate of his father and was fairly successful, and undertook the distribution of the assets of said estate amongst his father's devisees from time to time.

Some years ago the said Augustine McInnes became subject to attacks of melancholia, and at times would get into a condition of despondency and would have delusions imagining that his heart was affected, that he was going to die, that he would be lost, etc. These attacks appear generally to have been brought on by some family trouble, the death of his wife, or daughter or son, and would continue for a period of three to four months, during which time he would not do much work about his farm or take much interest in his business. Some evidence was given, which sought to shew that these fits of despondency were also brought on by, or came on after, excessive drinking of intoxicants; of this there was very little evidence, and it could not be said that deceased was of intemperate habits—but it would appear that on almost every occasion when he had an attack, it was caused by domestic trouble.

From the evidence given on the hearing I would gather that even when subject to these periods of depression, and at times under what might be called delusions, he would, when his mind was taken off himself, be quite rational; in fact, there was no evidence given which satisfied me that he was incompetent to capably look after his own affairs at any time. Some evidence was given that he had a mania for making wills; but two wills only were produced as having been executed by him; the first one dated 27th March, 1905, and the other (and which is the subject of this appeal) dated the 23rd November, 1906. Both of these wills are in the testator's own handwriting, and were regularly executed—except for the purpose of comparison the first-mentioned will does not come up in this appeal.

The real question in this case is, whether or not the testator was of sufficient testamentary capacity to make and execute the will of the 23rd November, 1906, it having been executed on the day it bears date.

The witness John R. McDonald testifies that he was sent for

to go to the testator's house at Ernscliffe, that he went there on the evening of the 22nd of November. When he went in testator said he was rejoiced—was glad to see him—why didn't I come long ago. Witness said, "Gusty, I am glad to find you so well—didn't think you were so well"—talked on like this to keep him in good humour. Testator said, "How do I look—how do I look, John?" "You look fine, Gusty—fine." "I am gone, my heart is gone," he said.

A. He walked the floor, for a minute or two after I went in, he was quite calm; that passed off, and the old trouble was on him. He was gone—his heart was gone; he was going to die and such like—walking the floor. He kept walking the floor; from the looking-glass he would walk across the floor and back again and look in the looking-glass, and then turn round to me—"how do I look, John?"

Witness remained at testator's house all night. Testator went to bed early in the night. He told witness to go to bed. The witness went to bed about 11 o'clock. Witness then speaks about testator coming into his room during the night, once with a lamp and once without, the last time he got into bed with witness and remained about half an hour. On the last occasion he said to witness, who had spoken to him "pretty wicked," not to do anything to him—he said, you don't know the state of my mind. Afterwards, he said, I have got to end myself—and that was his conversation while in bed.

A. The next morning he was walking the floor as usual in and out. He called me out to the kitchen, I was in the other room—he gave me some papers which he afterwards took away again, he gave me some instructions about his place; said that I had to look after his place. Witness said: "Where will you be, Gusty?" McInnes said: "Oh, I have got to end myself, John." "How will you end yourself—going to do like such a one?" McInnes said: "It is no difference what way I do it, it has got to be done."

Further remarks followed and witness said to him: "After the way you acted last night and the threats you have made to-day, you have got to go to the asylum. He refused, he would not go. Witness said, "I will take you there, and put you there. I am not going to leave you here." "Well," he said to witness, "do you think it will do me any good if I do go there?" "Certainly (witness replied), "they would treat you there." After some time he said he would go. "How will I go?" Witness replied he would take him. "When will you come?" "Come right away." "All right," he said, and witness and testator got ready and proceeded to Charlottetown, testator driving the horse. McDonald being asked if on previous occasions testator had made threats of committing suicide said, "Oh, yes, when he was bad at other times"—"he would have to die—have to die."

In fact from several witnesses it would appear that the

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tendency of the testator during the periods of depression were invariably suicidal.

It was on the morning of 23rd November witness McDonald accompanied him to Charlottetown, on the way to the Asylum, and when arrived at Charlottetown testator requested him (McDonald) to go to the Bishop's Palace as he said to state his case—to see if they could do anything for him, witness says he went there to satisfy him, and shortly after he (witness) again joined the testator and said, "Gusty, come in"—testator said, "Can they do anything for me?" Witness said, "Yes, come in," and he walked in with me. Witness says he walked the floor as soon as he got in. He said he was a doomed man; had to die, etc. Witness left testator with Dr. Morrison and went into another room, testator talked with Dr. Morrison for a time, and eventually Dr. Morrison came where witness was and said, "He will go with you to the Asylum; but he has got a will and we have to sign the will first, he wants us to sign the will before he will go." Witness says, he went into the room with testator, and he, Dr. Morrison, Father McLellan and testator, all four, were there together. Dr. Morrison was writing the jurat, his recollection is, Dr. Morrison handed him the pen and he wrote his name under Dr. Morrison's, he handed the pen to Dr. McLellan who signed his name also. Immediately after the signing of the will testator proceeded with McDonald to Falconwood Asylum where he remained for some three months.

Dr. Morrison in his evidence—the will in question being placed in his hands, says: "I saw him (testator) write the words 'To the Bishop of Charlottetown,' in the body of the will, and saw him write his signature thereto—in my opinion the handwriting in the will is his, the writing in date, in my opinion, is same as will, have no recollection about date except for this. The attestation is in my handwriting, it was duly executed, all present at same time—he seemed depressed and had not much to say. I think he said he was going to the Asylum and wished to make his will. He filled in the words two or three minutes before signing it." Witness further says:—

> I cannot say that he had a rational understanding—I saw he knew he was making a will, but I don't say he understood the full purport of it.

In answer to the question: "Did he know the extent of his property he was disposing of," witness answered: "I am unable to say"—it would look like as if he did know the amount of money he was leaving to the Bishop of Charlottetown. Witness says further on:—

> If he had not been going to the Asylum I would certainly have been more inclined to think he did understand the effect of the will at that time, I would suppose he understood the objects of his bounty when he wrote the will. Outside of the fact that I knew

he was being taken to the Asylum, I would not have pronounced him insane, that morning, that is if I had met him that morning for the first time. (On cross-examination, witness said): He talked on different occasions about his own condition and said he would do away with himself.

Witness being recalled on the question of execution of the will said:—

My impression is that the attestation was written first, and afterward he signed his name. I would not have signed the attestation if the three were not present.

Dr. G. McLellan says:—

Was present when Augustine McInnes executed this will. Was called in by Dr. Morrison—those present were testator, John McDonald, Dr. Morrison, and myself, don't remember of the words being written in the will. I think when not under delusions he would be competent to dispose of his property. I had several conversations with him when not under delusions. I believe when he signed it he understood that it was a will. Could not say that he understood the extent of it. He would know that such a one was his son. From the evidence given as to the condition of testator on the day the will was executed, beyond the fact that he was depressed and somewhat despondent it does not appear that he was under any delusion, but, on the contrary, was in full possession of his faculties, and expressed himself as willing to go to the Asylum because he evidently thought it would do him good.

Dr. Conroy in his evidence, says:—

Knew testator for many years. Can't say that I ever saw him under the influence of liquor—saw him under delusions. He was subject to periodical attacks of melancholia, apart from his delusions in matters pertaining to his own business I would consider him a pretty sharp man. He was decisive in his business affairs. He was not capable of dealing with a matter that was in any way involved in his delusions. I should think he would be capable of disposing of his property amongst his family or his relations.

Other witnesses speak as to the testator's capacity, namely, John A. McInnes, Dr. J. T. Jenkins, and say that outside of the fact that he was nervous, apprehensive, and at times afraid of himself, he was quite capable of transacting business.

Robert E. Mutch, one of the executors named under the will deposed:—

That he had a conversation with testator while in the Asylum, wherein testator told him that he had made his will, and had made a provision in it for Frank, saying he had wound up his father's business, that there was a good deal out and he had got in the most of it in sheep, cows, shingles, etc., that he had put them down at what they were worth, but it was bothering him, and he had made this provision. He said he had left me to look after it and wanted me to see that it was done right.

Dr. Goodwill on direct examination in speaking about the time during which testator was in the Asylum, says:—

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He was agitated, melancholy, with suicidal tendencies. We regarded him as insane—in my opinion he would would not be fit to make a will previous to the middle of January.

On cross-examination he says it was possible for him to have lucid intervals at times; I think he was always mentally deranged, could not say he was insane. On comparing the two wills he said, one seems as rational as the other. In answer to a question as to his (testator's) knowledge, he said he knew who he was leaving the property to, and the amount to each when he wrote it—he knew those things, in my opinion, when he wrote this document.

Looking at all the evidence in the case and considering fully the nature of the indisposition from which the testator suffered at certain periods, and that these periods of depression were generally brought on by the death of some member of his family, or domestic trouble of some kind, and that in the intervals between these periods of depression—which in some instances extended over several years—the testator would be quite capable of transacting any business, and also considering the fact that even during the period of depression when his mind would be taken off his own imaginary troubles, that he was rational on other subjects, I would hesitate to hold that he was not competent at any time to make a will. But with the additional facts as they appear in evidence that the will in question which he produced from his pocket in the Palace was in testator's own handwriting, that on the day he executed it he wrote in the words, "To the Bishop of Charlottetown," for which he had apparently, when writing the will left a blank to be filled up when he would ascertain the proper person to be named; that this will was to all intents and purposes similar in its provisions to a will duly executed by him, and written by his own hand about 20 months previously, the provisions of the last will differing from the previous one only in respect to the changed conditions of his property and a devise of 30 acres of land valued at about $500 to his brother Frank, to whom he had a few months previously intimated an intention to give a sum of about that amount. There is no doubt, in my opinion, as to his full comprehension of the provisions of the will in question.

On the argument, the case of *Waring* v. *Waring*, 6 Moo. P.C. 341, decided in the year 1848, was cited by counsel for appellant as an authority for the doctrine that unsoundness of mind, however slight, would render a will void. This law as there laid down apparently did prevail for a time, but it is not the law now. Since the case of *Banks* v. *Goodfellow*, L.R. 5 Q.B. 549, decided in 1870, a different doctrine has prevailed. In that case Lord C. J. Cockburn laid it down:—

That while the mind may be overpowered by delusions which utterly demoralize it and unfit it for the perception of the true nature of surrounding things, or for the discharge of the common obligations of life, there often are, on the other hand, delusions, which, though the offspring of mental disease and so far constituting insanity, yet leave the individual in all other respects rational, and capable of transacting the ordinary affairs and fulfilling the duties and obligations incidental to the various relations of life.

He also, in the same judgment, laid down what were essentials to the exercise of such a power (to make a will):—

That the testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect.

Following this case in *Smee* v. *Smee*, 5 P.D. 84, Sir James Hannen in delivering judgment said:—

If the delusions could not reasonably be conceived to have had anything to do with the deceased's power of considering the claims of his relations upon him and the manner in which he should dispose of his property, then the presence of a particular delusion would not incapacitate him from making a will.

In *Jenkins* v. *Morris*, 14 C.D. 674, V.-C. Hall in delivering judgment, referring to *Waring* v. *Waring*, 6 Moo. P.C. 341, and *Smith* v. *Tebbitt*, 1 P & D. 398, said:—

I do not hesitate to say that the doctrine laid down in these cases and now relied on by the plaintiff in this case is not now law. It has been overruled in *Banks* v. *Goodfellow*, L.R. 5 Q.B. 549, which latter case has been followed by Sir James Hannen, in *Broughton* v. *Knight*, 3 P. & D. 64, and *Smee* v. *Smee*, 5 P.D. 84. (He further said): I hold it to be now settled law and that until the contrary shall have been decided by the House of Lords, it must be considered that the mere existence of a delusion is not sufficient to deprive a party of testamentary capacity.

In *Hope* v. *Campbell*, [1899] A.C. 1, where a somewhat similar question of delusions was raised, Lord Watson said:—

In so fas as this writing is concerned, there is no delusion apparent in the deed and the man who wrote it, it being his own act, unaided by anybody else, so far as I can see must be held to have been mentally capable of conceiving the purpose, of expressing it in distinct language and of foreseeing and understanding its legal consequences and effects.

In the more recent case of *Skinner* v. *Farquharson*, 32 Can. S.C.R. 58, the same doctrine was laid down. In the judgment of Mr. Justice Davies all the leading authorities bearing upon the question are fully reviewed, and *Banks* v. *Goodfellow*, L.R. 5 Q.B. 549, followed. This case is a comprehensive review of all previous decisions bearing upon the question and settles the law so far as this Court is concerned.

After a careful examination of all the evidence, and noting

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the conduct of the testator on the day that the will was executed, and looking at the rational, and it might be said wise disposition made of his property, and such as a man in possession of all his faculties would reasonably be expected to make, and applying the law as laid down in *Banks* v. *Goodfellow*, L.R. 5 Q.B. 549, and other authorities along the same line, and the Supreme Court case of *Skinner* v. *Farquharson*, 32 Can. S.C.R. 58, decided in 1902, I am of opinion that the testator when he executed his will of 23rd November, 1906, was not influenced by any delusion and understood the nature of his act and its effects, the extent of the property of which he was disposing, the various objects of his bounty and the claims of those to which he ought to give effect, and that it was his own free spontaneous act uninfluenced by any one.

The judgment of Judge Reddin, Judge of Probate, should, in my opinion, be confirmed, the will of 23rd November, 1906, admitted to probate, and this appeal dismissed with costs.

Appeal dismissed.

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VERNER v. CITY OF TORONTO.

Ontario High Court, Middleton, J. January 24, 1912.

1. HOSPITALS (§ I—6)—ESTABLISHMENT BY ONE MUNICIPALITY IN LIMITS OF ADJOINING MUNICIPALITY.

The obtaining of the consent of the municipality within which certain lands lie, to the use of said lands by another municipality for an isolation hospital required under section 104 of the Public Health Act, R.S.O. 1897, ch. 248, is not a condition precedent to the acquiring municipality's power to make the purchase.

2 MUNICIPAL CORPORATIONS (§ II F 3—192)—PURCHASE OF LAND—ATTACKING LEGALITY—STATUS.

Whether a municipal corporation with power to purchase and hold real estate for certain purposes has acquired and is holding said property for other purposes is a question that can only be determined in a proceeding at the instance of the Crown.

3. COURTS (§ I C 3—104)—COMPLETED PURCHASE OF LANDS BY MUNICIPALITY—ANNULMENT.

The Court has no jurisdiction to rescind a sale actually carried out to a municipal corporation at the suit of a ratepayer, or to compel the vendor to repay the price if the municipality had statutory power to purchase lands for the object specified, although the actual user of the lands for that object could only be carried out with the consent of another municipality which consent had not yet been obtained.

4. MUNICIPAL CORPORATIONS (§ II D—146)—RATEPAYER'S ACTION ATTACKING VALIDITY OF COMPLETED PURCHASE—REMEDY.

The ratepayers' right to prevent an expenditure of municipal funds for purposes *ultra vires* the corporation does not justify an action to rescind a completed purchase and to compel the vendor to repay the price he has received; his remedy in such case is to hold the individual councillors responsible for the loss.

ACTION by John Verner, on behalf of himself and all other ratepayers of the city of Toronto, against the corporation of

the city of Toronto and one Thompson, for a declaration that the defendant corporation were not legally empowered to purchase certain land in the township of York, alleged to have been purchased for the purpose of erecting an isolation hospital thereon, and to set aside the conveyance from the defendant Thompson to the defendant corporation, and to restrain the defendant corporation from expending any money on or taking any steps towards the purchase of the land or the erection of the hospital thereon.

W. C. Chisholm, K.C., for the plaintiff.

H. L. Drayton, K.C., for the defendant corporation.

C. A. Moss, for the defendant Thompson.

MIDDLETON, J.:—I am content to accept the statement in Dillon (Municipal Corporations, 5th ed., par. 990):—

> Whether a municipal corporation, with power to purchase and hold real estate for certain purposes, has acquired and is holding such property for other purposes, is a question which can only be determined in a proceeding at the instance of the State.

The municipality has the power to purchase and hold lands for the use of the corporation (Municipal Act, 1903, sec. 534), and has, for certain purposes, the further right to expropriate lands both within and outside the municipal limits.

Under sec. 104 of the Public Health Act, this hospital cannot be established without the consent of the township of York. This consent was not asked at the date of the purchase, and, when asked, has been refused, or, perhaps it should be said more accurately, was not given.

It is argued that, this being the object of the purchase, the consent should have been obtained before the land was purchased. The statute does not so provide. All that it aims at is the establishment and maintenance of the institution which the municipality may regard as objectionable. There can be no objection to the ownership of the land by another municipality.

The city council, fearing that the disclosure of their plans before the site had been secured might make it impossible to purchase at all, or at a reasonable price, bought before any application was made to the township. This course was prudent; but, whether prudent or not, I have no right to criticise, if it was within the power of the council, as I think it was.

The council, if they cannot obtain the consent of the township, may have to use the land for some other municipal purpose, or may, if they see fit to determine that it is not required, sell. This, it is said, is speculation in land, which is *ultra vires*. I do not think so. Speculation and the making of a profit out of the land by resale formed no part of the motive for the purchase. The purchase was made because it was deemed a good business transaction to buy the site before disclosing the municipal inten-

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tions. The municipality took the chance of obtaining the consent of the township, and took the chance, if the consent is finally refused, of selling without loss. I cannot find any jurisdiction in the Court to interfere with this. Nor should I do so unless I found some express prohibition.

I can find no trace of any right in the Court to rescind a sale, actually carried out, at the instance of a ratepayer. A ratepayer has the right to prevent the expenditure of municipal funds for purposes *ultra vires* the corporation; and, when a loss occurs by reason of the *ultra vires* transaction, he may hold the individual councillors responsible for the loss; but this does not justify an action to rescind and to compel the vendor to repay the price he has received.

This land has been purchased; the title has passed; as between the vendor and purchaser the transaction is completed. If the land was not purchased "for the use of the corporation" or "the public use of the municipality," then the Crown alone can object.

It is clear that this land was purchased for the use of the corporation. There is no room for the suggestion that any other than a municipal purpose was ever contemplated.

The purpose of the purchase was plain from the proceedings of the council—the establishment of an hospital for contagious diseases.

If in any way material, I find that there is no evidence brought home to the vendor of knowledge of the purpose of the purchase before the completion of the sale.

The action must be dismissed with costs.

Action dismissed.

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MESSERVEY v. SIMPSON et al.

Manitoba King's Bench, Robson, J. March 5, 1912.

1. PARTIES (§ II A 5—86)—PARTNERS JOINED IN SLANDER ACTION—IRREGULARITY.

As a rule there can be only one defendant in an action of slander, namely, the person who uttered the words complained of, and unless the plaintiff pleads that one defendant instructed the other to utter the slander sued on, a claim against two persons jointly, although alleged to be partners, will be struck out as embarrassing.

[See Odgers on Libel, 5th ed., p. 601, and see Annotation to this case.]

APPEAL from an order of the Referee striking out portions of the statement of claim. The action is for damages for certain alleged torts. The individual defendants are the two members of the partnership firm of Simpson and Nelles and the other defendant is a corporation, The Thiel Detective Service Company, Limited. The statement of claim alleges that for a period

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prior to 7th December, 1911, plaintiff had been employed by Simpson & Nelles as a driver, which employment ceased on said date.

The plaintiff seeks damages for false imprisonment and slander. He makes the charge against the three defendants jointly.

N. F. Hagel, K.C., for plaintiff.

H. Phillipps, for defendants.

ROBSON, J.:—The matters now particularly in question are the charges contained in paragraphs 4, 5, 6, and 7 of the statement of claim wherein it is alleged that the defendants falsely and maliciously spoke and published defamatory words concerning the plaintiff, imputing theft from defendants Simpson & Nelles. This charge is made jointly against the two members of a partnership and an incorporated company. Under the old procedure this was such a misjoinder as to have defeated the action. See Carrier v. Garrant, 23 U.C.C.P. 276. See also Odger on Libel and Slander, 5th ed., at foot of page 601.

In brief I would say that it is my view that these clauses 4, 5, 6 and 7 are embarrassing and that any defendant is entitled to have them struck out under Rule 326.* The same remark applies to the words struck out of paragraph 8.

The appeal should be dismissed with costs as in the Referee's order. Time for amendment will be extended if desired.

Appeal dismissed.

Annotation — Parties (§ II A 5—86) — Irregular joinder of defendants — Separate and alternative rights of action for repetition of slander.

Annotation

Joining defendants in slander

Odgers (in his treatise on Libel and Slander, 5th ed., at foot of page 601, referred to in *Messervey* v. *Simpson*, above reported) says: "As a rule there can be only one defendant in an action of slander, viz., the person whose lips uttered the words complained of. If, however, the plaintiff can shew that A. instructed B. to utter the slander sued on, the slander becomes a joint tort, and A. and B. can be made defendants in the same action."

Where special damage is essential to the cause of action, the plaintiff should be careful to sue only that person whose utterance of the slander actually caused him special damage. He should not sue the originator of the falsehood, if his utterance of it has produced no direct injury to the plaintiff, unless he can prove that the originator desired and intended the publication which has produced the damage. *Whitney* v. *Moignard*, 24 Q.B.D. 630, 59 L.J.Q.B. 324, 6 Times L.R. 274.

With a libel, however, the case is different. Whenever more persons than one are concerned in the same publication, the plaintiff may sue all

*Rule 326 of the Manitoba King's Bench Act, R.S.M. 1902, ch. 40, is as follows:—

326. [Striking out or Amending Scandalous or Embarrassing Matters.] The Court or a Judge may, at any stage of the proceedings, order to be struck out or amended any matter in the pleadings respectively which may be unnecessary or scandalous, or which may tend to prejudice, embarrass or delay the fair trial of the action. [Taken from 58 and 59 Vict. (Man.), ch. 6, r. 318.]

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Annotation

Joining defendants in slander

Annotation (*continued*)—**Parties (§ II A 5—86)—Irregular joinder of defendants—Separate and alternative rights of action for repetition of slander.**

or any of them in the same action. Thus, where the libel has appeared in a newspaper, he can always join as defendants in the same action the proprietor, the editor, the printer, and the publisher, or so many of them as he thinks fit. But where there are two distinct and separate publications, even of the same libel, one by A. and the other by B., separate actions must, as a rule, be brought. *Sadler* v. *Gt. W. Ry. Co.*, [1896] A.C. 450, 65 L.J.Q.B. 462, 45 W.R. 51, 74 L.T. 561; but see *Compania Sansinena, etc.* v. *Houlder*, [1910] 2 K.B. 354. The plaintiff is not now, and never was, obliged to join as a defendant every person who is liable. He may, if he prefer, sue only one or two; and the liability of the others will be no defence for those sued, and will not mitigate the damages recoverable Odgers on Libel, 5th ed., p. 397. But a *judgment* against these is a bar to a subsequent action on the same publication against anyone else who was jointly liable with them; for all persons engaged in a common wrongful act are liable jointly and severally for the consequent damages. Co. Lit. 232(*a*); 1 Wms. Saund. 291(*f*); *Sutton* v. *Clarke*, 6 Taunt. 29; Odgers, Libel and Slander, 5th ed., p. 602.

An action for slander is subject to the rule that in any action of tort there can be only one defendant unless defendants are sued as joint tort feasors. *McEvoy* v. *Wright* (1904), 3 O.W.R. 428. Where two defendants were joined in an action for slander in which a like amount of damage was claimed from each defendant, an order was made requiring plaintiff within two weeks to discontinue the action against one or the other of the defendants, and to make all necessary amendments. *Ibid.*

Causes of action for conspiracy and slander cannot be joined. *Devaney* v. *World Newspaper Co.*, 1 O.W.N. 454; nor can there be a joint action for oral slander against several defendants, though uttered at the same time. *Carrier* v. *Garrant*, 23 U.C.C.P. 276. They can only be joined in an action for conspiracy to defame. *Devaney* v. *World Newspaper Co.* (1910), 1 O.W.N. 454, 455, affirmed 1 O.W.N. 472; see also a subsequent decision in the same case 1 O.W.N. 547 and *Evans* v. *Jaffray*, 1 O.L.R. 621.

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ALEXANDER v. SIMPSON et al.

Manitoba King's Bench, Robson, J. March 5, 1912.

1. PLEADINGS (§ II L—251)—STATEMENT OF CLAIM—ALLEGATION OF CONSPIRACY.

The mere use of the words "in collusion" in a pleading claiming damages against a defendant for having "in collusion with" his co-defendant defamed the plaintiff is insufficient to support a claim for damages for conspiracy.

APPEAL from an order of the Referee in Chambers striking out certain portions of the statement of claim.

The action was for damages for false imprisonment and slander, and resembles that of *Messervey* v. *Simpson et al.* [*ante* 1 D.L.R. 532], the defendants being the same.

N. F. Hagel, K.C., for plaintiff.

H. Phillipps, for defendants.

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ROBSON, J.:—Paragraph 2 of the statement of claim alleges two causes of action for false imprisonment, one against the defendants Simpson & Nelles, the other against the three defendants. The learned Referee directed that these be struck out with leave to substitute allegations in separate paragraphs. While this may not have been necessary, I will not interfere with the discretion so exercised.

Paragraph 3 and the parts of paragraphs 4 and 5 struck out by the Referee were objectionable for the reason mentioned by me in the *Messervey Case* [*ante*, 1 D.L.R. 532], and the Referee's order thereon must stand.

The whole of paragraph 6 was struck out by the order in appeal. This paragraph alleges that the defendants Simpson & Nelles *in collusion* with the other defendants defamed the plaintiff. It occurred to me that this might be treated as an allegation of a conspiracy to defame within *Carrier* v. *Garrant*, 23 U.C.C.P. 276, but one charge made in the paragraph seems to be levelled at defendants Simpson & Nelles, and the other at defendant Simpson. The paragraph is ambiguous as to whether defendant the Thiel Detective Company is being sued or merely named as a party in collusion. The defendant company is entitled to have that cleared up. Moreover, I do not think the mere use of the words "in collusion" sufficiently indicates to the defendants that they are being charged as members of a conspiracy to defame plaintiff, if that were really the pleader's intention. I will not interfere with the Referee's order. Amendments beyond those allowed by him may be proper and that phase may be spoken to. Costs in cause to defendants Thiel Detective Co. in any event.

Appeal dismissed.

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Saskatchewan Supreme Court, Wetmore, C.J., Lamont, Newlands, Johnstone and Brown, JJ. March 9, 1912.

1. INTOXICATING LIQUORS (§ III F—83)—SALE DURING PROHIBITED HOURS—SERVING TWO PERSONS AT SAME TIME—SEPARATE SALES.

Where a bar-tender of a licensee, permitted to sell intoxicating liquors, sold, during prohibited hours, two separate orders for intoxicating liquors to two individuals both present at the same time and place each man paying for the liquor furnished him, such constitutes two separate and distinct violations of the Saskatchewan liquor license law, and the holder of the license is liable to two separate penalties. [*Apothecaries' Co.* v. *Jones*, [1893] 1 Q.B.D. 89, and *R.* v. *Scott*, 33 L.J.M.C. 15, distinguished.]

A CASE stated by the police magistrate of the city of Regina to the Supreme Court of Saskatchewan *en banc*, in respect of his acquittal of defendant for an alleged offence under a liquor license law.

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The magistrate's order was set aside and the matter remitted to him with a direction to convict.

A. Ross, for appellant, informant.

J. F. Bryant, for respondent, defendant.

The judgment of the Court was delivered by

BROWN, J.:—The respondent was charged before William Trant, Esquire, a police magistrate,

> for that he, the said Simon Leschinski, at the city of Regina, on the 2nd day of December, 1911, in his premises, being a place where liquor may be sold, to wit, the Royal Hotel, unlawfully did sell liquor to one Max M. Lenhoff during the time prohibited by the Liquor License Act for the sale of the same without any requisition for medical purposes as required by the Act being produced by the vendee or his agent.

The charge was tried and determined by Mr. Trant on December 18th, 1911. The evidence shews that on December 2nd, which was a Saturday, between the hours of seven-thirty and nine o'clock in the afternoon, Lenhoff and one Collinson went to the respondent's hotel, being a licensed premises, and that upon Collinson asking one Wilson, the bar-tender of the hotel, what chance there was of getting a drink, they were shewn by him to a room upstairs. Wilson there asked each man what he would have, and they both gave orders. Collinson ordered a bottle of whiskey, and Lenhoff a bottle of whiskey and also a bottle of beer. The one order followed the other almost immediately, and each party at the time of giving the order paid Wilson for what each respectively ordered. Wilson, upon getting the order and the money, left the room, and soon returned with Collinson's bottle of whiskey and Lenhoff's bottle of beer. Lenhoff's bottle of whiskey was subsequently delivered to him downstairs by Wilson, and the evidence shews that Wilson went into the bar and got this last bottle at eight-fifty o'clock p.m., and the respondent was seen to open the bar a few minutes before Wilson got the same; in fact, the evidence shews that the respondent was aware of all that was taking place. The bottles of beer and whiskey which were delivered in the room were opened and part of the contents drunk there by Lenhoff and Collinson.

The respondent was convicted of the sale to Collinson, but upon hearing the evidence in this case, the magistrate dismissed the charge, being of opinion that the sales to Lenhoff and Collinson constituted but one offence. At the request of the appellant the magistrate has stated a case under section 761 of the Criminal Code for the opinion of this Court.

Counsel for the respondent supports the order of the magistrate on two grounds: firstly, that the sales to the two men constituted one transaction and were in reality one sale to the two men; secondly, assuming there are two sales, the respondent is only liable to one penalty, as the two sales were made on the

same day, and the Act does not contemplate that the penalty provided by it should follow each separate sale made on the same day. The sections of the Liquor License Act, being chapter 130, R.S.S. 1909, that bear on the matter are 65, 83 and 110. By sub-section 1 of section 65 it is enacted that—

> In all places where intoxicating liquors are licensed to be sold by retail no sale or other disposal of liquors shall take place therein or on the premises thereof or out of or from the same to any person or persons whomsoever save as hereinafter provided from or after the hour of seven of the clock on Saturday night till seven of the clock on Monday morning thereafter.

This sub-section then goes on to make similar provisions as to wholesale premises, and finally provides that no liquor, whether sold or not, shall be permitted to be drunk on the premises during prohibited hours. By sub-section 2 of section 65 the sale of liquors is prohibited on certain other days of the year. By sub-section 4 of section 65 it is provided that no bar-room shall be kept open at any time during prohibited hours. Sections 83 and 110 are respectively as follows:—

> 83. Violation of any of the provisions of sub-sections (1), (2) and (4) of section 65 hereof shall be an offence for which the person violating shall be liable on summary conviction:—
>
> 1. For the first offence to a penalty of not less than $50 nor more than $100 and in default of payment forthwith after conviction to not less than two months' nor more than four months' imprisonment:
>
> 2. For the second or any subsequent offence to a penalty of not less than $100 nor more than $200 with absolute forfeiture of license and in default of payment forthwith after conviction to not less than four months' nor more than six months' imprisonment with absolute forfeiture of license or to imprisonment for not less than one month nor more than six months with absolute forfeiture of license or to both fine and imprisonment with absolute forfeiture of license.
>
> 110. Convictions for several offences may be made under this Act, although such offences may have been committed on the same day; but the increased penalty or punishment hereinbefore imposed shall only be incurred or awarded in the case of offences committed on different days and after information laid for a first offence.

With reference to the first contention, the evidence shews that each man gave his separate order and paid for same. It was done at practically the same time, nevertheless, the orders were distinct and separate, and had delivery taken place after payment, each man could be charged only (assuming that a charge could be made at all) with what he had respectively ordered. No distinction can be made in this respect between the sale of liquors and that of any other commodity, as the orders were separate, and delivery made pursuant to the orders, and each man paid for what he ordered, and as there was nothing to shew that the two men were to be jointly responsible for the two

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orders, I am of opinion that the sales to Lenhoff and Collinson were separate and distinct and constituted two separate sales.

As to the second contention, counsel in support thereof cited the cases of *Crepps* v. *Durden*, 1 Cowper 640, and Smith's Ldg. Cases (11th ed.), 651; *Apothecaries' Co.* v. *Jones*, [1893] 1 Q.B.D. 89; *Rex* v. *Scott*, 33 L.J.M.C. 15; and *The King* v. *Swallow*, 8 T.R. 284. But an examination of these cases shews that the enactments under which they are decided are directed against an habitual or continuous course of conduct and not against an individual act, and it is on that ground that these decisions are based. The case of *Crepps* v. *Durden*, 1 Cowper 640, is one brought for violation of the Sunday Trading Act, 29 Car. II. ch. 7; and it was there held that a baker who sold a number of hot loaves on the same Sunday could not be convicted of more than one offence. The wording of the Act is as follows:

> Whoever shall do or exercise any wordly labour, business or work of their ordinary calling on the Lord's Day, etc.

Lord Mansfield, in giving judgment, says:—

> On the construction of the Act of Parliament, the offence is, "exercising his ordinary trade upon the Lord's Day;" and that, without any fractions of a day, hours, or minutes. It is but one entire offence, whether longer or shorter in point of duration; so, whether it consist of one or a number of particular acts. The penalty incurred by this offence is five shillings. There is no idea conveyed by the act itself, that, if a tailor sews on the Lord's Day, every stitch he takes is a separate offence; or, if a shoemaker or carpenter work for different customers at different times on the same Sunday, that those are so many separate and distinct offences. There can be but one entire offence on one and the same day; and this is a much stronger case than that which has been alluded to, of killing more hares than one on the same day; killing a single hare is an offence; but the killing ten more on the same day will not multiply the offence, or the penalty imposed by the statute for killing one. Here, repeated offences are not the object which the legislature had in view in making the statute; but singly to punish a man for exercising his ordinary trade and calling on a Sunday.

The case of *Apothecaries' Company* v. *Jones*, [1893] 1 Q.B.D. 89, is of a similar character to the last. It was brought under the Apothecaries Act, 55 Geo. III. ch. 194, by which it is enacted that "if any person shall act or practise as an apothecary in any part of England or Wales without having obtained such certificate as aforesaid, every person so offending shall, for every such offence, forfeit and pay the sum of £20." The defendant had prescribed for and supplied medicines to three different patients on three separate occasions on the same day. Baron Pollock, in giving judgment, says:—

> The question I have to determine is, whether under these words the advising and prescribing for these three persons consecutively under the circumstances constitutes three offences or one offence. The words

of the Act appear to me to point rather to an habitual or, at all events, a continued course of conduct than to an isolated act as constituting the offence.

And further on, referring to the case of *Crepps* v. *Durden*, 1 Cowper 640, he says:—

It appears to me, therefore, to be clear that however the subject-matter and character of the offences created by the two statutes may differ, they are both directed against an habitual or continuous course of conduct and not against an individual act.

The case of *R.* v. *Scott*, 33 L.J.M.C. 15, was decided on the special wording of the form of conviction which is given in section 8 of the statute, 19 Geo. II. ch. 21; and the case of *The King* v. *Swallow*, 8 T.R. 284, simply decided the point that a defendant could be convicted of several offences in the same conviction, and does not help the respondent in this case. On the other hand, the case of *Brooke* v. *Milliken*, 3 T.R. 509, was an action brought under the statute 12 Geo. II. ch. 36, which enacts as follows:—

It shall not be lawful to import or bring into this kingdom for sale any book, first composed or written and printed and published in this kingdom, and reprinted in any other place whatsoever; and if any person knowing the same to be so reprinted and imported, shall sell, publish, or expose to sale, any such book or books, he shall forfeit the said book or books, and the same shall be forthwith damasked, and such offender shall forfeit £5 and double the value of every book which he shall so sell, etc., together with costs, etc.

Two distinct sales on the same day were proved against the defendant, and it was determined by Lord Kenyon that it was the act of sale that was the offence, because he held that "two penalties may be recovered, because they were two distinct acts of sale." Again, in the case of *In re Hartley et al.*, 31 L.J.M.C. 232, it was held by Mellor, J., under the Public Health Act, 1848, that "each exposure of a piece of bad meat was a separate offence." I have been unable to see the statute in question in this case, and therefore am not aware of its exact wording. In every case where several acts are charged to have been committed it must depend upon the construction of the statute to which they refer as to whether distinct penalties are incurred and ought to be awarded for each act, or whether the several acts form but one aggregate offence and require but one penalty. Paley on Convictions, 8th ed., 283. Now, looking at the legislation bearing on this case, it in my judgment shews an intention that every sale made contrary to the provisions of section 65 should be regarded as a separate offence and visited by the penalty prescribed in section 83. The wording is that "no sale shall take place," and not that "no one shall sell"—indicating that the offence is not in carrying on the usual business of the licensee, but rather that each sale shall constitute an offence in

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itself. Again, we find in sub-section 4 of this same section provision for keeping the bar closed, and by virtue of sub-sections 3 and 4 no one is allowed in the bar during the prohibited hours except the licensee, a member of his family, or his employee, and then only during specified hours and behind locked doors and for the sole purposes of checking accounts and cleaning up. These latter sub-sections indicate an intention to prohibit the licensee carrying on his usual business of selling liquors, in contrast to the first sub-section, which indicates an intention to make each and every sale of liquor an offence, whether made in the bar or elsewhere on the licensed premises. And section 83, which fixes the penalties, notes the distinction between sub-sections 1 and 4 of section 65, and makes the violation of the provisions of each a separate offence, to be visited with a separate penalty. Again, section 110 tends to further confirm this view, because it provides that convictions may be made for several offences *though committed on the same day;* and at the same time it protects the licensee from the increased penalty in such cases.

I am, therefore, of opinion that the magistrate was wrong in dismissing this charge, and that his order should be set aside and the matter remitted to him with the opinion of this Court that the dismissal of the complaint was erroneous and that the defendant ought to have been convicted, and that the magistrate should be directed to convict the defendant of the offence charged in such amount as he may deem proper, and with or without costs, as he may see fit. This appellant should have his costs of appeal.

Remitted with direction to convict.

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Jan. 17.

Re MILNE AND TOWNSHIP OF THOROLD.

Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A. January 17, 1912.

1. EVIDENCE (§ II D—127)—EXEMPTIONS—SAVING CLAUSE—ONUS.

When there has been a deviation from a statutory requirement the onus lies upon those supporting the deviation to shew that the effect of same comes within the terms of a statutory saving clause intended to validate the result of the voting, notwithstanding the occurrence of certain errors and irregularities in procedure.

[*Re Giles and Town of Almonte* (1910), 21 O.L.R. 362, distinguished.]

2. INTOXICATING LIQUORS (§ I C—33)—LOCAL OPTION—FORM OF BALLOT.

Where a local option by-law is voted upon at the same time as other by-laws, the fact that the ballot used bore the words "For the By-law" and "Against the By-law" respectively instead of the words "For Local Option" and "Against Local Option," respectively in respect of which the voter was to signify his vote is a departure from the statutory form which is not cured by the provisions of section 204 of the Consolidated Municipal Act, Ont., 1903, and by sec. 7(35) of the Interpretation Act, 1907, which provide that deviations not affecting the substance or calculated to mislead or which appear not to have affected the result, are not to be grounds for annulling the vote.

[R.S.O. 1897, ch. 245, sec. 141, as amended by 8 Edw. VII. ch. 54, sec. 10, considered.]

APPEAL from the order of the Divisional Court affirming the order of Sutherland, J.

David Milne was the applicant for an order that by-law No. 13, passed on the 4th February, 1911, by the Municipal Council of the Township of Thorold, and intituled, "A By-law to Prohibit the Sale by Retail of Spirituous, Fermented, or other Manufactured Liquors in the Municipality of the Township of Thorold," be quashed.

April 6, 1911. The motion was heard by SUTHERLAND, J., IN the Weekly Court at Toronto.

J. Haverson, K.C., for the applicant.

H. S. White and *J. F. Gross*, for the respondents.

The judgment appealed from was as follows:—

April 10, 1911. SUTHERLAND, J.:—The motion was made upon the following, among other, grounds:—

1. That the ballots used for voting on the said by-law were not in accordance with the form prescribed by sub-sec. 8 of sec. 141 of the Liquor License Act, in that, instead of being in the form prescribed by the said Act, requiring the words "For Local Option" and "Against Local Option," there were used the words "For the By-law" and "Against the By-law."

2. That, by reason of the use of the said ballot, many electors were misled, and the vote as given does not truly represent the vote of the electorate.

The vote upon the said by-law was taken on the 2nd January, 1911, when 330 votes were cast for the by-law and 209 against it, with the result that the by-law was carried by a small but substantial majority beyond the three-fifths majority required.

The form of ballot used has printed on the face of it, in rather small type, the following words: "January 2nd, 1911, voting on by-law to prohibit the sale of intoxicating liquors submitted by the Council of the Township of Thorold," in addition to the words "For the By-law" and "Against the By-law."

It appears that at the election in question, in addition to the regular municipal ballot for the purpose of electing members to the council, there was a third ballot similar in size to the ballot which I shall term the "Local Option Ballot," already mentioned, but different in colour, and having printed upon it the following, "January 2nd, 1911, voting on by-law to grant certain rights to the Niagara Falls, Welland and Dunnville Electric Railway, submitted by the Council of the Township of Thorold," and also the words "For the By-law" and "Against the By-law."

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Sutherland, J.

It is contended on behalf of the applicant, that, in consequence of the similarity of these ballot papers, and in consequence of the fact that the local option ballot was contrary to the statutory form, in that it did not have the words "For Local Option" and "Against Local Option," but the substituted words "For the By-law" and "Against the By-law," the electors were confused and misled, no proper vote can be said to have been taken, and the by-law should be set aside.

Considerable evidence was taken intended to shew that the electors had been made familiar, by canvassers on both sides, with the proper form of ballot to be used at the election; that on the day of the election attention was called to the ballot not being in proper form; and that in individual cases electors had actually been confused, spoiling their ballots, and being compelled to ask for a second ballot before succeeding in properly recording their votes.

Evidence was also adduced to the effect that one elector had actually been misled, had marked his ballot wrongly, and only learned later what he had done, by discussing the form of the ballot with other persons.

The evidence is confined to some half a dozen voters alleged to have been confused; and the suggestion in several of these cases is, that its form led them to think that they were voting "For Public Houses," that is to say, for the continuation of the sale of liquor in public houses, rather than for a by-law to prohibit such sale. The evidence as to this does not impress me as at all satisfactory. It is, of course, a pity that in this case, as in so many cases in connection with the submission of by-laws of this character to the people, plain statutory requirements should not be observed. It is very difficult, however, to see how any intelligent person could be confused and misled, as the witnesses in question state they were.

In the case of *Re Sinclair and Town of Owen Sound* (1906), 12 O.L.R. 488, in which "it was objected that the voters were confused or misled by the colour of the ballot papers being similar to that used for voting upon another by-law at the same time and place. One was scarlet, the other pink. Each ballot had printed on its face a statement of its purport and effect:—*Held*, that no person of ordinary intelligence, exercising ordinary care, could mistake one for the other; and this objection was . . . overruled." In the present case each ballot "had printed on its face a statement of its purport and effect."

And in the case of *Re Giles and Town of Almonte* (1910), 21 O.L.R. 362, it was held, after the passing of 8 Edw. VII. ch. 54, sec. 10, by which it was provided that sec. 141 of the Liquor License Act is amended by adding thereto the following sub-section: "8. The form of the ballot paper to be used for voting on a by-law under this section or any sub-section

thereof shall be as follows:—'For Local Option'—'Against Local Option;'" that, where the ballot paper used was not that prescribed by the said amendment, but "For the By-law" and "Against the By-law," such defect in form was cured by the Interpretation Act, 7 Edw. VII. ch. 2, sec. 7 (35), and that the mistake was not such as was calculated to mislead the voters. It was held in that case by Meredith, C.J.C.P., 1 O. W.N. 698, in the first instance, "that the expressed wish of the voters ought not to be defeated by the clerk's mistake in departing from the words of the statutory form, where it is not shewn that the departure confused any one and so prevented the will of the voters from being manifested; that the circumstances brought the case within the gauge of the Interpretation Act, 7 Edw. VII. ch. 2, sec. 7 (35)." And in appeal from that decision, as reported in 21 O.L.R. and already cited, Britton, J., says, at p. 364: "Then this mistake was not in this case calculated to mislead. It was not even plausibly suggested how any voter could in voting upon this by-law be misled by the mistake in the words upon the ballot." And further: "No one has said that he or any one else was misled." And Clute, J., at p. 365, says: "Although the words used were 'For the By-law,' instead of 'For Local Option,' they were, in my view, the same in substance. Nor do I think the change was calculated to mislead any voter."

The conduct of the election in question is not attacked in any other material respect. It is, however, contended by counsel for the applicant that he has distinguished the present case from those already adverted to in this judgment, by shewing that several persons were actually misled, and that the effect of this is to supply something which, had it been present in those cases, would have led to a different result.

It seems to me, however, that, in view of the decision of an appellate Court in *Re Giles and Town of Almonte*, 21 O.L.R. 362, as to a ballot in the form in question, it would not be proper for me, even under the circumstances disclosed upon this application, to set aside the by-law in question. The will of the electors should be given effect to, if possible. I cannot see, upon the evidence before me, that the result of the election has been affected by the alleged confusion caused to the electors by the form of the ballot.

With some hesitation, I dismiss the application; but I think, under the circumstances, it should be without costs.

The applicant, David Milne, appealed from the order of SUTHERLAND, J., to a Divisional Court.

May 10, 1911. The appeal was argued by the same counsel before a Court composed of BOYD, C., LATCHFORD and MIDDLETON, JJ., and was dismissed with costs.

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Argument

The applicant then, by special leave, appealed to the Court of Appeal.

J. Haverson, K.C., for the appellant. The learned Judge before whom the motion to quash was made, and the Divisional Court which affirmed his judgment, thought they were bound by the decision in *Re Giles and Town of Almonte*, 21 O.L.R. 362, in which it was held that a similar defect in the form of ballot prescribed by the Liquor License Act, sec. 141, as amended by 8 Edw. VII. ch. 54, sec. 10, was cured by the Interpretation Act, 7 Edw. VII. ch. 2, sec. 7 (35), and that the mistake was not such as was calculated to mislead the voters. The judgment of Mabee, J., in *Re Sinclair and Town of Owen Sound*, 12 O.L.R. 488, at pp. 493, 494, shews the confusion that is sure to arise from mistakes of this nature; and, though his judgment was reversed in a higher Court, the final decision was given before the passing of the amending Act of 1908, which, it can scarcely be doubted, was passed for the express purpose of preventing voters being misled as they have been in connection with this by-law. It is submitted that the deviation from the prescribed form of ballot is a matter "affecting the substance," within the meaning of the Interpretation Act, and is not cured by the application of that Act. Nor is the illegality cured by sec. 204 of the Municipal Act, as the voting cannot be said to have been conducted in accordance with the principles of the Act, and the onus of proving that the result of the voting was not affected lies on the respondents, which onus has not been satisfied: *Re Hickey and Town of Orillia* (1908), 17 O.L.R. 317.

G. F. Shepley, K.C., and *H. S. White*, for the respondents, argued that the question for decision was covered by the judgment in the *Giles* case, and the appeal should be dismissed for the reasons given by the learned Judges of the Divisional Court in that case. The appellant has attempted to distinguish this case on the ground that the evidence here shews that certain voters were actually misled; but this evidence is subject to objection; and, moreover, the question whether or not the changed form of ballot was calculated to mislead is not one for evidence, but is a question of law to be decided by the Court on looking at the two forms of ballot papers: *Payton & Co.* v. *Snelling Lampard & Co.*, [1901] A.C. 308, 311. It was the duty of the voter to read his ballot paper before marking it: *Re Sinclair and Town of Owen Sound*, *per* Mulock, C.J., 12 O.L.R. at p. 504. Reference was also made to *Re Lincoln Election* (1878), 4 A.R. 206, at p. 210.

Haverson, in reply.

January 17, 1912. MOSS, C.J.O.:—The applicant, David Milne, moved before Sutherland, J., to quash by-law No. 13

of the Township of Thorold—a by-law commonly known as a local option by-law—to prohibit the sale of liquor in the municipality. The motion was dismissed, and upon appeal to a Divisional Court the order of dismissal was affirmed. And this is an appeal from that decision.

The ground on which the by-law was attacked was, that the ballot papers used at the voting did not comply with the provisions of sec. 10 of the Act 8 Edw. VII. ch. 54—amending sec. 141 of R.S.O. 1897, ch. 245—whereby it is enacted that the ballot paper to be used for voting on a local option by-law shall have printed upon it the words "For Local Option" and "Against Local Option."

Upon the argument of the appeal, counsel for the respondents virtually conceded—and properly so—that the form of ballot used for voting in this instance was not framed in compliance with the provisions of the amending Act, and that the by-law could only be supported, if at all, under sec. 204 of the Consolidated Municipal Act, 1903, and sec. 7 (35) of the Interpretation Act, 1907. But he contended, and the Courts below appear to have given effect to the argument, that it had not been shewn that the deviation from the prescribed form did affect the substance, or was calculated to mislead, or that the mistake in the use of the forms did affect the result of the election.

Sutherland, J., in the first instance, and the Divisional Court on the appeal, appear to have treated this case as governed by the decision of a Divisional Court in the case of *Re Giles and Town of Almonte*, 21 O.L.R. 362, affirming an order made by Meredith, C.J., 1 O.W.N. 698.

In that case the Courts seemed to consider that the onus was on the applicant to shew by evidence that the mistake did not mislead or affect the result of the election. But, where it is shewn that there was a mistake made in the use of the form or that there was a deviation from the form prescribed, the rule, upon general principles, should be, that it lies upon the party seeking to support what was done to make it appear that the departure was of such a nature as not to affect the substance of the voting or to be calculated to mislead and did not affect the result.

It happened that in the *Giles* case there was no evidence one way or the other, and so the Courts were apparently able to see their way to upholding the by-law.

But the circumstances which appear in this case are such as to render it entirely different from any of the decisions upon which reliance is placed for supporting this by-law.

The applicant, accepting the view that the onus was upon him, adduced evidence from which it is apparent that voters were misled and persons who intended to vote were unable intelligently and properly to mark their ballot papers.

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MOSS, C.J.O.

The evidence shews that the form of ballot paper used did lead to confusion and create difficulty in the minds of a number of voters as to the proper manner of recording their votes.

The Legislature has deemed it proper specially to provide that in the case of voting upon local option by-laws the ballot paper shall be in a form calculated to distinguish it from that to be used in voting upon other by-laws. No doubt, the object of this provision was to prevent just such confusion and difficulty as has been shewn to have occurred in this case.

In the face of the very positive provision of the statute and in view of the evidence, it is beyond question that the mistake in adopting such a widely different form to that prescribed was a substantial departure from the directions of the Act and was calculated to mislead, and did actually mislead.

The appeal should be allowed and the by-law quashed with costs throughout.

MEREDITH, J.A.:—It is difficult to imagine a more careless mistake, of this character, than the departure, from the plainly prescribed form of ballot, which was made in this case; it was quite inexcusable, as well as being not in accordance with the law.

But it is contended that it had no effect in substance, and that it was not calculated to mislead, and also that it did not affect the result of the voting: facts which the respondents must establish, to an extent sufficient to sustain the by-law; not things which must be negatived by the appellant.

Expressing my own views of these matters of fact, I cannot doubt that the mistake was calculated to affect, and did affect, "the substance" and was "calculated to mislead" and did mislead: how could anything else, reasonably, be thought? "For Local Option" and "Against Local Option" are not at all like "For the By-law" and "Against the By-law," and the difference is the much more apt to mislead when, at the time of voting for or against local option, the voters are called upon to vote for or against some other by-law in regard to which it is proper to mark the ballots "For the By-law" and "Against the By-law."

The printing in small type, at one end of the form of ballot in question, gives information which, if read, would make it plain, to him who can read and understood plain words, that it related to the prohibition of the sale of intoxicating liquors, but by no means as plainly that, "For the By-law" meant for the prohibition, and not, for the liquors; but how many voters would take the pains to read these words, even if they observed them; and how many could read them without their "glasses," in the crude, and frequently ill-lighted, compartments of polling booths?

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Meredith, J.A.

But, if not entitled to give evidence myself, and to determine this case upon such evidence, that which I have expressed as my view of the facts is abundantly proved by competent witnesses, and there is no testimony to the contrary. This evidence puts it beyond any reasonable doubt that the mistake in the form of the ballot did affect the substance, and was calculated to mislead, as well as that it may have affected, and probably did affect, the result: as well might be the case in all three respects.

When one voter seeks to thrust his opinions down the throat of another voter, whether it be for "local option" or for the repeal of "local option," he cannot reasonably find fault if the Courts require him to perform the operation only in the manner in which the law permits it to be done.

I would allow the appeal and quash the by-law.

GARROW, MACLAREN, and MAGEE, JJ.A., concurred.

Appeal allowed.

SMITH v. ERNST.

MAN.

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Feb. 26.

Manitoba King's Bench, Robson, J. February 26, 1912.

1. WRIT AND PROCESS (§ II A—16)—NON-RESIDENT—SERVICE EX JURIS—ORIGINAL CONTRACTING PARTY.

In an action for specific performance of an agreement for purchase of land the original purchaser is properly joined as a party, although he is living outside of Canada and has transferred all his interest in the contract and in the land to his co-defendant resident within the jurisdiction, and he may be served outside the jurisdiction with a statement of claim in such an action under the provisions of the Manitoba King's Bench, Rule 201, which authorizes service outside of the jurisdiction whenever any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction.

AN appeal from the Referee in Chambers refusing to set aside service of the statement of claim on defendant Ernst.

The appeal was dismissed with costs.

W. H. Trueman, for plaintiff.

F. J. Sutton, for defendant.

ROBSON, J.:—Appeal from an order of the Referee in Chambers refusing to set aside service of statement of claim on defendant Ernst.

The action is for specific performance of an agreement by defendant Ernst to sell to plaintiff certain lands in Ontario. The agreement was evidently made in Winnipeg at a time when defendant Ernst resided there. The purchase money is made payable at Winnipeg. Defendant Ernst is a citizen of, and now resides in, the United States of America. The statement of claim was served on him in the city of Saint Paul. The other defendants reside in Winnipeg and have appeared in this action.

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The statement of claim contains an allegation that Ernst assigned all his title to the lands and in plaintiff's agreement to Just or the defendant the Canadian German Realty Co., Limited. Defendant Just admits a conveyance to him by Ernst and an assignment of the moneys payable by plaintiff to Ernst. So there is no question of notice to Just of plaintiff's rights.

In his affidavit filed in support of this application Ernst says:

> 8. That I have at the present time no interest whatever in the said lands, the same having been conveyed by me to the defendant Just in or about the month of May, A.D. 1908.

Defendant Just is, upon these facts, *primâ facie* liable to plaintiff, at all events to the extent of the estate which he received, to carry out the agreement. The action is, therefore, properly brought against him. Ernst, being the original contractor with plaintiff, is certainly a proper party to the action.

Rule 201 says a statement of claim may be served out of the jurisdiction whenever—

> (*g*) Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction.

The English authorities mentioned in the Annual Practice, 1912, page 95, would support this service *ex juris*.

I think the learned Referee was right, and dismiss the appeal with costs.

Appeal dismissed.

MAN.

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Mar. 6.

THE KING v. JOHNSON.

Manitoba King's Bench. Motion before Prendergast, J. March 6, 1912.

1. HABEAS CORPUS (§ I B—8)—COMMON LAW AND STATUTORY POWERS—COMMITMENT ON SUMMARY CONVICTION.

As regards summary convictions the jurisdiction to review commitments thereunder on *habeas corpus* is not limited to the statutory powers founded on Imperial statute 31 Car. II. ch. 2, and the writ may be supported also upon the jurisdiction at common law.

[*R.* v. *McEwen*, 13 Can. Cr. Cas. 346, 17 Man. R. 477, distinguished.]

2. HABEAS CORPUS (§ I A—4)—CERTIORARI IN AID—REGULARITY OF SUMMARY CONVICTION BY MAGISTRATE.

The regularity of a summary conviction for a vagrancy offence (Cr. Code 1906, sec. 238) is properly enquired into upon *habeas corpus* when the proceedings before the magistrate are brought up upon a writ of certiorari in aid of the *habeas corpus* writ.

[*The King* v. *Pepper*, 15 Can. Cr. Cas. 314 and *The King* v. *Leschinski*, 17 Can. Cr. Cas. 199, specially referred to.]

3. SUMMARY CONVICTIONS (§ III—30)—DEPOSITIONS IN SHORTHAND BY UNSWORN STENOGRAPHER—CR. CODE (1906), SEC. 683.

The omission to swear the stenographer appointed to take down the evidence at the hearing of a prosecution under the summary conviction clauses of the Criminal Code (1906), as required by Code sec. 683, is a matter of jurisdiction and not a mere defect of form, and the depositions taken by the unsworn stenographer are invalid.

[*The King* v. *L'Heureux*, 14 Can. Cr. Cas. 100, followed.]

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4. DEPOSITIONS (§ III—14)—SUMMARY PROCEEDINGS—UNSWORN STENOGRAPHER—CR. CODE 683.

It is a good ground for quashing a summary conviction that the stenographer who took down the depositions was not sworn as required by Code sec. 683.

[*The King* v. *L'Heureux*, 14 Can. Cr. Cas. 100, followed.]

APPLICATION on behalf of the prisoner Dora Johnson on return of summons for *habeas corpus* and *certiorari* in aid following a summary conviction under the vagrancy clauses (Cr. Code (1906), sec. 238(*i*), upon which the whole matter was presented by agreement as if the writs had issued and been returned.

R. B. Graham, for Attorney-General.

P. E. Hagel, for prisoner.

PRENDERGAST, J.:—I dismiss the preliminary objection to the application, based on 31 Car. II., ch. 2, sec. 2.

Rex v. *McEwen*, 13 Can. Cr. Cas. 346, 17 Man. R. 477, deals only with convictions by a police magistrate exercising the extended jurisdiction to try indictable offences summarily and not with summary convictions. It has been the constant practice of this Court to deal with such matters as this one on application for *habeas corpus*, as in *The King* v. *Pepper*, 15 Can. Cr. Cas. p. 314, and in *Rex* v. *Barnes*, 18 W.L.R. p. 631. See also *The King* v. *Leschiniski*, 17 Can. Cr. Cas. p. 199, and the comment therein on *The Queen* v. *St. Clair*, 3 Can. Cr. Cas. p. 551, as to the original jurisdiction of the Court of King's Bench in England and of this Court.

On the first ground urged for the applicant, I hold that the information and conviction disclose a criminal offence under section 238(*i*) of the Code. [Cr. Code of Canada, 1906.]

As to the second objection that the stenographer was not sworn as required by sec. 683, I uphold the same; and, adopting the views of Craig, J., in *The King* v. *L'Heureux*, 14 Can. Cr. Cas. p. 100, I hold this to be fatal. There are then no valid depositions, there is no valid evidence to support the conviction, and this, of course, is not a mere matter of form or procedure, but one of jurisdiction.

The conviction will be quashed and the prisoner discharged from custody.

Prisoner discharged.

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Mar. 8.

EDMONDS v. EDMONDS.

British Columbia Supreme Court. Trial before Gregory, J. March 8, 1912.

1. DIVORCE AND SEPARATION (§ III A—15)—ACTS OF CRUELTY.

The cruelty charged in a suit for divorce in British Columbia must be such as would cause danger to life, limb, or health, or a reasonable apprehension of it.

[*Russell* v. *Russell*, [1895] P. 315, and *Tomkins* v. *Tomkins* (1858), 1 Sw. & Tr. 168, followed.]

2. DIVORCE AND SEPARATION (§ II—9)—PARTICULARS—ACTS OF CRUELTY.

Acts of cruelty alleged in support of a petition for divorce should be specifically set out in the petition so that the respondent may know what charges he has to meet.

[*Suggate* v. *Suggate*, 28 L.J.M.C. 7; *Timms* v. *Timms*, 15 B.C.R. 39, referred to.]

3. DIVORCE AND SEPARATION (§ III E—38)—ADMISSIONS OF ADULTERY—CORROBORATION OF FACT.

In a suit for divorce on the ground of adultery, corroboration of the fact will be required in addition to proof of an admission of adultery made by the defendant unless the admission is entirely free from suspicion.

HEARING of petition for divorce.

H. A. Maclean, K.C., for petitioner.

No one for the respondent.

GREGORY, J.:—This is a petition for divorce brought by the wife against her husband on the ground of cruelty and adultery. It does not appear to me that either charge has been satisfactorily proved, nor that the allegation of cruelty has been properly made in the petition.

The respondent is entitled to know the charges that he is expected to meet. The cruelty charged should be such as would cause danger to life, limb, or health, bodily or mental, or a reasonable apprehension of it: *Russell* v. *Russell*, [1895], P. 315; *Tomkins* v. *Tomkins* (1858), 1 Sw. & Tr. 168; and the acts alleging such cruelty should be specifically set out: *Suggate* v. *Suggate* (1858), 28 L.J.M.C. 7. See also *Timms* v. *Timms*, 15 B.C.R. 39.

Apart from the allegations in the petition, the evidence offered in support is exceedingly general and vague. As to the question of adultery, it is the practice of Courts to require corroboration of an admission by the guilty party unless the admission is entirely free from suspicion.

In *Robinson* v. *Robinson and Lane* (1858), 1 Sw. & Tr., at p. 393, Cockburn, C.J., says:—

> The admission . . . unsupported by corroborative proof, should be received with the utmost circumspection and caution, not only is the danger of collusion to be guarded against, but other sinister motives which might lead to the making of such admissions, if, though

unsupported, they could effect their purpose, are sufficient to render it the duty of the Court to proceed with the utmost caution in giving effect to statements of this kind.

These remarks of Cockburn, C.J., are referred to in *Williams* v. *Williams and Padfield* (1865), L.R. 1 P. and D. 29.

The case of *Maxwell's Divorce Bill* (1911), W.N. 220, referred to by Mr. Maclean, is meagerly reported, but the letter accepted by the House of Lords as evidence of adultery was evidently more definite and explicit than the one here, and it is quite consistent with the report of that case that there was also some evidence of corroboration.

The evidence of adultery relied on by the petitioner is a letter from the respondent and the petitioner's oath that one day on her husband's return from town (presumably after an absence of less than one day) she "accused him of having been away with other women, and he said yes he had, and he did not see any reason why he should not. He said . . . it is quite allowable for a man to do that sort of thing."

This is a very equivocal statement, and may mean many discreditable things short of an admission of adultery, and I cannot accept it in any way as an admission of adultery. It is suspicious, but suspicion is not sufficient, and I have no right, in the absence of other circumstances, to allow that suspicion to control my mind while interpreting the language actually used.

The letter goes further, it says: "No, I will not live with you any longer, you have found out I have been unfaithful and prefer being with Flo."

In the statement of the petitioner and the quotation from the letter I have, I believe, set out every word of evidence offered to support the charge of adultery. To accept it as sufficient would, I think, be to entirely disregard the language of Chief Justice Cockburn that an uncorroborated admission should be received with the utmost circumspection and caution. The suggestion of counsel is that the respondent was openly living with another woman, but the petitioner gives no evidence of it; she does not even pledge her own oath that there is such a woman as "Flo" referred to in the letter. The letter says the petitioner has found out respondent's unfaithfulness, but she herself tells the Court nothing of this. The community in which the parties lived is small, and if the fact were so, there should be no difficulty in shewing that the respondent had at least been seen with Flo or other women, or some other circumstance corroborative of the admissions.

A divorce will not be granted upon an admission of adultery unless the Court is satisfied that the admission is true. It is not inconceivable that a man might be willing to admit (not under the sanctity of an oath) that he had been guilty of such

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an act if he thought he would thereby enable his wife to obtain a divorce, while he would decline to commit the act for the same purpose.

The letter was written just before the presentation of the petition. It is apparently an answer to a previous verbal or written communication which has not been disclosed to the Court.

The petition will be refused, but in view of the fact that it may be possible to furnish some evidence of corroboration, it will be without prejudice to the right of the petitioner to present a fresh petition.

I wish again to draw attention to the tendency to loose practice in divorce matters. (See *Timms* v. *Timms*, 15 B.C.R. 39, above referred to.)

I heard the evidence in this case after reserving the right to examine into the regularity of the proceedings if the evidence proved sufficient, etc., On looking at the papers on fyle, I find that the affidavit of non-collusion and verifying the statements in the petition does not identify the affiant with the petitioner. That the affidavit of service of the citation is made by the deputy sheriff and sworn before the sheriff. That the citation was not as required by Rule 13 filed in the registry forthwith after service; in fact, it was not filed until the day of the making of the order for trial. Until the citation is filed the Court is not properly seized of the matter, and no application for trial or otherwise can be made until then. Rule 21 has not been complied with inasmuch as there has been no order obtained determining whether there should be a trial with or without a jury, or whether the trial should be by oral evidence or upon affidavit.

In undefended divorce proceedings, it is the duty of the Judge to carefully scrutinize every step and see that every rule of practice and trial is strictly complied with: it is the duty of counsel to give the Court every assistance, and prepare their cases even more carefully than when they know they are to be defended.

Petition refused with leave to renew.

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Feb. 10.

TORONTO GENERAL TRUSTS CORPORATION (plaintiffs) v. **MUNICIPAL CONSTRUCTION COMPANY** (defendants).

Saskatchewan Supreme Court, Newlands J., in Chambers.
February 10, 1912.

DISCOVERY (§ IV—20)—EX-EMPLOYEE OF COMPANY — FOREMAN — SASK. RULES (1911), 278, 279.

Under the Saskatchewan Rules 278 and 279 (S.R. 1911), a person who is or has been an officer of a company may be examined for discovery in an action against that company but a former foreman or employee not being an officer cannot be examined after the employment has terminated.

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TORONTO GENERAL TRUSTS CORPORATION v. MUNICIPAL CONSTRUCTION COMPANY.

Newlands, J.

THIS was an application to examine for discovery one Wm. Ross, who on the date of the accident for which this action was brought was the foreman for the defendant company on the work where said accident occurred.

T. S. McMorran, for plaintiffs.

C. W. Hoffman, for defendants.

NEWLANDS, J.:—Ross left the employment of the defendant company in the month of February, 1911, and is not now in their employ. Rule 278* authorises the examination for discovery of any one who is or has been one of the officers of the company and Rule 279† authorises the examination of any officer or servant of the company. In the case of an officer of the company he may be examined if he is or has been such officer, but in the case of a servant he must be at the time of the examination in the company's employment.

The person in question, Ross, was employed as a foreman in charge of some work the defendant company was doing; his authority would necessarily be limited to the men over whom he would be placed and he is in no sense an officer of the company. In fact, he has nothing to do with the company itself, only with a piece of work they are doing. Not being an officer of the company he can only be examined for discovery if he is in their employ at the time of the examination. Ross not being in the company's employment cannot therefore be examined under Rule 279.† Costs in any event to defendants.

Motion refused.

*Saskatchewan Supreme Court Rules numbers 278 and 279 (Consol. Rules of 1911) are as follows:—

278. Any party to an action or issue, whether plaintiff or defendant, or in the case of a body corporate, any one who is or has been one of the officers of such body corporate may, without order, be orally examined before the trial touching the matters in question in any action by any party adverse in point of interest, and may be compelled to attend and testify in the same manner, upon the same terms, and subject to the same rules of examination as a witness, except as hereinafter provided. (C.O. 21, R. 201.)

†279. (1) In the case of a corporation, any officer or servant of such corporation may, without order, be orally examined before the trial touching the matters in question by any party adverse in interest to the corporation, and may be compelled to attend and testify in the same manner, and upon the same terms, and subject to the same rules of examination as a witness, except as hereinafter provided; but such examination shall not be used as evidence at the trial.

(2) After the examination of an officer of a corporation a party shall not be at liberty to examine any other officer without an order of the Court or a Judge. (Ont. 439*a*.)

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Jan. 17.

GRAHAM v. GRAND TRUNK RAILWAY CO.

Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, Meredith and Magee, JJ.A. January 17, 1912.

1. NEW TRIAL (§ V A—36)—UNCONTRADICTED TESTIMONY—NO SURPRISE.

Where there is even meagre evidence to support a finding of fact drawn by a jury in favour of the plaintiff, and that evidence is not contradicted, a new trial should not be directed if the defendants were not taken by surprise by its introduction, and could easily have met it if untrue, although the point was raised only in a general way by the pleadings.

2. TRIAL (§ V C—280)—VERDICT—SPECIAL FINDING OF TWO ACTS OF NEGLIGENCE—REVERSAL OF VERDICT AS TO ONE ONLY.

In an action by the administratrix of a railway section man for damages for his death through being struck by a train which was running on the left-hand track contrary to custom because of an accident on the right-hand track, the negligence found by the jury against the railway in not providing a headlight while running in a dense fog will, if supported by evidence, be sufficient to sustain the verdict, although joined in the finding with one, not supported by the evidence, that the railway company was negligent in not having switched the train to the right-hand track.

3. EVIDENCE (§ I F—90)—JUDICIAL NOTICE BY JURY—LOCAL KNOWLEDGE—PROOF OF LOCATION OF RAILWAY SWITCHES.

To support a jury's finding of negligence in not transferring a train at a particular place to the right-hand track from the unusual left-hand track on which it had been running temporarily because of an accident on the other track, there must be evidence as to the location of the switches at which the cross-over could have been made; and the finding cannot be supported in the absence of such evidence on the assumption that the jury acted upon local knowledge of the location of switches at or near the *locus in quo*.

[*Kessowji Issur* v. *Great Indian Peninsula R. Co.* (1907), 96 L.T.R. 859, applied.]

4. EVIDENCE (§ II H I—241)—NEGLIGENCE AGAINST RAILWAY COMPANY—BREACH OF DUTY BY EMPLOYEE.

In an action against a railway company for negligence causing death, the plaintiff is not bound to call the engineer or fireman on whose alleged neglect the action is based to prove a breach of duty by themselves.

5. MASTER AND SERVANT (§II D I—83*a*)—LIABILITY OF RAILWAY COMPANY—INJURY TO EMPLOYEE REPAIRING TRACK—TRAIN IN FOG WITHOUT HEAD-LIGHT.

Where the plaintiff, in an action under the Fatal Injuries Act (Ont.) for damages for the death of her husband who had been run over by a train while employed as a section-man upon the railway, pleaded lack of notice or warning of the approach of the train and the defendant railway company pleaded in answer that the accident was not caused by their neglect or omission, the fact that evidence was given and submitted to the jury at the trial of the failure to maintain a head-light in accordance with the company's rules, although that point was not more specifically raised by the pleadings, will not be a ground for granting the defendants a new trial, if they were not taken by surprise, but stood upon the evidence given and raised no objection until after verdict.

APPEAL from judgment at trial in favour of plaintiff administratrix, in an action for damages for the death of her husband.

The appeal was dismissed, Meredith, J.A., dissenting.

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The statement of claim was as follows:—

1. The plaintiff is the widow of David J. Graham, late of the township of Elizabethtown, in the county of Leeds, section-man, deceased, who was run over and killed by a freight train of the defendants, on the 16th September, 1910.

2. Letters of administration to the property of the deceased David J. Graham were granted to the plaintiff by the proper Surrogate Court in that behalf.

3. The said David J. Graham, deceased, left him surviving the plaintiff, his lawful widow, and one infant child, William David Graham, two years old, his only next of kin.

4. David J. Graham, at the time of his death, was a workman in the employ of the defendants as a section-man on the double-tracked railway line of the defendants, near Lyn, Ontario.

5. The trains operated by the defendants over their said double-track, in accordance with the rules and regulations of the defendants, are run as follows: east-bound trains over the south track and west-bound trains over the north track; and, at the time of the accident to the deceased, he was aware that this was the practice and custom of the defendants in reference to the operation of their double-track for west-bound and east-bound trains.

6. On the 16th September, 1910, the said David J. Graham proceeded to work on the defendants' north or west-bound track near Lyn station, under the supervision and directions of the section foreman, L. Flynn, who was the foreman to whose orders the deceased was bound to conform, and did conform, and, while so employed, the deceased was run over and killed by a freight train, proceeding east on the west-bound or north track.

7. At the time of the said accident, there was a heavy fog over the tracks in question, and so thick that objects could not be distinguished at a distance of forty feet away. Knowing the conditions to be such, it was the duty of the said section foreman to have protected the deceased, while at his said work; and, in consequence of the negligence of the said foreman, in failing to protect the said deceased from danger, while carrying out the orders of the said section foreman, the deceased was run over and killed.

8. The plaintiff further says that it was the duty of the defendants to have given notice or warning to the deceased that the east-bound freight train in question was not proceeding on the south track as usual, but was proceeding eastward on the north track, which was unusual; and, in consequence of the neglect and breach of duty on the part of the defendants to give the deceased reasonable notice or warning of the approach of the said train, the deceased was run over and killed.

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9. The plaintiff further says that, in consequence of the heavy fog existing at the time and place of the said accident, and of the further fact that the said train was proceeding east on the west-bound track, it was the duty of the engineer in charge of the engine of the said freight train to give reasonable warning of the approach of the said train to the deceased and others lawfully employed upon the said track. In violation of his said duty, the said engineer did not give any notice or warning of his approaching train to the deceased; and, as a result thereof, the said engine struck and killed the said David J. Graham, while lawfully at work on the said track.

The plaintiff claims $1,500 damages.

The statement of defence was as follows:—

1. By statute 16 Viet. ch. 37, sec. 2, also the Railway Act, R.S.C. 1906, ch. 37, sec. 306, both public Acts, the defendants say that they are not guilty as in the plaintiff's statement of claim alleged.

2. The defendants deny the allegations contained in the plaintiff's statement of claim, and put the plaintiff to the strict proof thereof.

3. So far as the plaintiff's claim is founded upon any alleged right to recover at common law, these defendants say that they are a corporation and acting under the provisions of the various statutes passed respecting them.

(*a*) That the corporation, as such, cannot be liable for any error in judgment in its employees as to the proper system to be adopted or precautions to be taken.

(*b*) That the defendants' business in Canada is directed and superintended by a board of directors whose headquarters are in London, England, and is carried on in Canada by careful, skilled, experienced, and competent men, who give their full time and attention thereto.

(*c*) That, for the purpose of carrying on the said business in Canada, they are supplied with all necessary material and everything for the proper and efficient maintenance and management of the defendants' business.

(*d*) That for the said purpose they employ only skilled and experienced workmen who are fully competent to perform the various duties assigned to them.

(*e*) That, if the alleged accident was in any way caused by reason of the negligence of a person in the service of the defendants, as alleged by the plaintiff, and which the defendants deny, the same was caused by the act of a fellow-servant engaged at the time thereof in a common employment with the deceased, and for any alleged default or negligence of such fellow-servant, these defendants are not liable to the plaintiff.

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4. The defendants say that the accident complained of in the statement of claim was not caused:—

(*a*) By reason of the negligence of any persons in the service of the defendants, who had superintendence of the said train or locomotive or premises in question intrusted to them whilst in the exercise of such superintendence.

(*b*) By reason of the act or omission of any person, other than the deceased, in the service of the defendants, done or made in obedience to the rules and by-laws of the defendants.

(*c*) By reason of the negligence of any person other than the deceased in the service of the defendants who had charge of any points, signals, trains, tracks, buildings, or premises upon the defendants' railway.

(*d*) By reason of any defect in the condition or arrangement of the ways, works, machinery, plant, buildings, and premises in connection with or intended for the use of the business of the defendants.

5. The accident to the deceased complained of in the statement of claim was not caused through any neglect or omission on the part of the defendants, as alleged in the said statement of claim; but, on the contrary, the said accident and injury were due solely to neglect and want of care on the part of the said deceased and not otherwise, by reason of which, the defendants submit, the plaintiff is precluded from recovering in this action.

6. The defendants, for the reasons above set forth, submit that this action should be dismissed with costs.

The action was tried before SUTHERLAND, J., and a jury.

The questions submitted to the jury and their answers were as follows:—

1. Was the death of the deceased the result of negligence on the part of the defendant company? A. Yes.

2. If so, wherein did such negligence consist? A. By the servants of the company failing to do their duty by neglecting to switch back train on to right line at Lyn and not carrying a head-light.

3. Or was the death of the deceased the result of any negligence on his part? A. No.

4. If so, wherein did such negligence consist?

5. Could the deceased, by reasonable care, have avoided the accident? A. No.

6. If the 5th question is answered "yes," what could he have done to avoid it?

7. Damages? A. $1,500, divided $600 to plaintiff and $900 to her child.

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Upon these findings, SUTHERLAND, J., entered judgment for the plaintiff for $1,500 and costs.

The defendants appealed to the Court of Appeal.

I. F. Hellmuth, K.C., for the defendants, argued that there had been no negligence shewn on the part of the defendants, causing the accident. Upon the evidence adduced, the accident arose owing to the negligence of the deceased, and the finding of the jury to the contrary was perverse. There should have been a nonsuit.

J. A. Hutcheson, K.C., for the plaintiff, contended that the doctrine of *res ipsa loquitur* applied. The mere happening of the accident was presumptive evidence of negligence against the railway company. No warning had been given that the train was travelling on the wrong track. The train could have crossed to its proper track at a cross-over, a little to the west of where the deceased was killed. The finding of the jury that the locomotive had no head-light displayed, as required by rule 156 of the operating rules of the railway company, was based upon evidence which was not contradicted.

Hellmuth, in reply.

January 17, 1912. GARROW, J.A.:—Appeal by the defendants from the judgment at the trial before Sutherland, J., and a jury.

The action was brought by the plaintiff, as widow and administratrix of her late husband David J. Graham, who was in the employment of the defendants as a section-man on the Lyn section, and while so employed was struck by a moving engine and killed.

The accident occurred early in the morning of the 16th September, 1910, described in the evidence as an unusually thick, foggy morning.

The defendants' line of railway at the point in question runs east and west, and is double-tracked. Engines proceeding east use the south track, and those proceeding west, the north track.

The section-men, of whom there were in all three and a foreman, were, on the morning in question, put to work by the foreman at ties in the north track. And it was while working on that track that the deceased was struck.

The engine came from the west—the reason being that an accident had occurred near Mallorytown, nine miles west of Lyn, upon the other track, which made it necessary temporarily to use the north track for east-bound engines.

The jury, in answer to questions submitted, found that the defendants had been negligent in: (1) "neglecting to switch

back train on to right line at Lyn;" and (2) not carrying a head-light; that there had been no contributory negligence; and assessed the damages at $1,500.

The learned counsel for the defendants now contends that there was no proper evidence to support these findings. And as to the first, the objection is, I think, well founded. It is probable, as suggested upon the argument, that the jury may have acted upon local knowledge as to the location of switches at or near Lyn, which does not appear in the evidence, which, so far as I have seen, does not indicate that what the jury finds as to switching back to the other track could have been done between Mallorytown and Lyn, where the accident to the deceased happened.

But upon the other ground, while the evidence is certainly meagre, it is, I think, sufficient.

Cook, one of the section-men, said: "Q. Did you see any head-light on the engine? A. I did not see none at all. Q. Were you in a position where you could have seen the head-light if there had been one? A. Yes." And he was not contradicted, nor even cross-examined, as to these statements.

The defendants' rules were also put in, and one of them (156) provides that a train running when obscured by fog must display the head-light in front. The fog on the occasion in question was so dense, according to the evidence, as quite to obscure objects more than 60 or 70 feet away. The train was proceeding at a speed of 30 to 35 miles an hour. The proper whistles were proved to have been given, and were, no doubt, heard by the deceased, but he quite naturally would assume that, as they came from the west, the approaching train was upon the south track, and so continued at his work, as did both East, who also was killed, and Cook, who at the last moment escaped. There is no evidence that the bell was ringing, and no finding as to it.

The section-men knew nothing of the accident near Mallorytown necessitating a change in the use of the tracks until afterwards. No one at Lyn apparently did, not even the operator. Under these circumstances, it was especially incumbent, in my opinion, upon the defendants to have had the head-light displayed. And it was, I think, competent for the jury to infer that, if it had been lit, it probably would have prevented the accident. There would be less likelihood of such a continuous signal miscarrying than there was of those given by mere sound, under the unusual and ambiguous circumstances which we have here. The rays would, of course, extend somewhat beyond the mere line of track on which the engine was proceeding, but they would, naturally, be densest and most visible upon that track.

The point was, without objection, submitted to the jury by the learned trial Judge in his very full and careful charge, and

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was, under all the circumstances, one quite proper for their consideration.

I would dismiss the appeal with costs.

MAGEE, J.A.:—The jury seem, from their first finding as to particulars of the defendants' negligence, to have considered that the switch at Lyn connecting the north and south tracks was west of the place where the fatality occurred, which was at or close to the tool-house or hand-car-house, and that the train could by that switch have resumed the usual east-bound course on the south track before reaching that point. The track there is lower, owing to crossing a creek valley, so that there is an up-grade each way from Lyn. The witness Bouley says the cross-over switch is "just a little bit above the car-house." Whether this means up the grade on the east or the west or up-stream of the St. Lawrence does not appear. The trial was at Brockville, east of Lyn, and very likely the witness meant beyond, that is, west of, the car-house. Counsel are not agreed, even here, as to the locality of the switch. The jury possibly acted upon some knowledge of the locality, or of the current form of speech there as to east and west, but the fact cannot be said to have been proved, nor, even if it had been, that the switch could have been used by that train in view of other possible trains.

But I agree that the judgment should stand upon the other negligence found as to the head-light. The plaintiff called, as to that, the only survivor of the three section-men. The foreman was in the tool-house at the time. The plaintiff was not bound to call the engineer or fireman to prove a breach of duty by themselves. It seems to have been admitted or asserted on both sides that the engineer was in the court-room during the trial.

The question as to the head-light was deliberately asked during the examination-in-chief of the plaintiff's first witness, called as to the circumstances of the occurrence.

The statement of claim alleged that there was a dense fog, and it was the duty of the engineer to give reasonable warning of the approach of his train. The defendants' own rule shews that they consider one reasonable means of warning in a fog to be a head-light. Its importance is manifest from the fact that, if these men had been working west of the whistling place for the semaphore, as but for the foreman's caution they might well have been, they would have had no other warning of the approach of the train on the unusual track. The deceased was faced to the south, which would be at or nearly at right angles to the track, and was bending downward at his work. In such a position the reflection of a light upon the steel rails might well have attracted his attention, or even possibly the moving shadows on the fog of the two men to the west of him or of himself or

his adze. A second might have saved him. All that was for the jury. The defendants deliberately took their stand upon the evidence given. Meagre though it was, it was uncontradicted. No surprise was sprung upon them; and I do not think the plaintiff should be subjected to the expense, delay, anxiety, and hazard of another trial.

Then I cannot say that the jury were wrong in negativing contributory negligence. It would mean not only negligence on the part of Graham, but also of East, who lost his life, and Cook, who barely escaped. There is no compelling evidence that any instance of a train running on the left-hand track had occurred during Graham's work—from April to September—upon the railway. The foreman says it had not happened all the time he was on that section, and his foremanship began in June. Cook only says he guessed it would be weeks, not months, since he knew of an instance, but he had only been working since June, and not for two years before. The jury might well have discounted the foreman's general statement that he had warned the whole gang to watch both ways. Even if it be assumed that Graham heard the first whistle for the crossing, he might well assume that it was given at the usual distance from the highway crossing, near which they were working. Yet Cook says, "I heard it at (for?) the crossing, I looked up, and the thing leaped at me. I did not have time to jump." The jury might well find that there was no negligence of Graham.

I agree that the judgment should stand.

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

MEREDITH, J.A. (dissenting):—The difficulties which surround this case have arisen largely, if not altogether, from the plaintiff adducing as little evidence, upon essential points, as possible, trusting to the jury to do the rest in her interests; and from the defendants giving no evidence at all, though some of the material facts were especially within their knowledge; the result being, in my opinion, a necessity for a new trial, better conducted in these respects, to enable the doing of justice with some degree of satisfaction and certainty.

The plaintiff alleged, and went to trial upon allegations of, negligence in five respects only:—

1. In running the east-bound train on the west-bound track;

2. In the man being killed while conforming to the orders of his foreman, to whose orders he was bound to conform;

3. In failure of the foreman to protect the man in a dense fog;

4. In failure to apprise the man of the fact that an east-bound train was running on a west-bound track; and

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5. In failure of those in charge of the train to give warning of its approach.

The first four of these allegations are quite crude, and obviously insufficient to support an action.

As to the first allegation, it is not, in itself, negligence to run an east-bound train on a west-bound track or *vice versâ*; it may sometimes be necessary to do so. In order to make out a case of negligence, it must be proved that it was negligently so run.

The second, too, quite fails to disclose any cause of action; there is no allegation of anything negligent on the part of the person who gave the order, whose negligence is the very essence of a cause of action in this respect. For all that is alleged, the accident might have been caused through the fault of the man himself, or without fault on the part of any one.

So, too, of the third. There is no allegation of the manner in which the man should have been protected; it, like the other allegations with which I have dealt, is altogether too crude and uncertain to disclose any kind of a right of action. It was suggested here that the foreman might have put a torpedo on the west-bound track west of the place where the men were working; but that goes very near to saying that the men were negligent in remaining at work after hearing the whistle and the noise of the coming train, as they all did for some time before the accident. If there be such a known danger that a torpedo should be placed, it is surely such a known danger that the men should step off both tracks when it is impossible to see a train before it is upon them.

In regard to the fourth, I know of no duty such as that alleged; indeed, it would be manifestly absurd to say that, before so running a train, the company was bound to hunt up all its section-men in all the sections through which it was to be so run, and to inform them of the fact.

The fifth allegation might have afforded a good cause of action, if proved at the trial; but, on the contrary, it was plainly disproved, and the jury were against the plaintiff in this respect.

But also, in all these respects, the plaintiff failed with the jury, as was to have been expected; they, however, found for her on two other grounds not alleged in the pleadings: (1) because the train was not crossed over to the east-bound track at Lyn; and (2) because it was being run without a head-light.

It is, however, impossible to support the judgment in appeal on the first ground, even if there had been proper allegations of it in the pleadings, so that the defendants might have come down to trial prepared to meet it; and the trial Judge was of this opinion. Nothing is really proved as to the cause for the train taking the west-bound track, nor is it shewn that it safely and properly could have taken the east-bound track at Lyn, and con-

tinued upon it; nor is it even shewn, in any way, that the "cross-over" at Lyn is west of where the man was killed. The onus of proof in these respects was upon the plaintiff, and she really made no attempt to prove them. It is true that the essential knowledge was largely in the defendants' servants or officials; but it might have been extracted by the usual processes of discovery.

The finding in regard to the head-light is not based upon allegation, or upon any case made at the trial, respecting it; it is really based only upon the following few words which happened to come out, incidentally, in the examination of one of the witnesses, and was not even referred to in the cross-examination: "Q. Did you see any head-light on the engine? A. I did not see none at all. Q. Were you in a position where you could have seen the head-light if there was one? A. Yes."

An extraordinary thing to base a judgment for $1,500 upon, even if the action had been brought, or the parties had gone down to trial, upon this ground.

There is evidence upon which a reasonable jury might find negligence in running this train without a head-light, and that it was so run; but there is not a particle of evidence that such negligence was the cause of the accident; it was not even suggested in the evidence; but the few words of testimony which I have quoted were caught at as a straw, when all the grounds upon which the action was brought were failing. The learned trial Judge said that in this respect the jury were in as good a position as he was for determining the question; and that, of course, was quite true, but the difficulty is, that neither could really know anything about it; and so neither was in a position to attempt to determine it. Only those to whom experience has taught the effect of a head-light, on a double-track line, in a dense fog, in the daylight, could know really anything about it, and not one person in ten thousand has had any such teaching. I am in a dense fog of ignorance as to such effect, for want of experience, and I decline to let a denser fog of conceit make me oblivious to the fact; and I purpose putting the jury on the same plane. To assume that the purposes of a railway company's rule requiring its servant to have a head-light burning in a fog, or when it is dark, is to intimate to section-men which track the engine carrying it is running on, is a quite unwarranted assumption; its main purpose is the protection of the engine and train against obstructions upon the track, broken rails and open switches and other like dangers; it is also, of course, to give warning of the approach of the train. But whether, in the circumstances of this case, it would have given an indication of the track it was running upon at any distance, even from a point of observation, as I have said before, I doubt if one man

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in ten thousand really knows. Much less could any one, without experience, really know whether it would have any effect upon men so self-satisfied that the train was on the east-bound track that not one of them took the trouble to look, although they heard the whistle a long way off, and heard the increasing sound of the heavy on-rushing train, until struck by it, if two of them really looked, even then.

It is said that the jury may draw inferences from the facts proved; of course they may, in a measure; though I would rather put it that they may act upon proper presumptions of fact; but the jury may not draw upon their imaginations; nor supply facts which ought to be proved under oath.

I have no desire to detail things which are elementary; but sometimes that is necessary; and, upon this subject, that seems to me to be the case: I shall, therefore, read from one or two standard text-books the rule as it long has been.

"Presumptions of fact . . . differ from presumptions of law in this essential respect, that while presumptions of law are reduced to fixed rules, and constitute a branch of the system of jurisprudence, presumptions of fact are derived wholly and directly from the circumstances of the particular case, by means of the *common experience of mankind*, without the aid or control of any rules of law. Such, for example, is the inference of guilt, drawn from the discovery of a broken knife in the pocket of the prisoner, the other part of the blade being found sticking in the window of a house, which, by means of such an instrument, had been burglariously entered:" Taylor on Evidence, 10th ed., sec. 214.

"Evidence is usually required to be on oath. In accordance with this principle, although each juryman may apply to the subject before him the *general knowledge which every man* must be *supposed to have*," yet personal knowledge must be given on oath before it can be acted upon: *ib.*, sec. 1379.

"In general, the jury may in modern times act only upon evidence properly laid before them in the course of the trial. But so far as the question is one upon which *men in general have a common fund of experience and knowledge, through data notoriously accepted by all*, the analogy of judicial notice obtains to some extent, and the jury are allowed to resort to this information in making up their minds. . . . But the scope of *this doctrine* is narrow; it *is strictly limited to a few matters of elemental experience* in human nature, commercial affairs, and every-day life:" Wigmore on Evidence, sec. 2570.

And the impropriety of deciding cases upon one's own notions, or own knowledge, instead of upon the evidence adduced at the trial, is pointedly dealt with in the modern case of *Kessowji Issur* v. *Great Indian Peninsula R.W. Co.* (1907), 96 L. T.R. 859.

It seems that, at one time, the jury were allowed to give much greater effect to their own personal knowledge, as much as has sometimes been allowed in the Courts here, but that was in the middle ages or thereabout.

It is certainly not in the category of elemental experience that in a dense fog in the day-light the head-light of an engine would have conveyed to these unfortunate workmen the fact that the train was running on the east-bound track, and have conveyed it in time to save them from their self-satisfied assurance that it was, as usual, on the other track, though the sound of the on-coming train and the knowledge that it might possibly be on the east-bound track failed to do so. Whether at all, or how far away, the head-light would shew, even to one looking for it, upon which track the engine was running, are certainly not things included in the saying, "*Manifesta probatione non indigent;*" to complement which it is proper to add "*Non refert quid notum sit judici, si notum non sit in formâ judicii.*"

But, if the jury have the power to do that which was done in this case—both supply the facts and then draw the inference—it is hardly fair to make them take the oath to give a true verdict "according to the evidence:" it would be but fair to add to it "or your own knowledge or conceit."

I would allow the appeal, set aside the judgment and verdict, and direct a new trial.

Appeal dismissed; MEREDITH, J.A., *dissenting.*

Re ST. VITAL MUNICIPAL ELECTION; TOD v. MAGER.

Manitoba King's Bench, Robson, J. March 5, 1912.

1. OFFICERS (§ I A 3—16)—ELIGIBILITY AND QUALIFICATION—HOLDING OTHER OFFICE—MUNICIPAL WEED INSPECTOR CANDIDATE FOR REEVE.

Where there are two candidates for a municipal office under the Manitoba Municipal Act, R.S.M. 1902, ch. 116, the returning officer has no jurisdiction to deal with an objection that one of the nominees is disqualified nor to declare the other candidate elected without the votes being polled on the ground of the disqualification of his opponent, although the disqualification alleged was that the candidate as the "Noxious Weed Inspector" of the same municipality was its paid officer.

2. QUO WARRANTO (§ II C—30)—ELECTIONS—VOTE PREVENTED BY IMPROPER RULING OF RETURNING OFFICER.

When after two condidates for a municipal office are nominated, objection on the ground of disqualification is made to one of the candidates and the returning officer improperly gives effect to this objection and declares the other candidate elected without the votes being taken, the right to the office is properly tried upon an information in the nature of *quo warranto.*

APPLICATION for leave to file an information in the nature of *quo warranto* calling upon the respondent Mager to shew by

MAN.

K. B.

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RE ST. VITAL MUNICIPAL ELECTION.

Robson, J.

what authority he holds office as reeve of the municipality of St. Vital.

H. M. Hannesson, for relator.
H. Phillipps, for respondent.

ROBSON, J.:—From the material adduced it appears that applicant is a qualified elector of the municipality.

Applicant and respondent were candidates for election as reeve of the municipality for the present year. They were both duly nominated on the 5th day of December last. The voting would have taken place on the 19th day of that month.

After the nomination objection was taken before the returning officer that applicant, being a Noxious Weed Inspector of the municipality, was a paid officer and disqualified under section 53 of the Act. The returning officer gave effect to this objection, and put an end to the contest by declaring respondent elected. That the returning officer so acted without authority is clear: see *Pritchard* v. *Mayor of Bangor*, 13 A.C. 241, at 250 and 253.

But it is said that *quo warranto* will not lie and that the remedy was by petition. Sections 217 and 218 of the Municipal Act [R.S.M. 1902, ch. 116], are referred to. They are:—

> 217. A municipal election may be questioned by an election petition on the ground—
>
> (*a*) (Corrupt practices—not in question here).
>
> (*b*) That the person whose election is questioned was at the time of the election disqualified; or,
>
> (*c*) That he was not duly elected by a majority of lawful votes.
>
> 218. A municipal election shall not be questioned on any of the above grounds except by an election petition.

The question here in brief is, might the return have been questioned under section 217, clause (*c*)?

Sections 217 and 218 are almost identical with sections 87 and 88 of the Municipal Corporations Act, 1882 (England).

Section 225 of the English Act says:—

> 225. (1) An application for an information in the nature of a *quo warranto* against any person claiming to hold a corporate office shall not be made after the expiration of twelve months from the time when he became disqualified after election.

My attention has not been called to any such provision in the Manitoba Act.

I am referred, on behalf of the respondent, to *The Queen* v. *Morton*, [1892] 1 Q.B. 39, where, at page 41, A. L. Smith, J., said:—

> It was said that these two sections of themselves did away with proceedings by way of *quo warranto* excepting in cases of disqualification arising after election, and a passage in the judgment of Lord

Halsbury in *Pritchard* v. *Mayor of Bangor*, 13 A.C. 241, was read in that behalf. . . . It is not necessary to hold, and I do not hold, that in no case will proceedings by way of *quo warranto* lie excepting in the case of disqualification arising after election. It is, however, clear that proceedings by way of *quo warranto* are abolished by the 87th section of the Act of 1882 in cases which come within that section, or, in other words, where a petition will lie, *quo warranto* will not. The question is, does the present case fall within either sub-sec. (*c*) or (*d*)? for if it does the rule must be discharged.

It is evident from *R.* v. *Beer*, [1903] 2 K.B. 693, that even in face of the English section 225, the remedy by *quo warranto* is taken away only where an election petition will lie.

In *The Queen* v. *Morton*, [1892] 1 Q.B. 39, the facts were that at an election of an alderman for a borough there were two candidates, one of whom was the mayor. The mayor presided and voted for himself, which caused an equality of votes. He then gave the casting vote in his own favour, and declared himself elected. The rule for *quo warranto* was discharged because the complaint was either disqualification or that defendant was not duly elected by a majority of lawful votes, either of which grounds might have been the subject of petition.

Is the real complaint here that the respondent was not duly elected by a majority of lawful votes? If it is the leave cannot be granted.

I think clause (*c*) of section 217 was intended to extend to cases where there had actually been a vote. The evils to be rectified under Part III. of the Act are corrupt practices or the exercise of the privileges of the Act by those to whom they are not accorded, whether as candidates or voters. The Legislature would contemplate the carrying out of the election law by the named officers. The usurpation of office in disregard of the methods authorised was left to common law remedies. I think an objection to a petition that the case was not within section 217 would have been much stronger than is the objection to *quo warranto*.

Tod's alleged disqualification for election cannot be regarded now, that being a matter to be dealt with in the manner prescribed by the Act. He was a candidate and had a right to go to a vote; all questions of disqualification being left to petition proceedings: *Pritchard* v. *Mayor of Bangor*, 13 A.C. 241, *supra*.

I do not find anything in the other matters raised to justify discussion of them. The order for leave will go as asked.

Leave granted.

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Mar. 22.

Re WOLFE AND HOLLAND.

Ontario High Court, Latchford, J. March 22, 1912.

1. WILLS (§ III G 2—126)—LIFE ESTATE WITH POWER OF APPOINTMENT AMONGST CLASS.

The words "I leave my property to my wife, to share with the children as she sees fit" in a devise of lands, passes to the widow merely a life estate with a power of appointment among the children; such devise imposes an obligation on the devisee to divide or share the property among the children at her death.

[*Burrell* v. *Burrell* (1768), 1 Ambl. 660, followed; and see Theobald on Wills, 7th ed., 327, 482.]

MOTION by the vendors, under the Vendors and Purchasers Act, for a declaration that the objections made by the purchaser to the title to certain lands in Ottawa were invalid.

The objections were: (1) that the description contained in the conveyance under which the vendors held title was not the proper or legal description of the said lands; (2) that the will of the late August Bauer did not transfer the absolute estate in fee simple to his widow Charlotte Bauer, one of the predecessors in title of the vendors.

The motion was dismissed.

W. C. Greig, for the vendors.

W. Greene, for the purchaser.

A. C. T. Lewis, for the Official Guardian.

LATCHFORD, J.:—The first objection I disposed of on the argument by holding the description sufficient.

I reserved for consideration the second objection, although I expressed at the time the opinion that the widow had but a life estate.

August Bauer, the owner in his lifetime of the lands in question, made his will shortly before his death in 1898, in the following words: "I leave my property to my wife too share with the childring at her death as she thinks fit."

The will was duly attested; and the widow in March, 1909, took out letters of administration with the will annexed; and, assuming that she was absolutely entitled to the lands in fee simple, executed a conveyance in fee to the vendors, who in turn have contracted to sell to the purchaser.

It is contended on the part of the vendors that under the will in question the children took no interest, and that the conveyance which they (the vendors) have received from Mrs. Bauer vests in them the fee.

I am quite unable to adopt this view. The gift to the testator's wife is, in effect, like that considered in *Burrell* v. *Burrell* (1768), 1 Ambl. 660. There the testator gave all his property to his wife, to the end that she might give her children such fortunes as she thought proper or as they best deserved. The case came before the Court upon a question as to whether the power

had been properly exercised by the widow, who had given a merely nominal sum to one of the children; but nowhere was it suggested that the widow was absolutely entitled.

In the present case Bauer imposed an obligation upon his widow to share with or among his children at her death the same property which he gave to her. She took but a life estate, with power of appointment among the children. She could not convey to the vendors more than she received under the will; and the vendors are unable to convey in fee to the purchaser.

There will be an order accordingly. Costs to be paid by the vendors.

Purchaser's objection sustained.

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Mar. 9.

Saskatchewan Supreme Court, Wetmore, C.J., Newlands, Lamont and Johnstone, JJ. March 9, 1912.

1. EVIDENCE (§ VIII—674)—CONFESSIONS AND ADMISSIONS.

An entirely voluntary confession by the accused made to one in authority and without interrogation by the person in authority, is admissible although no caution or formal warning was given the accused.

2. EVIDENCE (§ VIII—674)—CONFESSIONS AND ADMISSIONS.

A confession made to one not in authority in the presence of a person in authority need not be preceded by a warning, if it is shewn affirmatively that the confession was free and voluntary.

3. TRIAL (§ III E 5—260)—CRIMINAL CASE—INSTRUCTION.

It is not misdirection for the trial Judge charging the jury to speak of an admission against his interest, made by the accused as a "confession" and to use the word "confession" synonymously for a statement against interest.

4. EVIDENCE (§ II A—102)—PRESUMPTION—FOREIGN LANGUAGE.

It will be presumed that English speaking people in Canada are not conversant with the Chinese language so as to understand an overheard dialogue in that tongue between two Chinamen and the conversation between the Chinamen in the presence of the chief of police but in which the officer took no part is to be treated as if the latter were not present as regards the proof of an admission or confession made therein. *Per* Newlands, J., Lamont, J., concurring.

5. TRIAL (§ I F—30)—OBJECTIONS AND EXCEPTIONS.

Where counsel for the prisoner objects, at the time, to evidence of a confession or admission by the accused being received on the ground that no proper foundation had been laid for such evidence, whereupon the Crown adduces evidence to disprove any threat or inducement and the prisoner's counsel cross-examines thereon but does not renew the objection when the examination is thereafter proceeded with, there is a waiver of further objection on that ground. *Per* Wetmore, C.J.

CROWN case reserved by Brown, J. The accused Hoo Sam, had been convicted of the murder of one Mark Yuen.

C. E. Gregory, for accused.

Alex. Ross, for Crown.

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WETMORE, C.J.:—The learned Judge has stated a case, which he has signed, for the opinion of this Court, but he has attached thereto a transcription of the official reporter's notes of the evidence and of the Judge's charge to the jury and also the Judge's notes of the application for a reserved case and of his remarks in granting that same. Consequently the stated case consists of all the material. I notice that in one or two particulars the case signed by the learned Judge and the reporter's transcription are not quite in accord with each other. I may have occasion to draw more particular attention to this hereafter. Hoo Sam, Mark Yuen, and one Mark Yen were partners carrying on a restaurant business in Prince Albert. Some time between 5.30 and 6 p.m. on the 26th August these three persons were in the kitchen of the cafe, when Hoo Sam and Mark Yuen went out. Whether they went together or not is not very clear; at any rate they disappeared. Shortly afterwards Mark Yen heard the report of a gun. He went and looked out of the back door (the kitchen door), and he saw Hoo Sam coming towards him at a quick walk with a revolver in his hand, and looking angry, as he expressed it. He (Mark Yen) turned and ran towards the front of the cafe, Hoo Sam running after him and firing at him with the revolver. He ran out of the front door on to the street; he then ran around a waggon and back into the cafe through the front door, and through the cafe to the kitchen door, and out of that door to a yard, and through that to a lane, and thence to another street and along that street, Hoo Sam pursuing all the time and firing at him with the revolver. Hoo Sam was then caught and held by some of the citizens, and the revolver taken away from him. As Mark Yen came along the lane as I have stated, he saw Mark Yuen or his body lying on the ground. Mark Yen was very seriously wounded by Hoo Sam on this occasion, so much so that he had to be taken to the hospital, and had not recovered from the effects of it at the time of the trial, which commenced on the 28th of November. Shortly after the capture of Hoo Sam as stated, Mark Yuen was found dead or dying in this lane. The wound that caused his death was inflicted by a pistol bullet. When found, fresh blood was issuing from his mouth. The body moved, whether from muscular contraction or because he was yet living is not very clear; but if he was not dead when first seen, he died almost immediately afterwards. Very shortly after Hoo Sam was captured and the pistol taken away from him, Shee and Brooks, two members of the North-West Mounted Police, came along and took him in custody; and while on the way to the police station he made the following remarks: —"Sons of bitches—shooting two Chinamen—stole my money!" Brooks was called as a witness, and testified to the making of these remarks. He also swore that Hoo Sam made

use of the word "girl," and that "the remarks were made in broken, disjointed sentences." No warning or caution had been given by Brooks or any person else before those remarks were made, but Brooks swore that "he did not offer any inducement or hold out any inducement or make any threat or did any one else before he made the remarks," and he also swore that he made the remarks voluntarily," and that they tried to stop him, they told him to be quiet.

The first question submitted by the learned Judge is, whether this evidence of Brooks is objectionable. The only objection raised to it was that, Brooks being a constable, and the statement having been made after arrest, no warning or caution was given the prisoner before it was made. I know of no general rule of evidence in criminal cases to the effect that a confession made to a constable or peace officer by a prisoner under arrest is not admissible in evidence merely because a warning was not given before it was made. There are cases which go to shew that a confession made to a peace officer by a person under arrest in answer to questions put by him will not be received in evidence unless a warning has been previously given.

Where, as in this case, the confession is entirely voluntary, without inducement or threat of any sort, and without any questions having been asked, I am very clearly of the opinion that it was properly admitted. This holding is not at variance with what was laid down by Duff, J., in *Rex* v. *Kay*, 9 Can. Cr. Cas. 403.

In *Rogers* v. *Hawken*, 67 L.J.Q.B. 526, Lord Russell of Killowen, at p. 527, commenting on the judgment of Cave, J., in *Reg.* v. *Male*, 17 Cox C.C. 689, states as follows:—

> I should like to say that the observations made by Mr. Justice Cave in that case were perfectly just, but that they must not be taken to lay down the proposition that a statement of the accused made to a police constable without threat or inducement is not in point of law admissible.

I desire to draw attention to the fact that no objection was raised to this testimony at the time it was tendered or at any time during the progress of the trial. I gather this from the transcription of the reporter's notes. He seems to have been careful to note when any objection was raised to the admission of evidence, but no objection is noted to the reception of the testimony now under consideration. It seems to have been raised for the first time after the verdict was entered.

One Pon Yin, also a Chinaman, was called as a witness, and he testified to another confession by Hoo Sam. It is important to note the circumstances under which this evidence was received, and how the questions reserved by the case as to its reception were raised. The objections to it are: (1) That the

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Crown did not shew that no inducement or threat was held out to the accused. (2) No warning was given as to the consequences of making a confession.

> This conversation took place in the office of the chief of police, while the accused was under arrest; and the chief of police was in the office at least part of the time during the conversation, but took no part in it. The parties conversed in the Chinese language, and neither Pon Yin nor the Chinaman accompanying him was a person in authority.

I have extracted what I have just set down from the case as stated by the learned Judge. This is one of the instances I have referred to where there is a difference between what appears in the reporter's notes and the formal case as stated by the Judge. In the first place, I cannot find from the reporter's notes that it affirmatively appears that the chief of police took no part in the conversation. Pon Yin states what took place on that occasion, but he does not state that the chief of police took any part in what took place. Again, the reporter's notes do not shew that the conversation between the Chinamen was in Chinese. Those notes are to the effect that the first question was put to Hoo Sam by Pon Yin in English, and that the prisoner's answer to that question was in Chinese; but there is nothing in these notes to shew in what language the rest of the conversation was carried on. As a matter of fact, the confession put in was in answer to questions by Chung Ho, Pon Yin's companion. I am of opinion, however, that we must accept the learned Judge's statement of the case. Pon Yin testified that he said to the prisoner in English, "Ho Sam, how are you, poor old man?" and he answered in Chinese. It does not appear what his answer was. Pon Yin also testified that before he talked to him he did not say anything to him to induce him to make any statement about his trouble, and that he made no threat to him. He also testified that he did not think that Chung Ho said anything to induce him to make any statement; thereafter he (Pon Yin) had made the remark before referred to, he said to the prisoner, "Poor old man," and then Chung Ho said, "What make you do that, you age man?" to which Hoo Sam replied making the confession which I am now considering.

When a question was put in the first instance with a view of putting this confession in evidence, counsel for the prisoner objected on the ground that if it was intended to give evidence of any statement or confession made by the prisoner, the Crown should first lay a foundation for it. The Crown prosecutor then proceeded to do so, and asked several questions with that object, when counsel for the prisoner intervened, as he had a right to do, and cross-examined the witness, clearly with a view of ascertaining whether the confession was admissible. It

could not at that stage have been for any other purpose. When he had finished, the Crown prosecutor proceeded to offer the confession in evidence, and it was put in without any objection whatever being taken at that stage.

I assume, therefore, that not only was the Judge satisfied that a proper foundation was laid for its reception, but that counsel for the prisoner must also have been satisfied. I am of opinion that under such circumstances it is not open to him to set up after verdict that it was improperly received. Moreover, after the testimony had been given, the Judge put this question to the witness:—

> "What did the other boy (Chung Ho) say before Hoo Sam gave that answer? You stated that the other boy said something before the accused spoke. What did the other boy say?" Answer: "He said, 'You don't do that, you shouldn't do that, a man of your age' or something like that."

The chief of police took no part in the conversation. That is, as I have before stated, set out in the case signed by the Judge. He was not called to testify as to what took place on the occasion in question. Chung Ho was not called at all and no other person was present except Pon Yin. There was at least *prima facie* evidence that everything that was said by either of those men on that occasion was proved; and, nothing having been proved to the contrary, the Judge was warranted in being satisfied that no inducement or threat was held out. No formula is necessary to be used to prove the want of inducement or threat. I am of opinion, therefore, that this objection cannot prevail.

Then as to the other objection, I have the same remark to make with respect to this objection, namely, that it was not raised until after verdict. However, I cannot find it laid down anywhere that a confession made to one not in authority in the presence of a person in authority must be preceded by a warning. This objection cannot prevail, either.

Objections are also raised to the learned Judge's charge. In referring to the statement made by the prisoner to Brooks, sometimes he mentioned it as a *statement*, sometimes as a *confession*. The Judge drew the attention of the jury to the statement made to Brooks, and directed them:—

> It is for you to say what interpretation is to be put upon the statement of the accused to constable Brooks; it is for you to put a reasonable interpretation on it, taking into consideration all the circumstances surrounding that particular statement.

It seems to me to be idle, after that, to contend that because he afterwards called the statement a "confession" that it could have misled or prejudiced the minds of the jury. I may say that I find in all the works on the law relating to crimes an "admission" is almost invariably called a "confession."

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Objections are also raised to the charge:—

(*a*) Because the learned Judge pointed out to the jury that they could infer that the prisoner shot the deceased with murderous intent because he had pursued Mark Yen along the street with murderous intent;

(*b*) Because the learned Judge assumed that the prisoner pursued Mark Yen with murderous intent; that this was a matter entirely for the jury;

(*c*) Because the learned Judge stated that the prisoner was fortunately stopped by Mr. Frank, otherwise another man would have been murdered; thereby assuming that the deceased man was murdered—a matter entirely for the jury.

What took place is as follows: The learned Judge stated to the jury that it was their duty to decide on the facts; he told them what constituted murder; he left to the jury the question whether Mark Yuen was dead, how he died, if from the wound found on him, who inflicted that wound, and the intent with which it was inflicted. I have described in an earlier part of the judgment the testimony given by Mark Yen, and the manner in which he was pursued and fired at by the prisoner. (No question is raised by this case as to the admissibility of this testimony.) I am of opinion that it was admissible as part of the *res gestæ*. The matter affecting Mark Yuen, the deceased, and those affecting Mark Yen were so mixed one with the other that they formed one transaction.

The learned Judge, first leaving the question of Mark Yen's credibility to the jury, pointed out what he had sworn to in this respect, and said:—

> He chased him with the determination of murder. It seems to me, gentlemen, that is the only inference you can draw. He is not satisfied with wounding him, with hitting him once, but he fired several shots at him, and he continues this shooting process until he is fortunately stopped by Mr. Frank. I say, "fortunately stopped by Mr. Frank," otherwise another man would have been murdered.

I think it would have been better if the Judge had not assumed that the prisoner was pursuing Mark Yen with murderous intent, but as stated, the question of Mark Yen's credibility was left to the jury, and if Mark Yen told the truth there can be no doubt in the mind of any reasonable man that the prisoner was pursuing him with the determination of murder, or in other words, with murderous intent. Under such circumstances, I cannot bring my mind to the conclusion that the jury were misled, that they might have believed that the Judge had settled that question, and that it was not for them, especially as they had been told that all questions of fact were to be found by them, and what constituted murder had been defined. As to the assumption that the deceased had been mur-

dered, I am quite assured that the jury were not misled thereby, in view of what they were told they must find in order to bring in a verdict of guilty.

I am by no means satisfied that a Judge has not a right to express his opinion on a question of fact in charging a jury. It was quite customary, when I was practising at the Bar, for very eminent Judges to do so. I am very much impressed with the remarks of Sir James F. Stephens, copied into Crankshaw's Criminal Code, 3rd ed., at p. 1003, which are as follows:—

> I think that a Judge who merely states to the jury certain propositions of law and then reads over his notes does not discharge his duty. . . . I think that he ought not to conceal his opinion from the jury, nor do I see how it is possible for him to do so if he arranged the evidence in the order in which it strikes his mind. . . . The act of stating for the jury the questions which they have to answer, and of stating the evidence bearing on those questions, and shewing in what respect it is important, generally goes a considerable way towards suggesting an answer to them, and if a Judge does not do as much at least as this, he does almost nothing.

And in this connection I draw attention to the remarks of Moss, C.J.O., in *Rex* v. *Ventricini*, 17 Can. Cr. Cas., at pp. 187 and 188.

It is further urged that the learned Judge was in error as to the first alleged ground of misdirection, because the jury would have no right to infer that the prisoner shot the deceased with murderous intent because he pursued Mark Yen with murderous intent, because they were separate transactions. I am of opinion that they would have such right. I have stated that it was practically all one transaction. Assuming that the prisoner inflicted the wound on the deceased, his conduct while this transaction was being carried on would be an important element in deciding with what intent he shot the deceased. This, I take it, is in accordance with what was laid down in *Makin* v. *Attorney-General for New South Wales*, [1894] A.C. 57.

It will be observed from the reporter's copy of the charge that the learned Judge at the stage of making this direction was dealing with the question of the motive in shooting Mark Yuen, not with the question of shooting him.

All the questions submitted by the learned Judge should be answered in the negative, the conviction affirmed, and the sentence carried out.

JOHNSTONE, J., concurred with WETMORE, C.J.

NEWLANDS, J.:—As to the evidence of Brooks, who was a police constable, I am of opinion that it was proved by affirmative evidence that it was free and voluntary. In reply to Mr. Ross, the Crown counsel, who asked Brooks, "Did you speak

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to him or ask him any question or in any way make any remarks to him?" he answered: "I told him to be quiet—that was all." And in reply to the question put to him by the learned trial Judge—

> At the time the prisoner made this statement to you after his arrest, on the way to the police station, did you offer any inducement, or hold out any inducement, or make any threat, or did anyone else, before he made that statement?

Brooks answered—

> No, my lord. He made that voluntarily, and we tried to stop him. We told him to be quiet.

In the case of a constable or other person in authority, where the confession is not given in answer to questions after the arrest of the prisoner, I think that all the law requires is for the Crown to prove affirmatively that the confession was free and voluntary before the same is admissible in evidence, and they have done so in this case. It was argued by Mr. Gregory that the Crown should go further than this, and prove that the prisoner was warned, before the evidence was admissible; and he cited in support of this proposition, *The King* v. *Trepanier*, decided in the Court of Appeal, Quebec, on the 5th December last, and not yet reported. In the judgment of the Court, delivered by Mr. Justice Trenholme, that learned Judge said:—

> The English decisions on this subject of confession appear very conflicting, and are not a sure guide for us. The decisions of our own Courts assist us. . . . It appears to be well established that evidence of a confession such as that alleged in this case ought not to be admitted unless it be first affirmatively shewn that it was freely and voluntarily made, and after proper warning.

In this case the confession was obtained in the following manner:—

> On the second interview, on Sunday night, McCaskill and Samson (the detectives) took the prisoner into a small room, and there, alone with him, they asked him questions. It is admitted they questioned him with a view to get a confession from him.

This case does not, I think, go any further than *Reg.* v. *Kay*, 9 Can. Cr. Cas. 403, where it was held that after an arrest a confession made to a constable in answer to questions is inadmissible unless the prisoner is first properly warned. The English authorities are to the same effect.

Now in this case the statement made by the prisoner in Brooks' presence was not made in answer to questions, and therefore the above cases requiring a warning do not apply.

As to the evidence of Pon Yin, neither he nor the other Chinaman was a person in authority. The conversation was in the Chinese language, and although it took place in the chief of police's office, and that officer was present part of the time, he took no part in the conversation. There is no evidence that

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the chief of police understood the Chinese language, and there can be no presumption that he did understand it, it being a matter of common knowledge that Chinese is not generally understood by English-speaking people. Now if the chief did not understand—and his not taking part in the conversation would point to the fact that he did not—he was not present so far as this conversation was concerned, any more than if he had been asleep or so far removed from the parties conversing that he could neither have heard nor taken part in it.

And when, in addition to this, we have evidence of all the conversation that did take place, and thereby evidence that it was free and voluntary, I am of the opinion that the learned trial Judge was right in admitting the same, and would therefore answer the first question in the negative.

As to the learned trial Judge's charge, it seems to me that it does not matter whether in referring to the evidence of Brooks he called the same a "confession" as well as a "statement." Any statement of the accused which tends to prove his guilt would be a confession, and if the words used are ambiguous, it would be for the jury to say what was the effect of them; and as the trial Judge told the jury that it was for them to say what interpretation was to be put on the statement of the accused to constable Brooks, there can be no objection to his referring to it either as a statement or a confession.

As to the second objection, that the trial Judge pointed out to the jury that they could infer that the accused shot the deceased with murderous intent because he had pursued Mark Yen, another Chinaman, along the street with murderous intent, and that such was not a fair inference to ask the jury to draw under the circumstances, I would only say that the Crown would make out their case if they proved that the accused killed Mark Yuen, and that if there was no evidence which would reduce the killing to manslaughter, or non-culpable homicide, that the accused would be guilty of murder; and there being no such evidence in this case, the trial Judge would have been justified in telling the jury and if they found that the accused killed Mark Yuen he was guilty of murder. There could therefore be no objection to his remarks about the prisoner's intention being murderous if the evidence proved him guilty of murder.

These remarks also apply to the other objections taken to the charge. I would, therefore, answer the second question in the negative also.

LAMONT, J.:—I agree with the conclusions reached by the learned Chief Justice and with my brother Newlands in his judgment, which I have had the opportunity of reading. The only points which presented any difficulty to my mind were

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those set out in the second and third objections to the charge of the learned trial Judge stated in the reserved case as follows:—

> Secondly, it is objected that I pointed out to the jury that they could infer that the accused shot the deceased with murderous intent because he had pursued Mark Yen along the street with murderous intent; that such was not a fair inference to ask the jury to draw under the circumstances.
>
> Thirdly, it is objected that I assumed that the accused pursued Mark Yen with murderous intent, and that I had no right to assume that he did so; that it was entirely a matter for the jury to make such assumption and draw such inference.

From the language used in the first of the above objections, it might be thought that the learned Judge was directing the jury that they might infer that the accused shot Mark Yuen from the fact that he pursued Mark Yen with murderous intent. Such, I take it, was not his intention, for when dealing with the matter in his charge, he deals with it solely in connection with the question of motive. Besides, it was not contended before us that such was the idea conveyed by the charge. The ground of the objection was that he told the jury that if they found that the accused had killed Mark Yuen, they could infer that he did so with murderous intent because he had pursued Mark Yen with murderous intent. Now, I am not prepared to say that because the accused pursues and shoots one man (Mark Yen) with murderous intent (assuming that fact to have been established) that it is a proper inference to draw from that fact that he killed another man (Mark Yuen) with murderous intent, should it be found that he did kill him. The question before the jury was, whether or not the accused shot Mark Yuen; and if he did do it, did he do it intending to cause his death or intending to cause to him bodily injury which he knew was likely to cause death and was reckless whether death ensued or not. Until the jury found as a fact that it was the accused's bullet that caused the death of Mark Yuen, the question of intention did not arise. When once they reached the conclusion that the accused did shoot and kill Mark Yuen, the question of intention became most material. If nothing appeared in the evidence to indicate the intention with which he shot him, the jury would be justified in inferring an intention to kill from the fact that he fired the fatal shot rather than from the fact that he pursued another man with murderous intent, because, until the contrary is shewn, every person is presumed to intend the natural and probable consequences of his own act. But whether the learned trial Judge's direction was or was not strictly justified under the circumstances of this case, there is to my mind no ground for setting aside the conviction. Section 1019 of the Criminal Code provides as follows:—

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1019. No conviction shall be set aside nor any new trial directed, although it appears that some evidence was improperly admitted or rejected, or that something not according to law was done at the trial or some misdirection given, unless, in the opinion of the Court of Appeal, some substantial wrong or miscarriage was thereby occasioned on the trial; provided that if the Court of Appeal is of the opinion that any challenge for the defence was improperly disallowed, a new trial shall be granted.

In *Allen* v. *The King*, 18 Can. Cr. Cas. 1, the Supreme Court of Canada decided that where evidence has been improperly admitted, or something not according to law has been done at the trial which may have operated prejudicially to the accused upon a material issue, although it has not been and cannot be shewn that it did in fact so operate, the Court of Appeal may order a new trial. That, being a judgment of the Supreme Court of Canada, is binding upon us, and we must construe section 1019 in the light of that decision. But to come within the principle of that decision, it must appear that the portion of the charge objected to might have operated prejudicially to the accused upon a material issue. In my opinion, the portion of the charge objected to could not have operated on the minds of the jury prejudicially to the accused. The question of intent, as I have already pointed out, could not arise until the jury found that the accused did shoot and kill Mark Yuen. Having found that he did so, there was no conclusion that they could arrive at on the evidence other than that he did so with intent to kill. There was no contention at the trial that the killing was accidental. The defence was that he did not do it. The jury had before them the evidence of Pon Yin as to the statements made by the accused to himself and Chung Ho. These statements were:—

> "I have been here for nine years and all the China boy been in partnership with my money and everything and then go home to China, and here I am not worth a cent and they don't satisfy me and I kill him"; and: "I want to kill them both before and then I kill myself."

From the evidence, the accused was evidently of opinion that both boys had been taking money from his restaurant, and these statements were evidence of what his intentions were when he did the shooting, and they were the only evidence of his intentions, apart from the circumstances of the case, which all pointed in the same direction, from which the jury could infer intent. The jury, in my opinion, would not have been justified on the evidence in coming to any other conclusion than that the killing was intentional. The direction of the learned trial Judge, therefore, even assuming it not to have been strictly justified, did not operate to the prejudice of the accused. The conviction should be affirmed.

Conviction affirmed.

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Mar. 22.

GILROY v. CONN.

Ontario High Court, Sutherland, J. March 22, 1912.

1. RECEIVERS (§ I B—14)—EQUITABLE EXECUTION—LEGACY LEFT TO DEBTOR.

A judgment creditor may be appointed receiver without remuneration and without security, of the legacy left to his judgment debtor, and an injunction order may be granted to restrain the debtor from dealing with the legacy to the prejudice of the judgment creditor.

2. INJUNCTION (§ I C—31)—SUPPLEMENTARY TO RECEIVERSHIP—PARTIES.

The executors are not necessary parties to a motion to continue an injunction restraining a judgment debtor legatee from dealing with his legacy and appointing a judgment creditor receiver thereof.

3. RECEIVERS (§ IV—33)—RIGHT OF ACTION BY RECEIVER—EQUITABLE EXECUTION—LEAVE TO CONTEST IN NAME OF DEBTOR.

A judgment creditor appointed receiver of his judgment debtor's legacy, and wishing to contest the executor's claim that the legacy is to be set off against advances which the testator had made to the debtor may be granted leave to contest such claim of the executors in the name of the judgment debtor on indemnifying him against costs.

MOTION by the plaintiff to continue an injunction granted and a receiver appointed by an order made *ex parte*, on the 26th February, 1912.

W. D. McPherson, K.C., for the plaintiff.

H. D. Gamble, K.C., for the defendant.

F. E. Hodgins, K.C., for the executors of the defendant's father.

SUTHERLAND, J.:—The applicant is a judgment creditor; and the defendant (the judgment debtor) is said to be entitled to a legacy under the will of his father, Meredith Conn, deceased. The order restrains the defendant from dealing in any way with the legacy, and appoints the plaintiff receiver thereof. Upon the facts disclosed in the material filed in support of the application, I think the plaintiff is entitled to an order continuing him as receiver. I, therefore, order and direct that he be continued as receiver, without remuneration and without security, of any and all legacies to which the defendant is or may be entitled under the will of Meredith Conn, deceased, to the extent of the plaintiff's judgment and costs, including the costs of the application for the order and of this application, which costs when taxed the plaintiff shall be at liberty to add to his claim.

The plaintiff directed the notice of motion to the executors of the will of Meredith Conn, deceased, as well as to the defendant. I do not think it was necessary for him to have done so for the purposes he had in view upon the application. Having been notified, I think the executors were warranted in being represented on the motion to state their position in the matter and protect the interests of the estate.

It appears from the affidavit of one of the executors that it is asserted by them that the defendant owes the estate $1,500 and interest, which, if set off against his claim with respect to

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the legacy, would more than exhaust it. Under these circumstances, and in the light of this claim on the part of the estate, of which the plaintiff had knowledge before serving his notice of motion, he asks therein that he be also appointed to contest for the defendant any right the executors may assert on behalf of the estate to set off any such alleged claim of the estate against the defendant's legacy. I think the plaintiff is entitled to be so appointed and do order and direct accordingly. Before so contesting the claim, he must first idemnify the defendant against costs.

It is said that the defendant is a non-resident, and that, upon this application, I should direct that, in case the plaintiff sees fit so to contest the claim of the estate against the defendant, he should be directed first to give security for costs. I do not think it necessary or appropriate to make such an order at this time. I am not at all disposing of the matter finally, or precluding the estate from or prejudicing it in making a future application for that purpose, in case the executors should be so advised and it becomes necessary.

The plaintiff will have his costs of the motion as aforesaid. The executors will have costs against the plaintiff, but limited to the costs of a formal attendance upon the application.

Order continuing receivership.

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Jan. 23.

Prince Edward Island, Court of Appeal in Equity, Sullivan, C.J., and Fitzgerald. January 23, 1912.

1. PARTNERSHIP (§ IV—17)—REAL ESTATE OF FIRM—DEATH OF PARTNER.

Land acquired for the purpose of carrying on a partnership business and used for that purpose is to be considered as partnership property and not as real estate owned by each partner as joint-tenants or tenants in common.

[*Jackson* v. *Jackson*, 9 Ves. 591; *Crawshay* v. *Maule*, 1 Swanst. 495, and *Watcver* v. *Watcver*, L.R. 15 Eq. 402, followed.]

2. PARTNERSHIP (§ V—21)—ACCOUNTING—DEVISEE OF DECEASED PARTNER ACCOUNTING TO SURVIVING PARTNER.

Where the devisee of a deceased partner in a mercantile co-partnership to whom the business was devised as a going concern to be worked by the devisee and the surviving partner share and share alike, continues to carry on the business for his own benefit, using the stock and plant of the co-partnership he must account to the surviving partner for any profits made.

[*Crawshay* v. *Collins*, 15 Ves. 218; *Featherstonhaugh* v. *Fenwick*, 17 Ves. 298; *Yates* v. *Finn*, L.R. 13 Ch. D. 839, followed.]

3. PARTNERSHIP (§ V—20)—DECEASED PARTNER—CLOGGING SURVIVING PARTNER'S INTEREST.

One partner has no right to devise his interest in the partnership property in such a manner as to clog his partner's interests in the partnership business, by imposing conditions as to making payments of sums alleged to be due to the testator by his partner.

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APPEAL from the order or decree of the Court of Chancery for Prince Edward Island declaring the respondent entitled to an account from the appellant in respect of the profits from certain lands used by the appellant, claiming under his father's will, but which the father held for the benefit of the partnership which had existed between the respondent and himself in a lobster factory and a starch factory.

The appeal was dismissed.

G. Gaudet, K.C., for appellant.
K. J. Martin, for respondent.

FITZGERALD, J.:—In April 1910, a bill was filed in this case before the vice-chancellor by the respondent against the appellant praying for a declaration that respondent is entitled to a one-half interest in a certain starch factory and in a lobster factory with all the equipment and personal property thereto severally belonging, and for a sale thereof in partition, and for an account of the rents, profits and earnings thereof received by the appellant and for payment to the respondent of what upon the taking of accounts should be found due to him.

On consent and without prejudice to the rights and interests of the parties, an order for sale was made by the Vice-Chancellor, and under it the said several lands and premises were sold. Afterwards on a hearing the Court made the following order, now appealed from:—

> This case coming on regularly this day for further hearing in the presence of counsel for the complainant and for the defendant, and upon hearing the evidence adduced and what was alleged by counsel the Court doth find and adjudge that the complainant is entitled to an account by the defendant of the use by the defendant of the joint properties and business described in the bill of complaint, and it is accordingly ordered and decreed that an account (to be taken by the Court without a reference) be had of all the dealings, use, disposition, rents and profits had, made, earned or received by the defendant with, of or from the lobster factory and starch factory and the equipment and business thereof described in the bill of complaint from the third day of June, A.D. 1903, to the twenty-third day of April, A.D. 1910, and to that end it is expressly ordered that the defendant shall within thirty days from date file with the registrar of this Court an itemized and sworn statement of account accordingly, and that said account as filed may be read and received as evidence and the defendant cross-examined thereon on the further adjourned hearing thereof.

At that hearing evidence was given—

That in 1890 the respondent and the late Donald Farquharson being then partners in a general trading and mercantile business leased in their joint names a site for a lobster factory, and erected thereon out of the funds of the partnership such factory;

That previously the respondent and the late Donald Farquharson being then also partners, purchased for $2,000 a site for a starch factory, and erected and equipped thereon such factory at a cost of some $10,000, the purchase money of the land, and the cost of erection and equipment being paid out of partnership funds;

That the deed of this site was made out in the name of the late Donald Farquharson but only inadvertently, the deceased according to the evidence telling his partner, the respondent, that "he could change it at any time";

That both these properties being so leased, purchased and equipped by the respondent and the late Donald Farquharson as partners, out of partnership funds, were by them as such partners operated, one in the manufacture of starch and the other in the canning of lobsters—the respondent and the late Donald Farquharson being equally interested in the profits of both businesses;

That they were so operated until the death of respondent's partner, the late Donald Farquharson, in 1903, who during respondent's absence from the Island on agreement between them managed the same, charging his partner so much per year for such management;

That by Mr. Farquharson's will he directed:—

> That the starch factory at Long Creek and the lobster factory at Canoe Cove both in lot sixty-five shall be the joint property of T. A. Stewart, my late partner, and James Alfred Farquharson, and to be worked by them share and share alike until such time as they deem it prudent and agree to dispose of the same. The said T. A. Stewart before receiving his claim for one half of these factories shall pay the ($2,000) two thousand dollars above referred to, to the said James Alfred Farquharson.

That afterwards—the respondent being still absent from the Province—the appellant took possession of and for some time operated and managed both industries, receiving whatever rents or profits accrued therefrom, but on the return of the respondent in 1905 to the Province refused to account to him for any rents, issues or profits resulting from such operation.

This evidence was not contradicted at the hearing.

The $2,000 referred to in the above quotation from the will of the late Donald Farquharson, is in said will referred to as follows:—

> WHEREAS the sum of ($2,000) two thousand dollars is due by T. A. Stewart of Westville, lot sixty-five, Queen's county, and which for the sake of convenience the documents at the time were made in favour of the said James Alfred Farquharson (meaning the defendant) and still so remain. When the children of the said James Alfred Farquharson (one being an adopted son) shall have attained their majority this money $1,000) one thousand dollars of which shall

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be paid to each of them, being the $2,000) two thousand dollars in all, the said James Alfred Farquharson using the interest only in the meantime.

It also appeared at such hearing that under an agreement signed by respondent and the executrices and executors of the will of the late Donald Farquharson, dated the 27th day of February, 1908, and made in settlement of a suit brought by the respondent against such executrices and executors and the appellant for a balance claimed to be due to him as a partner of deceased, and which the Master to whom it was referred reported as being $3,635.87, it was agreed that such executrices and executors should procure a satisfaction of the judgment given by the respondent to the late Donald Farquharson, but which "for the sake of convenience" at the time was entered in the name of the appellant—this judgment being the "documents" above referred to—and in consideration whereof that the respondent should release the estate of the late Donald Farquharson from all further claims and demands.

That on the filing of such agreement the Court ordered that satisfaction be entered of such judgment reserving all the rights which the defendant James A. Farquharson or his children should be entitled to under the will of the testator, Donald Farquharson, and confirmed the mutual releases contained therein. By this decree it was also ordered that the appellant herein, one of the defendants in that suit should pay to the respondent the sum $1,432.91, being amount in his hands of partnership funds. On this decree the judgment was marked satisfied, and amount ordered paid.

The appellant contends in this appeal that the respondent is not entitled to the account ordered.

He urged on the argument, and in his factum, that the condition as to payment of this judgment to appellant as directed by the will was not performed, and consequently no estate vested in the respondent. That respondent is barred by the Statute of Limitations. That no proceedings in partition can be sustained except as between those having a legal estate as tenants in common, etc. That there was no contract of partnership between appellant and respondent, and that appellant as a tenant in common had a right to occupy the premises without any accounting to his co-tenant.

The fact as established by the evidence, and uncontradicted, that these factories were the joint properties of the respondent and the late Donald Farquharson, and were by them erected and used for the purpose of their general trading and manufacturing business and that the lands upon which they were situated were acquired for the purpose of carrying on such partnership business, and were used for that purpose, together with the language used by the late Donald Farquharson in his will,

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wherein he treats these factories as going concerns, and devises them to be worked by appellant and respondent "share and share alike," determine most if not all the objections raised by the appellant

It is settled law as expressed in *Jackson* v. *Jackson*, 9 Ves. 591, *Crawshay* v. *Maule*, 1 Swanst. 495, and *Waterer* v. *Waterer*, L.R. 15 Eq. 402, that land acquired for the purpose of carrying on a partnership business, and used for that purpose, is to be considered as property of the partnership, and not as real estate owned by each partner as joint tenants or tenants in common.

In the first case cited the decision rested largely upon the fact that a trading business was what was devised—as in this case. In the second, that certain mines were devised for the express purpose of being worked in partnership—as is also the fact in this case. And in the last, Lord Justice James decided in a matter wherein certain real estate was used and occupied in connection with the business of a nurseryman, that it "is governed by that class of cases in which Lord Eldon said, that when property became involved in partnership dealings it must be regarded as partnership property," and added: "It seems to me immaterial how it may have been acquired by the surviving partners, whether by descent, or devise, if in fact it was substantially involved in the business," and held these gardens "part of the partnership property and therefore personal estate."

This being the law, we are not concerned here with the Statute of Limitations, or as to legal or equitable estates in partition, or whether there was a contract of partnership between appellant and respondent, or whether appellant as a tenant in common has a right to occupy and use as against his co-tenant the premises owned by both, without accounting for his profits under the law as declared in *Henderson* v. *Eason*, 17 Q.B. 701, and in our own Courts in *Field* v. *Field*, 8 E.L.R. 374.

This last contention is included because *Crawshay* v. *Collins*, 15 Ves. 218, *Featherstonhaugh* v. *Fenwick*, 17 Ves. 298, and *Yates* v. *Finn*, L.R. 13 Ch. D. 839, decide that in trading and mercantile co-partnerships when one partner continues to carry on the business for his own benefit, using the stock and plant of the business partnership, such partner must account to his partners for the profits made by him thereout, in order to prevent persons from deriving advantage from their own wrong.

Here the appellant claiming under his father's will, whereby alone he is given an interest in this partnership "to be worked share and share alike," with a person entitled in his own right to an equal interest therein, cannot enjoy the benefits of it in his partner's absence without, as the Lord Chancellor in *Crawshay* v. *Maule*, 1 Swanst. 495, at page 512 says,

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"submitting to the inconveniences which are imposed"—here that of sharing alike with his partner in the profits.

There only remains to consider the first contention of the appellant.

It is not tenable for two reasons—first, because the testator had no power to clog his partner's interest in this business with any condition as to payment of this or any sum claimed to be due from him to testator; the respondent held and holds this interest in his own right, not under any devise in this will: secondly, because the appellant cannot now, having accepted the decree of the Vice-Chancellor ordering this judgment to be marked satisfied (in a suit wherein he was a defendant) on an agreement that there is a greater sum than that secured by it, due from the testator's estate to the respondent, claim that this condition has not been fulfilled.

The executors of the testator's estate had a right as such, to deal with this debt due to the estate, no matter to whom it might be bequeathed, reserving appellant's and his children's rights and interests under the will. To allow appellant now to oust respondent's interest in this partnership on that account could not be permitted, it once being settled judicially in a decree binding the appellant, that respondent did not—on a settlement of accounts—owe this judgment to the estate of the late Donald Farquharson.

For these reasons the appeal will be dismissed with costs.

SULLIVAN, C.J., concurred.

HASZARD, J., took no part, having been counsel on the hearing of the case in the Court below.

Appeal dismissed.

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Feb. 20.

McKILLOP AND BENJAFIELD (defendants, appellants) v. CHARLES I. ALEXANDER (plaintiff, respondent).

Supreme Court of Canada, Davies, Idington, Duff, Anglin and Brodeur, JJ. February 20, 1912.

1. ASSIGNMENT (§ III—30)—EQUITABLE INTERESTS—PURCHASER WITHOUT NOTICE OF PRIOR EQUITABLE ASSIGNMENT.

Although an assignee of the purchaser's interest in a land contract, of which a prior undisclosed assignment had been made as to part of the land without notice to him is the first to procure the original vendor in whom the legal estate is vested to become a party to the assignment by consenting thereto, his right to call for the conveyance of the legal estate over that of the person whose equitable interest while prior in point of time had not been notified to the holder of the legal estate, is controlled by the registry laws and a caveat filed by the first purchaser under the Saskatchewan Land Titles Act before the second purchaser had obtained such consent, will preserve the first purchaser's priority.

[*Hopkins* v. *Hemsworth*, [1898] 2 Ch. 347, and *Taylor* v. *London and County Banking Co.*, [1901] 2 Ch. 231, specially referred to.]

2. Assignment (§ I—14)—Contract to Purchase Land—Stipulation against Transfer without Consent—Priority between Sub-purchasers.

A stipulation in an agreement for sale of land that no assignment thereof by the purchaser shall be valid unless formally approved of by the vendor is effective only for the protection of the vendor, and cannot be set up by a second sub-purchaser to defeat the claim of a prior sub-purchaser whose claim had legal priority under the registry laws as between themselves, although the second sub-purchaser had obtained the original vendor's approval and the first sub-purchaser had not.

3. Land Titles Act (§ I—10)—Caveat—Instrument—Notice.

A caveat is an "instrument" within the meaning of the Land Titles Act of Saskatchewan and when properly lodged prevents the acquisition or 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 the caveat is lodged.

[Sask. Land Titles Act, R.S.S. 1909, ch. 41, secs. 2 (former 2), 125 (former 136), and 128 (former 139), considered.]

4. Land Titles Act (§ I—10)—Caveat—Formalities—Specifying the Lands and Nature of Claim.

A caveat which describes the lands against which it is filed with reasonable certainty which enables the registrar to identify the land, but omits to give the number of the certificate of title as required in the statutory form is a sufficient compliance with the Land Titles Act, R.S.S. 1909, ch. 41, sec. 126 [6 Edw. VII. ch. 24, sec. 137], which is intended for the guidance of registrars and should be construed as directory only.

[*Wilkie* v. *Jellett*, 2 Terr. L.R. 133, on appeal, *Jellett* v. *Wilkie*, 26 Can. S.C.R. 282, specially referred to.]

This is an appeal from the judgment of the Supreme Court of Saskatchewan *en banc*, reported *sub nom. Alexander* v. *Gesman*, 4 Sask. L.R. 111, 17 W.L.R. p. 184, reversing the judgment of Johnstone, J. (*Alexander* v. *Gesman*, 3 Sask. L.R. 331).

The plaintiff (respondent) brought an action for specific performance of an agreement for the purchase of certain lands under the following circumstances: On February 28th, 1906, the Canadian Northern Railway Co., the registered owner of lands, gave to a subsidiary company, the Canadian Northern Prairie Lands Company, the management of these lands with power to sell the same. The Canadian Northern Prairie Lands Company agreed by two several agreements to sell to one Porter the two quarter sections forming the south half of section one in township 32, and range 15 west of the third meridian, in the Province of Saskatchewan. Before Potter paid the whole of the purchase money he assigned his rights under these agreements to one Gesman, who in turn on November 2, 1909, agreed with the plaintiff (respondent) Alexander, to assign his rights, one-half of the half section to him. Then on November 4, 1909, Gesman agreed to assign the same half section, and the other half to the appellants (defendants). These assignments were in writing. On November 10th, 1909, the plaintiff (respondent) filed in the land titles office a caveat asserting his claim to the half section and forbidding any transfer of the land in question. After-

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wards, on the 29th of that month, the assignment from Gesman to the appellants (defendants) was completed, the Canadian Northern Prairie Lands Company approving of this assignment, and on December 15, 1909, the full purchase money was paid. The trial Judge dismissed the action. The full Court, *en banc*, reversed this judgment and upheld the plaintiffs' claim to priority upon the caveat.

The appeal to the Supreme Court of Canada was dismissed, Duff, J., dissenting.

J. S. Ewart, K.C., for appellants.
F. H. Chrysler, K.C., for respondent.

DAVIES, J.:—I am of opinion that this appeal should be dismissed for the reasons given by Mr. Justice Anglin.

IDINGTON, J.:—The Canadian Northern Railway Company were registered owners of land under the Torrens system and gave to a subsidiary company named the Canadian Northern Prairie Lands Company the management of these lands. The latter company under powers thus given sold a section to one Potter who in turn sold it to one Gesman, and he, on the second of November, 1909, sold half of the section to the respondent Alexander who paid $100 cash and was to pay balance of what accrued due to Gesman in respect of his equity, for the selling company had not been paid their price. Then on the 4th of November, 1909, Gesman sold the same half section and the other half of the section to the appellants. Each of these transactions was reduced to writing and was so far as respects mere form a valid contract.

On the 6th of November aforesaid, respondent Alexander executed a caveat setting forth his claims against the half section he had so purchased, and registered same on the 10th of November aforesaid. On the 14th of December, 1909, Gesman was paid by appellants the balance of the $1,800 purchase-money and they received from him an assignment of the original agreement of sale from the Prairie Company to Potter. The Prairie Lands Company had given a written agreement in which there was a provision guarding against the recognition of sub-purchasers. The assignments to Gesman and by him to appellants were approved by the Prairie Company on the 29th of November, 1909. I will hereafter refer to this feature of the case.

The respondents began this action on the 21st of February, 1910. There is little if any dispute of fact. By their respective agreements of sub-purchase appellants and respondent Alexander each acquired an equitable interest in said lands. Alexander invokes for his protection the maxim *qui prior est tempore potior est jure*.

It is an undoubted principle of law that as between owners of equitable interests the first in time prevails unless he who

has acquired it has either done or omitted to do something he is by law required to do and thereby has lost this prior right. Alexander had not done anything to taint his right and so far as I can see omitted nothing he was required to do. His registration of notice of his claim may not have been requisite on the facts here presented, but was, if I understand the practice, exactly what is usually done by prudent purchasers under a time bargain. And prudent buyers are well advised in making search for such notice of prior purchase. But though claimed to be here notice to the subsequent purchasers I desire not to express my opinion on that point for in my view of this case that need not be considered merely from the point of view of notice. An argument was presented by the appellants founded on the practice relative to the assignments of *choses in action* in pursuance of which notices of the assignment thereof are given to the debtor or trustee of the fund provided for the discharge of the obligation in question in the assignment. I do not think the argument is well founded. Indeed the mass of authority against it seems overwhelming. In the case of *Taylor* v. *London and County Banking Company*, [1901] 2 Chy. 231, at page 254, in appeal, Stirling, L.J., states as follows:—

> Although a mortgage debt is a chose in action, yet, where the subject of the security is land, the mortgagee is treated as having "an interest in land" and priorities are governed by the rules applicable to interests in land, and not by the rules which apply to interests in personalty.

He proceeds to quote from Sir William Grant in *Jones* v. *Gibbons*, 9 Ves. 407, 410, and cites *Wilmot* v. *Pike* (1845), 5 Hare 14. The authorities cited bear out his statement of the law which is laid down to the same effect in Halsbury's Laws of England, vol. 13, page 79, where other authorities are collected.

There is nothing in this case in hand of what sometimes happens when the party holding the subsequent equity has been able to fortify it by the acquisition of the legal estate or its equivalent a declaration by him holding the legal estate that he so holds as trustee for him claiming. Nor can I find anything in a minor suggestion made that the respondent purchaser should have possessed himself of the prior contracts or agreements on which his title of recognition must rest. The thing was impossible.

The next way it is put is that the respondent should have had an endorsement on the contract of Gesman or perhaps one on each contract all along the line to the company. Who ever heard of a sub-purchaser looking for such a thing? And there is no evidence appellants did so. No case is cited to support these remarkable propositions save such cases as arise from mortgages by deposit of deeds or the like where possession of the deeds is of the essence of the transaction. Indeed in transactions such

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as this, to require that would be, if not a manifest absurdity, most unusual. Nor can I find anything to distinguish, as against respondent Alexander, the case of assignment of a mortgage from that of an assignment of a purchase of land. Any distinction between them is in favour of Alexander who in truth acquired an interest in the land but not by way of security only as a mortgagee does. Dart, in his work on Vendors and Purchasers, 5th ed., p. 837 [7th ed., p. 860], in a section devoted to the subject, treats purchasers of equitable title as bound by the same rule.

In this case we have then the ownership registered in the name of the Canadian Northern Railway Company who were holders of the certificate of title, and then the agreement of sale to Alexander and notice thereof by the registration of his caveat founded thereon, and the holder of the certificated title acknowledging the authority of the Canadian Northern Prairie Lands Company to sell and submitting its rights and duties to the direction of the Court. Can there be anything more to do than declare the equities between the other parties and direct accordingly?

I agree with the reasoning of the judgment of the Court below speaking through Mr. Justice Newlands, wherein he relies on the sections 136 and 139 of the Land Titles Act, now sections 125 and 128. By accident it is in the judgment made to appear as if the first of these sections itself declared the effect, whereas it is the caveator who makes the claims and the result is to render the acquisition of the legal estate by another impossible if the caveator's claim is rightly founded. It is pointed out in argument here that the legal estate is not in question, but that does not dispose of the whole argument for it only shifts the point and does not get rid of many reasons beginning with the scope of these sections and applying others in same Act which together tend to demonstrate that, considering, as in regard to interests in land we must, the equity of a purchaser filing a caveat must be held stronger than that of one who does not. I need not elaborate for this case does not need it.

I still adhere to the views I expressed in the unreported case of *Sawyer-Massey* v. *McLeod*,* that the clause in agreements of sale denying the right of any purchaser to assign unless with approval of the vendor are as between others of no consequence. They are designed to protect a vendor from annoying entanglements, and unless and until the vendor sets up for his own protection any of such stipulations in case of a claim made against or through him no one else has a right to do so. The appellant here tries to present the approval in a somewhat different light from what was presented in the former case by suggesting that the first purchaser not having got approval, the second was entitled to assume there was no prior purchaser. This is a new

*Decided by the Supreme Court of Canada in 1910, not reported.

contention I gather from the judgments below and we are not pointed to a line of evidence shewing either ever searched or inquired at the company's land office. Without such like evidence there is, in my opinion, no foundation for such an argument. It was not until long after purchase that the appellants applied to and got the approval in the vain hope it might in some way help. In the meantime, the respondents' caveat was entered and he became entitled, indeed bound to assert in Court his right which could not be defeated by such contrivance; without at least the co-operation of the owner cancelling the original agreement, much less when the owner assumes the attitude it takes here of merely submitting to the direction of the Court.

I have referred to numerous authorities cited in appellants' factum as if to support some argument to be derived therefrom but fail to see their relevancy, save to the point I have fully dealt with as to giving notice, and what I am about to refer to. Two of these authorities are worthy of notice. *Rice* v. *Rice*, 2 Drewry 73, is a case where a vendor's lien existed, yet the purchaser got his assignment with receipt for purchase money endorsed, and therewith got the title deeds, and by means thereof had by depositing them and this assignment raised a sum of money and absconded. In the face of such a clear equitable mortgage induced by the very acts of the vendor claiming the lien, it was found possible to argue for the vendor's lien being prior. And why so? Because the position of lien prior in time is so strong as to encourage the hope of overcoming such a later title fortified as this was. And in the case of *Cave* v. *Cave*, 15 Ch. D. 639, the rule set out in the maxim was followed after a full examination of *Rice* v. *Rice*, 2 Drewry 73, and *Phillips* v. *Phillips*, 4 DeG. F. & J. 208, and the principles underlying them. I need not set forth the complicated facts of that case. Suffice it to say there seems, to my mind, a great deal more in the facts there than in those here to tempt a Judge to discard the maxim, yet it was followed. Here the man Gesman had in truth and law nothing to sell when he sold to the appellants. It is only by a fiction, as it were, that we can refer to the second assignment, as an assignment at all. It can only become an assignment by virtue of some act or omission on the part of him holding the prior assignment that may raise an equity in him getting the second to have the man holding the first restrained from setting it up and thus let the later one operate. How can the approval of the vendor in ignorance of another assignment have any such force as the statutory effect gives the first by virtue of the caveat and all it implies.

The appeal should be dismissed with costs.

Duff, J. (dissenting):—On the 28th February, 1906, the Canadian Northern Railway Co. (acting through the Canadian

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Northern Lands Company) agreed by two several agreements to sell to one Potter the two quarter sections forming the south half of section one in township 32, and range 15 west of the third meridian in the Province of Saskatchewan. Before the whole of the purchase price was paid Porter assigned his rights under these agreements to one Gesman, who in turn on the second day of November, 1909, agreed with the respondent Alexander (the plaintiff in the action out of which this appeal arises) to assign his rights to Alexander. On the 4th day of the same month Gesman agreed with the appellants to assign the same rights to them. On the 10th day of November, Alexander filed a caveat forbidding any transfer of the lands in question and on the 29th of that month the assignment from Gesman to the appellants was completed and on the 15th of December, the consideration was fully paid. In February, 1910, Alexander brought his action in which he claimed specific performance of his agreement with Gesman and in which he also prayed for an order directing the appellants and the C. N. R. Co. to execute a proper conveyance to him of the lands that were the subject of these various dealings. The trial Judge dismissed the action. The Full Court reversed this judgment on the ground that, while the appellants had the better equitable rights to a conveyance from the company, the respondent Alexander by filing his caveat had gained priority.

I agree with the Full Court that the respondent must succeed (if at all) on the ground upon which their judgment proceeded; and consequently in my opinion the appeal ultimately turns upon one's view of the effect to be attributed to the filing of Alexander's caveat. But in order to reach a proper appreciation of the effect of that proceeding it is necessary, I think, to examine with care the rights of the parties under the agreements through which they respectively claim.

The agreements between the Canadian Northern Railway Company and Potter are both in the same form, were executed upon the same day and may for the purposes of this case be considered as if they had been one agreement embodied in one instead of two formal instruments. The purchase money (over and above a certain sum that was paid in cash) was to be paid in five annual instalments, the last of these instalments being due February 28th, 1911. The agreement contemplates and makes careful provision for the assignment of the purchaser's rights; and it will be necessary to dwell a little upon the effect of the stipulations upon this subject as they appear to me to be a governing ingredient in the considerations which determine the relative priority of the claims upon which we have to pass. The stipulations on part of the purchaser are formally declared by the instrument to be binding upon his assigns; and the instrument contains this clause:—

No assignment of this contract shall be valid unless the same shall be for the entire interest of the purchaser, and approved and countersigned on behalf of the company by a duly authorised person, and no agreement or conditions or relations between the purchaser and his assignee, or any other person acquiring title or interest from or through the purchaser shall preclude the company from the right to convey the premises to the purchaser, on the surrender of this agreement and the payment of the unpaid portion of the purchase money which may be due hereunder, unless the assignment hereof be approved and countersigned by the said company as aforesaid. But no assignment shall in any way relieve or discharge the purchaser from liability to perform the covenants and pay the monies herein provided to be performed and paid.

By these provisions it seems to me the parties have expressed their intention to give to the obligations of the company under the agreement the character of rights which should be personal to the contracting parties to the extent at least that they should be enforceable against the company only by the purchaser or his representatives or by such persons as with the consent of the company should become invested with the purchaser's rights and should become bound to assume his obligations under the agreement—"No assignment shall be valid unless the same shall be for the entire interest of the purchaser." That is to say, the purchaser cannot validly make any partial disposition of his rights; he cannot merely charge them, he cannot attach sub-equities to them; he can only affect them by a disposition which wholly divests him of whatever rights the contract confers upon him and vests these rights in an assignee who is substituted as purchaser for him. No assignment, moreover, though satisfying this condition, can take effect until it has been assented to by the vendors, until the vendors, that is to say, have accepted and approved of the assignee. The purchaser under such a contract stands of course in a position very different from that of a vendee of land under a contract of sale which is in the ordinary form and contains no such stipulation. A purchaser, under such a contract may multiply sub-equities to any extent he pleases and the holder of such sub-equities again may each in his turn repeat the same process indefinitely. Where lands are sold under terms by which the payment of purchase money is deferred for a considerable period during which the contract remains *in fieri*, it is obvious that such sub-equities may become a source of embarrassment to the vendor; and it is doubtless in part with the object of escaping such embarrassment that railway companies (holding large areas of land for the purpose of sale only and having of course in respect of such lands a very great number of dealings) customarily introduce this clause into the form of contract which they commonly use when small parcels of land are sold upon credit.

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But while the clause is thus beneficial to the company it is of even greater value to the purchaser and his assignee. The assignee whose assignment has been accepted gets the advantage of being placed in direct contractual relations with the vendor and being freed from the necessity of concerning himself about possible equities created by the purchaser in the meantime; and as to the purchaser (who cannot of course get a registered title so long as the purchaser's money remains unpaid) the advantage to him of being enabled to transfer to a sub-purchaser an unimpeachable title to his rights is obvious. That the assignee under an approved assignment does get such a title (I am of course assuming now that the assignee is free from any imputation of *mala fides*) is sufficiently apparent.

It is manifest that the assignment contemplated and provided for by the agreement is intended to result, when accepted by the company, in a new agreement between the company and the assignee. By the express terms of the contract the obligations of the purchaser are declared to bind his assignees; and the assignee in presenting his assignment for approval undertakes, of course, to submit to this as well as the other terms of the contract. The company, on the other hand, comes under an obligation to the assignee to perform on its part the contract of sale—whether because of an implied undertaking with the assignee arising out of the acceptance of the assignment or *ipso jure* in consequence of the assignment vesting in him the purchaser's rights is immaterial. The original purchaser is not relieved from responsibility under his covenants but the effect of the transaction is that the assignee is introduced as a party to the contract of sale; and under the contract so reconstituted the assignee is entitled to the rights, and assumes the primary burden of the correlative obligations of the purchaser as those rights and obligations are therein declared. Now, one of the terms of the original contract is, as we have seen, that no rights under it shall be acquired through any disposition by the purchaser unless such disposition complies with conditions which are only fulfilled by the assignment to the accepted assignee; and consequently nobody claiming rights under the contract through any disposition by the purchaser (which rights obviously cannot be constituted in defiance of the express terms of the contract itself upon which they are founded) can dispute the title of the accepted assignee to the benefit of the purchaser's rights. The company in a word by its acceptance of the assignment becomes a trustee of the land for the purposes defined by the terms of the contract thereby constituted, and according to those terms the land is to pass to the assignee on the performance of the conditions defined.

It is argued that the provisions we have been considering are for the benefit of the vendor alone, and that he alone can

take the benefit and claim the protection of them. It would be sufficient to say that such a proposition applied to the facts of this case means in the last analysis that the company being under no legal disability to carry out its contract with the assignee may lawfully refuse to do so, for it is perfectly obvious that appreciating the rights of the parties as rights governed by the contract alone the company is legally bound to convey this property to the appellants and is under no sort of legal duty or obligation to Alexander which creates an impediment in the way of its doing so. The contention, moreover, overlooks the circumstance that a new contract has been formed by which the assignees have come under obligations to the company. In entering into that relation the assignees were entitled to rely on this provision. They were entitled to rely upon it because it was one of the terms of the contract to which it was proposed that they should become parties and it was obviously as much for their benefit as for that of the company; and it is to be presumed that they did rely upon it. As against parties to the contract or persons claiming under the contract either directly or indirectly they are indisputably entitled to any protection which that provision may afford. Indeed, as I have pointed out, it is an unwarrantable assumption to say that this clause was originally framed exclusively in the interests of the company. It is obviously to the interest of all parties that sub-purchasers under such an agreement shall be able to pay their purchase money with perfect confidence in the title they are acquiring, and on an unsophisticated reading of it, it is manifest that one of the main objects of this clause is to secure to the sub-purchaser an unimpeachable title as against the vendors. That being so, it is impossible to argue that the sub-purchaser is not entitled to the benefit of it or that his rights under it can be neutralized by any action of another party to the contract.

From all this it is clear enough that the respondent Alexander cannot succeed in this action unless there is some other fact or circumstance in addition to this agreement with Gesman which gives him some right of action against the company or the appellants. That he has no right of action against the company is clear and it is clear also as a result of the special terms of the agreement that he can only succeed against the appellants by establishing that he is entitled to have the rights vested in them exercised for his benefit—that the appellants, in a word, are trustees of their rights for him. The contention on behalf of Alexander is that such a trust arises on one of these grounds: 1st, that his caveat bound Gesman's interest under the agreement for sale from the time it was filed and that the appellants took that interest charged with an obligation to carry out Gesman's contract with Alexander; 2nd, that the caveat was, in law, notice to the appellants of Gesman's contract with Alexan-

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der and that they consequently must be held to have acquired Gesman's interest with notice of Gesman's breach of trust; and 3rd, that the appellant's failure to search the register before paying the purchase money to Gesman was such negligence as to deprive them of the benefit of their legal position under the contract or to require the Court to impute to them constructive notice of the facts stated in the caveat which, of course, would have been ascertained if the register had been examined.

The first and second of these contentions are, I think, based upon a misconception of the purpose for which the machinery of caveats was devised by the authors of this Act. The fundamental principle of the system of conveyancing established by this and like enactments is that title to land and interests in land is to depend upon registration by a public officer and not upon the effect of transactions *inter partes*. The Act at the same time recognises unregistered rights respecting land, confirms the jurisdiction of the Courts in respect of such rights and furthermore makes provision—by the machinery of the caveat—for protecting such rights without resort to the Courts. This machinery, however, was designed for the protection of rights—not for the creation of rights. A caveat prevents any disposition of his title by the registered proprietor in derogation of the caveator's claim until that claim has been satisfied or disposed of; but the caveator's claim must stand or fall on its own merits. If the caveator has no right enforceable against the registered owner which entitles him to restrain the alienation of the owner's title, then the caveat itself cannot and does not impose any burden on the registered title. Alexander's caveat consequently conferred no right upon him, it could only operate to protect such rights as he had and could enforce against the land, that is to say against the registered owner of the land. It is quite clear as I have pointed out that he had no such rights and the filing of the caveat therefore was a wrongful interference with the proprietory rights of the company for which Alexander might have been answerable in damages if the company had sustained any loss in consequence of it. It seems equally clear that the caveat could not affect the appellants as bringing home to them notice of the transaction between Alexander and Gesman. The statute does not say that the caveat shall operate as notice of the facts stated in it to intending purchasers, and there is not anything in the statute giving the least ground or colour for attributing to it any such operation. If an intending purchaser chooses to close his purchase by paying his purchase money without first acquiring a registered title, he runs the risk of finding that he cannot get a registered title until some unregistered claim has been satisfied or some unregistered interest acquired. But he incurs this risk not because he is deemed to have had notice of the claim and for that reason to

be bound in good faith to recognise it, but because he can only acquire a title by registration and registration he cannot have free from an enforceable claim against the registered title in face of a caveat founded upon such a claim until that claim has been satisfied or the superiority of his claim has been established.

Section 173 of the Act when read together with the provisions respecting caveats would seem to establish beyond controversy that this view of the effect of a caveat correctly interprets the intention of the statute. "No person," the section reads, "contracting or dealing with . . . owner of land for which a certificate of title has been granted shall, except in case of land by such person . . . , be affected by any trust or unregistered interest in land, any rule of law or equity to the contrary notwithstanding."

It would be strange if after this formal declaration the Legislature had proceeded to provide a statutory method of affecting the conscience of the purchaser with notice of unregistered interests. The assumption that the Legislature has provided such a method in the system of caveats seems to be unwarrantable. The operation of the caveat according to the design of the Act (as affecting a purchaser), is, I think, aptly expressed in Lord Redesdale's language in *Underwood* v. *Courtown*, 2 Sch. and L. 41, at p. 66; it is to "bind his title not his conscience."

The third ground of relief is put in this way. Alexander, it is said, had an equitable right which was prior in time to the equitable right of the appellants, and the subsequent right of the appellants ought not to be permitted to displace his prior right, 1st, because the appellants, in failing to search for caveats before closing their purchase from Gesman were guilty of such gross negligence as to make it inequitable to permit them to retain the advantage arising from their contact with the company; or 2nd, because the appellants, by reason of their neglect to search the register, had constructive notice of Alexander's claim.

To the first of these contentions, there is an objection which seems to me to be absolutely fatal, and it is this. As a great equity Judge, Turner, L.J., said, in *Cory* v. *Eyre*, 1 DeG. J. & S. 149, at p. 167:—

> The maxim *qui prior est tempore potior est jure* founded . . . on this principle, that the creation or declaration of a trust vests an estate and interest in the subject-matter of the trust in the person in whose favour the trust is created or declared. Where, therefore, it is sought, . . . to postpone an equitable title created by declaration of trust, there is an estate or interest to be displaced. No doubt there may be cases so strong as to justify this being done, but there can be as little doubt that a strong case must be required to justify it.

Lord Westbury explains the maxim in the celebrated case of *Phillips* v. *Phillips*, 4 DeG. F. & J. 208, in language which is to

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the same effect. The maxim has never been applied in favour of persons who have neither by themselves nor by those whose rights they are asserting, had any legal or equitable interest in the land which was the subject of the dispute.

It is clear, as I have said, that Alexander never acquired any right which he could compel the registered owner to recognize and therefore he never had a right which in any lawyerly use of the words could be described as an interest in land. His right was, and remained a personal right against Gesman, enforceable, no doubt, by equitable remedies, both against Gesman and against others who might be implicated in Gesman's breach of faith, but still only a personal right because of the special provisions of the contract with the company under which Alexander could acquire no claim against the registered proprietors until they had assented to his assignment.

It is argued that Gesman was the owner of the land in equity, but this seems really to be an abuse of language, (see Fry, Specific Performance, 5th ed., p. 675, sec. 1392, and *Ridout* v. *Fowler*, [1904] 1 Ch. 658, at pp. 661 and 662, per Farwell, J.). The company, it may be admitted, was a trustee in a limited sense. It is inaccurate to say that the company held the land in trust for the purpose of fulfilling the agreement of sale. But as I have pointed out, that trust is defined by the agreement; and only those can in any admissible sense of the words be said to have acquired a beneficial interest in the land who have acquired, or in other words are entitled to enforce, some rights under the agreement. In this Alexander fails; his right (in the sense indicated) though in process of consummation was never consummated. The wrong done him by Gesman was not to aid in defeating an unregistered right in the land (or against its registered owner) already constituted, but in preventing Alexander from constituting such a right by effectively transferring to the appellants the rights he had agreed to vest in Alexander. If the appellants were implicated in this wrong, the Court would find a means of making them account for what they acquired by means of it. But that must at least involve finding in them either guilty knowledge or guilty ignorance of Gesman's wrongdoing—neither of which is suggested. The contention, moreover, fails because there is no adequate ground for imputing any such misconduct or negligence to the appellants as would justify the Court in holding them accountable as trustees for Alexander. The test to be applied is stated by Lindley, M.R., in *Oliver* v. *Hinton*, [1899] 2 Ch. 264, at p. 274.

> To deprive a purchaser for value without notice of a prior incumbrance of the protection of the legal estate it is not, in my opinion, essential that he should have been guilty of fraud; it is sufficient that he has been guilty of such gross negligence as would render it unjust to deprive the prior incumbrancer of his priority.

It may be observed in passing that Lindley, L.J., is not here

dealing with constructive notice; he is assuming an absence of notice either actual or constructive, and even in the absence of notice, the case from which his observation is taken, decides that gross negligence such as failure to require the production of the title deeds may deprive even a purchaser for value without notice of the right to retain his legal advantage whatever it may be, to the disadvantage of the holder of a prior equitable interest. I have pointed out that Alexander is not the holder of such an interest—but putting aside that objection, we come to consider whether the appellant's negligence (so called) in failing to examine the register is of the kind or degree which Lindley, L.J., had in view.

I should say before proceeding to apply this doctrine to the facts that I think it is doubtful whether the doctrine is one which can safely or properly be applied to impeach the rights of a purchaser contracting directly with a registered owner under the Act. I think there is something to be said in favour of the view that it cannot be applied consistently with the objects to be obtained by registration of title and that the design of the Act is that as against such a purchaser unregistered interests should depend for their protection upon caveats operating directly to bind the title of the registered proprietor. Doctrine developed under the old system of conveyancing for the protection of equitable rights ought, no doubt, to be applied very guardedly for the purpose of deciding controversies respecting unregistered interests in registered land; and the utmost vigilance ought to be observed to avoid the mistake of yielding a punctilious allegiance to the letter of a rule evolved under widely different conditions without determining to what extent the principle which underlies the rule is in the circumstances properly applicable. For the purposes of this case, however, I assume that the doctrine as stated by Lindley, L.J., is applicable. If I am right in the opinion I have expressed as to the effect of the appellants' contract with the company, it is perfectly clear that negligence cannot be imputed to him because of his failure to make inquiries respecting dealings of Gesman. Gesman produced his agreement with the company and the assignment approved, and the appellants were entitled to rely upon that. A cautious or suspicious man might have done more, but they were not bound to be suspicious, and they are not to lose their legal rights because they might by "prudent caution" (to use Lord Cranworth's phrase in *Ware* v. *Egmont*, 4 DeG. M. & G. 460, at p. 473), have obtained more information than they did unless they have been guilty of "gross and culpable negligence." As Lord Selborne said in *Agra Bank* v. *Barry*, L.R. 7 H.L. 135, at p. 157, the purchaser owes no duty to the "possible holder of a latent title" to exercise care with regard to the title of his vendor. A purchaser is under no legal obligation to investigate his vendor's title. *Bailey* v. *Barnes*, [1894]

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1 Ch. 25, at p. 35. The only relevant question is were the assignees (from the point of view exclusively of their own interests) guilty of "gross and culpable negligence" in not examining the register? As regards the absence of concern respecting dealings by Gesman—which could not affect him—the point seems clear; it is only "by falling into the error attributed to those who are wise after the event" (see per Lindley, L.J., [1894] 1 Ch., at p. 34) that one could charge the appellant with negligence in that respect. Then, can it be fairly said that in view of possible dealings by the company itself their failure to search was "gross and culpable negligence"?

It is quite clear that a purchaser acquiring property in the ordinary way under an arrangement such as that entered into by Potter with a great railway company, cannot avoid such risks as there may be in the possibility of fraud by the company with which he deals. No amount of vigilance on his part could, for example, prevent the ultimate registration of a transfer in course of transmission to the registry at the moment of the execution of his agreement for purchase. In the absence of fraud, however, there is no risk; and suffice it to say, that in such purchases the possibility of such frauds does not enter into the calculations of purchasers unless at least they are abnormally given to suspicion. It, in my judgment, would be laying down a rule utterly at variance with the habits and modes of thought of people who engage in such transactions, to hold that it was gross and culpable negligence or indeed negligence in any degree for a purchaser in such a transaction to act upon the assumption that the company's good faith could be relied upon with absolute confidence. I think, for these reasons, that the suggestion that there was negligence of such a character as to be material here is utterly baseless.

As to constructive notice I am inclined to think that as regards purchasers dealing with the registered owner, the doctrine has been swept away by sec. 173 of the Act, and that the protection for unregistered interests substituted for it is the filing of caveats. As regards titles completed by registration, it clearly has no place in the scheme of the Act, I am aware that in the Australasian Courts, the first of these propositions appears to have been doubted, but I have seen no case in which the decision depended in any way upon a recognition of the doctrine as applicable to determine the rights of a purchaser from a registered owner. Knowledge and notice, of course, must often present themselves as ingredients in fraud or in the facts from which fraud may be inferred, or in the circumstances giving rise to an estoppel or an equity of some description affecting the relative priorities of unregistered claims; but notice of an unregistered right or interest in itself cannot, I think, affect the rights of a purchaser dealing bonâ fide with a registered owner.

There is no necessary analogy between the position of a proposed purchaser dealing with a registered proprietor of land under a system of title by registration, and the position of a purchaser of land where no such system exists. In the course of centuries an elaborate system of rules has been developed touching the proof of title which such a purchaser is entitled to demand from his vendor and the practice of conveyancers points out the course a prudent solicitor will follow in order to protect the purchaser's rights. It was to avoid the delay, the uncertainty and the expense attendant upon the investigation of titles that the system of title by registration was devised; and one of the most fruitful sources of uncertainty and expense which the authors of this system designed to clear out of the way, was this doctrine of constructive notice. See Report of Commissioners on Registration, 1857; Hogg on Ownership and Encumbrance, pp. 8 and 26.

Not the least of the difficulties attending upon the application of the doctrine of constructive notice has always been the vagueness of the doctrine itself. "Every one who has attempted to define the doctrine of constructive notice has declared his inability to satisfy himself," said Lord St. Leonards in the 14th edition of his work on Vendors and Purchasers. An attempted definition inserted in a bill introduced by that great property lawyer in 1862 proved to be so unsatisfactory, that it was struck out with the consent of the author of the bill. Again and again eminent Judges in both common law and equity Courts have declared that the doctrine has been carried too far and is not to be extended. In *English and Scottish Mercantile Investment Co.* v. *Brunton*, [1892] 2 Q.B. 700, at p. 708, Lord Esher, M.R., said:—

> In a series of cases Lords Cottenham, Lyndhurst and Cranworth, Lord Justice Turner and the late Master of the Rolls, Sir George Jessel, have said that the doctrine ought not to be extended one bit farther; all the Judges seem to have agreed upon that. In *Allen* v. *Seckham*, 11 Ch.D. 790, I pointed out that the doctrine is a dangerous one. It is contrary to the truth. It is wholly founded on the assumption that a man does not know the facts; and yet it is said that constructively he does know them.

Bowen and Kay, L.JJ., accepted this view. In *The Birnam Wood*, [1907] P. 1, at p. 14, Farwell, L.J., said:—

> The Courts have of late years been unwilling to apply the principle of constructive notice so as to fix companies or persons with knowledge of facts of which they had no knowledge whatever.

And in Dart on Vendors & Purchasers (7th ed.), at p. 902, it is stated that

> the tendency is to restrict the doctrine of constructive notice so far as is compatible with the rules of the Court applicable to fraud.

In the latest decision of the Court of Appeal dealing with the subject, the view expressed by Lindley, L.J., is that the doctrine

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comes into play only when there are facts justifying an inference of knowledge or circumstances indicative of wilful ignorance.

It is not necessary to decide whether or not the doctrine has any application in this case, because if I am right in the view I have just expressed that the facts do not warrant any imputation of gross negligence *à fortiori* they do not support an imputation of fraud or of that wilful departure from the usual course of business "in order to avoid acquiring a knowledge of a vendor's title" or that "wilful ignorance of facts," which according to the view expressed by Lindley, L.J., in the case above referred to, it would be necessary to shew in order to impute constructive notice to the appellants. As Lindley, L.J., said in that case [*Bailey* v. *Barnes*, [1894] 1 Ch. 25, at p. 34]:—

> The doctrine of constructive notice (i.e., as expounded in his judgment) is based on good sense and is designed to prevent frauds on owners of property; but the doctrine must not be carried to such an extent as to defeat "honest purchasers; and although this limitation has sometimes been lost sight of, still the limitation is as important and is as well known as the doctrine itself.

ANGLIN, J.:—The defendants McKillop and Benjafield appeal from the judgment of the Supreme Court of Saskatchewan *en banc*, reversing the judgment of Johnstone, J., who dismissed the plaintiff's action for specific performance, holding that the defendants, although subsequent purchasers, by their diligence in procuring an actual assignment of their immediate vendor's interest and the approval thereof by the original vendor, the railway company, in which the legal estate was vested, and by obtaining possession of the original contract of sale made by the company with such approval endorsed thereon, had acquired a position "much stronger in equity than that of the plaintiff," who "had nothing more than an agreement to assign." The sale to the plaintiff was of one-half of the section purchased by his vendor: the sale to the defendant was of the whole section.

The Court *en banc* was of opinion that the registration by the plaintiff of a caveat in respect of his claim, prior to the defendants' completing their purchase and obtaining the assent of the original vendor to the assignment to them of the interest of the original vendee, prevented the defendants from acquiring any right or interest in the land except subject to the plaintiff's claim.

The facts of the case are briefly but sufficiently summarized by Newlands, J., as follows:—

> The plaintiff first obtained an equitable estate in the said half section of land. Subsequently, but without notice of the plaintiff's equitable estate, the defendants, McKillop and Benjafield, also obtained an equitable estate in the said land. Before anything further was done by the said defendants the plaintiff filed a caveat in the proper land

titles office against the said lands, after which the said defendants completed their purchase and had the assignment to them approved of by the owner of the legal estate.

Apart from the effect of Land Titles Act of Saskatchewan, (6 Edw. VII. ch. 24), and of the caveat lodged by the plaintiff pursuant to its provisions, I incline to the view that the defendants would have been entitled to succeed, because, although subsequent purchasers, they had the best right to call for a conveyance of the outstanding legal estate and were therefore in equity entitled to its protection. Dart on Vendor and Purchasers, 7th ed., p. 845. They held this position not because they had given notice of their purchase to the holder of the legal estate, which the plaintiff had omitted to do, *Hopkins* v. *Hemsworth*, [1898] 2 Ch. 347, nor because the plaintiff had omitted to have a note of his purchase endorsed on the original contract from the railway company: *Jones* v. *Jones*, 8 Simons 633 (the points much insisted on at bar), but because they had obtained the consent of the railway company to the assignment to them of their vendor's interest in the land. As a result of the original sale the railway company became a trustee of the property for its purchaser, who in the eye of a Court of equity was the real beneficial owner: *Shaw* v. *Foster*, L.R. 5 H.L. 321, 338. The defendants were purchasers of his interest for value and without notice of the plaintiff's claim. They procured the railway company to become a party to the conveyance to them of that equitable interest by obtaining its consent to the assignment under which they claim. Although the company did not formally convey or declare a trust of the legal estate in favour of the defendants, its privity and consent to the assignment to them gave them a position which (apart always from the effect of the Land Titles Act and of the caveat lodged by the plaintiff under it) was such that a Court of equity would not interfere to deprive them of the better right so obtained to call for the conveyance of the legal estate: *Wilkes* v. *Bodington*, 2 Vernon, 599; *Wilmot* v. *Pike*, 5 Hare 14, 22; *Taylor* v. *London & County Banking Co.*, [1901] 2 Ch. 231, 262-3. The effect of this consent of the railway company on the defendants' rights is certainly not lessened by the presence in the company's original agreement for sale of the following special clause:—

> No assignment of this contract shall be valid unless the same shall be for the entire interest of the purchaser, and approved and countersigned on behalf of the company by a duly authorized person, and no agreement or conditions or relations between the purchaser and his assignee or any other person acquiring title or interest from or through the purchaser shall preclude the company from the right to convey the premises to the purchaser, on the surrender of this agreement and the payment of the unpaid portion of the purchase money which may be due hereunder, unless the assignment hereof be approved and countersigned by the said company as aforesaid.

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But before the defendants obtained the assent of the railway company and when they had paid only $700 on account of their purchase money and there was still $1,800 unpaid, the plaintiff lodged in the land titles office his caveat forbidding "the registration of any transfer or any instrument affecting (the half-section in which he claimed an interest) unless such instrument is expressed subject to my claim." The agreement for purchase held by the plaintiff was an "instrument," within the meaning of clause 11 of sec. 2 of the Land Titles Act. Under sec. 136 the plaintiff was entitled to lodge a caveat in respect of his interest under that agreement; and when so lodged and while it remained in force, under sec. 139, the caveat had the effect of preventing the registrar from registering

> any memorandum of any transfer or other instrument purporting to transfer, encumber or otherwise deal with or affect the land in respect to which such caveat was lodged, except subject to the claim of the caveator.

That the caveat remained in force is not questioned. Although challenged on the ground that it did not shew the interest of the caveator, the caveat, in my opinion, sufficiently complied with the requirements of sec. 137. It stated the claim of the caveator to be as

> the owner of the south half, section one, in township thirty-two (32), and range fifteen (15) west of the third meridian in the Province of Saskatchewan, under and by virtue of an agreement for sale in writing of the said property to me from G. A. Gesman of the city of Des Moines in the State of Iowa, one of the United States of America, agent.

It did not give the number of the certificate of title as prescribed in the form W. But, in view of the complete description of the land which it contained, that was, in my opinion, unnecessary. The provision of sec. 137 should, I think, be regarded as directory and intended for the guidance of registrars. *Wilkie* v. *Jellett*, 2 Terr. L.R. 133, at p. 143, 26 Can. S.C.R. 282, 288. If a caveat enables the registrar to identify the land in respect of which it is lodged and if the interest claimed is stated with reasonable certainty, he properly receives it and, when duly lodged, it has the effect contemplated by the statute, although in some particular it should not be in strict compliance with the prescribed form. A certificate of title to the land in question had been granted to the C.N. Railway Company, sec. 73 of the statute is as follows:—

> 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 (sic) land except a leasehold interest not exceeding three years or render such land liable as security for the payment of money.

By sec. 74 it is provided that

> upon the registration of any instrument . . . the estate or interest specified therein, shall pass;

and by sec. 80, it is enacted that

> every instrument shall become operative according to the tenor and intent thereof so soon as registered and shall thereupon create, transfer, etc., the land, or estate or interest therein, mentioned in such instrument.

Under clause 11 of sec. 2, "instrument" means

> any grant, etc., or any other document in writing relating to or affecting the transfer of or dealing with land or evidencing title thereto.

Under this definition the contracts both of the plaintiff and of the defendants were "instruments." Neither of them created or transferred any interest under the Act because unregistered. But the equitable interests or estates conferred by them would nevertheless be recognized and dealt with and would be enforced against the registered owner and others adverse in interest, in the exercise of the jurisdiction of a Court of equity: *Re Massey & Gibson*, 7 Man. R. 172. The plaintiff's caveat from the time it was lodged prevented the registration of any instrument except subject to his claim (sec. 139). *Primâ facie* that means subject to his claim as it stood at the time when the caveat was lodged. At that time both the plaintiff and the defendant had equitable rights as purchasers. The plaintiff had an agreement for a sale to him in respect of which he had paid $100 on account; the defendants had a like agreement in respect of which they had paid $700 on account. Inasmuch as every conveyance of an equitable interest is innocent, the defendants not having at that time taken any step which would entitle them to priority or, which is the same thing, would entitle them to ask a Court of equity not to interfere to deprive them of any acquired right to call for a conveyance of the legal estate, and the plaintiff not having done or omitted to do anything whereby his priority would be impaired or affected, the defendants' claim as purchasers was still subject to his prior equity in respect of the half section bought by him. That the plaintiff's caveat, if it had been lodged only after the defendants had obtained the formal assignment of their vendor's contract and had procured the assent of the railway company thereto, would still have sufficed to entitle him to prevent the registration of the defendants as owners under a conveyance to them from the railway company seems to me improbable, inasmuch as, apart from the provisions of the Land Titles Act, the defendants would then have had a better right to call for the conveyance of the legal estate and would in equity be entitled to the protection of it against the plaintiff's prior equitable claim. But that question it is not now necessary to determine.

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Whether a caveat duly lodged should be deemed notice is apparently an open question. *General Finance Agency, etc., Co.* v. *The Perpetual Executors & Trustees' Association*, 27 Viet. L. R. 739, 744. Whether the plaintiff's caveat was in the present case notice to the appellants, in view of the fact that before it was lodged they had already made their contract and paid part of their purchase money, is in the opinion of Newlands, J., open to considerable doubt. But whatever its effect as notice, (and I incline to the view that it must be deemed notice to every person who claims to have acquired, subsequently to its being lodged, any interest in the lands, or to have increased or bettered any such interest already held) inasmuch as it is the only means provided for the protection of unregistered interests and it was obviously intended by the legislature thus to afford adequate and sufficient protection for them, I am of the opinion that 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. This, in my opinion, is the necessary result of a fair construction of secs. 73, 74, 80, 81, 136 and 139 of the Land Titles Act. I would refer to *General Finance Agency, etc., Co.* v. *Perpetual Executors & Trustees' Association*, 27 Viet. L.R. 739; and *Re Scanlan*, 3 Queensland Law Journal 43.

Moreover, as a document affecting the transfer of land a caveat is an "instrument;" and sec. 81 provides that

> Instruments registered in respect of or affecting the same land shall be entitled to priority, the one over the other according to the time of registration and not according to the date of execution.

It was, I think, incumbent upon the defendants McKillop and Benjafield before completing their purchase, to ascertain that no caveat had been lodged against the land, and in default of their having done so, they cannot complain if the prior equity of the plaintiff, protected by his caveat, is held to be paramount. As put by Lilley, C.J., in *Re Scanlan*, 3 Queensland Law Journal 43, it is a "plain practical precaution for a purchaser . . . to ascertain that there is no caveat (in the registry) before he pays his purchase money. . . . People cannot learn too soon that dealings outside, and without reference to the registry, are hazardous."

The judgment for specific performance, against the defendants Gesman and McKillop and Benjafield appears to be unimpeachable. The Canadian Northern Railway Company having submitted their rights to the Court may be taken to have waived any right which they might have had to refuse to approve of or recognize the assignment from Gesman to the plaintiff. Since

they do not set up against the plaintiff the special clause in their agreement above quoted, their co-defendants cannot do so. The judgment for specific performance as against the company would therefore appear to have been quite proper. I express no opinion as to what the result should have been, if, in answer to the action, the railway company had pleaded and relied upon the special clause referred to and the exercise of any discretion which it conferred upon them.

For these reasons I would dismiss this appeal with costs.

BRODEUR, J.:—I concur in the opinion expressed by Mr. Justice Anglin.

Appeal dismissed with costs.

SELLICK v. TOWN OF SELKIRK.

Manitoba King's Bench, Robson, J. March 23, 1912.

1. TRIAL (§ VI—320)—NOTICE OF TRIAL—CLOSE OF PLEADINGS—UNSERVED CO-DEFENDANT.

A notice of trial is irregular unless the pleadings are closed as to all parties including a co-defendant not served with the statement of claim within the time prescribed for service.

[*Ambroise* v. *Evelyn*, L.R. 11 C.D. 759, followed.]

2. DISMISSAL AND DISCONTINUANCE (§ I—3)—FAILURE TO SERVE CO-DEFENDANT.

Where one of two defendants has appeared and pleaded, but the other defendant has not been served within the time limited for service, the appearing defendant is not entitled to treat the action as having been abandoned as against his co-defendant and to himself serve notice of trial; he should first inquire of the plaintiff as to the intention to proceed against the unserved defendant, and if it appears that the action is being informally abandoned as to the unserved defendant without service of a discontinuance, the appearing defendant may make an interlocutory application to strike out the name of his co-defendant..

[*Foley* v. *Lee*, 12 P.R. (Ont.) 371, applied; *Vandusen* v. *Johnson*, 3 C.L.T. 505, distinguished.]

ACTION by plaintiff against the Town of Selkirk and the Winnipeg, Selkirk and Lake Winnipeg Railway Company for damages for personal injuries sustained by plaintiff, as alleged, as a result of negligence of the defendants.

The defendant the Town of Selkirk was served with the statement of claim, had pleaded, and had served notice of trial.

The other defendant the railway company was not served with the statement of claim. The period allowed for service has elapsed.

The plaintiff moved to set aside the notice of trial on the ground that the action was not at issue. The Referee granted the application.

This appeal therefrom was dismissed.

M. H. Hannesson, for plaintiff.

F. Heap, for Town of Selkirk.

R. D. Guy, for Winnipeg, etc., Ry. Co.

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ROBSON, J.:—It is, of course, possible that service on the railway company may still be permitted. See Rule 176. Whether or not such leave would be granted cannot be decided on this application. It cannot be overlooked that the plaintiff has the right to apply therefor.

Rule 545 provides that after the action is at issue either party may give notice of trial. Until all the defences are delivered the pleadings are not closed nor the cause at issue: *Ambroise* v. *Evelyn*, L.R. 11 C.D. 759. The extent of the probability of there ever being a defence filed by the railway company cannot be considered. That there is a possibility of such a defence is enough.

The defendant the Town of Selkirk would be confronted by the same difficulty evidently were it to move to dismiss as the cause must have been at issue two months. Rule 540.

Counsel for the town cited a note of a case of *Vandusen* v. *Johnson*, 3 C.L.T. 505. The plaintiff there had issued his writ against several defendants, but served only one. The pleadings were, it is said, closed with the defendant served. On a motion to set aside a notice of trial (served, I infer, by the appearing defendant) on the ground that the cause was not at issue, it was held that the plaintiff not having proceeded against the other defendants, must have taken to have abandoned as against them and that the pleadings were closed and the notice of trial regular. Very little can be learned from the meagre note, but it suggests that the pleadings were closed at the instance of the plaintiff himself by notation. This seems to have been the ground upon which the finding of abandonment was based.

I do not think that even strong evidence of abandonment by the plaintiff as against one defendant would entitle the other to act as if the cause were formally at issue.

The appearing defendant is not in such circumstances in any difficulty. He should inquire as to the plaintiff's intentions: *Ambroise* v. *Evelyn*, L.R. 11 C.D. 759, and *Foley* v. *Lee*, 12 P.R. 371, and if so advised thereafter might apply to strike out the name of the defendant not served. That an available defendant had not been served within the prescribed period would, unexplained, be some evidence of abandonment.

I think the question of abandonment is one to be decided on an application in Chambers, such as I have suggested. The action could not proceed to trial and final judgment with an unserved defendant still named on the record and not formally disposed of.

I think this appeal must be dismissed with costs in the cause to the plaintiff as against the defendant the Town of Selkirk.

Appeal dismissed.

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Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue and Cameron, JJ.A. March 4, 1912.

1. INSURANCE (§ III H—155) — LIFE INSURANCE PREMIUMS — DEFERRED HALF-YEARLY PREMIUM—DEDUCTION FROM POLICY.

Where by the terms of a policy of life insurance the balance of the whole year's premium was to be deducted on making settlement of the claim the deferred half-yearly payment of premium which had not accrued due during the lifetime of the assured is not a debt of his estate and the loss through the deduction thereof from the face of the policy falls upon the beneficiary in whose favour a statutory appointment operating as a declaration of trust had been made in the lifetime of the assured.

2. INSURANCE (§ IV A—162)—ASSIGNMENT OF LIFE INSURANCE POLICY—WIFE NAMED IN POLICY AS BENEFICIARY JOINING IN MORTGAGE OR CHARGE.

Where the insured in a life insurance policy assigned the same to secure the payment of his debt on the security of the policy, and his wife who had been named as the beneficiary in the policy joined with him in executing the assignment and in signing the charge or lien, such charge when made solely for the benefit of the insured is payable primarily out of his estate so as to free the insurance policy in favour of the wife as between herself and the estate where the designation of the wife as beneficiary on the face of the policy is by statute (R.S.M. 1902, ch. 83, and R.S.O. 1897, ch. 203), declared the creation of a trust for her separate use free from the debts of his estate.

[*Re Tatham*, 2 O.L.R. 343; *Re McGarry*, 18 O.L.R. 524, specially referred to; *Hall* v. *Hall*, [1911] 1 Ch. 487, applied; see also *Hudson* v. *Carmichael* (1854), Kay 613, and *Paget* v. *Paget*, [1898] 1 Ch. 470.]

3. INSURANCE (§ IV A—162)—ASSIGNMENT OF LIFE INSURANCE POLICY—WIFE NAMED IN STATUTORY APPOINTMENT AS BENEFICIARY JOINING IN MORTGAGE OR CHARGE.

Where the benefits of a life insurance policy have been settled upon the wife of the assured by a written appointment in her favour having the statutory effect of a declaration of trust for her separate use, a subsequent charge or mortgage of the policy made by the husband and wife jointly but solely for the husband's benefit is a debt of the assured which the wife is entitled to have satisfied out of his general estate so as to free the policy from such mortgage or charge.

[*Hall* v. *Hall*, [1911] 1 Ch. 487, applied.]

4. INSURANCE (§ IV B—170)—LIFE INSURANCE POLICY—WHEN CONDITIONAL APPOINTMENT INEFFECTUAL AS STATUTORY TRUST—R.S.M. 1902, ch. 83.

Where the insured, in a life insurance policy originally made payable to his personal representatives, endorses on the policy a declaration that the policy and the insurance thereunder should remain payable as in the policy mentioned, subject to alteration during his lifetime, but, if not "assigned or otherwise disposed of," that on his death, if his wife survived him, the policy should be for her benefit, such declaration is not sufficiently positive or unconditional to operate as a declaration of trust in favour of the wife or to confer upon her the benefits of the policy as her separate estate under the Manitoba Life Insurance Act, R.S.M. 1902, ch. 83. *Per* Howell, C.J.M., Richards and Perdue, JJ.A.

[As to statutory appointments of beneficiaries of life insurance policies see Mr. Labatt's article in 36 C.L.J. 249 and Cameron on Insurance, pp. 121, 214.]

5. INSURANCE (§ IV B—170)—LIFE INSURANCE POLICY—CHANGE OF BENEFICIARY—STATUTORY TRUST.

While the appointment of an insurance policy made in favour of the wife of the assured under the Manitoba Life Insurance Act, R.S.M.

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1902, ch. 83, may by section 15 thereof be revoked and the benefits declared in favour of the wife may by a writing be diverted to the estate of the assured, the writing must indicate in clear and conclusive language the intention of the assured to alter the appointment first made in her favour. *Per* Howell, C.J.M.

6. INSURANCE (§ IV B—170)—LIFE INSURANCE POLICY—APPOINTMENT OF BENEFICIARY—TRUST.

In order to create a trust in favour of the wife of the assured, the statutory appointment of the benefits of a life insurance policy which under the Manitoba Life Insurance Act, R.S.M. 1902, ch. 83, sec. 7 (similar to sec. 159(1) of the Ontario Insurance Act, R.S.O. 1897, ch. 203) the assured may make in writing, must be in clear and unequivocal words taking effect immediately as upon an immediate declaration of trust and so as to divest the assured of all beneficial interest therein for the time being subject only to any future appointment, the making of which may be reserved to him by the statute. *Per* Perdue, J.A. (Cameron, J.A., dissenting on this point.)

7. WILLS (§ I A 2—10)—LIFE INSURANCE POLICY—CONDITIONAL APPOINTMENT OF BENEFICIARY—EFFECT ONLY AT DEATH OF ASSURED.

Where a document purporting to be an appointment of a beneficiary by the assured under a life insurance policy declares that the policy shall continue payable to the assured, his executors, administrators and assigns, and shall continue to be subject to his disposal as he may see fit in his lifetime and further declares that if the insurance is subsisting at his death, and has not been sold, surrendered, assigned or otherwise disposed of, then upon his death it shall be for the benefit of his wife if she survives him, the effect is to make it a testamentary document and not a statutory appointment under the Manitoba Life Insurance Act, R.S.M. 1902, ch. 83, sec. 7 (similar to R.S.O. 1897, ch. 203, sec. 159). *Per* Howell, C.J.M., Richards and Perdue, J.J.A.

[*Foundling Hospital* v. *Crane*, [1911] 2 K.B. 367, 80 L.J.K.B. 853, applied.]

8. WILLS (§ III E—113)—GENERAL BEQUEST—PRIOR CONDITIONAL APPOINTMENT OF LIFE INSURANCE IF "NOT OTHERWISE DISPOSED OF."

A bequest in the will of the assured of all his life insurance is a "disposal" of insurance moneys within the terms of a condition contained in a document by which the assured purported to declare his surviving wife the beneficiary if the policy were not sold, surrendered, assigned, or "otherwise disposed of," by him. *Per* Howell, C.J.M., and Richards, J.A.

APPEAL from decision of Metcalfe, J., dismissing the action and giving judgment for defendants on counterclaim.

The appeal was allowed in part and the judgment below varied.

Messrs. *W. F. Hull*, and *J. K. Sparling*, for plaintiff.

Messrs. *W. R. Mulock*, K.C., and *J. W. E. Armstrong*, for defendants.

HOWELL, C.J.M.:—The deceased, Robert J. Walker, in 1889, at Brampton, in Ontario, while domiciled there, entered into a contract of insurance with the British Empire Insurance Co. whereby, in consideration of certain annual payments, his life was insured to the extent of $3,000, and by the terms of the policy the plaintiff, the wife of the deceased, became and was the beneficiary under the policy and entitled to the sum insured upon the death of the deceased. In April, 1907, the deceased, together with the plaintiff, his wife, executed an assignment of

that policy to Arthur & Company, to secure payment of a debt which the deceased then owed to those parties, and the plaintiff, his wife, joined with him in executing this assignment. The debt to secure which this assignment was given was clearly a debt owing by the deceased to the assignees of the policy, and it was executed in Manitoba while the deceased was domiciled here. In the year, 1893, while the deceased was domiciled in Ontario, he insured his life for the sum of $5,000 with the Ontario Mutual Life Assurance Company, which company at that time had its head office within that province, and by the terms of the policy of insurance issued by that company the plaintiff became and was the payee and beneficiary in that policy and entitled to receive the money on the death of the deceased. In the year 1901, while the deceased was still domiciled in Ontario, he applied to the last-mentioned insurance company for a loan from the company of $500, and offered as security the last-mentioned policy of insurance. For the purpose of carrying this matter through, a document was drawn up and signed by the plaintiff and the deceased, and the document really amounts to an acknowledgment that the plaintiff received this money and created a lien and charge on the policy, and the husband, by the terms of the document joins and consents to the affecting of the loan and both husband and wife covenant to pay the debt and the document further declares that if, before the loan is repaid, the policy becomes a claim, the company are authorised to retain the amount of this loan and interest out of the sum insured. It appears that the loan was purely and simply a loan made to the husband at his request, but the charge was apparently taken in that form because the wife was the beneficiary and the payee. It seems to be clear that the debt was really a debt due by the husband and the proceeds of the loan were received by him.

Section 7* of ch. 83 R.S.M. 1902, and section 159 of ch. 203, R.S.O. 1897, are alike in making a peculiar provision where a policy of insurance is assigned to or made payable to the

*Section 7 of chapter 83, Revised Statutes of Manitoba (1902), is as follows:—

7. In case of a policy of insurance heretofore or hereafter effected by a married man on his life is expressed upon the face of it to be for the benefit of his wife, or of his wife and children, or any of them, or in case he has heretofore indorsed or may hereafter indorse on such policy, or, by any writing identifying the policy by its number or otherwise or by his will, has made or may hereafter make, a declaration that the policy is for the benefit of his wife, or of his wife and children, or any of them, such policy shall inure, and be deemed a trust, for the benefit of his wife for her separate use, and of his children or any of them according to the intent so expressed or declared; and so long as any object of the trust remains, the money payable under the policy shall not be subject to the control of the husband or his creditors, or form part of his estate when the sum secured by the policy becomes payable; but this shall not be held to interfere with any pledge of the policy to any person prior to such declaration.

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wife or children of the insured. It is really a statutory method of settling property upon them beyond the reach of creditors or executors. These sections alike declare that in such a case a trust is created between the insured and the beneficiary in favour of the latter. By these policies, therefore, the plaintiff became the owner of the fund represented by such policies. At the request of the deceased, however, she united with him in mortgaging or charging this property to secure advances to him for the repayment of each of which he became personally liable, and each was a debt of his which he should repay.

When the deceased executed, with his wife, the transfer or mortgage of the first-mentioned policy, he was domiciled in Manitoba where he remained until his death, but apparently he was domiciled in Ontario when he united with his wife to execute the charge on the second mentioned policy. According to the law of Ontario once having made the policy payable to his wife, the deceased had no power to convert it into a policy payable to his executors; but the law is different in this province, and let us assume that the law of Manitoba applies to both of these cases. As soon as these policies were issued and made payable to the plaintiff, as between her and the insured she was the beneficiary and the moneys were her own property and estate and the husband was a mere trustee for her, and upon his death she was entitled to receive this money.

Section 15 of our statute, however, provides a method by which the husband can deprive his wife of the rights above set forth. It declares that he can, by an instrument in writing, absolutely revoke the benefit previously made and may re-apportion or alter or revoke the benefits "or divert the insurance money wholly or in part to himself or his estate." By virtue of the statutes above referred to and by the policies of insurance being made payable to her, the plaintiff was given peculiar statutory rights, intended, no doubt, for her special benefit and it would seem just to require clear and conclusive language that the deceased intended to invoke the powers given him under section 15 of our statute. If these loans had been paid off in his lifetime no one would doubt that the original rights secured to the plaintiff would have been restored to her, notwithstanding those documents executed by her. I do not find in either of the documents referred to that the deceased did by instrument intend to divert the insurance money or any part of it to himself or to his estate, and I do not think that either of these documents has deprived or was intended to deprive her of the insurance money secured by these policies.

One of the premiums of insurance of the second mentioned policy matured some months prior to the death of the insured, and, in order to continue the policy, the deceased gave his promissory note for this premium and the company accepted the

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note as payment of the premium. This note matured shortly after the death of the deceased, and pursuant to one of the conditions in the policy, the company retained enough out of the policy to satisfy this note, thus reducing the amount payable to the plaintiff also by the amount of this note. The plaintiff's position is that parts of the funds payable to her under these policies have been diverted to pay the debts of the deceased; because the deceased had not paid his debts her property has been charged with the payment of them. She has received from the companies the amount due on the policies less the two sums for which the policies were charged as above mentioned, and less the promissory note for the premium, and I think the estate should make good to her the sums so retained from her. If the will of the deceased can in any way modify the effect of these written documents, it seems to me it fortifies the plaintiff's position. The fifth clause is "Any of my life insurance which is made payable to my wife specifically, shall be her own estate moneys and property and are not intended to be affected by the terms of this will." That clause, read critically, would mean the whole of the life insurance that was made payable specifically to her, not that part of it which had not been pledged to pay his debts. In another portion of the will there is a specific devise for the payment of all his just debts. This promissory note for the premium of insurance and these two loans above referred to are his just debts, and I see no reason why they should not have been paid by the executors, thus freeing the policies from any claim.

I see no reason for differing from the conclusion arrived at by the learned trial Judge as to the disposition of the moneys paid under the Peace policies for two reasons: 1st, the assignment under which the plaintiff asserts her claim provides that the policies shall be and remain for his (the deceased's) own benefit and subject to any disposition he may make of them during his lifetime, and if "not assigned or otherwise disposed of then upon my death . . . they . . . shall be for the benefit of my wife." The will did otherwise dispose of them, and I agree with the conclusion of the trial Judge. 2nd. Upon the authority of *Foundling Hospital* v. *Crane*, [1911] 2 K.B. 367, the document above in part recited is a testamentary document and has not been executed in the form required by the Wills Act.

The appeal must be allowed in part and the judgment must be amended declaring that the plaintiff is to retain out of the moneys received by her from the Peace policies the three sums above referred to retained by the insurance companies out of the policies payable to her. The plaintiff will also retain out of the above-mentioned moneys her costs of this appeal.

RICHARDS, J.A.:—The plaintiff is the widow of Robert James

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Walker. In his lifetime he effected five insurance policies upon his life. Of these, three were made directly payable to his wife. The other two were made payable to a Mr. Peace, with whom he apparently had business relations. Mr. Peace subsequently assigned the benefit of those two policies to Walker. At the time of Walker's death there was no insurance on his life except that effected by the above policies. The plaintiff and Walker borrowed money on two of the policies which were made payable to the plaintiff on their face. The loans were applied for and got for Walker's own benefit, and he received the moneys for his own purposes. At the time of his death these loans had not been repaid. A few days before his death Walker executed, as to each of the policies which had been assigned to him by Mr. Peace, a document of one of which the following is a copy:—

> I, Robert James Walker, the assured named and described in Policy No. 65718 issued by the Mutual Life Assurance Company of Canada, do hereby in pursuance of the statute in that behalf, declare that the said policy and the assurance thereby effected, shall continue to be for the benefit of myself, my executors, administrators or assigns and subject to my disposal as I may see fit during my lifetime, but if the same be subsisting at my death and not sold, surrendered, assigned, or otherwise disposed of, then upon my death it shall be for the benefit of my wife Clara Celestia Walker, if she survive me.

In the other the number was 65719, but it was otherwise the same as the above.

Thereafter he made his will, by which he purported to give to his trustees, upon certain trusts, all his estate of every kind, "including all my life insurance." The same will contained the following clause (5):—

> Any of my life insurance which is made payable to my wife specifically shall be her own estate, moneys and property and are not intended to be affected by the terms of this my will.

As to certain of these policies Walker, before his death, had given promissory notes for premiums; and certain other premiums for which he had not given promissory notes, but which the companies had the right to deduct from the face of the policies, also come in question.

After Walker's death his widow received the proceeds of both of the policies which had been made payable on their face to Peace, the company, however, deducting, in respect of such policies the amounts of the promissory notes given by Walker for premiums and the amount of such other premiums as they were entitled as above mentioned to deduct. She also received in the same way, the amount of the policy made payable on its face to her, but on which no sum had been borrowed. As to the two policies on which loans had been made, she received the amounts payable, less the amount of the loans and premiums for which notes had been given and the other premiums as

above mentioned. The plaintiff brought this action against Walker's executors, to compel them to pay to her the amount which had been deducted, to pay the loans on the two policies upon which loans had been made. The executors disputed her right to this relief, and counterclaimed, asking that she be compelled to pay to them the amount received by her on the two policies which had originally been made payable to Peace.

The trial Judge, Mr. Justice Metcalfe, held that she was not entitled to be reimbursed out of Walker's estate, the amount deducted for loans, and held also that she was compellable to pay to the estate the amount received by her on the Peace policies. From that decision the plaintiff appealed. The parties resided in Manitoba when the loans were made, and I think the law of Manitoba is applicable. Sections 7 and 15 of the Life Insurance Act (eliminating such portions as are not material to this case) are as follows:—

> 7. In case a policy of insurance heretofore or hereafter effected by a married man on his life is expressed upon the face of it to be for the benefit of his wife . . . or in case he . . . by any writing identifying the policy . . . has made . . . a declaration that the policy is for the benefit of his wife . . . such policy shall inure, and be deemed a trust, for the benefit of his wife for her separate use . . . and so long as any object of the trust remains, the money payable under the policy shall not be subject to the control of the husband or his creditors, or form part of his estate when the sum secured by the policy shall become payable . . .
>
> 15. If, in case of a policy of insurance heretofore or hereafter effected by a man . . . it is expressed on the face to be for the benefit of, or has been . . . under this Act appropriated for the benefit of his wife . . . then the insured may, by an instrument in writing . . . absolutely revoke the benefit or declaration or appropriation previously made . . . and divert the insurance money . . . to himself or his estate. . . .

Under the wording of section 7 it seems to me that, although Walker was in no way bound to keep alive the policies payable on their face to his wife, yet, so long as he did so, such policies were, as against both him and the company, a trust for the benefit of his wife for her separate use, unless he executed a revocation and appropriation under section 15, which he did not do. The position, then, is this, with regard to the policies on which the loans were made, that they were the wife's separate property, and moneys were borrowed upon them for Walker's benefit. I think there is no doubt that, under those circumstances, his estate was liable to repay her the moneys retained to pay these loans, just as he would be responsible to repay her directly a loan made out of her separate estate to him. As to the Peace policies, however, I think the learned trial Judge was right in holding that the plaintiff was not entitled. If they became her property at all, they became so either by

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virtue of the above recited declaration of 29th May, 1909, or by virtue of the will.

Dealing first with the will. If the Peace policies were his, I do not think the will passed them to the widow. He distinctly bequeaths all his life insurance to his trustees. By that he must be held to have meant such as he had control over. The provision in the fifth clause, above quoted, by which he says his will is not to affect insurance payable to his wife specifically, seems, to me, only to refer to policies payable to her on their face, and his object, probably, was to prevent his will from operating, with regard to these last named policies, as a revocation, or appropriation, under section 15. By the word "specifically" I think he means "on their face," or "as originally made." It was urged that in bequeathing his life insurance to the trustees he may have supposed that he had other policies than the five which he had. I can see nothing in that contention.

It is argued, however, that the declaration of 19th May is an appointment of the Peace policies in his wife's favour. The first part of that declaration simply provides, in effect, that they shall be his own during his lifetime; and they would be that without any such declaration; so that, in so far as that goes, the declaration amounts to nothing, and does not affect the policies in any way. The part that the plaintiff has to rely on must be the last clause: "But if the same be subsisting at my death and not sold, surrendered, or otherwise disposed of, then upon my death it shall be for the benefit of my wife." Except as to that last clause, nothing is attempted to be effected by the declaration.

In the case of *Foundling Hospital* v. *Crane*, [1911] 2 K.B. 367, it is held that a document, executed and delivered by a person, to take effect only at the time of his death, is a testamentary document, and is invalid unless executed according to the provisions of the law with regard to the execution of wills. This is also held in *Habergham* v. *Vincent*, 2 Ves. 204, and in *Re Goods of Morgan*, L.R. 1 P. & D. 214.

I incline to the belief, therefore, that as this declaration was not to come into force until the time of Walker's death, and was not executed as the law requires with regard to testamentary documents, it was of no effect. But, if it should be that the provisions of the Life Insurance Act, as to appropriations of policies, extend far enough to make valid an appropriation of this kind, though not made by will—and I cannot, on reading the provision of the Act, see that they do—yet there is a further matter, which I think is fatal to the plaintiff's claim. This proviso in the declaration means that if at the time of his death the policies are not disposed of, then they are to be for the benefit of the wife. Section 22 of the Manitoba Wills Act says that every will shall be construed to speak, and take effect, as

if it had been executed immediately before the death of the testator, unless a contrary intention appear by the will. No such contrary intention is shewn in Walker's will, and therefore, under the provisions of section 22, the will, speaking immediately before Walker's death, disposed of these Peace policies, and they, therefore, had at the actual time of his death been disposed of, so that the condition on which the plaintiff should take them under the declaration had failed, as a result of this disposal.

I think the plaintiff is entitled to be repaid, from the general estate, the amounts deducted from two of the policies payable to her in respect of loans made upon them and also to be repaid in respect of such policies and of the other policy made payable on its face to her, any sums deducted for promissory notes given for premiums by Walker. As against that, I think she must repay to the general estate the amounts received by her upon the Peace policies. He was not bound to pay the premiums for which he had not given his notes. They were, therefore, not his debts, and his estate cannot be held liable for them.

PERDUE, J.A.:—The plaintiff was the wife of the testator Robert James Walker. After his death she married one Green. Walker, who was a resident of Winnipeg, had five policies of life insurance in force when he died. Three of these were upon their face made payable to his wife, the plaintiff. The other two policies, being for $5,000 each, were made payable by their terms to "W. T. Peace, the business partner of the assured during the existence of the co-partnership; thereafter to the executors, administrators, or assigns of the assured." Peace had released all his claims under these policies to Walker, so that the same became payable to the personal representatives of the latter, subject to any disposition he might make of them during his life. On 29th May, 1909, Walker executed two documents in identical terms referring to the Peace policies. One of these documents, sufficiently shewing the contents of both, is set out in the judgment appealed from. The testator during his lifetime had, with the concurrence of his wife effected loans upon two of the policies payable to her. These loans were, after the testator's death, paid out of the moneys receivable under the policies. Several promissory notes given by him for premiums and also several half-yearly deferred payments for premiums were deducted by the insurance company from the amounts payable under the policies issued by the company. The plaintiff claims that the amount of the loans and of the premiums so deducted should be paid to her out of the general estate of the deceased.

The defendants, the Standard Trusts Company and the wife of the deceased, are the executors and trustees under the

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will of the testator. The Trusts Company collected the insurance moneys payable under the five policies less the above deductions and paid the whole amount to the plaintiff. The testator by his will, the material parts of which are set out in the judgment of Metcalfe, J., devised all his estate including all his life insurance to his aforesaid trustees upon trust; (1) to pay debts; (2) to pay certain legacies mentioned; (3) to invest the residue and pay the income to his wife during her life and, upon her demise, to distribute the fund between his brothers and sisters named in the will. Then follows a declaration in the following words: "Any of my life insurance which is made payable to my wife specifically shall be her own estate moneys and property and are not intended to be affected by the terms of this will." The defendants counterclaim for the amount of the two policies of life insurance which had been made payable to Peace.

It is claimed by the plaintiff that the documents of 29th May were sufficient declarations under the statute and that their effect was to confer upon her the benefit of the policies. There was some discussion as to whether the Ontario or the Manitoba law applied to the two policies in question, both having been issued by a company having its head office in Ontario and the insurance money being payable under each policy at the company's head office. I do not think it is necessary to consider whether the law of Ontario or the law of Manitoba should be applied in regard to the questions that arise in this case. The Peace policies were not by their terms payable to the wife of the assured and the main question is, did the documents of the 29th May contain such a declaration in favour of the wife as is contemplated by our Life Insurance Act, R.S.M. 1902, ch. 83, or by the Ontario Act, R.S.O. 1897, ch. 203, sub-secs. 159-160?

I am unable to find any substantial difference between the provisions of the Manitoba Act and those of the Ontario Act in so far as this question is affected. By section 7 of the Manitoba Act (corresponding in effect with section 159, clause 1, of the Ontario Act), where a policy of life insurance is expressed on its face to be for the benefit of his wife, "or in case he has heretofore indorsed . . . or by any writing identifying the policy by its number or otherwise or by his will, has made . . . a declaration that the policy is for the benefit of his wife . . . such policy shall inure and be deemed a trust for the benefit of his wife for her separate use."

In order to create the trust in favour of the wife under the foregoing provision, where the policy is not on its face payable to her, there must be an instrument in writing signed by the husband declaring the insurance to be for her benefit. The words used in the writing must, at all events, be as full and as

operative as would be necessary in order to create an immediate declaration of trust. "They must be clear, unequivocal and irrevocable . . . , words that shew that the donor means, at the time he speaks, to divest himself of all beneficial interest in the property:" *Grant* v. *Grant*, 34 Beav. 623. The declaration under the Act should be positive and unconditional and should take effect at once.

The instruments of the 29th May declare that the policies and insurance shall continue to be for the benefit of the assured, his executors, administrators or assigns, and subject to his disposal as he may see fit during his lifetime. It is only at his death and if the insurance is then subsisting and not sold, surrendered, assigned or otherwise disposed of, that it shall be for his wife's benefit, if she survives her husband. This is not a positive, unconditional declaration that the insurance is for the benefit of the wife. There is no intention that it shall take immediate effect, on the contrary any effect it can possibly have is postponed until after the death of the husband. It is conditional, qualified and uncertain. It does not confer upon the wife any actual benefit or interest in the insurance moneys during the lifetime of her husband. It retains the insurance under the control of the husband, although the purpose of the Act was to enable him to create a trust in favour of his wife and children or his wife alone, which would, while it existed, remove the insurance from his control and from the control of his creditors.

The instruments of the 29th May are also open to another objection which appears to me to be fatal to their validity. By their terms the husband retains the property in, and benefit of, the insurance and complete power of disposal over it during his life, but declares that upon his death it shall be for the benefit of his wife if she survives him. The instrument does not operate in favour of the wife until after his death. This is clearly a testamentary document and, not being executed in the manner prescribed by the Wills Act, it is inoperative. In *Habergham* v. *Vincent*, 2 Ves. 204, 231, Buller, J., stated it to be established law that "an instrument in any form, whether a deed poll, or indenture, if the obvious purpose is not to take place till after the death of the person making it, shall operate as a will. The cases for that are both at law and in equity; and in one of them there were express words of immediate grant, and a consideration to support it as a grant; but, as upon the whole the intention was, that it should have a future operation after death, it was considered as a will." The same principle was adopted in *Re Goods of Morgan*, L.R. 1 P. & D. 214, and in the very late case of *Foundling Hospital* v. *Crane*, [1911] 2 K.B. 367.

I am therefore of opinion that the instruments of the

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29th May did not confer the benefit of the insurance upon the plaintiff. The last paragraph of the will clearly excepts from the operation of the prior parts of the will the policies made payable to the plaintiff specifically. The other two policies, those payable to Peace in the first instance, form part of the general estate and are subject to the trusts declared in the will. The loans effected by the testator upon two of the policies payable to his wife were made for his benefit. Although the plaintiff joined with him in pledging the policies as security for the loans and signed promissory notes jointly with her husband for the amounts borrowed, all the proceeds of the loans were paid to the husband and she received no part of them. These loans should be paid out of the testator's estate not specifically devised: *Re Tatham*, 2 O.L.R. 343; *Re McGarry*, 18 O.L.R. 524, 528; *Hall* v. *Hall*, [1911] 1 Ch. 487.

At the death of the testator there were three promissory notes unpaid which had been given by him for premiums due to the insurance company. The amounts of these notes were deducted by the company from the insurance money when making settlement. These were also debts of the testator and payable out of his estate, other than the policies specifically payable to the plaintiff. There were also deducted by the company from the insurance money three deferred half-yearly payments upon premiums. These half-yearly payments fell due after the death of the testator. By the contract of insurance the balance of the whole year's premium was to be deducted from the insurance on making settlement of the claim. These deferred payments were not debts of the testator. He was not bound to keep up the insurance. Making payment of the premiums was a voluntary act upon his part in so far as the devisees are concerned. I think the deferred premium upon each policy should be deducted from the amount of the policy.

The judgment of Metcalfe, J., should be varied in accordance with the foregoing. The registrar of the Court should if necessary, ascertain the amount to be repaid by the plaintiff to the defendants in respect of the Peace policies and this amount she should be ordered to pay to the defendants.

CAMERON, J.A.:—In the case of the insurance policy with the British Empire Mutual Life Assurance Company, the loan thereon was secured by the promissory note of the insured and his wife, the present plaintiff, and by an assignment of the policy. In the case of one of the policies with the Mutual Life Assurance Company of Canada, the loan was secured by an assignment of the policy to the company, containing the joint and several covenants of the insured and his wife for repayment. The proceeds of these loans went to the insured. Both policies were made payable to the plaintiff. The amounts of

the loans were deducted from these policies when payment was made, after the death of the testator, and as to them the question is whether these deductions are properly payable out of the proceeds of the policies or out of the testator's estate in the hands of the executor and executrix. These policies are payable on the face of them to the wife, and, therefore, are not affected by the will. The will directs the trustees to convert all the testator's real and personal estate and out of the proceeds "to pay all my just debts." Thus the testator charged all his estate with his debts and "the Courts have construed the expression 'debts' with considerable latitude." "Under a charge of 'debts' in a will are included all liabilities to which the personal estate is liable: as damages for breach of a covenant occurring after the testator's death:" Jarman on Wills, 1898, note.

By section 7 of the Life Insurance Act, R.S.M. 1902, ch. 83, a policy of insurance effected by a married man for the benefit of his wife, creates a trust in her favour, and the moneys payable thereunder do not, so long as any object of the trust remains unperformed, form part of the estate of the insured or become subject to his debts. By section 22, the insurance money is to be free from debts of the insured and is to be paid according to the terms of the policy. Here the insured procured advances from the insurance companies for his own benefit and gave his promissory note in the one case and his covenant in the other to repay the amounts of the several loans. Had he lived and repaid the loans no question would have arisen. Because of his death before this was done, is the value of her interest in the policies to be impaired? The object of the statute was to secure to the wife the payment of the policy free from any claims by executors or creditors. I cannot read the assignments as revocations *pro tanto* under section 15 of the Act. It was clearly never the intention of the testator that they should operate as such or they would have complied more plainly with the strict wording of that section. The testator was in the position of borrowing money upon the security of policies in which by the statute his wife had the beneficial ownership. It was open to him absolutely to revoke that ownership, but he did not choose to do so. The wife was in the position of lending the husband her property and her name as security for his debt. Under the circumstances it seems to me that the amounts deducted from the policies must be paid out of the testator's estate and that the plaintiff must succeed on this branch of the case.

As to the counterclaim, that depends altogether upon the construction to be given to the wording of the declarations and the will. The declarations are dated May 29th, the will was made June 1st, and the testator died June 9th, in the year 1909. There can be no doubt that under the appropriations

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of May 29th, the policies affected thereby were made payable on the testator's death to the plaintiff specifically as she is referred to therein as his wife, and by name also. Had these two been the only policies payable to her, and had the three other policies been payable to the testator's estate, or had the husband died intestate, I think the amounts payable under these two policies would have been paid over to the widow without any question. It is argued, however, that there were but five policies in all, three of them payable to the plaintiff on their face, and that, therefore, to make the words in subclause 5 of clause 3 of the will cover all the policies would be inconsistent with the previous part of clause 3, by which the testator devises all his real and personal estate, "including all my life insurance." Nevertheless, it is clear that if there be any inconsistency in different parts of the will, the later part must govern. This is the rule, and the effect of it, under the circumstances of this case, is practically to reject the words "including all my life insurance" as superfluous, or as referring to insurance the testator thought, mistakenly, he had previously effected, or insurance that he might effect after making his will. I fail to see how any distinction can be drawn between the policies payable specifically to the wife on their face and those payable specifically to the wife by a subsequent document. In fact they are all of them payable to the wife and to no other person and therefore payable to her specifically. In construing the language of the declarations or appropriations, it appears to me that, though expressed to be pursuant to the Ontario Act, they are sufficient and effective under our own statute, which must govern. The benefit of these policies is conferred upon the wife, but that benefit is to come into being only upon the death of the testator, and if the policies are then subsisting and "not sold, surrendered, assigned or otherwise disposed of."

It is argued that these appropriations are not in accordance with the statute, that they are for the benefit of the insured, his executors, administrators or assigns and subject to his disposal in his lifetime and for the benefit of the wife only upon the death of the insured, if the policies are then subsisting, and that they are, therefore, ineffective and invalid. And yet, if these declarations had been in these words: "I declare that policy No. — in the Ontario Mutual Life Assurance Co. is for the benefit of my wife under the provisions of ch. 83 R.S.M." what would have been the result? It is clear that the insured could still, under section 15, absolutely revoke the benefit, alter or revoke it, or divert the insurance moneys wholly, or in part to himself or his estate. So that the insured could do by law all that he is expressly empowered to do by the words of the appropriations. All of which goes to shew that the appropria-

tions are in accordance with the statute and therefore effective. As the statute authorizes the insured to appropriate the whole policy for the benefit of the persons therein named it must follow that he can appropriate a part of the policy, and that he can instead of making a gift absolute, make a gift conditional or contingent. In any event, here, where the benefit is contingent upon his death and upon the policy being then subsisting and not previously thereto sold or otherwise disposed of, the benefit of the policy is conferred upon the wife on such terms as the statute contemplates.

It was further argued that the appropriations being in fact gifts to take effect upon the death of the donor, are testamentary instruments and that, as they do not conform with the provisions of the Wills Act as to formalities of attestation, they are void. On this point we were referred to *Foundling Hospital* v. *Crane*, 80 L.J.K.B. 853, and the cases therein quoted. In principle it is difficult to distinguish those cases from this one now before us. But any appropriation for the benefit of a wife or children under the Act is open to the same objection. These appropriations are, in my opinion, in accordance with and authorized by the statute. They have the characteristics of testamentary instruments as have all other similar documents under the Act, but the Legislature, fully aware of this, gave such documents the powers and qualities set forth in sections 7, 8, 15, 28, 29 and other sections of the Act. They are special statutory instruments and are wholly without the provisions of the Wills Act.

I do not consider that the testator, when he uses the words in his will: "I give, devise and bequeath unto my said trustees all my real and personal estate of every nature and kind, including all my life insurance" thereby revoked the appropriations previously made. Had it been the wish of the testator by his will to revoke the benefits already declared or otherwise deal with them in accordance with the provisions of section 15 of the Act, it seems to me that he would have expressed his intention in language more definite and appropriate, and more in conformity with that employed in that section. In any event (and this is the view that appeals to me most strongly) the policies in question, being made payable by the appropriations to the wife specifically, and thus expressly excluded from the operation of the will, are unaffected, and cannot be held to be disposed of, by it. In my judgment, therefore, the policies covered by the declarations are payable to the plaintiff and not to the executor and executrix.

Appeal allowed in part and judgment below varied, Cameron, J., dissenting in part.

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VILLAGE OF MARBLETON v. RUEL.

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

1. WATERS (§ II E—87)—BUILDING DAM—LOWER RIPARIAN OWNERS.

A municipal corporation may not place a dam at the outlet of a lake for the purpose of raising the level thereof when such action diminishes the enjoyment of the mill owners having rights to the waters flowing from such lake by depriving them of their usual quantity of water at certain seasons.

2. INJUNCTION (§ I F—59*a*)—RIPARIAN RIGHTS.

Riparian owners have a right of action to compel the removal of a dam which seriously interferes with their riparian rights and to compel the restoration of the former *status in quo* so that the waters may escape from the lake at their natural level, and this without prejudice to their claim for damages.

THIS appeal was from a judgment of the Superior Court for the district of St. Francis (Globensky, J.), maintaining the action of the plaintiff for damages in the sum of $160 and ordering the corporation of the village of Marbleton to remove a dam and restore a watercourse to its old level.

The village corporation inscribed in appeal. The appeal was dismissed.

C. Walter Cate, K.C., for appellant.

J. A. LeBlanc, K.C., for respondent.

The judgment of the majority of the Court was delivered by

(*Translated.*)

ARCHAMBEAULT, C.J.:—The facts which gave rise to the present litigation occurred in 1909. At that time the corporation appellant caused certain works to be executed of which respondent complains. The latter, since 1906, has been the owner of a saw mill and a flour mill operated by means of hydraulic power. These mills are below a lake called "Silver Lake." The water in the lake is not very deep; indeed, at certain periods of the year it is not one foot deep.

At the outlet of the lake there is a culvert built a great many years ago. The record does not disclose very clearly who is the owner of this culvert. The deed of acquisition of respondent makes mention of it as being one of the things sold to him. On the other hand, appellant claims the ownership of this culvert; but it produced no title nor adduced any proof in support of this contention. The only fact proven by appellant is that a public highway runs over the culvert.

Be that as it may, and this question is of little importance, one thing is certain, and it is this: Those who built the culvert realized that they should not prevent the waters of the lake from following their usual course, and they made in this culvert an opening of some three or four feet in width in which they built

a wooden flume or watercourse allowing the waters of the lake to escape from the lake at their natural level.

Respondent and other mill proprietors utilized this water for operating their mills.

The waters in the lake were held back by a movable weir placed in the culvert; and by moving the flush-boards, when desirable, the water coming from the lake could be used for small hydraulic power purposes. Respondent used to do this. He used a power of from 35 to 40 h.p. to operate his mills.

In 1909 the council of the corporation appellant decided, in view of the fact that the old flume was going to pieces, to build it anew.

The old wooden flume was replaced by a new one made of cement.

Respondent complains that in the execution of this work appellant raised the bottom of the watercourse by about twenty inches, and that the water of the lake no longer flows out through the flume at its natural level. This damming holds the water in the lake when the level of the lake is lower than the level of the watercourse, and the respondent is, therefore, deprived of the water which formerly allowed him hydraulic power to run his mills.

Appellant on the other hand argues that the natural flow of the lake waters has not been affected by the raising of the bottom of the watercourse.

The Court below maintained respondent's action and condemned appellant to place back the watercourse at its former depth and to pay respondent $160 as damages.

The majority of this Court is of opinion that the judgment is well-founded.

The evidence adduced by respondent is absolutely conclusive.

(The learned Judge then quoted a few extracts from the evidence and continued.)

On October 4th, 1909, the interested parties protested against the new order of things. Seventeen ratepayers of the municipality addressed a petition to the council setting forth their grievances. And the petition says this:—

> By the construction of the new watercourse at the outlet of Silver Lake, the bottom of such new watercourse has been raised about two feet above the bottom of the old flume, thereby retaining about two feet of water in the lake which would run out as heretofore provided, that the bottom of such new watercourse had been placed as low as the bottom of the old flume; in consequence of such two feet of water being retained in the lake by the construction of such new watercourse, the mill owners situated along the outlet of such lake are deprived of the usual quantity of water at this season of the year, and therefore, we said ratepayers would respectfully ask your honourable body to take the necessary steps to

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lower the bottom of such new watercourse by cutting a channel, say about two feet deep and two feet wide, through the entire length of the bottom of such new watercourse, making such channel secure by the use of cement and by so doing you would not only satisfy the said mill owners, but would confer a public benefit as well.

The council took no notice of this petition and made no alterations in the bottom of the new watercourse.

Respondent was obliged to abandon his mill because he could no longer work it.

Under these circumstances, both law and equity, it seems to me, demand that we should protect this victim of injustice and illegality.

It would have been easy for appellant to build the bottom of the watercourse without interfering with the natural flow of the water. All that was required was to dig twenty-two inches into the earth and there to put the bottom of the new canal. The water would then have flowed from the lake at its natural level.

Appellant relies on the testimony of Mr. Mignault, C.E., in support of its contention that the natural outflow from the lake was not altered by the raising of the level of the watercourse. But Mr. Mignault does not uphold such a theory. He was asked:—

> Supposing it were true that the water in that lake had been raised a couple of feet; once the two feet had been filled up, as I suppose it would be in the spring of the year, would that interfere with the natural flow of the stream?

And he answers:—

> Certainly not; the flow of the stream would have to go through the culvert just as previously. It would be absolutely the same case as if you had excavated the lake two feet deeper than it is at the present time: simply hold more water in the lake."
>
> Q. And once it got to the crest of the culvert, the natural flow would be just the same?
>
> A. The natural flow would run over just the same.

Nobody can hold a different opinion. The minute there is too much water in a vase the water overflows whether the vase be six inches or six feet high.

There is no doubt that when the waters of the lake rise above the dam they flow out as formerly. But that is not the question.

The question is as to whether the water can flow out when there isn't enough in the lake to go over the dam.

To put the question is to have the answer.

Appellant apparently imagines that once the water has reached the required level to flow out over the dam it always remains at that level. It evidently forgets that in times of drought the lake is no longer fed from above and that its level sinks and falls lower than the bottom of the culvert.

From that moment the water no longer flows out, and as

stated by the witnesses, the respondent and the other mill owners are deprived of the two feet of water of which they had the benefit prior to the execution of these works by appellant.

I am wondering on what appellant can base its claim to have these works done.

It invokes in justification of its actions article 503 C.C.

That article has no application in the present case. It lays down that he whose land borders on a running stream, not forming part of the public domain, may make use of it as it passes, for the utility of his land, but in such manner as not to prevent the exercise of the same right by those to whom it belongs. And the article adds that he whose land is crossed by such stream may use it within the whole space of its course through the property, but subject to the obligation of allowing it to take its usual course when it leaves his land.

In the present case we are not dealing with a proprietor whose land borders on a running stream nor whose land is crossed by such stream. We are dealing with a municipal corporation.

Moreover, the prescriptions of the law have not been followed since the water is kept back in the lake, at certain times of the year, instead of being let free to follow its natural course.

The very fact that appellant prays for the benefit of article 503 shews the bottom of the whole thing.

Appellant tried to favour certain owners of summer villas bordering on Silver Lake. The year 1909 was a year of great drought. Silver Lake almost dried up, and it was thought that a little dam of some two feet at the outlet of the lake would result in ensuring a constant depth in the lake of at least two feet.

I realize the great importance to these owners of summer villas of always having a beautiful lake in front of their property. But they are not entitled to this luxury at the expense of those who have as much right as they to the waters of the lake.

The Courts must prevent such acts of injustice. The Court below has understood this full well. It allowed respondent a legal and equitable remedy. The judgment is confirmed.

LAVERGNE, and CARROLL, JJ., concurred.

TRENHOLME and CROSS, JJ., dissented.

CROSS, J. (dissenting):—Respondent claims damages from the municipal corporation, because, in doing certain road-work, where the highway crosses the watercourse which is the outlet of Silver Lake, the council carried the watercourse across the highway at a level twenty-two inches higher than the level which he calls "le cours naturel de l'eau."

As a result of this, the complaint is that the plaintiff's mill is without water supply for power in the autumn which he says is the busiest time of the year.

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I consider that it has not been proved that the floor of the cement culvert built through the road-embankment is higher in level than what was the natural bed of the creek.

It is about nineteen or twenty-two inches higher than the floor of the old replaced wooden culvert and an engineer has testified that it is about two feet above the rock, but there is no proof of the level of the creek bed before it was interfered with.

When the highway was carried across the creek a wooden culvert was made through which to send the water and on each side of it the earth was banked up so as to carry the highway across.

The whole work was an artificial affair and its present relation to old-time natural conditions has not been proved.

For this reason, as also for the reason that the plaintiff evidently has in mind a supposed right to use the culvert and roadway as a storage-dam equipped with flushboards to provide for the gradual lowering of the water as the dry season advances and to have this operation extended by getting artificial control of twenty-two inches more of head of water than is now available, I consider that the action fails. In fact the outflow of the creek runs to plaintiff's mill now as it did before and the plaintiff has shewn no evidence of a right to use Silver Lake for artificial storage of water. If he had shewn such right it is conceivable (though not proved) that it would be an injury to him to be prevented from controlling the outflow through an additional level of twenty-two inches.

I would reverse the judgment and dismiss the action.

Appeal dismissed with costs.

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Court of Review at Montreal, Tellier, DeLorimier and Dunlop, JJ.
February 28, 1912.

1. APPEAL (§ VII M 3—575)—TRIAL WITHOUT JURY—REVISION AS TO APPRECIATION OF EVIDENCE.

In an action for malicious prosecution and false arrest tried without a jury, an appellate Court has the right to revise the judgment of the trial Judge as to the appreciation of evidence offered for or against the character of one of the parties to the suit, and to increase the amount of damages awarded when the allowance is unjust and unfair.

2. DAMAGES (§ III G—152)—MALICIOUS PROSECUTION—ANIMUS.

When it is proven that the defendant acted under an improper motive and with a spirit of revenge in causing plaintiff's arrest, the plaintiff suing for false arrest in the Province of Quebec should be awarded an amount sufficient to carry costs on the scale of the Superior Court of that Province and not merely the costs on the scale of the Circuit Court.

THIS appeal was from a judgment in an action for damages for false arrest and malicious prosecution against the defendant, who had caused the arrest of the plaintiff on a charge of forgery of a cheque and false pretences, on the ground that defendant had acted maliciously in fact, as well as maliciously in law, in causing plaintiff's arrest. The trial Judge found in favour of the plaintiff, to the amount of $76.00 damages actually suffered; to wit: $75.00 counsel fees in the criminal Courts and $1.00 damage to reputation.

Plaintiff inscribed in review to have this amount increased, in order to obtain exemplary and punitive damages. The appeal was allowed, and the Court on the present appeal increased the verdict.

Plaintiff referred to the following authorities: *Guest* v. *Macpherson* 3 L.N. 84; Sedgwick on Damages, 8th ed., vol. 1, sec. 347, and pp. 519, 520, 526 and 527; Mayne on Damages, 7th ed., pp. 45-47; *Tullidge* v. *Wade*, 3 Wils. 18; *Merest* v. *Harvey*, 5 Taunt. 442; *Tillotson* v. *Cheetham*, 3 Johns. 56; *Boston Manufacturing Co.* v. *Fisk*, 2 Mason 119; *Burr* v. *Burr*, 7 Hill 207.

Reference was also made to a case of *Cameron* v. *Smith*, an unreported decision of the Court of Review of the 9th February, 1895, Jetté, Mathieu and Loranger, JJ., confirming the verdict of the jury, which found $3,000 damages in a libel action against the defendant under the charge of Doherty, J.

On the subject of the estimation of damages the Judge charged as follows:—

> It is due to the plaintiff that, while you seek not to impose too great a punishment upon the defendant, you should give to the plaintiff such an amount as may constitute in your opinion a fair compensation under the circumstances for the wrong that he has suffered, and such an amount, also, as may be sufficient to make the defendant realise the gravity of the injury that he has done the plaintiff. . . . It is quite proper that in your estimate of damages of this nature, which, after all, while mainly intended as offering compensation to the plaintiff, are also intended in some degree as a punishment for the wrong which the defendant has done, you should take into consideration, etc. . . . Although I did allow the defendant to be examined as to his means, and did so because the position and means of the parties are things to be taken into consideration in estimating damages, you are not to believe that the Court wishes to put you under the impression that because a man is wealthy you should punish him. I allowed that evidence solely in order that you should have some general idea as to what amount would constitute any punishment at all with regard to the defendant, and in your opinion might constitute a sufficient punishment for the wrong.

S. W. Jacobs, K.C., for plaintiff, appellant.
Henry Weinfield, for defendant, respondent.

Judgment was pronounced on February 28, 1912, by

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DUNLOP, J.:—This is an inscription in review from the judgment of the Honourable Mr. Justice Guerin, rendered on the 5th day of May, 1911, whereby plaintiff is awarded $76.00, as and for damages for false and malicious arrest and the costs of an action of that class in the Circuit Court.

Plaintiff, by his declaration, prays for judgment against the defendant in the sum of $5,075.00, and that defendant be held to the payment of the said sum by all legal means, even by coercive imprisonment, and alleges in substance: that plaintiff is a British subject, a resident of the city of Montreal, where he has resided for a number of years; that he is a married man with a family; that he is well and favourably known in the community and has the esteem and respect of all persons with whom he is brought into contact, and that it is necessary for the successful carrying on of his business that he should have such esteem and respect; that, in the month of February, 1910, the defendant laid an information against plaintiff before S. P. Leet, Esq., justice of the peace, acting in and for the district of Montreal, charging plaintiff with the crimes of forgery and false pretences, and that a warrant was issued upon the information so laid, upon which the plaintiff was arrested and detained in gaol until he procured bail for appearance at the preliminary investigation; that the information so laid against him was so laid maliciously and for the purpose of causing him annoyance. The plaintiff was subsequently acquitted and brings the present action for damages suffered by him, alleging specially that, in damages, he is entitled to receive from defendant damages for injury to his reputation, sensibilities and honour.

The defendant in effect pleaded: that he acted throughout in good faith, without malice and with reasonable and probable cause, and that he owes plaintiff nothing.

The trial Judge held that the cheque of $10.00, dated the 30th September, 1909, which the plaintiff was accused of having forged, was signed by the plaintiff when he was *de facto* president of the Brokers' Restaurant, Limited, and that defendant was well aware that he held such office, and that, prior to 11th February, 1910, a spirit of hostility existed between plaintiff and defendant, the former having previously made an accusation against the defendant before one of the police magistrates of this district, who, on the strength of this information, wrote a magistrate's letter to defendant, but this was not followed by any other proceedings; and he held further that the plaintiff was found not guilty of the offences charged against him of forgery of said cheque on 30th September, 1909, and of having used, dealt with and acted upon said cheque as if it were genuine, although knowing the same to be forged, and of having obtained $10.00 with intent to defraud and by false pretences,

and that the evidence tended to shew that the defendant obtained possession of this $10.00 cheque as his personal property, in order to lay against plaintiff the accusation of forgery and false pretences of which the plaintiff has been acquitted; and he held further that the defendant, under the circumstances, had been actuated by a spirit of revenge and malice, without reasonable and probable cause, and condemned defendant to pay plaintiff the sum of $76.00, to wit; $75.00 for real damages, and $1.00 for exemplary damages.

It will be seen by the findings of the trial Judge that the charges made by defendant against plaintiff were very serious, and that the Judge allowed him $75.00 for real damages and the sum of $1.00 as exemplary damages. Plaintiff appeals from this judgment and contends with great force that this amount should be increased.

The result of the judgment of the Superior Court is that the plaintiff, in order to vindicate his honour, is himself put to a large amount of costs and expense, and has to pay heavy disbursements without receiving re-payment from the man who put him to all this trouble and annoyance.

The judgment merely grants $76.00 and costs of an action of that amount in the Circuit Court, and all the costs of the depositions taken by plaintiff, amounting to $74.70, as well as other Superior Court costs, have to be paid by the plaintiff, to the complete exoneration of the man whom the Court found was actuated by malice in instituting the criminal proceedings against him.

This seems to me to be unjust and unfair to plaintiff. The judgment of the Court below would seem to indicate that plaintiff was a man of little reputation, but I do not think that the evidence as to his character was properly appreciated by the trial Judge. Even under the considerants of his judgment, which have been accepted by the defendant, I am of opinion that plaintiff is entitled to a greater sum than $76.00. The evidence of Messrs. Ligget and Gadbois and others, as well as the statements of plaintiff himself, speak as to his position in the community, and in which his reputation, it seems to me, was a good one, taking into consideration the many important positions connected with the Jewish community which he filled, as appears by the evidence.

As to the fact of his doing business in the name of his wife, this cannot deprive him of substantial damages, if he is entitled to them. It seems to be the rule, as stated in the factum of the plaintiff, for parties to do business in the name of their wives in many cases.

I am of opinion that the judgment should be altered and amplified to the extent of $50.00 in addition to the sum of $76.00 allowed by the judgment *a quo*, plaintiff being allowed this ad-

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ditional sum of $50.00 for injury to his reputation, his sensibilities and feelings, and for which nothing was allowed by the judgment of the Superior Court, and that judgment should be rendered in favour of plaintiff, against defendant, for the sum of $126.00, with interest from this date and costs of an action of that amount, reserving to plaintiff his right to have the other conclusions adjudicated hereafter should the necessity arise, as ordered by the judgment of the Superior Court, which is confirmed in all other respects, and that defendant should pay the costs of review.

Judgment below varied.

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SEALE (defendant, appellant) v. BOWERS (plaintiff), and DROUIN et al. (distrayants-respondents).

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

1. SOLICITOR (§ II C 2—36)—COSTS OF ACTION—LIEN—QUEBEC PRACTICE.

The attorney for a plaintiff is by the institution of suit placed in the position of incidental plaintiff against defendant for the recovery of his costs, and he has a direct action therefor subject, however, to the same fate as the main action of his client either in the Court of instance or in appeal.

2. COMPROMISE AND SETTLEMENT (§ I—9)—PLAINTIFF'S SOLICITOR'S CLAIM FOR COSTS.

A settlement or transaction between the parties entered into without the knowledge and consent of their attorneys cannot affect the rights which the attorneys for plaintiff have for their costs and they will be entitled to have judgment entered for such costs against the defendant notwithstanding such settlement.

3. COSTS (§ II—28)—SCALE—SETTLEMENT OF ACTION.

Where a defendant to buy his peace pays to plaintiff a certain sum after suit brought, he will also be condemned to pay costs of an action of the amount paid, as such payment is equivalent for this purpose to a confession of judgment; and this, even if on the merits of the case defendant would have obtained the dismissal of the action.

4. COSTS (§ I—2*a*)—SETTLEMENT BY PARTIES—ATTORNEY'S CLAIM FOR COSTS—QUEBEC PRACTICE.

A defendant who settles a case directly with the plaintiff prevents the fulfilment of the conditional right of plaintiff's attorney as incidental plaintiff to payment of his costs and the fulfilment of such condition being so prevented by the debtor the condition becomes absolute. (C.C. 1084.)

THIS was an appeal from a judgment of the Superior Court for the district of Quebec, Lemieux, J., rendered on May 3rd, 1910, condemning defendant-appellant to pay plaintiff's attorneys the costs of suit although the parties had settled the case privately.

The appeal was rejected but the judgment of the Superior Court reformed as to amount.

Hon. L. P. Pelletier, K.C., for appellant.
F. X. Drouin, K.C., for respondents.

(*Translated.*)

CARROLL, J. (dissenting):—Seale, the defendant, was in the milk business. Bowers, the plaintiff, being desirous of carrying this kind of trade, hired from Seale a certain number of animals, vehicles, etc.

The parties reduced their conventions to writing by authentic deed of the 4th of April, 1908, before Notary LeRue. Annexed to this deed was a schedule containing a list of the animals leased.

These animals, etc., were leased by Seale for a period of sixteen months, for which Bowers was to pay $50 per month. At the expiry of the lease and the payment of a total sum of $800, Seale was to pass a bill of sale of all that he had leased.

This schedule states that Seale leased three horses and eight cows. Seale himself states that he was to lease only one horse and three cows, but that as Bowers had no security to offer, in case of deterioration of the things leased, he was himself to buy two horses and five cows, which should revert to Seale in case of breach of the contract of lease. And the fact that two days before the drawing up of the deed, Bowers went to the stable and prepared a list of the animals leased, which list mentions but one horse and three cows, lends a semblance of truth to this version. Bowers explains this by saying that at that time he was to lease only a limited number of animals, whereas by the deed itself he agreed to lease the entire stock.

However that may be, I should be disposed to give effect to the contract of the 4th of April, 1908, had not subsequent facts, to which I shall refer later, modified the rights of the parties.

Bowers paid to Seale $450 on account of the rent, and then, being desirous of getting rid of the kind of business he was engaged in, sold a part of the stock and the book debts to one Carrigan for $350. The latter gave his promissory note for $350, which was transferred to Seale, so that Seale was paid the entire amount, $800.

Bowers, by the present action, claims $550 from Seale, of which $500 unduly paid and $50 alleged to have been promised by Seale in consideration of his selling to Carrigan. The $500, according to the allegations of the declaration, were due to Bowers, because Seale did not deliver him three horses and five cows as stipulated in the deed of April 4th, 1908. Seale denied these allegations and brought forward the grounds of defence above recited.

The case was inscribed. Bowers was heard in the box and declared that the three horses and five cows had been delivered, but that Seale had taken them back, promising to return them. After this statement had been made, Bowers' attorneys obtained permission to amend their declaration by adding these

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words at the end of the third paragraph; "Or did, without plaintiff's consent, re-take the said animals and has always kept them."

As will be seen, therefore, the declaration alleged default to deliver three horses and five cows. In evidence plaintiff states that they were delivered but taken back by Seale, who promised to return them, and the amended declaration alleges that they were taken away by Seale without Bowers' consent.

Plaintiff took two different positions in his action and still another one in his deposition in the box, which is itself full of contradictions, although very evidently given in good faith. The amendment was allowed and an answer thereto was filed invoking practically the same grounds of defence.

Subsequently, on December 1st, 1909, Bowers accepted from the Traders' Agency the sum of $125 in full settlement of the action, each party to pay his own costs. This Traders' Agency had been requested to settle the suit by one Dr. Hall, who himself had been requested by Seale to do so.

Seale's attorneys obtained leave to file a plea of "*pais d'arrein continuance*" in order to allege the settlement between the parties. Bowers' attorneys filed an answer thereto alleging such settlement was made in fraud of their rights with the view of depriving them of their disbursements and fees, then amounting to $214.60, and prayed that the case be declared settled only on condition that all their costs were paid.

A trial took place on this issue, and judgment rendered declaring the case settled but condemning Seale to pay all the costs on the ground that the settlement was fraudulent.

There is no doubt that parties can put an end to a lawsuit of their own initiative without the intervention of their attorneys. These are only the the agents of their clients and the principals are the masters of the litigation which they can prosecute or discontinue as they see fit.

"La volonté du mandant a le privilége d'être perpétuellement ambulatoire."—Troplong, Mandat, 764, quoted by Meredith, C.J., in *Carrier* v. *Coté*, 6 Q.L.R. 297.

> Le mandat peut être révoqué en tout état de cause. Le mandant ne doit au mandataire aucune explication, et ce dernier ne peut élever de controverse pour prouver que la révocation est intempestive, injuste, capricieuse ou dictée par la colère ou la violence. La volonté du mandant est souveraine; stat pro ratione voluntas. Le mandataire doit l'accepter et s'y résigner. Troplong (Mandat), 765.

Thus we see this author expressing the opinion that the agent cannot raise any discussion as to the injustice or caprice resulting from the revocation of his mandate; but it is remarkable that this learned jurist makes no allusion to fraud as a cause of revocation. So then parties may settle their lawsuits without the consent of their attorneys, when they are acting in good

faith. But they could not do so if the settlement was made with the view of cheating an attorney out of his costs.

> Il est de l'intérêt public qu'un procureur qui a été obligé de faire de grosses avances pour défendre une autre partie dans un proces qu'on lui faisait injustement, ait un recours assuré pour s'en faire rembourser par la partie qui a fait le procès injuste et qui a été condamnée aux dépens.

(Pothier, Traite du Mandat, p. 137, quoted by Dorion, C.J., in *Montrait* v. *Williams*, 24 L.C.J. 144). And the Chief Justice adds that distraction of costs in favour of the attorneys has always been most favourably considered.

But it is not sufficient that the parties seek some advantage by a settlement, such settlement must also prejudice the rights of the attorney. And, therefore, the attorney for a plaintiff who prayed for distraction of costs in his declaration, must prove not only that the action has been settled but that this action was well founded. Otherwise, he would obtain costs on a settlement in a case where he would not have had any at all if the action had been dismissed on the merits. This is the great objection I see against a condemnation to costs in an action which has not been heard on the merits.

In France the jurisprudence is more in accord with logic than ours; there the ordinary procedure of the "*actio pauliana*" is required. Nevertheless in the case of *Montrait* v. *Williams*, Chief Justice Dorion declared that as all the parties were duly summoned, this incident could be decided without the delays of a new direct action and he cited several decisions supporting this view.

We accept the ruling of this eminent jurist.

There remains this question to be decided. Did this settlement prejudice Messrs. Drouin, Drouin & Drouin? In other words, was their action well founded?

The learned Judge below stated that in his opinion it was well founded. The parol evidence is contradictory, and the uncertainty of this kind of evidence is well known. And for this reason I prefer to be guided exclusively by the writing signed by the parties, all the more so as plaintiff himself is far from certain as to the facts alleged since he changed his position three times during thi scase. As already stated, I would be guided entirely by the deed of April 4th, 1908, and would maintain the action were it not for the acknowledgment contained in the deed of January 27th, 1909, where Bowers declared he is paying Seale $350 "as the balance due him under the deed of lease and promise of sale above cited."

There is no reserve in this authentic document in which Bowers admits that this $350, balance of the total amount of $800, was due to Seale.

And this is the deed that Bowers seeks to contradict by parol

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evidence to shew that on the $800 paid Seale was overpaid by $500; and this deed is attacked neither on the ground of fraud nor of error! This deed cannot be contradicted by parol evidence and it disproves "*in toto*" the demand of Bowers.

The action should, therefere, have been dismissed, and as a result Messrs. Drouin & Co. had no right to claim any fees from Seale. Therefore it cannot be said that defendant in arranging the settlement effected tried to defraud plaintiff's attorneys. There can be no fraud, in law, if the action was unfounded, and it was unfounded. For these reasons I should allow the appeal.

CROSS, J., also dissented.

(*Translated.*)

The judgment of the majority of the Court was delivered by

GERVAIS, J.:—This is an appeal from a judgment rendered on May 3rd, 1910, by the Superior Court for the district of Quebec, Lemieux, J. This judgment confirmed an agreement of settlement or transaction entered into between plaintiff and defendant without the knowledge of plaintiff's attorneys, granted acte to defendant of the filing of such settlement; and further, on the claim and conclusions of respondents to be paid their costs in spite of such settlement, condemned defendant to pay these costs.

The parties, at respondents' demand, went to trial both on the issues on the merits and on the exception of transaction (not *puis d'arrein continuance*) filed long after the joinder of issues. Defendant wished to prove thereby that plaintiffs' action was unfounded and plaintiff attempted to justify his conclusions.

Defendant seems to have had the better of the trial.

As to the evidence on the exception of transaction, it shews that appellant, perhaps through ill-grounded fears of losing his case, perhaps to buy his peace, paid to Bowers, the plaintiff, on December 1st, 1909, through the intermediary of the Traders' Agency, Limited, at Montreal, a sum of $125 in full and final settlement of the present case in the Court below, with the stipulation that each party should pay his own costs. It has also been shewn that at the time of the negotiations for a settlement the question of the payment of costs due respondents came up between plaintiff and the representative of the Traders' Agency; that Bowers agreed to pay his attorneys, the respondents; that he has not yet paid them; that he can't pay them, as he is insolvent, and perhaps also because he doesn't want to.

"*Concilium fraudis*" has not been proven against appellant, but there may be proof of "*eventus damni.*"

But is this Court to decide, after all, on the facts disclosed at the trial? We do not think so, and it seems to me that it was useless to continue the trial when neither party asked for the setting aside of the agreement of settlement.

Thus, respondents, by prosecuting the action for Bowers after his settlement, have apparently shewn that he should have lost it; but, on the other hand, Seale, the defendant, saw fit to admit by the settlement in question that judgment should go in favour of Bowers for $125.

The only question we have to decide is, therefore, the following one:—

Can a contract of transaction put an end to a lawsuit, even against the distracting attorneys, when made without their knowledge or consent?

Article 1918 C.C. says that the main object of transaction is to allow the parties to terminate a law suit already begun. The answer to the first part of the question must, therefore, be clearly in the affirmative. This exception may, therefore, be victoriously urged at any stage of the proceedings by virtue of art. 1918 C.C. and of art. 199 C.P., which allows the filing thereof.

The solution becomes more difficult when we have to answer the second part of the above question, to wit: Can the parties by a transaction terminate a lawsuit and deprive the attorneys of one or the other party of their costs?"

We shall first of all examine the French civil procedure and the French jurisprudence, and then our own legislation and jurisprudence.

The English law is of but little use to us on this subject, as a desistment must be authorised by the Court, and the withdrawal of suit can only take place on payment of the costs of the attorneys. The "Court of Five Judges" at Glasgow, accordingly held, on February 11th, 1911, that the solicitor who has made disbursements and earned certain fees has the right to obtain distraction thereof in spite of a settlement or transaction between the parties: *Ammon* v. *Tod*, the Scots Law Times, vol. 1, page 118, part 7. The defendant who buys his peace by a transaction "must know that the plaintiff's solicitor is entitled to his fees," said the Court.

Now, if we turn to the French legislation and jurisprudence, we find one article only in the French Code of Civil Procedure, art. 133, which states that solicitors may ask for distraction of costs to their benefit by stating, at the time judgment is pronounced, that they have put up the greater part of the disbursements. The same article states that distraction of costs can only be pronounced by judgment condemning to the payment thereof; and in this case the taxed bill can be sued upon on a writ of execution issued in the solicitor's name, without prejudice to his recourse against his own client. Of course, we must remember that the organization of the profession of advocate is far different in France, as in England, in Spain, in Italy, for in all these countries it is the solicitor who receives

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the clients, drafts the proceedings, conducts the enquête, and then hands over the complete record to the barrister who goes to Court, at the appointed time, for the oral argument, either in the Court of first instance or in appeal. In Germany, however, the system is more like ours; the advocate is both barrister and solicitor as in the Province of Quebec.

In France the mandate of the barrister is not remunerative; but that of the solicitor is. This is why art. 133 speaks of the solicitor only. Both jurisprudence and authors have, in France, been divided on the question of the judicial nature of distraction of costs mentioned in art. 133 of the French Code of Civil Procedure, in arts. 549, 553 and 555 of our own Code of Civil Procedure. Some say that it is a sort of imperfect delegation, whereby the winning party is supposed to hand over to his solicitor as his (the solicitor's) debtor the losing party. Others look upon it as an attachment by garnishment, which the solicitor is supposed to exercise on the moneys due to his client.

Finally under a third theory, favoured by the greater number of the authors, it is held that distraction of costs is nothing more nor less than a direct action allowed by art. 133 of the French Code to the solicitor, or allowed by arts. 549, 553 and 555 of our own Code of Procedure to the Quebec barrister-solicitor.

As will be seen, under this last theory, the rights of the French solicitor are most completely safeguarded. So that, over there, when he institutes an action for his client, he is instituting a direct action for himself, accessory though it may be, subject to the same fate as the main action in the Court of first instance, or in appeal, and even in cassation, a direct action against the defendant; and as a consequence the settlement or transaction between the parties can only affect the main action as between the parties themselves, and it cannot affect the rights of third parties—that is to say, the rights of the attorneys of the parties. In France the Courts have almost constantly decided in this sense, and the authors have almost unanimously upheld the same theory, to wit: that a settlement between the parties could not be set up as against the attorneys unless these had acquiesced therein; or, in any event, had been prejudiced thereby, and this even in the absence of any fraudulent collusion between the parties.

And on the question as to whether a settlement between the parties, entered into after the first Court had rendered judgment allowing distraction of costs, could prejudice the solicitor, there has never been any difference of opinion. The answer has always been in the negative.

Locré, in 1815, in his "Esprit du Code de Procédure Civile, at page 74, vol. 2, says:—

> Que les frais ou dépens sont de droit à la charge de celui qui se désiste; qui est superflu d'observer que les tiers ne peuvent jamais souffrir d'un désistement qui leur serait préjudiciable; qu'il en sera du désistement comme de tous les actes.

Garsonnet, vol. 6, p. 678, says:—

> Que le desistement, s'il implique transaction, doit dans ce cas s'interpréter suivant les termes de l'accord et l'intention des contractants.

He quotes Bloche, at the word "desistement," Nos. 158 and 161, who himself quotes a judgment rendered at Florence on February 18th, 1811.

For over fifty years, the Courts of first instance have decided time and again that a transaction before the final judgment could not be set up against the solicitor claiming his costs. The Court of Cassation, within the same period, decided that a transaction after a definitive judgment could never be set up against the solicitors of one of the parties entitled to his costs either of the first Court or of appeal.

For instance: Cassation, Chambre Civile, October 22, 1900, *Hugo Oberndoerfelr* v. *l'Enregistrement*, Journal des Avoués, 1900, p. 475 *et seq.* Chambery, March 22, 1902, *Brun* v. *Ruy*, Journal des Avoués, 1902, page 430. Cassation, Sirey, 1907-1-260.

We may add that the Court of Cassation seems to have adopted the opinion of Garsonnet, "que des trois définitions de la nature de la distraction des dépens, celle qui la considère comme une action directe de droit est la meilleure." (Traité de Procédure, 1st edit., vol. 3, p. 380). See also Cassation, Nov. 9, 1910, Sirey, 1911-1-6; Bulletin des Sommaires; Seine, January 19, 1873, Journal des Avoués, p. 133; (*Delepouve* v. *X.*).

So we may safely say that in France, in 1912, a transaction or settlement between the parties cannot be set up as against their attorneys.

And now, can it be set up in the Province of Quebec? The weight of jurisprudence seems to be in the negative since the judgment in appeal in *Montrait* v. *Williams*, 3 Legal News 11, and that in *Laplante* v. *Laplante*, 3 Legal News, p. 330. In the case of *Montrait* v. *Williams*—an action in separation as to bed and board, and as to property, brought to an end by reconciliation, Chief Justice Sir Antoine Aimie Dorion seems to have been led to his decision by the fact that respondent who was rich had paid a provision to the female plaintiff and thereby had recognised her action as well founded. A similar admission in the case decided in 1873 by the Seine tribunal (Journal des Avoués, p. 134), the payment by defendant of 500 francs in settlement of an action in damages, led the Court to condemn the defendant to pay the costs of Mtre. Delepouve.

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In the present case the defendant, who might have won his case, admitted that judgment should go for $125. Should he not pay as well to plaintiff's attorneys the costs of the action to which Seale acquiesced up to the sum of $125, and should not the latter pay these costs as accessory to the debt, which costs were demandable and exigible by respondents under the direct action granted them by arts. 553 and 555 C.P., which are new law? The presumption, under these two articles, is that there is a demand of distraction of costs in favour of the attorney of the successful party, and there is an absolute and exclusive attribution of costs in favour of such attorney. *A fortiori*, under our law, has the attorney a direct action, pure and simple, against the losing party for the payment of his costs, subject, nevertheless, to the vicissitudes which may overtake the judgment of the trial Court. The attorney, in such cases, is a third party and a transaction cannot affect him.

It may be objected: "But the attorney has never but a conditional right to his costs; and hence only an action of the same nature." The answer to this would be: "That as the debtor of the costs is the party who puts an end to the lawsuit by his transaction, he thereby prevents the fulfilment of the condition, to wit, the judgment which would grant costs against him, the debtor, to the attorney of the successful party." Surely this is the case where art. 1084, C.C. should be applied against appellant.

For these reasons this Court is of opinion to confirm the judgment appealed from, although modifying the reasons and dispositif of the judgment.

As appellant recognised his indebtedness in the sum of $125 and acquiesced in plaintiff's demand to this extent he should be condemned to pay the costs of an action of this class only and not the costs of the action as originally brought. Nor should he have to pay the costs of the trial subsequent to the filing of record of the exception of transaction which trial was absolutely useless.

This Court therefore maintains the exception of transaction filed of record, condemns appellant to pay respondents the costs incurred in the Court below as of an action of $125 only up to the filing of the said exception, saving the right of deducting whatever Bowers may have paid to respondents; and confirms the said judgment as to the rest, each party to pay his costs in appeal.

Judgment modified without costs.

NEY v. NEY.

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Mar. 22.

J. S. Cartwright, M.C., Master in Chambers. March 22, 1912.

1. PARTIES (§ II A—100)—DEFENDANT JOINED IN ALIMONY ACTION AS TO COLLATERAL RELIEF.

While a claim for the custody of the children may be joined in an action by the wife against the husband for alimony, another person taking care of the children under the defendant's directions cannot be made a co-defendant for the purposes of the relief sought as to the custody of the children.

2. ACTION (§ II D—60)—JOINDER—CAUSE OF ACTION NOT AFFECTING A CO-DEFENDANT.

Two separate causes of action, in one of which one of the defendants has no concern, cannot be joined.

THIS action was brought by the plaintiff against her husband and his father. She asked for alimony as against the husband and for the custody of the two children of the marriage as against both defendants. The defendants moved for an order requiring her to elect on which branch she would proceed in this action, and striking out some parts of the statement of claim.

T. N. Phelan, for the defendants.

W. J. McLarty, for the plaintiff.

THE MASTER said that the motion was entitled to prevail, with costs to the defendants only in the cause. Two separate causes of action, in one of which one of the defendants has no concern, cannot be joined: *Hinds* v. *Town of Barrie*, 6 O.L.R. 656 (C.A.), and cases cited there. The plaintiff should amend. This could best be done by discontinuing as against the father, and continuing the action for alimony against the husband. In the present action she could claim the custody of the children, which would be given to her in a proper case, as in *Cowie* v. *Cowie*, 13 O.W.R. 599, 14 O.W.R. 226. Paragraph 5 would then be amended. Paragraph 6 might stand under the decision in *Millington* v. *Loring*, 6 Q.B.D. 190. It gave the defendant notice of what the plaintiff would prove at the trial. Paragraph 13 and clause 2 of paragraph 14 should also be amended. If these amendments were made promptly, the action would be tried at the non-jury sittings before vacation. If a mother seeks possession of her children from any one except her husband, should she not proceed to get out a writ of habeas corpus? Is not this the appropriate remedy?

Motion allowed.

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Mar. 23.

Re MATTHEW GUY CARRIAGE AND AUTOMOBILE CO. (Limited) (Thomas's Case.)

Ontario High Court, Middleton, J. March 23, 1912.

1. CORPORATIONS AND COMPANIES (§ V B—178)—CAPITAL STOCK—ILLEGAL ISSUE AT DISCOUNT—CANCELLATION.

It is competent to a company, upon discovering that it has, under a mistake of law, been illegally issuing its shares at a discount, to return the subscriptions and cancel the allotment, and the issue of stock so made.

2. ESTOPPEL (§ III E—78)—SHAREHOLDER OF COMPANY ATTENDING CORPORATE MEETINGS.

A shareholder's attendances as such at the meetings of the company may estop him from denying that he is a shareholder, but do not estop him from denying that he is a shareholder in respect of a greater number of shares than were covered by the certificates issued to him and on which alone his vote at the shareholder's meeting would be based.

APPEAL by the liquidator of the company from the certificate of the Master in Ordinary dismissing the application of the liquidator to place the name of R. W. Thomas upon the list of contributories in the winding-up of the company.

G. H. Kilmer, K.C., for the liquidator.

W. S. McBrayne, for R. W. Thomas.

MIDDLETON, J.:—Those in charge of this company seem to have formed the erroneous impression that they could issue stock at less than par; and some time before the 1st March, 1911, Mr. Thomas signed two applications for stock. By the first he subscribed for 125 shares of the par value of $100, and agreed to pay for the same $10,000 on or about the 1st March, 1911. This stock he intended to carry in his name. At the same time he subscribed for 40 other shares, for which he agreed to pay $3,200 on or about the 1st March; these shares to be made out in the name of F. R. Daniels. There does not appear to have been any stock allotted or any notice of allotment. The affairs of the company appear to have been conducted in the laxest manner possible; and, so far as the records and evidence shew, there was no corporate action whatever with respect to these subscriptions.

Early in March, Thomas paid to the company $10,000 in cash, and received from the company stock certificates in the name of Daniels for 40 fully paid-up shares, and in his own name certificates for 85 fully paid-up shares, which together would represent the stock he would be entitled to receive, including the bonus stock.

On the 30th March, he gave his note to the company for $3,200. This note was not at that time treated as a payment of the balance remaining upon his subscription, but was treated as an accommodation to the company. The note matured on the 3rd July, was paid, and was then treated as being a payment of the balance due for stock. By this time some question had been

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raised as to the legality of the issue of this bonus stock, and Thomas had taken the position that he would not receive the bonus stock; and he requested a certificate to be made out to him, not for the 40 shares that he would be entitled to receive upon the bonus basis, but for 7 shares only, which, with the 125 already issued, would be paid for in full by the $13,200 that he had paid to the company.

On the 3rd August, a resolution was passed, reciting that, whereas applications for stock had been taken upon the understanding that a portion of the shares to be issued should be given as a bonus, and certificates had been issued for this bonus stock, and whereas the directors and shareholders had been advised that this issue of bonus stock was illegal, and it had been mutually agreed to cancel the applications and recall any certificates, by which it was resolved that all applications for stock, which included bonus stock, and all certificates issued for bonus stock should be recalled, and that new applications should be received for the stock, without the bonus, and that new certificates should be issued.

It is not clear whether this resolution was passed at any meeting duly called, but apparently all the shareholders assented.

The original applications signed by Thomas were returned to him with a memorandum written across the face, "cancelled by resolution of the Board, July 17," signed by the secretary-treasurer. There is no record in the minute-book of any such resolution; but the applications were returned to Mr. Thomas with this memorandum, and for them were substituted, at some time after the resolution of the 3rd August, applications for 40 shares and 92 shares, antedated as of the 27th January, which was probably about the real date of the original subscriptions—these bearing no date upon their face.

Thomas attended meetings of the company as a shareholder, and undoubtedly would be estopped from denying that he was a shareholder; but I can see no reason why he should, by virtue of this estoppel, be held to be a shareholder in respect of any greater number of shares than were covered by the certificates issued to him.

It is true that the first 125 shares were issued as fully paid-up, when 25 of them were really bonus shares; but, when the note was paid in July, Thomas and the company mutually agreed that $2,500 then paid should be applied in discharge of the liability in respect of the bonus shares then issued, and that $700 should be applied in payment of 7 other shares covered by the certificate of the 3rd July.

I can find nothing which will preclude Thomas from denying any allotment or notice of allotment with respect to the shares over and above the 132.

Moreover, I think the transaction which took place in July

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and August, by which the subscriptions were returned because the parties were advised that what was contemplated was illegal, and new subscriptions substituted, was intra vires of the company and is binding upon the liquidator.

While, therefore, I cannot accept the reasons given by the learned Master, I arrive at the same conclusion, and hold that the liquidator is not entitled to place Thomas upon the list of contributories with respect to the 33 shares of stock in question.

I dismiss the appeal, but I do not give costs, because the laxity with which the affairs of this company have been conducted has invited the litigation, and I do not think the creditors should suffer thereby.

I do not know that the question of the liquidator's costs is before me, but I may say that I think the appeal was justified, and that he may properly be allowed his costs out of the estate.

Appeal dismissed.

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H. C. J. 1912

Mar. 28

TAYLOR v. TORONTO CONSTRUCTION CO.

Ontario High Court, J. S. Carty wright, K.C., Master in Chambers. March 28, 1912.

1. VENUE (§ II—10—FAILURE TO SERVE NOTICE OF TRIAL—MOTION TO CHANGE VENUE.

While there may be jurisdiction to change the place of trial, after notice of trial has been given, although irregularly, a plaintiff may not correct his own mistake in failing to give notice of trial in due time by a motion to change the venue to another trial sittings for which the time for service had not yet expired.

THIS action was commenced on the 18th January, 1912. The plaintiff sought to recover $22,000, on the basis of two contracts made with the defendant company—or, in the alternative, to recover almost $10,000 on a quantum meruit. Appearance was entered on the 26th January. The statement of claim was delivered on the 19th February, and statement of defence and counterclaim (so-called) on the 27th February. Issue was joined on the 15th March, which was the last day for giving notice of trial for the Hamilton sittings commencing on the 25th March. For some reason, notice of trial was not given until the 16th. The plaintiff moved to change the venue from Hamilton to Guelph, so that the action might be tried there on the 9th April.

F. Morison, for the plaintiff.

W. C. Chisholm, K.C., for the defendants.

THE MASTER said that the motion was made really to correct, if possible, the oversight in not serving the notice of trial in the time required by the Rules; but that which cannot be done directly cannot be done indirectly. It was strongly urged that it was most important to the plaintiff to have a speedy trial, on two grounds. His affidavit stated that four of his witnesses were obliged to go to Western Canada about the end of April and could not remain until the June sittings at Hamilton. There was no mention of their names nor of the nature of their evidence. But in a proper case this difficulty could be met by having their evidence taken de bene esse, and an order might issue for that purpose. The second ground was, that the plaintiff was a poor man, whose means had all been used in doing the work in question. He now wished to be free to go to New Brunswick, where he had obtained another contract since this action was commenced. The statement of defence alleged that the plaintiff had been paid over $14,000 up to the time when he abandoned the work, which was over $1,600 in excess of what had been earned; that the defendants had to take the work over and complete the same, which had not been done, but at the end of January this left $1,817.93 overpaid by the defendants in excess of the contract-price. They claimed to be allowed this sum, and also the sum found to be overpaid at the completion of the work. The affidavit of the president of the defendant company confirmed these statements; which seemed to shew that the whole matter could not be disposed of as early as the 9th April. If the notice of trial had been given in time, it might have been possible to have sent the trial to some other place; but the Master was not aware of any case in which a motion by a plaintiff to change the venue so as to expedite the trial and correct his own mistake had been successful—none such was cited on the argument nor was any to be found in Holmested and Langton's Judicature Act, under Rule 529. It seemed a necessary inference that the power to do so did not exist. The defendants' president in his affidavit stated that they would move to strike out the jury notice. If they succeeded in this, as seemed most probable, the case could be tried in June at Hamilton, or even entered at Toronto if both parties agreed. But, as the case stood, the motion must be dismissed with costs to the defendants in any event.

Motion dismissed.

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Jan. 24.

SINGER v. RUSSELL.

Ontario High Court of Justice, The Divisional Court, Boyd, C., Riddell, and Sutherland, JJ. January 24, 1912.

1. BROKER (§ II B—12)—REAL ESTATE AGENT—LOWER PRICE ACCEPTED BY PRINCIPAL AFTER AGENT'S REFUSAL.

Where there has been an oral contract of employment of the real estate agent by the owner without a limitation of time, or stipulation of the price to be obtained other than that the agent shall obtain a satisfactory offer, the owner must pay the agent's remuneration in respect of a sale which the owner makes directly to the prospective purchaser at a price which the latter has offered the agent but at which the agent does not submit a written offer because of instructions from the owner to demand a higher price.

[*Burchell* v. *Gowrie and Blockhouse Collieries*, [1910] A.C. 614, specially referred to.]

2. BROKERS (§ II B—12)—COMMISSION OF REAL ESTATE AGENT—INTRODUCTION OF PURCHASER—CONCLUSION OF SALE BETWEEN PRINCIPALS AT LOWER PRICE.

A real estate agent is entitled to a commission from the person who employs him to sell his property, if his introduction of the parties was the foundation of the negotiations which resulted in a sale being made by the principal to the buyer even at a lower price than that which the agent was authorized to accept.

[*Green* v. *Bartlett* (1863), 14 C.B.N.S. 681; *Stratton* v. *Vachon*, 44 Can. S.C.R. 395; *Burchell* v. *Gowrie and Blockhouse Collieries*, [1910] A.C. 614, followed.]

3. BROKER (§ II B—12)—REAL ESTATE AGENT'S COMMISSION—PRINCIPAL'S ACCEPTANCE OF LOWER PRICE.

Where the prospective purchaser with whom the agent is negotiating goes to the vendor direct and buys at a price lower than the limit given by the owner to the agent, the agent is entitled to a commission based upon the price at which the property was sold.

[*Stratton* v. *Vachon*, 44 Can. S.C.R. 395, followed.]

4. BROKER (§ II B—10)—COMPENSATION OF REAL ESTATE AGENT.

In an action by a real estate agent for a commission on a sale, it is for the jury to say whether the contract was or was not brought about by the agent by his introduction or intervention; the test is, was the sale brought about in consequence of the introduction and is it traceable thereto; and if it resulted directly from the continuation of the negotiations begun by the agent, the latter is entitled to compensation.

[*Morson* v. *Burnside*, 31 O.R. 438; *Wolf* v. *Tait*, 4 Man. L.R. 59; and *Re Beale, Ex p. Durrant* (1888), 5 Morrell 37, specially referred to. See also Leake on Contracts, 6th ed., 366, 367; Phipson on Evidence, 5th ed., 75.]

5. CONTRACTS (§ I B—5)—IMPLIED AGREEMENT—DEALINGS WITH BROKER—CONTINGENT COMMISSION.

Where a real estate agent knowing of a possible buyer of property not listed with him interviews the owner and submits an offer upon a form of "offer and acceptance" and the acceptance form contains in addition to the formal acceptance of the offer an agreement with the agents to pay them the usual commission, then if the owner asks the agent to submit offers and does not repudiate any liability to pay commission, a contract will be implied to employ the agent and to pay him the usual commission if he effects a sale, although the owner does not at any time sign such formal agreement to pay commission.

APPEAL by the defendant from the judgment of DENTON, Jun.Co.C.J., in favour of the plaintiff, an estate agent, for the

recovery of $187.50, in an action brought in the County Court of the County of York to recover a commission on the sale of land for the defendant. The opinion of the trial Judge is set out in the opinion of Sutherland, J.

The appeal was dismissed, RIDDELL, J., dissenting.

Donald Macdonald, for the defendant. The defendant did not, by express or implied contract, retain the plaintiff as his agent to sell the property in question. The only contract made by the defendant with the plaintiff was, that, if the plaintiff brought the defendant an offer of $8,000 for the property within four days, the defendant would accept the offer and pay a commission thereon. The plaintiff did not do so. The plaintiff was the agent of the purchaser, and not of the defendant. The plaintiff did not bring the purchaser and the defendant together; on the contrary, the plaintiff intercepted the purchaser, who was seeking the defendant with a view of purchasing the defendant's property. If an implied contract arose by reason of the action of the plaintiff and defendant, the same was superseded by the express contract which I have mentioned.

J. M. Ferguson, for the plaintiff. There was an implied contract between the plaintiff and the defendant that the latter should pay the former a commission; and the trial Judge rightly so found. The plaintiff brought the purchaser and the vendor together; and, while the plaintiff did not complete the transaction, yet he is entitled to his commission, as there was an implied promise at least by the defendant to pay a commission upon the sale being effected, directly or indirectly, through his agency: *Calloway* v. *Stobart Sons and Co.* (1904), 35 Can. S.C.R. 301; see judgment of Davies, J., at p. 306. I submit that before the express contract in regard to a sale at $8,000 was made, there was an implied promise to pay the agent a commission; and I contend that the defendant cannot avail himself of the plaintiff's efforts to secure this purchaser without paying him for his labour: *Morson* v. *Burnside* (1900), 31 O.R. 438; *Aikins* v. *Allan* (1904), 14 Man. L.R. 549; *Burchell* v. *Gowrie and Blockhouse Collieries Limited*, [1910] A.C. 614; *Stratton* v. *Vachon* (1911), 44 Can. S.C.R. 395.

Macdonald, in reply, referred to *Barnett* v. *Isaacson* (1888), 4 Times L.R. 645; *Locators* v. *Clough* (1908), 17 Man. L.R. 659.

January 24. BOYD, C.:—One Black, a tenant of the corner lot (Queen street and Logan avenue), called attention to the lot in conversation with Bedelli, who became the purchaser, and told him who was the owner and about an attempt to buy it. This was about a month before the transaction now under consideration, and is not connected with the present transaction. The plaintiff, who is a land agent and collected rent from Bedelli, fell into conversation with him about the 24th October,

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1910, about the desirability of his purchasing this lot, and finally said to Bedelli that, as he was a land agent, he would try to interview the owner (the defendant Russell) and find out the price of the property. He did not go to buy the place for Bedelli, nor was he so commissioned. Bedelli asked Singer what would be the expense to buy the lot, and Singer said it would be $10 or $15 for the lawyer.

At the first interview, Singer says, he told Russell that he was a land agent, and asked him if he would sell, and how much he would ask for the lot. The defendant would not give a stated price, told him of people that had been after the property, and told him of prices that had been offered him, and told the plaintiff to go and get an offer and he would consider it. The defendant appeared anxious to sell and said he would sell if the plaintiff were to give him a satisfactory offer.

(1) The defendant's version of this first conversation was, that he was not particular about selling, that he did not know Singer was an agent, but thought he was buying for himself, but admits saying, "Make me an offer for the property, no matter what it is."

(2) Two days or so after, occurred the second interview with the defendant. Meanwhile Singer told Bedelli that Russell wanted an offer, and one was prepared in which $7,000 cash was offered by Bedelli under his signature, witnessed by Singer as agent. This is in the usual printed form, filled up in writing as to the blanks, and is dated the 26th October, 1910. This offer was handed to the defendant and by him retained for some days, which he asked for its consideration, and was refused by him after that interval. What occurred on the second occasion is thus given by the plaintiff: "Russell noticed 'commission' marked on the printed offer, and he said, 'I suppose you expect commission?' I said, 'Yes, I expect the regular two and a half per cent.' I left offer with him and went away." The defendant does not appear to recall this conversation, and I do not find that he specifically contradicts it.

(3) The third interview was when Singer returned after the three days, and he gives the details thus: "Russell refused the $7,000 and said it was not enough. I said, 'How much do you want?' and he said, 'I want $8,000.' I said, 'I would like to get it for you: I am working in your interests and I would like to be able to put it through for you.' I said I would go and see my man again and see if he would make it $8,000. Before I left, he said, 'Well, I will give you four days to get the $8,000 for it.'" In cross-examination the plaintiff puts it thus: "Fetch me an offer within four days for $8,000, and I will accept it." The defendant's version is different of this third meeting. He says: "The plaintiff pressed me to put a price on it, and by looking over the document (offer) I saw

he was an agent and I pay the commission, and I asked $8,000 for the property. I did not know he was an agent up to that time, of course. . . . I gave him four days to find me a purchaser." The plaintiff says that agency and commission were spoken of at the first and second meeting. The defendant does not admit speaking in any way to the plaintiff about commission.

I may say that, on reading over the evidence, I am not favourably impressed with the way in which the defendant's evidence was given; and I would accept the recollection of the plaintiff and his witnesses as against the defendant's contradictions.

The plaintiff forthwith returned to Bedelli, but could get no definite result within the four days. He went to Bedelli three or four times and tried to induce him to give a higher offer. Bedelli said he would give the plaintiff an offer for perhaps $7,500, but did not feel inclined to give $8,000. On the night of the 8th November, Bedelli was to call the plaintiff up to let the plaintiff know if he would give an offer to take to Russell; but, before then, Bedelli had gone directly to Russell and purchased at $7,500. Bedelli was going to give an offer for $7,500 to the plaintiff, but he did not do it, and, instead of that, he closed directly with the owner.

When Singer saw Bedelli about increasing his offer, Bedelli said he would have to think it over, and then, in conferring with the other Bedelli, his brother (who was called as witness), he came to the conclusion to go and speak to Russell. Bedelli says: "I went to see Russell to see what kind of idea he got, if he want to sell or not, to see if I would do any better myself, a little better myself."

Both brothers Bedelli agree in their account of what was said by them, and the defendant, Russell, said: "Are you the one that Singer got the offer from?" "I said, 'yes.' I said, 'What do you want for the property?' And he says, '$8,000.' I said, 'I will give you $7,500,' and Russell said, 'How about the commission? Who is going to pay the commission to Singer?' I said, 'I don't know about the commission,' and he said, 'Didn't Singer ask you for commission?' I said; 'No, he only asked $20 for the lawyer.' Then Russell said: 'Well, I think I will sell it to you, and if I have to pay the commission I will pay it; but if not, I won't.'"

The written offer was for $7,000, $100 cash and the balance in cash on completion. What was accepted was $7,500, $100 paid down, $2,500 on mortgage, and balance cash. The defendant's account varies from that of the Bedellis. He says: "I asked, 'Are you paying Singer anything for carrying on this business for you?' And they said they were paying him something—I can't just remember the amount they told me. No

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lawyer's fee was mentioned by Bedelli at all. I did not know till after the sale that Bedelli was the man Singer had been speaking to me about. I did not consider I had anything to do with Singer. If Singer had got me $8,000, I understood then I would have paid him." This sale took place about the 7th or 8th November.

It appears that the defendant, after the four days given to get the $8,000 offer were up, and before the 8th November, sold to the Bank of Toronto, and the way it is stated by him is significant. I quote his language: "In the meantime, after they failed to come up with the offer of $8,000, I sold it to the Bank of Toronto, and then I got a letter from the manager, stating that the Board considered it a little too far west. I was mad that night they came up, or I would not have sold it."

Next morning after the sale, Singer went to the defendant and asked for his commission, and the defendant said he had put through the sale himself, and so refused to pay.

I cannot doubt that the defendant knew that Singer was a land agent from the time they first met in this transaction, and he then employed the plaintiff to get him an offer, saying he would sell if he got a satisfactory offer. Nor can I doubt that on the second occasion, when the offer of $7,000 was submitted, there was a talk about commission, and that the plaintiff told the defendant that he expected to get it at the regular rate which was mentioned. On the third occasion, the plaintiff was told to fetch an offer at $8,000 in four days, and it would be accepted. It was, of course, open for the defendant to sell otherwise after the lapse of the four days, and this he did to the Bank of Toronto—but this sale came to nothing, almost at its inception.

Next comes the present purchaser Bedelli in person, whose coming is naturally and reasonably attributable to the previous intervention and negotiation of Singer. The owner appreciated the situation and realised the connection by agitating the question of commission with the Bedellis, but resolved to get out of it if he could.

The plaintiff was still labouring the matter with Bedelli and had got him up to the point of $7,500; and, had that been put in writing and carried to Russell, there would have been no peradventure as to the right to commission. But, apart from this method of dealing, Singer brought the vendor and purchaser together, and practically introduced a willing purchaser to the owner and at the owner's request.

The owner first fixed a definite price on this third occasion, but that did not displace the employment of the agent to get a satisfactory offer. The defendant was ready to sell at $7,500, and the purchaser was willing to give it, and the sale made between the two was clearly traceable to the exertions of Singer.

whose "man" made the satisfactory offer in person, instead of putting it into writing and letting Singer carry it to the vendor.

There is made out from these interviews an implied contract to pay the agent commission for his effective services, and no difficulty arises about any express contract ousting the operation of the implied contract. The reference to express contract arises from an inadvertent misquotation of the evidence by the Judge. He has confounded question with answer, as will appear by quotation. On the examination of the plaintiff, he is asked: "And he said to you, 'You bring me an offer for $8,000 within four days and I will pay you a commission'? Is that what was said?" Answer: "No, he did not say, 'I will pay you a commission;' he said, 'Fetch me an offer of $8,000 within four days, and I will accept it.'" There was no express bargain about commission, according to the evidence of both parties; but, on the plaintiff's evidence, there is clear enough proof that he was working upon an implied promise of compensation. This being so, the defendant takes the benefit of what was done by the agent in preparing the way for the final sale, and whose intervention efficiently furthered the completion of the transaction.

Slight service in bringing together the parties so as to result in a sale is sufficient: *Mansell* v. *Clements* (1874), L.R. 9 C.P. 139, *per* Keating, J., at p. 143. It is for the jury (or a Judge trying the case) to say whether the sale was or was not brought about by the agency of the plaintiff, by his introduction or intervention: *Lumley* v. *Nicholson* (1886), 34 W.R. 716. The principle of the decision in *Re Beale, Ex p. Durrant* (1888), 5 Mor. 37, is applicable in its facts, where the test is explained by Mr. Justice Cave to be, whether the sale has been brought about in consequence of the introduction, and is traceable thereto.

The learned trial Judge has come to the conclusion, upon the evidence, in favour of the plaintiff; there is evidence well warranting this result; and I think his judgment should be affirmed with costs.

SUTHERLAND, J.:—An appeal from a judgment of Denton, County Court Judge, York, dated the 9th November, 1911, in favour of the plaintiff, a real estate agent, for the sum of $187.50, for commission at two and a half per cent. on $7,500, on a sale by the defendant to one Bedelli of real estate on Queen street, in the city of Toronto.

Some weeks before the 24th October, 1910, Bedelli had casually learned through one Black, the tenant of the property, that the defendant owned it and the price at which he had offered to sell it to the latter. It did not appear in evidence at the trial what this price was. Neither Bedelli nor Black, however, approached the defendant about the matter. On that date, the

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plaintiff, being in Bedelli's fruit store in Parliament street, was asked by him what he considered the value of the property in question, and gave his opinion. Seeing the apparent interest of Bedelli in the matter, he suggested that he would see the owner and ascertain his price. He called on the defendant, and says that he introduced himself by name and stated that he was an agent. He also says that the defendant did not, on this occasion, wish to give him a price upon the property, but told him to go and get an offer and he would consider it. Thereupon the plaintiff returned to Bedelli and secured a written offer, from which I quote in part: "Offer to Purchase. To John Russell, I, Mr. Bedelli, of the city of Toronto (as purchaser), hereby agree to and with John Russell (as vendor) through J. Singer (agent) to purchase all and singular the premises situate on the north side of Queen street," etc., at $7,000. "This offer to be accepted by the 29th day of October, 1910, otherwise void," etc.

It was signed by S. Bedelli, and witnessed by J. Singer, the plaintiff. Below Bedelli's signature, the following is printed:—

> I hereby accept the above-named offer and its terms and covenant, promise and agree to and with the said to duly carry out the same on the terms and conditions above-mentioned, and also agree with said agents to pay them the usual commission.

He returned to the defendant, handed the offer to him, and asked him if he would accept it. The plaintiff's version of what then happened is as follows:

> Well, I don't think that there was very much conversation took place at that time. He said he wanted a few days to consider it and told me to come back. He read it over and he noticed the commission marked upon it and he said, "I suppose you expect commission." I said, "Yes, I expect the regular two and a half per cent."

The offer was left with the defendant, and the plaintiff returned in a few days, when the defendant told him it was not enough money for the property. He was asked how much he wanted, and answered, "$8,000." Before the plaintiff left him on this occasion, he states, the defendant put it in this way: "Well, I will give you four days to get the $8,000 for it."

The plaintiff went back to Bedelli, and what then occurred between them is told by him as follows.

Being asked at the trial if he had secured an offer for that amount, he says:—

> A. Not within that four days. I had been to him three or four times trying to induce him to give me an offer; he said that he would give me an offer for perhaps $7,500; that he did not feel inclined to give $8,000.
>
> Q. Then what next took place? A. Well, on the night of the 8th Mr. Bedelli was to call me up and let me know whether he would give me an offer for something to take to Mr. Russell, and it seems that he had already gone to Mr. Russell.

Q. Now, have you asked Mr. Russell for this commission? A. I went there the day after the sale, the next day that Mr. Bedelli had been to Mr. Russell—the next morning. I went to Mr. Russell, and asked him for the commission.

Q. What did he do or say? A. Well, he said that he had put through the sale himself.

Q. Did he tell you to whom he had sold the property? A. Mr. Bedelli; he mentioned his name to me at the time.

Q. What did he say? A. He said he thought he had put through the sale himself.

Again he says:—

Q. You never brought Mr. Russell any offer for over the $7,000? A. No, although I tried to get an offer; I was to Mr. Bedelli about four or five times, trying to fetch it up to the $8,000.

Q. You could not raise the other offer? A. He was going to give me an offer for $7,500.

Q. He did not do it? A. He did not give it to me.

Q. Why did you not get the offer for $7,500 when you were there with him? A. Well, it was simply a matter of not exactly making up his mind in such a hurry; I could not hold him; he wanted a few days to consider it himself; I thought perhaps I might be able possibly to get $8,000 from him. I tried my best to get $8,000 for it so that I would be able to go there and Mr. Russell would not refuse.

The purchaser, Salvidor Bedelli, was called on behalf of the plaintiff, and says:—

One night Mr. Singer happened to come over to my place, you know to buy some fruit—I ain't sure—buy fruit or get rent, I ain't sure which—and we started talking about property and we said to Mr. Singer—I said to Mr. Singer, "What do you think about this corner of Queen and Logan?" He said, "That is a nice property," and he said, "Have you any idea to buy?" I said, "Yes, if the price suit me, I think I get a notion to buy." He says, "Well, I am an agent," and I said, "I know." "Then I go and see the owner," Mr. Singer said, I said myself to Mr. Singer, I said, "What will the expense will cost me to buy the property," and he told me $15 or $20 for the lawyer, and that is all, he told me.

He corroborates the plaintiff about giving him a written offer to take to the defendant at $7,000; about the plaintiff returning and saying that the defendant wanted a few days to think it over, and coming back again and telling him that he would not accept $7,000 and wanted $8,000. He then states that a night or two afterwards he thought he would go and see Russell himself, and in company with his brother did so, whereupon the following conversation, he says, occurred:—

And I went over to Mr. Russell, and soon as we get into Mr. Russell and Mr. Russell tell me, he says, "Are you the one that Mr. Singer got the offer from?" I say, "Yes," He say, "Well—you see Mr. Russell tell Mr. Singer he won't accept the $7,000, so I said, What do you want for the property?" and he says, "I want $8,000;" and then I say, "I think that is a little too much." So I say, "I will

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give you $7,500." And then Mr. Russell say, "How about the commission?" He says, "Who is going to pay the commission to Mr. Singer?" I said, "I don't know about the commission." And he said, "Didn't Mr. Singer ask you for any commission?" And I said, "No;" I say, "Mr. Singer only ask me for $20 for the lawyer"—because I ask him that myself, you see, what the expense will be. And he says then, "Well, I think I will sell it to you." And he put his hand upon his head, and he say, "I think I will sell it to you, and if I have to pay commission I will pay it and if not I won't." That is what Mr. Russell told me.

Q. And did you buy the property from him for $7,500? A. Yes, and I give him a deposit of $100.

Joe Bedelli, a brother of the purchaser, was called, and he corroborated in detail his brother's testimony as to what was said at Russell's on the occasion when the sale for $7,500 was made.

The defendant denied that the plaintiff had told him, on the first occasion when he saw him about the property, that he was an agent, and says that he was not aware of this until after the written offer from Bedelli at $7,000 was left with him, when he saw it stated on its face. It seems rather extraordinary that, when the very object which the plaintiff had in going to the defendant was to try and effect a sale of the defendant's property and secure a commission from him, he should not have disclosed the fact to him. It also seems curious that, on receiving from the plaintiff Bedelli's written offer, he should not have looked it over before asking for a few days to consider it. He must, I think, be assumed to have done so, and to have then discovered, if he did not know before, as I think he did, that the plaintiff was an agent and that the question of commission would arise. It would also look as though he then had in mind to sell at a price not greatly in excess of $7,000, or he would at once have told the plaintiff he would not sell at that figure and not taken some days to consider the matter. The defendant, however, puts it in this way:—

A. Well, he went away; and, I think a day or so after, he came back with an offer and he had on the offer it gave me three days to consider it; so, after the three days was up, he came back and I told him I could not accept his offer, and he pressed upon me to put a price on the property, and by me looking over this document I saw that he was an agent and I pay the commission, and I asked $8,000 for the property; I did not know that he was an agent up to that time, of course.

The defendant also says that, when the sale was finally made to Bedelli, the following conversation occurred:—

I asked him, "Are you paying Singer anything for carrying on this business for you?" and they said they were paying him something—I cannot just remember the amount now, but they told me though; I did not consider that I had anything to do with Singer.

Q. That is after the sale was made? A. Yes, and I would not back out of it.

Q. You have heard what the Bedellis have said about your paying the commission? A. Yes; I never mentioned anything—there was no mention of the commission to nobody—but, if Singer had got me $8,000, I understood then I would have paid him.

Q. There was no mention of commission at that interview? A. Well, I asked him who was going to pay Singer, and they said they were paying him something; they did not say what the amount was at all.

And then again the defendant states:—

Q. And, when you sold the property to the Bedellis, you knew that these were the men that Mr. Singer had been speaking to you about? A. I did not know until after I had sold the property.

And again, on the cross-examination of the defendant:—

Q. You see what these Bedellis say is, that when they went there that night, you said to them, "Are you the men that Singer got the offer from?" A. There was nothing of that mentioned at that stage of the game.

Q. Well, that is what they both swear to? A. I cannot help what they swear to.

The learned trial Judge has found, in his judgment, as follows: "The plaintiff then asked him to place a price upon the property, and the defendant said, 'Bring me an offer within four days of $8,000 and I will accept it and pay a commission.'"

I do not find anywhere in the evidence anything to support the statement that the defendant said "and pay a commission." Neither the plaintiff nor the defendant says this. The plaintiff, on the contrary, says:—

A. No, he did not say, "I will pay you a commission." He said, "Fetch me an offer of $8,000 within four days and I will accept it."

And the defendant says:

And by me looking over this document I saw that he was an agent and I pay the commission, and I asked $8,000 for the property; I did not know that he was an agent up to that time, of course. Q. Did you give him any period within which to find you a purchaser for the property? A. Four days.

At p. 25:—

Q. So that, as I understand it from your evidence, if $8,000 had been procured for the property, you were quite willing to pay a commission? A. That is correct.

The trial Judge Denton, County Judge, says:—

The evidence of the plaintiff and Bedelli, coupled with the fact that the defendant had the first written offer in his possession for more than a week before the sale was made, and that this offer mentioned the plaintiff's name as an agent, convince me that, when the defendant sold direct to Bedelli, he knew that Bedelli was the man who had been introduced to him by the plaintiff through the first offer, and the man to whom the plaintiff had been trying to effect a sale.

The weight of evidence, I think, is also in favour of the view that, on the day on which the sale was actually made, there was some dis-

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cussion about the plaintiff's commission; so that, when the defendant made the sale to Bedelli, he knew that there might be some claim made to commission. I am inclined to think that the defendant then concluded that, as the plaintiff had not brought the offer within the four days that he had mentioned, he was not liable for the commission, and that in any event he would take the chance.

Is the plaintiff, on these facts, entitled to his commission? I am of opinion that he is. A contract for the payment of commission may be implied from the conduct of the principal or from the circumstances of the particular case.

When the plaintiff first saw the defendant, and the defendant told him to bring an offer and he would consider it, there was, I think, an implied promise on the part of the defendant that, if the plaintiff brought him an offer which he accepted, or brought about a sale, the defendant would pay him a commission. The plaintiff brought the purchaser and the vendor together; and, while the agent did not complete the transaction, he is nevertheless entitled to commission if there was a promise, express or implied, on the part of the defendant, to pay a commission upon the sale being effected directly or indirectly through his agency.

The defendant's contention is, that the only time the defendant ever agreed to pay him a commission was when the defendant said, Bring me an offer of $8,000 and I will accept it and pay a commission.' It may be that that was the only time when an express promise was made; but, long before that, there was an implied promise to pay the plaintiff a commission; and, after an agent has been trying to negotiate a sale on such an implied promise, the defendant cannot, by express contract with more onerous terms, deprive the agent of his right to the commission. If, instead of the defendant saying, "Bring me an offer of $8,000 within four days," he had said that he would have nothing further to do with the plaintiff and refused to pay him any commission, and the defendant afterwards sold to the man with whom the defendant knew the plaintiff had been negotiating, and whose name had been first introduced to the defendant as a purchaser, the defendant would clearly have been liable. And he must be equally liable when, instead of saying he would have nothing further to do with him, he by express terms, fixed a price ($500 higher than the price at which it was sold) on which he is willing to pay a commission. If these terms had been expressly mentioned at an earlier stage, before any implied promise to pay arose and before the plaintiff had done anything towards bringing the parties together, th defendant's contention would be sound. But, on the facts of this case, I think the plaintiff is entitled to his commission.

It seems to me that the plaintiff at the trial proved facts from which it could be fairly and properly inferred that the defendant, knowing that the plaintiff was a real estate agent, placed his property in his hands on an implied promise to pay him a commission if a sale were effected through his acts. It seems to me that it was through the plaintiff and his activity in the matter that the purchaser was introduced to the defendant and the sale ultimately effected. If it be true, as from the evidence and weight of evidence I think it is, that, before the

sale by the defendant to Bedelli, he said to the latter, "Are you the one that Singer got the offer from?" he approached the negotiations with that in mind; and, if it be also true, as I think it is, that, before he completed the sale, he raised with the proposed purchaser the question of a commission to be paid to the plaintiff, by asking, as Bedelli and his brother say, "What about this commission?" or, as he himself puts it, "Well, I asked him who was going to pay Singer," etc., and learned that Bedelli was not paying any commission, then I do not wonder he should say "I will sell it," and "If I have to pay commission, I will pay it, and if not I won't."

As Clute, J., puts in in *Sager* v. *Sheffer* (1911), 2 O.W.N. 671, at p. 672: "The parties were brought together by his act; and the form of the agreement entered into by the defendant with the other agents clearly indicates that the defendant realised that the plaintiff had a claim for commission." So here, the conversation at the time of the sale plainly indicates that he realised the same thing.

It appears from the plaintiff's evidence that he was actually expecting to have an offer from Bedelli of $7,500, which they had discussed, and which he hoped to obtain and submit to the defendant, when Bedelli, the purchaser, himself went and offered the defendant that price. The negotiations were not broken off. The purchaser himself called on the defendant, and the defendant continued them with him, knowing that he was the man introduced by the plaintiff as the intending purchaser. See *Morson* v. *Burnside*, 31 O.R. 438, at p. 442. Meredith, C.J.:—

> The case might have been different had negotiations been broken off when the parties left the office at which they had met. They were not, however, broken off, but what took place when the documents were executed was a continuation of the negotiations which had been begun owing to the plaintiff having introduced Moore as an intending purchaser, and the sale, which was finally made at the expiration of the year, was the direct result of those negotiations.

In *Wilkinson* v. *Martin* (1837), 8 C. & P. 1, it was held:—

> The broker will be entitled to his commission, if he was, up to a certain time, the agent or middle-man between the parties, although the contract be afterwards completed without his instrumentality or interference.

And see p. 5, where Tindal, C.J., says:—

> Undoubtedly a dry introduction of one man to another will not be enough: it would be absurd to say that it can be the subject-matter of such a claim as this. But if the introduction is the foundation on which the negotiation proceeds, and without which it would not have proceeded, then the parties cannot by their agreement deprive the brokers of their just remuneration. If the plaintiffs were the middle-men or agents up to a certain time, the parties cannot afterwards deprive them of their right.

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In the present case, the introduction of the purchaser to the vendor, the defendant, was made by the plaintiff, and the latter's acts were, I think, what led to the sale.

In *Green* v. *Bartlett* (1863), 14 C.B. N.S. 681, an auctioneer and estate agent was employed to sell an estate, under an agreement by which he was to receive a commission of two and a half per cent. "if the estate should be sold," and, "in case the estate should not be sold," he was to be paid £25 as a compensation for his trouble and expense. Having put up the estate to auction, and failed to sell it, the agent, being asked by a person who had attended the sale who was the owner of the property, referred him to his principal; and ultimately that person, without any further intervention of the agent, became the purchaser. Held, that the sale having been effected through the means of the agent, he was entitled to the stipulated commission. Erle, C.J., at p. 685, said:

> The question whether or not an agent is entitled to commission on a sale of property has repeatedly been litigated; and it has usually been decided, that, if the relation of buyer and seller is really brought about by the act of the agent, he is entitled to commission although the actual sale has not been effected by him. I think, the sale here having been brought about through the plaintiff's introduction, the plaintiff is entitled to the stipulated remuneration of two and a half per cent. on the amount of the purchase-money.

And again *per* Williams, J., at p. 686:—

> And the evidence distinctly shewed that the sale to Hyde was the direct consequence of the plaintiff's act.

In *Wolf* v. *Tait* (1887), 4 Man. L.R. 59, "the plaintiff was employed by the defendant to sell for him certain lands upon certain terms. He found a man willing to purchase upon less advantageous terms. Held, that the defendant, having accepted the purchaser and ratified the variation of the terms, was liable for the plaintiff's commission." See also *Aikins* v. *Allan*, 14 Man. L.R. 549.

Burchell v. *Gowrie and Blockhouse Collieries Limited*, [1910] A.C. 614: "In an action by the appellant to recover an agreed commission on the proceeds of a sale of mining property by the respondent company the latter contended that he was not the efficient cause of the particular sale effected. Held, that as the appellant had brought the company into relation with the actual purchaser he was entitled to recover although the company had sold behind his back on terms which he had advised them not to accept." Lord Atkinson, at p. 625:—

> The answer to the second contention is, that if an agent such as Burchell was brings a person into relation with his principal as an intending purchaser, the agent has done the most effective, and, possibly, the most laborious and expensive, part of his work, and that

if the principal takes advantage of that work, and, behind the back of the agent and unknown to him, sells to the purchaser thus brought into touch with him on terms which the agent theretofore advised the principal not to accept, the agent's act may still well be the effective cause of the sale. There can be no real difference between such a case and those cases where the principal sells to the purchaser introduced by the agent at a price below the limit given to the agent. . . . On this question of fact there was, their Lordships think, ample evidence to sustain the conclusion at which the referee presumably arrived, namely, that the appellant's acts were an effective cause of the sale which actually took place. In their Lordships' view it was the right conclusion, and the finding to that effect ought not, they think, to be disturbed.

Stratton v. *Vachon*, 44 Can. S.C.R. 395: "Held, reversing, in part, the judgment appealed from (*Vachon* v. *Stratton*, 3 Sask. L.R. 286), that as the steps taken by the agent had brought the owner into relation with the persons who finally became purchasers he was entitled to recover the customary commission upon the price at which the property in question had been sold. *Burchell* v. *Gowrie and Blockhouse Collieries Limited*, [1910] A.C. 614, applied." The Chief Justice, at p. 399:—

The property was brought by Stratton to the attention of Moore, who was instrumental in inducing Millar and Robinson to consider it with a view to a purchase on joint account. The subsequent disappearance of Moore as purchaser before the transaction was finally completed did not operate to destroy the right acquired by Stratton through his original introduction of the property to one of the three associates, two of whom completed alone the purchase begun with and through the men to whom it was introduced originally and who had undertaken then to buy it or find a purchaser for it.

Davies, J., at p. 401:—

The knowledge on the part of the vendor that the person with whom he completes the sale was introduced by the agent is not the test of his liability to pay commission, but the fact whether the agent's acts have really been the effective cause of the sale, and if the agent's acts have brought a person or persons into relation with his principal as an intending purchaser, and the sale is effected, the agent has done what he contracted to do and is entitled to be paid.

Anglin, J., at p. 410:—

In my opinion the defendant has established that his introduction was the foundation upon which the negotiations which resulted in the purchase proceeded and without which they would not have proceeded.

A perusal of the evidence does not lead me to think the defendant was candid or reliable. He is expressly contradicted by the plaintiff as to when he first learned that the plaintiff was an agent; and, upon the evidence of each and the circumstances and probabilities of the matter, I would credit the plaintiff's version rather than his. He is also at complete variance

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with the Bedellis as to what occurred at the interview when the sale was concluded.

I would dismiss the appeal with costs and affirm the judgment.

RIDDELL, J. (dissenting):—The defendant was the owner of premises on Queen street, Toronto, of which one Black was tenant. Bedelli was carrying on business on Parliament street, and Black, passing Bedelli's shop one day, told him that the defendant's property would be a great corner for his business and he ought to buy it, and told him further that the defendant owned it, where he lived, and the price he asked Black for it—apparently $8,000, although that does not expressly appear. This was about a month before the sale was made, and therefore about the end of September or the beginning of October. Nothing was done by Bedelli upon this information; and, on the 24th October, 1910, the plaintiff, who is a real estate agent, came into Bedelli's place, and in the course of conversation he (Bedelli) intimated that he might buy the property in question if he could get it at the right price. The plaintiff said, "Well, I am an agent," and Bedelli said, "I know." The plaintiff: "Then I will go and see the owner." The plaintiff then "went to Mr. Russell to find out whether he would sell it and also how much he would ask for it." The defendant was just about to leave his house; the plaintiff met him at the front door, and asked him if he would sell, and, if so, at what price. The plaintiff says he introduced himself as an agent—this the defendant denies, and says that he thought the plaintiff was buying for himself. The defendant refused to put a price upon the property, but told the plaintiff to bring him an offer and he would consider it. Nothing was said or suggested about any commission. Thereupon the plaintiff went to Bedelli and got him to sign an offer for $7,000 cash. This offer reads:—

> I, Mr. Bedelli, of the city of Toronto (as purchaser), hereby agree to and with John Russell (as vendor) through I. Singer, agent, to purchase, etc., etc., one hundred dollars in cash to the said agent on this as a deposit, etc., etc.

On the 26th October this was taken by the plaintiff to the defendant, "who then said nothing more than that he wanted a few days to consider it." The plaintiff says that the defendant, noticing the commission marked on it, said, "I suppose you expect commission?"—but this the trial Judge discredits, as will be seen from the clause I have copied from his judgment. The defendant expressly says he did not know at that time that the plaintiff was an agent nor until he, when afterwards looking over the offer, saw that the plaintiff was described as an agent and that the vendor was expected to pay a commission. Up to that time he had thought that the plain-

tiff was buying for himself. The trial Judge does not discredit the defendant, but rather the contrary, as we have seen.

After three days or so, the plaintiff returned and was told that the offer was refused. He urged the defendant to put a price upon the property, and at length—the learned trial Judge finds—the defendant said: "Bring me an offer within four days of $8,000, and I will accept it and pay a commission." The evidence, however, does not shew that any mention was in fact made of commission; but it is clear that the defendant impliedly agreed to pay a commission if the price mentioned was obtained.

The plaintiff tried to get Bedelli to offer $8,000, but failed—and some six or eight days or perhaps more thereafter Bedelli went to the defendant. The defendant had sold to another purchaser, who declined to carry out the purchase, and he was "mad" and sold to Bedelli for $7,500, $5,000 cash and $2,500 on a mortgage. The defendant asked Bedelli, "Are you paying Singer anything for carrying on this business for you?" and the purchaser said he was paying him something—and Bedelli says that the defendant said: "If I have to pay commission, I will pay and if not I won't." No doubt is cast by the trial Judge on the good faith of the defendant, and I can find no reason for any.

The learned Judge says further:—

> The evidence of the plaintiff and Bedelli, coupled with the fact that the defendant had the first written offer in his possession for more than a week before the sale was made, and that this offer mentioned the plaintiff's name as an agent, convinces me that, when the defendant sold direct to Bedelli, he knew that Bedelli was the man who had been introduced to him by the plaintiff through the first offer and the man to whom the plaintiff had been trying to effect a sale. The weight of evidence, I think, is also in favour of the view that on the day on which the sale was actually made there was some discussion about the plaintiff's commission; so that, when the defendant made the sale to Bedelli, he knew that there might be some claim made to commission. I am inclined to think that the defendant then concluded that, as the plaintiff had not brought the offer within the four days that he had mentioned, he was not liable for the commission, and that in any event he would take the chance.

I have set out the facts as the learned trial Judge finds them where there is any conflict. On this state of facts, the plaintiff has been held in the Court below entitled to commission.

I think this case is covered by authority in a sense adverse to the judgment.

In *Toulmin* v. *Millar* (1887), 58 L.T.R. 96, in Dom. Proc., Lord Watson, says:—

> It is impossible to affirm, in general terms, that A. is entitled to a commission if he can prove that he introduced to B. the person who afterwards purchased B.'s estate, and that his introduction became

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the cause of the sale. In order to found a legal claim for commission, there must not only be a causal, there must also be a contractual relation between the introduction and the ultimate transaction of sale.

It is too often thought that the mere fact that a real estate dealer brings about a sale of property entitles him to a commission from some one; but it is clear that this is not the law. Of course, if the owner puts his land into the hands of an agent to sell, the law implies a contract to pay commission on a sale effected through the agent—and the most trifling services on the part of the agent have been recognised as making him the *causa causans* of a sale. "In ninety-nine case out of a hundred, the service performed by the house-agent upon these occasions is of the slightest possible kind: it consists for the most part in merely bringing the vendor and the purchaser together, so as to result in a sale. It is often done by a line written or a word spoken:" *per* Keating, J., in *Mansell* v. *Clements*, L.R. 9 C.P. 139, at p. 143. And see *Green* v. *Bartlett*, 14 C.B.N.S. 681.

But, if the owner, upon being asked whether he would sell, and, if so, at what price, does not put the property in the hands of the applicant as an agent at all, but simply refuses to put a price upon the property, and says, "Bring me an offer and I will consider it"—at the time supposing that the applicant is buying for himself—how can it be said that he thereby makes the applicant an agent for sale? It takes two to make a bargain, and a contract of agency requires two consenting minds, like every other contract.

When the defendant became aware that the plaintiff was an agent and was looking for a commission, as he did when he read with any care the offer delivered to him on the 26th October, the aspect of matters was altered—he recognised that if the plaintiff brought him an offer which he accepted, he would claim commission; and thereupon he made the first and only contract of agency which he did make with the plaintiff—"Bring me an offer for $8,000 within four days, and I shall accept;" and then he quite understood that he might have to pay commission.

If a contract of agency be considered as existing before this, the case would be not unlike *Toppin* v. *Healey* (1863), 11 W.R. 466. There the defendant employed the plaintiff to negotiate a loan on certain terms, and subsequently, before the loan was effected, changed the terms. The plaintiff endeavoured to procure the loan on the latter terms and failed; but he procured a loan on the original terms. It was held that he could not recover; the plaintiff had not done what he was to do under the substituted terms, and the former terms had been revoked. Williams, J., points out (p. 467):

> The letter of the 17th (containing the altered terms) amounted to a revocation. The plaintiff might have brought an action for the breach of contract, but he does not, but assents to the substituted terms. Then he has not earned that which he agreed for . . .

And Willes, J.:

> If the plaintiff chose to treat the letter of the 17th as a breach of contract, he ought to have done so at the time. But he did not choose to do so.

Erle, C.J., and Keating, J., agreed.

In any view, the only contract of agency between the plaintiff and defendant was that created on their last interview. The plaintiff shewed by his conduct that he so understood it—he made every effort to get Bedelli to make an offer for $8,000, but failed.

Where the parties have made an express contract, the conditions under which the remuneration becomes payable must be ascertained by the terms of the contract itself: *Barnett* v. *Isaacson*, 4 Times L.R. 645; *Green* v. *Mules* (1861), 30 L.J.C.P. 343; *Alder* v. *Boyle* (1847), 4 C.B. 635.

Of course, if what the agent has been employed to do, he does in substance, that is enough: *Wycott* v. *Campbell* (1871), 31 U.C.R. 584; *Rimmer* v. *Knowles* (1874), 22 W.R. 574, 30 L.T. R. 496; *Johnston* v. *Kershaw* (1867), L.R. 2 Ex. 82; *Morson* v. *Burnside*, 31 O.R. 438; but not otherwise. There is no pretence that the plaintiff did procure the offer or could procure it.

Had there been any fraud or bad faith in the matter on the part of the defendant, the principle of *Wilson* v. *Deacon* (1911), 2 O.W.N. 1229 (affirmed in Divisional Court, 3 O.W.N. 163), might be considered to apply; but there is no such complication here—there is "no trick to deprive . . . the plaintiff of" his "commission, and to take advantage of" his "services:" *per* Lord Esher, M.R., in *Noah* v. *Owen* (1886), 2 Times L.R. 364, at p. 365; *Wilson* v. *Deacon*, 2 O.W.N. 1229, at p. 1232.

Willes, J., in *Curtis* v. *Nixon* (1871), 24 L.T.N.S. 706, at p. 708, says:

> These actions by house-agents spring up at every turn, and as they are generally based upon agreements which they have persuaded people who are not so well versed in the law as themselves to enter into, to their injury, they ought not to be encouraged.

Without adopting the learned Judge's view and without casting reflection upon an estimable class of the community, I think it would be adding another terror to the ownership of property if the defendant were to be compelled to pay a commission under the circumstances of this case.

I have not thought it necessary to consider whether the sale was due to the plaintiff at all—the purchaser knew of the property and had it in mind to buy it—he knew who the owner

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was—and it was rather the purchaser who introduced the plaintiff to the defendant than *vice versâ*. Nor have I thought it necessary to go through the myriad cases in which the owner placed his property for sale in the hands of a land agent—perhaps the latest in the higher Courts are *Stratton* v. *Vachon*, 44 Can. S.C.R. 395, and *Burchell* v. *Gowrie and Blockhouse Collieries Limited*, [1910] A.C. 614.

I am of opinion that the appeal should be allowed with costs and the action dismissed with costs.

Appeal dismissed; RIDDELL, J., *dissenting.*

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Mar. 11

ARCHDEKIN v. McDONALD.

Manitoba King's Bench. Trial before Macdonald, J. March 11, 1912.

1. CONTRACTS (§ I C—12)—CONSIDERATION FOR OPTION—EFFECT OF REDATING ON TIME LIMIT.

Where an option is given for a consideration for a limited time from its date and is later amended, and re-dated as of the date of the amendment without further payment, the amended option as to the time for which no consideration was paid is a new agreement without consideration, and is revocable at any time before acceptance.

2. SPECIFIC PERFORMANCE (§ I E—32)—OPTION TO BUY LAND—DEPOSIT

When five dollars has been paid for an option for purchase of land under which a first payment of $1,000 is stipulated to be made if the option is exercised, a tender of $995 on the last day of the option is bad, unless the option stipulates that the consideration therefor shall in the event of sale be applied on the deposit.

3. TENDER (§ I—12)—VALIDITY—CHEQUE ON BANK.

To constitute a valid tender of money there must, in the absence of some act or condition which amounts to a waiver, be something more than a mere readiness and willingness to pay even though expressed; there must be an actual production of the money and not merely of a cheque therefor.

[See also 28 Am. & Eng. Encycl. 2nd ed., p. 28; 38 Cyc., p. 131, and Annotation to this case.]

ACTION to enforce an option agreement for the sale of land. The action was dismissed.

Messrs. *R. M. Dennistoun*, K.C., and *H. N. Baker*, for plaintiffs.

Messrs. *H. A. Burbidge*, and *F. M. Burbidge*, for defendants.

MACDONALD, J.:—The defendant is the owner of certain property in the city of Winnipeg, known as numbers 375 and 377 William avenue.

In July, 1911, she gave the plaintiffs an option for 60 days to buy this property, the plaintiffs paying her $5 on such option.

Some time after the giving of this option the plaintiffs thought it advisable to improve on the option, which they had obtained, by specifying the terms of payment, which were omitted in the first option, and on the 25th August, 1911, they

procured the option, exhibit 1. The former option would have expired in September, but the second option, being the one under consideration, being taken for 60 days from its date would not expire until 24th October. This second option would have the effect of extending the former option.

In this last option the defendant acknowledges the receipt of five dollars, but it is admitted by the plaintiffs that the five dollars were not paid to the defendant, and it is submitted that it was but a re-acknowledgment of the five dollars paid at the time of the giving of the first option.

There is no consideration for the extension of time given under the second option and it is not under seal; the defendant could then, after the expiration of the time granted by the first option have revoked the second before its acceptance. Now the question is, was there such a revocation?

After the giving of the second option the plaintiffs endeavoured to induce the defendant to change its terms, the plaintiff Austin Archdekin says that on the 23rd October, being one day before the expiration of the 60 days' option, he interviewed her and wanted her to accept $500, instead of the $1,000 payment provided for by the terms of the option, and that finally she got cross and stated that she was tired of it and wanted a five thousand dollars deposit instead of the one thousand dollars. The plaintiff made no reply to her demand for this five thousand dollars and left without anything further being said. The defendant claims that this was a revocation of the option given, or at least a variation of it which she asserts she had a right to do at any time before acceptance, and it seems to me that as the plaintiffs were importuning and evidently worrying her for better terms, she was within her rights in withdrawing her offer, which, being without consideration, she had the power to do, and the non-acceptance by the plaintiffs of her variation of the agreement was in effect a revocation by her of the option she had given.

Nor do I think this is the only difficulty in the plaintiffs' way. Even were there no revocation of the option did the plaintiffs comply with requirements of the option to entitle them to succeed?

The conditions imposed on the exercise of an option are always strictly construed. All precedent conditions must be fulfilled by the purchaser before the contract for sale binds the vendor. Moreover, time is of the essence of such contracts, hence if the conditions are not complied with by the day fixed the option is lost'': Dart on Vendors and Purchasers, 7th ed., p. 272.

To entitle the plaintiffs to enforce the benefit of the option they must pay the $1,000 cash within the sixty days. They waited until the very last day, after failing in the meantime

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to secure better terms, and then called upon the defendant, and told her they had come to close the deal, and said they had a cheque, and offered it to her, but could not say if she saw the cheque, to which offer the defendant replied, "Too late, have already sold property" and walked away.

This is not, to my mind, a proper or legal tender for two reasons; the amount was not sufficient, the cheque being for but $995, and even were it for $1,000, the manner of tender did not constitute a legal tender; a cheque, even though marked is not a legal tender. To constitute a valid tender of money, there must, in the absence of some act or condition which amounts to a waiver, be something more than a mere readiness and willingness to pay, even though expressed; there must be an actual production of the money": 28 Am. & Eng. Encyc., p. 28. Here there is no evidence that the defendant even saw the cheque, so that she may not have had the opportunity of taking objection to the cheque itself as a legal or proper tender. It is quite possible that she might have rejected the cheque. It was but the day before that the plaintiffs were endeavouring to get easier terms and the defendant might, with reason, suspect the value of a cheque as payment, and there was no intimation to her that the cheque was marked. She did not, as a matter of fact, have the opportunity of taking exception to the form of tender, nor did she at any time prior to the alleged tender do or say anything constituting a waiver of a legal tender. The waiver claimed by the plaintiffs was an act of the defendant subsequent, and not prior to, the alleged tender or intimation of readiness to pay.

The defendant was entitled to the payment of one thousand dollars. That amount was not tendered, nor was there any tender made.

The option was without consideration and therefore revocable at any time, and it was revoked prior to acceptance on the part of the plaintiffs. I dismiss the action with costs.

Action dismissed.

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Annotation—Tender (§ I—12)—Requisities.

In making a tender there must be an actual offer by the tenderer to pay. An announcement without more of an intention of making a tender is not sufficient, nor is an assertion of readiness or willingness to pay: *Scott* v. *Franklin*, 15 East 428, 104 Eng. Reprint 906; *Sucklinge* v. *Coney*, Noy, 74, 74 Eng. Reprint 1041.

On the 29th of December, 1903, the Minister of Finance for the Dominion of Canada wrote to the Premier of Ontario respecting the payment of interest on certain funds held by the Dominion and belonging to the Province of Ontario, as follows: "It has been decided to pay on the 1st of January, 1904, the interest on these funds at the rate heretofore paid, namely, 5 per cent. After that date, interest at the rate of 4 per cent. will

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Annotation (*continued*)—Tender (§ I—12)—Requisities.

be paid until further notice or until the principal of the funds is paid to Ontario in full. If this arrangement is not satisfactory to your Government I shall be pleased to receive notice to that effect, whereupon arrangements will be made to pay off the principal sum at an early date." On the 6th January, 1904, the Premier of Ontario replied that such proposal was not satisfactory to his Government; and intimated that the rate of interest, 5 per cent., was not susceptible of modification without the consent of the province. This was held not to constitute a good tender of the amount of the said funds. To make it effective for such purpose, the letter should have been followed or supplemented by an unconditional offer and tender of the money by the Dominion to the province: *Province of Ontario* v. *Dominion of Canada*, 10 Can. Exch. R. 292, affirmed 39 Can. S.C.R. 13, *sub nom. Attorney-General of Ontario* v. *Attorney-General of Canada*.

At common law a mere written proposal to pay a sum of money if unaccompanied with production of the money or thing to be tendered is not a good tender: *Angier* v. *Equitable Bldg., etc., Assoc.*, 109 Ga. 625, 35 S.E. 64; *Brill* v. *Grand Trunk R. Co.* 20 U.C.C.P. 440.

A tender of money in satisfaction of an obligation payable in money, to be unobjectionable, must be made in whatever form of money is, at the time, legal tender for the payment of debts: *Polglass* v. *Oliver*, 2 Cromp. & J. 15, 1 L.J. Exch. 5, 2 Tyrw. 89. But objection to a tender of bank bills or other money not legal tender, but which is lawful money current and circulating at par, is deemed to be waived, if at the time the money is offered, objection be not taken that the money is not legal tender; and similarly, although the general rule is that an offer of a bank cheque for the amount due is not a good tender, if the tender of the cheque is refused, not on the ground that it is not legal tender, but upon some other ground as that it is not drawn for the sum the creditor demands, or that it is not made in time, the objection to the cheque is waived and the tender is good as far as the medium of payment is concerned, and this rule extends to drafts and certificates of deposit: *Jones* v. *Arthur*, 8 Dowl. P.C. 442, 4 Jur. 859. Mere silence on the part of the tenderee as to his reason for refusing the tender is held in Ohio not to constitute a waiver of the objection that the tender is made by cheque: *Jennings* v. *Mendenhall*, 7 Ohio St. 257.

A tender in bank notes is good, if not objected to on that account: *Stewart* v. *Freeman* (*No.* 3), 2 N.B. Eq. 451.

Where a tender is made in current bank bills, and objection is made only to the amount tendered, the objection cannot subsequently be taken that the tender was not made in "legal tender:" *Yuill* v. *White*, 5 Terr. L.R. 275.

Prior to the maturity of a mortgage, the mortgagor's solicitor wrote to the mortgagee's solicitor, that if he would call at the former's office he could have the principal and interest then due, naming the correct amount, and on the mortgagee's solicitor failing to call, he wrote to the mortgagee that he was prepared to pay the said sum; this was answered by the mortgagee's solicitor sending a statement claiming in addition subsequent interest and certain disputed costs. This did not amount to a waiver or dispensation of a tender of the amount due under the mortgage: *Middleton* v. *Scott*, 4 O.L.R. 459.

Before it can be said that a formal tender is waived, the tenderee must have placed himself in such position as would make a tender an unneces-

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Annotation (*continued*)—**Tender** (§ I—12)—**Requisities.**

sary act. And a plaintiff before he can recover damages for the breach, or what he has parted with under the contract, must shew, not only the facts constituting the waiver of the formal tender, but that he was able and willing, at the time fixed to perform on his part: 38 Cyc. 136; *Hochster* v. *De la Tour*, 2 E. & B. 678, 17 Jur. 972, 22 L.J.Q.B. 455, 1 Wkly. Rep. 469, 75 E.C.L. 678, except in those cases where a tender is rendered unnecessary by the previous declaration, act, or omission of the other party: *Lovelock* v. *Franklyn*, 8 Q.B. 371, 10 Jur. 246, 15 L.J.Q.B. 146, 55 E.C.L. 371; *Ford* v. *Tiley*, 6 B. & C. 325, 9 D. & R. 448, 5 L.J.K.B. O.S. 169, 30 Rev. Rep. 339, 13 E.C.L. 154. A formal technical tender is not dispensed with by a mere assertion, without more, of a lien or claim in excess of the actual amount due, for a tender of the proper sum might be accepted: *Llado* v. *Morgan*, 23 U.C.C.P. 517; *McBride* v. *Bailey*, 6 U.C.C.P. 523; *Kendal* v. *Fitzgerald*, 21 U.C.Q.B. 585; *Buffalo, etc., R. Co.* v. *Gordon*, 16 U.C.Q.B. 283. But demanding an exorbitant price for repairs done on a ship and giving notice that it will not be surrendered unless such price be paid dispenses with a tender: *Watson* v. *Pearson*, 9 Jur. N.S. 501, 8 L.T. Rep. N.S. 395, 11 Wkly. Rep. 702.

Nothing short of an offer of everything that the creditor is entitled to receive is sufficient, and a debtor must at his peril tender the entire sum due: *Dixon* v. *Clark*, 5 C.B. 365, 5 D. & L. 155, 16 L.J.C.P. 237, 57 E.C.L. 365; 38 Cyc. 137; *Bauld* v. *Fraser*, 34 N.S.R. 178. The insignificance of the deficiency does not make any difference. A shortage of forty-one cents has been held fatal: *Boyden* v. *Moore*, 5 Mass. 365. So where the deficiency was seventy-one cents on a demand amounting to six hundred and forty-nine dollars and forty-four cents, the tender was held not good: *Wright* v. *Behrens*, 39 N.J.L. 413. Furthermore, the tenderer must name the sum which he wishes to tender: *Knight* v. *Abbot*, 30 Vt. 577; *Alexander* v. *Brown*, 1 C. & P. 288, 12 E.C.L. 173, unless perhaps the exact sum and interest is tendered so that the tenderee may easily satisfy himself that the amount is correct: 38 Cyc. 138.

The amount tendered must be sufficient to cover both principal and interest, if the obligation upon which the tender is made carries interest: *Suse* v. *Pompe*, 8 C.B.N.S. 538, 7 Jur. N.S. 166, 30 L.J.C.P. 75, 3 L.T. Rep. N.S. 17, 9 Wkly. Rep. 15, 98 E.C.L. 538; *Gibbs* v. *Fremont*, 9 Exch. 25, 17 Jur. 820, 22 L.J. Exch. 302, 1 Wkly Rep. 482. An objection that interest was not tendered is waived by refusing the tender solely upon another ground: *Christenson* v. *Nelson*, 38 Oreg. 473, 63 Pac. 648. And the objection that the sum tendered did not include interest cannot be raised if the creditor in his complaint claimed interest only from a date subsequent to the tender: *Rudulph* v. *Wagner*, 36 Ala. 698.

Usurious interest need not be tendered: *Shiver* v. *Johnston*, 62 Ala. 37; and the tender must include interest up to, and including the last day of grace: *Smith* v. *Merchants, etc., Bank*, 14 Ohio Cir. Ct. 199, 8 Ohio Cir. Dec. 176; 38 Cyc. 138.

A tender to be in time to avoid the consequences of pending sale proceedings (ex. gr. under a mortgage) must be made at a sufficient interval of time before the sale takes place as will enable the direction for sale to be cancelled, as where the sale is advertised to take place at a distance from the creditor's place of business. The defendant company advertised an auction sale of mortgaged lands situate near Kincardine to take place there

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Annotation (*continued*)—Tender (§ I—12)—Requisities.

on January 19. At eleven a.m. on January 17th the mortgagor telegraphed to the defendants at Toronto to inquire the amount required to redeem it and the defendants telegraphed a reply. At ten a.m. on January 19th the defendants received at Toronto the amount named, but in accordance with their office procedure, the accountant was not aware of this till about eleven a.m., when knowing the property was up for sale, he telegraphed and telephoned the fact to Kincardine. The sale had, however, been made a few minutes before to the plaintiff. The defendants then returned the money to the mortgagor. It was held, that the plaintiff was entitled to specific performance, for the mortgagor had not tendered the amount such reasonable time before the sale as to make it obligatory on the defendants to receive it in payment: *Gentles* v. *Canada Permanent and Western Canada Mortgage Corporation*, 32 O.R. 428.

To impeach a sale under powers in a chattel mortgage on the ground that an offer to redeem was made prior to the time fixed by the notice of sale, the person entitled to redeem is obliged to shew that the amount due under the mortgage was actually tendered or that the mortgagee was distinctly informed that the mortgagor was then and there ready and willing to pay what was so due and, being thus informed of the intention to redeem, refused to accept payment. *British Columbia Land and Investment Agency* v. *Ishitaka*, 45 Can. S.C.R. 302.

Where a debtor offers in payment, as the sum due, a larger sum than is actually due, or such larger sum is offered in payment of a less sum and he does not expressly or impliedly request any change to be returned, the tender is not objectionable for a tender of a greater sum includes the less sum; but it is held that a tender of a larger amount than is due, coupled with an express or implied request for change, is bad: 38 Cyc. 140.

The objection to a demand that change be furnished is waived if the tender is refused upon some other ground, as where a larger sum is demanded, or where the tender is refused unless a certain amount be agreed upon as the sum due on a separate account: *Bevan* v. *Rees*, 7 Dowl. P.C. 510, 3 Jur. 608, 8 L.J. Exch. 263, 5 M. & W. 306.

The actual production of the money is dispensed with if the party is ready and willing to pay the same, but is prevented by the party to whom it is due expressly saying that it need not be produced, as he would not accept it, or if he declares that he will not receive it, or refuses to remain until it is produced, or repulses the debtor, or makes some unjustifiable demand as a condition of accepting the tender. So an actual production is waived where, the debtor being about to produce, the tenderee refused to receive, not on the ground that the tender is not produced, but, upon some other and distinct ground, or refuses to deal with the debtor, referring him to an attorney of the tenderee; or where the agent to whom the offer is made denies having authority to receive the money, when he in fact has such authority. Where a debtor goes to the place designated for payment, at the time appointed, with the money or thing to deliver it, and the person who is to receive it is not present, the money or thing need not be produced. But the actual production of the money is held not to be dispensed with by a bare refusal to receive the sum proposed and demanding more: *Thomas* v. *Evans*, 10 East 101, 10 Rev. Rep. 229, 103 Eng. Reprint 714; *Dickinson* v. *Shee*, 4 Esp. 67; *Kraus* v.

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Arnold, 7 Moore C.P. 59, 17 E.C.L. 508; but see *Black* v. *Smith*, Peake N.P. 88, 3 Rev. Rep. 661; 38 Cyc 145.

In order to make a valid tender of either money or chattels the thing to be tendered must be actually produced and offered to the party entitled thereto, a mere offer to pay being insufficient. An offer by letter to pay the money due is no tender, although the creditor's attorney treated it as a tender, and wrote, in answer, "I decline your tender, and shall file the bill." (*Powney* v. *Blomberg*, 8 Jur. 746, 13 L.J. Ch. 450, 14 Sim. 179, 37 Eng. Ch. 179, 60 Eng. Reprint 325.) The tenderer must place the money or property in such a position that his control over it is relinquished for a sufficient time to enable the tenderee if he so desires, to reduce it to possession by merely reaching out and laying hold of the money or thing; and a person is not bound to say whether or not he will accept the money or thing until it is produced: 38 Cyc. 144.

If, by contract, money is to be paid or goods are to be delivered at a certain place, a tender may, and must be made at that place, and a tender at the place is sufficient although the one to whom it is to be made be absent at the time. A tender to the person at a place other than the one designated is good unless objected to on that ground: *Cropp* v. *Hambleton*, Croke R. 48, 78 Eng. Reprint 310; *Union Mutual L. Ins. Co.* v. *Union Mills Plaster Co.*, 37 Fed. 236, 3 L.R.A. 90, 38 Cyc. 150.

Where a person is to perform an act, the obligation to perform which is independent of any precedent or concurrent act to be performed by the other party, as where money is to be paid in liquidation of a debt, or the object is to discharge the tenderer of the obligation, the money or thing to delivered must be tendered unconditionally: *Greenwood* v. *Sutcliffe*, [1892] 1 Ch. 1, 61 L.J. Ch. 59, 65 L.T. Rep. N.S. 797, 40 Wkly. Rep. 241; *Jennings* v. *Major*, 8 C. & P. 61, 34 E.C.L. 610; *Mitchell* v. *King*, 6 C. & P. 237, 25 E.C.L. 412; *Peacock* v. *Dickerson*, 2 C. & P. 51*n*, 12 E.C.L. 445; *Brady* v. *Jones*, 2 D. & R. 305, 16 E.C.L. 87, and a tender accompanied with some condition, performance of which is impossible or which the tenderer has no right to make, as where a sum is offered "as a settlement:" *Martin* v. *Bott*, 17 Ind. App. 444, 46 N.E. 151; *Mitchell* v. *King*, 6 C. & P. 237, 25 E.C.L. 412; or in full discharge, or as payment in full is invalid. But the tenderer may upon making a tender, accompany it with a declaration, not a condition, that it satisfied the debt: *Bowen* v. *Owen*, 11 Q.B. 130, 11 Jur. 972, 17 L.J.Q.B. 5, 63 E.C.L. 130; *Robinson* v. *Ferreday*, 8 C. & P. 752, 34 E.C.L. 1001; if the expression used amounts to no more than an assertion of what the tenderer claims to be due: 38 Cyc. 153.

A tender under protest, reserving the right to dispute the amount due, if it does not impose any conditions on the tenderee, is good: *Atchison, etc., R. Co.* v. *Roberts*, 3 Tex. Civ. App. 370, 22 S.W. 183 (where freight charges were tendered under protest); *Sweny* v. *Smith*, L.R. 7 Eq. 324, 38 L.J. Ch. 446; *Scott* v. *Uxbridge, etc., R. Co.*, L.R. 1 C.P. 596, 12 Jur. N.S. 602, 35 L.J.C.P. 293, 13 L.T. Rep. N.S. 596, 14 Wkly. Rep. 893; *Manning* v. *Lunn*, 2 C. & K. 13, 61 E.C.L. 13; *Peers* v. *Allen*, 19 Grant Ch. (U.C.) 98. See *Greenwood* v. *Sutcliffe*, [1892] 1 Ch. 1, 61 L.J. Ch. 59, 65 L.T. Rep. N.S. 797, 40 Wkly. Rep. 241 (where the debtor on making a tender to a mortgagee in possession, reserved the right to review their account); *Thorpe* v. *Burgess*, 8 Dowl. P.C. 603 (where the debtor in offering

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a sum said "that it was more than was due, but that plaintiffs might take it all," and the tender was held good): 38 Cyc. 154.

To keep a tender good, the party making it must keep the money so that he can produce it when demanded, and a tender of money must be kept good in money. The identical money tendered need not be kept, it being sufficient if similar current funds are kept on hand in readiness, and before an action is commenced or a defense interposed based on a tender, the tender may be kept good by the tenderer keeping the money in his possession. But the tenderer must not use the money, and if by so doing his readiness to pay at all times is impaired, using the money amounts to a withdrawal of the tender: *Gyles* v. *Hall*, 2 P. Wms. 378. 24 Eng. Reprint. 774.

HARRIS v. GOTTSELIG & WILLIAMS.

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Feb. 20

Saskatchewan Supreme Court. Trial before Lamont, J. February 20, 1912.

1. JOINT CREDITORS AND DEBTORS (§ II—7)—DEFENDANTS JOINED IN ACTION FOR TORT—VERDICT AGAINST ONE.

In an action for tort where two persons are alleged to have been guilty of negligence causing an injury and are joined as defendants, each defendant is to be considered as charged with a breach of duty which he individually owed to the plaintiff and a verdict may be supported which is in favour of one defendant and against the other both at common law and under Sask. Rule 34 (Sask. Rules of 1911).

[See also Underhill on Torts, 9th ed., 49, 50(*a*), 50(*d*).]

MOTION for judgment on behalf of plaintiff following a verdict in his favour by a jury against the defendant Williams only.

This action was for damages for personal injuries caused by the explosion of a detonating cap used for exploding dynamite in blasting operations. The statement of claim alleged (par. 3) that the defendant Williams employed the defendant Gottselig to excavate on some land on which the defendant Williams was about to erect a large store; that (par. 4) for the purpose of excavating and the removing of earth and stones the defendant Gottselig, on behalf of himself and on behalf of the defendant Williams, and under the control and direction of the defendant Williams, had and used on the said premises powerful explosives, including detonating caps; that (par. 5) on March 7th, 1910, the plaintiff, who was an infant, picked up a detonating cap on a public thoroughfare, which cap exploded, injuring the plaintiff; that (par. 6) the injuries were caused through the defendants, by their servants and workmen, negligently and recklessly bringing the said cap upon the premises of the defendant Williams and negligently placing it or causing it to be placed on the said public thoroughfare.

Messrs. *H. E. Sampson* and *W. F. Dunn*, for plaintiff.

H. Y. MacDonald, for defendant Gottselig.

Messrs. *A. Casey* and *G. F. Blair*, for defendant Williams.

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LAMONT, J.:—The action was tried before me with a jury. The evidence shewed that the defendant Gottselig had entered into a contract with the defendant Williams to excavate for the basement of the building now known as the Glasgow House, and that this contract did not include the taking out of the stone foundation of the old school formerly on said premises, the renewal of this foundation being performed by the defendant Williams himself. The work of excavating by Gottselig and the taking out of the foundation by Williams were carried on simultaneously, and both used dynamite for their respective operations prior to the accident of the plaintiff. For the purpose of exploding the dynamite both used detonating caps. Gottselig's caps were kept sometimes in his pocket and sometimes in a toolbox a few feet from where the plaintiff picked up the cap which caused his injury. The detonating caps of the defendant Williams were also kept at times in the said toolbox, and at other times in the pocket of his servants. There was no evidence that they had joint ownership or possession of any caps, or that they had been jointly engaged in their use, neither was there any evidence from which a jury could reasonably conclude that prior to the accident the defendant Williams had employed Gottselig to assist him in removing the stone foundation. The only operations in which Gottselig was engaged up to that time were those carried on under his contract. There was evidence from which a jury might very readily infer that the defendant Gottselig, in carrying on operations under his contract, and the defendant Williams, in removing the stone foundation, were each guilty of negligence in the use of detonating caps.

At the close of the plaintiff's case, counsel for the defendant Gottselig moved that the plaintiff be nonsuited in so far as his client was concerned, on the ground that there was no evidence of any contractual relationship between his client and the defendant Williams and no evidence that they were acting in concert, and that therefore on the pleadings the defendant Gottselig could not be liable to the plaintiff.

Counsel for the defendant Williams also moved for a nonsuit on the ground that, as the evidence shewed there was no joint negligence, and the pleadings alleged only joint negligence, no judgment other than a joint judgment against both defendants could be given.

I refused both motions, stating that I would take the verdict of the jury, and that counsel might on motion for judgment argue their respective rights to nonsuit if it was then deemed necessary or advisable to do so. Accordingly, I left to the jury the question, Were the defendants, or either of them, guilty of negligence which resulted in injury to the plaintiff with respect to the care of detonating caps? If either of them,

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which one? The jury, it was admitted by counsel for both defendants, fixed the defendant Williams alone with liability. On motion for judgment by plaintiff's counsel, Mr. *MacDonald*, for the defendant Gottselig, asked for judgment for his client as the jury had exonerated him from liability. On giving the matter further consideration, I am of opinion that the defendant Gottselig was entitled to succeed on his motion for nonsuit. The statement of claim (par. 6) alleges that the injury resulted from the negligence of the defendants or their servants; but paragraphs 3 and 4 set up that the defendant Williams employed the defendant Gottselig for the purpose of excavating, and that for this purpose the defendant Gottselig, on his own behalf and on behalf of the defendant Williams, but under the control and direction of Williams, had used detonating caps negligently and carelessly. As I understand the language of these paragraphs, they mean that the defendant Gottselig, in using these explosives, was doing so under the control or direction of Williams, or in other words, that while he was using them he was doing so as a servant or employee of Williams. There is no other allegation of separate liability on part of the defendant Gottselig. Therefore, when the evidence shewed that there had been no joint undertaking on part of both defendants, and that Gottselig had not used any caps as a servant or employee of Williams, it negatived the only allegation in the statement of claim which charged him with liability for the injury, and he was therefore entitled to a nonsuit. As, however, the jury negatived negligence causing the injury so far as he was concerned, it is immaterial whether he has judgment on the nonsuit or on the answers of the jury.

The jury having found the defendant Williams guilty of negligence causing the injury, the plaintiff is entitled to judgment against him unless the contention of his counsel be sound. That contention is that as the claim alleges a joint tort, the plaintiff fails unless he establishes that both defendants were liable. In my opinion, this contention cannot be supported. Rule 34 (Sask. Rules 1911) provides that all persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative, and judgment may be given against such one or more of the defendants as may be found liable. This is express authority for signing judgment against one of several joint defendants if one only is found liable.

Apart from the rule, the meaning of an allegation of tort points conclusively in the same direction. Where two persons are alleged to have been guilty of negligence causing the injury, it means that each one was guilty of a breach of the duty to take care which he individually owed to the plaintiff, and a judgment against two joint tort feasors means that

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each one is severally liable for the whole. In other words, an allegation of joint negligence is an allegation of a want of care on the part of each of the individual defendants. There is, therefore, in my opinion no good ground for saying that in order to justify a judgment against the defendant Williams, both defendants must have been found liable. Considerable argument was adduced, and many authorities cited, to the effect that two separate causes of action cannot be joined in one claim. These authorities have no bearing on the present case. No two causes of action are here joined. Only one cause of action is set up in the statement of claim, namely damages resulting to the plaintiff from the explosion of a certain detonating cap, which damage is charged against the defendant Williams as employer and Gottselig as superintending the blasting operations under the control and direction of Williams. No individual liability on the part of Gottselig other than this is alleged against him, and, as I have indicated above, the submission of individual negligence on his part to the jury was superfluous. The plaintiff is therefore, entitled as against the defendant Williams to judgment for $932.00 and costs: as against the defendant Gottselig the plaintiff's action will be dismissed with costs.

Judgment against defendant Williams only.

LOVE v. MACHRAY.

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March 4

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, and Cameron, JJ.A. March 4, 1912.

1. NUISANCE (§ I—22a)—UNPROTECTED WELL ON PASTURE LAND — LOSS OF HORSE BY FALLING IN.

The owner of property let to a tenant without any retention of control or right of entry by the owner or any undertaking by him to keep the premises in repair is not responsible for the loss of a horse from falling into an unprotected well on the premises while being pastured under an agreement between the tenant and the owner of the horse.

[*Cavalier* v. *Pope*, [1906] A.C. 428, and *Lane* v. *Cox*, [1897] 1 Q.B. 415, applied; see also Underhill on Torts, 9th ed., 173, 190c, 224.]

2. MUNICIPAL CORPORATIONS (§ II C 3—126a)—PROTECTING WELLS ON PRIVATE PROPERTY—MUNICIPAL BY-LAW—LIABILITY OF "OWNER OR OCCUPANT."

In a municipal by-law requiring the "owner or occupant" to guard or cover a well when not in use, the word "owner" must be read "owner in occupation," and the by-law would not apply to render the equitable owner of the fee in lands let to a tenant, liable for breach of the by-law by the tenant resulting in the loss of plaintiff's horse of which the tenant was bailee.

3. LANDLORD AND TENANT (§ III C—62)—DANGEROUS PREMISES—OMISSION TO PROTECT OPEN WELL IN FIELD—MUNICIPAL BY-LAW.

Breach by a tenant of a municipal by-law, requiring all wells to be fence-guarded or kept covered except when in use, by the "owner or occupant," does not render the equitable owner of the fee liable either for the penalty under the by-law or for damages for the tenant's neglect to comply therewith.

APPEAL from County Court judgment against defendant in an action for damages for the loss of a horse by falling into a well on defendant's lands.

The appeal was allowed and the action dismissed.

W. J. Cooper, K.C., for plaintiff.
C. H. Locke, for defendant.

RICHARDS, J.A.:—The defendant has an equitable title to certain property under an agreement to purchase. Certain parties, for whom he alleges he holds it in trust, let the property to one Cooper, who entered into possession. Cooper agreed with the plaintiff for a consideration, that the plaintiff might pasture horses on the land. One of these horses fell into an uncovered well on the land and was injured so that he died. The plaintiff sued the defendant in the County Court of Portage la Prairie for damages for the loss of the horse. As Cooper was in possession of the property and the defendant is not shewn to have had any right to enter on the property to cover the well, and it is not even shewn that the defendant knew that there was an uncovered well on the property at any time at which he may have had control, it seems to me that there is no common law liability. It is claimed, however, that the defendant is liable because of a by-law of the rural municipality of Portage la Prairie, within which the land is situate.

Section 635 of the Municipal Act gives the municipality power to pass a by-law for compelling or regulating the enclosing or covering up of all wells that are open or insufficiently guarded in the municipality by the owners or occupants of the land whereon such wells are situate. The by-law says that every well within the municipality that is not enclosed within a lawful fence shall be covered with a sufficient and proper covering and shall at all times be kept covered except when necessarily opened for the purpose of obtaining water or for the purpose of cleaning or repairing said well; and also that any owner or occupant of any land upon which such well may be situate, shall cover the said well with such good and sufficient covering within two days after service of written notice on him from the clerk of the municipality or any ratepayer within the municipality, calling upon him to cover such well. It is argued that there is no liability to keep the well covered until after such notice has been given. But that need not now be considered, I think.

The by-law provides for a penalty by fine or imprisonment in case of default, and also that if the owner or occupant makes default the well may be covered by the municipality and the costs assessed and levied against the lands. Though the word "owner" is used in this by-law, it seems to me that it can only mean an owner who has power to enter and cover the well,

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otherwise it would impose a penalty upon a party for not doing that which he is unable to do.

In the present case Cooper was in possession as a tenant, and, in the absence of evidence to the contrary, the presumption is that the defendant had no power to enter. I cannot think that the intention of the by-law or of the statute could be that in such a case as this the owner should be subject to punishment or open to any liability for not doing that which is to him impossible. I would reverse the finding of the learned trial Judge in favour of the plaintiff and enter judgment in the County Court for the defendant with costs, including a counsel fee, the defendant to have the costs of this appeal.

PERDUE, J.A.:—This is an action brought to recover damages for the loss of a horse which was killed by falling into a well. The evidence shews that the defendant had entered into an agreement for the purchase of a section of land from the plaintiff and certain members of the plaintiff's family. The land was held by the defendant as a bare trustee for the Oakland Club, and the defendant had no personal interest in the land. The Oakland Club let the land to one Cooper and Cooper entered into an arrangement with the plaintiff to pasture several of the plaintiff's horses upon the land. While the horses were so pasturing upon the land one of them fell into an uncovered well and sustained such injuries that it died.

This action is brought against the defendant as the owner of the land to recover damages for the loss sustained by the plaintiff. The learned County Court Judge expressed a doubt as to whether the defendant was liable or not, but entered a verdict for the plaintiff, assessing the damages at $200. The defendant was not in control of the premises and had not undertaken to keep them in repair. The tenant of the premises was the person, if any, on whom the responsibility rested of keeping the well in question fenced or covered. If there was no duty owed by the defendant to the tenant respecting the safe condition of the well, there was none due to a stranger: *Lane* v. *Cox*, [1897] 1 Q.B. 415, 417; *Cavalier* v. *Pope*, [1905] 2 K.B. 757, confirmed [1906] A.C. 428. This position was indeed conceded by the plaintiff's counsel on the argument and the plaintiff's case was rested upon the by-law of the municipality and upon the legal liability which it was argued followed thereon.

This by-law, being No. 155 of the rural municipality of Portage la Prairie, passed under the authority of section 635 of the Municipal Act, provides as follows:—

> 1. That every well within the rural municipality of Portage la Prairie that is not enclosed within a lawful fence shall be covered with a sufficient and proper covering and shall at all times be kept covered except when necessarily opened for the purpose of obtaining water or for the purpose of cleaning or repairing said well.

2. That any owner or occupant of any land upon which such well may be situated within the municipality shall cover the said well with such good and sufficient covering within two days after service of written notice on him calling upon him to cover such well, which notice may be given by the clerk of the municipality or by any ratepayer within the municipality.

Clause 3 provides that any person violating the provisions of the by-law or failing to comply with the same, shall be subject on conviction before a justice of the peace to a fine or to imprisonment for twenty-one days.

Clause 4 provides that in the event of any owner or occupant of any land on which there is any such uncovered well making default in covering the well as aforesad, the well may be covered by the municipality and the costs charged against the owner and added to his taxes.

Clause 5 provides that nothing in the by-law shall prevent any party aggrieved from recovering compensation for damage sustained by any breach of the by-law from the person or persons whose default caused the damage.

Clause 6 defines the word "well" as including any hole or excavation made or used for the purpose of obtaining water.

Without discussing the broad question whether a person who has been injured by reason of a breach of the by-law can maintain an action against the person on whom the duty is imposed, it is clear that, unless the person sought to be charged has committed a breach of the by-law and become liable to the penalty provided, the action will not lie. Looking at the by-law in question, it is clear that the defendant does not fall within the provisions of clause 1. That clause plainly applies to the person who is in occupation of the premises, whose duty it would be to see that the well was kept covered.

Where the owner of land has leased the land to a tenant who is in use and occupation of the land, it would be unreasonable and absurd that the municipality should, under stress of fine or imprisonment, compel the owner of the land to repeatedly enter upon it to see that the well was kept in proper condition, and in the case of a well that was in actual use, to compel the landlord to see that the tenant covered the well on each occasion after making use of it for the purpose of drawing water.

It is equally clear that clause 2 of the by-law does not apply to the defendant in this case. There is no pretence that any notice was served upon him, either by the municipality or by any other person calling upon him to cover the well, and without notice there is no liability under the clause. There is nothing else in the by-law which will afford any assistance to the plaintiff in establishing his claim.

I think the plaintiff failed to shew any liability on the part

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of the defendant. The appeal should be allowed, the verdict in the County Court set aside, and a verdict entered for the defendant. The plaintiff will have to pay the costs of this appeal and also the costs in the County Court, including the usual counsel fee.

CAMERON, J.A.:—Section 1 of By-law No. 155 of the rural municipality of Portage la Prairie contains no direct reference to, and does not name any person, landlord or tenant, mortgagor or mortgagee, owner or occupant or trespasser. In the provision that the well shall at all times be kept covered "except when necessarily opened for the purpose of obtaining water or for the purpose of cleaning or repairing said well"; the indirect reference is to the person in occupation of the premises where the well is. It would be the occupant or tenant of the premises who would ordinarily use the well and keep it in order. This indirect reference can hardly be extended to include landlords or mortgagees, or owners not in possession.

Section 2 of the by-law does not apply here at all. There was never any notice served on the defendant in this case.

Section 3 of the by-law, the penalty clause, "that any person violating the provisions of this by-law . . . shall be subject . . . to a penalty, etc.," applies to the persons designated in section 2. That it has any application at all to section 1, wherein no persons are mentioned, is doubtful. If it does apply, however, to section 1, it can only refer to occupants. The judgment of the Court below must be set aside.

HOWELL, C.J., concurred.

Defendant's appeal allowed.

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March 5

FRASER v. CANADIAN PACIFIC RAILWAY CO.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, and Cameron, JJ.A. March 5, 1912.

1. ASSIGNMENT (§ II—23)—SUB-CONTRACTOR FOR WORK ON IDENTICAL TERMS—EQUITABLE ASSIGNMENT.

An agreement whereby a contractor for work sub-contracts with another to do the same work at the same price as he is to receive and agrees to pay the second contractor in the same instalments as are stipulated for in the original contract with the property owner, does not constitute an assignment to the person who performs the work of the moneys to accrue under the original contract made by the property owner, and such transaction is not an equitable assignment of a chose in action.

APPEAL by the plaintiff from the decision of Mathers, C.J. K.B., *Fraser* v. *C.P.R.*, 19 W.L.R. 369.

The appeal was dismissed.

Messrs. *M. G. Macneill*, and *W. L. McLaws*, for plaintiff.

Messrs. *C. P. Fullerton*, K.C., and *J. P. Foley*, for defendants.

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Howell, C.J.M.

The judgment of the Court was delivered by

HOWELL, C.J.M.:—The plaintiff's case is that he obtained an equitable assignment of the chose in action which was created by the agreement made between the C.P.R. and the deceased Garson. The bargain or arrangement made between the deceased and the plaintiff was verbal and the only witness as to the terms of that bargain is the plaintiff. His evidence is conflicting and unsatisfactory. It seems certain, however, that the deceased, Garson, was to receive the money from the company and was to pay the plaintiff. Counsel for the plaintiff asserts, and there seems to be evidence to support it, that this agreement was reduced to writing, but it was not produced, and we are in the dangerous position of hearing parol evidence to prove the terms of a written contract where the loss is only vaguely accounted for.

I think it would be unsafe from the evidence to find as a fact that there was an equitable assignment of this chose in action. For all that appears in the evidence, the bargain might have been (and indeed it seems to have been) that the plaintiff was to do the work for the deceased for the same sum which the latter had contracted for, and that he would be paid for the same from time to time as the deceased received the money therefor from the company. This would not be an assignment of the chose in action.

The appeal is dismissed with costs.

Appeal dismissed.

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March 22.

Saskatchewan Supreme Court, Newlands, J., in Chambers. March 22, 1912.

1. AFFIDAVITS (§ I—5)—EXHIBIT NOT MARKED—EXCLUSION.

Where an affidavit for a garnishee summons purported to verify a statement of claim said to be marked as an exhibit to the affidavit, a statement of claim not in fact marked as an exhibit cannot be read as part of the affidavit.

2. GARNISHMENT (§ III—61)—AFFIDAVIT FOR GARNISHEE SUMMONS — CLASS OF ACTION FOR WHICH ATTACHMENT LIES.

It is essential that the affidavit for a garnishee summons under Sask. Rule 505 should comply strictly with the Rule so that it may appear whether the action is for a debt or liquidated demand so as to warrant the issue of the summons.

[*Mohr* v. *Parks*, 15 W.L.R. 250, followed.]

THIS is an application to set aside a garnishee summons.

E. B. Jonah, for plaintiff.

H. F. Thomson, for defendant.

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Newlands, J.

NEWLANDS, J.:—By Rule 505* the affidavit on which the summons is issued should shew the nature and amount of the claim. The affidavit in this case states that the defendant is indebted to the plaintiff in the sum of $3,561.88, "particulars of which are set out in the statement of claim hereto attached and marked exhibit 'A.'"

The statement of claim is not marked as an exhibit, and therefore cannot be read as part of the affidavit, and the affidavit does not therefore shew the nature of the claim. This is necessary because it is only in an action for a debt or a liquidated demand that a garnishee summons can be issued and without knowing the nature of the plaintiff's claim, it could not be decided whether it is a case in which a garnishee summons could issue.

The affidavit must strictly comply with Rule 505. In this case it is more than an irregularity, it is a fatal defect: *Mohr* v. *Parks*, 15 W.L.R. 250. The garnishee summons must be set aside. The plaintiff asked that the money paid in by the summons be set aside as being the proceeds of the plaintiff's grain. That is a question that I cannot decide upon this application, it being the question in controversy in the action. Costs to defendant in any event.

Summons set aside.

*Rule 505 of the Saskatchewan Rules of Court of 1911 (Order XXXV., attachment of debts) is as follows:—

505. Any plaintiff in any action for a debt, or liquidated demand before or after judgment, and any person who has obtained a judgment or order for the recovery or payment of money, may issue a garnishee summons in the form No. 69 in the appendix hereto, with such variations as circumstances may require. Such summons shall be issued by the local registrar upon the plaintiff or judgment creditor, his solicitor or agent filing an affidavit:—

(*a*) Shewing the nature and amount of the claim or judgment against the defendant or judgment debtor, and swearing positively to the indebtedness of the defendant or judgment debtor to the plaintiff or judgment creditor.

(*b*) Stating to the best of the deponent's information and belief, that the proposed garnishee (naming him) is indebted to such defendant or judgment debtor.

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CITY OF MONTREAL v. MONTREAL STREET RAILWAY COMPANY (the Attorney-General for the Dominion of Canada and the Attorney-General for the Province of Quebec intervening).

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Jan. 16.

Judicial Committee of the Privy Council. Present: The Right Hons. the Lord Chancellor (Earl Loreburn), Lords Macnaghten, Atkinson, Shaw, and Robson. . January 16, 1912.

1. CONSTITUTIONAL LAW (§ II A 3—195)—PROVINCIAL RAILWAY—THROUGH TRAFFIC—DOMINION RAILWAY COMMISSION.

Upon the true construction of sections 91 and 92 of the British North America Act, 1867, a provincial railway is not subject to the jurisdiction of the federal Railway Commission in respect of its through traffic with a federal railway.

[*Montreal Street R. Co.* v. *City of Montreal*, 43 Can. S.C.R. 197, 11 Can. Ry. Cas. 203, affirmed on appeal.]

2. STREET RAILWAY—ELECTRIC RAILWAY AUTHORISED BY PROVINCIAL STATUTE—FEDERAL SUPERVISION OF THROUGH TRAFFIC—RAILWAY ACT, R.S.C. 1906, CH. 37, SEC. 8 (*b*).

The provisions of sub-section (*b*) of sec. 8 of the Railway Act, R.S.C. 1906, ch. 37, purporting to subject to the federal Railway Act the through traffic upon any railway or street railway authorised by special Act of a provincial Legislature which connects with a federal railway, although such provincial railway or street railway had not been declared by federal statute to be a work for the general advantage of Canada," is ultra vires of the Parliament of Canada.

[Opinon of Fitzpatrick, C.J., Girouard, and Duff, JJ., in *Montreal Street R. Co.* v. *City of Montreal*, 43 Can. S.C.R. 197, 11 Can. Ry. Cas. 203, affirmed on this point on appeal to the Privy Council.]

APPEAL by special leave from a judgment of the Supreme Court of Canada (Fitzpatrick, C.J., Girouard, Idington, and Duff, JJ.), Davies and Anglin, JJ., dissenting, *Montreal Street R. Co.* v. *City of Montreal*, 43 Can. S.C.R. 197, 11 Can. Ry. Cas. 203, on an appeal from a decision of the Board of Railway Commissioners for Canada.

The facts of the case, which were not in dispute, are fully set out in the judgment.

Hon. *A. W. Atwater*, K.C. (of the Canadian Bar) appeared for the appellant corporation.

E. L. Newcombe, K.C. (of the Canadian Bar), for the Attorney-General for Canada, intervening.

Sir *R. Finlay*, K.C., *F. E. Meredith*, K.C. (of the Canadian Bar), and *Geoffrey Lawrence*, for the respondent company.

Messrs. *Geoffrion*, K.C., (of the Canadian Bar) *Hamar Greenwood*, and *Horace Douglas* for the Attorney-General for the Province of Quebec, intervening.

The following authorities were referred to in the course of the arguments:

Valin v. *Langlois*, 41 L.T. Rep. 662, 5 App. Cas. 115; *Cushing* v. *Dupuy*, 42 L.T. Rep. 445, 5 App. Cas. 409; *Citizens' Insurance Company* v. *Parsons*, 45 L. T. Rep. 721, 7 App. Cas. 96; *Bank of Toronto* v. *Lambe*, 57 L. T. Rep. 377, 12 App. Cas. 575; *Union Colliery Company* v. *Bryden*, 81 L. T. Rep. 277, [1899] A. C. 580; *Attorney-General for Ontario* v. *Attorney-General for*

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Canada, 74 L. T. Rep. 533, [1896] A. C. 348; *Canadian Pacific Railway Company* v. *Parish of Bonsecours*, 80 L. T. Rep. 434, [1899] A. C. 367; *Grand Trunk Railway Company* v. *Attorney-General for Canada*, 95 L. T. Rep. 631, [1907] A. C. 65; *Madden* v. *Nelson Railway Company*, 81 L. T. Rep. 276, [1899] A. C. 626; *Toronto* v. *Canadian Pacific Railway Company*, 97 L. T. Rep. 726, [1908] A. C. 54; *Maritime Bank* v. *Receiver-General of New Brunswick*, 67 L. T. Rep. 126, [1892] A. C. 437; *Toronto* v. *Bell Telephone Company*, 91 L.T. Rep. 700, [1905] A.C. 52; on the question of the distribution of powers between the Dominion and the Provincial Legislatures under the British North America Act, 1867.

The following American decisions were also cited:

Gibbons v. *Ogden* 9 Wheaton, 1; *Kidd* v. *Pearson*, 128 U. S. Sup. Ct. Rep. 1; *Norfolk and Western Railroad Company* v. *Pennsylvania*, 136 U. S. Sup. Ct. Rep. 114; *Hanley* v. *Kansas City Southern Railway Company*, 187 U. S. Sup. Ct. Rep. 617.

Newcombe, K.C., was heard in reply.

At the conclusion of the arguments their Lordships took time to consider their judgment.

Their Lordships' judgment was delivered by

LORD ATKINSON:—This is an appeal by special leave from a judgment of the Supreme Court of Canada pronounced upon the 11th March, 1910, whereby an appeal from a certain order of the Board of Railway Commissioners for Canada, dated the 4th May 1909, was allowed, the said order set aside, and it was declared that the said commissioners had no jurisdiction to make the order appealed from.

The facts of the case are few and are undisputed.

There are in the city of Montreal and the adjacent township two so-called railways. One of these is the Montreal Park and Island Railway, hereafter styled for convenience the Park Railway, and the other the Montreal Street Railway, which is in fact a tramway laid along the streets of that city and its suburbs, and for convenience may be styled the Street Railway. These railways being constructed on the Island in the St. Lawrence on which the city of Montreal stands are, of course, situate wholly within the Province of Quebec. They connect physically at several points both within and near the limits of the city, and arrangements have been entered into between the companies owning them by which the cars of each railway run over the lines of the other, and passengers are conveyed from points on one system to points on the other over the permanent way of both. It is not disputed that there is conducted over these lines "through traffic" within the meaning of the statute hereafter referred to.

The Park Railway, though originally constructed and worked

under the powers conferred by certain enactments of the provincial Legislature, was, by a statute of the Canadian Parliament (57 & 58 Vict. ch. 84), amended by two other similar statutes (59 Viet. ch. 28, and 6 Edw. VII. ch. 129), declared to be a work for the general advantage of Canada. Railways so declared were in this case called "federal" railways to distinguish them from railways situate wholly within a province and under the exclusive control of the Provincial legislature, styled "provincial" railways. It is admitted that by this declaration the railway to which it refers was withdrawn from the jurisdiction of the provincial Legislature, that it passed under the exclusive jurisdiction and control of the Parliament of Canada, and, small and provincial though it was, stood to the latter in precisely the same relation, as far as the enactments upon the true construction of which this case turns, as do those great trunk lines, also federal railways, which traverse the Dominion from sea to sea, and were originally constructed and are now worked in exercise of the powers conferred by the statutes of the Parliament of the Dominion of Canada. The Board of the Railway Commissioners was created by a Dominion statute (3 Edw. VII. ch. 58), entitled "The Railway Act." The commissioners are officials of the Dominion Government, and in the exercise of their powers are outside the jurisdiction and beyond the control of any provincial Legislature or Government.

A complaint having been made to them that an unjust discrimination had been made by the Park Railway Company in respect of the rates charged and of the service and operation of this railway between the residents of a certain ward in the city of Montreal, named the Mount Royal Ward, and the residents of an outlying township, named the town of Notre Dame de Grace, in both of which localities they have stations, the order appealed from was made. It purported to have been made under the authority and by virtue of the powers conferred upon the commissioners by the Railway Act. By it they directed, first, that the Park Railway Company should grant the same "facilities in the way of services and operation, including the rates to be charged by it," to the people residing in Mount Royal Ward as it grants to those residing in Notre Dame de Grace, and that it should forthwith enter into the necessary agreements for the purpose of removing the unjust discrimination which they had found in fact to exist; and, secondly, that with respect to "through" traffic over the Street Railway, the Street Railway Company should "enter into any agreement or agreements which may be necessary to enable" the former company to carry out the provisions of this order.

The Park Railway, having by statutory declaration become in the manner mentioned a federal railway, it is admitted that the first portion of this order dealing with the "unjust discrim-

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ination" which it was found to have made was *intra vires*, but the validity of the second part of the order is challenged, and it has, on behalf of the Street Railway Company, been from the first insisted that the commissioners had no jurisdiction whatever to make it.

Moreover, it is practically not disputed that the existence in the commissioners of the jurisdiction challenged depends itself upon this further consideration—namely, whether, having regard to the provisions of the 91st and 92nd sections of the British North America Act, the Parliament of Canada have any jurisdiction, power, or authority, express or implied, to enact the 8th section of the before-mentioned Railway Act, so far as it affects provincial as distinguished from federal lines. This was in effect the question of law raised by way of appeal from the order of the commissioners for the decision of the Supreme Court. It is by the order of the former body, dated the 8th June 1909, framed thus: "Whether upon the true construction of secs. 91 and 92 of the British North America Act, and of sec. 8 of the Railway Act of Canada, the Montreal Street Railway is subject in respect of its through traffic with the Montreal Park and Island Railway Company to the jurisdiction of the Board of the Railway Commissioners of Canada."

It is to be observed that the question is framed in a general form. The jurisdiction of the commissioners or of the Dominion Parliament is not made to depend in any way on the character, nature, or volume of the "through" traffic; nor upon the question whether it is of such a kind as to confer special advantages upon Canada or upon two or more of its provinces. Indeed, counsel on behalf of the appellants at the hearing before their Lordships contended boldly that when once a line of railway, though wholly provincial, *i.e.*, situate wholly within one particular province, and not federal, connects with a federal line, and "through" traffic is conducted over both, the jurisdiction of the commissioners attaches at least so far as this "through" traffic, whatever its character or amount, is concerned.

The Supreme Court by a majority of its members answered the question so put to them in the negative. The question for the decision of their Lordships is whether their answer is right in point of law.

The 8th section of the Railway Act [R.S.C. 1906, ch. 37] runs as follows:—

> Every railway, steam or electric street railway or tramway, the construction or operation of which is authorized by special Act of the Legislature of any province, and which connects with or crosses or may hereafter connect with or cross any railway within the legislative authority of the Parliament of Canada, shall, although not declared by Parliament to be a work for the general advantage of Canada, be subject to the provisions of this Act relating to (*a*) the connection or

crossing of one railway or tramway with or by another, so far as concerns the aforesaid connection or crossing: (*b*) the through traffic upon a railway or tramway and all matters appertaining thereto; (*c*) criminal matters, including offences and penalties; and (*d*) navigable waters: Provided that, in the case of railways owned by any provincial Government, the provisions of this Act with respect to through traffic shall not apply without the consent of such Government.

It will be observed that if the argument of the appellants be right this section would seem to subject a provincial railway authorised by an Act of the provincial Legislature to all the provisions of this statute of the Canadian Parliament dealing not only with the physical connection or crossing of the two lines and with the through traffic, but also with criminal matters, offences, and penalties, whether connected with the through traffic or not, and further with the relations of the provincial line and its traffic with navigable waters. As to all these matters the jurisdiction and control of the local Legislature is superseded or overborne, comparatively little is left to that authority, and the line itself is placed in this unfortunate position that its local traffic is put under the jurisdiction and control of the provincial Legislature and the officials of the local Government, and its through traffic, with all these other matters, is subjected to the jurisdiction and control of the Dominion Legislature and the officials of the Dominion Government, a most unworkable and embarrassing arrangement.

The effect of sub-sec. 10 of sec. 92 of the British North America Act is, their Lordships think, to transfer the excepted works mentioned in sub-heads (*a*), (*b*), and (*c*) of it into sec. 91, and thus to place them under the exclusive jurisdiction and control of the Dominion Parliament.

These two sections must then be read and construed as if these transferred subjects were specially enumerated in sect. 91, and local railways as distinct from federal railways were specifically enumerated in sec. 92.

The matters thus transferred are: (*a*) Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings, connecting the province with any other province or provinces, or extending beyond the limits of the province; (*b*) lines of steamships between the province and any British or foreign country; (*c*) works, wholly situate within the province, but declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more provinces.

These works are physical things, not services. The appropriate number of the group would probably be 29 or 29 (*a*). It has accordingly been strongly urged on behalf of the respondents that if it be desirable in the interest of the Dominion to place the through traffic on a provincial line, such as the Street Rail-

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way, under the control of the Railway Commissioners, owing to its nature, character, or amount, the proper course for the Dominion Parliament to take, and the only course which it can legitimately take, is by statutory declaration to convert the provincial line into a federal line, thus removing it from the class of subjects placed under the control of the Legislature of the province, and placing it amongst the classes of subjects over which it has itself exclusive jurisdiction and control; and, further, that there is nothing in the British North America Act to shew that such an invasion of the rights of the provincial Legislature, as is necessarily involved in the establishment of this embarrassing dual control over their own provincial railways, was ever contemplated by the framers of the British North America Act. It has, no doubt, been decided many times by this board that the two sections 91 and 92 are not mutually exclusive, that their provisions may overlap, and that where the legislation of the Dominion Parliament comes into conflict with that of a provincial Legislature over a field of jurisdiction common to both the former must prevail; but, on the other hand, it was laid down in *Attorney-General of Ontario* v. *Attorney-General of the Dominion*, 74 L.T. Rep. 533, [1896] A.C. 348: (1) that the exception contained in sec. 91, near its end, was not meant to derogate from the legislative authority given to provincial Legislatures by the 16th sub-section of sec. 92, save to the extent of enabling the Parliament of Canada to deal with matters, local or private, in those cases where such legislation is necessarily incidental to the exercise of the power conferred upon that Parliament under the heads enumerated in sec. 91; (2) that to those matters which are not specified amongst the enumerated subjects of legislation in sec. 91 the exception at its end has no application, and that in legislating with respect to matters not so enumerated the Dominion Parliament has no authority to encroach upon any class of subjects which is exclusively assigned to the provincial Legislature by sec. 92; (3) that these enactments, sec. 91 and 92, indicate that the exercise of legislative power by the Parliament of Canada in regard to all matters not enumerated in sec. 91 ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any classes of subjects enumerated in sec. 92; (4) that to attach any other construction to the general powers which, in supplement of its enumerated powers, are conferred upon the Parliament of Canada by sec. 91 would not only be contrary to the intendment of the Act, but would practically destroy the autonomy of the provinces; and, lastly, that if the Parliament of Canada had authority to make laws applicable to the whole Dominion in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also con-

cern the peace, order, and good government of the Dominion, there is hardly a subject upon which it might not legislate to the exclusion of provincial legislation. The same considerations appear to their Lordships to apply to two of the matters enumerated in sec. 91—namely the regulation of trade and commerce. Taken in their widest sense these words would authorise legislation by the Parliament of Canada in respect of several of the matters specifically enumerated in sec. 92, and would encroach seriously upon the local autonomy of the province. In their Lordships' opinion these pronouncements have an important bearing on the question for decision in the present case, though the case itself in which they were made was wholly different from the present case, and the decision given in it has little, if any, application to the present case. They apparently established this, that the invasion of the rights of the province which the Railway Act and the order of the commissioners necessarily involves in respect of one of the matters enumerated in sec. 92—namely, legislation touching local railways—cannot be justified on the ground that this Act and order concern the peace, order, and good government of Canada, nor upon the ground that they deal with the regulation of trade and commerce.

It follows, therefore, that the Act and order if justified at all must be justified on the ground that they are necessarily incidental to the exercise by the Dominion Parliament of the powers conferred upon it by the enumerated heads of sec. 91. The only one of the heads enumerated in sec. 91 dealing expressly or impliedly with railways is that which is interpolated by the transfer into it of sub-heads (*a*), (*b*), and (*c*) of sub-sec. 10 of sec. 92. Lines such as the Street Railway are not amongst these.

In other words, it must be shewn that it is necessarily incidental to the exercise of control over the traffic of a federal railway in respect of its giving an unjust preference to certain classes of its passengers or otherwise, that it should also have power to exercise control over the "through" traffic of such a purely local thing as a provincial railway properly so called, if only it be connected with a federal railway. The commissioners have by the 317th section of the Railway Act vast powers over federal railways. They can compel the companies who own such lines to make all the arrangements therein mentioned for receiving and forwarding traffic of all kinds, through or local, and also to compel them to conduct their business so as not to give an unjust preference to any person or persons or body or bodies corporate; but it is not to be assumed that the provincial railway companies would in the reasonable conduct of their business refuse to make such agreements with federal railway companies as would enable the latter to discharge the obligations which might be placed upon them under this section, and still less is it to be assumed that the provincial Legislature would fail to exercise

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their own legislative powers to compel recalcitrant companies over which they had control to enter into such agreements if they refuse to do so. As long as it is reasonably probable that the provincial companies will enter into such agreements, or will be coerced to enter into them by the provincial Legislatures which control them, it cannot be held, their Lordships think, that it is necessarily incidental to the exercise by the Dominion Parliament of its control over federal railways that provincial railways should be coerced by its legislation to enter into these agreements in the manner in which it sought to coerce the Street Railway Company in the present case to enter into the agreements specified in the order appealed from. There is not a suggestion in the case that the "through" traffic between this federal and this local line, or between any other federal or local line, had attained such dimensions before this Railway Act was passed as to affect the body politic of the Dominion. If it had been so the ready way of protecting the body politic was by making such a statutory declaration in any particular case or cases as was made in reference to the Park line. The right contended for in this case is in truth the absolute right of the Dominion Parliament wherever a federal line and a local provincial line connect to establish, irrespective of all consequences, this dual control over the latter line whenever there is through traffic between them, at least of such a kind as would lead to unjust discrimination between any classes of the customers of the former line. In their Lordships' view this right and power is not necessarily incidental to the exercise by the Parliament of Canada of its undoubted jurisdiction and control over federal lines, and is therefore, they think, an unauthorised invasion of the rights of the Legislature of the Province of Quebec.

One of the arguments urged on behalf of the appellants was this: The through traffic must, it is said, be controlled by some legislative body. It cannot be controlled by the provincial Legislature because that Legislature has no jurisdiction over a federal line, therefore it must be controlled by the Legislature of Canada. The answer to that contention is this, that so far as the "through" traffic is carried on over the federal line, it can be controlled by the Parliament of Canada, and that so far as it is carried over a non-federal provincial line it can be controlled by the provincial Legislature, and the two companies who own these lines can thus be respectively compelled by these two Legislatures to enter into such agreement with each other as will secure that this "through" traffic shall be properly conducted; and, further, that it cannot be assumed that either body will decline to co-operate with the other in a reasonable way to effect an object so much in the interest of both the Dominion and the province as the regulation of "through" traffic.

On the whole, therefore, their Lordships are of opinion that

sec. 8, sub-sec. (*b*), of the Railway Act is, as regards provincial lines of railway properly so called, *ultra vires* (upon the other sub-secs. it is unnecessary to express any opinion); that the order of the commissioners of the 4th May, 1909, was in respect of its second part made without jurisdiction; that the decision of the Supreme Court was right, and that this appeal should be dismissed with costs. The intervenants will pay any costs incurred owing to the interventions. Their Lordships will humbly advise His Majesty accordingly.

Appeal dismissed.

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Ontario Divisional Court, Boyd, C., Latchford and Middleton, JJ. February 14, 1912.

1. APPEAL (§ III B—76)—STAY OF EXECUTION PENDING APPEAL—PRIVY COUNCIL APPEALS FROM ONT.—ONT. C.R. 832.

Subject to the power to otherwise order in any particular case, execution is stayed on an appeal from the Court of Appeal for Ontario to the Judicial Committee of the Privy Council, notwithstanding Ont. Con. Rule (1897) 832, when the security required by the Privy Council Appeals Act, 10 Edw. VII. (Ont.), ch. 24, has been perfected. [This practice has since been varied by statute of 1912, 2 Geo. V. (Ont.).]

APPEAL, pursuant to leave granted, from the decision of Clute, J., dismissing defendant's motion to set aside a writ of execution.

The motion was made by defendant to set aside a writ of *fi. fa.* issued by the plaintiff upon the judgment of the Court in favour of the plaintiff, upon the ground that, security having been given by the defendant for an appeal to the Judicial Committee of the Privy Council, execution in the original cause was thereby stayed, and that the issue of the writ was irregular and contrary to the Privy Council Appeals Act, 10 Edw. VII. ch. 24, sec. 4.

The appeal was allowed.

Messrs. *F. Arnoldi*, K.C., and *F. McCarthy*, for the defendant.
F. R. MacKelcan, for the plaintiff.

January 25. CLUTE, J.:—In this case security has been given for an appeal to the Privy Council, and it is contended that thereby execution in the original cause is stayed.

This application is made to set aside a writ of fi. fa. issued on behalf of the plaintiff, on the ground that the issue of the writ is irregular and contrary to the statute.

The statute here referred to is 10 Edw. VII. ch. 24, sec. 4. Section 3 declares that no appeal shall be taken to His Majesty in His Privy Council until the appellant has given security as therein provided. Section 4 declares that, upon the perfecting

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of such security, unless otherwise ordered, execution shall be stayed in the original cause. Section 5 provides that, subject to rules to be made by the Judges of the Supreme Court, the practice applicable to staying executions upon appeals to the Court of Appeal shall apply to an appeal to His Majesty in His Privy Council.

Con. Rule 832 declares that, upon the perfecting of the security for an appeal to the Privy Council, execution shall be stayed in the original cause, except in the following cases— . . . (*d*) If the judgment appealed from directs the payment of money, execution shall not be stayed until the appellant has given security to the satisfaction of the Court of Appeal or a Judge thereof, that if the judgment be affirmed, the appellant will pay the amount, etc.

It was urged by Mr. Arnoldi that the statute, having been passed since the Rule came into force, overrides the Rule. The statute is simply a revision of R.S.O. 1897, ch. 48, with a slight modification. Section 3 of the revised statute corresponds to sec. 4 of 10 Edw. VII. ch. 24, except that the words "unless otherwise ordered" are not in the revised statute.

I do not think that this objection can be supported. It would mean that any Rule of practice would be abrogated without reference to it where a statute was repealed and re-enacted in almost the same terms. Such a view cannot, I think, be entertained. Besides, the Interpretation Act, 7 Edw. VII. ch. 2, sec. 7, clause 48 (*a*), expressly provides that all rules made under a repealed Act shall continue good and valid, in so far as they are not inconsistent with the substituted Act or enactment, until they are annulled and others made in their stead.

I do not think the giving of the required security for appeal to the Privy Council had the effect of staying execution in the Court below.

The motion is dismissed with costs.

The defendant moved for leave to appeal to a Divisional Court from the order of CLUTE, J.

February 2. The motion was heard by BRITTON, J., in Chambers.

The same counsel appeared.

February 6. BRITTON, J.:—An application by the defendant for leave to appeal from the order of Mr. Justice Clute dismissing an application to set aside a writ of fi. fa. issued against the goods and chattels of the defendant, after the defendant had given security and perfected the same, pursuant to ch. 24, secs. 3 and 4, of 10 Edw. VII. (1910).

The order allowing the sum of $2,000 paid into Court as sufficient security on the appeal herein to His Majesty in His Privy Council was made in the Court of Appeal on the 15th November, 1911.

The defendant contended that the security so given operated, under the Act cited, as a stay of proceedings. The plaintiff contended otherwise.

On the 19th December, 1911, the plaintiff's solicitors, having issued a writ of fi. fa. against the defendant, notified the plaintiff's solicitors of the same, and stated that they were holding the writ in order that the defendant's solicitors might move to set it aside. The defendant's solicitors moved accordingly, and Mr. Justice Clute, who heard the defendant's motion, dismissed it.

I am asked to grant leave to appeal from that decision and order.

The case involves a large amount of money, and is otherwise important because of the question of law raised. The construction of secs. 3 and 4 of the Act cited is asked. Section 4, if it stood alone, is perfectly plain and unambiguous. The words are, "Upon the perfecting of such security" (that is, the security required by sec. 3, and which in this case has been given), "unless otherwise ordered, execution shall be stayed in the original cause."

Section 5 creates the difficulty, if difficulty there be: "Subject to rules to be made by the Judges of the Supreme Court, the practice applicable to staying execution upon appeals to the Court of Appeal shall apply in an appeal to His Majesty in His Privy Council."

"The practice applicable" is subject to rules. What rules? The rules are not in express terms referred to, so that they can override or be of equal force with the statute. The rules, however, may be applicable, because the practice "shall apply," and the practice apparently is under Con. Rule 832. "Unless otherwise ordered," as found in sec. 4, can hardly apply to what is ordered by a rule, but may apply to some order made in the cause in Court or by a Judge. It may be argued that mere "practice" in obtaining an order authorised by a rule, cannot control the express terms of a statute.

In this case, sec. 4 is not interfered with by anything "otherwise ordered," unless these words mean that rules are to govern where rules have been made. I am not attempting to give a considered opinion upon the construction of this statute, as would be necessary were the case before me as or in an appellate Court. I have a doubt; and so can not satisfy myself in withholding the leave asked.

Leave to appeal granted. Costs in the cause.

February 8. The appeal was heard by a Divisional Court composed of BOYD, C., LATCHFORD and MIDDLETON, JJ.

F. Arnoldi, K.C., for the defendant, argued that Con. Rule 832 (*d*), on which Clute, J., based his judgment, had been abrogated by virtue of 10 Edw. VII. ch. 24, secs. 3, 4, 5, the statute having been passed since the Rule came into force. This view of the matter is in accordance with the general trend of provincial

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legislation, which is to favour the stay of execution. Under sec. 5 of the Act, the practice on appeals to the Court of Appeal, as to which there is no doubt, is to apply to appeals to the Privy Council, subject only to rules "to be made" by the Judges. No such rules have been made since the statute was passed, and rules "to be made" cannot refer to rules already made. He referred to *McMaster* v. *Radford* (1894), 16 P.R. 20.

F. R. MacKelcan, for the plaintiff, argued that Con. Rule 832 (*d*) was still in force, and had not been abrogated by the statute of 10 Edw. VII. He referred to *McMaster* v. *Radford*, *supra*, and to Safford & Wheeler's P.C. Practice, ed. of 1901, pp. 134, 207. The expression "to be made" has not the effect contended for by the appellant.

Arnoldi, in reply, argued that the whole matter of security had been put on a new footing by the statute of 1910.

February 14. BOYD, C.:—The defendant has paid $2,000 into Court, and the same has been allowed as good and sufficient security on his appeal to the Privy Council, and an order has been made allowing his appeal to that final Court (15th November, 1911).

The practice respecting appeals to the Privy Council is to be found in 10 Edw. VII. ch. 24; and former Acts are therein repealed as from the 7th March, 1910. Section 4 of that Act declares that, upon the perfecting of such security (the security in amount herein given), execution shall be stayed in the original cause, unless otherwise ordered. Without special order, the plaintiff has undertaken to issue execution; and, upon that process being moved against, Mr. Justice Clute has affirmed its regularity, and an appeal is now (by leave of Mr. Justice Britton) taken from his order to the Divisional Court.

Mr. Justice Clute bases his judgment on the terms of Con. Rule 832, declaring that in appeals to the Privy Council execution shall not be stayed, if the judgment appealed from directs the payment of money, until security is given for such amount. If this Rule is in force, his judgment is right; otherwise, not so. It appears to me that this Rule is not in force, by virtue of the recent legislation, but to make this plain needs a good deal of intricate examination of what has been, and how it has been, superseded.

The development of the practice is to be regarded. In R.S.O. 1877, ch. 38, as to appeals to the Privy Council, it was prescribed, by sec. 51, that, upon the perfecting of security for $2,000, in respect of costs and damages, the execution should be stayed. But the next section, 52, declared that the provisions of the 27th section of the Act, as to appeals to the Court of Appeal, was to apply to Privy Council appeals, whereby execution was not to be stayed when the judgment directed the payment of money, till further security for that was given. On the revision ten years later, R.S.O. 1887, ch. 41, a separate Act, embodied the legislation

as to appeals to the Privy Council; and, by sec. 3, upon perfecting security to the extent of $2,000, execution was to be stayed. By sec. 4, the practice applicable to staying execution upon appeals to the Court of Appeal shall apply to appeals to the Privy Council. To ascertain that practice resort had to be made to the Rules passed by the Judges, of which No. 804 contained provision for special security in case of judgments directing the payment of money: *McMaster* v. *Radford*, 16 P.R. 20, 23. The provisions of the statute as to appeals to the Court of Appeal were taken out of the statute and reappear as Rules of Court: see Holmested and Langton, ed. of 1890, p. 670 (see 51 Vict. ch. 2, sec. 4).

So the provisions as to Privy Council appeals were referred to in the Rules of 1888, and it was provided that security should be for $2,000, and that any application to the Court of Appeal to stay proceedings shall be made in like manner and be upon the like terms as to security as is provided in like cases upon appeals to the Court of Appeal: Con. Rule 855. It is the union of these two Rules, which appear combined as the present Rule 832, which regulated the practice up to the 7th March, 1910. The last case on this point, which shews the then practice, is *Sharpe* v. *White* (1910), 20 O.L.R. 575, which was argued in the Divisional Court on the 31st January, 1910.

The Rules of 1897 provide that in cases of appeal to the highest Court in Ontario security need not be given (apart from special application) for the amount directed to be paid by the judgment in order to secure a stay of execution: Rule 827; and Rule 832* varies that policy as to an appeal to the highest Court of the Empire.

That was the state of the law under R.S.O. 1897, ch. 48, sec, 2, 3, 4. Section 4 reads: "Subject to Rules to be made by the Judges . . . under the Judicature Act, the practice applicable to staying execution upon appeals to the Court of Appeal in force prior to 16th April, 1895, shall apply to an appeal to Her Majesty

*832. Upon the perfecting of the security, mentioned in Rule 831 execution shall be stayed in the original cause, except in the following cases:—

(*a*) If the judgment appealed from directs the assignment or delivery of documents or personal property, execution shall not be stayed until the things directed to be assigned or delivered have been brought into the Court of Appeal or placed in the custody of such officer or receiver as that Court or a Judge thereof appoints, nor until security has been given to the satisfaction of that Court or a Judge thereof, and in such sum as may be directed, that the appellant will obey the order of the Judicial Committee of the Privy Council;

(*b*) If the judgment appealed from directs the execution of a conveyance or any other instrument execution shall not be stayed until the instrument has been executed and deposited with the proper officer, to abide the judgment of the said Judicial Committee;

(*c*) If the judgment appealed from directs the sale or delivery of possession of real property or chattels real, execution shall not be stayed until security has been entered into to the satisfaction of the Court of Appeal, and in such sum as that Court or a Judge directs, that during the possession of the property by the appellant, he will not commit or

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in Her Privy Council." (See 62 Vict (1) ch. 2, sec. 1.) This was an expansion of what is found in R.S.O. 1887, ch. 41, sec. 4, which is quoted as its original.

A note as to chronology: R.S.O. ch. 48 (1897), referring to Rules to be made by the Judges, was prepared in draft soon after, if not before, the 13th April, 1897, the date of passing the Act 60 Vict. ch. 3, giving effect to the Revised Statutes of 1897, which were to be completed at an early date (see preamble). This body of Revised Statutes was, by proclamation, declared to come into effect on the 31st December, 1897 (see R.S.O. 1897, p. xxi.) The Rules referred to in sec. 4 of ch. 48 were made by the Judges under 58 Vict. ch. 13, sec. 42, and were approved and to go into effect on the 1st September, 1897 (see Rule 1 and title page of Con. Rules 1897), and were completed on the 23rd July, 1897 (see ib., p. x.)

Prior to the making of these Rules, the practice as to these appeals was under the Con. Rules of 1888, which were in force on the 16th April, 1895, but were superseded by the new body of Rules consolidated as of 1897. No such action as to the making of Rules has taken place under or in contemplation of the passing of the Act 10 Edw. VII. ch. 24.

As I have said, this statute of 1897 is repealed; and the section now in force when this security was given, reads: "Subject to Rules to be made by the Judges of the Supreme Court, the practice applicable to staying executions upon appeals to the Court of Appeal shall apply to an appeal to His Majesty in His Privy Council." That is to say, by the express enactment now in force the practice applicable to staying executions in appeals to the Court of Appeal shall apply to appeals to the Privy Council—which is, that no security for the amount directed to be paid by the judgments is required—subject to rules (i.e. of a contrary effect) to be made by the Judges. None such have been made: the Act contemplates and provides for future rules "to be made," and one must find some declaration of practice in such rules contrary to and equally explicit with the statutory declaration that execution shall be stayed when security for the $2,000 has been given. This is a new statute, which, in my opinion, cannot be varied in its meaning by omitting some of the words and reading "to be made" as if synonymous with "already made."

suffer to be committed any waste on the property, and that if the judgment be affirmed, he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession thereof, and also, in case the judgment is for the sale of property and the payment of a deficiency arising upon the sale, that the appellant will pay the deficiency;

(*d*) If the judgment appealed from directs the payment of money execution shall not be stayed until the appellant has given security to the satisfaction of the Court of Appeal or a Judge thereof, that if the judgment, or any part thereof, be affirmed, the appellant will pay the amount thereby directed to be paid, or the part thereof as to which the judgment may be affirmed if it be affirmed only as to part, and all damages awarded against the appellant on appeal.

For this reason, I cannot agree with the order of my brother Clute, which should, I think, be set aside, with costs in any event to the defendants.

LATCHFORD, J.:—I agree in the result.

MIDDLETON, J.:—When the Court of Error and Appeal was established, the statute (12 Vict. ch. 63) contained provisions relating to appeals to Her Majesty in Her Privy Council; and sec. 46 provided for giving security for the costs of appeal, and that "upon the perfecting such security, execution shall be stayed in the original cause: provided always, that the provisions of the first, second, third, fourth and fifth provisoes in the fortieth clause of this Act contained, shall be in force and apply to the appeal hereby granted, and the completion of the security hereby required shall not have the effect of staying execution in the original cause, in the different cases excepted out of the said fortieth clause, unless the provisions in the said provisoes contained shall have been complied with."

Section 40 relates to the stay of execution on an appeal to the Court of Error and Appeal. The first of the provisoes is, that the perfecting of security for the future costs shall not operate as a stay of execution unless additional security is given for the amount ordered to be paid. The practice upon the appeal to the Privy Council remained upon this footing until after the Judicature Act.

In the revision of 1877, the statute had been changed in form, but not in substance. The general provision for a stay of execution upon giving security for costs was placed in a separate section, 51, and the proviso requiring security for the debt when money was ordered to be paid, was embodied in sec. 52.

In 1887, the language of the statute was changed. By R.S.O. ch. 41, sec. 3, the general provision that "upon the perfecting of such security" (*i.e.*, the security for the costs of the appeal) "execution in the original cause shall be stayed," was continued. Section 4 provided: "The practice applicable to staying execution upon appeals to the Court of Appeal shall apply to an appeal to Her Majesty in Her Privy Council." It was assumed in general practice that this made no change in the law, and that sec. 4 had the effect of retaining the old proviso as an exception to the general words of sec. 3. The proviso itself was removed from the statute, and became Con. Rule 804 of the revision of 1888.

In 1895, the experiment was tried of providing for one appeal and one appeal only, and giving the dissatisfied litigant the right to go either to a Divisional Court or the Court of Appeal, and as part of the scheme all security on an appeal to the Court of Appeal was abolished (58 Vict. ch. 12, sec. 77), unless specially ordered.

This system was found to be unsatisfactory; and in the revision of 1897 provision was made for security for costs on all

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appeals to the Court of Appeal; but, on this being given, execution for a money demand is stayed (Con. Rule 827).

By the statute relating to Privy Council appeals, R.S.O. 1897, ch. 48, sec. 3 remains unchanged, and sec. 4 assumes this form: "Subject to rules to be made by the Judges authorised to make rules with reference to the High Court and the Court of Appeal under the Judicature Act, the practice applicable to staying executions upon appeals to the Court of Appeal in force prior to 16th April, 1895, shall apply to an appeal to Her Majesty in Her Privy Council." This statute came into effect on the 31st December, 1897. The 16th April, 1895, was the date when 58 Vict. ch. 12 came into force.

The Con. Rules of 1897 were not Rules made by the Judges, but were Rules framed by a special commission appointed under 58 Vict. ch. 13, sec. 42; and, by 59 Vict. ch. 18, sec. 15, these Rules are given statutory effect.

These Con. Rules came into effect on the 1st September, 1897, four months before the revised statutes. In them a separate provision was made with reference to Privy Council appeals, and the Court of Appeal practice before 1895 was continued in Con. Rule 832 as applicable to Privy Council appeals, so that there was no conflict between the statute and the Rules, and the words "practice applicable to staying execution" received a statutory interpretation by Con. Rule 832.

No rules were ever made by the Judges under the statute.

By the statute of 1910 (10 Edw. VII. ch. 24) a change is made. Section 3 is modified. Execution is, upon the perfecting of security, to be stayed, "unless otherwise ordered." Section 4 is also changed: it becomes (as sec. 5): "Subject to rules to be made by the Judges of the Supreme Court, the practice applicable to staying executions upon appeals to the Court of Appeal shall apply to an appeal to His Majesty in His Privy Council." The Judges having made no rules, this statute is a clear provision that the present practice relating to the stay of execution on an appeal to the Court of Appeal shall govern, and not the old practice prior to 1895, referred to in the revision of 1897, and embalmed in Con. Rule 832.

It may be that the Judges have no power to cut down or modify the general provision, that, subject to such order as in the particular case may be deemed just, execution is to be stayed, and that no such general provision as Con. Rule 832 (*d*) would be valid. We are not now called on to interpret the expression "practice applicable to staying executions," as found in the Act of 1910. It may be found that it falls short of making Con. Rule 827 apply to Privy Council appeals.

The appeal should be allowed, and the execution should be set aside with costs to the defendant in any event of the appeal.

Appeal allowed.

[By a statute of 1912, the old practice has been restored.]

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Ontario High Court, Middleton, J. February 15, 1912.

1. JUDGMENT (§ II D 3—121)—ARREARS OF ALIMONY—REGISTRATION OF JUDGMENT—STATUTORY CHARGE.

Arrears of alimony due under a judgment which has been registered in the land registry office, pursuant to sec. 35 of the Ontario Judicature Act is a statutory charge upon the lands belonging to the husband, and may be enforced by a petition in the original action.

2. JUDICIAL SALE (§ II A—16)—FORM OF JUDGMENT—INCUMBRANCERS.

The judgment on an application to enforce the statutory lien created pursuant to section 35 of the Ontario Judicature Act in respect of an alimony judgment should provide for sale subject to prior incumbrancers unless the holders of these consent to sale free from their claims; subsequent incumbrancers must also be notified and allowed to prove their claims.

3. DIVORCE AND SEPARATION (§ V—46)—JUDICIAL SALE TO SATISFY ARREARS OF ALIMONY—WIFE'S DOWER.

On an application by a wife to enforce the statutory charge for arrears due on a judgment for alimony, an order will not be made for a sale of the lands free from her dower, nor to provide for payment to her of a lump sum in lieu of this right.

[*Forrester* v. *Forrester* (unreported) distinguished.]

4. COSTS (§ II—20)—ALIMONY ACTION—JUDGMENT — COSTS OF ENFORCING STATUTORY CHARGE.

In an action for alimony the plaintiff's costs up to judgment are an execution debt only, but where an application is made by way of petition for sale of the lands of the husband to enforce the statutory charge for arrears of alimony due under the judgment, the costs of such application and of the sale are to be paid in priority out of the fund realized by the sale.

PETITION by the plaintiff for an order for the sale of the defendant's lands to satisfy the plaintiff's judgment against the defendant for alimony.

The order was granted.

J. E. Jones, for the plaintiff.

G. H. Sedgwick, for the Bank of Toronto, execution creditors.

MIDDLETON, J.:—Judgment for payment of alimony was obtained in November, 1911; and no alimony has been paid.

The judgment was registered in due course, under sec. 35, O.J.A., and so had the statutory effect of "a charge by the defendant of a life annuity on his lands."

The charge may be enforced without separate action by a petition in the original cause.

The judgment or order should be in form similar to the judgment in an action to enforce a charge, and should provide for sale, subject to the claims of prior incumbrancers, unless such prior incumbrancers consent to a sale free from these claims. Subsequent incumbrancers must be notified and be allowed to prove their claims.

It is said that the incumbrances here are executions, some of which are prior and some subsequent to the plaintiff's charge.

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There may be some difficulty in adjusting the rights of these execution creditors, in view of the provisions of the Creditors' Relief Act for ratable distribution, and the intervening charge.

The applicant seeks to have the order provide for a sale free from her inchoate right of dower, and to provide for allowance to her of a lump sum in lieu of this right. I can find no warrant for this—and no indication that the point was considered in *Forrester* v. *Forrester* (unreported), cited in Mr. Holmested's book.

The Partition Act, R.S.O. 1897 ch. 123, sec. 49, has no application to this sale.

When the matter reaches the Master's office, if it appears that the executions exceed the value of the land, an arrangement may be made between the plaintiff and those concerned for the surrender of her dower right, but this must be a matter of arrangement.

Something was said upon the argument indicating that the plaintiff's counsel thought she would only take in competition with the creditors, ranking for the amount of past due alimony as an execution creditor. This view, if it exists, seems to me to require very careful reconsideration.

The plaintiff will have her costs of this motion and the sale out of the fund realised. Her costs up to judgment are an execution debt only.

Order granted.

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Mar. 21.

SMITH (plaintiff, appellant) v. NATIONAL TRUST CO., administrators of Beattie estate (defendants, respondents).

Supreme Court of Canada, Davies, Idington, Duff, Anglin and Brodeur, JJ. March 21, 1912.

1. ADVERSE POSSESSION (§ I E—22)—MORTGAGEE'S POSSESSION AGAINST MORTGAGOR—LAND UNDER TORRENS SYSTEM.

The title of a registered owner of land registered under the Torrens system or new system of registration in Manitoba is not extinguished by adverse possession of the land held by his mortgagee and persons claiming under him for the statutory period which by R.S.M., 1902, ch. 100, sec. 20, is applicable to lands not so registered.

[Compare sec. 29 of the Ontario Land Titles Act, 1 Geo. V. ch. 28; and see *Belize Estate* v. *Quilter*, [1897] A.C. 367.]

2. MORTGAGE (§ VI B—76)—CHARGE UNDER TORRENS REGISTRATION SYSTEM —STATUTORY RIGHTS—SPECIAL ADDITIONAL POWER OF SALE.

While at common law the rights and powers of a mortgagee of land are incident to the legal or equitable estate vested in him as mortgagee, the statutory mortgage under the Torrens or "New System" registry law in Manitoba, R.S.M. 1902, ch. 148, does not vest any estate in the lands in the mortgagee, but takes effect as a security only, with statutory powers for enforcement; the mortgagee's rights and powers are consequently dependent directly upon the statutory provisions, and any additional stipulations in a mortgage made under that statute, which purport to authorize the mortgagee or his assigns to sell the lands, are not effective to pass the registered title merely on a transfer by the mortgagee in purported exercise of the conventional power of sale without the judgment of a Court or the compliance with the statutory proceedings for enforcing the security.

[*Smith* v. *National Trust Co.*, 20 Man. R. 522, affirmed.]

3. LAND TITLES (TORRENS SYSTEM) (§ III—30)—TRANSFER ONLY AS STATUTE PERMITS.

Where real property is mortgaged by an instrument executed in accordance with the Real Property Act, R.S.M. 1902, ch. 148, known as the Torrens or "New System" registry law it can be transferred by the mortgagee to a purchaser from him only in the manner prescribed by statute.

[*National Bank of Australia* v. *United Hand-in-Hand Co.*, 4 A.C. 391, applied; *Greig* v. *Watson*, 7 V.L.R. 79, specially referred to.]

4. LAND TITLES (TORRENS SYSTEM) (§ III—30)—STATUTORY FORM—VARIATION.

Mortgages of land which is subject to the Torrens or "New System" form of registration in the Province of Manitoba are permitted only in the form specified by the registration statute (the Real Property Act, R.S.M. 1902, ch. 148), and the direction in the statutory form which permits of "special covenants" being added thereto is insufficient to cover an added power of sale or other stipulation whereby the mortgagor authorizes the mortgagee to execute an assurance or transfer of the mortgaged property and extinguish the mortgagor's title thereto; such a power of sale or stipulation is not in strictness a "covenant" even if framed as a covenant, and is not within the scope of the statutory form or consistent with the statutory provisions.

5. MORTGAGE (§ VI B—76)—STATUTORY FORM—SPECIAL COVENANTS.

The "special covenants" which may be introduced into a statutory mortgage under the Torrens or "New System" title registration (the Real Property Act, R.S.M. 1902, ch. 148), must not be such as are repugnant to the imperative provisions of the statute itself.

APPEAL from the decision of the Court of Appeal for Manitoba, delivered on 10th April, 1911, reversing the judgment of Metcalfe, J., in favour of the plaintiff and dismissing the action.

The judgment appealed from, *Smith* v. *National Trust Co.*, 20 Man. R. 522, 17 W.L.R. 354, was affirmed by a majority of the Court, DAVIES, DUFF, and BRODEUR, JJ.

J. B. Coyne, for appellant.

Messrs. *C. P. Wilson*, K.C., and *A. C. Galt*, K.C., for respondents.

DAVIES, J., agreed with DUFF, J.

IDINGTON, J. (dissenting):—In December, 1892, one Beattie mortgaged land in Manitoba to mortgagees whose assignees exercising a power of sale therein on default sold the lands to appellant by a written agreement dated 10th of June, 1901, and followed that by a deed of 24th November, 1908, which purported to transfer said lands pursuant to said sale to appellants. The mortgagees had taken possession some six years before the said sale. Prior to all these transactions the land had been brought under the Torrens system of registration, and so continued. The registrar refused to register the above mentioned deed of transfer on the ground that the steps required by the Real Property Act, R.S.M. 1902, ch. 148, as amended, for selling under mortgage had not been taken.

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The issue is thus broadly raised that mortgagor and mortgagee of land brought under said system cannot usefully contract with each other for any power of sale. With great respect such is the logical result of the reasoning proceeded on by the learned Chief Justice and Mr. Justice Perdue in the Court of Appeal, the former pointing to the question of possession which he seems to hold cannot be contracted for but must depend on the terms of the Act, and the latter, that as the instrument in question is under the Act, failure to comply with the mode of sale provided thereby is fatal to the sale now in question.

Counsel for respondent properly accepts this as the result for which he argues.

Mr. Justice Richards, if I understand him aright, does not go so far but rather relies on the construction he gives the power of sale here in question.

The power of sale relied upon here is as follows:—

> It is also covenanted between me and the said mortgagees that if I shall make default in payment of the said principal sum and interest thereon, or any part thereof at any of the before appointed times, then the said mortgagees shall have the right and power and I do hereby covenant with the said mortgagees for such purpose and do grant to the said mortgagees full license and authority for such purpose when and so often as in their discretion they shall think fit to enter into possession either by themselves or their agent, of the said lands, and to collect the rents and profits thereof, or to make any demise or lease of the said lands, or any part thereof for such terms, periods, and at such rent as they shall think proper, or to sell the said lands and such entry, demise or lease shall operate as a termination of the tenancy hereinbefore mentioned without any notice being required, and that the power of sale herein embodied and contained may be exercised either before or after and subject to such demise or lease. Provided that any sale made under the powers herein may be for cash or upon credit or partly for cash and partly for credit and that the said mortgagees may vary or rescind any contract for sale made or entered into by virtue hereof.

By a preceding clause the mortgagor had attorned to the mortgagee. If we bear in mind that the main purpose of the exemplars of this Act was, if at all possible, to relegate forever to the juristic lumber-room so many conceptions that had long dominated the ordinary mind of the lawyer as to frustrate the execution of the purposes of men in their dealings with each other, we will be better able to understand and apply the Act and give effect to it in its proper sphere.

That sphere is not to limit the powers of contracting in relation to real estate. It is, in the language of the recital the earliest one, the Land Registry Act, 1862—

> To give certainty to the title to real estates and to facilitate the proof thereof and also to render the dealings with land more simple and economical.

And this is the keynote of all like legislation. But it by no means covers the registration of all such contracts.

What we have first to do is throw away some preconceived notions of what a mortgage must be, and apply the common sense of the ordinary man knowing none of these things, but knowing that a mortgage is as section 100 of the Act seeks to constitute it and section 1 interprets it.

Section 100, Land Registry Act (Imp.), 1862, 25 and 26 Viet. ch. 53 and 59, reads as follows:—

> 100. A mortgage or an incumbrance under the new system shall have effect as security, but shall not operate as a transfer of land thereby charged, or of any estate or interest therein.

Then the interpretation section 2, sub-section (*d*) is as follows:—

> (*d*) The expression "mortgage" means and includes any charge on land created for securing a debt or loan or any hypothecation of such charge.

Again let us look at the definition of "mortgagor" in same section, sub-section (*f*):—

> (*f*) The expression "mortgagor" means and includes the owner of land or of any estate or interest in land pledged as security for a debt.

The preceding sub-section interprets "mortgagee" to mean "the owner of a mortgage registered under this Act."

A good deal has been said in argument here as well as in text books to raise puzzling questions which the above quoted sections give rise to. Most of them are beside the questions we have to resolve.

The mortgagees were in this case given their power of sale by the very instrument of mortgage registered and notwithstanding the length at which I will out of respect to the argument put forward deal with this case, I have never had but one opinion relative to this phase of the matter. It is this, that the registration was not only a registration of the charge of the statutory character defined by the sections I quote, but of that charge coupled with this power, and this latter became of the very essence of the transaction, duly recognized by the officers on whom was cast, by section 83 of the Act, the duty to pass upon and if need be reject what is not within the provisions of the Act, and also became part and parcel of that claim which the mortgagees tendered and had irrevocably placed on record and is for that reason a part of that to which the mortgagee thereof acquired an indefeasible title.

I have never been able to see, notwithstanding the argument well presented, how it could be cut down to mean something else than the plain language imports.

It was a power to sell. To sell what? I answer, all the interest the mortgagor had in these lands; nothing less, nothing more. And once thus properly sold and conveyed by virtue of

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ordinary common law principles being applied, as well as the recognition thereof given by the Act, the title of the mortgagor disappeared and became rightfully that of the appellant. An estate in fee simple being what the mortgagor had, and the mortgagee was given power to sell, passed thereby as effectually as if the mortgagor had executed the deed himself.

The mortgage as registered being a charge and power, there cannot be any difficulty, to my mind, any more than if the power had been (what it is not) a simple power of attorney authorizing a sale and the execution of a conveyance in the name of the mortgagor as vendor. Indeed a learned writer suggests this latter method as a means of overcoming another difficulty he sees in one of the English Acts of a similar character.

The conclusion to which I have referred, that no power of sale can be contracted for, finds no countenance in the grammatical language of the Act. There is not a line therein that specifically prohibits an "owner" or a "registered owner" from conveying and contracting relative to his land as he may see fit or to render null such conveyances or contracts as he may have made.

The language of section 115 at first blush might suggest that the duty of the officers under the Act is absolutely to ignore any proceedings of foreclosure or sale unless the mortgagee had filed a certificate of *lis pendens* or notice in the land titles office. Counsel did not seem to rely on this. I think him well advised in that regard. It is only intended to relieve the officers from being bound to take notice of such proceedings as they may progress elsewhere. That is an entirely different thing from dealing with the title the proceedings when completed may result in vesting in the mortgagee, or those claiming under him; when so completed as to shew that the registered title has passed from the registered owner to the mortgagee or purchaser from him, executing a power of sale, and no other conveyance of interest or notice thereof, or of other claim has intervened, the registrar is as much bound to take it up and record it as if presented with a direct conveyance given in the Act to transfer from owner to purchaser. And much less does there appear any prohibition against the resort to statutory or other powers to transfer title.

The mortgagee proceeding outside the Act, as Cozens-Hardy, L.J., puts the matter in another aspect of the Land Transfer Act, 1897, section 20, in the case of *The Capital and Counties Bank* v. *Rhodes*, [1903] 1 Ch. 631, at page 656 at foot and top of 657, may be unwise in running the risk of some intervention instead of proceeding under the Act, and the Act may thus furnish a sort of indirect compulsion to use the Act's provisions.

A new statutory remedy never takes away the old unless the new is given in substitution of the old or henceforth prohibits either expressly or by necessary implication those concerned from resorting to the old mode of relief. The new Act may by its scope and provisions demonstrate such an inconsistency between the old and the new as to lead to the conclusion that the old remedy has been abrogated. I infer from the scope and purpose as well as the terms of this Act that there can be no such necessary conflict or inconsistency between the rights and remedies existent before the Act and its enactments as to drive us to the conclusion that this Act must be accepted not only as a registry Act designed to protect purchasers, but as one designed to limit the powers of contract in relation to interests in, or power over, real estate.

The Act itself by its very terms in section 70, sub-sec. (*j*), and section 126, demonstrates that this latter purpose was not within its purview.

Section 70 excludes specifically those numerous subjects of claim named, and as to sub-section (*j*) clearly anticipates future caveats, and on what can such caveats rest? I answer on any legal or equitable right enforceable against him getting the certificate.

Again section 126 is as follows:—

> Nothing contained in this Act shall take away or affect the jurisdiction of any competent Court on the ground of fraud, or over contracts for the sale or other disposition of land, or other equitable interest therein, or over mortgages, nor shall anything contained in this Act affect the right of the mortgagee to foreclose or sell through any competent Court, which right it is hereby declared may be exercised in such Court.

The sale in this case was made but only took its effective form by a conveyance some two years after the Act had stood amended as quoted. It is therefore to be tested by the Act as amended in latter part of the section.

How can it be said in face thereof that it is not competent for the Court to declare the rights of these parties and that declaration bind the registrar to register?

Again let us look at the language of the section 108, which expressly declares the *first mortgagee*—

> Shall . . . have the same rights and remedies at law and in equity as . . . if the legal estate in the land . . . had been actually vested in him . . .

What does it mean by "rights and remedies at law and in equity" if the usual remedy of executing a power of sale or of foreclosure, for example, be not respectively such? If it had used less comprehensive language we might have supposed or imagined from the resemblance the form of security given by the statute bears to a hypothec in civil law, it is to be implied

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that some judicial proceedings to enforce it must be resorted to as required under that system of law as usually developed in modern times. To simplify and clarify the register is the purpose of this form of mortgage and to supplement that record by this and other sections of the statute and thus give efficiency and practical utility thereto, is the plan or scheme provided.

Then section 109 which is the basis of the procedure given by the Act for sale or foreclosure is as clearly permissive as can be.

Counsel cited us authority to shew that "may" in certain cases imposing a duty on a public officer to act, must be read in an imperative sense. But there is no duty cast by this section on the officer. It is merely a permissive step for the mortgagee to take as preliminary to and laying the foundation for the proceedings in the subsequent sections where "may" is possible of the construction claimed. But the initial step, the right of election, lies in the mortgagee alone to invoke these powers of the later sections and is entirely permissive. If the draftsman had any such notions as are now claimed to have governed him, he erred in thus beginning.

This is a mortgage where if the power is good no notice was required. We are therefore not concerned with the case, respecting which I express no opinion, of power conditional on a notice to be given and which once given it may be argued is imperatively required to be filed in the land office. The power of sale herein is one that does not require notice.

I am not concerned with the bearing of the expression "without notice" in this power, for if notice is not required by the terms of a bare power it becomes operative on the events happening that are stipulated for as preliminary to its execution.

I am unable to reconcile the proviso at the end of section 110 with the contention set up that there cannot be a power of sale included in a registered mortgage.

Again the form of mortgage given by this Act leaves a space for covenants such as parties may agree upon and I would suppose it was intended to enable the parties to insert their agreed on terms and conditions of any kind not clearly inconsistent with the Act. Not only does the Act fail to furnish ground for holding its provisions prohibitive of or inconsistent with the existence of a contractual power of sale but the history of the law in regard to concurrent remedies for sale in the case of mortgages demonstrates them as existent both outside of such Acts as this and in harmony with the workings of such Acts.

Though foreclosure of mortgages by the Court had existed for centuries, it was not until 1852, when by 15 and 16 Vict. ch. 86, section 48, an almost universal power of sale to en-

force mortgages was conferred upon the Court. The power had, as the result of the settled jurisprudence of that Court, been before that enactment confined to a limited number of specific instances which are set forth by Story in par. 1026, page 207, 8th ed. of his work on Equity Jurisprudence.

The Court had half a century or more preceding this enactment reluctantly recognized as settled law that a power of sale might be agreed upon by the parties to the mortgage, and inserted therein, and when exercised honestly and in conformity with the terms of the power, the Court could not interfere.

The arguments presented to us now as to clogging thereby the right of redemption and ousting or discarding the sacred powers and jurisdiction of that Court, were no doubt ably presented and weighed for a long time before such an innovation could be conceded as possible.

The conferring by statute upon the Court the ample powers of sale I have adverted to, never seems to have been so thought of by anyone as to constitute that a substitution for the contractual power of sale so long recognised. Yet I venture to think it might as logically have been contended for as is the position taken here.

The Cranworth Act, 23 and 24 Vict. ch. 145, section 11, as to trustees and mortgagees, some nine years later enabled the person to whom money secured or charged by a deed (as in the given terms is specified) was payable or his executors or administrators to sell. Has anyone ever conceived the idea that this new statutory power was so inconsistent with the powers of sale given the Court of Chancery as above or the usual contractual powers of sale that one or the other of these powers were superseded?

This Act formed part of the law of England presumably introduced into Manitoba by, if not previous to, the declaratory Act of its own legislature, 38 Vict. ch. 12, which directs—

> The Court to recognise and be bound by the laws existing or established and being in England, as such were existing and stood, on the 15th of July, 1870, so far as the same can be made applicable to matters relating to property and civil rights in this Province.

The terms of the Cranworth Act exclude the application of its powers from having any direct bearing on this case; but it is not in force in Manitoba. Can there be a doubt of its having been introduced and in force when the Torrens system was introduced? Did anyone ever suppose it was (if so introduced) in conflict with the then existing powers of the provincial Courts or contractual powers as to affect them? And can the Real Property Act, passed later be held to be so inconsistent with it as to repeal it?

Then we have in England the first indefeasible registration Act, 25 and 26 Vict. chs. 53-59, called by some as I have above,

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the Land Registry Act, 1862, brought forward by Lord Westbury and so named hereafter as his Act. Some lands were brought under that system and the registered owner thereof mortgaged them and later gave two subsequent mortgages. On default the first mortgagee acting upon the power given by the Cranworth Act, which was the earlier Act, sold and his purchaser applied for registration as appellant did here, and was refused. Thereupon he appealed, and the appeal having been heard by Lord Romilly, M.R., he directed registration. See *In re Richardson*, L.R. 12 Eq. 398. The registrar submitted but would not put the record so as to cut out the subsequent mortgages because of the restricted terms of the order, and again Lord Romilly was applied to, *In re Richadrson*, L. R. 13 Eq. 142, and he amended the order so that the purchaser got the indefeasible title the mortgagor had when he gave the first mortgage. The same learned Judge in *Re Winter*, L.R. 15 Eq. 156, made an order resting upon similar views of that Act.

These cases are all instructive and the *Richardson* ones specially so when we consider the fact that Lord Romilly was two years before the first decision chairman of a royal commission to consider the Westbury Act. The two first-named cases are not very fully reported. We have to rely on the statement of counsel for the source or character of the power there in question. The mortgage seems clearly to have been conformable to the Act the power was exercised by virtue of the Cranworth Act.

Let it be noticed first that the learned Master of the Rolls states "a first mortgagee sells under a power of sale to a purchaser" and next shews the existing subsequent mortgages on the register. He then points out that the purchaser has nothing to do with the application of the purchase money, which is the statutory protection given him, as is given by section 111 of the Act here in question. He then proceeds:—

> The registrar appears to think that there would be some inconsistency in registering the purchaser with an indefeasible title while the subsequent mortgages remain on the register; but I do not think that there is any inconsistency. The subsequent mortgagees have no claim against the land. They are entitled to be paid out of the surplus which remains after satisfying the first mortgage; but the purchaser has nothing to do with that; his title is perfectly good, and he is entitled to be registered as indefeasible owner.

Reading this I find much light shed on the peculiar form of mortgage given in the Act here and there which seemed such a puzzle to the Court below and on argument here. Its purpose in each case was to create a charge without passing the legal estate and thus relieve from such puzzles.

The Westbury Act of 1862 expressly permitted the use

either of the statutory form or the old form of a deed to create a mortgage, and hence this cannot be said to be a case decisive of the exact questions here. It is as a practical illustration of how the old and the new can be made to harmonize in a more complicated situation than the Real Property Act in question here may produce, that these decisions on that Act are instructive and thus demonstrate that it cannot be maintained there is any such necessary conflict or inconsistency as to drive us to hold that the power to contract for a power of sale has been abrogated and, as argued, can no longer exist.

The Land Transfer Act of 1875, amended in 1897, is much ampler in its provisions than the Manitoba Act, and has in it many provisions that suggest exclusiveness of contract, yet in the *Capital and Counties Bank* v. *Rhodes*, [1903] 1 Ch. 631, at 653 to 658, the possibility of working out such an Act is found to be quite consistent with the conveyancing powers outside its provisions being exercised.

It is true sec. 49 of that Act makes a reservation to remove any doubt on the subject, and hence the judgment in that case cannot govern this case. But like the cases cited above, it demonstrates how far men may go in dealing with land brought under the Act without resorting to the provisions of the Act and yet no necessity be found for holding them, as contended for here, exclusive.

Weymouth v. *Davis*, [1908] 2 Ch. 169, is another illustration. Here the land was on the register, and the possessory title appeared in a man who executed a charge in the form prescribed by the Act but to save expense did not register it, but registered a notice of deposit of the certificate; and those things were all done after having taken a mortgage deed. The mortgagee foreclosed the latter, and on getting his final order of foreclosure and for possession, sought, though no reference had been made to the formal charge in such proceedings, to have his order of foreclosure registered, and on refusal of the registrar, an application was made to Swinfen Eady, J., who ordered the rectification of the register as desired.

Stevens v. *Theatres, Limited*, [1903] 1 Ch. 857, may be referred to as a case where the question of inconsistency between the exercise of the power of sale and foreclosure proceedings at the same time is discussed. However much the power of the Court to interfere may exist yet the power of sale is held not extinguished by any mere inconsistency so as to defeat a purchaser's title under the power of sale.

I may also observe that in some jurisdictions the Courts have passed orders to deprive mortgagees pressing all their remedies of ejectment, foreclosure, power of sale and action on the covenant at the same time, and I think statutory enactments exist to put them to their election in such cases. Such rules

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of Court or statutes rather affirm than controvert the proposition that *prima facie* they are in law not inconsistent.

In the case of *Cruikshank* v. *Duffin*, L.R. 13 Eq. 555, raising the question of the power of an executor enabled to mortgage, to give a power of sale in the mortgage, it was held he could. It was treated by the Court then as a necessary incident of the power. See also *Russell* v. *Plaice*, 18 Beav. 21.

The reasoning upon which the judgment in the case of *Belize* v. *Quilter*, [1897] A.C. 367, proceeds, may also be well borne in mind in this connection, as demonstrating that an Act such as the Real Property Act is not to be taken as an exclusive code relative to the rights men acquire in real estate.

Questions were suggested in argument as to a power of sale in an instrument merely charging the property, and suggestions were made as to the mortgagees not having the legal estate. In the first place without needlessly going here deeply into the question of the legal estate, I may refer the curious to the work of Mr. Hogg on Australian Ownership, part 3, ch. 2, section 2 thereof. The ascertainment of where the legal estate may, in any given case, be, under such a system as the Real Property Act creates, is there fully discussed. I may also, to relieve those troubled about what seems to me vain imaginings relative to the legal estate, again refer to section 108, quoted from above. I need not dwell upon the subject in the view I take of the power in question here.

The English Conveyancing Act, 1881, section 21, sub-section 4, provided that the power of sale conferred by that Act may be exercised by any person for the time being entitled to give and receive a discharge for the mortgage money.

It is equally competent I think for the contracting parties to provide a like power fully as efficient.

In the case of *In re Rumney and Smith*, [1897] 2 Ch. 351, it was contended the power of sale there in question could be executed by the party entitled to receive the money, but Stirling, J., held they could not in that case and referred to the law as follows:—

> I am asked to hold that the power of sale contained in the mortgage deed is a mere security for the debt, and is exercisable in the absence of any contrary intention by any person who in equity can give a receipt for the mortgage money. I am far from saying that that would not be a reasonable state of the law, but the question is whether it is the present state of the law. In carefully drawn mortgages there is usually found a clause enabling anyone who in equity can give a receipt for the mortgage debt to exercise the power of sale; but no such clause is found in the mortgage before me.

In considering this case in appeal Chitty, L.J., says, page 360:—

> We have now become so accustomed by virtue of improved conveyancing, and by reason of the statutes, to find a power of sale in a

mortgage accompanying the debt, that there is a danger of assuming that as part of the general law. No doubt the statutes made it quite plain, and all the conveyances in years past made it perfectly plain.

I take it there can be no doubt of this and it all comes back to the proper construction of the power of sale herein. The Act manifestly gives a power of sale which extends to and covers the legal estate or rather whatever estate the mortgagor may have. That is independent of any special power such as this in question. The power in question expressly given by the instrument does not depend on the Real Property Act for its efficiency or execution but must depend upon the intention of the parties so expressed.

A common law power does not need any technical language to give it force. The question always is whether it can be construed as giving the power. And repeating what I have already said there can be no doubt of the meaning and intent of the parties to this power as to what it was to enable the doing of. Of course a power to operate by virtue of the Statute of Uses or in execution of some trust must, though needing no peculiar language to create it, be so expressed, as to shew its conformity to what such statute or trust may require.

Finding neither warrant in the statute nor in the principle of law applicable thereto for precluding mortgagees from stipulating for a power of sale in or collateral to a mortgage given on land brought under the Torrens system and the sale in question duly made under the mortgage in question I need not enter into the enquiry as to the effect of section 75 relative to the bearing of the Statutes of Limitations invoked in favour of appellant.

This appeal should be allowed with costs throughout.

I may observe that notwithstanding the profuse quotations from the opinions expressed here in disposing of the case of *Williams* v. *Box*, 44 Can. S.C.R. 1, I fail to see the bearing of that case or what was said therein on this.

That was a case of a mortgagee resorting to this statute to enforce his rights of sale and foreclosure seeking to set up his proceedings, which did not conform to the statute he chose to proceed under, to deprive the mortgagor of his property. That case involved the examination of the judicial powers in that regard as contained in the Act. This case apart from the collateral questions incidentally arising, involves merely questions of conveyancing. In turning to the report of that case I find it of the illuminating kind which contains neither full statement of fact nor argument, and hence apt to be misleading.

Since writing the foregoing the information has been given the Court that section 110 was not in force till after the date of contract of sale, but in my view the fact does not alter though it may emphasize what I have already said.

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DUFF, J.:—The action out of which this appeal arises was brought by the appellant against the respondents, the National Trust Company, as the administrator of the estate of one James Beattie, deceased, claiming a declaration that an "estate in fee simple" in certain lands—the property in dispute—became vested in him by virtue of a certain transfer to him executed by the Canada Permanent Corporation. James Beattie was in his lifetime the registered owner of the lands in question which were registered under the "New System" established and governed by an Act of the Manitoba Legislature originally passed in 1885, and now known as the Real Property Act. In 1892 the property was mortgaged by Beattie as registered owner in favour of the Freehold Loan and Savings Co., to secure the repayment of a loan and the mortgage (with all the incidental rights and powers of the mortgagees) was subsequently acquired by the Canada Permanent Corporation. The transfer by the last-mentioned company is said according to the contention of the appellant to have effectually transferred to him an estate in fee simple in this property on one of two grounds: 1st, That the company had acquired a title by possession, and 2nd, that the legal authority to convey such an estate was vested in the company by a certain power of sale which was contained in the mortgage executed by Beattie and which according to its terms was exercisable by the mortgagees and their assigns. As to the first of these grounds I may say at once that section 75 of the Real Property Act in my opinion makes it untenable, and I am quite content to rest that view upon the reasons in support of it which have been given by the learned Judges in the Court of Appeal for Manitoba. The second contention raises questions of considerable importance which have been very ably discussed by counsel, and deserve a more particular examination. These questions turn primarily upon the effect of the legislative provisions which govern the transactions in dispute. It was assumed on the argument that it was only necessary to consider the Act of 1900 which was in force at the time of the attempted sale. I think it is immaterial in the result whether we confine our attention to the provisions of that Act or consider also the provisions of the enactments in force in December, 1892, when the mortgage was executed. I shall first discuss the effect of these latter provisions, which are to be found in the Real Property Act of 1891 as amended in April, 1892.

The mortgage in question is in the form prescribed by the Act and was admittedly intended to take effect under its provisions. By those provisions a statutory power of sale is an incident of every registered mortgage. It was not disputed on the oral argument before us that the transfer in question cannot be sustained as an exercise of this statutory power; but it was

contended that a special agreement contained in the mortgage conferred on the transferors a conventional power of sale exercisable independently of the provisions of the statute. In considering this contention it is necessary to examine the constitution and characteristics of a mortgage under the Act.

By the provisions of the Real Property Act the owner of an estate in fee simple in land having applied to register his title under the system established by the Act called the "new system" and having complied with the statutory requirements leading to registration becomes entitled to a certificate called the "Certificate of Title" which declares him to be the owner of an estate in fee simple in the land of which he is the proprietor. This certificate is bound in a book called the register, and a duplicate of it is delivered to the owner. Thenceforward the certificate not only evidences but constitutes the owner's title. Title to the land to which it relates can be effected only as the Act permits, and by an instrument registered as the Act provides. The purpose of the Act was to simplify and cheapen the transfer and the encumbering of and to give security of title to the owners of lands and interests therein; and broadly speaking the scheme devised is that title is acquired by registration in this register which contains the various certificates of title, each of which shews the interest of the registered proprietor and the encumbrances to which it is subject.

The mortgage contemplated and provided for by the Act is a real security which primarily derives its efficacy as a security of that character from the statute itself. Section 99 is explicit, that a registered owner intending to charge or to create a security upon land by way of mortgage (which by the interpretation clause includes "any charge on land created for securing a debt or loan") shall "execute a memorandum of mortgage in the form contained in schedule D, or to the like effect"; and by sec. 83 no instrument is to be "effectual . . . to render" any land under the "new system" liable as security for the payment of money or against any *bona fide* transferee of such land until such instrument be registered in accordance with the Act. The registered owner can charge his land in such a way as to bind the registered title only by the execution and registration of a memorandum in the prescribed form. It is quite clear, moreover, that the registration of a mortgage under the Act is not intended to vest in the mortgagee any registered "interest" in the mortgagor's land as that term is used in the Act. By section 100 it is declared that "a mortgage . . . shall have effect as security but shall not operate as a transfer of the land thereby charged," and in 1900 this section was amended by adding the words "of an estate or interest therein." The amendment only had the effect

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however of making unmistakable the real operation of such a security under law as it stood before the amendment was passed. That such was the effect of the statute appears readily enough when we compare and contrast the provisions relating to the transfer and registration of any interest less than full ownership and compare them with the provisions relating to the creation and registration of mortgages. The Act does not (in a word) treat the mortgage authorized by it as an instrument immediately effecting any dismemberment of the mortgagor's registered title. The operation of the statute is rather this: when a registered owner wishes to charge his registered title as security for a debt, he is to execute an instrument by which he declares that he "mortgages" his land and that instrument being registered the mortgagee becomes invested with such rights in respect of the possession of the land and its profits and the registered title becomes (for the benefit of the mortgagee) subject to such powers of disposition as the statute expressly or by implication declares. It is in these rights and powers that the virtue of the mortgage as a real security consists; and it is consequently to the statute that we must primarily resort to ascertain what are the rights and powers incidental to such a security.

It is argued that the view thus stated is too narrow; and another view is put forward, which is this: that the mortgage authorised by the Act is to be regarded as having annexed to it all the legal incidents which by law belong to a mortgage at common law and as being capable of having annexed to it by contract all the incidents which may by contract be annexed to a mortgage at common law in so far as such incidents are not expressly or by necessary implication excluded. I think in either view the practical result of this appeal must be the same; but I must say that it seems to me to be an artificial and unnatural reading of the statute to regard the mortgage contemplated by it as primarily a common law mortgage, and I think that in adopting such a reading one incurs some risk of losing the point of view from which the legislator envisaged the problem to which he was addressing himself. There is much in the Act to indicate an intention on the part of its authors that under the statutory mortgage the powers and rights of the mortgagee should in substance be economically equivalent to those possessed by a mortgagee under a common law mortgage; yet juridically considered there is—as I have indicated—this essential difference between the two instruments, viz., that at common law the rights and powers of the mortgagee as such in respect of the mortgaged property are rights and powers which are incidental to the legal or equitable estate vested in him as mortgagee while under the statutory instrument the rights and powers of the mortgagee do not and

cannot take their efficacy from any such estate because none is vested in him and his rights and powers must consequently rest directly upon the provisions of the statute itself.

This view of course does not involve the consequence that the mortgagee's rights are those only which the statute expressly gives him. It is obvious that many things are left to implication; and where in any particular case it appears that the rules governing reciprocal rights of the mortgagor and mortgagee under the mortgage contract in relation to the mortgaged property are left to implication then it is a question to be determined upon an examination of the statute as a whole how far the rights of the parties are to be governed by the rules of law which, apart from the statute, are applicable as between mortgagor and mortgagee.

It is to be premised generally that the statute nowhere countenances the idea that a registered owner can except under the authority of some specific provision of the Act by instrument *inter vivos* confer upon another the power to defeat or override his title by transferring a registered title to his property without constituting the donee of the power his agent for that purpose and without transferring any interest to the donee himself. It is probably needless to repeat what was said upon the argument that at common law an attempt by an owner of the legal estate in fee simple in land to endow by an instrument *inter vivos* a third person having no estate or interest legal or equitable in the land with power to vest an estate of freehold in another must in the absence of an assurance to uses or a trust express or implied utterly fail for reasons of the most elementary and obvious character; and there is nothing expressly or impliedly abrogating this general rule. There is nothing in a word to indicate any intention on the part of the legislature to declare or recognize any such general principle as that a licensee under a bare license to sell or convey land registered under the new system given *inter vivos* may validly transfer a title to such land otherwise than as agent of the registered owner. On the contrary the Act expressly forbids the registration of any "instrument" purporting to transfer or otherwise deal with or affect land under the new system except in the manner herein provided for registration under the new system nor unless such instrument be in accordance with the provisions of this Act as applicable to the "new system." The provision dealing with the transfer *inter vivos* generally (sec. 78) authorizes transfer only by the registered owner. Cases in which it is intended that such a power of disposition should be vested in other than the registered owner in consequence of some act *inter vivos* seem to have been carefully considered and specifically provided for.

All this, of course, has no reference to powers arising out of

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testamentary instruments. These stand, as everybody knows, upon another footing, and the rules governing the exercise of them have, of course, no relevancy whatever to any question we are concerned with on this appeal.

The statute contains express provisions conferring powers on the mortgagee to defeat the mortgagor's title by causing a title to vest in a purchaser through proceedings outside the registry (analogous to proceedings under a conventional power of sale in a common law mortgage) as well as by proceedings in the registry. There is nothing in the Act, however, indicating any intention to recognise the exercise of powers in that behalf by the mortgagee in addition to and independently of those conferred by these statutory provisions. On the contrary an examination of the legislation in the light of its history seems to shew that the legislature was dealing exhaustively with the powers of the statutory mortgagee to defeat the mortgagor's registered title in the express enactments relating to that subject and that in this respect nothing has been left to implication. I am not for the present considering the effect of an agreement introduced into a statutory mortgage as giving rise to equities between the mortgagee and mortgagor affecting the land in the mortgagor's hands; that I postpone for the present. I wish to examine the legislation with a view to ascertaining whether there is fair ground for an inference that by means of a conventional power introduced into a statutory mortgage, the mortgagee may be endowed with a power of divesting the mortgagor of his registered title by causing a registered title to the mortgaged property to be vested in a purchaser without the intervention of a Court of equity and without taking advantage of the machinery expressly provided by the statute for that purpose.

The system of title by registration was introduced into Manitoba, as I have mentioned, by an Act of the Manitoba legislature passed in 1885. The system had then for some years been in force in some of the Australian colonies and on the subject of mortgages the provisions of the Manitoba Act (with one significant exception) appear to be in substance those then in force in Victoria as will be seen by a reference to Mr. Hogg's invaluable book "The Australian Torrens System."

These provisions of the Victorian statute had been the subject of consideration by the Courts in that Colony as well as by the Privy Council; it is quite clear that judicial opinion was unanimously in favour of regarding these sections as providing the only means by which the mortgagee could extinguish the mortgagor's title. In *The National Bank of Australia* v. *The United Hand-in-Hand and Band of Hope Co.*, 4 A.C. 405 and 406, Sir James W. Colville, in delivering the judgment of the Judicial Council said:—

The company was the registered owner of the mine under the provisions of the Transfer of Land Statute, and the mortgage was made under and subject to the provisions of the 83rd and following sections of that Act, and was duly registered thereunder. The instrument itself is in the form set forth in the 12th schedule to the Act, except that it contains, as that form permits, a special covenant or agreement, which will be hereinafter considered. Hence the only way in which the mortgagee could extinguish the rights of the mortgagor in the mine was by foreclosure, under 31 Vict. No. 317 (of which there is no question here), or by a sale under the 84th, 85th and 87th sections of the Transfer of Land Act.

To the same effect is the decision of the Chief Justice of Victoria in *Greig* v. *Watson*, 7 V.L.R. 79, pronounced in 1881. I think it cannot be presumed that the Manitoba Act was framed in ignorance of these authoritative pronouncements upon the effect of the legislation that Province was adopting in a matter so deeply important as the rights of a mortgagee in respect of the foreclosure or sale of the mortgaged property. Yet nothing was introduced into the Act of 1885 to negative such a construction; and the only provision of the Victoria statute affording by its terms any plausible support to the appellant's view, a provision which afterwards (in 1900) was introduced into the Manitoba Act and which was largely relied on by the appellant in this connection was left out of the Manitoba Act of 1885. The fair inference appears to be that the view of the effect of the Victoria statute expressed by the Privy Council was that which the framers of the Act of 1885 deliberately adopted; and the provisions of the Act as a whole strongly support this conclusion. The form of mortgage prescribed by sec. 99 contains a direction permitting the introduction of special covenants. There is no suggestion of conventional powers. That circumstance is in my judgment not without significance. It is quite true that a power of sale might be expressed in the form of a covenant but if it is to confer upon the mortgagee the authority to execute an assurance of the mortgaged property and extinguish the mortgagor's title it is in substance much more than a covenant.

The provisions of the Act shew that the distinction which lawyers understand between a power to deal with property in such a way as directly and immediately to effect the title to it and a mere personal obligation was not overlooked by the authors of the Act and in the form referred to the word "covenant" appears to be employed in this its usual sense. The Act again permits mortgages only in the specified form (secs. 83 and 99), and declares this form to be a part of the Act (secs. 3 and 4). If the intention had been to permit the introduction of an agreement authorising the mortgagee to deal with the title in a manner which the Act itself not only does not provide for but which would appear to do violence to some of its ex-

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press provisions, I think, in view of these stringent provisions we might have expected something more explicit than a direction authorising the introduction of "special covenants." Then there is no provision for the registration of a transfer executed by a mortgagee under such a power. The Act, as I have pointed out, forbids the registrar to "register any instrument purporting to transfer or otherwise deal with or affect land under the new system, except in the manner herein provided for registration under the new system nor unless such instrument be in accordance with the provisions of the Act, as applicable to the new system" (sec. 83). The transfer authorised by sec. 78 of the Act is a transfer by the registered owner; and such a transfer could not of course be executed by a mortgagee as such. Provision is specially made for the registration of the transfers made by the mortgagees in execution of the express powers of sale vested in them by the Act itself (sec. 110), but that provision is strictly limited to such transfers. Provision, moreover, is expressly made preserving the rights and powers of mortgagees under mortgages existing at the time the land is brought under the "new system." In face of all this the omission of any provision touching the execution or the registration of transfers by a mortgagee under a statutory mortgage exercising a conventional power of sale appears to be significant.

There is a provision of the Act which was introduced as an amendment in 1889 and requires particular notice. It is contained in 77 of that Act and is in these words:—

> 77. . . . Provided, however, that where an instrument, in accordance with the forms in use or sufficient to pass an estate or interest in lands under the old system, deals with land under the new system, the inspector may, in his discretion in a proper case, direct the district registrar to register it under the new system, and when so registered it shall have the same effect as to the operative part thereof, as and shall by implication be held to contain all such covenants as are implied in an instrument of a like nature under the new system, and if it is a mortgage the mortgagee may, for the purpose of foreclosure or sale under the mortgage, elect to proceed either under the provisions of this Act or as if the land were subject to the old system, but in case he proceeds under the provisions of this Act, and the mortgage covers other land not under the new system, he must before doing so bring all the land intended to be foreclosed or sold under the new system.

There can be little doubt as to the occasion which led to the enactment of this provision. The preparation of conveyances of land by unlearned persons (a practice facilitated by the general use of printed forms for such purposes even by professional lawyers), was at the time of the passing of this Act a very general practice in many of the Provinces of Canada; and it was probably found that such forms in many cases were

made to do duty for mortgaging and transferring land under the new system; and the provision mentioned was doubtless suggested by the frequent occurrence of such cases. It was evidently thought that in those cases it would be unfair to deprive the mortgagee of the benefit of powers which the parties might be presumed to have contemplated he should be entitled to exercise and he was given the option of resorting to them if the inspector of land registries should approve of the registration of his mortgage. The points to be noted are first that it was deemed necessary to make a special provision conferring on the mortgagee in such circumstances a right at his election to proceed under his conventional powers a provision which seems superfluous if the appellant's contention be correct that the mortgagee under any registered mortgage may *ipso jure* have the benefit of rights and powers which he might at common law have exercised under a mortgage containing the like provisions, and second, the language used in authorising the mortgagee "to proceed as if the land were under the old system" rather pointedly indicates that in the legislator's view proceedings by way of sale under a conventional power or by way of sale or foreclosure through a Court of equity were as a general rule competent to a mortgagee only in respect of land "subject to the old system."

Thus far of the legislation as it stood in 1892 when the mortgage in question was executed. In 1900 some amendments were introduced and it was one of these (sec. 108 of that Act) on which Mr. Coyne chiefly relied on this branch of his argument. That section is as follows:—

> In addition to and concurrently with the rights and powers conferred on a first mortgagee, every present and future first mortgagee for the time being of land under this Act, shall, until a discharge from the whole of the money secured or until a transfer upon a sale or order for foreclosure (as the case may be) shall have been registered, have the same rights and remedies at law and in equity as he would have had or been entitled to if the legal estate in the land or term mortgaged had been actually vested in him with a right in the owner of the land of quiet enjoyment of the mortgaged land until default in the payment of the principal and interest money secured or some part thereof respectively, or until a breach in the performance or, observance of some covenant expressed in the mortgage or to be implied therein by the provisions of this Act. Nothing contained in this section shall affect or prejudice the rights or liabilities of any such mortgagee after an order for foreclosure shall have been entered in the register or shall, until the entry of such an order, render a first mortgagee of land leased under this Act liable to or for the payment of the rent reserved by the lease or for the performance or observance of the covenants expressed or to be implied therein.

The contention is that the mortgagee is by virtue of this enactment in the same position for all purposes as if the legal

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estate were vested in him and it follows it is said as a necessary corollary that a conventional power of sale confers upon a statutory mortgagee the same powers of disposition over the mortgagor's title as would be vested in a legal mortgagee at common law.

The section read by itself with due attention to the phraseology employed appears to me to mean this: So long as the security is on foot as a security and the ownership of the land is consequently vested in the mortgagor the first mortgagee is to have certain rights and powers in respect of the land and they are to be the rights and powers to which he would by law be entitled if the legal estate were actually vested in him under an instrument such as that described. That is not to say—at least so it seems to me—that by this enactment the statutory mortgagee is endowed with any novel power to extinguish the mortgagor's title or to convey an estate to a purchaser; and there are some considerations which I think make it impossible to give such an effect to the section. The first of those considerations is that this section as I have already mentioned was to be found in the Act which the Judicial Committee was discussing in the passage I have quoted and I think if the intention in re-enacting the section in Manitoba had been to establish the law upon a footing different from that indicated in the view there expressed, we might have expected something explicit to indicate that intention.

Then this section deals with the rights of the first mortgagee only. That would appear to indicate that those rights only are contemplated with which the law would invest a legal mortgagee as peculiarly incidental to his possession of the legal estate. If rights of foreclosure and sale independently of the other provisions of the Act were in view there appears to be no explanation why the benefit of such rights was withheld from the holders of mortgages subsequent to the first.

In considering, moreover, the effect of the amendment embodied in sec. 108 it is to be observed that it must be read with other amendments which were introduced into the statute at the same time and particularly with the amendments affected by secs. 100 and 110 of the Act. These latter amendments it is true are not expressly (as sec 108 is) made applicable to existing mortgages. But, it is not, of course, to be supposed that the last-mentioned enactment having been declared to be applicable to existing as well as to future mortgages was intended to have an operation in respect of future instruments different from its operation in respect of those already existing; and we may properly look at the whole of the contemporary legislation which is *in pari materia* in order to ascertain the effect of any part of it. Sec. 100 makes explicit what as I have already mentioned was already implicitly in the Act; that the mortgage does not

vest in the mortgagee any estate or interest in the land pledged as security. That section declares that the first mortgagee is to have no "interest" in the land—thus emphasizing the characteristic of the statutory mortgage upon which I have been dwelling, viz.:—that as regards title the mortgagee has no registered interest, but only powers of disposition.

The amendment embodied in section 110 emphasizes another feature of the Act, viz.: that in course of the exercise of the statutory powers to extinguish or dispose of the mortgagor's title, the legislature has provided for the protection of the mortgagor by subjecting such proceedings to the supervision of a public officer. The proviso to that section is as follows:—

> Provided that, in case the mortgage or incumbrance contains a provision that the sale may take place without any notice being served on any of the parties, the district registrar may order such sale to take place accordingly.

This enactment affords evidence of the care with which the legislature deemed it necessary to protect the mortgagor against oppression or unfairness or mere carelessness on the part of the mortgagee as well as improvidence on his own part in this matter of the sale of the mortgaged property. The provisions of section 109 by which the period of one month which that section requires shall elapse between the mortgagor's default and the service of notice of intention to sell is permitted to be extended, but is not allowed to be abridged; and the provision of section 110 first introduced in 1892 requiring that the manner in which the sale is to be conducted as well as the conditions of sale shall be determined by the registrar are other instances of the same careful forethought for the interests of the embarrassed mortgagor. I have no doubt these precautions were not taken without good reason; and it would require some language more apt to the purpose than that of sec. 108 to convince me that the legislature intended by that section to enable the mortgagee by the simple expedient of exacting a conventional power of sale to neutralize these carefully devised expedients for the protection of the mortgagor.

For these reasons, I think that whether we regard the rights of the mortgagee as governed by the enactments of the Act of 1900 or by those in force in 1892 when the mortgage was executed, the conventional power of sale on which the appellant's title rests conferred no legal authority upon the mortgagee to extinguish the registered title of the mortgagor except under and according to the express provisions of the statute in that behalf.

It is still necessary, however, to refer to the Act of 1906. Sections 2 and 3 of that Act are as follows:—

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2. Section 108 of the said Act is hereby amended by inserting after the word "equity" in the seventh line thereof the words "including the right to foreclosure or sell through any competent Court."

3. Section 126 of the said Act is hereby amended by adding after the word "therein" in the fourth line thereof the following, "or over mortgages, nor shall anything contained in this Act affect the right of the mortgagee to foreclose or sell through any competent Court, which right it is hereby declared may be exercised in such Court."

These enactments were passed long after the sale in question took place and notwithstanding the form of the amendment in sec. 3 and notwithstanding the fact that the amendment of sec. 108 would by the express terms of that section apply to mortgages in existence at the time the amendment was passed they cannot, I think, be taken to have any such retrospective effect as to determine the construction and operation of the Real Property Act at the date either of the execution of the mortgage in question on this appeal or of the professed exercise of the power of sale: *Harding* v. *Comr. of Stamps of Queensland*, [1898] A. C. 769, at 775.

These amendments are, however, to a limited degree not without relevancy to the point under discussion. They afford an additional instance in which the legislature having before it the subject of proceedings by the mortgagee for the extinguishment of the mortgagor's title seems to have deliberately avoided any recognition of proceedings under a conventional power of sale; and furthermore, while these enactments constitute a departure from the strict principle of the earlier enactments as explained by the Privy Council in *National Bank of Australasia* v. *United Hand-in-Hand Band of Hope Co.*, 4 A.C. 391, at pp. 405 and 406, in that they provide for proceedings for foreclosure and sale outside the registry they indicate no abandonment of the principle to which I have adverted, of requiring all proceedings for the extinguishment of the mortgagor's title to take place under the supervision of a public officer.

As I have already said, I do not think it was seriously contended that the transfer in question would be supported as a transfer made in execution of the statutory power of sale; and I agree that such a contention is quite hopeless.

I think it is not a forced construction of the Act of 1891 as amended in 1892 or of the Act of 1900 to say that the express provisions of these statutes in respect of the exercise of the statutory power of sale relating to the supervision by the registrar over the manner and conditions of sale and to the giving of notice of intention to sell are imperative provisions; and that the "special covenants" which are authorized to be introduced into the statutory mortgage must be such as are not repugnant or contrary to these provisions. Assuming then that the power of sale in the mortgage in question may fairly be read as professing to give an authority to the mortgagee to sell

without notice and assuming also that the rights of the parties are not to be governed by sec. 110 of the Act of 1900 such a dispensation from observance of the requirements of the statute could nevertheless not be permitted to take effect. The respondent's case, however, does not necessarily rest upon this view that the proceedings by the mortgagee under the statutory power are thus inexorably prescribed by the statute; because it is perfectly clear that there is nothing in the mortgage indicating an intention to dispense with the supervision by the registrar required by sec. 109 of the Act of 1891 as amended by that of 1892 and moreover, there is no pretence that any supervision took place, or that there was any attempt in fact to observe the conditions of the statutory power or any intention to exercise that power.

But it is suggested that the power in question gave some authority to a mortgagee to vest equitable rights in a purchaser in defeasance of the mortgagor's title.

On that suggestion, I have to make two observations *in limine*. First: No Court governed by equitable principles would permit itself to be made an instrument in effecting the evasion of the imperative provisions of section 110 (either as to notice or as to supervision), under the pretence of protecting equitable as distinguished from legal rights; and, secondly, the action was not brought to enforce equitable rights. There is not a shadow of a suggestion of such rights in the pleadings or in the record from the first to the last page. The right asserted is the absolute legal right to be registered as owner of the mortgaged property. What facts relating to the conduct of the parties having a bearing upon the equities between them might have been disclosed if a claim based upon equitable grounds had been put forward it is impossible now to say. It is clear, however, from the mortgage deed alone, that no equitable rights in the land in question have been vested in the appellant.

If an attempt were made by a debtor (without formally vesting in his creditor an estate or interest and without creating any trust or executing any assurance to uses) to confer on the creditor as security for his debt a power to sell land held under a common law title then no doubt a Court of Equity might in a proper case find a method of giving effect to such an instrument by way of equitable charge. And in the case of an informal document professing to create such a power a trust in favour of the creditor or in favour of purchasers from him might be implied if it were necessary to imply such a trust in order to prevent the instrument failing of operation entirely. Such a case is perhaps conceivable.

But it is clear that it would be a violation of principle to imply any such a trust unless on the one hand it was manifest that the parties really intended a trust to be created or on the

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other it was necessary to assume they had done so in order to prevent a failure of consideration. Now consider the instrument before us. First the instrument is a formal conveyance prepared as we may assume by the solicitors of a great mortgage company. There is not a word in the document to indicate an intention on the part of anybody that a trust in favour of the mortgagees or a purchaser should be created. On the other hand it is indisputable that the instrument was intended to be a statutory mortgage taking effect under the statute and all the probabilities of the case favour the view that the power of sale was intended to be a power taking effect as incidental to such a mortgage and to confer authority to deal with the registered title and to vest in the purchaser a title under the Real Property Act by the execution of a transfer which could be registered under that Act without resorting to judicial proceedings.

The assumption that the parties intended to create a trust in favour of the mortgagee, or a purchaser to be nominated by him, would really be a very extravagant one; and I do not think it was welcomed by Mr. Coyne when I suggested it to him during the course of his useful and able argument. It is really impossible to suppose that these parties ever entertained the idea of vesting in the mortgagee (in addition to the legal authority to deal with the mortgagor's estate conferred upon him by the statute) some equitable right to which effect could only be given by proceedings in equity or the authority to confer some such right upon a purchaser. The reading of the clause in question most consonant with the probable intentions and expectations of the parties is, as Mr. Wilson argued, that which treats it as a power of sale to be given effect to under the authority of and through the machinery provided by the statute.

ANGLIN, J. (dissenting):—On this appeal several questions present themselves for determination:—

1. Whether the title of a registered owner of land under the Real Property Act of Manitoba is extinguished by adverse possession of the land held by his mortgagee and persons claiming under him in circumstances and for the period which would under sec. 20 of R.S.M., ch. 100, extinguish the title to it of the mortgagor if the land were not under the Act.

2. Whether, in the case of a mortgage of land registered under the Act, the mortgagor may by introducing apt and sufficient words into a statutory mortgage confer upon his mortgagee a power of sale additional to and independent of the statutory power given by secs. 109 and 110 of the Act, and whether such a power, if so created, may be exercised by the mortgagee as in the case of a like power conferred on a mortgagee of land not under the Act and without reference to the provisions of secs. 109 and 110.

3. Whether the power of sale contained in the mortgage in question in this action should be deemed a power independent of and additional to the statutory power conferred by secs. 109 and 110 or should be deemed merely a variation of such statutory power.

4. Whether the words used in the mortgage are sufficient to confer an effectual power of sale.

5. Whether they give a power of sale without notice; and

6. Whether, in view of the fact that the mortgagee takes no interest or estate in, but merely obtains security on, the land (sec. 100), the special power of sale if effectually given can be exercised without resorting to the provisions of secs. 109-112 of the Act.

The clause in the mortgage upon which the five latter questions arise is as follows:—

> It is also covenanted between me and the said mortgagees that if I shall make default in payment of the said principal sum and interest thereon, or any part thereof at any of the before appointed times then the said mortgagees shall have the right and power and I do hereby covenant with the said mortgagees for such purpose and do grant to the said mortgagees full license and authority for such purpose when and so often as in their discretion they shall think fit to enter into possession either by themselves or their agent, of the said lands, and to collect the rents and profits thereof or to make any demise or lease of the said lands, or any part thereof for such terms, periods, and at such rent as they shall think proper, or to sell the said lands and such entry, demise, or lease shall operate as a termination of the tenancy hereinbefore mentioned without any notice being required and that the power of sale herein embodied and contained may be exercised either before or after and subject to such demise or lease. Provided that any sale made under the powers herein may be for cash or upon credit or partly for cash and partly for credit and that the said mortgagees may vary or rescind any contract for sale made or entered into by virtue hereof.

The mortgage provides that the expression "mortgagees" wherever it is used in the mortgage shall include the mortgagees' "successors and assigns."

For convenience I shall deal with the questions in an order somewhat different from that in which I have stated them. Assuming for the moment, that an owner of land registered under the "new system" can, in a statutory mortgage under the Real Property Act, confer on his mortgagee a power of sale other than and independent of the statutory power, I think that the provision of the mortgage which I have quoted creates such a power. It purports to give to the mortgagee an express authority "to sell the said land" without attaching to it any of the conditions of the statutory power. The statutory power (at all events unless expressly negatived, sec. 157) is inherent in every statutory mortgage. No words conferring or declaring it are

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required in the mortgage. Reference is properly made to it only for the purpose of modifying, or, perhaps, of excluding it. Unless another and an independent power was contemplated by the parties, the provision in the present mortgage granting to the mortgagees full license and authority to sell the lands is entirely supererogatory. It is scarcely necessary to refer to the canon of interpretation opposed to such a construction. Moreover, the reference in the concluding proviso of the clause quoted from the mortgage to "any sale made under the powers herein" indicates that the parties contemplated the existence of more than one power of sale—the inherent statutory power and also the power expressed in the mortgage.

In the absence of any other allusion in the mortgage to the statutory power, I find no support for the suggestion that the purpose of the clause under consideration was not to create a special and independent power of sale, but merely to modify the statutory power.

I agree with the learned Judges of the Court of Appeal for Manitoba that the words "without any notice being required" apply only to the termination of the tenancy of the mortgagor provided for in the mortgage and do not affect or qualify the authority to sell. But I am also of the opinion that, in the absence of any condition as to notice being annexed to it, the express power of sale conferred by the mortgage may be exercised without notice: *Jones* v. *Matthie*, 11 Jurist (1847), 504; Blythewood and Jarman's Conveyancing, 4th ed., 689; Smith's Equity, 4th ed. 297.

No precise or technical form of words is necessary to create a power of sale. It suffices that the intention be sufficiently denoted: Sugden on Powers (8th ed.), 182; Farwell on Powers (2nd ed.), 48. The intention is here clearly expressed; the donor was competent; the instrument—a deed—is apt; and the object is lawful and proper.

The objection to the sufficiency of the power urged on behalf of the respondents, that the donee of it has no estate, legal or equitable, in the mortgaged land, is possibly met, as Mr. Coyne contended, by the provisions of sec. 108 of the Act which give to every first mortgagee—

> The same rights and remedies at law and in equity as he would have had or been entitled to if the legal estate in the land or term mortgaged had been actually vested in him, etc.

I rather think, however, that this provision is intended to preserve to, or to confer upon the mortgagee, for the protection of whatever interest he may have under the terms of the statutory form of mortgage, rights and remedies other than the power to convey the land and that it would not enable him in the exercise of a power of sale other than that conferred by the statute to give a conveyance which would have the effect of

vesting in his purchaser the mortgagor's title and estate in the mortgaged registered land.

I am confirmed in this view of the scope and purpose of sec. 108 by the fact that, notwithstanding its presence in the statute the legislature deemed special provisions necessary to give to the conveyance of a mortgagee exercising the statutory power of sale the effect of vesting in the transferee the mortgagor's title and estate (secs. 111, 112). But the objection, in my opinion, cannot prevail although it should be held that, for the purposes of powers of sale sec. 108 is inapplicable and that the mortgagee is in the same position as if he were a stranger without any estate or interest in the land, and although the power should be regarded as simply collateral, or as a power in gross because exercisable for the benefit of the donee: Sugden on Powers, p. 47 (8). A power given to nominees of a testator to sell estates vested not in them but in devisees of the donor was held by Kay, J., in *Re Brown*, L.R. 32 Ch. D. 597, to be unquestionable and was treated as an instance of the equitable powers arising, as put by Lord St. Leonards in his book (8th ed., pp. 45-6) out of "declarations or directions operating only on the consciences of the persons in whom the legal estate is vested" and whom "equity would compel . . . to convey according to the (donee's) contract" (L.R. 32 Ch. D. at p. 601). In the *Brown case*, L.R. 32 Ch. D. 597, the donor's devisees of the estate were bound in equity to convey to the purchaser from the donee of the power; in the present case the mortgagor, in whom the whole estate remained notwithstanding the mortgage (sec. 100) and those claiming under him are subject to the like duty arising out of the trust of the land declared by the mortgagor in giving to his mortgagees a special express power of sale, while retaining the whole estate in the land. If the mortgagees neither had themselves, nor had the right, by a contract made in the exercise of their power of sale, to create in their purchaser an equitable interest in the land, which the mortgagor or his representatives might be compelled to perfect by a transfer or conveyance, they were at all events empowered to confer on him a right to claim such transfer or conveyance which a Court exercising equitable jurisdiction will enforce. The registrar is not obliged—indeed he is probably not entitled—to recognize or to register a transfer of the land executed by a mortgagee of new system land acting under any other than the statutory power. But the equity which the mortgagee acting under a special power of sale creates as against the mortgagor and those claiming under him by the contract with his purchaser, will be recognized by the Courts and will in a proper proceeding be enforced against them: *Re Massey & Gibson*, 7 Man. Rep. 172, 178, 179; *Wilkie* v. *Jellett*, 2 Terr. L.R. 133, 26 Can. S.C.R. 282; and the Court will give proper directions for

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the execution of any necessary assurances and for action by the registrar upon them.

It is noteworthy that the statute itself contains a provision under which a purchaser from a mortgagee selling new-system land under a power of sale in his mortgage may, in order to complete his title, be entitled in equity to a transfer from the mortgagor or the registered owner claiming under him and may be obliged to resort to a Court of equity to compel such a conveyance. Sec. 83 provides for the registration of old form instruments dealing with lands registered under the new system. As to its "operative parts," when so registered such an instrument is declared to have the same effect as "an instrument of like nature under the new system." Estates or interests in land under the new system are transferable not by execution and delivery of an instrument, but only by and upon registration of it (secs. 80 and 81). An unregistered instrument merely confers a right or claim to its registration (sec. 90). An old form mortgage of land under the new system, though its registration should be procured under sec. 83, does not transfer to the mortgagee any estate or interest in the mortgaged premises (sec. 100). But sec. 83 nevertheless provides that—

> The mortgagee may, for the purpose of foreclosure or sale under the mortgage, elect to proceed either under the provisions of this Act, or as if the lands were subject to the old system.

Should he exercise the latter option and proceed to sell under his power of sale without reference to the registrar, having no estate or interest in the land, he could not, in the absence of some statutory provision giving that effect to his conveyance, vest any legal title in his purchaser: *Re Hodson and Howes' Contract*, L.R. 35 Ch. D. 668. Such a provision is made by sec. 112 in respect of conveyances by mortgagees in the exercise of powers of sale contained in mortgages affecting the land before it was brought under the new system:—

> Upon the registration of any memorandum or instrument or transfer executed . . . by a mortgagee selling under the power of sale in any mortgage which affected the land when the first certificate of title issued therefor, the estate or interest of the owner of the land mortgaged or incumbered shall pass to and vest in the purchasers, etc.

In the case of a purchase from a mortgagee exercising under the old system the power of sale in an old form mortgage registered under sec. 83 against new system land, unless the mortgagee had been made the mortgagor's attorney to convey his estate and the sale was made while the mortgagor was still the owner of the land, the purchaser or transferee would acquire merely an equitable interest or an equitable right to a transfer which the mortgagor, or his representative, would be compellable in a Court of equity to perfect by a legal transfer of the mortgaged property.

If, therefore, it is competent for the registered owner of land under the new system when giving a mortgage under the Act to confer upon his mortgagee a power of sale independent of and additional to the inherent statutory power conferred by secs. 109 and 110 and exercisable without reference to those sections, no case having been made of fraud or mistake affecting the creation, or of imposition or unfair dealing affecting the exercise of the power here in question, I see no reason why the sale under it by the assigns of the mortgagees should not be upheld as giving to their purchasers an equitable interest or right enforceable against the mortgagor or his representatives, or why the plaintiff, who was that purchaser, should not in this action obtain appropriate relief. In the absence of a provision, such as is found in sec. 112, or of a power of attorney from the mortgagor enabling the mortgagee effectually to transfer the mortgaged land to, and to vest it in his purchaser, the latter must, if the mortgagor or his representatives will not voluntarily execute a transfer in his favour, seek the aid of the Courts to perfect his title and to put him in a position to become the registered owner.

Finding nothing in the statute which ousts their jurisdiction, I know of no reason why the Courts should not grant to the plaintiff the relief to which he has shewn himself to be entitled. But can the owner of land registered under the "new system" give to his mortgagee a power of sale other than the statutory power and exercisable without observance of the requirements of secs. 109 and 110 of the Act? There is no clause in the Real Property Act which forbids him doing so. Neither can it be said that the existence of such a right would be incompatible with any provision of the Act or destructive of any right which it confers or of the machinery which it provides for the cases to which it applies. All that the statute enacts is that, without an express power of sale being given him in his mortgage, a mortgagee taking a statutory form of mortgage is authorized and empowered to sell the mortgaged land. If he should elect to exercise this statutory power certain terms and conditions are prescribed which he must observe. But, nowhere does the Act say that the statutory power shall be the only power of sale which a mortgagee of land under it shall have or exercise or that any other power of sale which the mortgage may purport to give shall be exercisable only on terms and conditions the same as those prescribed for the exercise of the statutory power. Neither is it provided by secs. 109 and 110, or by any other section of the Act, that, in every case and notwithstanding any provision to the contrary which may have been made in the mortgage, it shall be the right of a mortgagor that his mortgagee shall not exercise any power of sale of the mortgaged premises until there has been

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one month's default and (as the Act stood prior to 1900, or 1902), until a notice has been given by the mortgagee under sec. 109 and another month has elapsed after the giving of such notice. No such right is conferred on the mortgagor. All that the statute provides is that, if the mortgagee wishes to avail himself of the statutory power of sale which it confers, he may do so only upon observing the prescribed conditions. In this respect the provisions of the Manitoba Real Property Act are similar to those of Lord Cranworth's Act. No one ever thought that the provisions for a statutory power of sale made by that legislation prevent mortgagors and mortgagees contracting for independent and additional powers of sale upon such terms as they may think proper.

It is contended for the respondents, however, that it is a fair and reasonable implication from the Act taken as a whole that the legislature intended to deny to mortgagors and mortgagees of land under it the right of contracting for any special power of sale and to prevent a mortgagee of such land obtaining any power of sale other than that which the Act itself confers on the statutory mortgagee; and in support of this view great reliance is placed on the fact that a mortgagee of land under the Act acquires no estate or interest in it.

In examining the statute in order to discover whether it affords evidence of any plan or scheme of legislation incompatible with the existence of a right to provide in the statutory mortgage for a special power of sale exercisable independently of secs. 109 and 110, I find that in sec. 99 a form of mortgage of new system land is prescribed. But by clause (*z*) of sec. 2 it is provided that:—

> Whenever a form in the schedules hereto is directed to be used such direction shall apply equally to any form to the like effect . . . and any variation from such forms not being a variation of a matter of substance shall not affect their validity or regularity but they may be used with such alterations as the character of the parties or the circumstances of the case may render necessary.

On turning to the prescribed form, D. I observe that in the third clause it contemplates special provisions being made—"Here set forth special covenants if any" sec. 157 of the statute provides that—

> Every covenant and power declared to be implied in any instrument by virtue of this Act may be negatived or modified by express declaration in the instrument or endorsed thereon.

Although the power of sale given by sec. 110 is not "declared to be implied in" the statutory mortgage, as are the covenant for indemnity mentioned in sec. 89 and the covenants and powers in statutory leases mentioned in secs. 94 and 95, I incline to the view that the power of sale given by sec. 110 should be regarded as within the provisions of sec. 157. But

whether that is or is not the case, the special power of sale given by the mortgage now under consideration was a "special covenant" and was an alteration in the nature of an addition to the prescribed form which it was, in my opinion, competent for the parties to make, if they thought "the circumstances of the case rendered it necessary," and it was not "a variation in substance" and certainly did not affect the "validity or regularity" of the instrument.

It is not the scheme of the Act that the implication of statutory covenants or powers in other instruments should preclude the introduction of express covenants and powers of an entirely different character and not mere modifications of the implied covenants and powers, or the enforcement, in the event of breaches, of such express covenants or of any special remedies for which the parties may have contracted. This has been held in respect to the clauses in the New South Wales and South Australian Acts similar to secs. 93-96 of the Manitoba statute, which provide for implied covenants and powers in leases and for the determination of such leases by proceedings in the registrar's office where there has been non-observance of the implied covenants: *Baker's Creek Consolidated, etc.* v. *Hack*, 15 N.S.W. L.R. (Eq.) 207; *Bucknall* v. *Reid*, 10 S.A.L.R. 188.

Provision is made by secs. 83 and 112 of the Act already alluded to for the exercise by a mortgagee in certain cases of powers of sale in respect of new system land other than that conferred by the statute and without observance of the provisions of secs. 109 and 110. The respondent bases on the presence in the statute of secs. 83 and 112 an argument, undoubtedly entitled to some weight, that they indicate an intention on the part of the legislature that, except in the cases thus specially provided for, no power of sale other than the statutory power conferred by sec. 110 shall be exercisable by a mortgagee of new system land. I rather think, however, that these provisions indicate that the Act was not meant to be so inelastic as the respondents contend; that contractual powers of sale other than the statutory power are not precluded; and that, while, except in the special case dealt with by sec. 112, the statute does not facilitate the exercise of contractual powers specially created, or aid or give efficacy to transfers made under them, persons using them and claiming under them are permitted to assert and exercise such rights as their contracts expressly give them and to obtain such relief as the Courts may allow.

There is nothing to prevent the parties inserting a provision enabling the mortgagee who exercises a special contractual power of sale to convey to his purchaser as attorney of the mortgagor the latter's estate in the mortgaged land. Because

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not essential to its exercise, the power of sale does not, I think, carry such a power of attorney as a necessary incident. To avoid the expense and delay involved in recourse to the Courts, such an express provision would, however, seem to be reasonable and desirable in the interest of all parties whenever a special contractual power of sale is given. But when the mortgagee is not so empowered to convey the mortgagor's estate, or where the mortgagor has parted with his estate, I perceive no reason why the purchaser under a special power of sale lawfully exercised may not successfully invoke the equitable jurisdiction of the Courts.

If this view be not correct it would be impossible for mortgagors and mortgagees to provide for the sale of land mortgaged under the new system until there had been one month's default as the Act now stands, and, as it was prior to the introduction in 1900, or 1902, of the proviso to sec. 110, until there had been at least two months' default and certain notice had been given. In many cases where the property dealt with is highly speculative in character or where for other reasons the mortgagee is willing to lend his money only if enabled in the event of default to realize immediately upon his security, owners of registered land might find themselves seriously embarrassed and perhaps even driven to sacrifice it because unable to obtain a loan upon it. Again, if the statutory power of sale is the only permissible power, and if it is necessarily inherent in every mortgage (as it must be unless it may be negatived under sec. 157) an owner of new system land insisting that his mortgagee should have no power of sale whatever, would find himself unable to give a mortgage on his land.

Having regard to the tendency of modern legislation towards permitting freedom of contract in dealing with land as with other property and to the inconveniences and difficulties which such a construction of the statute would entail, I think we would not be justified in assuming that the legislature meant to tie the hands of owners of land registered under the new system, as is contended for the respondents, unless, that intention not being distinctly expressed, it is abundantly clear that the scheme of the Act would be defeated if the contrary view should prevail.

Notwithstanding the explicit language of sec. 80 that—

> Every transfer (of land) shall when registered operate as an absolute transfer of all such right and title as the transferor had therein at the time of its execution unless a contrary intention be expressed in such transfer.

I have no doubt that where it was intended to operate as a security for money, a registered transfer of land under the Act may, as between the parties, have no greater effect than a mortgage of land had under the old system, and that it is within

the power of a Court clothed with equitable jurisdiction to declare that the person registered as owner under such a transfer is merely a mortgagee and that his transferor has an equity of redemption in the land and to require the person registered as owner to submit to redemption. That such a Court may exercise this jurisdiction where there is an unregistered deed of defeasance was determined in *Sander* v. *Twigg*, 13 V.L.R. 765. That it can afford the same relief where it is proved that the real understanding of the parties was that a transfer though absolute in form, should be taken by way of security only is, I think, equally clear—and that apart from the provisions of sec. 126 of the statute: *Williams* v. *Box*, 44 Can. S.C.R. 1.

I make this passing allusion only because it is illustrative of the equitable jurisdiction which the statute, notwithstanding its sweeping terms, should be held not to have destroyed.

Although sec. 71 declares that—

> Every certificate of title hereafter or heretofore issued under this Act shall, so long as the same remains in force and uncancelled be conclusive evidence at law and in equity as against His Majesty and all persons whomsoever that the person named in such certificate is entitled to the land described therein for the estate or interest therein specified;

were it not for the express provision of sec. 75, the title of a registered owner of land holding such a certificate would nevertheless be extinguishable by adverse possession for the period prescribed by the Statute of Limitations: *Belize* v. *Quilter*, [1897] A.C. 367.

Without committing myself to the proposition advanced by Mr. Coyne that the Manitoba Real Property Act "merely introduced a simpler system of registration" and did not in any other respect interfere with, modify or displace the general law respecting real property, I think, that, in view of the instances to which I have alluded, it cannot be said that there is any clear or well-defined scheme of the Act to which it would be repugnant that a mortgagee should be given by contract a special power of sale independent of, and exercisable without reference to the provisions of secs. 109 and 110. It would have been so very easy for the Legislature to have provided, if that were its purpose, that, whenever the provisions of his mortgage, a mortgagee of land under the new system should not have or exercise over the mortgaged land any power of sale other than that conferred by the statute, that, in the absence of such a provision, I think we would not be justified in assuming that it was intended that this should be the effect of the statute.

The argument against the existence of the right to confer any power of sale other than the statutory power based on the fact that the mortgagee has no estate or interest in the land loses any force it might otherwise have when we find that, not-

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withstanding that fact, a contractual power of sale and its exercise without reference to the provisions of sections 109 *et seq.* are expressly permitted under sec. 83, the purchaser, in the absence of a special provision in the mortgage enabling the mortgagee to convey the mortgagor's estate, being left to obtain title either by the voluntary act of the mortgagor or his representatives, or through the intervention of a Court of equity.

Although the observation of Lord Macnaghten that "no one, I am sure, by the light of nature ever understood an English mortgage of real estate" (*Samuel* v. *Jarrah, etc.,* [1904] A.C. 323, 326) may be applied with peculiar fitness and significance to a mortgage under the Manitoba Real Property Act, I am for the foregoing reasons of the opinion that it is competent for the parties to such a mortgage to provide for a special power of sale exercisable without reference to the provisions of secs. 109 and 110; that in the mortgage now before us this has been sufficiently done; that, in the absence of any proof of fraud or mistake in its creation or of imposition of unfairness in its exercise, the power was effectual and was well exercised; and that the plaintiff obtained if not an equitable interest in the land at least an equitable right to a conveyance of the land from the mortgagor or his representatives which the Court in the exercise of its equitable jurisdiction will recognise and enforce.

I would, therefore, with respect, allow the plaintiff's appeal with costs.

Judgment should, in my opinion, be entered declaring that the sale of the lands to the plaintiff was a valid and proper exercise of the power contained in the mortgage in question and directing that the defendants, the National Trust Company, in whom as personal representatives of the deceased mortgagor, the legal ownership of such land is vested under 5 and 6 Edw. VII. (Man.), ch. 21, shall execute and deliver a transfer of such lands to the plaintiff, and that, upon the plaintiff filing in the land titles office such transfer together with the deed executed by the mortgagees in the exercise of the power of sale, the district registrar shall cancel the existing certificate of title and issue a new certificate of title to the lands in question in favour of the plaintiff for such estate as the mortgagor held therein. The plaintiff should also have his costs of this action including the costs of the appeal to the Court of Appeal for Manitoba.

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

Appeal dismissed with costs; IDINGTON *and* ANGLIN, JJ., *dissenting.*

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Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A. February 15, 1912.

1. INSURANCE (§ II E 1—91)—FIRE INSURANCE ON GOODS—CHANGE OF LOCATION.

Antedating a consent to a transfer, of a fire insurance policy covering a stock of goods on their removal from one warehouse to another, will not operate to bind the insurance company, when obtained after the fire but without disclosing the fact, in the knowledge of the insured, but not known to the insurance company that the fire had already occurred.

2. INSURANCE (§ V C—212)—FIRE INSURANCE POLICY—ASSENT TO TRANSFER AFTER LOSS.

An insurance company in giving a formal assent to a transfer already made of the insured goods to another building will not be held to have waived their right to afterwards claim on learning that a fire had already destroyed the goods that the rights of the parties became fixed at the time of the fire, and that it was an implied term of the consent that no loss had occurred whereof prompt notice had not been given to the insurance company as required by the terms of the policy.

APPEAL by plaintiffs from the judgment of Sutherland, J., dismissing the action.

The appeal was dismissed.

January 16, 1911. The action was tried by SUTHERLAND, J., without a jury, at Toronto.

Leighton McCarthy, K.C., and *Frank McCarthy*, for the plaintiffs.

H. Cassels, K.C., and *R. S. Cassels*, K.C., for the defendants.

March 18, 1911. SUTHERLAND, J.:—The plaintiffs, a company incorporated under the laws of Florida, seek in this action to recover from the defendants, an insurance company with their head office at the city of Toronto, the sum of $2,000, under the terms of a policy of insurance dated the 1st September, 1908, and numbered 200345. The stock of merchandise insured consisted of leaf tobacco and other materials then contained in a building situated on the south-east corner of Love and Washington streets, in the city of Quincy, Florida. The policy was issued in the city of New York, for the defendants, by a firm of insurance agents named Dickson & Tweeddale, who had some time before, under a verbal arrangement made with the defendants, become their agents there, and were in the habit of filling out and issuing the policies. They had been supplied with a rubber stamp facsimile of the name of the president of the defendant company, Robert F. Massie, for use as required.

In the month of October, the plaintiffs had applied for permission to transfer the policy so as to cover similar property while contained in another building owned by the Owl Commercial Company, situated east of and in the suburbs of the said

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city of Quincy. The course of procedure pursued on that occasion and attempted to be followed on the occasion in question was as follows:—

The plaintiffs applied to one McFarlin, an insurance agent at Quincy, and he in turn communicated with Ring & Co., a firm of insurance underwriters at New York, who had in the first instance procured the issuance of the policy to the plaintiffs. This policy was sent back to Ring & Co. by McFarlin, and received by them apparently on the 14th October, 1908. Ring, who is called, says that he probably dictated the indorsement by way of assignment.

Retaining the policy in their own possession, they sent the indorsement by one of their employees, called by one of the witnesses a "placer," to Dickson & Tweeddale. The indorsement was left with them, so as, when confirmed by the defendant company, to be handed back to Ring & Co., to be attached to the policy.

At the same time that the indorsement was left with Dickson & Tweeddale, what is known as a "binder" was secured from them; and the one in connection with the first assignment is said to be similar to the one in evidence and marked as exhibit 3. Such documents contain a dated memorandum of the proposed transfer, the number of the policy, and the name of the company, and are acknowledged in some form by the persons receiving the indorsement from the applicants or their representatives. These binders are temporary documents, to be held by the applicants, apparently, for a few days until the return of the policy, with the signed consent of the company to the indorsement agreeing to the transfer, and being intended, in the meantime, to hold the transfer as binding.

In the case of the October, 1908, transfer, Dickson & Tweeddale apparently used the rubber stamp already mentioned, as it appears at the foot of the indorsement as follows, "Robert F. Massie, Prest.;" and there are the initials "J. B. C." apparently verifying it, and said to be the initials of a man named Clark, then one of the managing underwriters of the New York State Department and in the service of the firm of Dickson & Tweeddale.

This indorsement did not apparently come to the knowledge of the defendants until about the 4th December, 1908. They did not then question it, because, though the notice only reached them after they had discontinued Dickson & Tweeddale's authority, they recognised that that firm had dealt with the matter before its revocation.

In connection with the said first assignment, Ring & Co., on getting the company's consent, signed in that way, to the indorsement, attached the latter to the policy, and returned both to McFarlin.

The defendants say that, on or about the 28th November, 1908, the business relations between them and Dickson & Tweeddale, having proved unsatisfactory, were verbally terminated by their president and manager, Massie, in New York. The accounts were settled between them, and he took away the stamp at that time. He says that never after that had Dickson & Tweeddale, or any one in their employ, authority to act for the defendant company. He admits that nothing was done in the way of advertising the revocation of that authority or to give notice to people who had dealt with the defendants through Dickson & Tweeddale, that it had been terminated. He says that the arrangement, being a verbal one in the first instance, was terminated in the same way at the end.

It is then said by the plaintiffs that shortly before the 14th January, 1909, desiring to secure a retransfer of the policy so as again to cover similar property in the premises where the merchandise originally was, viz., at the south-east corner of Love and Washington streets, they took the same course as before. They applied to McFarlin, and he to Ring & Co., again sending on the policy. A "placer" from Ring & Co. was again sent to the office of Dickson & Tweeddale, where, apparently, he came in contact with one August Schekira, an employee in their insurance office. Schekira at this time was twenty years of age, and says that, Clark having left the employment of Dickson & Tweeddale some time before, he discharged some of the duties Clark had previously been performing. He says he understood that Dickson & Tweeddale were still representing the defendants in New York, but had no knowledge of any contract. Neither Dickson nor Tweeddale was in the office on the 14th January, 1909, when Ring's "placer" came in and handed to Schekira an indorsement said to be in similar terms to the one now attached to the policy, and dated the 14th January, 1909. Schekira received the indorsement and filed it in the office of Dickson & Tweeddale, and initialled a binder, of which exhibit 3 is a copy, and which contains the following in writing across ist face: "Transfer to cor. Love and Washington Sts., Quincy, Fla.;" and has printed across it the following: "The undersigned companies accept the above as per the amounts set opposite their respective names, and make the same binding from foregoing written date, subject to conditions of policy issued by respective companies. Void on delivery of policy to Charles E. Ring & Co." It also has in writing the following: "Company, Dominion, No. 200345. A.C.S."—the A.C.S. being Schekira's initials.

Schekira admits that he did this without consultation with or any direct authority from either Dickson or Tweeddale. He also admits that he did not communicate with the defendants with respect to the indorsement put on file, as that was not in the line of his duties.

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It appears that in a few days the firm of Dickson & Tweeddale came to grief, and he left its employment. The defendants' manager says that no word of the binder in question or the said indorsement ever came to the knowledge of the defendants until after this suit was commenced. He also says that he knew of Schekira only as a junior clerk in Dickson & Tweeddale's office.

Ring testified, in the course of his evidence, that his firm endeavoured from time to time to get from Dickson & Tweeddale the indorsement ratified by the company, but were unable to do so. It is not shewn, however, in what way this was being done. It would seem that, if either Dickson or Tweeddale had been applied to, Ring & Co. would have been informed that they no longer had authority to act for the defendant company. The efforts of Ring & Co. to secure the signing of the indorsement never came to the defendants' attention. Ring says that, under these circumstances, about the 7th March, 1909, he met one Stinson, of the insurance brokers' firm of McLean Stinson & Co. Limited, Toronto, at Niagara Falls, and gave him a duplicate of the indorsement which had been given by his "placer" to Schekira on the 14th January, and at the same time handed him the policy. He says that the first indorsement was never got back from Dickson & Tweeddale.

Apparently, Stinson did not deliver to the defendants or bring the indorsement given to him by Ring to their attention for some time after receiving it.

On the 19th March, 1909, the fire occurred in the premises on the south-east corner of Love and Washington streets, and the insured property is said to have been totally destroyed. On that same day, Ring telegraphed to McLean Stinson & Co. Limited as follows: "Has Dominion policy covering Kline Brothers given Mr. Stinson been indorsed? Wire immediately."

He is not clear whether he did this before or after learning about the fire. He learned of it on that day. He speaks of having written a letter a couple of days before to McLean Stinson & Co. Limited about the matter of the indorsement, but it is not produced. It appears very likely that this telegram was sent in consequence of learning of the fire.

On the following day, the 20th March, McLean Stinson & Co. Limited sent the renewal indorsement to the defendants, enclosed in a letter; and, not having received any acknowledgment thereof, wrote again to the defendants on the 25th March as follows: "Some time ago we forwarded to you an indorsement to be attached to policy 200345, Kline Brothers Company. As we would like to dispose of this matter, we would ask you to kindly let us have this as soon as possible, and oblige."

Neither Ring & Co. nor McLean Stinson & Co. Limited (if the latter knew of the fire, which does not appear) had meantime apprised the defendants thereof, and they were not other-

wise aware of it. Their secretary, Neil W. Renwick, under these circumstances, subsequent to the fire, and thinking the matter was purely a formal one, without even changing the date of the indorsement as drawn, viz., the 14th January, 1909, stamped with a rubber stamp the name of the defendant company at the foot of the indorsement and signed as secretary.

On the 27th March, 1909, Renwick returned to McLean Stinson & Co. Limited the indorsement, enclosed in a letter in the following terms: "We are returning herewith removal indorsement as forwarded in your favour of the 20th. We have completed the same and altered our records accordingly."

Under these circumstances, the defendants are contesting the policy

The plaintiffs have apparently, and upon the evidence, sustained loss entitling them otherwise to make and maintain their claim, if the policy was at the time of the fire in force so as to cover goods in the original premises.

It is admitted by the defendants that Dickson & Tweeddale had authority to issue the policy in the first instance, and that it was in force at the time of the fire, in so far as covering goods in the Owl Commercial Company building.

I do not think that the binder left by the "placer" with Schekira on the 14th January, 1909, was of any force. The arrangement or contract referred to therein was never indorsed on or added to the policy. It states that it is attached to and forms a part of the policy in question. It was never so attached, and neither Schekira nor Dickson & Tweeddale nor the defendants ever had the policy in their hands to which to attach it. Neither Dickson & Tweeddale nor Schekira, at the time it was initialled by the latter, any longer had any authority to act in any way for the defendants. I do not think Schekira at any time had. I referred to his evidence. But, in the absence of any testimony by either Dickson or Tweeddale, I cannot see or hold that he had authority to bind them, let alone the defendents: *Walkerville Match Co.* v. *Scottish Union and National Insurance Co.* (1903), 6 O.L.R. 674, and cases therein cited.

Not only did the binder then, in my opinion, have no effect, but the indorsement left with Schekira never came to the knowledge of the defendants, nor was ratified by them.

As to the second indorsement, it is clear that, at the time the fire occurred, it had not been brought to the attention of the defendants nor ratified by them. It was the duty of the plaintiffs, who knew of the fire, at once to notify the defendants. They do not appear from the correspondence to have done this until after they had obtained the alleged consent of the defendants as indicated. It was also, I think, the duty of Ring, when he learned of the fire, to notify the defendants. It is plain that the defendants had given no consent of any kind to the re-trans-

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fer at the time of the fire. There was, at that time, no binding contract between the parties to re-transfer. But, it is said, by the plaintiffs, that the defendants subsequently ratified the indorsement, and are bound; and in this connection they point to the fact that the indorsement bears date on its face the 14th January, 1909. I do not think that that date can affect the matter. The alleged ratification admittedly was not given on that date. The only reason that the date was left unaltered, and the real date not inserted, was because it was treated by the official of the defendants as a mere matter of form. The real date of the alleged ratification was subsequent to the date of the fire. But such alleged ratification was made under a mistake of fact, and in ignorance that, at the time, the merchandise in question had been destroyed by fire. Apart from such alleged ratification, the policy was then covering no merchandise in the premises on the corner of Love and Washington streets, and the plaintiffs could claim no benefit as to insurance under the policy in question on the same.

I do not think that the alleged ratification is binding on the defendants, under these circumstances. The defendants cannot, I think, be said to have waived their right to object to the alleged ratification, when it is apparent that it was obtained without their knowledge of the fire, and with that fact known to the plaintiffs and their agent and withheld: *Nippolt* v. *Firemen's Insurance Co. of Chicago* (1894), 59 N.W. Repr. 191; *Western Assurance Co.* v. *Doull* (1886), 12 Can. S.C.R. 446, at p. 455; *Grover & Grover Limited* v. *Mathews*, [1910] 2 K.B. 401.

There will be judgment for the defendants with costs.

The plaintiffs, by consent of the defendants, appealed directly to the Court of Appeal from the judgment of SUTHERLAND, J.

Leighton McCarthy, K.C., and *Frank McCarthy*, for the plaintiffs. The defendants are bound by the "binder" dated the 14th January. This binder was obtained in the ordinary course of business from A. C. Schekira, a clerk in charge of the office of Messrs. Dickson & Tweeddale, who were the agents who issued the policy to the plaintiffs in the first instance. It was through Dickson & Tweeddale that the transfer of the 14th October was effected by J. D. Clark, the predecessor in office of A. C. Schekira. The binder in question was obtained in the usual course of business. The indorsement was not obtained at the time, owing to the unsettled condition and the subsequent closing on the 23rd January of the office of Dickson & Tweeddale. The plaintiffs and the clerk Schekira had no knowledge whatever of the discontinuance of the agency of Messrs. Dickson & Tweeddale for the defendants. There had been no notification or publication whatever of the fact: Halsbury's Laws of England, vol. 1, p. 158; Story on Agency, 9th ed., p. 505, sec. 443; Campbell's Ruling Cases, vol. 2, p. 357; *Insurance Co.* v. *McCain* (1877), 96 U.S. 84,

at p. 86; *McNeilly* v. *Continental Life Insurance Co.* (1876), 66 N.Y. 23; *Campbell* v. *National Life Insurance Co.* (1874), 24 C.P. 133, at p. 144; Clement on Fire Insurance, vol. 2, pp. 458 (rule 25), 467, 469 (rule 43), and 470 (rule 44). As to the contention that Dickson & Tweeddale could not delegate the authority to Schekira, see Clement at p. 470; *Rossiter* v. *Trafalgar Life Assurance Association* (1859), 27 Beav. 377; *Goode* v. *Georgia Home Insurance Co.* (1895), 23 S.E. Repr. 744, at p. 745. The fire occurred on the 19th March; but, so far as the evidence discloses, neither Stinson nor the defendants had any knowledge of the fire until after the 26th March. It is clear, on the evidence, that such transfers are purely formal matters. The transfer of the 14th October was accomplished by means of a rubber stamp, and the defendants had no notice thereof until the 4th December. The indorsement obtained in March was put through the head office in a most informal manner. It is admitted that Dickson & Tweeddale were general agents of the defendant company; that they had authority to issue the policy in question; and that they had authority to effect the transfer of the 14th October. The transfer was duly effected, and the policy covered the property destroyed in the place in which it was destroyed; and the indorsement obtained, as is the usual practice, in March, dated the 14th January, ratified and confirmed the binder of the same date and as such is binding on the defendants: Cooley's Briefs on the Law of Insurance, 1905 ed., vol. 1, p. 535; *Putnam* v. *Home Insurance Co.* (1877), 123 Mass. 324; *Marsden* v. *City and County Assurance Co.* (1866), L.R. 1 C.P. 232; *Canada Fire and Marine Insurance Co.* v. *Western Insurance Co.* (1879), 26 Gr. 264. If Dickson & Tweeddale were in the position for which we contend, then *Hawthorne* v. *Canadian Casualty and Boiler Insurance Co.* (1907), 14 O.L.R. '66, governs.

H. Cassels, K.C., for the defendants. The judgment appealed from is right, and should be affirmed. It is admitted by the plaintiffs that the insurance policy in question was transferred in October, 1908, so as to cover property while contained in a building known as the Owl Commercial Company's warehouse; and that, unless there was a further valid transfer, the policy did not cover the property which was burnt. There was, I submit, no valid transfer of the insurance. The plaintiffs rely in the first place on the transfer assented to by the defendants in Toronto on the 26th March, 1909; and, in the alternative, on the informal assent given in New York on the 14th January, 1909; but neither the formal assent nor the informal assent is valid or binding on the defendants. The formal assent is invalid because it was given after the fire had occurred, without knowledge by the defendants of that fact, and with knowledge but non-disclosure by the plaintiffs of that fact: *Western Assurance Co.* v. *Doull*, 12 Can. S.C.R. 446; *Hendrickson* v. *Queen Insurance*

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Co. (1871), 31 U.C.R. 547. The assent given in New York is also invalid because the agency of Dickson & Tweeddale had been terminated before that assent was given by their clerk, and neither they nor any one in their employ had at that time any power to bind the defendants in any way: *Pigott* v. *Employers' Liability Assurance Corporation* (1900), 31 O.R. 666. Even if the agency of Dickson & Tweeddale had not been terminated, the assent alleged to have been given by the clerk Schekira would not have been binding on the defendants. Dickson & Tweeddale had not assumed to delegate to him, and could not delegate to him, the discretionary power which, if the agency had not been terminated, would have been vested in them, and Schekira had no authority in writing to represent the defendants and no implied authority to act on their behalf: *Summers* v. *Commercial Union Assurance Co.* (1881), 6 Can. S.C.R. 19; *Canadian Fire Insurance Co.* v. *Robinson* (1901), 31 Can. S.C.R. 488; *Lount* v. *London Mutual Fire Insurance Co.* (1905), 9 O.L.R. 699. Then, too, the assent alleged to have been given by Schekira was at most a temporary assent, for the convenience of Charles E. Ring & Co. No notice of it was given to the defendants; and, in any event, it lapsed and came to an end long before the fire occurred: *Nippolt* v. *Firemen's Insurance Co. of Chicago*, 59 N.W. Repr. 191; *Grover & Grover Limited* v. *Mathews*, [1910] 2 K.B. 401; *Skillings* v. *Royal Insurance Co.* (1903), 6 O.L.R. 401; *Dohmen Co. Ltd.* v. *Niagara Fire Insurance Co. of City of New York* (1897), 71 N.W. Repr. 69; *Mead* v. *Phenix Insurance Co.* (1893), 158 Mass. 124; *Hamblet* v. *City Insurance Co.* (1888), 36 Fed. Repr. 118; *Burlington Insurance Co.* v. *Campbell* (1894), 60 N.W. Repr. 599.

McCarthy, K.C., in reply. The evidence shews that Dickson & Tweeddale had notice of the transfer.

February 15, 1912. GARROW, J.A.:—Appeal by the plaintiffs from the judgment at the trial, of Sutherland, J., who dismissed the action.

The action was brought to recover the sum of $2,000 upon an insurance policy issued by the defendants in favour of the plaintiffs, whereby the defendants agreed to insure the property of the plaintiffs contained in a building in the city of Quincy, in the State of Florida, for one year, against loss by fire.

The facts are set out very fully in the judgment of Sutherland, J.; and, as I agree in the result, I do not think it necessary to repeat them at any length.

As will be seen, Sutherland, J., in dismissing the action, proceeded upon two main grounds: (1) the absence of authority in Mr. Schekira, the clerk in the defendants' New York agents' office, to consent for the defendants to a transfer, or even to issue a "binder;" and (2) that the consent to the transfer obtained at the defendants' head office at Toronto, after the fire, could

not be upheld, it having been given in ignorance that a fire had occurred.

The second conclusion seems to be undoubtedly correct. The fire had completely altered the relation of the parties, and had fixed their respective rights and obligations under the contract as it then stood: see *Skillings* v. *Royal Insurance Co.*, 6 O.L.R. 401, at p. 405. That the consent was antedated is, I think, of no consequence. The defendants cannot, under the circumstances, be assumed to have intended thereby to ratify the "binder" issued by Mr. Schekira, of which, upon the evidence, it is clear that they then knew nothing.

As to the other ground, I have had more difficulty. The defendants' agents, Dickson & Tweeddale, consented to the earlier transfer, with the apparent approval of the defendants. That transfer was put through the agents' office by Mr. Clark, an employee, and initialled upon its face by him, and not by the agents themselves or either of them. This the defendants must be assumed to have known when they received particulars of the transfer on the 4th December following. Nor does Mr. Massie, the defendants' president, when called as a witness, disapprove of what was then done, either by the agents or by Mr. Clark as their employee. There is no evidence that Mr. Clark was appointed in writing. So far as appears, he may have been appointed exactly as Mr. Schekira was. When Mr. Clark left the employment, Mr. Schekira, who had acted as Mr. Clark's assistant, continued to discharge his duties with respect to such transactions, which were not at all unusual. Mr. Schekira had so acted for several weeks before the date of the "binder" in question, and had in that time put through several for the other companies represented by Dickson & Tweeddale, although this happened to be the first for the defendant company. That he was so acting must have been known and approved by Dickson & Tweeddale, who, if they did not expressly appoint him to succeed Mr. Clark, at least did not appoint any one else to do so.

The case is not, I think, governed by the case in this Court of *Walkerville Match Co.* v. *Scottish Union and National Insurance Co.*, 6 O.L.R. 674. That was the case of a small local agency. This is the case of a single exclusive agency doing a large business, in a foreign jurisdiction, for it is not shewn that the defendants had any other agent in or for the city, or even for the State of New York. Such an agency has been, not unreasonably, held, in this Province, to stand, as to its authority to bind its principals, at least in some respects, in the position of the head office: see *Campbell* v. *National Life Insurance Co.*, 24 C.P. 133, at p. 144. In such an office in a great city like New York, and in an office doing the extensive business done by Dickson & Tweeddale, it could not reasonably be expected that the agents would do everything personally. But what would be expected,

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and what would be reasonable, it seems to me, would be, that the business, while carried on under their general supervision, would be managed, as to details, with the aid of subordinates such as was Mr. Clark, and, after him, Mr. Schekira. And a policy-holder, acting in good faith, would not, I think, be bound to see that such subordinates had been duly or efficiently appointed, if they were apparently acting within the scope of an ostensible authority. The plaintiffs had dealt in a similar manner with one subordinate, Mr. Clark, with the apparent approval of the defendants, and I incline to think that they were equally justified in the subsequent dealing with Mr. Schekira, who, although a young man and less experienced than Mr. Clark, was apparently performing the same duties in the agents' office with respect to such transactions as the one in question.

I am also of the opinion that the secret cancellation of the agents' authority does not affect the matter. Such agencies cannot be terminated in that summary way to the prejudice of customers who continue to deal with the office in good faith and without notice.

In the result, the "binder," in my opinion, should be regarded as if, when it was given, Dickson & Tweeddale had continued to be the defendants' agents and had themselves given it.

But this by no means ends the plaintiffs' difficulties. The "binder," it is clear upon the evidence, is only intended to be in force pending the production of the policy and a proper indorsement thereon of the change in the contract. The policy contains a provision that no officer or agent shall have power to waive the provisions or conditions of the policy, unless such waiver is written upon or attached to the policy, and that no privilege or permission affecting the insurance under the policy shall exist or be claimed by the insured unless so written or attached. Granting the temporary "binder" seems to have become a practice, not actually warranted by the usual contract of insurance, owing to the exigency of the haste with which business is now transacted. But it is clear, and it is not unreasonable, that the formal completion should, in the interests of both parties, take place without unnecessary delay. No actual time for doing so is stated, either in the "binder" or by the witnesses who describe the practice. The assured holds the policy. The next step must, therefore, come from him. He would be bound to produce the policy to the assurer for the purpose of having the further formal indorsement made. And this, I think, he would be bound to do within a reasonable time: see *Scammell* v. *China Mutual Insurance Co.* (1895), 164 Mass. 341, and *Thompson* v. *Adams* (1889), 23 Q.B.D. 361, where cognate subjects are discussed. What is a reasonable time is, of course, a question of fact; and, with every desire to put no unnecessary obstacle in the plaintiffs' way in seeking to recover what appears

to be an honest claim, I find it quite impossible to hold that they, and those for whom they are responsible, acted otherwise than with great, unnecessary, and inexcusable delay. Ring & Co., their agents at New York, knew before the end of January that Dickson & Tweeddale had, through financial difficulties, been closed up. That was matter of newspaper notoriety. They must have known where the head office was, and might have applied there, but did not. On the 7th March, at Niagara Falls, they handed to Mr. Stinson, an insurance agent residing in Toronto, the policy and formal transfer, to obtain from the defendants at their head office the necessary indorsement, which, as subsequent events shewed, could have been easily obtained; but, for some wholly unexplained reason, Stinson did nothing until the day after the fire. The result is, that, through no fault of the defendants, the requisite indorsement upon the policy not was made in time. And they are, therefore, now in a position, successfully in my opinion, to set that up as a defence to the action.

The appeal should, in my opinion, be dismissed with costs.

MEREDITH, J.A.:—An insurance of goods in one building or locality is not an insurance of them in another building or locality; the removal of them from one place to another requires that which is tantamount to a new contract in order to preserve the insurance: see *Pearson* v. *Commercial Union Assurance Co.* (1876), 1 App. Cas. 498.

The goods in question were moved from the place and building in which they were insured to another place and building, and were there destroyed by fire; and, therefore, the plaintiffs can recover in this action, upon the policy of insurance, only if they had procured, before the fire, that which was tantamount to insurance of the goods in the place and building where they were so destroyed.

They took steps with that object in view; but had not, in my opinion, accomplished it when the fire took place.

Their first step was, through their agents, an application to a co-partnership firm in the city of New York, who had been the New York agents for the defendants, but had some time before ceased to be their agents, and were in difficulties which brought their business to a close soon after; the application was made in writing upon a form, called a "binder," which, upon its face, is singularly inappropriate; being in the form of an application for insurance, which form, when accepted, becomes that which is in this Province always called an "interim receipt," constituting a binding contract of insurance, subject to the conditions of the policy to be issued upon it. But no premium or consideration was given, nor any readjustment in any respect attempted; so that it is quite plain that all that ought to have been sought, and given, was the assent of the company to change

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of the locality of the goods insured; and the main difficulty I find in the plaintiffs' way to success in this action is, that that was not done, and the defendants cannot be bound, especially on the facts of this case, by intentions or by what ought to have been done, not carried into effect.

The application was presented to a young man, who was at the time in charge of that branch of the New York firm's business to which the application would, in the ordinary course of business, be made; but he was little experienced, and the business was, as I have intimated, in a stage approaching collapse. Without inquiry, except to see that the application came from a reputable insurance broker, he, without consulting any one else in the office, initialled the application, which the broker retained, and placed another, I suppose a duplicate, "on the file in the office" of his masters.

While the same policy was in force, another change of locality of the goods had taken place previously, and had been duly assented to by the defendants: the change in question was a removal of the goods back to the place where they were when the insurance upon them was first effected. On this occasion, the procedure adopted seems, from the evidence, to have been of a different character: according to the testimony of the broker on the first occasion, an indorsement of the policy giving consent to the change was drawn by him, signed by the company, through their New York agent, and attached to the policy by him, and returned to the plaintiffs. But, however this may be, when consent to the second change was sought, all concerned say—the brokers and the New York firm's clerk both say so very plainly—that the indorsement upon the policy could not be made by the New York firm; that, at that time at all events, it must be procured from the defendants, as it afterwards was, but not until after the loss.

Assuming, as I do, that, in the circumstances of this case, the plaintiffs might deal with the New York firm, as to this insurance, as they did, as if still agents of the defendants, because no notice of their discharge had been given, I am yet unable to perceive how it can rightly be found that any consent of the defendants to change of locality had been obtained before the loss. Whatever the persons concerned intended to do or should have done, no such consent was actually given; all that was done was the presenting of the application in writing and the initialling of it, and placing it upon the file, as I have mentioned, by the New York firm's clerk; no indorsement was made; the character of the "binder" was, on its face, entirely different from that of the indorsement which had previously been obtained, and which would be the usual mode of evidencing consent to such a change; and no knowledge of the change came to the defendants until late in the month of March, more than three months after the

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"binder" transaction took place; and, as I have before intimated, the New York firm, having actually no sort of authority to act for the defendants at that time, ought not to be given any binding power, by reason of any ostensible power, beyond that which they actually exercised; which is in writing, and which was exercised only through the ignorance of their clerk.

As the plaintiffs' claim seems to me morally a just one, that is, they have, through misfortune only, lost their goods, one may regret that they should also lose their indemnity, through nothing but want of ordinary care and business method; but I am quite unable to perceive how it can justly be said that, before the loss, they had obtained a binding consent of the defendants to the change of locality of the goods, the burden of proof of which is upon them; and, if that be so, they rightly failed in this action at the trial.

MOSS, C.J.O., MACLAREN and MAGEE, JJ.A., agreed in the result.

Appeal dismissed.

Annotation—Insurance (§ II E 1—91)—Fire insurance—Change of location of insured chattels.

Annotation

Fire insurance—Change of location

The fundamental principle upon which the decision in the above case is founded is thus stated in 17 Halsbury's Laws of England, sec. 1065. "If goods are insured as being in certain premises, the insurers will not be liable for loss or damage occurring to them when removed from the premises for any cause whatever." See also Cameron on Fire Insurance 72, and Welford and Otter-Barry on Fire Insurance 18.

So, in *Pearson* v. *Commercial Union Ins. Co.*, 1 App. Cas. 498, under a time policy against fire on a steamship, describing it, as then lying in a certain dock, but which gave it "liberty to go into dry dock," recovery was denied where the ship was burned after it had gone into dry dock and was brought out and moored in the river preparatory to putting on its paddle wheels. The Court declared that the policy covered the ship while in the dock where she was at the time the insurance was effected and while passing to the dry dock, and while directly returning from the dry dock to the other dock, but did not cover the vessel while moored in the river for a collateral purpose.

And in *Gorman* v. *Hand in Hand Ins. Co.*, Ir. Rep. 11 C.L. 224, under a policy insuring certain "agricultural machines" then being in a specified place and providing that the insurer's liability should cease if they were removed from that place without its assent, recovery was denied for the loss of the machines by fire at another place than that specified in the policy.

But it seems that if the removal is merely a temporary one and the goods are brought back to the place specified in the policy and are there destroyed by fire, the insurer is liable: 17 Halsbury's Laws of England sec. 1065; *Gorman* v. *Hand in Hand Ins. Co.*, Ir. Rep. 11 C.L. 224; *Ohio Farmers' Ins. Co.* v. *Burget*, 65 Ohio State R. 119.

An insurer was held not to be liable where the goods were destroyed by fire, while temporarily located in another building in the process of

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Annotation

Fire insurance—Change of location

Annotation (*continued*) — **Insurance (§ II E 1—91) — Fire insurance — Change of location of insured chattels.**

removal from their old location to a new location, to which removal the insurer had consented, the agreement being that the policy was to cover the property during removal in proportion as the value in each location should bear to the whole value: *Palatine Ins. Co.* v. *Kehoe*, 197 Mass. 354. The same conclusion had been reached under similar circumstances in an earlier case in the same jurisdiction: *Goodhue* v. *Hartford Fire Ins. Co.*, 184 Mass. 41, where the goods were burned in railway cars while being removed to a new location.

This rule has not been accepted in its entirety in the United States. The weight of authority there supports the proposition that, in the absence of language in the policy making the insurers liable for the loss of the goods only when in a certain locality, the insured may recover for a loss of the goods though not in the location stated in the policy if the ordinary use of the insured property makes it necessary not to leave it permanently in such location.

To illustrate; in *Boyd* v. *Mississippi Home Ins. Co.*, 75 Miss. 47, the Court said: "Wearing apparel is to be worn on the person, and phaetons are to be ridden in, and mules are to be used in the cultivation of crops, and threshing machines are to be taken to the fields where threshing is to be done; and, though policies may refer to them as in, or contained in, particular houses, the insurers necessarily know—what all men commonly know—that such uses will be made of them, and are liable, though they be destroyed elsewhere, if they are put to such customary use only."

Thus, in accordance with this rule in *London Life Ins. Co.* v. *Graves*, 4 Ken. Law Rpts. 706, recovery was allowed for the loss of two buggies, described in policy as contained in a livery stable, though at the time of their destruction, they were temporarily in another place undergoing repairs.

To the same effect are *Longueville* v. *Western Ins. Co.*, 51 Iowa 553, where recovery was allowed for clothing though it was lost while sleigh-riding although the policy described it as contained in a certain building, and *Noyes* v. *North-Western Nat. Ins. Co.*, 64 Wis. 415, where recovery was allowed for clothing which was at another place than that described in the policy for the purpose of being repaired.

But, where a policy clearly shews that it was intended by the parties to limit the liability of the insurer to a loss which happened only at the location of the property as stated in the policy, there can be according also to the rule in the United States no recovery if the property is destroyed while in another place: *Lakings* v. *Pheonix Ins. Co.*, 94 Iowa 476; *L'Anse* v. *Fire Association*, 119 Mich. 427; *Leventhal* v. *Home Ins. Co.*, 32 Misc. 685, 66 N.Y. Supp. 502. For a full discussion of the rule in the United States upon this question, see the notes 26 L.R.A. 237 and 22 L.R.A. (N.S.) 848.

HENRY H. ROGERS (plaintiff) v. ESTHER HEWER, HARRIET D. TENANT, CHARLES A. WRIGHT, I. B. HEWER, JOHN TENNANT, and ROBERT T. D. AITKEN (defendants).

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Jan. 15.

Alberta Supreme Court. Trial before Scott, J. January 15, 1912.

1. CONTRACTS (§ I E 5—98)—STATUTE OF FRAUDS—SUFFICIENCY OF WRITING—DESCRIPTION OF LAND—SEVERAL DOCUMENTS.

Where a receipt for the initial payment upon land sold failed to shew with certainty how many lots were sold, its insufficiency in this regard under the Statute of Frauds, if any, was covered by the fact the cheque given by the purchaser for such payment plainly shewed that the sale was of a specified number of lots.

2. SPECIFIC PERFORMANCE (§ I E 1—30)—ABSENCE OF TERMS OF PAYMENT OF PURCHASE MONEY — OFFER TO PAY WHOLE.

Where a purchaser of land offers to pay the whole purchase price the fact that his contract of purchase omitted to state the terms of payment will not disentitle him to a specific performance of the contract.

3. EVIDENCE (§ VI J—571)—DESCRIPTION OF LAND—IDENTITY ASCERTAINABLE — PAROL EVIDENCE.

Where the instruments relied upon to shew a contract for the sale of land described the property sold with such certainty that its identity could be ascertained, parol evidence to identify it is admissible.

4. CONTRACTS (§ I E 5c—106)—STATUTE OF FRAUDS—DESCRIPTION OF PARTIES.

Where the instrument relied upon as shewing a contract of sale of land consisted of a receipt signed by a real estate agent which contained a stipulation that the sale was "subject to confirmation by owner," such reference is sufficient to describe the joint-owners as the vendors to satisfy the Statute of Frauds, and they will be bound by the terms of the writing if it is shewn that the real estate agent had their authority to sell on the terms of the receipt and that their approval had been duly given by one of such co-owners holding written authority from the others so to do.

5. PRINCIPAL AND AGENT (§ III—41)—POWER OF ATTORNEY FOR SALE OF LAND—DELEGATION.

The fact that the donee of a power of attorney for the sale of land which left to his discretion the price and terms of payment authorized a third person to find purchasers for him at a stated price and on stated terms, did not constitute a delegation to such third person of the discretion lodged in the donee.

6. PRINCIPAL AND AGENT (§ II D—26)—AUTHORITY TO CO-OWNER TO SELL—RATIFICATION.

Where several owners of land gave one of their number a power of attorney which authorised him to sell it and to approve on behalf of the other owners, of an offer of purchase, his tacit approval of a sale effected by a third party employed by such co-owner to sell the land must be deemed to be also their approval and ratification of the sale.

ACTION for specific performance of an agreement for the sale of land.

Judgment was given for plaintiff.

On June 7th, 1910, the male defendants, Hewer, Tennant and Aitken were joint owners of the land in question. On that day Tennant and Aitkin gave a power of attorney to Hewer authorising him to make, sign and execute agreements of sale of those and other lands and thereby agreed to ratify and confirm all things done by him under the power. On 21st July,

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ROGERS v. HEWER

Statement

1910, Hewer gave the Eureka Real Estate Company of Calgary verbal authority to sell the property at $85 per lot and stated in effect that time would be given for payment of a portion of the purchase money but the terms of payment were not specified. On 28th of the same month he gave the company the following written authority to sell, viz.:—

Calgary, 28th July, 1910.

To Eureka Real Estate Co., Calgary.

You are hereby authorised to sell the following described property at the price and terms stated below. I agree to pay you a commission of five dollars per lot out of the first payment made.

Lots 5 to 40 inclusive block twenty-seven, plan 4479 P. South Calgary. Exclusive listing.

Price $85 per lot. Terms cash or terms.

(Sgd.) I. B. HEWER.

On the 26th of the same month the company sold certain of the lots in question to the plaintiff who then gave the company the following cheque by way of deposit on account of the purchase, viz.:—

Calgary, Alta., July 26th, 1910.

Pay to Eureka Real Estate Co. or order twenty-five 00/100 dollars.
(Sgd.)

(Sgd.) H. H. ROGERS.

Deposit on lots 37, 38, 39, 40 Block 27 So. Calg.

which cheque was endorsed by the company and they received payment of it two days later.

At the time of the sale the company gave the plaintiff the following receipt, viz.:—

Calgary, 26th July, 1910.

Received of H. H. Rogers twenty-five dollars deposit on lots 37-40 Blk 27 South Calgary. Price $85 each. Terms half cash. Bal. 3 and 6 mths.

Subject to confirmation by owner.

(Sgd.) EUREKA REAL EST. CO'Y.,
GEO. T. BROCKBANK.

On the 29th August following the company sold certain other lots to the plaintiff and gave him the following receipt:—

Calgary, 29th August, 1910.

Received of H. H. Rogers twenty-five dollars deposit on lots 35-36 Block 27 So. Calgary. Price $85 each.

Subject to confirmation by owner.

(Sgd.) EUREKA REAL ESTATE CO.
GEO. T. BROCKBANK.

C. T. Jones, for plaintiff.

T. M. Tweedie, for defendants.

SCOTT, J.:—The plaintiff claims that cheque and receipts referred to constitute agreements on the part of the three defendants referred to for the sale to him of lots 35 to 40 both inclusive in block 27 according to a plan of sub-division called "South Calgary" and registered as Plan No. 4479 P. being the

lands in question and that the sales were upon terms of payment of one half the purchase money in cash and the balance in six months with interest at eight per cent.

The defendants, among other defences, rely upon the Statute of Frauds and contend, as to the first sale (1st) that the receipt shews a sale of only two lots instead of four as contended by the plaintiff and (2nd) that it omits to provide for the payment of interest. As to the second sale, that it does not specify the terms of payment of the purchase money and, as to both sales, that the receipts do not describe the property sold with sufficient certainty.

It may be open to question whether the receipt given by the company on the first sale is a sufficient agreement under the statute for the sale of four lots, but any doubt upon that point is set at rest by the fact that the cheque given by the plaintiff at the time of the sale and endorsed by the company shews that the sale was of four lots and, in my view, the two documents may be read together for the purpose of ascertaining the subject-matter of the agreement.

In view of the fact that the plaintiff has offered to pay the whole purchase-money and interest, the fact that the terms of sale as to the payment thereof were omitted from the agreement relied upon by the plaintiff will not disentitle him to specific performance of the agreement (see *Martin* v. *Pycroft*, 2 DeG. M. & G. 785).

The evidence shews beyond a doubt that the property described in the documents referred to as being in "South Calgary" is the property in question. Hewer in his examination for discovery and Brockbank who made the sale on behalf of the company both identify it as being the property in question. It is apparent from the evidence that the subdivisional plan referred to was known as "South Calgary" and the trial proceeded throughout on the basis that they were identical. In my view, the documents referred to describe the property with such certainty that its identity can be ascertained and, such being the case, parol evidence to ascertain it is admissible (see *McMurray* v. *Spicer*, L.R. 5 Eq. 527, at pp. 536, 7).

It was also contended that the statute was not complied with in that the documents referred to do not shew who were the owners of the property. I think, however, that the statement therein that the sale was subject to the owners' approval is sufficient to shew that the owners were the vendors and a sufficient description of them to satisfy the statute (see *Rossiter* v. *Miller*, 3 A.C. 1124, at p. 1140).

It was also contended on behalf of the defendants that the power of attorney referred to did not authorize Hewer to delegate to another the power to sell thereby conferred upon him.

If Hewer had left it to the company to fix the price and

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terms of sale, sales made by it would, unless otherwise authorized, be without the authority of the other joint owners. What Hewer did, however, was to himself fix the price and terms and authorize the company to find purchasers and made sales upon those terms. In my opinion that did not constitute a delegation to the company of the discretion which he was authorized by the power to exercise but was in effect merely an authority to the company to find purchasers and to carry out sales, the terms of which were fixed by him.

Another contention on behalf of the defendant was that the sale being subject to the owners' approval, there was no evidence of such approval.

The evidence shews that Hewer tacitly approved of the sales, and as the power of attorney authorized him to approve on behalf of the other owners, his approval must be deemed to be theirs also.

In their statement of defence, the defendants claim that by reaso nof the plaintiff's *laches* he is not entitled to recover. That defence was not referred to by their counsel upon the argument and I am of the opinion that no *laches* has been shewn.

Subsequent to the sales to the plaintiff the male defendants Hewer, Tennant and Aitken transferred the property in question to the remaining defendants who now hold a certificate of title therefor. At the trial counsel for the defendants consented that, if the plaintiff were entitled as against the three defendants to specific performance of the agreements referred to, the other defendants would execute the necessary conveyances of the property to him.

I hold that the plaintiff is entitled to judgment for specific performance of the agreements for sale of the property in question with costs against all the defendants.

Judgment for plaintiff.

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Feb. 21.

ADOLPH *v.* GOOD.

Saskatchewan Supreme Court. Trial before Wetmore, C.J. February 21, 1912.

1. SPECIFIC PERFORMANCE (§ I E 1—30)—ORAL AGREEMENT—SALE OF LAND BY DECEASED WIFE—PROPERTY BELONGING TO HUSBAND.

Specific performance cannot be granted to enforce against his personal interest in the lands a contract to which the defendant was not a party made by a person deceased, of whose estate he is the personal representative where the suit is brought against him in his representative capacity only.

2. CONTRACTS (§ I E 6*b*—121)—ORAL AGREEMENT—PART PERFORMANCE—STATUTE OF FRAUDS.

No taking of possession sufficient to satisfy the requirements of the Statute of Frauds, occurs where one in possession of a piano under a storage arrangement, orally agrees to exchange certain land for the piano, and merely continues in possession of the piano without any overt act or writing to indicate a change in the character of the continued possession.

[*Maddison* v. *Alderson*, 8 App. Cas. 467, specially referred to.]

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3. CONTRACTS (§ I E 6b—121)—SALE OF LAND—PART PERFORMANCE—RESALE.

The purchaser under an oral agreement for sale cannot set up his own contract of re-sale made with a third party as a part performance of the original agreement excluding the operation of the Statute of Frauds for the purpose of the purchaser's action for specific performance, if the contract of re-sale was made without the knowledge or acquiescence of the original vendor.

[See also Fry on Specific Performance, 5th ed. p. 311.]

TRIAL of an action for specific performance of an alleged agreement for sale of lands.

The action was dismissed.

J. E. Chisholm, for plaintiff.

Emile Gravel, for defendant.

WETMORE, C.J.:—This was an action for specific performance and damages. I find the following facts:—

The plaintiff was possessed of a piano. His wife died, and he was about selling his furniture, and at the request of Rubina A. Good he left the piano with her for the use of her daughter until he made up his mind as to what he was going to do with it. This was in 1907. The piano continued there until the spring of 1908, when the plaintiff informed her that he was going to sell it and would take $200 cash for it. She told him she did not have the cash. In June, 1908, she offered him the lots set out in the statement of claim, being lots 51 and 52, block 27, in city view subdivision of the city of Moosejaw, in exchange for the piano. The plaintiff accepted the proposition, and agreed to leave the piano in Mrs. Good's house, where it had been since 1907, when the plaintiff left it there, and it has been there ever since; and Mrs. Good agreed to accept it and to give the plaintiff the lots in question. There was no written agreement or memorandum signed by any person. Mrs. Good died about the 14th September, 1910, and her husband, the defendant, took out letters of administration to her estate. The plaintiff never made an application for a transfer until April, 1910, nearly 22 months after the agreement was made. On the 1st July, 1910, the plaintiff by articles of agreement agreed to sell these lots to one Charlie Chow. There is no evidence that Mrs. Good or the defendant was aware of this agreement. Neither the plaintiff nor any person claiming under him ever entered into possession of the lots. As a matter of fact, Mrs. Good never owned these lots; she had no right or interest in them whatever; they belonged, and still belong to her husband. Specific performance cannot, therefore, be granted.

I can find cases which establish that if the vendor has any interest whatever in the property, and the purchaser chooses to take it, specific performance will be decreed with an abatement. But I can find no case where the vendor has no interest whatever where specific performance has been granted. It seems to

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me that to decree it under such circumstances would be against one of the rules governing relief of that character; namely, it would be useless. I may state that effort was made at the trial to obtain a decree for specific performance against the defendant personally. That cannot be granted in this action, because he is sued as administrator of his wife, and not otherwise. I cannot, however, discover any grounds for such a decree against him personally. One or two letters were written by Messrs. Grayson and Armstrong to the plaintiff. They, however, were acting for the plaintiff, and the letters were written to acquaint the plaintiff, with the result of an interview they had had with the defendant at the plaintiff's instance; they were not written by them as the agents of the defendant at all. A letter was put in evidence purporting to be signed by the defendant and written to the plaintiff. As a matter of fact, it was not written by the defendant. It was written by one of the defendant's daughters at the instance of her mother, without the defendant's knowledge or authority. No agreement to sell the land was proved as against him personally.

The only question that remains is, whether the plaintiff is entitled to damages as against the estate of Mrs. Good, and that depends upon whether there was such a part performance of the agreement as to take it out of the Statute of Frauds. It is set up on the part of the plaintiff that his agreeing that Mrs. Good should retain the piano and that she retained it was part performance. I am of opinion that the retaining of possession was of such an equivocal character that it did not necessarily point to an agreement of sale. There was no actual change of possession. There was no overt act, or surroundings which pointed to any change of character in Mrs. Good's continued possession. It was just as much in keeping with possession she got in 1907 as it was with a possession by any agreement of sale. In *Maddison* v. *Alderson*, 8 App. Cas. 467, Earl Selborne lays down the following, at p. 479:—

> All the authorities shew that the acts relied upon as part performance must be unequivocally and in their own nature referable to some such agreement as that alleged.

Then does the executing the agreement to Charlie Chow amount to a part performance? This agreement was executed more than two years after the agreement was made between the plaintiff and Mrs. Good. As I have before stated, the fact of its being executed was not communicated to her in her lifetime or to the defendant since her death before action brought. I am of opinion, therefore, that that was an act which comes within the class of acts referred to by the learned author of Fry on Specific Performance, (4th ed.) at p. 273, [5th ed. at p. 311]; as being of that sort which are

> the mere acts of the party doing them; the other party is not necessarily cognizant of them, and consequently he is not so bound by

them as to render it fraudulent in him subsequently to refuse to carry the contract into effect.

The latter part of this citation is especially applicable to the circumstances of this case, assuming the act of the executing transfer could under ordinary circumstances be held to be an act of part performance, because no act of the plaintiff which can be held to be an act of part performance was done until over two years from the date of the alleged agreement. The result is that I hold that there was no agreement binding on Rubina Good in her lifetime or on the defendant as her administrator since her death to enable me to give damages in this action.

Evidently no liability on the part of the deceased intestate or the defendant as her administrator for a conversion at common law was established. There was no demand and refusal proved. It is therefore unnecessary to determine whether if there had been I could give damages for the value of the piano in this action.

There is a paragraph in the statement of defence which has caused me to hesitate somewhat in reaching this conclusion. That paragraph is as follows:—

> The defendant admits that there was among the assets of the said Rubina A. Good, a piano which the defendant says was paid for in full.

If the piano mentioned therein is the piano in question, the plea is false, because that piano was not paid for. But I cannot under any circumstances understand why that paragraph was pleaded. It denies no allegation in the statement of claim, nor confesses and avoids any such allegation. It appears to be merely a gratuitous statement that seems to serve no purpose, except possibly to seriously embarrass the defendant's defence. I have come to the conclusion that the paragraph is so vague that I would not be justified in paying attention to it. It is vague because it is not alleged that the piano specified is the one in question. But assuming that it is, the mere fact that, finding this piano among his wife's effects, he put it in the inventory as part of her assets, would not under the evidence amount to a part performance by him as administrator of any contract of sale on the part of the deceased, for he swore in effect that he had no knowledge of any such contract or agreement, and there is no evidence to the contrary.

Judgment for the defendant with costs.

Judgment for defendant.

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Mar. 2.

Re LOCKHART.

Saskatchewan Supreme Court, Wetmore, C.J., in Chambers. March 2, 1912.

1. EXECUTORS AND ADMINISTRATORS (§ II A—42)—ORIGINATING SUMMONS —APPROVAL OF SALE.

An application by administrators, for the approval of a sale of lands belonging to the estate may be made in Saskatchewan by way of an originating summons issued pursuant to the provisions of sub-sec. 8, sec. 624 of the Saskatchewan Rules of Court (1911), following statutory form number 80, and returnable before a Judge in Chambers.

2. EXECUTORS AND ADMINISTRATORS—(§ II A 2—43)—SALE OF LAND TO ADMINISTRATOR—LEAVE TO PURCHASE.

Administrators as trustees for the next of kin of the intestate have no right to purchase property belonging to the estate without the leave of the Court, but a sale of land by the estate to one of the administrators may be approved and leave given to the administrator to purchase where the sale is an advantageous one for the estate.

3. LAND TITLES ACT (§ III—30)—TRANSFERS FROM EXECUTORS OR ADMINISTRATORS TO THEMSELVES AS BENEFICIARIES.

Where a certificate of title was issued under Land Titles Act of the Province of Saskatchewan to the administrator or executor as such, and he is one of the parties beneficially interested in the property, the practice for passing the administrator's interest to him when he is entitled to be clothed with it absolutely in his own name is to file in the land titles office a transfer from the administrator or executor as such to himself personally.

[*Re Galloway*, 3 Terr. L.R. 88, considered.]

AN application, by originating summons, by the administrators of the estate of Marion Lockhart, deceased, for the approval of the sale by them to Alfred Percy Lockhart, one of the administrators, of certain property belonging to the estate.

The order was granted.

Messrs. *MacKenzie, Brown and Co.*, for applicants.

No one *contra*.

WETMORE, C.J.:—This is an application by originating summons on the part of the administrators for the approval of the sale by them to Alfred Percy Lockhart of the intestate's real estate, being the north-east quarter of sec. 14, tp. 25, rg. 13, west of the 2nd meridian, and the crops grown last year thereon. The summons was taken out returnable before the Judge in Chambers as provided by Form No. 80 in the "Rules of Court, 1911." It was claimed that the application could be entertained under Rule 578. I am inclined to the opinion that it cannot be entertained under that Rule, because there is no cause or matter pending relating to any real estate, but I express no decided opinion.

I am of opinion, however, that if the application would lie under that Rule, the wrong form of summons has been adopted; that Form 79 should have been followed. There seemed to be some doubt at the hearing of the application as to when Forms Nos. 79 and 80 were respectively applicable. Rule 601 provides the requisites and forms of originating summons; that is, so far as form is concerned, it "shall be in the Form No. 79 or

80 in the appendix with such variations as circumstances shall require." Rule 604 provides that the parties served with an originating summons should except as thereinafter provided enter an appearance with the local registrar before they are heard. The Form 79 is headed "General Form of Originating Summons," and that is the form to be used unless the Rule or Act authorising the dealing with some special subject by originating summons directs that it is to be made returnable before a Judge in Chambers, as is provided in Rule 624. This application, I am of opinion, can be entertained under paragraph 8 of that Rule, and therefore the procedure is correct.

I had some doubt, however, whether I could allow it, because Alfred Percy Lockhart, the purchaser, is one of the administrators, and therefore a trustee for the next-of-kin and others interested in the estate in respect thereto. In order to pass a title it would be necessary for him to join in the transfer, and if he could not legally do so the only title he could get would be from the two other administrators. That would leave him still a trustee, and would serve no purpose to vest the title in himself freed from the trust. I have no power, so far as I can discover, to make a vesting order under paragraph 8 of Rule 624. (I assume that the certificate of title is at present in the administrators as such.) I am informed on inquiry that the practice in all the land titles offices in cases where a certificate of title has issued to an administrator or executor as such, and he happens to be the party or one of the parties beneficially interested in the property is that when the time arrives that he is entitled to be clothed with the interest in his own name, to accept a transfer from the administrator or executor as such to himself personally or to himself personally or others if there are others interested besides himself. It seems that this has been the practice since *Re Galloway*, 3 Terr. L.R. 88. I am not clear that that case went far enough to warrant the practice. But at the same time I am of opinion that I ought not to interfere with such practice, and possibly thereby unsettle a good many titles, after it has been followed for nearly fourteen years, at any rate when no person appears to question it.

There are eight next-of-kin of the deceased interested in the property, and they all, with one exception, have consented to the sale. Jessie Syme, a daughter of the deceased, refuses to do so. She was served with a copy of the originating summons She did not appear at the return of such summons, nor did any person for her. I should judge, from a letter of hers attached as an exhibit to one of the affidavits used on the application, that she was attempting to hold the sale up to compel payment of an account against the estate with respect to which she had no legal claim, as practically admitted in her letters. I think

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RE LOCKHART

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the sale in question would be a most advantageous one in the interest of the estate and next-of-kin. The price offered for the property is $4,300.00 cash. The land is a quarter of a section, which is farm land. A partition among so many persons interested would leave such a small portion to each that it would be of very little present use, at any rate.

I have not lost sight of the fact that the purchaser being a trustee has no right to buy in the property without leave of the Court. I am of opinion that although I am merely asked to approve of the sale, and that is all I can do, I may for the purpose of carrying the approval out order that the purchaser have leave to purchase the property.

The order will be, that I approve of the purchase; and that the purchaser, Alfred Percy Lockhart, have the right to purchase the property in question; and that the costs of this application be paid out of the estate.

Order granted.

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Jan. 24.

PARSONS v. CITY OF LONDON.

Ontario Divisional Court, Sir Glenholme Falconbridge, C.J.K.B., Britton, and Riddell, JJ. January 24, 1912.

1. MUNICIPAL CORPORATIONS (§ II D—149)—CONTRACT TO SELL MUNICIPAL REAL ESTATE—INADEQUACY OF PRICE.

The Court will not sit in review of the action of municipal councils while acting within the scope of its authorized powers, except upon the ground of fraud; and a sale of municipal property cannot, in the absence of fraud, be impeached on the ground that the council did not obtain as much for the property as it should have received in the exercise of its duty towards the ratepayers.

APPEAL by the plaintiff from the judgment of MIDDLETON, J., 25 O.L.R. 172.

The appeal was dismissed.

N. W. Rowell, K.C., and *C. G. Jarvis*, for the plaintiff, contended that the City of London Act, 1 Geo. V. ch. 95, sec. 10, did not authorize the inclusion in the attempted sale of city hall property of the portion of "Covent Garden Market" involved therein: *Western Counties R.W. Co.* v. *Windsor and Annapolis R.W. Co.* (1882), 7 App. Cas. 178; *Roe* v. *Lidwell* (1860), 11 Ir. C.L.R. 320. The municipal council did not take the steps incumbent upon it as trustee to obtain a fair and full price for the property, and was guilty of a breach of trust in that regard: *Phillips* v. *City of Belleville* (1905), 9 O.L.R. 732; *Dance* v. *Goldingham* (1873), L.R. 8 Ch. 902; *Attorney-General* v. *Goderich* (1856), 5 Gr. 402.

T. G. Meredith, K.C., for the defendants the Corporation of the City of London, and *J. B. McKillop*, for the defendants the Royal Bank of Canada, were not called upon.

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January 24. The judgment of the Court was delivered by FALCONBRIDGE, C.J. (*v.v.*):—This case is of some public importance. I think the appeal should be dismissed. As to the first branch of the appeal, namely, that the City of London Act, 1911, did not authorize the inclusion in the sale of the city hall property of the portion of "Covent Garden Market" involved therein: but for the ingenious and persistent argument of the plaintiff's counsel, I should not have thought that the point was arguable. The statute gives power to sell this very parcel, defining it, so as to place the matter beyond doubt, as 55 feet of lot No. 11 on Dundas street and 55 feet of lot No. 11 on King street. As to the second branch, namely, that the sale was made by the council, who are of course in a fiduciary position as regards the ratepayers, without observing the precautions which as trustees they should have observed, I think the learned trial Judge has stated the law well, when he says that the Courts will not sit as an upper chamber of the municipal council, and interfere with the action of the people through their elective representatives, unless fraud is shewn.

The appeal must be dismissed with costs.

Appeal dismissed.

SIEMENS v. DIRKS.

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Apr. 9.

Manitoba King's Bench. Trial before Macdonald, J. April 9, 1912.

1. RECORDS AND REGISTRY LAWS (§ III B—15)—DEPOSIT OF MORTGAGE WITH REGISTRAR—STATUTORY REQUIREMENTS OF REGISTRATION.

The mere deposit of an instrument with the registrar does not amount to a registration under the Manitoba Registry Act R.S.M. ch. 150, sec. 50; the certificate of the registrar is required to be endorsed on the instrument to make the registration complete; the registrar must endorse the actual date of the registration and the endorsement of an erroneous date of registration will not give priority over an instrument which had been previously registered.

[*Harris* v. *Rankin*, 4 Man. R. 115, distinguished.]

2. RECORDS AND REGISTRY LAWS (§ III C—21)—EFFECT OF NON-RECORDING —SUBSEQUENT PURCHASER.

The prior registration of a deed from the owner of the land will take precedence of a mortgage previously made by the owner which was not registered until after the deed under the provisions of the Manitoba Registry Act, R.S.M. ch. 150, if the purchaser had no notice or knowledge of the mortgage until after he had completed the purchase.

AN action by Siemens the mortgagee against Dirks the mortgagor and Long a subsequent purchaser from Dirks without notice of the mortgage, claiming payment of the amount due for principal and interest and in default for foreclosure. The defendant Long counterclaiming for rent of the premises from the date of his purchase.

The plaintiff's action was dismissed against the defendant Long, and the counterclaim was also dismissed.

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Macdonald, J.

Messrs. *E. K. Williams*, and *H. F. Tench*, for plaintiff.

Messrs. *A. E. Hoskin*, K.C. and *P. J. Montague* for defendant, Long.

MACDONALD, J.:—The question involved in this action is one of priority of registration. The plaintiff is a mortgagee of certain lands in the village of Gretna in the Province of Manitoba, under an indenture of mortgage, dated the fifth day of April, 1905, made by the defendant Dirks, endorsed upon which is a certificate of registration, dated the 26th April, 1906, and signed by the deputy registrar of the district in which the lands are situate, the registered number being 26,084.

The defendant Long is a grantee of the same lands from the defendant Dirks under deed dated the 20th January, 1906, and registered in the registration division in which the lands are situate on the 1st May, 1906, as No. 26,063.

The plaintiff brings this action for payment of the principal and interest due under the said mortgage, alleging that the defendant Long has, since the giving of the said mortgage, acquired, and is the owner of the equity of redemption in the said lands, and is in possession thereof and asks that in default in payment that the equity of redemption in the said lands may be foreclosed.

The defendant Long purchased the property from his co-defendant without any knowledge of the mortgage to the plaintiff. On the 5th May, 1906, the defendant Long received an abstract of the said lands from the proper registry office, signed by the registrar, the last instrument appearing thereon as having been registered being a deed from the plaintiff to the defendant Dirks dated the 1st April, 1897, and registered on the 24th April, 1897, as No. 16,140. After registration of the deed from the defendant Dirks to his co-defendant, the latter received a continued abstract (Ex. 6), signed by the deputy registrar, shewing the deed from his co-defendant Dirks to him as the only instrument affecting the said lands subsequent to the deed (No. 16,140) from the plaintiff to the defendant Dirks. It is quite evident from the books of the registry office that the entries in such books, which are intended to indicate the order of the registration of instruments, were first made in respect to the deed to the defendant Long.

The abstract book, Ex. 8, shews that this deed was received on the 1st May, 1906, as No. 26,063, the only other prior instrument affecting these lands being the deed from the plaintiff to the defendant Dirks. According to the Receiving Book (Ex. 9), at page 165, the deed (No. 26063) to the defendant Long was received on the 1st May, 1906, as No. 26063, whereas at page 166, the mortgage is made to appear as having been received on the 26th April, 1906, as No. 26084; clearly out of its order

and the entry was made not earlier than the 7th May, 1906. The mortgage I find was the first instrument received for registration, having been received on the 26th April, 1906, the deed having been received 1st May, 1906; the omission to make the entries in their proper order being unaccounted for.

Under these conditions the question is which instrument is entitled to priority? The plaintiff claims that his mortgage was registered when deposited with, that is, received by, the registrar for that purpose, and cites in support of his contention the case of *Harris* v. *Rankin*, 4 Man. R. 115. The mortgage, as stated, was received by the registrar for registration on the 26th April, 1906, and should have been registered on that date.

The case of *Harris* v. *Rankin*, 4 Man. R. 115, in so far as it decides the question of registration, was an interpretation of the sections of the Lands Registration Act of Manitoba, ch. 60, Consolidated Statutes of Manitoba, 1880. Section 15 of that Act provided for the manner of registration of grants from the Crown and "all other instruments excepting wills shall be registered by the deposit of the original instrument or by deposit of a duplicate or other original part thereof with all the necessary affidavits."

Section 30 provided that, "all instruments that may be registered under this Act shall be registered at full length," etc. Section 31 provided that, "In case one of two or more original parts is registered, the registrar shall endorse upon each of such original parts a certificate of such registration," etc., shewing clearly that the endorsement was not part of the registration.

Section 32 provided that, "The registrar or deputy registrar of the county in which the lands are situate, shall, upon production to him of the instrument for registration, do certain things, among them that he shall endorse a certificate on every such instrument to the effect," etc. These duties devolving upon the registrar are not a part of the act of registration. Section 15 provided that which was to be done to effect registration, namely, the deposit of instrument for registration.

The Registry Act now in force, however, ch. 150, R.S.M., and which applies to this case, differs from the Act interpreted by *Harris* v. *Rankin*, 4 Man. R. 115. Section 50 is the governing section, and settles what constitutes registration:—

> The registrar shall upon production to him of the original instrument or instruments or the requisite exemplification or certified or sworn copy of instrument, indorse a certificate on every such instrument or copy to the effect or purport of the form in schedule A. to this Act, and shall therein mention the year, month, day, hour and minute in which such instrument is registered, and the number of registration and when such certificate is so indorsed and signed by the registrar on the original or any duplicate original or on any

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such exemplification or copy the instrument or document bearing such certificate shall be deemed to be registered as of the time mentioned in such certificate, etc.

A deposit of the instrument for registration is not now, therefore, a registration thereof, and there is no registration until the certificate is indorsed as provided by the statute. It is urged, however, on behalf of the plaintiff that the indorsement on the mortgage certifies to its registration on the 26th April, 1906, at 10.04 a.m., and although this certificate was not indorsed until the 7th May, 1906, yet that the registration must be held as of the date mentioned in the certificate, in effect that the registrar can, if he sees fit, by falsifying the date of registration, give priority to an instrument deposited for registration after one of a prior registration.

I find that the deed to the defendant Long was registered prior to the mortgage to the plaintiff, and that this defendant had no knowledge of this mortgage until after the completion of his purchase of the property. The plaintiff is not, therefore, entitled to a foreclosure of the equity of redemption or other redress against the defendant Long, and as against this defendant the action is dismissed with costs. As against the defendant Dirks, the plaintiff is entitled to judgment for the amount sued for, together with costs.

The defendant Long, by way of counterclaim claims from the plaintiff a sum of money for rent of the premises during the time of occupation thereof by the plaintiff after this defendant became the owner thereof. I find that the relation of landlord and tenant did not exist between the parties, and this claim cannot be sustained, and I dismiss the same without costs.

Judgment dismissing action against defendant Long, and in favour of plaintiff against defendant Dirks.

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Mar. 30.

O'BRIEN et al. v. MALONEY.

Quebec Court of King's Bench (Appeal Side), Archambeault, C.J., Trenholme, Cross, Carroll and Gervais, JJ. March 30, 1912.

1. REVENDICATION (§ II—25)—RECOVERY OF GOODS—QUEBEC PRACTICE.

The owner who brings an action of revendication to recover a team of horses left in the possession of the defendant by the person by whom they had been hired from the owner, and who accepts in settlement of suit the costs and a sum of money in full value of the said property which thus passes to the defendant, does not thereby waive his right to the value of the use of the property during the interval between the institution of the suit and the settlement thereof, and has an action against the defendant to recover the same.

2. COMPROMISE AND SETTLEMENT (§ I—8)—RESERVATION OF ACCESSORY DEMAND.

Where in an action to revendicate the plaintiff has reserved his recourse for hire or use of his property and this action is settled by means of a lump sum in full of "capital, interest and costs" such settlement is a settlement of the action as taken only and the word "interest" cannot be construed as embracing the claim for use and hire expressly excluded from such suit.

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Argument

APPEAL from a judgment of the Superior Court for the district of Montreal, Saint-Pierre, J., of February 27th, 1909 (reported in 36 Que. S.C. 62), condemning defendants, appellants, to pay plaintiff, respondent, $705 as the value of the use of two teams of horses belonging to plaintiff, respondent.

The appeal was dismissed.

D. R. Murphy, K.C., for appellants. There is no *lien de droit* between the parties. If any debt is due it must be by respondent's brother for whom appellants continued his sub-contract when he made default to carry out his agreement with appellants. If there was a lease of these horses it was between respondent and his brother, not between appellants and respondent. Therefore as long as the lease existed, and it has never been cancelled or annulled, respondent's brother alone was responsible. Now, the fact that the appellants took over the contract of respondent's brother did not constitute novation: C.C. 1171; Beaudry-Lacantinerie & Barde, vol. 3 on Obligations, no. 1757. In any event if ever there was any liability appellants were discharged thereof by respondent under receipt of January, 22nd, 1907. Otherwise the word "interest" would have no meaning and would be "mere surplusage" as the trial Judge said.

F. J. Laverty, for respondent. The correspondence anterior to the settlement of February, 1907, shews clearly the intention of the parties and that respondent was settling for the value of the horses, for their ownership only and not for the use and hire of the horses during many months. Respondent's offer was: "For $400 I will sell you my horses, and for $600 more I will give you a discharge of my claim for rental" and appellants answered, "We accept your offer of $400." Appellants were fully warned of respondent's intentions by the reserve inserted in respondent's conclusions to his first action in revendication. No contract between respondent's brother and appellants could affect the rights of respondent and make him lose either his right of ownership or his right to the value of the hire and use of his animals.

The unanimous judgment of the Court was delivered by

CROSS, J.:—The action was taken by the respondent to recover from the appellants $840 for the usage of four horses for fourteen months from 1st December, 1906, to the 23rd January, 1908, at $60 per month.

The defendants (appellants) were contractors for construction of the Great Northern Railway. One S. J. Maloney had sub-contracted with them to grade about five miles of the railway, but fell into difficulties and in February, 1907, abandoned his contract work. The defendants thereupon proceeded to complete S. J. Maloney's contract work at his expense and

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availed themselves in so doing, of a covenant in his contract, whereby materials and equipment provided by S. J. Maloney for the work would be their property until completion of the work, and of a further covenant whereby, in case of failure of S. J. Maloney to prosecute the work, they could take it out of his hands and complete it at his cost.

They took possession of S. J. Maloney's materials and equipment and it happened that amongst these there were four horses which S. J. Maloney had hired from the plaintiff (respondent) M. J. Maloney.

By the judgment appealed against, it was decided that the appellants should pay $705 to the respondent for use of his horses from the beginning of February, 1907, to the 27th January, 1908, namely, eleven months and three weeks, at $60 per month.

It has been proved that the respondent, in a letter to the appellants dated the 26th February, 1907, and received in due course of mail, stated to them that he understood that the appellants were holding possession at St. Stanislas of two teams of horses which belonged to him, and that he was ready to sell them if they wished to buy them, otherwise he asked that they be shipped to him.

No sale was agreed upon at that time, and in April, 1907, the respondent took a first action in the Superior Court at Three Rivers, whereby he asked that the four horses be attached, that the defendants be ordered to deliver them up to him, and, in default of delivery that the defendants be adjudged to pay $550, value of the animals, with interest; also stating that he reserved his recourse for hire or use of the horses.

That action for recovery of the horses was pending for over eight months, but in the end was settled on the 22nd January, 1908, by a payment to the plaintiff of $506, in circumstances to be presently referred to.

Shortly afterwards, the plaintiff (respondent) took the present action for hire or use of the horses.

The first ground upon which it is argued that the judgment should be set aside and the action dismissed, is that the appellants did not contract with the respondent or come under any legal obligation to him. It is true that the horses had been leased to S. J. Maloney and not to the appellants, and that no cancellation of that lease is alleged. It happened, however, that, upon S. J. Maloney having stopped work, the horses were found in the appellants' possession. It was no part of the respondent's agreement with S. J. Maloney, a mere hire of the horses, that they could be passed on by him into the appellants' possession. It is true that, in taking the horses, the appellants were acting upon an agreement between themselves, and S. J. Maloney, but the respondent was not a party to or bound by

that agreement, and the appellants' position came to be that of a person who takes possession of things belonging to a third party. That is not a contract-relation but it is nevertheless one which creates an obligation in favour of the owner of the thing. It is probably true that the defendants, having received the horses from a person who was outwardly in legal possession of them, were not obliged to recognise the claims of a third person to the ownership of them merely because he said he was owner.

In the present case, however, instead of merely leaving it to the respondent to prove his ownership of the horses, the appellants contested the action taken to recover the horses by a plea, but, when the action was about to be tried and about nine months after it had been commenced, they settled it by a money payment of $400 and costs, instead of the $550, claimed by it.

In such circumstances, I take it that the respondent is to be considered to have proved his ownership of the horses at the time at which he gave notice to the appellants of his ownership, namely, from about the beginning of February, 1907, and that the appellants were in the wrong in contesting the first action, and refusing to surrender the horses.

The first ground of appeal is consequently not well founded.

The other ground of appeal is in effect that in settling the first action, namely, the action for recovery of the horses, the appellants also settled the claim for use of the horses and obtained the respondent's discharge therefor.

This ground of defence rests upon the wording of the voucher taken in settlement of the first action, which voucher reads as follows:—

> Montreal, January 22, 1907 (1908?),
> O'Brien & Mullarkey, Montreal,
>
> To Blair & Laverty, Dr.
>
> Received from O'Brien & Mullarkey the sum of five hundred and six dollars in settlement of capital, interest and costs in connection with action instituted by M. J. Maloney against O'Brien & Mullarkey in the Superior Court, Three Rivers. No. 271. $506.00.
>
> Received from O'Brien & Mullarkey five hundred and six dollars in payment of account to date.
>
> BLAIR & LAVERTY.
> Attorneys for M. J. Maloney.

It is proved that, before this payment was made, the question of the rental had been raised. In fact, in a letter written by the plaintiff's solicitors to the defendants on the 16th January, 1908, it was stated that:—

> The writer succeeded in obtaining communication with Dr. Maloney—the plaintiff—since speaking to your Mr. Mullarkey, and ascertained that the offer he made was simply for the ownership and had nothing at all to do with the question of the rental of the horses during over eighteen months past.

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The letter went on to assert that a dollar a day per team was a usual charge for use of horses.

It would appear that, after consultation, the defendants came to the conclusion that if a receipt worded as is the one above recited, were to be signed by the plaintiff, the claim for rental or use of the horses would be extinguished, and they accordingly paid over the money and took the voucher.

The appellants rely particularly upon the effect of the word "interest" in the receipt, reasoning that a receipt for the price of the horses in "capital interest and costs" must include the accessory liability, if any, for use of the horses.

It is true that "interest" means in law the price or product of a money debt, and there is obviously a strong analogy between that and the price or product of a thing yielded while the thing is in the possession of a person other than the owner of it. In that aspect a claim for the price of a thing with interest thereon, if satisfied, would exclude or replace a claim for the value of the use of the thing.

In the present case, however, it is to be remembered that the demand made in the first suit was for the horses, and the accessory money demand is made only "in default of such delivery and is for $550, value of the said animals, with interest and costs, plaintiff reserving all other rights and recourse for the hire or use of the said horses as he may be advised." That was the demand with accessory claim which was settled. In virtue of the settlement, all right of the plaintiff to demand the horses, or, in default of delivery, payment of $550, value thereof, with interest, was extinguished inasmuch as the "capital, interest and costs in connection with the action" to recover the horses were settled for; but it does not follow that it was the accessory money claim which was singled out and settled.

There is a recital in the judgment of the Superior Court to the effect following:—

> Considering that the word "interest" included in the receipt evidencing the purchase of plaintiff's horses and the settlement of the case in revendication was never intended to mean that said plaintiff had abandoned his right to claim the price of the earnings of said horses, which price he had specially reserved, and that said word must be taken as mere surplusage.

Without, perhaps, going quite so far as that, it appears to me to be a proper conclusion to say that the settlement is to be taken as being a settlement of the demand as formulated in the first suit and with the reservation therein stated.

While that reservation may be said to be contradictory of the demand for interest which immediately precedes it in the subsidiary conclusion of the action, I consider that in the event which happened effect is to be given to it by holding that the claim for rental of the horses was in fact excluded from the settlement.

Authority can be found for the proposition that a receipt is not always to be read as conclusive, but may be merely *primâ facie* evidence of payment: *Skaife* v. *Jackson*, 3 Barn. and Cress, 421; *Lee* v. *Lancashire and Yorkshire Railway Co.* (1871), L.R. 6 Ch. 527; as also for the statement that a release will be construed according to the intention of the parties and the surrounding circumstances: *Ex parte Good* (1877), 5 Ch. D. 46; *L. and S. W. Railway Co.* v. *Blackmore* (1870), 4 H.L. 610; *In re Perkins*, [1898] 2 Ch. 182; *Turner* v. *Turner* (1880), 14 Ch. D. 829.

I therefore feel authorised not only to connect the voucher here in question with the statement of claim as made in the first suit, but also to read it in the light of the writings which preceded the actual payment, because I find that these writings establish a concluded agreement upon the settlement.

These writings consist of two letters, of which the first is a letter from the plaintiff's solicitors, dated the 13th January, 1908, to the defendants, the material part of which is worded as follows:—

> We beg to advise you that we have had an interview by telephone with Dr. Maloney and induced him to signify his acceptance of your offer of $400 cash, plus our taxed costs of action, as instituted, in full settlement of the said action.

The other letter is one from the defendant's to the plaintiff's solicitors, dated the 18th January, 1908, worded as follows:—

> Dear Sirs,—Re action of Dr. Maloney, we beg to say that we are prepared to pay the sum of four hundred dollars ($400) and your costs in settlement of this action, as per conditions contained in your letter to us of the 13th instant.

These letters make it clear that what was settled was the demand made in the first action, though the voucher reads "in settlement of debt, interest and costs."

As has been pointed out, the plaintiff's solicitors had written before the carrying out of the settlement, asserting that the offer had nothing to do with the rental of the horses.

In the circumstances we consider that the claim for hire or use of the horses was not included in the settlement, and that the second ground of appeal is not well founded.

It was argued in support of the appeal that the horses had not been actually put under seizure in the first suit, the bailiff's minute of seizure being so informal as not to amount to a seizure at all. The defendants, however, admitted in paragraph No. 10 of their defence that there had been a seizure. The point in any event is unimportant, because even upon the footing of there having been no seizure the principal demand in the first suit was for return of the horses, and the demand for $550 and interest was only subsidiary, and there is less ground for saying

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that it was that money-demand which was settled, than that it was the main demand for return of the horses which was settled.

It is our conclusion that the appeal should be dismissed.

Defendant's appeal dismissed.

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Feb. 20.

POIRIER v. THE KING.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin, and Brodeur, JJ. February 20, 1912.

1. PETITION OF RIGHT (§ I—10)—CLAIM AGAINST CROWN—ACTS OF GOVERNMENT OFFICERS.

Where goods submitted for inspection and possible purchase by the Government were rejected by the Government inspector, but the owner neglected to remove the goods from the Government property on which they were deliverable subject to inspection and acceptance forthwith after their rejection and, in consequence of urgent need of the space which the goods in question and other rejected goods occupied, the Government officials sold them all and divided the proceeds *pro rata*, the owner has no claim against the Crown on the ground of wrongful conversion, or on the ground that the price realized on such sale was inadequate, the Crown not being liable for such act of its servant, either as for negligence or tort or as for acts done by the Government officials as volunteer agents, nor was such sale by the Government officers an acceptance of the goods on the part of the Crown.

[*Per* Fitzpatrick, C.J., Davies and Anglin, JJ., affirming the judgment of the Exchequer Court on an equal division of the Supreme Court. *Boulay* v. *The King*, 43 Can. S.C.R. 61, considered.]

2. PETITION OF RIGHT (§1—5)—GENERAL GROUNDS UPON WHICH AVAILABLE.

The only cases in which a petition of right may be brought by the subject against the Crown for a money demand are when the land or goods or money of the subject have found their way into the possession of the Crown and the purpose of the petition of right is to obtain restitution or, if restitution cannot be given, compensation in money, or when a claim arises out of a contract for goods supplied to the Crown or to the public service. *Per* Fitzpatrick, C.J.

[*Feather* v. *The Queen*, 6 B. & S. 257, and *Windsor and Annapolis R. Co.* v. *The Queen*, 11 A.C. 607, specially referred to.]

APPEAL from the judgment of the Exchequer Court of Canada dismissing a petition of right.

By this judgment the appeal stood dismissed without costs on an equal division of opinion among the Judges, the CHIEF JUSTICE and DAVIES and ANGLIN, JJ., being in favour of the dismissal, and IDINGTON, DUFF and BRODEUR, JJ., being in favour of allowing the appeal.

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

R. C. Smith, K.C., for the respondent.

FITZPATRICK, C.J.:—This case arises out of a contract between the appellant and the Department of Agriculture similar in all respects to the one in question in *Boulay* v. *The King*, 43 Can. S.C.R. p. 61. The issues raised in these pleadings, however, differ materially from those which fell to be determined in

that case. Boulay represented that his hay had never been properly inspected, but alleged that the subsequent dealing with it at the place of delivery by the Crown officials was equivalent to an acceptance after inspection within the meaning of the contract.

It is admitted, in this case, both in the pleadings and in the appellant's factum, that the hay was properly inspected and rejected and no complaint is made on that score. The ground of complaint is that the hay, when rejected, remained the property of the suppliant; and that the Crown, through its servants, wrongfully caused it to be sold, to the suppliant's damage in that the price realised was not as high as it should have been in the circumstances. The facts as to which there is no dispute are that the Government's employees had a very limited and inadequate space at their disposal by the ship's side where the hay was deliverable subject to inspection and acceptance; that the accumulation of rejected hay seriously interfered with their work; and, it being absolutely impossible to find space for it on the wharf, they mixed it up and sold it for the best price obtainable at the spot, the other alternative being to throw it into the sea. All the appellant's rejected hay was credited to him and he accepted without protest the sum realised from the sale.

The claim set out in the petition of right is for wrongful conversion; but, realising that, in the absence of statute, a petition of right does not lie in respect of a tort committed by a person in the service of the Government, the appellant argued here that, on the facts as proved, the claim might be brought within section 19 of the Exchequer Court Act. If for the purpose and in the circumstances of this case we accept the proposition enunciated by Cockburn, C.J., in *Feather* v. *The Queen*, 6 B. & S. 257, 293, and subsequently approved of in *The Windsor and Annapolis Railway Co.* v. *The Queen*, 11 App. Cas. 607, at p. 614, by Lord Watson, that the only cases in which the petition of right is open to the subject are when the land, or goods, or money of a subject have found their way into the possession of the Crown, and the purpose of the petition of right is to obtain restitution, or, if restitution cannot be given, compensation in money; or when a claim arises out of a contract for goods supplied to the Crown or to the public service; the irresistible conclusion must be, in my opinion, that this appeal fail. The rejected hay was certainly not converted to the use of the Crown and there was no contractual relation between the suppliant and the Crown with regard to it; the petition of right in effect admits this. It was suggested at the argument here that the Crown officials in assuming to dispose of the hay as they did, to protect the suppliant from what in the circumstances would in all probability have been a complete loss, are responsible to him as volunteer-agents (*nego-*

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tiorum gestor), and for their negligence in that capacity the Crown is liable. I have not been able to find a single case which gives countenance or support to the contention that the suppliant is entitled to compensation for a negligent or wrongful act done by a servant of the Crown under such circumstances. To maintain such a claim would be to open wide the door to innumerable raids on the treasury and create a convenient way to reach the public revenues.

If there was liability on the part of the Crown for laches, misconduct or negligence of its officers; or if this action was brought against the employees personally, I would hold on the evidence that there was no proof of actual damage, that the price obtained for the hay, $9.80 a ton, was, in the circumstances, a reasonable price, that the course adopted by the Government's officials was that which reasonable men would have taken and that the appellant acquiesced in and tacitly ratified all that was done. I concede that when a person takes upon himself voluntarily to do some business for or to look after property belonging to another he must exercise reasonable care in the management of the business; but in appreciating the degree of care the Court should take all the circumstances into account. This hay, as I said before, was to be delivered at the ship's side where it was to be accepted after inspection. The duty of the suppliant was to have a representative there to see that the inspection was properly made and take care of the hay that might be rejected; and, having failed to do this, he comes with bad grace to assert this claim years after it arose and he had accepted without protest a cheque in settlement of the proceeds realised out of the sale of his hay.

I would dismiss with costs.

DAVIES, J.:—This action is one brought to hold the Crown liable for a certain quantity of hay shipped by the suppliant from the Province of Quebec to St. John, N. B., under a written contract with the Department of Agriculture. The contract is in the same terms as the one we had before us in *Boulay* v. *The King*, 43 Can. S.C.R. 61, but here we have the admission that the hay sued for had been rightly rejected. The suppliant's contention is that the officers of the Crown in St. John, after inspecting and rightly rejecting the hay sued for, placed it in sheds on the wharf and subsequently sold it without notice to him, and that such subsequent sales of the hay without notice amounted in law to an acceptance of it which made the Crown liable under its contract. I cannot under the facts as proved accept this contention. The shippers agreed to be bound by the inspection of the officers of the department when the hay reached St. John, and the ordinary rules as to the duty of a purchaser when rejecting an article forwarded to him on the ground that it is not up

to the contract standard or sample are wholly inapplicable to the facts of this case. The agreement in question provided that "The Department agreed *to accept* 1000 tons of hay from Poirier on the following terms and conditions:"—

> (5) The hay to be subject to inspection and acceptance by the Department alongside the steamship at St. John, New Brunswick. In case more than ten (10) bales in any carload are found not up to the specifications, the whole of such carload may be rejected; and the balance of the contract or contracts then unfilled may be cancelled in the case of any shipper from whom more than three carloads have been rejected in that way.

It was conceded by the suppliant that when the hay in question arrived alongside the steamship at St. John, it was inspected and *properly rejected*. There were in all about 60 or 70 shippers of this hay and the evidence shews that the rejected hay was placed in one of the sheds of the Intercolonial Railway on or near the wharf and that subsequently such of it as was not removed by the shippers was sold by the officers acting for the Department as a matter of necessity and because the shippers had not taken charge of it in order to make room for other shipments of hay coming from day to day. The rejected hay was in the way of the Department in the carrying on of its work. It had to be removed. The shippers who had agents in St. John looking after their hay were personally notified to remove the rejected hay. Notices were not sent to those who did not have any such agents present and who resided many of them a great distance away, amongst whom was Poirier, before the hay was sold. But as regards the ultimate disposition of the hay the evidence shews that it had as a matter of necessity, to be removed; otherwise the congestion would have stopped entirely the work of shipment.

The question then arises did such sale and removal of the rejected hay without notice to its owner amount in law to an implied acceptance of it? I do not think that under the agreement and facts in this case it did.

The hay under the agreement was simply sent forward to be inspected and accepted or rejected at the wharf. Until accepted no property ever passed to the Crown. The hay in question here was rejected and admittedly properly so. Its subsequent sale under the circumstances to permit shipping to be carried on was a necessity unless the hay was thrown over the wharf or otherwise removed. Such a sale without notice to the owner or shipper may or may not have been a wrongful one. That would depend upon the facts of each case. But if it was a wrongful one it could not operate in my opinion to work an acceptance under the contract of hay which had been inspected and properly rejected and so to make the Crown liable for the wrongful act of one of its servants, committed after the hay had been properly rejected. Then on the facts as proved I do not think the suppliant entitled

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to recover. I think it clear that he had full knowledge of the course of dealing adopted by the servants of the Crown with respect to his rejected hay.

The evidence of Robertson, the Commissioner of Agriculture, and of Moore and Macfarlane, together with the suppliant's own letter to the Department dated April, 1901, satisfies me of this, and that he acquiesced in that disposition of the rejected hay as under the circumstances the best that probably could be done with it. It is true that he did not get express notice before each sale took place but each month from August till December, 1901, Mr. Moore says that he sent him reports of the sales of the hay shewing dates of sales, quantities sold and prices obtained, and as Poirier several times visited St. John and as Robertson says, was aware of the transactions and what was being done he must be held to have acquiesced. It was not until January, 1902, that he expressed any wish that any other course should be adopted and after his letter of that month so far as it was possible to do so his wishes as there expressed appear to have been complied with.

The actual facts must be borne in mind and Moore's uncontradicted statement is that under the conditions as they existed at the time of the shipment of the hay and with the accommodation available it was absolutely impossible to have dealt separately with the rejected hay of the 63 shippers who had each more or less hay rejected or to have dealt with each shipper's hay separately.

The contract shews the shippers took the risk in forwarding hay for shipment not up to inspection standard and that it was their duty as much as it was that of the Crown servants to look after hay properly and rightly rejected. If they took no steps to discharge that duty they cannot complain if the officials in charge did the very best with the rejected hay that under the circumstances could be done. As I have already said in the present case I think the suppliant with knowledge of the facts acquiesced in the course adopted with respect to his rejected hay and cannot now be heard to complain. I would dismiss the appeal.

IDINGTON, J.:—This case arises out of the same undertaking of the Dominion Government through its Department of Agriculture to buy hay for the Home Government for use in the South African war, as we had to consider in *Boulay* v. *The King*, 43 Can. S.C.R. 61. The form of contract between the department and the hay seller is the same. A number of questions have been finally disposed of by the learned trial Judge. The only remaining question is respecting a quantity of hay which the officers of the department finding not up to the standard needed for South Africa say they resold without giving the slightest intimation to the appellant or anyone for him. It was not an entire shipment in any case, but such selections as the officers made out of many

and extending over a period of months that was thus dealt with. I need not repeat here what I said in the *Boulay* case. I adhere to the opinion then formed as to the law governing the execution of such a contract and the consequences of the vendee taking possession of the goods.

I have never been able to quite understand how a vendee taking possession at the place of delivery provided for by the terms of the contract, can be heard to say he did not; and that he was at liberty to depart from the mode fixed by the contract for inspection and selection, and so use his possession of the hay after delivery that he could, as to one part of it be able to say he was accepting that under the contract, and as to the other that he had done nothing with it; though his same servants who shipped to South Africa one part and kept the other in store for a while, never told the vendor of any fault to be found with it and finally thinking it not suitable for South Africa, resold it for $6.80 a ton, kept an account thereof and of the incidental charges and the department having the matter in charge finally paid such proceeds through the same hands as paid the price to the appellant; and hence can call one part of the dealing contractual and the other tortious and so deprive the vendor of any right or remedy. The truth is, the moment the officers departed from the lines laid down in the contract, every step was in a sense tortious. They had no more authority to adopt any other line or mode of selection than that specified in the contract, than they had to resell any part of the hay. Yet the Court finds the one unauthorised dealing a thing it can deal with, but strangely cannot reach unto the other because it is a tort.

The respondent's servants never dreamt they were doing wrong in any case or to anybody, but were executing the contract the best way they knew how.

It is as clear as anything can be in law that unless bound by a contract to a specific mode of dealing, the purchaser is always entitled to accept the whole and insist on the right he has to claim a reduction in the price commensurate with the degree of inferiority in quality found to exist below the standard of quality stipulated for. The vendee here in effect says that is what he did. The acts of his servants and the omissions of his servants are consistent with no other view. To claim rejection without even notifying the vendor is not rejection, no matter how much inward struggle of mind we may afterwards hear of having taken place.

This hay as a whole came into the hands of the respondent's servants under and pursuant to the contract and the respondent is answerable by way of petition of right to account therefor on the lines laid down by Cockburn, C.J., in the case of *Feather* v. *The Queen*, 6 B. & S. 257, 293, and which were ap-

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proved of by the Privy Council in the case of *Windsor and Annapolis Ry. Co.* v. *The Queen*, 11 App. Cas. 607, as follows:—

> Their Lordships may, however, refer to the accurate exposition of the law given by the late Cockburn, C.J., in *Feather* v. *The Queen*, 6 B. & S. 293: "We think it right to state that we see no reason for dissenting from the conclusion arrived at by the Court of Common Pleas." (In *Tobin* v. *The Queen*, 16 C.B.N.S. 310.) "We concur with that Court in thinking that the only cases in which the petition of right is open to the subject are, where the land or goods or money of a subject have found their way into the possession of the Crown, and the purpose of the petition is to obtain restitution, or, if restitution cannot be given, compensation in money, or where the claim arises out of a contract, as for goods supplied to the Crown or to the public service."

Surely the language is comprehensive enough to cover the facts in this case and the essential quality of the acts complained of there were certainly, in tortious appearance, far beyond the nature of those here in that regard. It seems to me it is neither expedient nor just to try to make that which no doubt is typical of an everyday occurrence relative to the handling of supplies purchased by the Government, wear the character of a tort in order to deprive a suppliant of his rights. The complaint of a conversion is every day treated, if the man deprived of his goods so chooses, as a contract and the proper price is allowed. Nothing more is involved here. It is merely a question of whether or not a fair price was got. The burden of proof is on the Crown.

The learned trial Judge has not dealt with it because in his view he had not the necessary jurisdiction. With respect, I cannot agree in this. I think as the facts presented a case fairly within his jurisdiction it should be remitted to him to pass upon the evidence or refer if so advised. The amount is small, the litigation has been protracted and hardly warrants a reference if that can be avoided. The evidence is meagre but I imagine to the learned trial Judge who heard the evidence it cannot be difficult to say whether any allowance beyond that already made, should be made, and if so how much.

It seems to me of much greater importance that this case should not be so decided as to be a perpetual danger to those supplying the Crown, than anything involved in the merits of the appellant's claims. Of course if and when so decided the contractor for supplies will protect himself by adding to the cost to insure against such risks.

I would allow the appeal with costs and remit the case to be disposed of by the learned trial Judge leaving him to deal with the question of further costs, as he may deem right.

DUFF, J.:—This appeal presents in substance the same features as those presented in *Boulay* v. *The King*, 43 Can. S.C.R. 61. I adhere to the views expressed in my judgment in that case and think the appeal should be allowed.

ANGLIN, J.:—Although in the allegations in his petition of right the suppliant would appear to have preferred a claim based on wrongful conversion rather than a demand for payment of the price of his goods sold to and accepted by the Crown, or for the value of his goods which came to the possession of the Crown and which it cannot restore to him (Exch. Court Act, sec. 19), I proceed on the assumption that it is nevertheless open to him to succeed on either of the latter grounds if the evidence adduced at the trial warrants a recovery. So treating the case, for reasons given by my Lord the Chief Justice, Davies, J., concurring, and by myself in *Boulay* v. *The King*, 43 Can. S.C.R. 61, I am of the opinion that in the circumstances now before us, which, so far as material, do not differ from those considered in the *Boulay case*, 43 Can. S.C.R. 61, the sale by the officers of the Crown of the appellant's hay, which they found to be not suitable for shipment to Africa, did not constitute an acceptance of that hay by the Crown; neither did it render the Crown liable in damages for conversion.

Had the foregoing consideration not sufficed for the determination of this appeal as to the claim in respect of the hay rejected prior to the 21st Dec. 1901 (148, 892 lbs), I should, I think, be obliged to find that the appellant had acquiesced in the disposition of that hay made by the officers of the Crown at St. John. Upon this point the impression left on my mind at the conclusion of the argument was adverse to the appellant and a subsequent reading of the evidence has confirmed it.

As to the hay rejected on and after the 21st December, 1901, there is evidence in the record that the Crown officers undertook with the suppliant that they would deliver it to the Intercolonial Railway for shipment to England. Of this hay 102,600 lbs. was handed back to the suppliant and for this no claim is made; but 118,858 lbs. would appear to have been sold by the Crown officers at St. John contrary to the undertaking given to the suppliant. Assuming that that undertaking imposed on the Crown a contractual responsibility for breach of which it would be liable to the suppliant (which I consider very doubtful indeed), in order to succeed he must prove that he sustained damage by the breach. Far from this being the case, the evidence, in my opinion, makes it tolerably clear that he received its full value for the hay disposed of at St. John.

The hay so disposed of was culled and rejected. That it was rightly rejected is admitted. Its inferiority is, therefore, fairly well established. It had been twice pressed to meet the stowage requirements of the contracts. It would have been on this account, even if of good quality, unsuitable for the English or any other market as ordinary pressed hay. James B. Scott, a large dealer, says that the price obtained for it ($6.80 plus $3 freight) was remarkably good—he could not do better than $5;

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Wm. H. Dwyer, another hay merchant, says that hay so pressed had no value except for long distance freight and that the $9.80 a ton received for it from the Government was better than he could do with it in any other way. It may be fairly assumed that the rejected hay was inferior to that accepted from Poirier. Yet of the latter a report from the Canadian representative in South Africa, dated March 4th, 1902, says:—

> A great many bales were opened and many of these were very much discoloured, in fact some were nearly black and musty. There were also a great many in which you could see all the hay seeds and, as it were, the end of the mow. This you could plainly see at the end of the bales. They were surprised that such was allowed to be shipped.

Another report, dated the 18th of April, 1902, says:—

> The hay was all of second quality, there being too much clover, which had turned quite black and gave the bales the appearance of being rotten in the centre. The hay which comes from A. Poirier is the worst of all.

A further report, dated the 3rd of May, 1902, says:—

> Quite a quantity of really bad ones were chiefly composed of chaff or minced broken stubby hay, or a bale of stalks would be a better name for it. It is quite evident that the hay was in this condition when it was loaded in Saint John. Even the outward appearance of this hay was much against it.
>
> In the other bales I opened all was good except in the centre of it—about 10 to 15 large handfuls of dust or sweepings composed the heart of the bale.
>
> I regret to say the hay pressed by A. Poirier, of Ste. Madeline, Que., seemed to figure largest in sending poor hay. One bale in No. 2 pressed by A. Poirier was nothing but large reeds, and the large quantity of clover mixed with the hay gives it a very poor appearance.

If this was the quality and the condition of Poirier's accepted hay—and there is no reason to question the accuracy or reliability of these reports—what must have been that of his culled and rejected hay? If the suppliant has made a case of contractual responsibility on the part of the Crown in respect of the 118,858 lbs. of hay rejected on and after the 21st December, 1901, and sold at St. John, and if such a claim is open to him on the present record, he fails on that branch of his petition for lack of proof of damage.

The appeal should be dismissed with costs.

(Translation.)

BRODEUR, J.:—The appellant's contention that the Government is responsible for all the hay that he has delivered, including that which it is alleged was rejected, seems to me well founded.

The contracts with the Government are made in the same manner as with individuals.

The facts which on the part of an individual would have constituted an obligation stipulated by contract must also, when they are fulfilled by the Government or his authorized officers, form the same *lien de droit*.

The purchaser of a merchandise has the right to refuse same if it is not in conformity with the quality agreed upon.

But if, while making use of this right, he thinks fit to appropriate to himself and dispose of same, he becomes, by the fact bound to pay the price thereof.

This is what happened in the present case. It has been said that this appropriation had been illegally made by the Government's employees, and that it constituted a fault for which the Crown cannot be held responsible.

But it must be admitted that this act was done by the said employees with the authorization of the department from which they were depending.

This act being a perfectly authorized act, consequently gives cause to an obligation stipulated by contract.

It is contended that the lack of space has obliged the Government to dispose of the hay as he did, that is to say, to sell it without even making any advertisement in the newspaper, and without even notifying the vendors.

This reason could not validate their action and give to their act a meaning different from that which is attributed to it by law.

The hay was received in the Government railway sheds. In virtue of the Act which rules this railway, power is given to dispose of merchandises not claimed for. See art. 41, R.S.C. 1906, ch. 36.

Authorization to act should have been secured in virtue of that section of the law, if the Government was not willing to keep the hay.

But no. The hay was taken, was sold at a very low price and the petitioner is asked to be satisfied with such price.

A person who would have assumed the title of proprietor in such a manner upon merchandises sold, would by this fact have constituted herself the purchaser and ought to pay the price agreed thereupon.

I am of opinion that the Government should pay to the petitioner the price of the hay in litigation. His appeal, for this reason, ought to be maintained with costs.

Appeal dismissed, on an equal division.

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Mar. 11.

LEVI v. LEVI.

Manitoba King's Bench. Trial before Macdonald, J., March 11, 1912.

1. ESTOPPEL (§ III B—53)—SEPARATION AGREEMENT—PREVENTING COMPLIANCE WITH CONDITION.

Where it is provided by a separation agreement that the husband shall obtain a religious separation in another country and if not procured within three months by reason of any default or neglect on the part of the wife the allowance for separate maintenance shall cease, it becomes the duty of the wife to facilitate the obtaining of such religious separation, and if she declines to go to the foreign country which she knew when making the agreement would be necessary to the obtaining of the religious separation and thereby prevents her husband from fulfilling that condition of the agreement, and thereafter makes no claim thereon for many years, she will be estopped from claiming that her husband was in default in respect of maintenance payable by the terms of the agreement "until the separation is procured."

ACTION upon a separation agreement.

The plaintiff and defendant are husband and wife, and in December, 1898, they agreed to live separately and apart from one another and on that date they entered into an agreement under seal whereby they agreed to separate under the terms and conditions therein set forth.

The agreement contained the following clause:—

The said husband agrees to obtain from the Jewish authorities at St. Paul a proper form of separation according to the Jewish faith and religion, which is the religion of the parties hereto, and to pay the expenses of procuring the said papers but not the travelling or living expenses of the said wife.

In the event of the said separation not being procured by the said husband within three months, the said husband shall contribute after the three months, and until the said separation is procured to the support of his said wife and shall pay to the said wife as such support the sum of two dollars ($2.00) per week until the said separation is secured.

Provided, however, that if it is impossible for the said separation to be procured within three months from the date hereof by reason of any default or neglect on the part of the wife or by reason of the illness of the wife, then the said husband is not to be liable to contribute to the support of the said wife or to pay the said sum of two dollars per week.

The separation contemplated by the agreement was never procured, although the parties lived apart, and the wife now sues for the $2.00 per week provided for in the agreement.

The defence raised was that immediately after the execution of the agreement and for over three months thereafter the defendant used every effort to obtain the separation referred to and made many requests to the plaintiff and urged her to go with him to St. Paul for the purpose of securing such separation, and that the plaintiff refused, and treated every effort of the defendant with contempt and derision.

The action was dismissed.

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W. S. Morrisey, for plaintiff.
E. J. Thomas, for defendant.

MACDONALD, J.:—The plaintiff admits that she understood it was necessary for her to go with her husband to St. Paul, and although the agreement (Ex. 3) does not in so many words state that she was to do so, yet such must be the deduction from clause 7 of the agreement, by which it is provided that the husband agrees to obtain from the Jewish authorities at St. Paul a proper form of separation according to the Jewish faith and religion and to pay the expenses of procuring the said papers but not the travelling or living expenses of the said wife.

It is clear from the evidence that the personal attendance of the wife with the husband before the Rabbi at St. Paul was necessary to enable the husband to carry out his agreement and it is equally clear that the wife so understood it and knew that without her assistance the sought-for separation could not be obtained.

I find that the husband did on more than one occasion send a messenger to his wife requesting that she should accompany him to St. Paul for the purpose of securing the separation and that she refused to render any assistance.

For four years after the agreement to separate (Ex. 1) the wife remained in Winnipeg, carrying on business and maintaining herself thereby and not once during that time did she make any demand upon her husband and after the expiration of these four years she left Winnipeg for the United States, where she remained for upwards of nine years without once communicating with or making any demand upon her husband, and now, after the expiry of upwards of thirteen years, she seeks to recover the conditional support provided for in the agreement to separate (Ex. 1.).

It has been urged that under clause 9 of the agreement, (Ex. 1), the neglect or refusal of the wife applies only to the three months from the date of the agreement and that the husband did not within these three months make any move towards completing the agreement and that, therefore, any refusal or neglect on the part of the wife after that date does not constitute any breach on her part and she is not obliged to render any assistance to her husband after that date. I cannot so construe the agreement.

It contemplates a separation according to the Jewish faith and the husband is not limited to the three months within which to procure it. Clause 9 provides that in the event of the said separation not being procured within three months, the husband shall contribute after the three months, and until the said separation is procured, to the support of his wife. This clearly shews that the separation is in contemplation of the parties even after the expiration of the three months.

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If the husband did not move in the matter of securing such separation within the three months he would be liable to contribute to the support of his wife as provided for in the agreement, but finding as I do that the husband made efforts to induce his wife to go to St. Paul and her refusal she would not be entitled to such support after her taking that stand.

The evidence is not very clear as to the time when the husband expressed his readiness and her refusal to go to St. Paul. It could not indeed be expected that at this late date it could be otherwise.

I am of the opinion, however, that it was within the three months, and accept the husband's evidence that he was anxious that there should not be any breach of the agreement on his part. I dismiss the action with costs.

Action dismissed.

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Feb. 20.

CARLETON v. CITY OF REGINA.

Saskatchewan Supreme Court, Regina Judicial District. Trial before Lamont, J. February 20, 1912.

1. NEGLIGENCE (§ II C—95)—INJURY BY COLLISION WITH STREET CAR—DUTY TO LOOK—CONTRIBUTORY NEGLIGENCE.

Anyone who attempts to drive across the track of an electric street railway, where he knows that cars are constantly passing, without looking to see whether a car is approaching, is guilty of contributory negligence barring recovery for injuries caused by a car colliding with the buggy in which he was driving.

[*Danger* v. *London Street Ry.*, 30 O.R. 493; *O'Hearn* v. *Port Arthur*, 4 O.L.R. 209, followed.]

2. STREET RAILWAYS (§ III B—25)—MOTORMAN'S DUTY AT STREET CROSSINGS.

Apart from statutory enactment, a street car and other vehicles have equal rights of the same kind to the concurrent use of the streets, the rights and duties of both are reciprocal and mutual, and each is bound to the exercise of reasonable care in self-protection, and in avoiding harm.

[*Jones* v. *Toronto and York Radial Ry. Co.*, 25 O.L.R. 158, specially referred to.]

3. STREET RAILWAYS (§ III B—26)—CARS PASSING STREET CROSSING.

It is the duty of a motorman in taking his car over a crossing to keep a reasonable lookout for pedestrians and vehicles using the same crossing.

4. STREET RAILWAYS (§ III B—33)—DUTY AS TO PERSONS NEAR TRACK.

A motorman seeing a vehicle driving at right angles to his track, as if to cross, is justified in not reversing his controller until he sees that the driver of the vehicle does not intend to stop at the track and allow the car to pass, but the moment he perceives that there is danger it is his duty to act as promptly as he can to avert the danger.

5. STREET RAILWAY (§ III C—48)—CONTRIBUTORY NEGLIGENCE—DRIVERS OF VEHICLES.

It is contributory negligence for the driver of a horse-drawn vehicle not to look, immediately before attempting to cross a street railway crossing to see that he has plenty of time to cross in safety and before any properly operated car can approach dangerously close to him.

THE plaintiff claims damages for injuries received by his being thrown out of his buggy, as a result of a collision with one of the defendants' street cars, while he was crossing Eleventh avenue on Smith street in the city of Regina. The plaintiff alleges that the collision occurred by reason of the said car being at the time negligently driven by the defendants' servants.

J. F. Bryant, for plaintiff.

S. P. Grosch, for defendants.

LAMONT, J.:—The acts of negligence alleged against the defendants in the statement of claim are:—

(1) That the defendants did not exercise due and proper care in the selection of a motorman to operate the said car;

(2) That the said car was driven by the defendants' servants at an excessive and unsafe rate of speed;

(3) That the defendants' servants did not sound warning of the approach of said car to the said Smith street corner;

(4) That the defendants' servants were negligent in that they did not reduce, or did not sufficiently reduce, the rate of speed of the said car while crossing Smith street.

As to the first of the above I find on the evidence that the motorman in charge of the car which collided with the plaintiff's buggy was both careful and efficient. As to the second, I find that the car was being driven at an ordinary and reasonably safe rate of speed. I also find that on approaching Smith street crossing, the motorman sounded the gong in the usual manner, and followed that up by sounding it violently when he observed the plaintiff approaching the car tracks. It was only upon the last of the above alleged negligent acts that counsel for the plaintiff made any serious argument that the plaintiff ought to succeed. He urged that the motorman, after he saw that the plaintiff was going to cross ahead of the car, might have reversed his car sooner and thereby have avoided the accident.

The facts as disclosed by the evidence are, that the plaintiff was driving south on Smith street about eight o'clock on a star-lit night. He says that some distance north of Eleventh avenue he looked westward and saw a car turning on to Eleventh avenue from Albert street (which is 630 feet from the point of accident); that, thinking this gave him ample time to cross ahead of the car, he drove on, and when he came to Eleventh avenue he did not look to see if the car was coming and did not see it until it was upon him, and that he did not hear it approaching. According to all the evidence the plaintiff's horse was going at a trot of four or five miles per hour. The fender of the car caught the hind wheel of his buggy and he was thrown out. The buggy was not upset, nor was it injured beyond having the hind axle bent about an inch. The

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plaintiff says that the point on Smith street from which he saw the car turning at the corner of Albert street was thirty-two paces north of the car-line. Other evidence shewed that the only point in the vicinity where the plaintiff says he was when he saw it from which a car turning on Eleventh avenue could be seen was 72 feet north of the car-line on Smith street, and that there was only a space of three or four feet between two houses in which it could there be seen. The evidence also shewed that for a car to go from the corner of Albert to the point of accident and there collide with the plaintiff, who had gone 72 feet at the rate of five miles per hour, the car must have travelled at the rate of 45 miles per hour, and at the rate of 33 miles per hour if the plaintiff was travelling at four miles per hour. The utmost limit of speed of the car which collided with the plaintiff was 20 miles per hour. It is therefore perfectly apparent either that the plaintiff did not see a car turning from Albert street, as he says, or if he did it was a car following the one with which he collided. The car which struck his buggy could not possibly have travelled from Albert street while he was travelling 72 feet at the rate he says he was travelling. Further, the evidence shews that the car stopped after it had turned on Eleventh avenue, and that it travelled from Albert street to the Smith street corner at the usual rate of speed, which was about eight miles per hour between crossings and about six miles at the crossings. Considering the small amount of traffic on this part of Eleventh avenue, this was, in my opinion, an ordinarily safe rate of speed. But even if the plaintiff had seen the car turning from Albert street when he was some distance up Smith street, was it not his bounden duty, when he reached Eleventh avenue, where he was well aware cars were constantly passing, to have looked to see if a car was approaching before attempting to cross? The duty of a person intending to cross a street-car line on which he knows cars are constantly running, as well as the duty of a motorman in charge of a car in crossing streets, has received judicial consideration in numerous cases.

In *Danger* v. *London Street Railway*, 30 O.R. 493, the plaintiff, who was driving a horse along the same street and in the same direction in which a car was going, turned in front of the car to cross the rails without first looking or listening to ascertain the position of the car. A wheel of his vehicle was struck by the car, and he was injured. In an action for damages, it was held that he was not entitled to recover, as the accident was caused by his own negligence in not looking to see how close the car was before attempting to cross.

In *O'Hearn* v. *Port Arthur*, 4 O.L.R. 209, the plaintiff, who was driving a horse and wagon along a street on the left side of a car, turned to the right to cross the track and the wagon was struck by the car, which had been coming behind. The

plaintiff said that about a hundred feet from the point at which he tried to cross he looked back, and no car was to be seen, and that he did not look again before trying to cross. It was held that it was his duty to have looked, and that his not having done so constituted contributory negligence on his part which disentitled him to recover damages. In that case Mr. Justice Meredith said, at page 217:—

> I understand the *Danger* case to decide this, that under ordinary circumstances anyone attempting to cross an electric street railway, with a knowledge of the constant running of cars upon it such as is usual in cities and towns, without looking, is negligent. I entirely concur in that view of everyone's duty to himself and to all else whom he may endanger by want of that ordinary care. No reasonable man could, in my judgment, say that in the facts of this case there was not great negligence in attempting to cross without looking.

And in Clark's Street Railway Accident Law, 2nd ed., par. 88, the learned author says:—

> It is well settled that a person who goes directly in front of a street car where there is evidence either that he did not look or that there was an unobstructed view so that he might have looked is not in the exercise of due care.

Here the plaintiff knew the cars were constantly crossing Smith street on Eleventh avenue. More than that he knew that a car was approaching. No attempt to cross under these circumstances, without first ascertaining the whereabouts of the car he had seen, and without seeing if there was any other car closer to the crossing, was, in my opinion, sheer negligence on his part. Looking meant only turning his eyes to the right, and this he should have done. The defendants had done nothing to mislead him into thinking it was safe to cross. He also says he did not hear the car approaching. The evidence leaves no doubt whatever, in my mind, but that the gong was sounded in the ordinary way as the car was approaching Smith street and then evidently as soon as the motorman perceived the plaintiff's approach. The plaintiff's hearing was not defective. The only thing that might interfere with it was the fact that he had the collar of his fur coat turned up. But even so, I find it difficult to understand how he did not hear the gong. So far as this case is concerned, however, it is immaterial whether the plaintiff heard the gong or not. If he did hear it, and attempted to cross because he believed he could get over before the car reached him, it was a foolhardy thing to do, and any damages he received on account of his miscalculating the distance or time can be attributed to no one but himself. On the other hand, assuming he did not hear the gong, he admits he attempted to cross without looking to see where the car was or if there was any danger in his so doing. This, according to the above authorities, is negligence.

But it was argued that even if the plaintiff was negligent in not looking to see where the car was before attempting to

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cross, yet the motorman could, by the exercise of reasonable care after he saw the plaintiff was going to cross, have stopped the car and avoided the accident. It is the duty of a motorman in taking his car over a crossing to keep a reasonable look-out for pedestrians and vehicles using the same crossing. A street-car and other vehicles have equal right to use the crossing but in using it both must exercise reasonable care to avoid collision. The motorman, in his evidence, stated—and I accept his testimony—that as he approached Smith street he slowed down the car from eight miles to six miles per hour and sounded the gong; that when he was almost a car length from Smith street he noticed a man driving south on Smith street, and approaching the car-line; that he sounded the gong, and put on the brakes; that he believed the man would do as many people are accustomed to do, that is, come close to the car line and stop there until the car has passed; that as soon as it appeared that the man was going to cross in front of the car, he released the brakes, reversed the lever and applied the power so as to send the car in a backward direction; but that, notwithstanding this, the car could not be stopped until after the fender had come in contact with the hind wheel of the plaintiff's buggy. The plaintiff's counsel contended that he should have reversed the power sooner. The question is, was he justified in not reversing until it appeared that the plaintiff was not going to stop? I am clearly of opinion that he was. It is a matter of common daily occurrence for a motorman to see both pedestrians and vehicles approach a track on which a car is moving and stop when they come within a few feet of it and allow the car to pass. A prudent and cautious man would not attempt to cross in front of a moving car unless there was clearly time to cross safely. If there is nothing to indicate to the contrary, a motorman is justified in assuming that a person approaching his car-line will use ordinary prudence, and will not attempt to cross when there is danger in so doing; but the moment the motorman perceives there is danger it is his duty to act as promptly as he can to avert the danger. See *Fewings* v. *G.T.R.*, 14 O.W.R. 586, and *Jones* v. *Toronto and York Radial Ry. Co.*, 25 O.L.R. 158. In this case it is not shewn that there was anything to indicate to the motorman that the plaintiff was not going to follow the ordinary and prudent practice of stopping before reaching the car-line; and on the evidence I find that as soon as it appeared that the plaintiff was bound to cross, the motorman did all in his power to avert a collision. I cannot find that he was in any way guilty of negligent conduct. I am therefore forced to the conclusion that the collision occurred as the result of the plaintiff's own negligence, and that he has no one but himself to blame for the injuries he received.

There will be judgment for the defendants with costs.

Judgment for defendants.

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Annotation

Street railways and vehicles

Annotation—Street railways (§ III B—26)—Reciprocal duties of motormen and drivers of vehicles crossing the tracks.

The great weight of authority supports the rule of law enunciated by Judge Lamont, that streets cars and other vehicles have equal right to use crossings but that in using it the operators of both must exercise reasonable care to avoid collision, though its application to the facts of the various cases has evolved many fine distinctions.

In *Gosnell* v. *Toronto R. Co.*, 21 O.A.R. 553, affirmed 24 Can. S.C.R. 582, Judge Burton, in delivering his judgment, used the following language: "It is quite true that under the law, and if we are to have fast travel from the necessity of the case, the company must have a right of way on that portion of the street on which it alone can travel paramount to that of ordinary vehicles—but it is not an exclusive right. The owners or drivers of other vehicles must give way, and are not justified in impeding the cars of the company, and are liable to penalties when wilfully doing so; but the public still has a right to the ordinary use of the streets, and the company under its charter, whilst entitled to the priority of the right of way, cannot unnecessarily impair or lessen the right of the public who have still the right to drive along or across the tracks if they use due diligence not to interfere with the passage of the cars. Notwithstanding the very broad and general language of the company's charter, they are bound to recognize the rights and necessities of public travel, and to notice the presence of other vehicles or of pedestrians, and so to regulate the speed of the car that it may be quickly stopped should occasion require it. On the other hand the driver of a carriage or other vehicle is bound to use ordinary diligence when crossing or driving upon the tracks of the railway, and to look up and down the track before entering upon it, and to turn off and allow the cars to pass without hindrance or slackening of the ordinary speed." On the appeal of this case the Supreme Court held that persons crossing the street railway tracks were entitled to assume that the cars running over them would be driven moderately and prudently, and if an accident happened through a car going at an excessive rate of speed the street railway company was responsible. The driver of a cart struck by a car in crossing a track is not guilty of contributory negligence because he did not look to see if a car was approaching if, in fact, it was far enough away to enable him to cross if it had been proceeding moderately and prudently. He can be in no worse position than if he had looked and seen that there was time to cross.

A cab driver was endeavouring to drive his cab across the track of an electric railway when it was struck by a car and damaged. In an action against the tramway company for damages it appeared that the accident occurred on part of a down grade several hundred feet long, and that the motorman after seeing the cab tried to stop the car with the brakes, and that proving ineffectual reversed the power, being then about a car length from the cab. The jury found that the car was running at too high a rate of speed, and that there was also negligence in the failure to reverse the current in time to avert the accident; that the driver was negligent in not looking more sharply for the car; and that notwithstanding such negligence on the part of the driver the accident could have been averted by the exercise of reasonable care. It was held, affirming the judgment of the Supreme Court of Nova Scotia, 32 N.S. Rep. 117,

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Street railways and vehicles

Annotation (*continued*)—**Street railways (§ III B—26)—Reciprocal duties of motormen and drivers of vehicles crossing the tracks.**

that the last finding neutralized the effect of that of contributory negligence; that as the car was on a down grade and going at an excessive rate of speed it was incumbent on the servants of the company to exercise a very high degree of skill and care in order to control it if danger was threatened to any one on the highway; and that from the evidence given it was impossible to say that everything was done that reasonably should have been done to prevent damage from the excessive speed at which the car was being run: *The Halifax Electric* v. *Inglis*, 30 Can. S.C.R. 256.

In *O'Hearn* v. *Port Arthur*, 4 O.L.R. 209, the facts of which are sufficiently set forth in Judge Lamont's judgment, Chancellor Boyd uses the following language: "When vehicles are moving ahead of the cars and in the same direction it is reasonable to hold that the drivers of the vehicles who know when and where they are going to turn and cross the track, should be vigilant to see that no car is coming behind them. A greater burden in this regard should rest on the drivers than on the motorman, who is not to be kept in a state of nervousness and apprehension that someone or every one ahead may cross in front of the running car at any moment. The driver can move in any direction—not so the motorman. The right of way being with the car the driver should keep out of its tracks, unless, upon observation, he is satisfied that the passage is clear."

In *Danger* v. *London Street R. Co.*, 30 Ont. R. 493, the facts of which are sufficiently shewn in Judge Lamont's judgment, Chancellor Boyd quoted from *Stubley* v. *London and Northwestern R. Co.*, L.R. 1 Exch. 13: "That persons crossing the rails are to exercise ordinary and reasonable care for their own safety and look this way and that to see if danger is to be apprehended."

The same rule of law finds support also in many American cases, thus, the driver of an ordinary vehicle can be justified in proceeding at a crossing to get over a street railway in the face of an approaching car when and only when he has reasonable grounds that he can pass in safety if both he and the men in charge of the car act with reasonable regard of the rights of each other: *Indianapolis Street Ry. Co.* v. *Bolin*, 39 Ind. Appeals, 169; *McCarthy* v. *Consolidated R. Co.* (Conn.), 63 Atl. 725, in which the Court went on to say: "The duty to slow up, or stop, if necessary, and prevent the collision, rests clearly on each party."

And in *Marden* v. *Portsmouth, K. and Y. Street R. Co.*, 100 Me. 41, the Court declared that the law, as far as it had been able to discover: "almost universally holds that, upon the approach of public streets crossings, the rights of street cars and vehicles are equal, and that neither has a paramount right over the other."

The driver of vehicle and the motorman of electric street car are each bound to use due care to avoid a collision and neither is entitled to assume that the other will keep out of his way: *Scannell* v. *Boston Elevated R. Co.*, 176 Mass. 170.

A street car and vehicle have equal rights of the same kind to concurrent use of city streets. The right and duties of the operators of both are reciprocal and mutual. Each is bound to exercise commensurate care in self-protection and avoid harm. The Court, however, went on to

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Street railways and vehicles

Annotation (*continued*)—Street railways (§ III B—26)—Reciprocal duties of motormen and drivers of vehicles crossing the tracks.

say that such care on the part of the street car company was deferentiated from that of an ordinary use of the street, because of the fact that the car cannot leave its tracks and by reason of the momentum and inertia of the heavy cars: *Bremer* v. *St. Paul St. R. Co.*, 107 Minn. 326, 21 L.R.A. (N.S.) 887.

It is the duty of motormen on street cars to have their cars under control when crossing other streets and persons with vehicles passing over the railway track may assume that care will be used, to reduce the speed of cars when at a sufficient distance from a passing team so as to enable it to get out of the way: *Pilmer* v. *Boise Traction Co.*, 14 Idaho 327.

The driver of vehicle may assume that the motorman will have the car under such control that he will reduce its speed to avoid a threatened collision: *Meng* v. *St. Louis and Suburban R. Co.*, 108 Mo. App. 553; *Smith* v. *Metropolitan Street R. Co. Co.*, 7 N.Y. App. Div. 253; *Citizens' Rapid Transit Co.* v. *Scigrist*, 96 Tenn. 119.

The driver of vehicle approaching a railway crossing with which he is familiar is bound to avail himself of his knowledge of the place and act accordingly. If, as he approaches the crossing, his vision is unobstructed, he is bound to look for approaching cars, and if his vision is obstructed he must exercise extreme care and caution: *Dungan* v. *Wilmington City R. Co.*, 4 Penn. (Del.) 458.

In *Robinson* v. *Rockland T. and C. Street R. Co.*, 99 Me. 47, recovery was denied one for injuries to himself and team resulting from a collision with an electric car by reason of his having attempted to cross the track without looking or listening or doing any act of precaution for his safety, his view being obstructed by an intervening embankment.

In *Williamson* v. *Old Colony Street R. Co.*, 191 Mass. 144, recovery was allowed for personal injuries caused by a collision with a street car to the driver of a four horse vehicle filled with furniture, so constructed that he could not look behind to see if a car was coming, without getting down from his seat, where it appeared that while driving his team in the same direction as the car was moving but at the left hand side of the street, he attempted to cross the tracks at a point where there was an unobstructed view 1,800 feet in each direction, in order to get out of the way of an approaching team and he had almost made the crossing when the car collided with him. The Court said: "It was the duty of the motorman to notice the apparent movement and consider the probable movement of teams travelling before him in the same direction, especially if the driver was so seated that he could not see a car approaching behind him. The driver of such a team as this has a right to suppose that a motorman coming from behind will give him time to cross the tracks after he has started to do so, and not run against him while he is crossing. While it is his duty to use reasonable care for his own safety, he may trust something to the expectation that others will do their duty:" 5 L.R.A. (N.S.) 1081.

On the other hand it was held in *Solatinow* v. *Jersey City H. and P. Street R. Co.*, 70 N.J.L. 154, that the driver of a covered waggon who could not look to the right or left without leaving the seat was guilty of contributory negligence in driving upon a street car track without exercising reasonable care to ascertain if there was danger from an approaching car.

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Street railways and vehicles

Annotation (*continued*)—Street railways (§ III B—26)—Reciprocal duties of motormen and drivers of vehicles crossing the tracks.

A motorman seeing a team driving ahead of his car in the same direction that his car is going and parallel to his track might be justified in assuming that the driver would not attempt to cross the track at other points than at the street crossings but he would not be justified in assuming that the driver would not cross when he reached the intersection of another street where it might become necessary for the man to change his course of travel: *Techlenburg* v. *Everett R. Light and Water Co.*, 59 Wash. 384; 34 L.R.A. (N.S.) 784.

For other American cases see Annotations 5 L.R.A. (N.S.) 1081, and 32 L.R.A. (N.S.) 266; also 36 Cyc. 1495, 1550.

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JOHN C. DURANT AND HANNAH B. DURANT (two of the defendants below, appellants) v. **LUCRETIA ANN HUESTIS, THOMAS HUESTIS AND HARRIET EVELYN TUPLIN** (complainants below, respondents).

Prince Edward Island, Court of Appeal in Equity, Sullivan, C.J., Fitzgerald and Haszard, JJ. January 23, 1912.

1. PARTITION (§ II B—20)—TRYING A QUESTION OF TITLE—EQUITY COURT.

On a bill in equity for partition the plaintiff must prove title in himself to an undivided part of the property, but, if his title is denied, the equity jurisdiction is not ousted merely because the title in dispute is a legal and not an equitable one.

2. EQUITY (§ II—50)—TRANSFERS BETWEEN LAW AND EQUITY—DISPUTE OF LEGAL TITLE.

Where there is a *bona fide* dispute as to plaintiff's title in a partition suit brought in a Court of equity, that Court will not, under cover of a suit for partition, adjudicate upon a purely legal title but will leave the plaintiff to his remedy at law.

3. WILL (§ III G 6—145)—DEVISE—CONDITIONAL LIMITATION.

A condition in a will that should the devisee refuse to comply with provisions of the will to provide maintenance for certain other beneficiaries during minority, then the property shall vest in and belong to another person subject to the same stipulations constitutes a conditional limitation of the estate if the first named devisee so as to immediately vest the subsequent estate in the second named devisee without any claim entry or act to be done by the latter.

[See Theobald on Wills, 7th ed., 652.]

4. WILLS (§ III G 6—145)—CONDITIONAL LIMITATION—DIVESTING—DECLARATION OF FORFEITURE.

A Court of equity has jurisdiction to determine whether the contingency of a conditional limitation of lands has happened and, in the event of forfeiture, to declare to whom the property has passed.

[*Craven* v. *Brady*, L.R. 4 Eq. 209, applied.]

THIS is an appeal from the decision of the Vice-Chancellor in a suit by the respondents against the appellants and Christian R. Hussey, Teresa G. Woodside, Moses Woodside, Mary Eliza Leard, Elijah Leard, Annetta Jane Profitt, George Profitt, Bertha Maria Lea, Jabez Lea, Julia Sarah McPhail, E. Stewart McPhail, William C. White, "The Commissioner of Public Lands," and John Bentley, executor of the last will and testament of William Bragington Tuplin.

The bill of complaint prayed for the partition or sale under the Partition Act, 1896, of a tract of sixty acres of land in township number nineteen in Prince county to which the complainants claimed to be entitled jointly with certain of the defendants, and in the event of a sale, prayed for a distribution of the proceeds of such sale after payment of expenses, and encumbrances, if any, among the parties entitled thereto. The bill was taken *pro confesso* against all the defendants except the appellants.

Neil McQuarrie, K.C., for appellants.

Messrs. *D. C. McLeod*, K.C., and *W. E. Bentley*, for respondents.

SULLIVAN, C.J.:—The facts in the case as submitted by counsel at the argument before us were not materially contested. They are to the following effect:—

William Bragington Tuplin died in 1874 possessed of a leasehold interest for an unexpired part of a term of 999 years in the sixty acres of land in question. By his will dated 8th November, 1872, he devised this land, which included a mill site and mill buildings to his grandson, John Torr Tuplin, and to John Torr Tuplin's mother, Mary Tuplin, widow of testator's son John Tuplin, then deceased, subject to certain bequests. The will on this point reads:—

> The said farm or tract of land and mill property to be held and worked jointly and in equal proportions by Mary Tuplin and John Torr Tuplin until the youngest child shall become of age; that the said Mary Tuplin and John Torr Tuplin shall be equally bound to provide for and support the unmarried children of Mary Tuplin and the late John Torr Tuplin until the said children shall become of age, marry or otherwise leave their home of their own good will, after which time such children shall cease to have any lien or claim upon the said Mary Tuplin and John Torr Tuplin, and it is my intention that each child shall individually cease to have any claim upon Mary Tuplin and John Torr Tuplin when such child shall become of age, marry or leave her home of her own good will, and it is further my will that when the youngest of the children aforesaid shall have become of age or all the children provided for according to the foregoing clause of this will, then the farm or tract of land and mill property before described shall become the property of my grandson John Torr Tuplin aforesaid, subject only to the support in comfort of his mother Mary Tuplin aforesaid, during her natural life or as long as she remains the widow of my late son John Tuplin, but that if the said Mary Tuplin marry again she shall forfeit all interest or claim to the provisions of this will, and I further stipulate that should the aforesaid John Torr Tuplin refuse or neglect to comply with the provisions of this will that he shall only be entitled to the sum of eighty dollars ($80), said eighty dollars being a lien upon and payable out of the above described property, and the said eighty dollars shall constitute the sole and only interest or claim

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of said John Torr Tuplin upon the provisions of this will, and should the said John Torr Tuplin refuse to comply with the provisions of this will or die without issue, the property as before described shall vest in and belong to the mother of the said John Torr Tuplin (Mary Tuplin aforesaid) subject to the above stipulation as regards the children, and at her death or marriage shall be equally divided among the then surviving children.

At the time of the testator's death Mary Tuplin, the widow of the testator's son John Tuplin was living upon the land in question with her son the said John Torr Tuplin, who was then about 21 years of age, and her seven unmarried daughters, the eldest of whom was then 19, and the youngest 4 years of age. John Torr Tuplin remained there with his mother and sisters for upwards of three years. While there he attended chiefly to the mill on the farm. He was also engaged in conducting the business of a butcher. He got into debt, was arrested by a creditor, and other troubles having come upon him he removed from this province in April, 1878, and has ever since remained absent herefrom. After his departure, his mother with the assistance of her daughters managed with great difficulty to subsist on the farm, at times working it as best they could, and at other times renting it until her death in August, 1906. During all which period she with her daughters remained on the farm and occupied the dwelling-house thereon. In December, 1881, the devisee Mary Tuplin and some of her children, including the said John Torr Tuplin, sold and conveyed to John C. Durant, one of the appellants, the mill site on the 60 acres. In the deed of conveyance the will of the testator and the abandonment of the property by John Torr Tuplin are thus recited:—

> And whereas the said William Bragington Tuplin duly made and published his last will and testament which is duly recorded, thereby devising the said lands to the said John Torr Tuplin and Mary E. Tuplin, upon certain conditions as set out in said will; and whereas the said will provided that should the said John Torr Tuplin refuse to comply with the provisions of the said will, the said property hereinafter described shall vest in and belong to the said Mary E. Tuplin (subject to certain stipulations) and at her death or marrying should be equally divided among the then surviving or remaining children of the said Mary E. Tuplin, and whereas the said John Torr Tuplin has abandoned the said property and has neglected and refused to comply with the conditions contained in said will and has thereby forfeited all claim and interest in said property so far as the same is derived by virtue of said will.

This deed is executed by John Torr Tuplin, the co-devisee of his mother, Mary Tuplin. Mary Tuplin being thus in possession of the farm, excepting the mill site, the appellant John C. Durant who lived on a plot of land adjoining the 60 acres, about the year 1887, took it on the halves for a while and afterwards rented it from her as her tenant at an annual rent of

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$90. He held and worked the farm as such tenant and paid rent to her until her death in 1906. At the time of her death Harriet Evelyn Tuplin, one of the complainants was residing with her mother in the dwelling-house on the homestead premises in question, and remained there in possession thereof until after the commencement of the suit for partition. On the 11th of August, 1906, John Torr Tuplin in consideration as it is alleged of the natural love and affection which he bore to his sister Hannah B. Durant, wife of the appellant John C. Durant, and of one dollar, purported by deed to grant her all his estate and interest in the 60 acres, less the mill site.

The children of the said Mary Tuplin and John Tuplin mentioned in the will of the testator Wm. B. Tuplin, are the complainants, Lucretia Ann Huestis and Harriet Evelyn Tuplin, and the defendants, Hannah B. Durant, Christian R. Hussey, Teresa G. Woodside, Mary Eliza Leard, Annetta Jane Profitt, Bertha Maria Lea, Julia Sarah McPhail and the said John Torr Tuplin.

It appears that the appellants after the death of the said Mary Tuplin and previous to the commencement of the suit for partition made offers to pay $100 to each of the daughters of the said Mary Tuplin for their respective shares in the land in question, and that such negotiations were continued until about the 1st December, 1906, after the suit for partition had been commenced, when the respondent Harriet Evelyn Tuplin left this province to seek a livelihood elsewhere.

It appears by the letters in evidence of John Torr Tuplin, that he never claimed more than a share equally with his sisters as one of the children of Mary Tuplin.

The appellant, John C. Durant and his wife by their answer to the bill of complaint admit that the said John Torr Tuplin left this province about four years after the testator's death (upwards of 28 years before the death of his mother) but claim that instead of refusing or neglecting to work the farm and to support his mother Mary Tuplin and her children or to comply with the provisions of his grandfather's will, he went away, "the better to enable him to assist in working the said farm and in supporting his mother and the said children, and not only were the annual income and profits of the share or interest of the said John Torr Tuplin in said farm applied to the support of his mother, the said Mary Tuplin and the said children, but he also arranged for working said farm for the purpose aforesaid, and further assisted and applied his personal earnings and other moneys for that purpose." In regard to this contention on behalf of the appellants the learned Vice-Chancellor says in his judgment:—

> I can find nothing in the evidence to support this defence. Indeed, no one can read it through without being satisfied that it is untrue.

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What I do find is that up to a week before Hattie Tuplin went away the defendant or his wife had offered to pay $100 to each of the heirs for their several interests.

A careful examination of the evidence does not lead me to differ from this finding of the Vice-Chancellor.

From this recital of the material facts in the case, I proceed to view the appellants' objections to the Vice-Chancellor's judgment, and to consider the reasons advanced on their behalf in favour of allowing this appeal. The first objection is of a somewhat technical character, namely, that the suit as instituted must fail, because the respondent Lucretia Ann Huestis, being a married woman, should have been made a complainant by her next friend. The ground alleged for this objection is that "her share of the property devolved on her, if at all, prior to the passing of the Married Women's Property Act, 1896, and therefore she and her husband had separate and independent rights in the property." If the respondents contention as to the termination of John Torr Tuplin's right to the land is correct, the estate vested in his mother, Mary Tuplin, in 1878, during her life, and at her death, which occurred in August, 1906, it devolved in terms of the will to her then surviving children. In view of the provisions of our Married Women's Property Act this objection is not, in my opinion, well founded. But in any case, as Harriet Evelyn Tuplin, one of the complainants, had an unquestioned right to maintain a suit the enactment in section 150 of the Chancery Act, which provides that it shall not be competent to any defendant in a suit to object for want of parties, renders the objection unavailable to the respondents.

The main issue in the case is that which arises under paragraph 9 of the bill of complaint, in regard to John Torr Tuplin's abandonment of the land in question. The evidence of that abandonment is to be found in the circumstances already alluded to under which he removed from this province, in his continued absence from this province which to the date of his mother's death was a period of upwards of 28 years, in his letters dated September 12, 1906, and February 22nd, 1907, to his sister indicating that he claimed only an interest as one of the surviving children, and especially in the deed of the Mill site, executed by him in 1881, in which he solemnly declared that he had "abandoned the said property and neglected and refused to comply with the conditions of the will and thereby forfeited all claim and interest in said property so far as the same is derived by virtue of said will." All these facts, to my mind, constitute most conclusive evidence of his abandonment of the land and of his neglect and refusal to comply with the provisions of the will. The will provides that in such an event—

> The property as before described shall vest in and belong to the mother of the said John Torr Tuplin (Mary Tuplin aforesaid) sub-

ject to the stipulations as regards the children, and at her death or marriage shall be equally divided among the then surviving children.

Mary Tuplin never re-married and died as already mentioned in August, 1906.

But it has been argued for the respondents that to enforce this provision of the will against John Torr Tuplin is to enforce a forfeiture, and that a Court of equity will not enforce a forfeiture. The estate created under the will clearly falls within the class described as Conditional Limitations which determine as soon as the contingency happens, and the next subsequent estate, which depends upon such determination becomes immediately vested without any claim, entry or act to be done by the person who is next in expectancy.

> They so far partake of the nature of conditions, as they abridge or defeat the estates previously limited, and they are so far limitations as upon the contingency taking effect, the estate passes to a stranger. (2 Bl. Com. 156.)

It is within the province of a Court of equity to determine whether the contingency has happened which changes the relationship of the estate, and in the event of forfeiture to declare to whom the property has passed: *Craven* v. *Brady*, L.R. 4 Eq. 209, is typical of the large and varied class of cases in which a Court will so intervene. In that case a testator appointed under a power, real estate, and devised other real estate to his wife for life, and from and immediately after her death to his son, with a proviso that if his wife should "do, make or execute any deed, matter or thing whereby she should be deprived of the rents and profits or the power or right to receive or the control over the same, so that her receipt alone should not at all times be a sufficient discharge for the same, her life estate should cease and determine as fully and effectually as it would by her actual decease." The wife married again without making any settlement, and it was held by the Court (Lord Romilly, M.R.) that she had forfeited her estate by marrying without making a settlement, that the remainder, both in the appointed and devised estates was accelerated and that the property passed to the person entitled thereto on such forfeiture.

This decision was upheld on appeal by Lord Chancellor Hatherley: *Craven* v. *Brady*, L.R. 4 Ch. App. 296.

It was alleged in the argument at the Bar that the appellants are in possession of the land, and it was thereupon strenuously urged that the respondent's remedy, if any, was not in a Court of Chancery which it was argued had not jurisdiction to try a question of title in a partition suit, but in a Court of law. Any right of possession that the appellant John C. Durant ever had as appertaining to himself personally was derived as tenant from Mrs. Tuplin, and while he retains such possession he is estopped from claiming adversely: *Doe d. Manton* v. *Austin*,

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9 Bing. 41; *Board* v. *Board*, L.R. 9 Q.B. 48; *Dods* v. *McDonald*, 36 Can. S.C.R. 231. His own evidence proves that he did not claim any title or right of possession otherwise than in right of his wife. At the trial he gave the following answers to questions asked by his counsel:—

Q. Since her death (the death of Mrs. Tuplin) have you worked on the place? A. Yes, sir.

Q. Did you work on it last fall after her death? A. Oh, yes.

Q. And this spring? A. Yes, sir.

Q. That, I presume, is for your wife? A. Yes, sir.

Q. Are you there under anybody's right except your wife's? A. No, sir.

Regarding the evidence in the case as a whole, it does not establish that there is involved any *bonâ fide* question of title beyond that which must necessarily occur in almost every partition suit. It devolved upon the respondents in their suit for partition to prove their title to the undivided part of the property which they sought to have divided. There appears to be no rule that a bill for partition cannot be maintained if the parties proceeded against deny the title, and the title is purely legal. Where the plaintiff has not at once succeeded in proving a title, there are cases in which the Court has given him an opportunity of producing further evidence of his title without sending him to a Court of law. In the case of *Baring* v. *Nash*, 1 V. & B. 551, Sir Thomas Plumer notices that it is expressly stated in *Parker* v. *Gerard*, 1 Amb. 236, that there is no instance of not succeeding upon such a bill, but where there is not proof of title in the plaintiff; and in the case of *Cartwright* v. *Pultney*, 2 Atk. 380, the Court gave leave and time for the plaintiff to make out his title. In the latter case Lord Hardwicke observed that where there were "suspicious circumstances in the plaintiff's title the Court would leave him to law." And generally in that class of cases referred to by the appellants' counsel where there is a *bonâ fide* disputed title the Court will not under cover of a suit in equity for partition adjudicate upon the title, but will leave the party to his remedy in law.

This case, in which the appellants and respondents claim under a common title, namely, the will of Wm. B. Tuplin, is not one of the latter class.

In my opinion the decision of the Vice-Chancellor is right, and this appeal must be dismissed with costs.

FITZGERALD, and HASZARD, JJ., concurred.

Appeal dismissed.

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Manitoba King's Bench. Trial before Mathers, C.J.K.B. April 2, 1912.

1. WATERS (§ III B 4—210)—PUBLIC WATER SUPPLY—METERS—CLANDESTINE TAKING OF WATER.

Where the consumer continued to use water through a concealed pipe knowing that the supply so obtained was not going through the meter after a change made from a flat rate to a meter rate and the placing of a meter on another and visible supply pipe, he is liable to pay on the basis of the capacity of such concealed pipe for the entire time for the water so wrongfully taken through it unless he can prove the quantity actually used, and he must pay at the general fixed rate without regard to any reduced rate applicable to the metered service.

[*Lamb* v. *Kincaid*, 38 Can. S.C.R. 516, and *Armory* v. *Delamirie*, 1 Strange 505, applied.]

2. EVIDENCE (§ II E 9—206)—PRESUMPTION AGAINST SPOLIATOR.

In computing the amount of damages recoverable for clandestine use of a water supply the maxim "*omnia praesumuntur contra spoliatorem*" applies.

[*Lamb* v. *Kincaid*, 38 Can. S.C.R. 516, specially referred to; see also *The King* v. *Chlopek*, 1 D.L.R. 96.]

3. MUNICIPAL CORPORATIONS (§ II D—146)—UNANIMOUS RESOLUTION—SETTLEMENT ADOPTED—RATIFICATION.

Where a settlement of a claim for water rates by a municipal corporation against a consumer is made by unanimous resolution of the Council, and the terms of the settlement are in part carried out by payment to and acceptance by the treasurer of the municipal corporation of successive instalments of money due to the municipality under the settlement, there is such ratification of the contract as to preclude a successful attack upon it by reason of the settlement not having been formally adopted by the Council.

4. DURESS (§ I—14)—REPUDIATION—WAIVER.

The voluntary acting under an agreement for five months after knowledge of facts afterwards set up to prove that the agreement was obtained by fraud, duress, undue influence or extortion, is such an unequivocal affirmation of the contract as to amount to a waiver of the complainant's right to rescind the contract upon these grounds even if proved.

5. ESTOPPEL (§ III E—73)—SUBMISSION AND ACQUIESCENCE IN BONA FIDE DEMAND.

When one party makes against another a claim in the existence and amount of which he has an honest belief, and the other agrees to pay it without investigation, such agreement, made in good faith, cannot afterwards be repudiated on the ground that the amount is excessive.

[*Dixon* v. *Evans*, L.R. 5 H.L. 606, applied; *Smith* v. *Cuff*, 6 M. & S. 160, distinguished; see also Leake on Contracts, 6th ed., p. 259, and *Lindsay Petroleum Co.* v. *Hurd*, L.R. 5 P.C. 221.]

AN action to recover possession of seven post-dated and unpaid cheques drawn by the plaintiff in favour of defendants and to recover $2,000 paid by the plaintiff to defendants in pursuance of an alleged settlement on the grounds that the cheques were obtained by the defendant under circumstances amounting to fraud, duress, undue influence and extortion, and upon a void and illegal consideration and upon a consideration which failed. The defendants counterclaimed for $7,000, the balance due in respect of the settlement and on application the defendants were

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allowed to amend their counterclaim so as to claim payment of the unpaid cheques.

The action was dismissed and judgment given for the defendant on its counterclaim as amended.

Messrs. *C. P. Wilson*, K.C., and *J. F. Kilgour*, for plaintiffs.
Messrs. *J. E. O'Connor* and *S. H. McKay*, for defendants.

MATHERS, C.J.K.B.:—Since 1896 the plaintiff company has carried on the business of producing and supplying electric current for lighting and power purposes, generated partially by means of a steam plant and partially by water power. The city of Brandon, owns its own waterworks, and for the purposes of their steam engines the plaintiffs received water from the city. Up to 1903 the plaintiffs had what is known as a "flat rate." A 2-inch upright service pipe ran from the city's main through the floor of the company's power house. From this 2-inch pipe the company took away two 1-inch pipes, one of them just beneath the floor, and the other above the floor. The former was connected with a suction pipe which connected with an engine pump and also with a large tank and the other with another tank. About the 1st of June, 1903, the city abandoned the flat rate system of charging for the water used by its customers and adopted a measured service rate. For the purpose of measuring the water supplied to the plaintiffs, the city, about that time, installed a meter on the plaintiffs' supply pipe. This meter was placed above the floor and from the meter the plaintiffs took a 2-inch pipe which ran above the floor to the rear basement and from which branched three 1-inch pipes to three several several pumps. When this was done the pipe below the floor was not removed, I surmise because the city officials had then no knowledge of its existence. The company went on using this pipe below the floor when it was necessary to do so for about a year. It was then disconnected from the suction pipe, but the valve was left, and a nipple for a hose connection was put on. It remained in this condition until about the end of 1907 or the beginning of 1908, when the chief engineer Moring, connected it up with a 1-inch pipe which ran through to one of the tanks. On the 28th November, 1910, the existence of this pipe was discovered by the city officials and the city engineer was notified. The official who discovered it states that the valve which regulated the flow of water into it was then two-thirds open. He left it in the condition in which he found it and notified the city engineer, who, with the city foreman, went there and examined the pipe and found it as described. The mayor was notified and he communicated with Mr. Patterson, the company's manager, and told him what he had been informed. The latter denied that any such pipe was in existence. Moring, the chief engineer, was absent, but the manager says that the same evening he spoke to

Stanley, the second engineer, who informed him that there was a pipe there. He was directed to take it out, and that same night Stanley, took out a 5-foot length of the pipe that ran from the valve to an elbow where it connected with the straight pipe running to the tank. He also plugged up the valve and took off the valve wheel. The next day, viz., the 29th, the city engineer called upon Mr. Patterson and asked him about this pipe, but the latter denied that any such pipe was in existence. He was asked by the engineer to go with him and he would shew him it, and they went into the pit, but discovered that the 5-foot length was gone. The manager denied that any such pipe had ever been in existence and asserted that it had been plugged as it then was "for years and years." When asked where the pipe ran to he denied all knowledge of where it ran to, but when told by the engineer that he would pull up the floor of the building and find out, he then informed him that it ran to the tank. At the time of this interview the manager was not aware that the engineer had been to the works the day before and had seen the pipe.

The city obtained statutory declarations from two former employees of the company to the effect that this pipe had been used for the purpose of running water into the tank, but took no further steps at that time with reference to the matter.

About the 6th of December following, the manager was asked by a reporter of one of the newspapers for his version concerning a rumour on the street that the company had been taking unmetered water. The manager at once went to Alderman Dowling, chairman of the waterworks committee, and said he came to see if he could arrange for a settlement, and offered to settle for the water that had been used. Dowling replied that he could not arange any settlement with him unless he was prepared to admit that the company had been taking water unlawfully. Patterson replied that he was prepared to admit that the company was in the wrong. They both then went to the mayor and arranged to have called a meeting of the waterworks committee to which all the members of the Council would be invited.

The desire on both sides was to avoid publicity in the interests of both the company and the city, which could only be accomplished if all the members of the Council consented. When the meeting convened all members were present. The purpose of the meeting was to arrive at a settlement with the company for the unmetered water it had taken. The mayor pointed out that the company had a bond sale pending and that there was an inspector at that time in the city looking over the company's affairs, and that it would be injurious to the company if a charge of this kind should become public. He also pointed out that it would do the city harm, and that it was in the interests

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of both that a settlement should be made without publicity. One or two members of the Council thought a settlement should not be made, but that there should be a judicial investigation. However, on hearing the statement made by the mayor, they ceased to press for an investigation and were willing to affect a settlement.

The engineer was asked to prepare a statement of the probable quantity of water used and its value at the rate paid by the company, namely, 12½c. per 1,000 gallons, and he did so. He averaged the meter readings for the three days immediately after the unmetered pipe had been disconnected, getting an average of 48,000 gallons per day. He assumed that was the average used during seven and three-quarter years, during which the pipe was in existence. He also assumed that for 200 days in each year, the steam plant was operated. The total value of the water used at 12½c. per 1,000 gallons would thus be $9,300. From this he deducted the value of the water which had passed through the meter and been paid for, viz., $2,679.98, leaving a balance of $6,620.02. As it appeared the engineer had nothing definite on which to base his calculation, one of the aldermen said that in his opinion the city could only be protected by charging the company for the full flow of that pipe at 40 lbs. pressure during the whole period from the time the meter was installed up to the time the pipe was removed, and asked the engineer to prepare a statement on this basis. He did so, assuming that the pipe was 100 feet long, and on this basis the value of the water amounted to $13,778. Three of the aldermen took the ground that this was the amount for which the company should be charged. The majority of the members thought that the first estimate of the engineer was sufficient. However, as the minority refused to abate their demand for the full amount the members of the Council present unanimously agreed that they should ask for the larger amount.

The city solicitor had been called in and advised the Council in favour of the policy of settlement. When it was decided to call in Mr. Patterson and ask for the larger amount the solicitor warned them that they must make no threats, and advised that the accounts should be presented through the ordinary waterworks officials. In order to avoid the appearance of threat it was decided that only one, either the mayor or the chairman of the committee, should be spokesman, that the engineer should present the account, and that the other members should say nothing. Mr. Patterson, the manager, was called in and stated his desire to settle. The engineer then told him the amount. The chairman, Alderman Dowling, asked him if he accepted the bill and he replied, of course he accepted; if it were $30,000 he would have to accept it. Alderman McLean asked him if it were possible

for him to have used that quantity of water, and he said it was not.

Considerable discussion took place then between the aldermen themselves, the majority arguing in favour of acceptance of the smaller bill, but the others standing firmly in favour of accepting only the larger amount. Mr. Patterson was then asked to retire, but the discussion still continued. Finally Alderman Whillier left the room, stating as he was leaving that they must settle for the larger amount or they would hear from him, or there would have to be a public investigation or something to that effect. As the minority would not yield to the views of the majority, in order that a unanimous decision should be come to, the majority agreed to accept the views of the minority and demand payment for the full flow of the pipe. This decision having been arrived at it was decided that an account for the amount agreed upon should be presented to the company for payment the next morning by one of the clerks in the waterworks department, and the mayor was appointed to take settlement.

Accordingly, on the 7th December, Patterson was presented with a bill for unmetered water, amounting to $13,778, by the waterworks collector, who asked him if he would pay the amount, and he said he would. It appears that he afterwards represented to the mayor that the amount was a very large one to pay at once, and asked if it could not be extended over a year. For the purpose of deciding this point, the mayor called another meeting of the members of the Council on the 8th December. All members were present at this meeting except Aldermen Dowling, Whillier, Clark and Coleman, and it was agreed to accept as payment $1,778 cash and twelve cheques for $1,000 each, maturing over a year, a month apart. At this meeting the mayor told Patterson what the attitude of the minority had been at the other meeting and that they would not consent to a settlement for anything less than the full amount. One or two of the aldermen urged Patterson then not to give the cheques, and said he was a fool to do so, but he went on and signed and handed over the cheques to the mayor. These were handed to the city treasurer, who, as the cheques matured, handed them to the waterworks collector for collection.

The first cheque for $1,778 was paid, as were also five of the monthly cheques given. The plaintiff company on the 28th June, 1911, notified the bank to refuse payment of the addition cheques. On July 3rd the City Council referred the matter "of the stoppage of payment of the post-dated cheques deposited with the treasurer" by the plaintiffs "to the finance committee to discuss the matter with Mr. Patterson and report at a subsequent meeting of Council." Alderman Hughes, the chairman of that committee, made an investigation of the

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company's books and prepared a report, dated 17th March, 1911, which was assented to by the finance committee, that the amount already paid by the company upon the cheques "represents an amount much in excess of the price of the quantity of water which could possibly have been used by the company from the pipe in question" and recommends "that the amount already paid by the company be accepted in full settlement of all claims against the company in respect of the said matter, and that the city solicitor be instructed to return the balance of the cheques to the company."

This report was, by resolution, adopted by the Council on the same day, but was not acted upon.

On the 4th December, 1911, the company commenced this action to recover possession of the seven unpaid cheques, and also to recover back $2,000 of the money already paid. The ground of the action is that the cheques were procured by the defendants under circumstances amounting to fraud, duress, undue influence and extortion, and upon void and illegal consideration and a consideration which failed. On the 29th December, 1911, the defendants' City Council by resolution, unanimously rescinded the said report of the finance committee dated the 17th November, and of the resolution adopting it.

I find that when the meter was installed by the city, the pipe in question was connected with the city service pipe underneath the floor and was not then disconnected because the officials performing the work were not aware of its existence. The company's servants continued to pass water through this pipe as they required for about one year. At this time the pipe communicated with a suction pipe. It was then removed from the suction pipe and a nipple and hose connection put on. Water was taken to the tank from this pipe by means of a hose from time to time as required until about the end of 1907 or the beginning of 1908, when, as before stated, the chief engineer of the company himself installed an iron 1-inch pipe running through to the tank and after that date water was used through this pipe.

I find that the fact that water was being used through this pipe was known to the engineers and servants of the company, and was also known to the manager, Mr. Patterson. At the trial he denied on oath that he had any knowledge of the existence of this pipe. His evidence on that point appeared to me utterly improbable, but when taken in connection with the surrounding circumstances and his own conduct after it was discovered by the city, and the evidence of Stokes, I have no hesitation at all in finding that water was used through this pipe with his entire knowledge and concurrence. It would be remarkable if the existence and use of this pipe was known to everybody employed around the works with the exception of the active manager.

After the city officials had discovered that the company had been clandestinely taking water by means of the pipe in question the company's manager became alarmed at the consequence to the company's credit and reputation if the fact should become public, and possibly from the fear that the company might be publicly charged with stealing water. In order to, if possible, prevent this, he went to the city to procure a settlement of the claim, which he knew the city had against the company. His purpose could only be accomplished by a secret settlement and he requested that the facts be not made public. The mayor and aldermen were quite prepared to meet his wishes as to secrecy, both for the sake of the company and the city, and were also willing to accept payment for the water wrongfully used, and the only point on which there was any divergence of opinion was as to the means of arriving at the quantity so used. There was not then, and is not now any known means of ascertaining with even approximate accuracy the quantity of water improperly passed through this pipe. When the aldermen met on the 6th December at the company's request, to discuss a basis of settlement, they had before them nothing but the bald facts that this pipe had been in existence since 1903 and that it had been used by the company. They had no information as to the extent of such user. Mr. Patterson knew, or had the means of knowing, whether or not it had been in constant use, but he chose to assume the attitude of entire ignorance and offered no information to aid the aldermen to a conclusion. The company had gone on for years deliberately appropriating the city's water without preserving any record of the quantity so taken. In such a case the maxim *omnia præsumuntur contra spoliatorem* must be applied and every presumption be made against the company. The principle applicable is well illustrated by the case of *Lamb* v. *Kincaid*, 38 Can. S.C.R. 516. There a quantity of auriferous material was taken from the disputed and undisputed portions of a mining claim by the defendant, who intermixed the products without keeping any account of the quantities taken from these portions respectively, and appropriated the gold recovered from the whole mass. The Court held the defendants accountable for as much of the mixed products of the two claims as they did not strictly prove to have come from their own. Duff, J., at p. 541, speaks of this as a "long settled doctrine of English law." Again, at p. 540, he says: "The Court is not called upon to speculate in such a case for the benefit of deliberate wrong-doers, they come within the wholesome rule that if a man by his deliberately tortious act destroys the evidence necessary to ascertain the extent of the injury he has inflicted, he must suffer all the inconvenience which is the result of his own wrong," citing the well-known leading case of *Armory* v. *Delamirie*, 1 Strange 505.

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Lamb v. *Kincaid*, 38 Can. S.C.R. 516, was a case not of destroying evidence, but of not preserving evidence of the extent of the wrong done. In that respect it applies exactly to this case. The plaintiffs have tortiously taken the city's water without preserving any record of the quantity used. *Primâ facie* they were bound to pay for the full flow of the pipe for the entire period. Those members of the City Council who took this stand were, in my opinion, but asserting the strict legal right of the city. If the company did not want to accede to this demand the onus was upon them to shew by undoubted evidence that the full flow of the pipe had not been used. There was nothing extortionate on the part of the city in claiming $13,778. In arriving at that amount the engineer had assumed that the pipe was 100 feet long, and that the pressure was 40 lbs., but he had only charged 12½c. per thousand gallons, which is a special manufacturers' rate. The rate fixed by the city by-laws for general consumption was much in excess of this. The company would have no right to claim the benefit of a special rate granted them for metered water for water surreptitiously taken, and the city would have a perfect right to charge them for water so taken at the general rate fixed by its by-laws. Calculated at the by-law rates the value of the water the pipe was capable of carrying would be $23,409. The pipe, however, was not over 50 feet long, and the pressure was probably not more than 30 lbs. The value of the water the pipe was capable of passing on this basis, even at the special rate of 12½c. would be $16,689, and at the general rates would be $27,600. So that it does not appear that the city made its claim anything like as large as it might have made it with perfect propriety.

When the amount the city asked was mentioned to Mr. Patterson at the meeting on the 6th December, and he was asked if he would accept it, he said, of course he would accept it, he would have to do so if it were $30,000. He neither tendered nor offered to tender any evidence that the quantity of water charged for had not been used. He did say before leaving, in response to one of the aldermen, that it was not possible for the company to use that quantity of water, but he suggested no method by which the quantity could be more accurately arrived at. Indeed, he gives as the reason for his delay in stopping payment of the cheques that he was not earlier in possession of data from which to calculate even the ultimate quantity of water used.

When the account was presented to him the next day he again promised to pay it and he telephoned the city engineer to ask about the odd $778, as he had understood the amount was even $13,000. On the 8th, when he signed and handed over the cheques to the mayor, he was subjected to no pressure or duress to do so. Dowling and Whillier, the leaders of the minority, were not present. Even Fleming, who had favoured an investi-

gation, urged him not to give the cheques, as also did some others. He knew a large majority of the council, including the mayor, were in favour of accepting in settlement $6,600, the first estimate of the city engineer. He must be taken to have known that if the matter were allowed to take the usual course the majority could enforce their views on the minority. Such a course, however, would involve exposure and probably public discussion of the company's conduct in the Council and in the press, and in order to stifle publicity he was willing to pay the amount asked. I am satisfied that those members of the Council who refused to consent to any settlement for less than $13,778, acted with perfect *bona fides* and in the honest belief that in no other way could the city's interests be fully protected. There was no disposition on the part of either the mayor or any of the aldermen to take advantage of the position in which the company found itself. The evidence entirely fails to establish either fraud, duress or extortion on the part of the city.

It is contended, however, that the cheques were given under circumstances which in law amounted to equitable duress or undue influence. In support of this contention *Smith* v. *Cuff*, 6 M. & S. 160, was relied upon. That was the case of a creditor who refused to execute a composition deed with his debtor unless the latter gave him notes for the balance of his claim and threatened a commission in bankruptcy. The debtor gave the notes which were transferred to an innocent party and afterwards paid by the debtor, who then sued the creditor for the amount so paid. In argument counsel for the debtor put the case upon the ground that it was a fraud upon the other creditors. The defendant's counsel admitted the principle, but urged that the plaintiff could not recover as he was *pari delecto*. Lord Ellenborough in answering the defendant's argument, said: "This is not a case of *par delectem*, it is oppression on one side and submission on the other: it could not be predicated as *par delictem* when one holds the rod and the other bows to it" and he concluded by saying that there was no case where money having been obtained "extorsively and by oppression and in fraud of the party's own act as regards the other creditors, it has been held that it may not be recovered back." It appears quite clear that the basis of the decision was the fraud upon the other creditors. It would hardly be suggested that a sole creditor who refused to compound with his debtor and insisted upon payment of the full claim under threat of bankruptcy proceedings would be compelled to refund what he had received over and above the composition offered. If the defendant in *Smith* v. *Cuff*, 6 M. & S. 160, had openly made his execution of the deed conditional on being given notes for the balance of his debt and the other creditors had executed it with knowledge of such condition, he could not have been compelled to refund the

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amount collected upon them. In my opinion *Smith* v. *Cuff*, 6 M. & S. 160, has no application to the facts of this case. Here the company had by its own misconduct brought about a situation fraught with danger to its credit and reputation. In order to escape from this situation the company approached the city with a proposition that it should pay. The city stated an amount it was willing to accept. The method of computation adopted by the city was logically and legally sound; and the company agreed to pay the amount. It is but the case of one party making a claim upon another in the existence and amount of which he has an honest belief, and the other party agreeing to pay it without further investigation. Under such circumstances all that a Court of justice has to do with respect to the agreement arrived at by the parties is to ascertain that it has been *bonâ fide* made. If so made a Court of justice ought to respect it and not allow it to be questioned: *Dixon* v. *Evans*, L.R. 5 H.L. 606. And that is so even although the claim put forward turned out afterwards to be wholly unfounded: *Callisher* v. *Bischoffsheim*, L.R. 5 Q.B. 449, and *Cook* v. *Wright*, 1 B. & S. 559.

The plaintiffs have, therefore, in my opinion, failed to shew that they were induced to give the cheques in question either by the fraud, duress, undue influence or extortion of the defendants or that the consideration therefor was either void or has failed.

The other grounds of action alleged in the statement of claim were not supported by the evidence and were not pressed in argument.

Even if there had been any evidence to support a finding of fraud or duress against the defendants, the plaintiffs have, by the voluntary payment of five successive cheques maturing over five months, waived their right to rescind: *Doll* v. *Howard*, 11 Man. R. 577, and *Ormes* v. *Beadel*, 2 DeG. F. & J. 333; 7 Hals. 357. The company's bond sale was consummated before the end of the year, when all reason to apprehend financial embarrassment from an exposure was removed, yet the company went on and paid a cheque for $1,000 on the last day of each of the following months of January, February, March, April and May. It seems to me idle to contend that after such an unequivocal affirmation they have a right to attack the transaction.

It is said, however, that the settlement was only made with a committee of the Council and that the agreement never was adopted by the Council. I think the plaintiffs, by their pleading, have deprived themselves of the right to successfully urge this objection. By paragraphs 7 and 8 of the statement of claim the plaintiffs admit that the account for $13,778 for unmetered water was rendered by the defendants to the company, and that the cheques were given by the company to the defendants. Supplying of water and collecting the charges therefor is part of the city's regular routine business. When an account for

water has been presented and cheques given in payment therefor it would be singular if the city could not retain and collect such cheques without shewing that they had been formally accepted by the city. They were in this case accepted by the mayor with the concurrence of the whole Council, and handed by him to the proper official, the treasurer, who from time to time handed them out for presentation at the bank. The mayor for some reason not apparent, warned the treasurer that he gave no instructions with respect to the cheques. No instructions, however, were necessary. Having received them as payment of a water account it was his duty to collect them and he proceeded to do so. If evidence of ratification by the city were necessary, the receipt and retention of the proceeds of the six paid cheques would supply it.

It was admitted that the adoption by the City Council of the Finance Committee's report of the 17th November affords the company no ground of action against the defendants. Such report does, however, as was contended, afford evidence for the plaintiffs of the quantity of water the company's works was capable of consuming. For the purpose of considering the validity of the settlement arrived at, it is not the facts which subsequent investigation, conducted by the city, brings to light that are to be looked at, but the facts and information present to the minds of the aldermen when the agreement was arrived at. Besides the report only pretends to take account of the water the company would properly consume in the operation of its plant. There is always the possibility that that pipe may have been carelessly allowed to run when the steam plant was not in operation. While this may be regarded as an improbability, it was still a possibilty which might reasonably operate on the minds of the aldermen.

In my opinion the plaintiffs' action fails and must be dismissed.

The defendants have counterclaimed for $7,000 balance due for unmetered water taken.

It follows from what I have said that the city would be entitled to judgment for the unpaid cheques if it had counterclaimed therefor. The defendants' counsel asked leave to amend and I think the leave ought to be given.

The defendants also asked leave to amend as indicated in notices of motion dated 11th and 15th January, 1912, to which the plaintiffs ask leave to reply as indicated in notice dated 5th February, 1912. I allow both amendments.

The plaintiffs' action will be dismissed with costs, and upon the defendants amending their counterclaim so as to make it a claim upon the unpaid cheques there will be judgment for the defendants upon the counterclaim for $7,000 without costs.

MAN.

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Mathers, C.J.

I think this is a case of "special importance or difficulty within the meaning of chapter 12, sec. 1, 7 & 8 Edw. VII., and in the exercise of the discretion conferred upon me by that Act, I allow costs to be taxed without regard to the statutory limit of $300. I also grant fiat for costs of examination for discovery.

Action dismissed and counterclaim allowed as amended.

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Alberta Supreme Court, Harvey, C.J., Scott, Stuart, and Beck, JJ. February 3, 1912.

1. INJUNCTION (§ III—142)—UNDERTAKING AS TO DAMAGES—ENFORCEMENT.

Where an order declared that "an issue be and is hereby directed as to what damages, if any, have been sustained by the defendant . . . by reason of the injunction herein which the plaintiff, according to the practice of this Court, ought to pay" and sent the issue for trial and directed the parties to file pleadings, and upon the trial of the issue the Court dealt only with the amount of damages and did not consider the question whether any damages should be assessed and it appeared that the Judge issuing the order did not intend to decide the latter question, the duty devolves upon the Court to do so. *Per* Harvey, C.J., and Stuart and Beck, JJ.

[*Smith* v. *Day*, 21 Ch. D. 421, considered.]

2. INJUNCTION (§ I C—32)—CREDITORS' ACTION—HUSBAND'S MONEY DEPOSITED IN WIFE'S NAME.

An injunction is improperly granted to restrain a debtor and his wife from using or in any way transferring certain funds placed to the credit of the wife upon the mere ground that such funds had been and still were the property of the husband but had been deposited in the wife's name, in the absence of any allegation that the money had been given to the wife and that the same was fraudulent and void as to creditors. *Per* Harvey, C.J., and Stuart, J., on an equal division of the Court.

3. INJUNCTION (§ III—142)—DAMAGES ON INJUNCTION UNDERTAKING.

A claim for damages upon an injunction undertaking is not established on shewing only that the defendant by reason of being restrained from withdrawing his bank deposit account lost the opportunity of securing an assignment of an option for the purchase of lands, the contents of which were not offered in evidence. *Per* Harvey, C.J., and Stuart, J.

4. INJUNCTION (§ III—142)—DAMAGES ON INJUNCTION UNDERTAKING—HUSBAND AND WIFE.

Where an injunction against a debtor and his wife restraining them from using funds deposited in the wife's name stopped the use also of money to which the husband had no claim, but which was used in another business in which the wife was a partner, and it was shewn that such business had been profitable but that the injunction suspended the same for a time and caused the wife and her partner great inconvenience she was entitled to damages therefor. *Per* Harvey, C.J., and Stuart, J., on an equal division of the Court.

5. CREDITOR'S ACTION (§ VI—30)—PROCEDURE—SIMPLE CONTRACT CREDITOR.

Under the Alberta Judicature Act it is no longer necessary for a non-judgment creditor in order to maintain an action against the debtor to sue on behalf of all creditors. *Per* Beck, J.

[*Scane* v. *Duckett*, 3 O.R. 370, and *Pacific Investment Co.* v. *Swan*, 3 Terr. L.R. 125, specially referred to.]

6. FRAUDULENT CONVEYANCES (§ VIII—42)—RESTRAINING FURTHER TRANSFERS—INJUNCTION.

Where a debtor has fraudulently transferred property a non-judgment creditor is entitled to have further transfers enjoined until he can obtain judgment in his action to impeach the conveyance. *Per* Beck, J.

[*Fairchild* v. *Elmslie*, 2 Alta. L.R. 115, followed.]

7. WRIT AND PROCESS (§ I—4)—NAME OF PARTY—STATEMENT OF CLAIM ANNEXED.

Inasmuch as a writ of summons cannot be issued without a statement of claim annexed thereto, a writ expressly referring to the statement of claim as annexed thereto and the statement of claim are to be taken as one, so that one whose name is omitted from the writ is nevertheless a party if his name appears in the statement of claim. *Per* Beck, J.

8. INJUNCTION (§ III—142)—UNDERTAKING—DAMAGES.

The mere vacating of an interlocutory injunction is not sufficient to entitle the defendant to an enquiry as to the damages sustained by him in the absence of a shewing on his part that the injunction was improperly granted upon a consideration of the facts involved in the action. *Per* Beck, J.

9. INJUNCTION (§ III—142)—UNDERTAKING—DAMAGES.

The undertaking of a plaintiff in an injunction suit to abide by any judgment the Court may make as to damages suffered by the defendant by reason of the injunction is not a contract with the defendant but a conditional obligation to the Court which becomes absolute only when the Court finds as a condition precedent to liability that the case in view of all the circumstances is a proper one in which to direct an enquiry as to damages. *Per* Beck, J.

10. DAMAGES (§ III M—292)—INJUNCTION UNDERTAKING OR BOND.

Where the plaintiff in an injunction suit had reasonable grounds for instituting his action but the injunction was dissolved without reference to the merits because improperly launched, no damages should be awarded upon the usual undertaking given upon its issue. *Per* Scott, J.

APPEAL by defendant, Secord, from the judgment of Simmons, J., awarding the present plaintiff $450 damages on the trial of an issue as to damages upon the undertaking given by the present defendant in an action of *Secord* v. *Albertson* on obtaining an interim injunction against the present plaintiff.

Frank Ford, K.C., for defendants, appellants.

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

HARVEY, C.J., concurred with Stuart, J.

SCOTT, J.:—For the reasons I now state I agree with the conclusion reached by my brother Beck.

The evidence shews that, had the original action in which the injunction complained of was issued been properly launched, the defendant had reasonable grounds for instituting his action in the proper form and obtaining an injunction restraining the plaintiff dealing with the fund until the trial of the action and the authorities referred to by my brother Beck are strongly in favour of the view that, in such case, the Court should not, in the exercise of the discretion reposed in it by the terms of the injunction, award any damages for its issue.

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I have already expressed the opinion in a former judgment herein that the action was improperly launched and I therefore dissolved the injunction complained of without reference to the merits. I think it is unnecessary to consider whether I was right in the conclusion I then reached. It is apparent that, if there was any impropriety in the form of the action, it was, at most, merely a slip in the office of the defendants' solicitors. The grounds upon which the defendant claimed to enjoin the plaintiff from dealing with the fund were shewn in the statement of claim, although it may be open to doubt whether they were properly pleaded.

If the Court should not, in the exercise of its discretion, award the plaintiff damages if the action were properly launched, should it award them to her merely by reason of the slip referred to? I think not. That would be rather a heavy penalty for an error the curing of the like of which by the Courts without penalty is a matter of almost daily occurrence.

If the undertaking in the injunction had been merely to pay such damages as the plaintiff might sustain without more, the plaintiff would undoubtedly be entitled to recover any damages she may have sustained but where it is left to the discretion of the Court to say whether the defendant ought to pay any I think it should, in the exercise of that discretion, attach more importance to the circumstances of the case and the nature of the action than to defects in the proceedings in the latter.

STUART, J.:—This is an appeal from the judgment of Mr. Justice Simmons, rendered on the trial of an issue as to whether the plaintiff in the issue, Addie Albertson, had suffered any damages by reason of an interim *ex parte* injunction obtained against her by the present defendant who was plaintiff in the suit in which the injunction was granted. The trial Judge awarded the plaintiff $450 as damages. From this judgment the defendant appeals and the plaintiff also enters a cross-appeal seeking to increase the amount of the damages awarded.

The order for the trial of the issue was made by the Chief Justice and it is in these words "that an issue be and is hereby directed as to what damages, if any, have been sustained by the defendant, Addie Albertson, by reason of the injunction herein, which the plaintiff, according to the practice of this Court, ought to pay." The order also contained a clause setting the issue down for trial and directing the parties to file pleadings; that is, that Addie Albertson, the complaining defendant, should file a statement of claim and that the plaintiff should file a statement of his defence against the claim for damages.

When the issue came on for trial before Mr. Justice Simmons the defendant in the issue, Secord, contended that the question whether or not he ought, in any case, to have damages

assessed against him was still open and should be considered by the trial Judge. The plaintiff in the issue on the other hand contended that the only question open for the Court to deal with was the amount of the damages, if any. Mr. Justice Simmons took the latter view. The respondent in the present appeal, the defendant in the issue, now raises the same point before us as to the proper interpretation of the order of the Chief Justice. No written reasons for judgment were given by the Chief Justice when he made the order and the form of the order seems to have been settled by consent of the parties. The Chief Justice stated in the argument before us and so informs us, that he is strongly of the impression that he did not intend to decide the question of liability but intended to pass the whole matter on to be dealt with by the trial Judge in a more formal way. The result is that it does not distinctly appear that the initial question was really ever decided at all. The Chief Justice does not think he intended to decide it. Mr. Justice Simmons held that it was already decided before the matter reached him. There is no doubt that upon the authorities which have settled the practice in England the view taken by Mr. Justice Simmons is correct, namely, that where a defendant, who has been enjoined, comes into Chambers after the matter has been finally determined in his favour and asks for an enquiry as to damages, the Judge who hears that application, before directing a reference or an issue, first decides the preliminary question whether in the circumstances of the case there should be enquiry or an issue at all or not. But, on the other hand, it is to be observed that this is merely a question of practice and we are not so strictly bound by English decisions upon points of practice. There is really no reason in the nature of things why a Judge when such an application comes up, perhaps on a crowded Chamber day, might not very well say, "I haven't time now to go fully into this question. The whole matter had better be dealt with more deliberately at a more convenient time and place"; and this, is apparently what the Chief Justice intended to do. There are features in the order also which corroborate the view that a different rule of practice was here adopted. The order refers to damages "which according to the practice of this Court the plaintiff ought to pay." The practice of the Court can have nothing to do with the amount or the remoteness of damage but the phrase could have some sensible reference to the question of liability. Then again, pleadings were to be filed. This looks much as if the idea was to have the matter proceed as if the rule against commencing an action did not exist. The parties were before the Court already and all that was really needed was pleadings. The statement of claim sets forth a ground of liability in addition to specifying the damages suffered.

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In any case it is quite clear that so far no Judge has really adjudicated upon the matter and in all the circumstances I think it is not only open to us, but that we are bound to do so.

The question arises in this way: On August 27th, 1910, Secord began an action in the Supreme Court against certain defendants. I have, I think not improperly, looked at the *pracipe* for the writ. It is directed to the clerk of the District Court of the judicial district of Edmonton. It was accepted and filed by the clerk of the Supreme Court and treated as authority for the issue of a writ from his office. The defendants named in the style of cause in the *pracipe* which was typewritten are Andrew Albertson, Frederick P. Hobson, Elmina Hobson and Aggie Albertson, the last name being added by pen. But the *pracipe* asks for a writ only against the first three and the writ when issued only named the first three. The statement of claim, however, attached to the writ, as well as the copy left with the clerk, named Aggie Albertson as a defendant. The statement of claim sets forth the history of certain dealings between the plaintiff and the defendants other than Aggie Albertson in regard to a partnership in certain coal lands and stated that in consequence of these dealings the defendant Andrew Albertson was indebted to the plaintiff in the sum of $5,119.50. It was further alleged that the defendant Andrew Albertson had in August, 1910, placed to the credit of the defendant Aggie Albertson large sums of money in the Great West Permanent Loan Company for the purpose of preventing the plaintiff from realizing on the same and that these moneys still remain the property of the said Andrew Albertson or in the alternative "if the same have been given to the said Aggie Albertson the same is a preference as against the plaintiff." Curiously enough it was not alleged that Aggie Albertson was a creditor of her husband Andrew Albertson, so that the suggestion of a preference is absolutely unintelligible. There was no allegation that the money had really been given to the wife that as between husband and wife the property had passed but that the gift was fraudulent and void as against creditors under the Statute of Elizabeth. In substance and in fact the allegation made was that the moneys in question had been and still remained the property of the husband but had been deposited in the wife's name. This clearly amounts to nothing more than an allegation that the wife held the money as trustee for her husband in a trust account.

The statement of claim concludes with a prayer for an injunction restraining the husband and wife from withdrawing any of the said sums of money from the company with which they were deposited and restraining the company from paying the money out to either of them; and (2) for a declaration (not that any gift was fraudulent and void as against credi-

tors) but that the moneys so deposited were "liable to the plaintiff's claim herein."

Upon the same day as the issue of the writ the plaintiff applied to Mr. Justice Beck for and obtained an *ex parte* interim injunction restraining the husband and wife according to the prayer of the statement of claim. Also upon the same day the plaintiff issued a garnishee summons directed to the Great West Permanent Loan Company and in a most reprehensible way, which cannot be too strongly condemned, procured the clerk of the Court, who should have known his business better than to allow such a thing, to insert in the garnishee summons certain words which are not provided for in the statutory form at all. The garnishee summons reads "and it is alleged on affidavit filed that you are indebted to the said defendant Andrew Albertson *part of whose moneys are deposited with you in the name of Aggie Albertson.*" I have underlined the words improperly inserted. This was a suitable ending to a whole series of slipshod practice.

On September 9th, the wife appearing in her real name as Addie Albertson, and the defendant Andrew Albertson, her husband, obtained on motion an order from Mr. Justice Scott dissolving the injunction. The reason given for the dissolution of the injunction was that the action was improperly framed inasmuch as the plaintiff did not sue on behalf of himself and all other creditors. On September 12th, the plaintiff filed a discontinuance of the action and began another with which I do not think we are here concerned.

On September 30th, the application above referred to was made to assess the damages suffered by Addie Albertson by reason of the injunction. With respect, I am of opinion that the injunction was improperly issued, if not for the reason given by Mr. Justice Scott in dissolving it, then for a different one. The action was in no way an action to set aside a gift or conveyance as void against creditors. As I have pointed out, there was no allegation whatever that the husband had made a gift to his wife; there was no prayer that any gift be set aside. There was absolutely nothing more than an allegation that these moneys belonged to the husband; there was no suggestion that as between him and his wife they belonged to her except a faint one in the peculiar hypothetical phrase which I have already quoted and which leads to the absurd statement about a preference. The whole proceeding was simply an attempt to get equitable execution in regard to certain trust moneys before any judgment had been recovered. I know of no authority for such a course. In view of the looseness with which everything was done I cannot think it right to attempt to put any generous interpretation upon the statement of claim in the then plaintiff's favour. He ought to be confined, especially

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where he seeks the extraordinary remedy of an injunction, simply to what he actually alleges and to nothing more.

It may be said that the distinction between a gift to the wife and a deposit of money in her name in the bank is so fine as to be properly disregarded, but however difficult it might ultimately be to make the distinction clear in evidence and to prove an actual gift this is no excuse for not making the necessary allegation of a gift in an exact and definite form in the statement of claim. The real reason for not alleging a gift was, I imagine, because the garnishee summons could in such case have no effect and the peculiar insertion made in that document simply confirms the view that the plaintiff never intended to allege any gift.

This being so I think the plaintiff in the issue is entitled to damages if any are proven. The trial Judge refused to allow any damages in respect to a certain option for the purchase of coal lands which it is alleged the present plaintiff was prevented, not from taking up finally, but from obtaining at all by reason of her money being tied up by the injunction. I am of opinion that the learned Judge was right in refusing these damages. The whole position of the plaintiff was too uncertain. Kenwood, from whom she expected to get an option, had himself as he stated in his evidence only an option from one Hutton. This alleged option was not put in evidence. Kenwood said he had it in his possession when in the witness-box but upon his expressing a wish not to reveal its contents it was not filed and its contents were not stated. We have, therefore, no evidence that Kenwood had himself an option at all. We have no evidence of its terms. Whether Kenwood could have turned it into a contract enforceable by specific performance or not is absolutely unknown to us. Furthermore, even if all this were plain and proven, an option is well known not to be assignable and grave difficulties might have arisen between Hutton and Kenwood and the plaintiff upon that ground. Put in its bald form, the plaintiff claims damages because she was prevented, not from carrying out a contract, not even from obtaining a contract, but from obtaining an assignment legally unenforceable of an unknown something not before us but which a witness spoke of as an option. It is impossible in my opinion to allow damages on such an uncertain ground.

With respect to the damages allowed by the trial Judge for stopping the use of moneys deposited in the wife's name which were being used for paying the working expenses of a partnership business in drilling operations in which the plaintiff was engaged along with one Gilmore, it is to be observed that in so far as the portion of that claim is concerned there is a special and stronger ground for allowing damages.

It is quite clear from the evidence and indeed it is practically admitted that in so far as the second amount of $1,408.09 the husband had no claim or interest in it, at all. Even the wife was interested in it only jointly with another person and she really held it in trust for the partnership of which she was a member. Yet the injunction clearly tied up this money as well as the money standing in the larger account. If the injunction had been limited specifically to the one account to moneys deposited in the wife's name from a certain source as is at least attempted to be done in the statement of claim then the plaintiff would have been able to act freely with regard to the smaller account. It is impossible to say that the injunction did not interfere with it merely because a sum of $5,119.50 is mentioned and then the costs which are an indefinite sum. There was nothing in the injunction to shew what account was referred to. The plaintiff might quite possibly have been open to process for contempt if she had touched even the $1,408.09 and was not to blame if she took this view. The evidence, moreover, discloses that the bank did refuse to pay over any money at all because they knew of the injunction. The amount allowed, $450 in all, is not large. There was evidence which shewed that in the past these operations had been quite profitable. There was evidence that the injunction suspended them for a time and that it put the plaintiff and her partner to great inconvenience. While it was impossible to estimate with absolute accuracy and certainty the amount of the damages there was certainly enough evidence to justify the trial Judge in concluding that some real damage had been suffered. Cheques given to employees were refused payment. Work did in fact have to be stopped. It is clearly a case in which the Judge was entitled to make a moderate and reasonable allowance for the damages which must have been suffered. The trial Judge heard all the evidence and decided that $300 should be allowed for direct interruption of business and $150 for the inconvenience, loss of time and expense which the plaintiff suffered. I am unable to say that he was so clearly wrong that we ought to interfere with his decision. Such damage as indicated was, I think, the natural and proximate result of the injunction. With regard to the contention that the garnishee summons may itself have caused the damage, I am of opinion that we should not give the defendant any advantage from such an illegal proceeding. The garnishee summons could not legally have had any effect and the garnishees were not bound to regard it.

The appeal should be dismissed with costs, and the cross-appeal should also be dismissed with costs.

BECK, J.:—On the 10th August, 1910, in an action in this Court brought by Richard Secord against Andrew Albertson

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and others, I granted an interim injunction order in the following form, following in this respect the common practice of the Court not to accompany the interim injunction by a summons to continue, but leaving the defendants to move to vacate or vary:

BETWEEN:

Richard Secord,

Plaintiff,

and

Andrew Albertson, Frederick P. Hobson, Elmina Hobson, and Aggie Albertson.

Defendants.

UPON THE APPLICATION of the above named plaintiff and upon hearing counsel for the plaintiff and the plaintiff undertaking to abide by any judgment this Court may make as to damages in case the Court or a Judge thereof is of the opinion that the defendants have suffered any damages by reason of this injunction which the plaintiff ought to pay:—

IT IS ORDERED that the above named defendants Andrew Albertson and Aggie Albertson, and their respective agents each be restrained from using or in any way transferring or issuing cheques or orders on or paying certain moneys deposited by them or either of them in the Great West Permanent Loan Company to the extent of the plaintiff's claim, namely five thousand, one hundred and nineteen dollars and fifty cents ($5,119.50) and costs of this action; and an injunction is hereby granted accordingly.

The statement of claim in that action is set out in full in the appeal book and, in my opinion, sets up sufficiently though not artistically, a case to the effect that Secord was a creditor of Andrew Albertson and that Albertson had for the fraudulent purpose of defeating Secord and his other creditors deposited the sum of money mentioned in the injunction order in the name of his wife, Aggie Albertson, whose correct name, it now appears, is Addie Albertson. The allegations of the statement of claim which, I think, are fairly to be interpreted in this sense, are as follows:—

The defendant Andrew Albertson on or about August, 1910, placed to the credit of the defendant Aggie Albertson large sums of money in the Great West Permanent Loan Company for the purpose of preventing the plaintiff from realising on the same; the said money so deposited still remains the property of the said Andrew Albertson.

The material upon which I granted the order is not before us, but I suppose it is to be assumed that it supported the case made by the statement of claim and was sufficient to justify the order, subject to a consideration of objections which I am about to refer to. Some time after an application was made to my brother Scott to set aside my order.

On that application it appeared that, although Addie Albert-

son was named as a defendant in the statement of claim and in the order, she had not been named as a defendant in the writ of summons.

The result of the application was that my brother Scott set aside my order and gave leave to the plaintiff "to amend the writ of summons" by adding the name of Addie Albertson as a party defendant. This order was made on the 10th September, 1910.

My brother Scott's reasons for judgment are set forth at length in the appeal book and from them it appears that he set aside the order on two grounds (1) that the plaintiff being a non-judgment creditor could sue only on behalf of himself and all other creditors and (2) that even had the action been so constituted an injunction cannot be granted except at the instance of a judgment creditor restraining a debtor from dealing with his own property, citing *Pacific Investment Co.* v. *Swan*, 3 Terr. L.R. 125.

I have a recollection that in granting the interlocutory injunction, I observed the fact that the plaintiff was not expressly suing on behalf of all the other creditors, but was then of opinion that if this was a defect it was the merest matter of form which under the rule as to "non-compliance" I might disregard for the time being inasmuch as if necessary the formal amendment might at any time be made. I have now come to the conclusion that under the system of the Judicature Act the reason for a non-judgment creditor suing on behalf of all other creditors as well as himself is gone, and that therefore, this Court should declare that it is no longer necessary. Boyd, C., in *Scane* v. *Duckett*, 3 O.R. 370, goes almost to this extent. In my opinion, too, the other ground put by my brother Scott was also not tenable in such a case as this, for the reason indicated in my decision in *Fairchild* v. *Elmslie*, 2 Alta. L.R. 115, sufficiently expressed in the headnote which is as follows:—

> The Court will not, at the instance of a creditor who is not a judgment creditor, interfere by injunction to prevent a transfer of property by a debtor, but where the debtor has fraudulently transferred property the Court will enjoin further transfers until the creditor can obtain judgment in his action to impeach the conveyance. *Campbell* v. *Campbell*, 22 Grant 314, followed.

My opinion, therefore, is, with due respect to my brother Scott, that his order setting aside the interlocutory injunction, so far as based upon the grounds mentioned by him, was wrong; and that so far as the sufficiency of the facts is concerned, there being no suggestion that they were enquired into on that application, it must be assumed that a sufficient *prima facie* case had been shewn as the basis for the interlocutory injunction.

There remains the question arising from the omission of Mrs. Albertson's name from the writ of summons. As to that

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I am of opinion that inasmuch as, under our system of procedure, a writ of summons cannot be issued without a statement of claim being annexed to it, and the writ expressly refers to the statement of claim as annexed, the two should be taken to be one, with the result that in this case, while the writ was irregular, Mrs. Albertson was nevertheless a party defendant to the action.

The action about which I have been speaking was discontinued, and on the 12th November, 1910, a new action was commenced by Secord suing on behalf of himself and all other creditors of Andrew Albertson against the same defendants, and setting up substantially the same case as in the former action, but charging fraud in undoubtedly sufficient form. On the same day the Chief Justice granted an interim injunction order in this action similar in terms to that granted in the first action.

This second action was ultimately settled on the 28th September by a cheque of Mrs. Albertson on the moneys in question in this form:—

Edmonton, Alta., Sept. 28th, 1910.

THE GREAT WEST PERMANENT LOAN COMPANY.

Pay to the order of Messrs. Emery, Newell & Bolton $3,000.00/100, three thousand dollars as per endorsement and charge to account No. A5.

(Sgd.) ADDIE ALBERTSON.

Indorsed:

In full of Secord (suing on behalf of himself and all others the creditors of Andrew Albertson an insolvent) and Andrew Albertson et al. defendants, and in payment of all moneys claimed in and causes of action set out in the said action . . . to the claim against Addie and Andrew Albertson . . . only, not to affect any claims which the said Secord has against the defendants F. & Elmina Hobson.

(Sgd.) EMERY, NEWELL & BOLTON.

Besides these two actions there was a third, an action by Joseph Hostyn, suing on behalf of himself and all other creditors of Andrew Albertson against Albertson and his wife. The cause of action was similar to that in the other action and in it Scott, J., granted a similar injunction on the 9th September, 1910. This action likewise was settled on the 28th September by a cheque upon the same fund for $495, which was in the following form:—

Edmonton, Alta., Sept. 28th, 1910.

THE GREAT WEST PERMANENT LOAN COMPANY.

Pay to the order of Robertson, Dickson & Macdonald $495.00/100, four hundred and ninety-five dollars as per indorsement, and charge to account No. A5.

(Sgd.) ADDIE ALBERTSON.

Indorsed:—

Payment in full of Hostyn, suing on behalf of himself and all other creditors of A. Albertson, an insolvent, plaintiff, and A. Albertson et al. defendants and all claims made in and causes of action set out in the said action, without prejudice to the rights of A. Albertson to recover back from the said Hostyn whatever, if any, shall be found to have been paid to the said Hostyn in excess of the amount actually due by him the said Albertson.

(Sgd) ROBERTSON, DICKSON & MACDONALD.

On the 22nd December, 1910, the Chief Justice made the following order in the first action of *Secord* v. *Albertson et al.*:

UPON THE APPLICATION of the defendants Andrew Albertson and Addie Albertson, upon hearing read the affidavits of Andrew Albertson, Richard Secord and Andrew Albertson filed, and the pleadings and proceedings herein, and upon hearing what was alleged by counsel for the plaintiff and the applicant herein:—

IT IS ORDERED that the application of the defendant Andrew Albertson be dismissed;

IT IS FURTHER ORDERED that an issue be and is hereby directed as to what damages, if any, have been sustained by the defendant Addie Albertson by reason of the injunction herein, which the plaintiff, according to the practice of this Court ought to pay;

AND IT IS FURTHER ORDERED that the said issue be set down for trial before a Judge of the Supreme Court of Alberta at the next sittings of the said Court to be holden at Edmonton in the Province of Alberta;

AND IT IS FURTHER ORDERED that the defendant Addie Albertson deliver a statement of claim to the plaintiff within ten days from the issue of this order and the plaintiff shall deliver his statement of defence thereto within five days thereafter;

AND IT IS FURTHER ORDERED that such statement of claim and statement of defence together with the reply (if any) which shall be delivered within five days of the delivery of the statement of defence) shall constitute the pleadings or record of the issues between the said defendant and the said plaintiff so to be tried;

AND IT IS FURTHER ORDERED that each of the parties to the said issue be at liberty to appear by counsel and prosecute or defend such issue as the case may be or as they may be advised and that they be bound by the finding of the Court or Judge upon the question, subject to appeal; and that they be at liberty to submit evidence and call witnesses on their own behalf as they may be advised; and that they be at liberty to examine all witnesses called at the said trial.

IT IS ORDERED that the costs of this application and all subsequent costs be reserved to be dealt with by trial Judge at the hearing of the said issue.

In pursuance of this order a trial took place before Simmons, J.

Objection was taken by counsel for Mrs. Albertson, that this order concluded the question whether she was entitled to any damages and left to the Judge solely the question of the

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quantum. The learned Judge took this view, but nevertheless, admitted, subject to objection, the evidence tendered on Secord's behalf for the purpose of shewing that Mrs. Albertson was not entitled to recover any damages at all.

The learned Judge adhering to his view assessed the damages at $450 and gave Mrs. Albertson the costs. Secord appeals from this decision, and Mrs. Albertson makes a cross-appeal for an increase of the damages. The form of the order of the Chief Justice, which, of course, was not of his wording but of both parties, for the solicitor for Secord approved of the form, to my mind, bears on the face evidence that the Chief Justice did not consider the preliminary question whether it was a proper case to direct an enquiry as to damages but, by arrangement of the parties, adopted a procedure other than the usual one and left that question as well as the question of the quantum of damages to the trial Judge. The Chief Justice has in any case informed us that that was his understanding at the time of the purpose and effect of the order and under these circumstances I think we should so treat it, and inasmuch as the trial Judge has not dealt with the preliminary question whether it is such a case as that an enquiry should be directed, we must now decide that question. It seems to be clear enough that the undertaking is extinguished only by a determination of the action in favour of the plaintiff or by agreement, though the Court may, where it is not extinguished, refuse to enforce it on the ground of misconduct or laches on the part of the party otherwise entitled to its benefit: *Newby* v. *Harrison*, 3 De G. F. & J. 287; *Ex p. Hall, re Wood*, 23 Ch. D. 644 (C.A.).

Undoubtedly the usual practice is first to determine whether an enquiry ought to be directed and if the Court or a Judge decides that it is a proper case in which to direct an enquiry one is directed in these or similar terms:—

> An enquiry whether the defendant has sustained any and what damages by reason of the injunction granted by the said order which the plaintiff ought to pay according to his undertaking contained in the said order: Seton on Decrees, 6th ed., p. 519.

What are the principles upon which the Court or Judge should act in deciding whether or not to grant an enquiry?

In *Newby* v. *Harrison*, 3 DeG. F. & J. 287 (*supra*), Turner, L.J., said (at p. 290):—

> A party who gives an undertaking of this nature puts himself under the power of the Court not merely in the suit but absolutely; the undertaking is an absolute undertaking that he will be liable for any damage which the opposite party may have sustained, in case the Court shall ultimately be of opinion that *the order ought not to have been made*. . . . . We must hear the case upon the question whether *under the circumstances* this jurisdiction ought to be exercised, for *there may be cases* in which the Court will not consider it *just* to enforce an undertaking, though the jurisdiction to do so exists.

In *Bingley* v. *Marshall*, 11 W.R. 1018, 9 L.T. N.S. 144, the Court on the hearing of the action held the plaintiff to be entitled to succeed in an action for specific performance only on submitting to terms which he refused to accept. The action was therefore dismissed without costs. On an application for an enquiry to ascertain damages payable under an undertaking of the plaintiff contained in an interim injunction order obtained *ex parte*. The reports of the case do not quite agree, and it is true that in the Law Times Reports it is stated that the Vice-Chancellor said that he could not see that the defendant had suffered any damage. Yet both reports seem to shew that the real ground of the Vice-Chancellor's decision was not that. In the Law Times, [9 L.T.N.S. 144] it is said:—

> The Vice-Chancellor said that there were two cases in which the Court, in granting an injunction, required an undertaking as to damages: When an order was made upon an *ex parte* motion; and when upon argument of the case the balance of evidence appeared to be in favour of restraining the commission of the acts complained of and giving compensation for the restraint, *if the right of the defendant should be completely established*. . . . Now where there was a *probabilis causa litigandi* it would not be fair to put a plaintiff to any additional expense on account of an undertaking of this sort. That there was such a probable cause in this case the Court had shewn to be its opinion by giving no costs against the plaintiff. It would be absurd therefore to saddle him with other expenses which equally arose from the mere institution of the suit.

In the Weekly Reporter [11 W.R. 1018] it is put in this way:

> It was quite plain that this Court could not have allowed the property to be dealt with during this litigation; and that the bill had not been filed without some foundation was shewn by his having dismissed it, not with, but without costs. The present application was an attempt to extend the jurisdiction of the Court in respect of these undertakings in a manner that was never intended. The plaintiff was not wrong in coming to this Court and it would be monstrous that he should be made to bear all the costs and damages incident to a litigation which the Court had thought he was right in instituting, though he had not succeeded at the hearing.

In *Hessin* v. *Coppin*, 21 Grant 253, Blake, V.-C., refused an enquiry as to damages on account of his view of the conduct of the defendant. He said:—

> Where the plaintiff obtains an injunction on the usual undertaking it is not, as of course, to give damages where the injunction is not continued or is dissolved. . . . I do not think the conduct of the defendant presents so meritorious a state of facts as compels me to grant the enquiry asked. I exercise the discretion which, under the authorities, appears to be vested in the Court in these cases by refusing the application without costs.

In *Graham* v. *Campbell*, 7 Ch. D. 490, 47 L.J. Ch. 593, James, L.J., says:—

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> If any damage has been occasioned by an interlocutory injunction, which, on the hearing is found to have been wrongly asked for, justice requires that such damage shall fall on the voluntary litigant who fails, not on the litigant who has been *without just cause* made so.

After quoting this passage Boyd, C., sitting in Divisional Court, in *Gault* v. *Murray*, 21 O.R. 458, at p. 463, says:—

> But if the defendant in such case has been made a party *with just cause*, even though he may succeed, it does not follow that he gets damages. And in dealing with the case before him refused to disturb the trial Judge's decision refusing an enquiry though the plaintiff failed at the trial. He said: "The Judge has believed this case to be of that suspicious character which invited investigation.

Ferguson, J., concurred.

Smith v. *Day*, 21 Ch. D. 421, holds that the granting of an enquiry is very largely subject to the discretion of the Court—that before granting an enquiry the Court should consider all the circumstances of the case, including the question of the ground upon which, if it be so, the interlocutory injunction was dissolved for the Master of the Rolls says (at p. 425):—

> It may happen that an interlocutory injunction is dissolved for delay or some cause which disentitles the plaintiff to an interlocutory injunction, though not to relief at the trial. . . Then again the Court must have regard to the amount of damages; if it be trifling or remote the Court would not be justified *in directing an enquiry* as to damages, *though the damages might not be so remote that an action would not lie.* Then again the time at which the application is made is material.

In my opinion the defendant Mrs. Albertson shews no case for an enquiry inasmuch as she has not proved that the interlocutory injunction was improperly granted upon a consideration of the facts involved in the action, and I think proof of that is an essential element to her right to an enquiry and that the onus of proof is upon her. I think the mere vacating of the injunction, if nothing more appeared, would not be sufficient because *non constat*, but that it was dissolved on some ground other than the merits; but here we have it quite clearly shewn that the injunction was set aside upon grounds which, even if my opinion that they are not tenable be incorrect, do not cover the substantial ground of complaint in the action, namely, the disposition of a fund belonging to the debtor for the fraudulent purpose of defeating or delaying his creditor. There is nothing to shew—and the way in which the action was settled appears to me to point rather the other way—that Secord would have failed to establish his case at the hearing, though even that would not be a final test of liability and there is therefore, in my opinion, no case made to shew that Secord "ought to pay" any damages at all.

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As pointed out in *Smith* v. *Day*, 21 Ch.D. 421 (*supra*), the undertaking is not a contract with the defendant; neither can an action be brought upon it. It is an obligation to the Court. Looking at its form, and considering the common practice of the Court, it is an obligation which is conditional—which becomes absolute only upon the Courts, as a condition precedent to liability, finding that the case, in view of all the circumstances, is a proper one in which to direct an enquiry. Here we have only the fact that the injunction was set aside on grounds which do not go to the merits and no evidence on which to form the opinion that the justice of the case demands an enquiry.

On this ground, I would allow the appeal and declare the defendant Addie Albertson not entitled to any damages. As to the costs, I would give no costs against her either of the application before the Chief Justice or the trial before Simmons, J., or of this appeal, because so much of these costs have arisen out of errors of the solicitors for the other side.

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Alberta Supreme Court, Harvey, C.J., Scott, Beck, and Simmons, JJ.
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1. FRAUDULENT CONVEYANCES (§ I—2)—SECURITY FOR PAST INDEBTEDNESS AND PRESENT ADVANCE—STATUTE OF 13 ELIZ.

An agreement for an absolute sale of the property of a debtor given to a creditor as security for past indebtedness and a further advance is not void under the Statute 13 Eliz. in the absence of an intent to defraud other creditors though it does in fact delay and hinder the other creditors and was so intended by the debtor.

[*Mulcahy* v. *Archibald*, 28 Can. S.C.R. 523, applied.]

2. CREDITORS' ACTION (§ III—10)—EXCESS AFTER PAYMENT OF PREFERRED CLAIMS.

Where a debtor gave certain creditors an agreement for an absolute sale of his property as security with the necessary result of hindering and delaying his other creditors under circumstances which would support the preference, the judgment creditors are entitled to such order and directions from the Court as will enable them to reach in the preferred creditors' hands all the property of the debtor that remains after the preferred claims are satisfied.

AN appeal from the judgment of Stuart, J., dismissing the plaintiffs' action against Miller and others to declare void certain transactions of one Irwin of whom the plaintiffs are creditors.

The judgment was varied on this appeal.

O. M. Biggar, for plaintiffs.

H. H. Parlee, for defendants.

The opinion of the Court was delivered by

BECK, J.:—In September, 1905, Irwin purchased under agreement with Mackenzie, Mann & Co. Ltd., lots 20, 21 and 22

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block 1 Lloydminster and shortly afterwards put up an hotel known as "The Alberta Hotel" upon lots 21 and 22. Soon after he became indebted to the defendants as a firm of Miller and Robinson to the extent of $2,000 and to a firm of Miller Bros., of which the defendant Miller was a member, to the extent of $4,000, and also to other persons in sums aggregating to a large amount.

About April, 1906, in consequence of being unable to meet his obligations to his creditors, conferences took place between Irwin and the defendants—chiefly with Robinson; these conferences continued from time to time with the result that some time during the course of the summer of 1906, Irwin, with the assistance of Robinson, prepared a statement of his assets and liabilities, shewing assets, composed very largely of the hotel and furnishings, to the amount of $30,685, and liabilities to the amount of $16,450, thus shewing an apparent surplus of about $14,000, and an indebtedness to creditors other than Miller & Robinson and Miller Bros., for whom throughout the transactions in question one or other of the defendants was acting, of $10,450.

In September, 1906, the conferences between Irwin and the defendants resulted in the defendants agreeing to advance Irwin $6,000 to enable him to reduce his liabilities to his creditors other than Miller & Robinson and Miller Bros., and which if so applied would reduce those liabilities to $4,500; and, in Irwin agreeing to give security to Miller & Robinson for $12,000 made up of the advance of $6,000 and the indebtedness of Irwin to Miller & Robinson of $2,000 and to Miller Bros. of $4,000.

Sometime before this Irwin had paid the balance of the purchase price for lots 21 and 22 and had thereby become entitled to a transfer of them. The evidence satisfies me that this arrangement was an entirely honest one on the part both of Irwin and the defendants. The Assignments Act (ch. 6 of 1907, assented to 15th March, 1907) had not then been passed. The statute law of the Province as it then stood (C.O. 1898, ch. 42) did not prevent a preference being given by a debtor to one creditor over another by way of security upon real estate. The arrangement, so far as it provided for securing the indebtedness of Irwin to Miller & Robinson and Miller Bros. was therefore unobjectionable. It is obvious also that the proposal that Miller & Robinson should advance $6,000 to Irwin for the purpose of enabling him to pay it to his creditors and that Miller and Robinson should have security for that advance was also unobjectionable. The plaintiffs, however, contend that the whole arrangement is vitiated because of what occurred when it came to be carried out. What took place was this: Miller and Robinson proposed, or rather, I fancy, assumed that the trans-

action would be carried out by Irwin giving them a mortgage upon the hotel property for $12,000. Irwin, however, proposed that he should give Miller & Robinson a transfer by way of security instead of a mortgage. He tells his reason as follows:—

> I wanted to give them a bill (agreement) of sale so I could be protected from the other creditors.
>
> I was badly tied up with the creditors and I wanted to pay them off. They were bothering me for money and Miller & Robinson had always been good friends to me, and I don't know whether I made the suggestion or they did but in talking over the matter we came to the conclusion that we would make an absolute bill (agreement) of sale of the property to Miller & Robinson—so that I could say to my creditors that I had made a sale of the hotel.
>
> The verbal understanding I had with Miller & Robinson was that as soon as I had paid off their indebtedness first the property would revert to me and I intended that way to make the creditors wait until I was in a position to pay them. My intentions at all times were to pay everyone . . . I thought by time I could pay them off.

Robinson says:—

> I was pushing him for money or for security different times during the summer. I wanted a mortgage on it and he refused to let a mortgage go on because it would get out to his creditors but he thought that when he had his house (hotel) completed he could raise money enough on it and at one time I offered him the privilege of raising the money and buying off his creditors and I would take a second mortgage on it for our account.

Robinson tells of this becoming impracticable and then says: "We finally compromised on (the advance of) $6,000";—

> Q. Now will you tell me under what circumstances and why an agreement for sale was taken instead of a mortgage?
>
> A. Because I thought it was equally good security as a mortgage and for no other reason but I think Irwin, if I remember right, when he found out he couldn't get money enough to pay them all off, Irwin then wanted to give an agreement for sale instead of a mortgage.
>
> Q. Why?
>
> A. Because he said those he didn't pay off were likely to jump on him and close him out. That was the reason that he didn't want to give a mortgage, he wanted to give the agreement for sale instead.
>
> Q. Well, why did you advance him the $6,000?
>
> A. In order to get security for the balances we had; for the $4,000 that Miller had a security also for the $2,000 we had in the building without closing him out.
>
> Q. Now, Mr. Irwin on the stand has said in effect this was a collusion between you and him whereby the creditors were to be defrauded or delayed. What have you to say to that?
>
> A. Well, we had no money except what was engaged in the business. We had to pledge our credit to the utmost to get it and would we be likely to enter into any collusion to hurt ourselves when we were pledging everything we had to get the money to give him?
>
> Q. Well, now, that is all right in a way but was there any collusion?
>
> A. Absolutely none at any time.

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Miller's evidence is to the same effect.

Furthermore, I think that counsel for the defendants in putting his question to Robinson as to collusion did so more strongly than Irwin's evidence justifies. Irwin does not say there was collusion. He states the reason he had for insisting that Miller & Robinson should, for the purpose of carrying out the arrangement they had come to, take security in the form of an agreement for sale instead of a mortgage, namely, that while he intended to pay the $6,000, proposed to be advanced, to his other creditors and expected shortly to be able to pay and intended to pay them in full he would be enabled to do so without being harrassed by these creditors in the meantime. I think there was no direct intent on the part of the defendants to prejudice the creditors in any way. Their intention was to get security for their claim of $6,000. They could get this only on such terms as Irwin would agree to, namely, the advance of a further sum of $6,000 and the taking of a security in the form of an absolute agreement for sale. Their agreeing to take security in this form, notwithstanding they knew Irwin's reason for its being in that form, did not, it seems to me, make them parties to Irwin's intent to prejudice his creditors. Their primary and prevailing intent was to get security. If the other creditors were to be delayed, that delay was merely the effect of the realising of their real intent. The statute 13 Eliz. does not void a transaction which merely has the effect of delaying, hindering or defrauding creditors. The transaction was entirely honest I think, too, even on the part of Irwin. He had no intent to defraud his creditors. He had, it is true, an intent to delay them but that intent was not fraudulent.

It was long ago settled that the Statute of Elizabeth does not prevent a debtor giving a preference to one creditor over another with the deliberate intent of so doing and with the necessary result that the unpreferred creditors are hindered and delayed. The honest intent to do the lawful act of giving security to one creditor does not cease to be honest because the necessary consequence is foreseen, namely, that other creditors will be hindered and delayed and must, therefore, be secondarily intended.

In *Mulcahy* v. *Archibald*, 28 Can. S.C.R. 523, at page 529, it is said:—

> The Statute of Elizabeth, while making void transfers, the object of which is to defeat or delay creditors, does not make void but expressly protects them in the interest of transferees who have given valuable consideration therefor, and it has been decided over and over again that knowledge on the part of such a transferee of the motive or design of the transferor is not conclusive of bad faith or will not preclude him from obtaining the benefit of his security. So long as there is an existing debt and the transfer to him is made for

the purpose of securing that debt and he does not either directly or indirectly make himself an instrument for the purpose of subsequently benefiting the transferor, he is protected and the transaction cannot be held void. As Jessel, M.R., said in *Middleton* v. *Pollock*, 2 Ch. D. 104, at page 108: "It has been decided, if decision were wanted, that a payment is *bonâ fide* within the meaning of the Statute of Elizabeth, although the man who made the payment was insolvent at the time to his own knowledge, and even although the creditors who accepted the money knew it. . . . The meaning of the statute is that the debtor must not retain a benefit for himself."

Going one step further, it is a common and lawful mode of giving security to give a conveyance absolute in form. If it is honestly given, the fact that that particular form may have the effect of hindering and delaying other creditors does not necessarily modify the primary honest though it may of course constitute a circumstance from which fraud may be inferred. It is however quite clear that though this form of security was adopted there was no intent even on Irwin's part to retain ultimately or even indefinitely any interest in the property to the prejudice of his creditors.

The onus is on the attacking party to prove the common intent. The evidence, some of which I have quoted, shews that the defendants were pressing for security; that they were willing to accept a mortgage; that Irwin was not willing to give security in that form but wished to give it by way of an agreement for sale. The defendants certainly had a right to take the security in any form in which they could get it, whether or not the probable or necessary effect would be to hinder or delay other creditors. I therefore hold the transaction attacked by the plaintiffs to be valid. It seems to me wholly unnecessary to enter into a discussion of the details of the transaction. Once that form of security was agreed upon, it was necessary that certain fictitious statements should be made in the documents embodying it and that certain fictitious relationships should be constituted.

For the reasons indicated I hold that the plaintiffs cannot succeed upon that branch of the case which attacks the transaction in question as fraudulent.

The plaintiffs however state a case for equitable execution. The learned trial Judge has set out at length the sundry subsequent dealings with the property conveyed to the defendants by way of security, and, in my opinion, the plaintiffs, being judgment debtors, are entitled to such order and directions from this Court as will enable them to reach in the defendants' hands all the property or money of Irwin that remains after their own claim is satisfied. For this purpose Irwin is not a necessary party to the action. The fact that the defendants have not yet realised upon certain substituted properties, which

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came to their hands as security for part of their claim can be no obstacle to giving effect to their claim for equitable execution. Some of the lands now in the hands of the defendants, being part of the proceeds of the original land, are within the jurisdiction of this Court; some are not. This Court can act directly upon the former, and if necessary indirectly upon the residue by process against the defendants, these latter properties necessarily forming items in an account which this Court can properly direct.

I think the order of this Court should be that an account be taken of the amount owing to the defendants, including the amount owing to Miller Bros.; an account of what property they received by way of security and what disposition was made of it and what their present securities consist of, their respective purchases of certain property which came to their hands by way of substituted security being declared ineffective to vest in them absolute title. I would reserve the further consideration of the action—to be had before a single Judge—until the account has been taken.

I would allow the defendants their costs below and their costs of this appeal, not directly against the plaintiffs but to be added to their claim and as a charge against the security in their hands. I would allow the plaintiffs their costs of appeal as a second charge upon the property after the satisfaction of the defendants' claim and costs. As the plaintiffs failed to establish fraud I would allow them no costs up to the giving of judgment in the Court below. The costs of the reference I would reserve. The defendants are ready and willing to give an account. If they do so promptly, completely and particularly the costs of the reference should be quite small.

Judgment varied accordingly.

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Apl. 13.

Alberta Supreme Court, Harvey, C.J., Scott, Beck, and Simmons, JJ. April 13, 1912.

1. ACCORD AND SATISFACTION (§ I—8)—AGREEMENT TO ACCEPT WITHOUT PROMISE TO GIVE CONSIDERATION.

To constitute a bar to an action on an original claim or demand the accord must be fully executed, unless the agreement or promise, instead of the performance thereof, is accepted in satisfaction.

[See also 7 Halsbury's Laws of England, p. 443; *Stewart* v. *Hawson*, 7 U.C.C.P. 168, and *Macfarlane* v. *Ryan*, 24 U.C.Q.B. 474, specially referred to.]

2. ACCORD AND SATISFACTION (§ I—12)—MUTUALITY—CONSIDERATION.

A document, made after the execution of an executory agreement for the sale of an engine, stating that it was mutually agreed between the seller and the purchaser that whereas the purchaser complained that the engine was defective in certain specified parts and whereas the seller, while not admitting the alleged defects, desired to adjust all differences, therefore in consideration of the seller supplying the purchaser with certain specified new parts of the engine and crediting him with a specified sum on his account, the purchaser admitted full satisfaction of his complaint as to defects and the complete fulfilment of all warranties made by the seller and thereby released and waived all liability on the part of the seller, arising out of the original transaction, such document, however, not containing any promise on the part of the seller to supply the parts or to give the credit mentioned, will not operate as a satisfaction of the purchaser's right of action under the original contract in default of the actual delivery and acceptance of the engine parts but merely as an "accord" that if the seller did supply the parts and give the credit then the document should operate as a release to the seller of the claims of the purchaser arising from any defects in the engine.

APPEAL from the judgment of Stuart, J., in favour of plaintiff on a motion to strike out certain paragraphs of defendant's counterclaim and to dispose of the questions of law raised thereby.

The appeal was allowed and leave given to amend.

C. F. Adams, for the plaintiffs.

A. A. McGillivray, for the defendant.

The defendant by paragraphs 1 to 9 of his counterclaim alleged an agreement for the sale to him by the plaintiff of certain machinery and certain breaches of warranty and other causes of damage by reason of defective condition in connection therewith. Following these allegations paragraphs 10, 11 and 12 were as follows:—

10. Further, and in the alternative, the defendant says, that on or about the 19th day of April, A.D. 1911, he entered into an agreement with the plaintiff, which is in the words and figures following, to wit:—

Taber, Alta., April 19, 1911.

It is mutually agreed by and between George Gorham, of the town of Taber, in the Province of Alberta, farmer, and M. Rumely Co. Ltd., of La Porte, Ind., a corporation incorporated at La Porte, and doing business in the Province of Alberta:—

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That whereas the said George Gorham has purchased from the said M. Rumely Co. one 36 h.p. steam plowing engine.

And whereas the said George Gorham complains that the said engine is defective, viz., that the ports to one of the cylinders was not properly opened, and admits that there are no other defects.

And whereas the said M. Rumely Co., not admitting above claimed defect, is desirous of adjusting all differences with the said George Gorham.

Now, therefore, in consideration of the said M. Rumely Co. supplying to the said George Gorham, a new cylinder and engine bed frame to take the place of above mentioned cylinder and in further consideration of the sum of three hundred 00/100 ($300 00/100) dollars to be endorsed on notes of said George Gorham to said M. Rumely Co., viz., No. 45960 ($300 00/100).

The said George Gorham admits full satisfaction of above complaint and complete fulfilment of all warranties on above engine and does hereby release and waive all liability of said M. Rumely Co. for both of the same, and for above consideration does release said M. Rumely Co. from all action of damages whatsoever, arising out of the original transaction and accruing since that time, of this transaction, and admits that above consideration is in full satisfaction of all claim whatsoever, in connection with above engine, against said company and that he is forever estopped from claiming any damage whatsoever either from above defect or under any of the warranties.

11. The defendant says that he was induced to execute the agreement in the last paragraph set out by the plaintiff representing to him that the plaintiff would deliver to him a new cylinder and engine bed frame in the said agreement referred to immediately and the plaintiff has not delivered the said new cylinder and engine bed frame whereby the defendant has suffered damage.

12. The defendant, therefore, claims damages as follows:—

(*a*) Damages, particulars of which are set out in paragraphs 1 to 5 inclusive hereof, $3,000.00.

(*b*) Damages, particulars of which are set out in paragraph 6 hereof, $2,000.00.

(*c*) Damages, particulars of which are set out in paragraphs 7 and 8 hereof, $5,000.00.

(*d*) Damages, particulars of which are set out in paragraph 9 hereof, $4,900.00.

(*e*) Damages, particulars of which are set out in paragraphs 10 and 11 hereof, $2,000.00.

(*f*) General damages, $5,000.00.

The plaintiff had obtained a summons to strike out paragraphs 1 to 9 and clauses (a), (b), (c), and (d) of paragraph 12, "or for such further or other relief as to the said Judge may seem meet," and the order appealed from was made on the return of the summons.

HARVEY, C.J.:—In the judgment of my brother Stuart appealed from it is stated that it was agreed to have the motion considered as if a point of law had been set down for argument. The judgment on the motion was that the claim in respect of the

defaults under the agreement for sale should be struck out for the reason given that there may be accord and satisfaction by a subsequent agreement. No one questions this last statement which was the reason of the decision, but it is clear also that the agreement may be only the accord and its performance constitute the satisfaction. As Coleridge, J., says in *Flockton* v. *Hall* (1849), 19 L.J. Q.B. 1 (affirmed on appeal to the Exchequer Chamber *sub nom. Hall* v. *Flockton*, 20 L.J.Q.B. 208), at p. 3:—

> Now an action may be agreed to be settled in one of two ways: either an agreement to do certain things may itself be the ground of settlement or the doing of those things may be the ground of settlement.

In *Stewart* v. *Hawson* (1858), 7 U.C. C.P. 168, Draper, C.J., in delivering the judgment of the Court said:—

> It is settled that a new mutual agreement between parties may be made, which being binding when entered into, may be accepted as a substitution for, or satisfaction of, a preceding claim for damages arising from the breach of a preceding agreement. On such a plea the jury would have to decide whether the plaintiff agreed to accept the agreement itself or the performance of it.

The chief argument of the appellant's counsel appears to me to be entirely beside the point. He contends that the law is as I have just stated it, which the plaintiff does not dispute. He also contends that he may set up alternative inconsistent claims which the plaintiff does not deny. Plaintiff's counsel, however, says that this has not been done and that he cannot tell what the defendant is really claiming and that either one or other set of claims must be struck out or the pleading amended. It appears to me that this position is absolutely beyond question. Plaintiff's counsel in his factum states that defendant did not ask to amend on the motion below. This is not denied and he has not made any such application on the appeal but his whole argument is based on the view that it is his wish and intention to claim damages in the alternative. I feel free to say that from the pleading alone I would have found difficulty in concluding that that was his intention.

It may be noted that in the document set out in paragraph 10 the plaintiff agrees to nothing but paragraph 11 says that the plaintiff did agree to deliver the cylinder and bed frame immediately. We then have a bilateral agreement which may or may not have been intended to be itself the satisfaction of the claim for damages. As indicated in *Stewart* v. *Hawson* (1858), 7 U.C.C.P. 168, it would be a question of fact whether it was to be the satisfaction or its performance. In some cases that fact might be ascertained by a simple interpretation of the terms of the agreement but on the terms of the agreement set out in paragraph 10 it appears to me that it would be quite competent to the defendant to deny

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that the agreement was the satisfaction and denying that and denying the performance he might still claim under the original cause of action and might at the same time set up an alternative claim under this agreement in the event of its being held that the agreement was itself the satisfaction of the original claim. But he has not done this or anything, it appears to me, that suggests it. It can scarcely be doubted that he might elect to treat the agreement itself as the satisfaction and claim damages for its breach and the manner in which the pleading is framed justifies the inference that that was what was intended, perhaps, without his being aware that he could not have damages under it and the original cause of action at the same time. The only thing that casts doubt on the correctness of that conclusion is the use of the words "in the alternative" in paragraph 10 but those words appear to me to be unintelligible, as used, for any purpose. I think therefore that the judgment below is strictly correct, but inasmuch as the defendant might be deprived of a valuable right if restricted to the second agreement alone I think that leave to amend might be given as an alternative even though it has not been asked for. This is, however, not a matter of right but one of grace and should be allowed only on the terms of all costs being paid.

Inasmuch as there is a difference of opinion between the members of the Court as to the form of the judgment and the question of costs, I am content that the judgment should go in form and in respect to costs in accordance with the view of my brother Beck.

SCOTT, J.:—The plaintiff company obtained a summons to strike out the first nine paragraphs and claims *a*, *b*, and *c*, of paragraph 12 of the defendant's counterclaim. These relate solely to the cause of action under the first agreement between the parties. The remainder of the counterclaim relating solely to the alternative claim under the second agreement which is set out in full in paragraph 10.

The ground of the application is not stated in the summons but reference to the reasons for judgment of my brother Stuart shews that it was treated as an application on the ground that these paragraphs were embarrassing.

It appears, however, by the formal judgment on the application that, upon the hearing, it was, by consent of the parties, turned into an application for the disposal of the points of law raised by the first paragraph of the plaintiff company's "reply" to the counterclaim. That paragraph is as follows:—

> 1. In reply to paragraphs 1, 2, 3, 4, 5, 6, 7, 8 and 9 of the defendant's counterclaim herein the plaintiff pleads the agreement between the parties hereto bearing date the 19th day of April, 1911, more particularly set out in the 10th paragraph of the defendant's counterclaim herein, and says that if there were any defects in the

engine and machinery referred to in the defendant's counterclaim herein or if the same was not well built or capable of doing the work for which it was intended or of developing its rated power, or if there were any breaches of warranty under which the said engine is alleged to have been sold, whether expressed or implied, or if the defendant suffered any damages by said alleged defects, breaches of warranty or other troubles (which the plaintiff does not admit but denies) the same were completely released, waived, satisfied and adjusted and the defendant is by said agreement forever estopped from alleging or recovering damages upon any of said matters or things complained of.

I think it is clear therefore that the only question submitted to my brother Stuart was whether the written agreement set out in paragraph 10 of the counterclaim in itself constituted accord and satisfaction of all claims under the first agreement. It is not clear from his reasons for judgment that, in deciding as he did, he based his conclusion entirely upon the effect of the second written agreement. He refers to the fact that the defendant in the eleventh paragraph of the counterclaim alleges that he was induced to enter into that agreement by plaintiff company representing to him that it would immediately deliver the machine parts referred to in the agreement and that it failed to deliver them and it may be that he based his judgment upon the combined effect of that agreement and that allegation. If so, I am of opinion that he was wrong in so doing as it was not open to him to consider the effect of the allegation.

I agree with my brother Beck in the conclusion he has reached that the second agreement is not accord and satisfaction of the first. It contains no promise or agreement on the part of the plaintiff company to supply the machine parts or to give the credit therein referred to, and it casts no duty upon it to do so. It merely gives it the option of obtaining a release from its liability under the first agreement by doing those acts and, until they were done, there would not be satisfaction of the first agreement.

I am also of opinion that the counterclaim is not embarrassing. It was open to the defendant to claim alternatively under the two agreements and I think he was only taking a reasonable precaution in doing so. He was not called upon to decide before pleading whether or not the second agreement constituted a release of his claim under the first. That was a question he was entitled to leave to the Court to decide at the trial. During the argument of the appeal I suggested to counsel for the defendant that he should have claimed only under the first agreement leaving it to the plaintiff company to set up the second as a bar to the action and he could then answer by setting up reasons why it should not be held to be a bar but he then called my attention to the fact that, in that case, he could not claim

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damages under the second and I think he was right in this. It is true that, if the plaintiff company set up the second agreement as a bar to the action under the first the defendant might then obtain leave to amend his counterclaim by claiming damages under the second but by claiming alternatively under it in the first place he avoided the costs of an amendment.

If the defendant had based his alternative claim under the second agreement merely upon what is contained therein, I am of opinion that he would not have disclosed a cause of action as there was nothing in its provisions which bound plaintiff company to do anything. It was, therefore, necessary to allege matter other than the provisions contained in it to shew that plaintiff company was bound by it. It was apparently for that purpose and that purpose alone that that matter contained in the eleventh paragraph of the counterclaim was pleaded.

At the time he counterclaimed the defendant could not know what answer in law or in fact the plaintiff company would make to the claim under the second agreement or to the allegations in the eleventh paragraph. As a matter of fact it has practically traversed the allegations therein and it might follow that the question whether and to what extent either party is bound by that agreement would have to be decided upon the evidence at the trial.

In my view the fact that the damages claimed by the defendant under paragraph 12 of the counterclaim in respect of the two alternative claims are not there specially claimed as alternative damages does not render the pleading embarrassing as it is apparent from a perusal of the whole pleading that they were not intended or could not be construed as cumulative.

In my view of the fact that the point of law submitted was merely as to the construction to be placed on the second written agreement I am of opinion that it is not competent for this Court to consider the effect of the allegations contained in the eleventh paragraph of the counterclaim. There is nothing to shew on this appeal that that question was argued upon the hearing of the application in the Court below.

For the reasons I have stated I am of opinion that the appeal should be allowed with costs and that the application in the Court below be dismissed with costs.

BECK, J.:—The counterclaim sets up first an agreement for the sale by the plaintiff company to the defendant of one 36 h.p. double cylinder traction engine and a breach of express and implied warranties and claims damages. Then it proceeds as follows:—[The learned Judge here set out paragraphs 10 and 11 of the counterclaim, as above.]

The defendant counterclaims for damages under both agreements. I call what is set out in the 10th and 11th paragraphs

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the second agreement. In the course of conference the learned Chief Justice has pointed out that the promise upon which the defendant must rely for the purpose of basing any claim for relief under the second agreement is that alleged, or rather to be gathered as intended to be alleged from the very inartistic language of the 11th paragraph, namely, a promise, apparently verbal, made by the plaintiffs, immediately prior to the defendant's signing the release, that if the defendant would sign the release the plaintiffs would immediately deliver to him a new cylinder and engine bed frame and credit him with $300. The instrument set forth in the 10th paragraph is one which contains no promise of any kind on the plaintiff's part—and this was the contention before us of counsel for defendant and a contention with which I agree—and its execution, therefore, one must suppose, is stated merely as the consideration for the promise alleged in paragraph 11. The exaggerated importance given to the consideration as contrasted with the promise, which must constitute the defendant's alleged cause of action is extremely embarrassing and misleading; so much so that the argument before us—and I have no doubt before the learned Judge below—proceeded wholly on the effect of the written document and not upon the view suggested by the Chief Justice; that is, on the one hand it was contended that the written document constituted a final discharge; on the other, that it shewed an accord only and unless satisfaction had followed, it was ineffective. The written document, clearly on its face, and admittedly, refers to the subject-matter of the first agreement. I think the allegation of the written document must be taken as a distinct and positive allegation that it was, in fact, made and that the statement that it is set up "alternatively" can be taken only as meaning that the fact of the second agreement and its breach entitles the defendant to damages either in addition to or alternatively to his claim under the first agreement, and there is no reason why the defendant should not do this. But this being so, if the second agreement—that is not merely the document set forth in paragraph 10 but also and specially the promise alleged in paragraph 11—is established, it would seem to constitute an accord and satisfaction of the claims under the first agreement, and then clearly the defendant's claim must be confined to one under the second agreement.

It was contended, as I have said, by counsel for the defendant that the document set forth in paragraph 10 shews an accord only and that he alleged non-delivery as shewing want of satisfaction. There is a confusion of thought here. That would merely shew that the written document constituted no defence to his claim under the first agreement and would be the setting up in anticipation of possible matter for reply—an unnecessary, and, under the circumstances, a very embarrassing method

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of pleading. If, however, he seeks affirmative relief under the second agreement he can succeed in doing so only because that agreement is as may be gathered from paragraph 11 something extrinsic to and preceding the written document of release, an agreement, therefore, which took the place of the first agreement and which in itself constituted both an accord and satisfaction—the satisfaction being the promise and not its performance. If the written document is taken independently of any intrinsic promise, I would construe it as constituting an accord—and with the allegation of non-delivery—without satisfaction and, therefore, constituting not only no defence to the defendant's right of action on the first agreement but no cause of action against the plaintiff.

Taking the second agreement as being the promise alleged in paragraph 11, there is, as I have said, no reason why the counterclaim should not be framed so as to allege both agreements in the alternative and to claim damages in respect of them alternatively. That perhaps was the intention, but, if so, it has been done in an inartistic way and in a way tending to embarrass the opposite party, who has a right to have his opponent's case presented in such a way as to indicate with reasonable clearness what is the case sought to be made against him.

The plaintiff, in my opinion, was fully justified in moving to strike out the counterclaim as embarrassing. The Judge of first instance, however, with the consent of both parties, dealt with the application as one for the purpose of determining the point of law as to the effect of the allegations in paragraphs 10 and 11. In view of the nature of the argument before us I suspect, as I have stated, that his decision was solely an interpretation of the written document, and if so, I think his decision is wrong. Even if he looked at it from the point of view suggested by the Chief Justice, I think he ought to have treated the counterclaim as attempting to set up two alternative claims, and to have allowed the defendant to amend so as to set them up in a clearer and more intelligible way.

The law with reference to accord and satisfaction seems to be well stated in Cyc. vol. I.:—

> To constitute a bar to an action on an original claim or demand the accord must be fully executed, unless the agreement or promise, instead of the performance thereof, is accepted in satisfaction. An accord without satisfaction is no bar, because there is no consideration and no mutuality to support it; the creditor has no means of obtaining satisfaction by enforcing it, and of course, derives no satisfaction directly or indirectly from it (pp. 313, 314).

In Halsbury's Laws of England, vol. VII. title "Contract," p. 443, it is said:—

> An accord without satisfaction has no legal effect. The original cause of action is not discharged so long as the satisfaction agreed

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upon remains executory. A tender of performance is not sufficient. If, however, it can be shewn that what the creditor accepted in satisfaction was the debtor's promise and not the performance of that promise, the original cause of action is discharged from the time when the promise was made.

An accord is not a contract and performance of it cannot be enforced by action against the debtor, who remains liable on the original cause of action until satisfaction has been accepted.

An Ontario case supporting these propositions and reviewing earlier English and Ontario authorities is *Macfarlane* v. *Ryan*, 24 U.C.R. 474.

In the case of a written document its construction is a question of law.

I construe this document as containing no agreement on the part of the company to supply a new cylinder and engine bed frame but as an "accord" that if the company does supply these articles and if it does give credit to the defendant for $300, then the document shall operate as a release to the company. If this construction is correct then in default of the actual delivery by the company and the actual acceptance of these articles, there was no satisfaction—for part performance is not sufficient (Cyc. 1, p. 315, *Gabriel* v. *Dresser*, 15 C.B. 622)—and the defendant has no right of action merely upon the written document.

In the result, I think the order appealed from should be set aside, with leave to the defendant to amend his counterclaim as he may be advised within fifteen days. He should pay the costs of the motion before the Judge below, as his pleading was such that an application to strike it out was justified. I would leave the costs of this appeal to abide the result of the issue upon the first agreement.

SIMMONS, J., concurred.

Appeal allowed.

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Feb. 7.

Alberta Supreme Court. Trial before Scott, J. February 7, 1912.

1. CONTRACTS (§ IV C 1—345)—PART PERFORMANCE—OUSTER—QUANTUM MERUIT.

Where a contract for railway grading empowered the employing party, if in the opinion of a certain specified person there was not sufficient force at work to complete the grading within the time called for by the contract, to put on an additional force to be charged to the contractor or to take over the work by giving due notice of such intention, and the employing party after notifying the contractor that an additional force would be put on but without notice that the work was to be taken over, not only put an additional force but also took charge of the work and of the contractors' workmen, it amounts to an ouster of the contractor from the work and he is entitled to recover on a *quantum meruit* for the work performed by him with damages, if any, sustained by reason of not being permitted to complete the same.

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2. CONTRACTS (§ IV B 3—335)—PART PERFORMANCE—OUSTER BY EMPLOYER—PAYMENT CONDITIONED ON COMPLETION.

A provision in a contract for work and labour that no formal payment will be made on account of the work until completion and acceptance thereof becomes inoperative if the contractor is wrongfully ousted by the other party from the work before its completion.

[See also Leake on Contracts, 6th ed., 507; and compare *Dodd* v. *Churton*, [1897] 1 Q.B. 562.]

3. TROVER (§ I C—21)—CONVERSION BY LAND OWNER—TOOLS OF CONTRACTOR.

Where the defendant after ousting the plaintiff from work which the latter had contracted to do for the former, took possession of the plaintiff's tools and used them on the work, such use was sufficient evidence of the conversion of the tools though no demand for their return was shewn.

The plaintiffs on 28th May, 1911, entered into a contract in writing with the defendants to do all the grading on the line of the Canadian Northern Railway between stations 186 and 205.50 for which they were to be paid at certain specified rates for the quantity of material excavated by them for the purpose.

By the terms of the agreement the work was to be completed by the first day of November, 1911, but no provision was made for a penalty for non-performance within the time limited. It was also a term of the agreement that, if at any time in the opinion of the engineer there was not sufficient force engaged on the work to complete it in the time specified, the defendants should have the right to put on additional force to be charged to the plaintiffs, or to take over the work from them by giving three days' notice in writing.

H. H. Robertson, for plaintiffs.
O. M. Biggar, for defendants.

SCOTT, J.:—On the 10th November, 1911, the work not having been then completed, the defendants gave the plaintiffs notice in writing that they had been informed by the railway company's engineer that all the force that could be worked had to be put on immediately, and that if this was not done in four days they would have to put on a big enough force to complete the contract as quickly as possible, and that all expenses connected therewith would be charged to the plaintiffs' account.

On the 27th November following, one of the defendants appeared at the work with his foreman and put the latter in charge of it. I hold that what occurred at that time was in effect an ouster of the plaintiffs from the work, irrespective of what the defendants intended by their action. By the terms of the contract they had the right, upon notice, either to put on an additional force or to take over the work. They had not the right which they assumed, viz., to put on additional force and also to take charge of and oversee the work of the plaintiffs' workmen and to claim that the work was still being carried on as the

plaintiffs' work. They did not give any notice of their intention to take over the work.

The plaintiffs are, therefore, entitled to recover on a *quantum meruit* for the work performed by them and also for damages, if any, that they may have sustained by reason of their not having been permitted to complete the work. I hold, however, that they have failed to shew that they sustained any such damages. Some evidence is given on the question of such damages, but it was not sufficient to enable me to determine whether any was sustained.

The agreement provides that no final payment will be made on account of the work until completion and acceptance by the railway company's engineer, when final estimate should be given and that ten per cent. should be held back on all progress estimates until the final estimate. It is contended by the defendants that the plaintiffs having abandoned the work they are not entitled to any payment for the work done by them. I have already held that the defendants ousted them from the work before its completion and the provision referred to is, therefore, inoperative.

Mr. Chappell, the railway company's engineer, on 2nd December, measured the work. He had seen the work between that date and the 27th November. His estimate of the plaintiffs' work is as follows:—

Solid rock 51 yards at $1.00	$ 51.00
Loose rock 75 yards at 35c.	36.25
Hardpan 3667 yards at 32c.	1173.44
Common earth 2152 yards at 21c.	451.92
Sandstone 1229 yards at 80c.	983.20
Overhaul	65.00
	$2,760.81

He did not, however, measure or estimate a small excavation shewn to have been made by the plaintiffs shewn to be about 100 yards. From his knowledge of its position he classified the material as follows:—

20 yards loose rock at 35c.	$ 7.00
30 yards hardpan at 32c.	9.60
50 yards common earth at 21c.	10.50
	$27.10

which brings his total estimate up to $2,787.91.

Lynns, an engineer employed by the plaintiffs, measured the work done by them on 13th January after the whole work was completed. His measurement and estimate is based upon information furnished by Neros, one of the plaintiffs, who testifies that the information so furnished was correct. His estimate is as follows:—

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Solid rock, 55 yards at $1.00	$ 55.00
Loose rock, 200 yards at 35c.	70.00
Hardpan, 3,700 yards at 32c.	1,184.00
Sandstone, 1,107 yards at 80c.	885.60
Common earth, 4,148 yards at 21c.	871.00
Overhaul	65.00
	$3,130.60

Neros states that it was understood that the plaintiffs were to be paid on the estimate of the railway company's engineer both as to quantities and specification and that that is the usual contract. Had Mr. Chappell's estimate been based upon measurements made by him at the time the defendants took over the work I would be bound to accept it as conclusive, but, as the measurements were taken some days after that and after the defendants had done work thereon in the meantime, and his knowledge, if any, of the proportion of the whole done by the plaintiff must have been based upon information obtained from defendants, it does not appear that any such information was given, or, if given, that it was correct. If any was given it must have been incorrect as he omitted to estimate upon some of the work which is shewn to have been done by the plaintiffs. As Mr. Lynn's measurements were based upon information shewn to have been correct, I accept his estimate and hold that the plaintiffs are entitled to $3,130.60 for the work done by them.

The plaintiffs also claim that the defendants wrongfully converted to their own use certain tools to the value of $28.50 and wrongfully detained same, that the plaintiffs demanded payment therefor, but the defendants refused to account for or return same. The defendants deny that any such demand was made.

The evidence shews that when the defendants ousted the plaintiffs from the work they took possession not only of the tools referred to, but also of a number of others and continued to use them on the work. There is no evidence of any demand having been made for their return, but their use by the defendants constitutes sufficient evidence of the conversion and I, therefore, hold that the plaintiffs are entitled to recover their value, which I fix at $28.50.

The defendants claim to have furnished goods, money and supplies to the plaintiffs and to have paid wages for them to the amount in all of $2,839.92, from which they admit there should be a deduction of $16 for goods returned.

In the defendants' statement of account is included a charge of $30 for damages to one of their cars and a charge of $10 for damages to the box of another car. These charges are, in my opinion, excessive and I reduce them to $15 and $5 respectively, making a reduction of $20 from the amount claimed by them.

On 24th November the defendants supplied the plaintiffs with

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25 kegs of powder, of which only about 5½ kegs were used by the plaintiffs when defendants took possession of the work and used the remainder of the powder. I think it only reasonable that the plaintiffs should be called upon to pay only for the portion they themselves used. I, therefore, deduct from the amount claimed by them, $68.40, being the value of nineteen kegs at $3.60. It also appears that the defendants used some of the dynamite supplied by them to the plaintiffs, but I have no means of ascertaining with any certainty the quantity so used or its value.

I find that there is due to the plaintiffs $423.59 made up as follows:—

Amount allowed plaintiffs for work		$3,130.60
Value of tools converted by defendants		28.50
		$3,159.10
Defendants claim for goods, etc.	$2,839.92	
Less goods returned	816.00	
Less overcharge on cars	20.00	
Less powder used by defts.	68.40 104.40	2,735.52
		$ 423.58

I give judgment for plaintiffs for $423, with costs.

Judgment for plaintiffs.

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Jan. 15.

P BURNS and COMPANY (Ltd.), suing as well on its own behalf as on behalf of all the other creditors of the defendant Vaclav Matejka (plaintiff) v. VACLAV MATEJKA, TERESE MATEJKA and THE ARLINGTON HOTEL COMPANY (Ltd.) (defendants).

Alberta Supreme Court. Trial before Scott, J. January 15, 1912.

1. EVIDENCE (§ II E 7—185)—FRAUDULENT CONVEYANCE—BONA FIDES OF DEBTOR—ABSENCE OF CONTRADICTORY EVIDENCE.

In an action to set aside conveyances of a debtor as fraudulent and void as against creditors the good faith of the transaction may be shewn by the uncorroborated testimony of the debtor where he gives his recital in an honest straightforward manner without attempting to conceal anything tending to support the creditor's contention and no evidence is offered to contradict him.

[*Merchants Bank* v. *Hoover*, 5 W.L.R. 516, not followed.]

2. HUSBAND AND WIFE (§ II K—130)—PURCHASE BY WIFE—HUSBAND ASSISTING — RIGHTS OF HUSBAND'S CREDITORS.

The wife of a debtor may purchase property in her own name and the debtor may assist her in the transaction if he does not thereby withdraw from the reach of his creditors any portion of his estate which should be applied in payment of their claims.

3. FRAUDULENT CONVEYANCES (§ VIII—43)—WIFE'S PURCHASE OF LAND—HUSBAND DEBTOR FURNISHING PART OF PRICE—RECOVERY OF PROPORTIONATE PROFITS FOR CREDITORS.

The fact that a debtor applied some of his own money to the purchase of property in his wife's name would not render the whole property liable for payment of the creditors' claims, but such liability should be restricted to the amount so applied, with a proportional share of increase if the property has increased in value.

[See Annotation to this case.]

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4. FRAUDULENT CONVEYANCES (§ VIII—41)—TWO SUCCESSIVE CONVEYANCES—ONE ACTION.

One action to set aside as fraudulent as against creditors two successive conveyances of the same property may be brought against both grantees where it is alleged that both conveyances were part of the same fraudulent scheme and that both grantees were parties to the fraud.

5. ACTION (§ II D—61)—JUDGMENT FOR DEBT AND SETTING ASIDE FRAUDULENT CONVEYANCE—JOINDER.

A simple contract creditor suing on behalf of himself and all other creditors of his debtor to set aside an alleged fraudulent conveyance by the latter may join the debtor as a defendant and recover judgment against him for the amount of his claim.

Trial of a creditors' action to realise on property standing in the name of the debtor's wife.

Alex. Knox, for plaintiff.

Messrs. *G. B. O'Connor*, and *J. F. Canniff*, for defendants.

SCOTT, J.:—The plaintiff company claiming to be a simple contract creditor of the male defendant, seeks in this action judgment against him for the amount of its claim, a declaration that the conveyance to his wife, the female defendant, by one Bakken of a property known as "The Arlington Hotel" at Camrose, and a subsequent conveyance thereof by her to the defendant company are fraudulent and void as against the plaintiffs, and that the male defendant be declared to be the owner of the property or that he be declared to be the owner of the shares held by his wife in the latter company. At the trial counsel for plaintiff company applied to amend the statement of claim by claiming also a declaration that the male defendant is the owner of the hotel property and the stock and furniture therein, and that same are liable to execution for debts due by him to the plaintiff company and his other creditors.

The male defendant formerly owned and carried on business in a hotel erected by him in Wetaskiwin. On 6th September, 1904, being then apparently in insolvent circumstances, he made an assignment for the benefit of his creditors of all his real estate including his hotel property and all his personal property. About March or April, 1905, one Bakken who then owned the Arlington Hotel at Camrose employed him as manager and his wife as cook thereof. They continued in these positions until early in May, 1905, when an agreement was entered into for the purchase of the hotel property and the stock and furniture therein for $10,000. The male defendant states that the purchase was made by his wife and that an agreement in writing for the sale and purchase was executed by Bakken and her at that time, which agreement was destroyed by him after Bakken had executed a transfer to her about a year after the agreement was entered into. All the negotiations leading up to the purchase were made by him with Bakken but he states that he was acting merely as agent for his wife in the trans-

action, At the opening of the negotiations with Bakken he asked for a cash payment of $2,000 and payments of $150 per month thereafter. Matejka endeavoured to borrow that amount but was unable to arrange a loan. One Oehsner, a brewer in Strathcona, having agreed to assist in the purchase, the following arrangement was then made with Bakken. Oehsner gave his note to Bakken for $400 and agreed that he would supply the hotel with beer to the value of $1,300, and that the proceeds of the sale thereof, instead of being paid to him, should be paid over to Bakken on account of the purchase. The remaining $300 of the $2,000 required by him was paid out of the proceeds realized from the sale by Matejka to the Edmonton brewery company of stock to the amount of $3,000, held by him in that company, upon which only $300 had been paid up by him. On the 13th March, 1906, Bakken conveyed the hotel and contents to Mrs. Matejka and she executed a mortgage on the hotel for $6,500, being the balance of the purchase-money remaining unpaid. On the same day she transferred the hotel and contents to the defendant company, which had been incorporated shortly before for the purpose of taking over the property and carrying on the hotel business therein. The capital stock of the company was $15,000, divided into 300 shares of $50.00 each of which 287 shares were allotted to Mrs. Matejka for the transfer of the property, which shares are still held by her. The remaining thirteen shares were allotted to four other shareholders.

Mrs. Matejka is a foreigner who speaks English only imperfectly and appears to be utterly incapable of transacting or understanding ordinary business dealings and her claim that she purchased the property from Bakken is supported by the evidence of her husband alone.

In *Merchants Bank* v. *Hoover*, 5 W.L.R. 516, I held, following the rule laid down by the Court of Chancery and the Court of Appeal in Ontario, that transactions of this nature ought not to be held sufficiently established by the uncorroborated testimony of the parties to it but in the recent case of *Green* v. *Lawrence* (not yet reported) the majority of this Court in effect held that that principle as a hard and fast rule should not be adopted here.

Matejka's evidence as to the nature of the transaction was not contradicted and the only circumstances tending to cast doubt upon it are that he was manager of the business, that for some weeks after the purchase his name appeared as proprietor at the head of each page of the hotel day book and that baggage labels for the hotel were printed shewing his name as proprietor. He states, however, that the hotel clerk made the entries in the day book and procured the printing of the labels without his knowledge and that, upon his attention being called to the clerk's action, he objected to his being styled the pro-

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prietor and it does not appear that the labels were ever used. These circumstances alone, suspicious though they may be, will not justify me in entirely discrediting his testimony, especially in view of the fact that the manner in which he gave his evidence impressed me favourably. He did not attempt to conceal anything relating to the transaction which tended to support the plaintiffs' contention and which, had he been untruthful, he might easily have suppressed. Upon the examination of Matejka for discovery before the trial the plaintiffs became aware of the evidence he would give relating to the transaction and, if it was untrue, they could have called Ochsner to disprove it.

One of the grounds for believing Matejka's statement, as I do believe it, is that, from his long experience in business, he must have known that he could not himself purchase the property and hold it against his creditors. I see nothing wrong in the wife of a debtor purchasing property in her own name, nor can I see anything wrong in the debtor assisting her in making the purchase, so long as he does not in rendering such assistance withdraw from the reach of his creditors any portion of his estate which should be applied for in payment of their claims. The only wrong Matejka committed was in so withdrawing the $300 realized from his stock in the brewery company, but the fact that he applied it on the purchase of the property should not, I think, render the whole property liable for payment of the creditors' claims. I think the reasonable course to adopt would be to restrict such liability to the amount so withdrawn. *Jackson* v. *Bowman*, 14 Grant 156, and *Collard* v. *Bennett*, 28 Grant 556, appear to me to support this view. I think, however, that the amount so withdrawn should increase with the value of the property, such increase to be ascertained by the proportion the amount withdrawn bore to the whole purchase money, and, as the present value of the property is shewn to be $40,000, the amount which should be rendered liable is $1,200.

At the commencement of the trial, counsel for the defendants contended that there was a misjoinder both of parties and of causes of action and that plaintiff company should be called upon to elect as to which parties and which causes of action they should proceed. As I entertained some doubt upon the point, I refused to issue such a direction and intimated that I would consider the question after hearing the evidence.

I see no reason why a simple contract creditor suing on behalf of himself and all the other creditors of his debtor to set aside a fraudulent conveyance by the latter and joining him as a defendant should not in such an action claim and recover judgment for the amount of the debt upon which his claim is founded. I can find no authority against it and it appears to

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me that it would be unreasonable and a hardship on the debtor that he should be saddled with the costs of a separate action for such a judgment.

Apart from the claim for a personal judgment against the defendant Matejka, the plaintiff company's action is to set aside as fraudulent as against his creditors two successive conveyances of the same property. Both grantees under those conveyances are charged with being parties to the fraud. In fact, it is charged that both conveyances are part of the same fraudulent scheme to defeat creditors and I therefore see no reason why a separate action should be brought against each grantee.

I hold that the plaintiff company is entitled to judgment against the defendant Vaclav Matejka for $493.86 and costs and that the shares of the defendant Teresa Matejka are chargeable with the payment of $1,200 and the costs of this action except such portion thereof as may have been incurred by reason of the claim of the plaintiff company for the debt due by the defendant Vaclav Matejka, the said sum when realized to be paid over to the assignee of the defendant Vaclav Matejka. In default of payment thereof and the costs of the action by the defendant, Teresa Matejka, the shares held by her to be sold under the direction of the Court and the proceeds of the sale to be paid into Court to await further order.

Judgment accordingly.

Annotation—Fraudulent conveyances (§ VIII—43)—Right of creditors to follow profits.

Annotation

Fraudulent conveyances —Following profits

There is a lack of authority both in Canada and England as to the right of a creditor, upon the setting aside of a conveyance as fraudulent against him, to have an accounting from the fraudulent grantee of the profits of the property. In *Higgins* v. *York Buildings Company*, 2 Atkyns 107, the Court, upon setting aside a conveyance by the debtor as fraudulent against the creditor, refused to decree in favour of judgment creditors profits back against the original debtor and owner of the estate received *pendente lite* from the filing of the bill.

Attention, however, should be called to two Canadian cases, which, though not strictly in point upon the question here discussed, went off upon an analogous principle. Thus, in *Kilbride* v. *Cameron*, 17 U.C.C.P. 373, it was held that though a sale of land might be fraudulent as against creditors, still, where evidence shewed that the execution debtor and the vendor had not raised the crops, the subject of the seizure, or furnished the means of doing so, the labour and means being contributed by the vendee alone, the crops were the sole property of the vendee as against the execution creditor.

And the case last cited was followed in *Massey-Harris Co.* v. *Moore*, 6 Terr. L.R. 75, in which the sheriff seized crops grown on property of the claimant who was a son of the defendant. Part of the property was the defendant's homestead transferred to the claimant, and a part was the property of the defendant's wife, leased by him verbally to the claimant,

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Annotation

Fraudulent conveyances —Following profits

Annotation (*continued*)—Fraudulent conveyances (§ VIII—43)—Right of creditors to follow profits.

under authority from the wife. The claimant purchased the seed grain, hired and paid for the help. The defendant did a small amount of work on the farm. It was held that the question of *bona fides* of the transfer from father to son did not materially affect the ownership of the crops; and that on the evidence the claimant was entitled to the crops.

In the United States the rule is well settled that the fraudulent grantee is accountable to judgment or lien creditors for the rent and profits of the property: *Backhouse* v. *Jett*, 1 Brock (U.S. Cir. Ct.) 500; *Bean* v. *Smith*, 2 Mason (U.S. Cir. Ct.) 252; *Pharis* v. *Leachman*, 20 Ala. 662; *Ringgold* v. *Waggoner*, 14 Ark. 69; *Jones* v. *Macleod*, 61 Ga. 602; *Hine* v. *Camp*, Walker (Mich.) 427; *Plattsmouth First National Bank* v. *Gibson*, 74 Neb. 236; *Lee* v. *Cole*, 44 N.J. Equity 318; *Burne* v. *Partridge*, 61 N.J. Equity 434; *Kinmouth* v. *White* (N.J. Ch.), 47 Atl. 1; *Sands* v. *Codwise*, 4 Johns. (N.Y.) 536; *Loos* v. *Wilkinson*, 110 N.Y. 195; *Brown* v. *McDonald*, 1 Hill Ch. (S.C.) 297; *Parr* v. *Saunders* (Va.), 11 S.E. 979.

"The theory of the law in all such cases is, that the fraudulent grantee must be considered as a trustee of the rents and profits, as well as of the *corpus* of the property itself, inasmuch as he acquired them through his own fraud, and he, therefore, holds them in the right and for the benefit of the attaching creditors:" *Kitchell* v. *Jackson*, 71 Ala. 556, overruling *Marshall* v. *Croom*, 60 Ala. 121.

So, where a grantee of land to which the lien of a judgment against the grantor had already attached, fraudulently foreclosed a mortgage and bid in the property at the sale in order to cut off such lien, the judgment creditor is not limited to the value of the property at the time of such foreclosure, but may reach the enhanced value since the foreclosure sale: *Warner* v. *Blakemar*, 4 Keyes (N.Y.) 487.

And where a woman's real estate has been improved by the funds of her husband with intent to defraud creditors, the wife acquiescing therein, such portion of the rents and profits as is proportionate to the increase of value in the property resulting from such improvements may be subjected to the payment of the husband's debts: *Heck* v. *Fisher*, 78 Ky. 643.

And this rule was applied to non-judgment creditors in *Strike* v. *McDonald*, 2 Harris and G. (Md.) 191 and in *Strike's* case, 1 Bland (Md.) 157; while in *Kipt* v. *Hanna*, 2 Bland (Md.) 26, and in *Mead* v. *Combs*, 19 N.J. Equity 112, from which it cannot be found with certainty what class the creditors were of, the language of the Courts in applying the rule is broad enough to cover all classes of creditors.

On the other hand, in *Robinson* v. *Stewart*, 10 N.Y. 189, it was held that the grantee in a fraudulent conveyance upon sale of the land in a creditor's suit, could not be compelled to account for the rents and profits to his grantor's creditors at large, prior to the time a receiver is appointed.

And where a conveyance is set aside as fraudulent at the suit of a non-judgment creditor, the grantees therein are not accountable for rents and profits prior to the decree: *Blow* v. *Maynard*, 2 Leigh (Va.) 29.

Where the grantee took the conveyance, afterwards set aside as fraudulent, in good faith for a deed to him, the creditors are not entitled to follow the profits. Thus, where the grantee in a fraudulent conveyance collected rents from the property in payment of a *bonâ fide* debt due him from the grantor, he cannot, upon the setting aside of the conveyance at the

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Annotation

Fraudulent conveyances —Following profits

Annotation (*continued*)—Fraudulent conveyances (§ VIII—43)—Right of creditors to follow profits.

suit of the other creditors, be compelled to account for rents: *Boessneck* v. *Edelson*, 40 N.Y. App. Div. 631.

And where a creditor takes a transfer of his debtor's property in payment of the debt, without fraud on his part, he will not be compelled to account for rent and profits upon the setting aside of such transfer because in violation of the assignment law: *McGahan* v. *Crawford*, 47 S.C. 566.

So, the trustee under an assignment of land declared fraudulent at the suit of a judgment creditor, is not bound to account for the rents received and applied according to the terms of the trust before suit begun or the attaching of any specific lien on the land: *Collumb* v. *Read*, 24 N.Y. 505.

In an action by a receiver solely to set aside as fraudulent a conveyance of real estate by the judgment debtor so as to subject the property to levy and sale on execution, the plaintiff not asserting any title to an interest in the property of the debtor by virtue of his appointment as receiver is not entitled to an accounting of rents and profits: *Wright* v. *Nostrand*, 94 N.Y. 31, 98 N.Y. 669.

The doctrine applied in the judgment in *Burns* v. *Matejka*, above reported, seems opposed to the principle upon which are founded the decisions reached in some American cases in dealing with transfers by the debtor to his wife, where no fraud was shewn on her part.

Thus, where the wife of an insolvent purchased a hotel partly with money loaned by her by her husband and carried on the business in her own name, the husband's creditors would be entitled on a subsequent sale of the property only to the sum, with interest, contributed by the husband and not to the profits realized by the wife in running the hotel: *Karstorp's Estate*, 158 Pa. 30.

And in *Morel* v. *Haller*, 7 Ky. Law Reporter 122, it was held that where a debtor transferred his business to his wife the creditors could not reach the profits made by her though they could reach the goods in her hands.

Upon the setting aside of a conveyance by a bankrupt to his wife, no personal decree can be rendered against the latter for the rents, issues and profits: *Clark* v. *Beecher*, 154 U.S. 631.

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Jan. 2.

Alberta Supreme Court. Motion before Beck, J. January 2, 1912.

1. VOTERS (§ I B—12)—AMENDMENT OF VOTERS' LIST.

The addition to the voters' list by a Court of Revision of the name of a registered owner of the necessary amount of land to make him a qualified voter is valid though no notice was given to the former owner as a person interested, it appearing that the latter was on the voters' list in respect to other property and was not opposed to the action taken.

2. TAXES (§ III D—136)—CORRECTION OF ASSESSMENT ROLL.

The substitution, for the purpose of qualifying him as a voter, of the name of a land owner for that of a former owner of the same property upon the assessment roll upon his shewing to the officer

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charged with the custody of the roll his certificate of title, is not invalid merely on the ground that it was done prior to the decision of the Court of Revision upon the owner's application to that Court to have his name placed upon the voters' list under the Municipal Ordinance, Terr. C.O. 1898, ch. 70, in force in Alberta, if, in fact, the Court afterwards granted his application.

3. TAXES (§ III D—136)—CORRECTION OF ASSESSMENT ROLL.

Under a statute which permits any person otherwise duly qualified to vote whose name is not on the voters' list, to apply to have such list amended by the addition of his name, and which also declares qualified those persons who are named on the last revised assessment roll as occupants or owners of real estate of a stated amount held in their own right, the amendment of the voters' list on such application casts upon the officer in charge of the assessment roll the duty of amending the latter in the same way.

THIS is a proceeding by way of a writ of *quo warranto* to test the validity on the question of his qualification of the election of the respondent as mayor of the city of Wetaskiwin.

The motion was dismissed.

O. M. Biggar, K.C., for plaintiff.
Frank Ford, K.C., for defendant.

BECK, J.:—The qualification required is that called for by section 9 of the Municipal Ordinance, C.O. 1898, ch. 70, but the only point in dispute is whether the respondent fulfilled this particular requirement, namely, the owner at the time of the election of freehold, leasehold or partly freehold and partly leasehold real estate rated in his own name on the last revised assessment roll of the municipality to at least a certain stated value; and as to this requirement it is admitted that the respondent was at the time of the election the owner of real estate rated on the last revised assessment roll for a sufficient sum, but the relator contends that the facts shew that this real estate was not rated in the respondent's own name on the last revised assessment roll.

The facts are that the land in question stood assessed under the name of one Wallace; that it remained so assessed till after the close of the Court of Revision upon assessments some time in July and continuously thereafter until some time in October, when the respondent gave notice to the secretary-treasurer, in pursuance of section 12, that he intended to apply to the council to have his name added to the voters' list for the reason that he then was the registered owner of land which he described and which was in fact—though he did not so state—the same land as that assessed to Wallace, and which shortly before the date of his notice he had purchased from a purchaser from Wallace. The secretary-treasurer posted notice of the respondent's application in pursuance of section 15, but there is no evidence that Wallace was notified as a person interested. As making this unnecessary it is urged Wallace was not interested because he was on the voters' list in respect of other property and also it is stated by the respondent on evidence that Wallace was aware

of the application and virtually approved of it and of its being granted. The council acting as a Court of Revision on the voters' list at any rate directed the respondent's name to be added to the voters' list. All the members of the council were present and the relator was one of them. Under these circumstances I think the act of the council was valid. The secretary-treasurer did not wait for this decision of the Court of Revision on the voters' list, but before its decision, on being shewn the respondent's certificate of title, crossed out the name of Wallace and substituted that of the respondent on the assessment roll as the owner and the person assessed for the land. Counsel for the respondent now contends, as I understand him, that the moment of making the alteration is of no consequence provided that, had it been made after the decision of the council, the secretary-treasurer would have been justified in making it. In this I agree with him. He contends then that: (1) In view of the decision of the council the alteration was justified; (2) if not, it was an official act which cannot be collaterally attacked, and (3) if it can be collaterally attacked, no such ground is taken in the application for the writ.

The persons qualified to vote are, according to the Municipal Ordinance, sec. 18, as amended for the purposes of the city of Wetaskiwin (Wetaskiwin Charter, ch. 41, 1906, sec. 18), are "the men and women over 21 years of age who are assessed upon the last revised assessment roll of the municipality for income or personal property for $200 or upwards or who are named upon the said assessment roll as either occupants or owners of real estate held in their own right for $100 or upwards and whose names appear on the voters' list founded upon such roll."

There is no difference between the amended section and the original section which in any way affects any question I have to decide. It is to be observed that section 18 makes an essential element of the qualification to vote that the person claiming the right to vote should be a person who is assessed on the last revised assessment roll, which plainly, I think, means that he should be named on the roll as the person assessed, and this meaning is made clearer if possible by the subsequent words "as either occupants or owners of real estate held in their own right."

But section 12 provides that:—

> Any person who has been resident in the municipality in the then current year prior to the 1st day of July, and who is otherwise duly qualified, whose name does not appear on the voters' list . . . . may apply to have the voters' list amended by the addition of his name and section 13 provides that . . . . if a person has disposed of the property for which he was qualified as a voter under this Ordinance before the first day of October in the then current year . . . he shall be deemed disqualified as a voter, and any person duly qualified may apply to the council to have the name of the party so or otherwise disqualified struck off the voters' list and the name of the proper party, if any, substituted therefor.

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It was under these provisions that the name of the respondent was added to the voters' list.

It would be senseless that a ratepayer's name should be added to the voters' list if the placing of it there did not carry with it a right to vote, and yet section 18, which comes after the two sections I have quoted in part, makes an essential qualification the presence of the voter's name not merely on the voters' list but also on the assessment roll. How is this apparent inconsistency to be reconciled? In my opinion they must be reconciled so as to give the person whose name is added the right to vote, and it seems to me that this can be done only in one of two ways —either by reading into section 18 an unexpressed exception excluding the necessity for the name appearing on the assessment roll in the case of names added to the voters' list or by interpreting sections 12 and 13 to mean by implication that the assessment roll either is to be deemed to be amended *ipso facto* by the amendment of the voters' list or is to be in fact amended accordingly.

In deciding this question there seems to me to be little if anything to guide me either in any decisions or in any other parts of the Ordinance except perhaps section 135, sub-secs. 4-6, which provides that, at any time before the 1st December, property or income of any taxable person omitted from the roll may be assessed and the assessment added to the roll. The words of section 18 are not at all ambiguous but on the other hand quite clear and distinct. I cannot restrict them unless forced to do so by equally unambiguous, clear and distinct provisions. There seems to me that no inconveniences but on the other hand some conveniences and advantages arise by holding, as I have come to the conclusion I ought to hold, that the amendment of the voters' list involves an amendment of the assessment roll—that the amendment of the voters' list casts upon the secretary-treasurer the duty of amending the assessment roll in the same sense. One advantage of this is that a party applying to be added to the voters' list, upon his application being granted, becomes personally liable to the municipality for the taxes payable in respect of the land by reason of the ownership of which he becomes entitled to vote, the liability thus accompanying the ownership of the land; and a convenience is that the assessment roll, being thus amended, is made to accord with the facts and thus to afford truer information for the compiling of the roll for the succeeding year.

Section 2, sub-sec. 11, of the Ordinance says:—

> "Revised Assessment Roll" means the assessment roll as finally passed by the Court of Revision and certified by the clerk, notwithstanding the fact that an appeal to a Judge in respect thereof may be pending, and after the decision of any such appeal the said expression shall mean the said roll with any amendments made thereto by the Judge.

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But, first, this is the meaning "unless otherwise declared or indicated by the context"; and, secondly, it does not even as it stands exclude further amendments lawfully made. A roll amended under section 135 to which I have already made reference would still be the revised assessment roll and equally so if amended in pursuance of the decision of a Court of Revision on the voters' list.

This being my conclusion I give judgment in favour of the respondent with costs.

Motion dismissed.

Re PHILLIPPS AND WHITLA (Decision No. 2).

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March 5.

Manitoba King's Bench, Robson, J., March 5, 1912.

SOLICITOR (§ II C—30)—REMUNERATION—ABSENCE OF CONTRACT WITH CLIENT.

Unless there is a contract between a solicitor and his client for a percentage under section 65 of the Legal Profession Act (Man.), the tariff promulgated under rule 990 of the Manitoba King's Bench Act, is the only measure of a solicitor's remuneration for litigious business. [*In re Richardson*, 3 Chy. Ch. R. 144, distinguished.]

SOLICITOR (§ II C—33)—SETTLEMENT OF ACTION—BASIS OF FIXING REMUNERATION.

Where solicitors acting for clients in important litigious matters, succeed in effecting a settlement and there is no special agreement under section 65 of the Legal Profession Act (Man.) for their remuneration, the solicitors must deliver an itemized bill which may include a fee on settlement, the amount of which is subject to taxation by the taxing master.

[See *Thomson* v. *Wishart*, 19 Man. R. 340, as to sec. 65 of the Legal Profession Act, and see *Re Attorneys*, 26 U.C.C.P. 495, and *Re Johnston*, 3 O.L.R. 1.]

APPEAL by the client, John McGibbon, from the report or certificate of a taxing officer upon a reference to him of a bill of the solicitor's firm (Phillipps and Whitla) for taxation.

A. B. Hudson, for solicitors.

G. W. Jameson, for client.

ROBSON, J.:—McGibbon set up a cause of action against parties in Winnipeg for the return of certain property alleged to have been sold by his agents under circumstances which he alleged entitled him to repudiate the transaction. He employed the solicitors, who instituted proceedings, negotiations followed, and as a result the property was re-transferred. McGibbon gained the advantage of a title under the Real Property Act obtained meanwhile. He had had the use of the consideration paid him, a large sum, for a considerable period free of charge. The commission charged by the agents was refunded. Each party paid his own costs of the litigation. The property could command a higher price than that obtained by the agents. The sale was made at $155,000. As to the increase in market price,

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it is sufficient to say that the client, during the negotiations, claimed that the property was worth $308,000. There can be no question that the solicitors exercised skill and diligence, in fact pertinacity, in their employment, and that their efforts brought about advantageous results for their client. The action did not proceed beyond the pleadings and an order for production of documents. The burden of the solicitors' labours were in connection with the settlement. The carrying out the settlement included work in connection with a large loan to the client, which was necessary to procure the money to refund the consideration he had received on the impeached transaction. There was no arrangement between the solicitors and client for any special rate of remuneration.

The solicitors rendered the bill now in question. Apart from disbursements which are not in question it consists of one single item, "Fee on settlement, $9,500.00." The taxing officer considered that the case was one in which he should allow a lump sum, and he fixed $7,976.44, being 5 per cent. on his calculation of the difference between the $155,000 and the value asserted by the client, some fractional frontage probably accounting for the odd figure.

The taxing officer in proceeding on a commission basis thought *In re Richardson*, 3 Chy. Ch. R. 144 (Upper Canada) an authority for that course. There the solicitor was acting under a power of attorney in selling lands for the client and collecting and remitting moneys; an employment of quite a different nature, the method of remuneration for which forms no criterion here.

I take it to be clear that unless there is a contract between a solicitor and his client for a percentage under section 65 of the Legal Profession Act, the tariff promulgated under the Queen's Bench Act, rule 986 (K.B. Act rule 990) provides the only measure of a solicitor's remuneration for litigious business.

In his memorandum the taxing officer says the solicitors forego their fees for work done in the suit and charge only for the settlement. From the evidence (pages 7-8) I would think it had been intended that the suit work was being covered by the bulk item charged. If that were the case there should have been an itemized bill.

Assuming, however, that the item was allowed solely in regard to the settlement and that the usual tariff items for instructions, pleadings, etc., are being abandoned, the question arises, was the taxing officer correct in arriving at a fee on settlement on the basis mentioned? As far as the tariff goes the only possible authority for this would be the memoranda on page 10, which says:—

1. When it is proved that proceedings have been taken by solicitors out of Court to expedite proceedings, save costs, or compromise actions, an allowance to be made therefor in the discretion of the taxing officer.

Of course if the taxing officer, on a right principle exercised his discretion under the words quoted, it would not be lightly interfered with, if at all. But what was the principle here? That a solicitor should receive remuneration "in the way of commission or percentage on the amount recovered or defended or on the value of the property about which (the) action, suit, or transaction is concerned." This language is from section 65 of the Law Society Act. And that section provides that there may be a contract for such a basis of remuneration. Is not that provision an enabling one without which such a basis could not be adopted, and therefore limited to the case for which it provides, *i.e.*, a contract between the parties to that effect? Section 65 is of course valid: *Thomson* v. *Wishart*, 19 Man. R. 340 but it is an innovation upon the common law and is not to be carried beyond its strict terms. If the result be otherwise, solicitors, in charging clients, may ignore the tariff and seek remuneration by commission or percentage without any previous agreement with their client to that effect.

I cannot hold that the taxing officer was justified in fixing a fee on settlement under the tariff on any basis that would have that result.

It is further contended that the solicitors' efforts in procuring the settlement should be treated independently of the tariff and as work not therein provided for.

I do not agree with this. I think the proper course here is that the solicitors deliver an itemized bill and that the taxing master allow a fee in respect of the settlement under the clause quoted from the tariff. Counsel for the solicitors cited in support of his contention authorities for the allowance in certain circumstances of remuneration by way of commission.

One of these cases was *In re Attorneys*, 26 U.C.C.P. 495, where the attorneys had been engaged in non-contentious business which involved their receiving and disbursing from time to time large sums of money. They were allowed for their care and responsibility a commission of one-eighth of one per cent. This case was referred to in *Re Johnston*, 3 O.L.R. 1. There the solicitor had succeeded in collecting upwards of $70,000 for his client on disputed insurance policies, and had satisfactorily settled the claim of a third party to the moneys. The Court held he was entitled to receive a *quantum meruit* for these services, and the $3,200 which had been allowed by the taxing officer was not interfered with. It does not appear that this was a percentage allowance. Boyd, C., held that, having regard to the exceptional circumstances, a liberal allowance was justified.

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He mentioned the line of practice which followed *Re Richardson*, 3 Chy. Ch. R. 144, as manifested in *Re Attorneys*, 26 U.C.C.P. 495. It seems to me that while in certain cases a percentage measure, varying according to circumstances, may fairly be applied to the sale of property or the receiving and investing or otherwise disbursing moneys, as was done in those cases, it does not follow that solicitors' efforts in litigation should be rewarded upon any such rule.

While it is apparent that the solicitors are entitled to substantial remuneration, I do not consider that the measure applied was authorised, and the bill must be referred back. The solicitors will have liberty to deliver an amended itemized bill. The taxing officer will allow to the client his costs of this appeal.

Reference back with leave to deliver itemized bill.

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Feb. 3.

MARSON v. GRAND TRUNK PACIFIC RAILWAY CO.

Alberta Supreme Court, Harvey, C.J., Scott, and Stuart, JJ.
February 3, 1912.

1. DAMAGES (§ III K 1—205)—TRESPASS—SPECIAL DAMAGE—MEASURE OF COMPENSATION.

The rental value of land is not to be adopted as the measure of damages for a trespass thereon if special damage is alleged and proved and the trespasser will be liable for loss shewn to have been suffered by the owner by reason of his being deprived of an actually intended and natural and probable use of his land.

[*France* v. *Gaudet*, L.R. 6 Q.B. 199, followed.]

2. EVIDENCE (§ II E 5—165)—KNOWLEDGE OF REASONABLE USER OF LAND—NOTICE PRESUMED—TRESPASS.

A trespasser on lands is to be dealt with as having notice or knowledge that the owner of the land will try to use it in any reasonable and usual way which may be profitable to him, and is accountable for damages accordingly.

[10 Halsbury's Laws of England 317, discussed; *Lloy* v. *Dartmouth*, 30 N.S.R. 208, specially referred to.]

3. DAMAGES (§ III K 1—206)—FORCIBLE POSSESSION OF LAND—ANTICIPATED USE—SPECIAL DAMAGE.

The extension by the owner of land of an existing pig corral is not such a peculiar and unusual use of the land as will relieve a trespasser from the duty of anticipating the probability of it, and being charged in damages for the interference with the owner's intended exercise of his right in that respect.

4. EMINENT DOMAIN (§ III C 1—142)—RIGHT TO COMPENSATION—ABANDONED NOTICE TO EXPROPRIATE—ANTICIPATED PROFIT ON A CROP.

The owner of land cannot recover as special damage resulting from the service of a notice of expropriation, by a railway company, which was abandoned, the anticipated profit on a crop which the owner desisted from raising because of the notice having been served.

5. DAMAGES (§ III P—334)—LOSS OF PROFIT—EXCLUSION FROM LAND.

Where excavations and other trespasses by a railway company prevented the land owner from extending his pig corral so as to keep the increase of the pigs and the corral thereby became crowded and un-

healthy, resulting in the death of some of the pigs and the depreciation of others in value, the owner will be limited to such damage as would have resulted had he reduced the number of his pigs to what he had theretofore safely kept, and he cannot recover as special damage more than the difference in the selling value, at the time of the trespass of the pigs he should have removed and sold for lack of accommodation to keep them and their value at the time when they would have been the most fit to sell less the saving in feed and labour by reason of the reduced number.

O. M. Biggar, for the defendants.
E. B. Edwards, K.C., for the plaintiff.

The judgment of the Court was delivered by

STUART, J.:—This is a story, not about pigs in clover, but about pigs in mud. The plaintiff owned a certain lot in the outskirts of Edmonton. He had the southern portion fenced in and in 1907 had used this fenced portion as a pig corral, raising young pigs and feeding them until fit for sale. In the spring of 1908 he was using the same corral for the same purpose, the rest of the lot not yet being fenced in at all but being open prairie. The defendant trespassed upon the unfenced portion, dug a deep cut for the railway through part of it and covered a great deal of it with the excavated earth. The plaintiff says that he intended to extend his corral so as to take in the rest of the lot, but by reason of the defendant's action it was rendered unfit for this purpose, in consequence of which his pigs, which in 1908 were considerably increased in number, were confined in too narrow a space so that the ground became filthy and unhealthy, whereby he lost a number of pigs by death, and the selling value of others was greatly decreased.

A reference was made to the clerk at Edmonton to assess the damages. He estimated the damage suffered by the plaintiff at $640. Upon motion before Mr. Justice Scott to confirm this report and to enter judgment, the matter was sent back to the clerk for further report upon the ground that the plaintiff should have done all he could to minimize the damage, particularly by securing other land for his purpose. The clerk took further evidence and in his report disallowed the claim entirely on the ground that although the plaintiff had endeavoured to secure other land he had not looked in the right direction and had not availed himself of land of his own which he might have used. Upon motion by the plaintiff before Mr. Justice Beck to vary this report, the learned Judge directed judgment to be entered for the plaintiff for $640, the original amount of damage found by the clerk to have been suffered by the plaintiff, and this upon the ground that the burden was upon the defendant company to shew that other suitable land was available for the plaintiff to rent which they had not shewn, and on the ground that the evidence shewed that the other land owned by the plaintiff was not available for the purpose because such a use of it would

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have created a nuisance to the plaintiff himself and to his neighbours.

The defendants appeal from this judgment upon the ground that the true measure of damages is the fair rental value of the land trespassed upon, and also on the ground that the damage from loss of life and condition among the pigs was too remote, and that in any case the amount allowed was excessive.

I agree with the Judge appealed from that the plaintiff did all that he could reasonably be expected to do in the way of attempting to secure other premises. If other suitable premises were, in fact, available for him for his purpose I think it was incumbent upon the defendants to shew that these could have been secured without unreasonable expense or trouble. But, for myself, I am unable to conclude that this settles the matter in the plaintiff's favour. It does not seem to have occurred to any one that there were other ways of minimizing the loss. Assuming for the moment that the damages claimed are not too remote and are the natural consequence of the act of trespass it appears to me to that the perfectly obvious course for the plaintiff to adopt was to reduce the number of his pigs to the number which he had kept the previous year in the same place without loss and without feeling the necessity of extending the boundaries of his corral. The plaintiff in his evidence says that he had never kept less than 100 pigs in his corral. It is not very clear whether he meant to say, although he is, in fact, reported to have said that he had kept 200 pigs in this same corral the year before. His evidence is as follows:—

> Q. How many did you have in May, 1907, there?
> A. Sometimes I had 125; I don't know exactly.
> Q. Sometimes you had 200, didn't you?
> A. Yes.
> Q. Why didn't you say so?
> A. Like this year, I have 200.
> Q. This year, was May of 1908?
> A. Yes, I had 200 this year.
> Q. I am asking you for May of 1907? You had that 200 that year too? Why don't you say so?
> A. Two years ago, I want to tell you that I don't know really how many pigs I had at that time, but I never kept less than a 100, 125, 150, but I can't tell you how many I had that time.
> Q. You might have had 200?
> A. No, sir; I never had more than 200 only this year I had 215 or 225, something like that.

And again, he says:—

> Q. How many had you the year before?
> A. I don't remember exactly how many, but I know I had not so many.
> Q. Well, how many?

A. I can't tell you; I never counted them, because like I told you a few minutes ago, you see when I am selling pigs I used to replace them.

Q. Did you have 200?

A. No, not on that place, no; I only had a hundred on that place at the most.

Q. You swear that?

A. Yes, sir.

Q. That you never had more than 100 pigs in this three-quarters of an acre the year before?

A. Yes, the year before, about a 100 pigs.

Q. I want you to swear positively.

A. I never counted them. I had interest this way for myself, but I never counted them, I used to feed about 100 or 125 pigs all the time.

Q. Do you want to swear this, that in the year before you didn't carry more than half the pigs that you did last year?

A. Yes, about that, a 100; I never keep less than a 100 pigs, 125, sometimes 150, and the first year I kept 500.

Q. Do you know what you said just now, you never kept more than a 100 pigs? You never kept less than a hundred?

A. Yes.

Q. So that was the lowest figure you ever kept there?

A. Yes.

And again, he says:—

Q. Well, now, did you have any more than a hundred at any time in 1907?

A. Well, I guess I had more, yes.

Q. Did you have 150?

A. Well, during the winter, yes, I guess I had pretty near 150.

Q. That is, during the year 1907?

A. Yes.

Now I gather from this that the plaintiff admitted that he kept as many as 150 pigs in his corral during the season of 1907 without feeling any urgent necessity for extension. It is also fairly clear that there was 30 or 33 feet outside of his corral north of it and between it and the cutting which he might have taken into his corral by extending his fence. He says:—

Q. You had 30 feet between your piggery and the cutting that was high land?

A. Yes.

Q. That you could have used?

A. I could have used it, I used it too, but I used to put my tank here, and we need a road to go alongside the pasture, and I used to keep my tank to empty my load, so I wanted a little strip to make a road to go round my pasture.

In view of this evidence I think it is clear that he could at least have used some portion of the 30 feet (or 33 feet as he calls it elsewhere), and could in any case have kept 150 pigs

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as safely as he had kept those which he had kept in 1907, as he says, without loss.

The number of pigs he was keeping in 1908 was put by him at between 200 and 225. He nowhere swears positively to more than 215. It is, therefore, clear that he cannot safely assume that his pigs were overcrowded in any greater extent than 65 in number.

The plaintiff swears that he knew he was overcrowded and that he tried to get other premises but could not do so. The obvious thing for him to do in order to obviate damage resulting from inability to use his extended quarters was to sell 65 pigs and keep his number down. It will not be suggested that he could not sell them. There is surely a market for pigs at all times, even if they are not fat. If, therefore, he had sold 65 of the most saleable of his pigs he would have been in just as good a position as he was the year before. It cannot, I think, be contended that he had a right to keep his excessive number of pigs there and see them die and deteriorate before his eyes and then charge the defendants with the whole loss.

It is somewhat difficult to gather from the evidence what the increase in selling value of 65 of the plaintiff's most saleable pigs between the date of the trespass and the ordinary selling time when they would be the most fit for sale would be, but making the best that can be made from the evidence I do not see that the difference could possibly be more than $4 or $5 a piece on an average at the very outside. Parker, a witness called by the plaintiff, swore that young pigs when weaned are worth $5.00 a piece, while when they are grown and fat they bring between $10 and $12 a piece. Grown pigs, of which the plaintiff swears he had, I think, 55, would before fattening be worth more surely than the young weaned ones. They ought to be worth at least $6 a piece. Taking the difference in value, therefore, at $5 a piece the loss without any deduction for saving of food and labour would be only $325. Notwithstanding what the plaintiff said about there being no additional labour involved in attending to 50 more pigs, I think some allowance should be made for labour. He did not, in any case, have to incur the labour and expense of building his extended corral. The food for 65 additional pigs was something which he would have saved by selling them at once. On the whole I think $250 is the utmost that could safely be allowed. I am confident that if the plaintiff had adopted the reasonable course of keeping his number of pigs within the number which he had safely kept the year before without loss on the same space by selling 65 of them when he saw his intending extension of premises to be impossible he would not have incurred an actual loss of more than $250, that is a little less than $4 a piece.

Mr. Justice Beck in restoring the original finding of the

clerk simply accepted his calculations, and in his first report the clerk gives no indication of how he arrived at the sum of $640. Indeed, Mr. Justice Scott seems to have understood this to have been the cost of repairing the premises injured, which is clearly under the authorities not the true measure of damages and cannot in any case be applied here. Even if he calculated the loss on the pigs, it is clear that he must have taken into account losses from death which the plaintiff could easily have prevented by reducing his number. He must have proceeded upon a wrong principle and, I think, we should now end this unfortunate wrangle by dealing with the case as best we can on the evidence before us without again sending it back for further evidence and further costs. I think $250 only should, in any case, be allowed on the first item.

With regard to the contention that the rental value of the land should be adopted as the measure of damages, it seems to me that it is utterly impossible and unfair to apply such a rule here. It amounts to saying this, that a person who deprives another of the use of his land is only to pay the injured person what the land could be rented to third parties for. The result of that would be that if no tenants could be found at all for the land, if it had no regular rental value because it was no use to other people, yet, though its use might be exceedingly valuable to the owner whose remaining land was adjacent to it and who could, owing to its proximity to his own, have made a profitable use of it in connection with his other land and who in fact was prevented from making such use by reason of the trespass, nevertheless the owner is to get no damages at all. It is, in my opinion, useless to attempt to apply a general rule which has been applied in cases where the facts do not correspond. I have found no case of pure trespass to land where the rule of mere rental value was applied in such circumstances as exist here. I cannot see how it can be open to a trespasser to say to the owner, "Oh, I had no idea that you intended to use your land in that way." A trespasser must be held to know that the owner of land will try to use it in any reasonable and usual way which would be profitable to him.

In Halsbury's Laws of England, vol. 10, p. 317, it is said:—

> The rule with regard to special circumstances is somewhat different in cases of tort from that in case of contract. In cases of tort which are not founded upon contract the defendant's knowledge must be estimated at the time of the wrongful act. And the enquiry is not only whether he knew of any special circumstances attaching at the time but also whether he had reasonable means of knowing them and whether the damage which ensued was such as he could fairly be expected to anticipate as likely to result from his act.

Again, at pages 340 and 341 of the same volume the two following passages occur:—

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> Where by the trespass of the defendant the plaintiff has been wholly deprived of his land he is to be compensated according to his interest and if he is a freeholder entitled to possession the damages will be the total selling value of the land . . . Where the trespass consists of a wrongful and unauthorised use of the plaintiff's land the measure of damages is not the depreciation in the value of the plaintiff's land or the amount required to repair the injury which has been suffered but such reasonable payment in the nature of rent as would have been required for a license to make use of the plaintiff's land during the period whilst it was so used.

The authorities quoted for the last proposition are, as will appear on examination, carelessly cited but the result I deduce from them and other cases is this, that in the absence of special damage where a plaintiff is deprived of his land entirely, the trespasser must pay merely its value, or, where he is deprived of its use for a term, the value of that term, just as if a lease or license had been given. The same rule, indeed, applies to land as to chattels. If the plaintiff's chattels are taken away the trespasser must pay their value in the ordinary case. But special damages may be pleaded and proven. For example in *Bodley* v. *Reynolds* (1846), 8 Q.B. 779, although the tools converted were worth only £10 the plaintiff was given damages for loss of their use as well and got a judgment for £20. The Court there said, "where special damage is laid and proved there can be no reason for measuring the damages by the value of the chattel converted."

In *France* v. *Gaudet*, L.R. 6 Q.B. 199, at page 205, there is the following reference to *Bodley* v. *Reynolds, supra*:—

> We think that (in that case) there must have been evidence of knowledge on the part of the defendant that in the nature of things inconvenience beyond the loss of the tools (*i.e.*, I take the Court to mean the value of the tools) must have been occasioned to the plaintiff.

Now it seems to me that these cases dealing with chattels furnish a solution of the problem as to rental value of land being the true measure of damage in case of trespass. The rule is as stated in the extracts from Halsbury's Laws of England [vol. 10, pages 317, 340] that where the whole land is taken its value is the measure of damage just as in the case of total conversion of chattels. Where, however, there has been only a wrongful user for a period the value of the estate taken, i.e., a lease for the term of the trespass, is the ordinary measure of damage. But this is aside from any question of special damage. In none of the cases upon which the rule of rental value is based does there appear to have been any question of special damage raised. The plaintiff was simply deprived of his property, *viz.*, a short term in the land. The question was, what was the value of the term, *i.e.*, the rental value; just as in the case of deprivation of

chattels the ordinary question is, what was their value. But it appears clear that in the one case of land as well as in the case of chattels special damage arising from deprivation of use for special purposes may be pleaded and proven. There may be damages given not merely for the value of the goods converted, of the term in the land forcibly taken but also "for the detaining," if the plaintiff has suffered any special damage by reason thereof. The statement of claim is not before us but the appellants are seeking to modify the judgment. They were chiefly responsible for the contents of the appeal book, the enquiry before the clerk proceeded upon the basis of special damages having been claimed, and I do not think it would be open to the appellants now to say that special damage was not alleged in the pleadings.

The view I take seems to have been followed by Meagher, J., in the appeal in *Lloy* v. *Town of Dartmouth*, 30 N.S.R., at page 213.

There are also some notes of American cases in Cyc., vol. 13, at pages 152 and 155. A Texas appeal case says:—

> While the measure of damages for placing cars in front of plaintiff's premises is in general the depreciation in value of the use of the property during the time the cars are there, special damages may also be recovered where they are warranted by the facts and are pleaded with particularity and certainty.

And a Pennsylvania case says:—

> The true rule of damages in such a case is to estimate the injury sustained from the diversion of the water in the use of the land for the purposes to which it was devoted *or for which it would have been used but for the refusal of the defendant upon notice to discontinue the diversion.* As a means of computation a reduction of rental value from this cause may be shewn.

The only question, therefore, is the question of notice or knowledge as referred to in the first quotation I have made from Halsbury [Laws of England, vol. 10, page 317] and in *France* v. *Daudet*, L.R. 6 Q.B. 199.

Now in none of the cases which are given as authority for the rule, just above quoted from Halsbury [Halsbury's Laws of England, vol. 10, p. 317], was there a trespass to land. In general the rule has been deduced in cases of accident from negligence and the like, or from breach of some statutory duty. In the case of trespass to both chattels and land it seems to me the rule that the damage must be such as the defendant could fairly be expected to anticipate as likely to result from his act may well be applicable; but in my opinion a trespasser can always be fairly expected to anticipate that the owner will be intending to use his property, whether chattels or land, in any reasonable and usual way.

Possibly anticipation of some very peculiar and unusual use

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intended to be made of the property could not be fairly expected of him, but it seems to me that extension of a pig corral already on part of an owner's property to wider boundaries so as to give greater accommodation is not such a peculiar or unusual use as to relieve a trespasser from the duty of anticipating the possibility of it.

The evidence points strongly to the conclusion, and the clerk I think, must have so found that the plaintiff was overcrowded and that he intended to relieve this by an extension of his corrals. I think we must take it to be the fact that he was prevented from an actually intended natural, and probable, use of his property by the defendants' trespass and that, assuming him to have done what I think he should have done, *viz.*, sell 65 of his pigs, he was prevented from carrying this additional number and so from realizing a profit thereby. It is, of course, purely a case of loss of profits. The plaintiff had his pigs there. He had all arrangements made for keeping them except the extension of his corrals. The simple question is this: If he had sold 65 pigs for what they would bring could he have sued for damages for loss of profit of these, saying that he was deprived of a place to keep them properly so as to fatten and sell them at a better time? The rule as to recovery of profits as damages is stated to be "that they can be recovered only when they are made reasonably certain by the proof of actual facts with present data for a rational estimate of their amount": see 13 Cyc., p. 49.

In the present case, I think, the fact of loss of profit is sufficiently certain, although the exact amount may be difficult to ascertain from the evidence as it stands. Loss of profits arising from the prevention of a clearly intended and obviously reasonable and natural use of land as a place of business, or as a means of extending a business already existing, seems to me to be a natural and proximate result of such prevention.

I think, therefore, though with some hesitation, that there should be damages in this respect, but I am satisfied that they should be reduced to $250.

The defendants also appeal from the finding of Mr. Justice Beck whereby he allowed the sum of $250 as damages resulting from the service of an abandoned notice to expropriate lot 32. The clerk in his second report, acting upon the opinion expressed by Mr. Justice Scott, allowed only $50 as being a fair rental value. The plaintiff claimed that he had intended to use this land as a garden and that he had prepared most of the land for this purpose the year before by breaking and clearing it. He had not cropped it at all before himself, but his brother had cropped about half an acre of it and had raised some vegetables, cabbages, carrots, beets, onions and lettuce. There is no definite evidence to shew how much the plaintiff could make out of a garden such as this, no evidence of what he or his brother

ever had made out of a garden. The whole question simply is reduced to this: Can the plaintiff recover as special damage the anticipated profit on a crop of vegetables which he was prevented from sowing or planting. In my opinion, there is much more uncertainty here than in the case of the pigs. Weather conditions and conditions of soil do not affect them. Crops are notoriously dependent upon the uncertainties of weather. I am satisfied that we have here too much certainty to justify a Court in awarding damages for loss of anticipated profits. My brother Beck, suggested that in any case twenty per cent. of the value would be a fair rental value for such a piece of ground, but with great respect I cannot see that we are justified in fixing that as the rental value arbitrarily when there is no evidence at all to suggest it. The clerk himself went far enough in that direction when he disregarded the only evidence adduced which was to the effect that $10 an acre would be a fair rental and allowed five per cent. of the value, *viz.*, $50. I think that allowance should in any case not be increased, and that the Clerk's decision should on this point be left undisturbed. The nominal allowance of $5 for loss of business should, I think, in view of what I have said be also disallowed.

The result is that judgment should be directed to be entered for the plaintiff for $300 as damages for the trespass complained of, with interest at six per cent. from July, 1908, or $345 in all.

With regard to costs the defendants should get the costs of the first motion for judgment before Mr. Justice Scott because that motion was refused, and properly so. The plaintiff should get the costs of the motion to vary before Mr. Justice Beck because he was right in being dissatisfied with the clerk's second decision. The defendants should get the costs of this appeal because they have been substantially successful. The costs of the second reference should be treated as part of the costs of the first which are disposed of in the original judgment at trial. These various costs of the actions should be taxed and a balance struck including the amount for which judgment is now directed to be entered and a final judgment entered in favour of the party to whom the excess is due for the amount of such excess.

Judgment for plaintiff for $300, *with set-off of costs.*

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ACME CO. Limited (plaintiffs, respondents) v. HUXLEY (defendant, appellant).

Alberta Supreme Court, Harvey, C.J., Scott, Stuart and Simmons, JJ. February 3, 1912.

1. LAND TITLES (§ III—30)—DEALING WITH UNREGISTERED TRANSFER—PRODUCTION OF CERTIFICATE.

One who gave her husband an unregistered transfer of her land duly executed by her and duly attested for registration in order that he could deposit the same with a third person as security for the price of certain property purchased by the husband from such third person, but retained her duplicate certificate of title, cannot afterwards be permitted to shew to the prejudice of such third person, that she had no intention of parting with her title to the land and she will be required at the suit of such third person, after the husband has transferred the land to him in part payment of the debt so secured, to deliver up the certificate in order to complete the record of title in favour of such transferee. *Per* Harvey, C.J., and Scott, J., dismissing the appeal on an equal division of the Court.

[*Rimmer* v. *Webster*, [1902] 2 Ch. D. 163, applied.]

APPEAL from a judgment requiring the defendant to deliver up her duplicate certificate of title [statutes 1906 Alberta, ch. 24] on the application for registration of the plaintiffs as owners under a transfer made by defendant's husband following the transfer in question from the defendant to her husband.

The appeal was dismissed and the judgment below sustained on an equal division of the Court *en banc*, Harvey, C.J., and Scott, J., being in favour of the affirmance and Stuart and Simmons, JJ. being in favour of reversing the judgment appealed from.

C. A. Grant, for plaintiffs, respondents.

Frank Ford, K.C., for defendant, appellant.

HARVEY, C.J.:—In my opinion the appeal should be dismissed with costs and I base my opinion altogether on the ground that the defendant, having put in her husband's hands a transfer duly executed by her and duly attested for registration purposes, thereby represented to the plaintiffs that he was entitled to deal with the property as his own and after they have acted on that representation she cannot, to their prejudice, be permitted to shew that such was not the intention.

In *Rimmer* v. *Webster*, [1902] 2 Ch.D. 163, at 173, it is said:—

> If the owner of property clothes a third person with the apparent ownership and right of disposition thereof, not merely by transferring to him, but also acknowledging that the transferee has paid him the consideration for it, he is estopped from asserting his title as against a person to whom such third party has disposed of the property and who took it in good faith and for value.

The only possible distinction to be drawn whereby the present case would not fall within that proposition is that the consideration given in the transfer is $1.00, but that is stated to be

the amount of the consideration for the transfer and the receipt is acknowledged. The evidence shews that the transfer is from a wife to her husband, given after a purchase by him of property for the purpose of securing the vendors, and there would consequently be nothing in the fact of the consideration appearing as $1.00 to suggest any reason for enquiry.

The intention of the transferor as to the extent of the security appears to me to be absolutely immaterial, it being at variance with the reasonable conclusion to be drawn from the transfer and not having been communicated to the plaintiffs.

The evidence as to the reason for the non-production of the duplicate certificate of title is not as satisfactory as one would like, but the witness says he has no recollection about it. One can quite understand, however, that being a transfer from wife to husband, given to enable him to secure the property, the plaintiffs might not unreasonably have supposed that the duplicate certificate of title would be delivered if required, even supposing nothing was said about it at the time. It does not appear, however, from the evidence that this duplicate certificate was delivered from the land titles office to the defendant about a month after the date of her transfer and at that time it was probably in that office, which might account for its non-production, it being as useful for the plaintiffs there as if in their own possession. Having held the transfer, as they had for nearly a year without any intimation that it meant anything other than it appeared on its face to mean, the plaintiffs made a settlement with the transferee, taking the value of the property transferred being part of the consideration, and taking a transfer from the transferee, relying on the other transfer as giving him the right to pass the title to them.

Under these circumstances, I think the defendant should not now be permitted to say that the transfer she gave meant anything other than what it purported to mean and that she should be required to deliver up her duplicate certificate to enable effect to be given to it.

SCOTT, J., concurred with HARVEY, C.J.

STUART, J.:—It seems to be clear that under our system of land titles a transfer executed in accordance with the Act does not pass the legal estate in the land until registered. The purchaser who holds the transfer may have paid the full purchase price, as in *Wilkie* v. *Jellett*, 2 Terr. L.R. 133, and in such case he becomes the beneficial owner, no real interest but only the bare legal estate remaining in the vendor. In the judgment delivered in *Wilkie* v. *Jellett*, 2 Terr. L.R. 133, at p. 149, in the territorial Court *en banc* it was said: "A transfer not under seal would not, apart from the Territories Real Property Act, pass any title; and it, being a creature of the statute, can become

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effectual formally to pass the estate only when it is duly registered." See also Hogg (Australian Torrens System) pp. 4, 901. The same must, I think, be the rule under our Land Titles Act. If the registered owner, instead of receiving the full purchase-price merely executes the transfer for a limited purpose, without receiving any real purchase-money, the legal estate must remain in him, and as between him and the transferee the beneficial interest will be determined by the actual relationship or bargain between them.

If the facts are, as held by the learned Judge whose decision is appealed from, that the defendant here, instead of getting any real consideration for the transfer, simply executed it and handed it to her husband so that he could deposit it with the plaintiffs as security for the second payment of $400 only, then the equities existing between her and him were that she was not merely the owner of the legal estate, but had herself a beneficial or equitable interest in the land, namely, the whole beneficial interest subject to the charge in favour of the plaintiffs, assuming that such a charge was ever properly created, to secure that payment; and that upon that payment being made the whole beneficial interest would revert to her. If the transfer from the defendant to her husband passed no legal estate, as it clearly did not, then the transfer from the husband to the plaintiffs could pass no legal estate, but only such beneficial interest as the husband then held, just as an execution registered against the husband's lands would have attached only upon such beneficial interest as the husband held at the date of its registration. It seemed to be assumed in the argument for the respondent that the first transfer had passed the legal estate to the husband, that the second transfer had passed it on to the plaintiffs, and that all they had to do was to insist on the registrar calling in the certificate in order to effect a formal registration. But the real situation is that the legal estate always remained in the defendant, coupled also with a serious beneficial and equitable interest; and unless the mere equitable interest, if any, of the plaintiffs can be shewn to be entitled upon some equitable ground to be given priority over that of the defendant, coupled as it is with the legal estate, then the defendant's interest must prevail.

The case is indeed peculiar. It is a question whether the husband was pledging or intending to pledge an estate of his own or not. Whatever his intentions may have been, he certainly had no legal estate to pledge and no equitable estate either, because he had paid no money to his wife at all. The transfer conveyed to him neither the one nor the other. The defendant instead of handing him her certificate of title, which indeed she did not have in her possession until some months afterwards (a fact not adverted to in the argument) gave him

a transfer which conveyed no interest to him whatever, and authorized him to deposit that as a security. What effect then are we to give to the transfer? The respondent, no doubt, contends, that she thereby purported to transfer her estate in the land to her husband. But the trouble is that the transfer does no such thing, has, in fact, no such legal effect, which the plaintiffs must be held to have known at the time. What then did the transfer do? In my opinion, it did little more than would have been done by a letter from her to her husband saying, "I intend to transfer my legal estate in this land to you." I have no fear of the result of such a view, because where the transferee has given real consideration, as in *Wilkie* v. *Jellett* [2 Terr. L.R. 133], he acquires a beneficial interest, and the transfer becomes, as the judgment in that case points out, the evidence that such an interest has passed, and amounts to an agreement to that effect. See the sentence already quoted from that case, 2 Terr. L.R. 133, at p. 149, where it is said: "The transfers given in the other cases are after all little, if anything, more than agreements binding on the vendor," i.e., until registered under the Act.

Can it be said, then, after all, that an equitable mortgage can be created in such a way? Once again, I emphasize the question, "Whose estate was being mortgaged or pledged? If it was the husband's, he clearly had none to pledge or mortgage. If it was the wife's, then, was any title deed of hers deposited at all? Clearly not. The transfer from herself to her husband was no part of her muniments of title. So far from shewing any title in her it actually speaks of a transference of her title to her husband, but does not, however, effect such transference. Examine the matter as you will, I cannot see that the defendant did anything more than at most give a written expression of intention to transfer her legal estate to her husband, and say verbally to him, "You may pledge this agreement I give you as security for your debt." It is impossible to hold that this is an equitable mortgage by means of the deposit of title deeds. No title deeds of the defendant were ever deposited.

To meet a barely possible contention, I would add that while it is possible that a purchaser under a real agreement of sale may pledge that document as security for a debt and so mortgage equitably whatever interest he has, still here I repeat the husband Huxley had no equitable interest to pledge.

Even if there had been an equitable mortgage created, it is still not so very easy to see why the plaintiff's equity would be higher than that of the defendant. The facts of the case do not seem to have been presented to the Court on the argument with absolute accuracy. The plaintiff sold the tin shop and stock in trade to the defendant's husband for $4,400. A chattel

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mortgage was taken by the plaintiffs for the full purchase-money, but $400 in cash was paid on account of the mortgage at the time of the making of the mortgage. The mortgage is dated November 12th, 1909. An additional $400 was payable under the mortgage on December 20th, 1909, and then the balance was to be paid in annual instalments of $500 each. It was assumed upon the argument—by myself, at any rate; I cannot speak for the other members of the Court—and it is indeed so stated in the judgment appealed from, that at the time the mortgage was given, which was no doubt the date of the sale, the purchaser, the defendant's husband, deposited with the plaintiffs as further security the transfer of the lot, of which defendant was registered owner from the defendant to him. This does not seem to have been the true situation. The transfer in question is dated December 2nd, 1909, that is, some three weeks after the date of the mortgage. Mr. Adams, the secretary-treasurer of the plaintiffs, is hardly correct, I think, when he says in his affidavit that "The Acme Company, Limited, sold to the said W. R. Huxley the tin-shop business carried on by the Acme Company, Limited, and the said transfer was handed to the Acme Company, Limited, by the said Huxley at that time as part security for the purchase-price of the said business."

Besides the evidence furnished by the discrepancy of three weeks between the dates of the chattel mortgage and the transfer, there is the evidence of Adams on the hearing wherein he says: "Well, we sold the Acme tin-shop to W. R. Huxley, and we obtained the chattel mortgage on the goods that we transferred to him and we asked for further security and these transfers were handed to us, as further security in addition to the chattel mortgage that we already had." This also is corroborated by the defendant's evidence, wherein she says:—

> Well, I gave it to him at the time—well, it wasn't at the time he went into the business with the Acme Company, it was a little while afterwards, about a month, I think, afterwards.

It is true that Adams says that "at the time the chattel mortgage was signed it was agreed that the transfer should be given to us, and two or three days later, I suppose they handed it over." Aside from the evident inaccuracy as to the length of time which must have been about three weeks, instead of "two or three days," it does not appear anywhere that the defendant was a party to this agreement. It is admitted that she was not present, and the agreement was evidently with the husband and not with her. There is no evidence either that she had yet authorized her husband to agree to deposit the transfer.

From all this it is clear that the transfer was deposited, not as a present security for the unpaid purchase price at the

date of the sale, but subsequently, and only as additional security for a debt already existing, i.e., for a past indebtedness.

There is no evidence that the plaintiff surrendered any other security as a consideration for the deposit of the transfer. There is no evidence that they refrained from exercising any right they might otherwise have enforced. The chattel mortgage is not before us and we do not know indeed whether or not it contained any clause giving the plaintiffs the right to seize at any time before the maturity of the debt. The $400 due on December 20th, 1909, was paid, and nothing more was due for a year. It is true that the evidence is that a seizure was made in October, 1910, before the next yearly payment was due, but I am unable to see how the mere fact of seizure at a certain time can be taken as evidence against Mrs. Huxley that the mortgage in fact gave them a right to seize. There is, in any case, no evidence whatever, that the deposit of the transfer in fact led to a refraining from seizure, or that it induced the plaintiffs to alter their position in any way except at the final settlement. In view, moreover, of the evidence of Adams, who endeavours to give the impression that the transfer was deposited at the beginning, it is abundantly clear that the deposit did not induce the defendants to refrain.

In the American and English Encyclopedia of Law, vol. 23, page 491, it is stated:—

> By the prevailing weight of authority a conveyance or mortgage taken from the debtor merely to secure the creditor for an existing debt, no extension of time of payment being given and no present consideration of any kind being advanced does not constitute the creditor so secured a purchaser for value.

Up to this point, therefore, I think the plaintiffs took the transfer, whatever it may have been worth, subject to all equities existing between the plaintiff and her husband.

Then later on, in October, 1910, the plaintiffs found the stock being depleted, and entered into possession and closed Huxley out. They took all the chattels there were. They took an assignment of the book debts and a transfer of another lot not here in question. They took also a transfer from Huxley of the lot in question, and, having got everything it was possible to get, and without releasing any security, or making any cash payment, the evidence is that they merely released Huxley from his liability.

Even, therefore, if there had been an equitable mortgage, it seems to me to be clear that the plaintiffs could only have the advantage of being purchasers for value and without notice, because they did, at the end, release the husband from a liability, that is, because they accepted the transfer as a part payment of a debt and, having received it along with other property, accepted it as payment.

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There is authority for the proposition that the simple release of an antecedent liability is sufficient to constitute the person who makes such release a purchaser for value without notice within the equitable rule. See Am. & Eng. Encyc. of Law, vol. 23, p. 491; *Moore* v. *Kane*, 24 O.R. 541.

I do not think it necessary to examine the correctness of this rule, because, even accepting it as sound, I cannot see that in the circumstances of this case it will help the plaintiffs in any way. The inference which I think must be drawn from the evidence is that they knew that it was the defendants' property which was in reality being pledged to them. It is true that Adams in his affidavit swears that "the company had no knowledge that no consideration had passed from Effie D. Huxley to her husband, if such was the case, or that the transfer was held by W. R. Huxley in any other capacity than as owner for value." But I am afraid I must take the liberty of doubting the absolute accuracy of this statement. Adams swears that the transfers were merely promised at first. Now if the husband already had them in his possession there was no need to wait three weeks for them. I think there must have been some explanation given by Huxley of the delay. He must have promised to get the transfer from his wife. The fact that it was not executed for three weeks afterwards was known to Adams or the company, because the date is on the transfer. Now did they suppose Huxley got it? They could not have supposed that he paid his wife value for the lot, because they must have wondered why such a payment could not have been made to them directly if the husband had any money to spend. It may be suggested that value might have been given by the husband long before the signing of the transfer and that Adams may not have had any reason to suppose otherwise. But I simply draw another inference from the evidence. The transfer mentions $1 as the consideration. It was deposited after December 2nd by the husband, in pursuance of a promise made three weeks before, to give further security for a debt of his own. The transfer was from a wife to a husband. All these circumstances convince me that the company knew that the wife was in reality giving security for her husband's debt. They had what they no doubt thought was a conveyance from her, but a conveyance as security only. Yet they undertook to turn that supposed conveyance, known to them to be conditional only, into an absolute one without reference to her. In effect, they foreclosed what they thought was a mortgage without notice to the mortgagor. There is no evidence whatever that the defendant took part in the settlement or knew of it or consented to it. There is no evidence that her husband was her agent for that purpose. What evidence there is tends to shew that she was not a party to it and did not assent to it.

If, before making the settlement, before deciding to treat her supposed conveyance as absolute, they had notified her of their intention, they would then have learned of the rights which she claimed to have, and, if they had then released the debt, they would have done so with their eyes open.

It is contended, however, that the defendant, by executing the transfer in her husband's name, and leaving it in her husband's possession, thereby represented that he had full power to deal with the property, and that she no longer had any interest in it, and this, I apprehend, is the real ground upon which the judgment appealed from proceeds. A very close analogy to a transfer under our Land Titles Act is furnished by a transfer of shares in a company. In *Shropshire Union Railway and Canal Company* v. *The Queen*, at the prosecution of Sarah Robson, L.R. 7 H.L. 496, one Holyoake, a director of the defendant company, held, with the company's knowledge and permission, share certificates in his own name for shares in the company, but they were held in trust for the company itself. Holyoake deposited these certificates, in breach of the trust, with Robson, as security for advances, and had signed memoranda declaring the shares to be his own property, and promising to execute a legal mortgage of them. The executrix, the plaintiff, sued for a mandamus to compel the company to register her as the holder of the shares. She succeeded in the Exchequer Chamber, but failed in the House of Lords, who restored the original judgment against her. The House of Lords held that the mere fact that the company had permitted its shares to stand in the name of Holyoake, who was the legal owner by virtue of the certificate, did not preclude them from setting up a trust of which the equitable mortgagee had no notice.

Now can it be said that the defendant here did anything more than the company did in that case? The company issued a certificate certifying that Holyoake was owner of the share, but the Court said that every one aught to know that a person may be legal owner and yet not beneficial owner, and that there was not any such representation as would preclude the company from asserting its equitable right against another who had not a legal estate, but only an equitable right.

The case of *Ortigosa* v. *Brown, Janson and Co.*, 38 L.T. 145, is also, I think, much in point. One Ortigosa owned beneficially and was registered owner of 600 shares in a company. He applied to S. for an advance. S. demanded the security of a transfer of the shares. O. executed a transfer, stating the consideration to be £1,500, but not acknowledging the receipt of it, and deposited his certificates. O. received no money by way of advance at all. S., in fraud of O., deposited the certificates with, and executed a further transfer to, the defendants, who were his creditors to a large amount. But the defendants never

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registered their transfers and O. remained the legal owner. Hall, V.-C., held that O. was entitled to an order for the delivery up of the certificates. He relied strongly upon *The Shropshire Union Railways and Canal Co.* v. *The Queen*, L.R. 7 H.L. 496, and quoted *Heath* v. *Crealock*, L.R. 10 Ch. App. 23, at p. 33, where the Court said:—

> It is a cardinal rule of this Court that if a purchaser, however honest, on the completion of his purchase acquires a defective title, that defective title this Court will not allow to be strengthened either by his own fraud or the fraud of another person.

In the present case, upon the facts found by the trial Judge, and fairly supported, I think, by the evidence, the husband acted in fraud of his wife. The Vice-Chancellor also said:—

> It has been argued that Brown, Jansen and Co. have an equity as against the plaintiff by reason of his having executed the instrument of transfer to Smithers, and entrusted him with the certificates, it being said that he was thus enabling him to represent himself as having been purchaser and being owner of the shares in question. It appears to me that there are not circumstances existing in this case to deprive the plaintiff of the benefit of his legal and equitable title or either of them. His equitable title was to have the instrument of transfer treated as remaining operative only until the plaintiffs' drafts were met, such equitable title being pre-existing as regards any title of Brown and Co. The conduct of the plaintiff in executing the instrument of transfer and delivering the certificates to Smithers upon the terms mentioned in the letter were not in my opinion misconduct, fraud or negligence.

He refers also to the fact that the defendants who claimed under the second transfer admitted in their evidence that they looked upon the purchase price stated in the first transfer, £1,500, as only formal, which presents another point of analogy to the present case, where the purchase price named was on the face of it formal.

Another very analogous case is that of *Carritt* v. *Real and Personal Advance Company*, 42 Ch. D. 263, 58 L.J. Ch. 688, 61 L.T. 163. In that case Scoley owed Carritt money. Scoley gave a deed of assignment of certain leaseholds already subject to mortgage to one Chuck, a clerk of Carritt's, which was complete on its face, and disclosed no trust. In reality it was to be held as security for the plaintiff and a secret deed of trust was executed by Chuck, which set forth the real relationship of the parties. Chuck was given possession of the deed. In fraud of Carritt he pledged it to the defendants as security for an advance. Chitty, J., refused to postpone Carritt's claim to that of the defendants'. He said, at p. 269:—

> The law allows a man for convenience, being the absolute owner, to take a conveyance of land, or a transfer of stock or an assignment of a lease, or indeed any other property, instead of to himself, to a trustee, to hold for him; and, though it may not be prudent to allow the indicia of title—the title deed, the stock certificate or the like to

remain with the trustee, yet it is clear law that the deeds, or certificates of title or other indicia of title are lawfully and rightfully in the custody of the trustee. I say it is not altogether prudent for the equitable owner to leave the deed in the hands of a trustee because in many cases the trustee has the legal estate also; and taking the case, for instance, of stock, he can make a perfect assignment of stock to a purchaser for value, who takes it without any notice and thereby obtains a good title as against the equitable owner for whom the transferor held the stock merely as trustee (the learned Judge here means, of course, that the purchaser gets the legal title). But the *cestui que trust*, the absolute owner, has at least some safeguard in a case of that kind if he keeps the certificate in his possession, because the trustee then has a greater difficulty in procuring the transfer to be registered in the books of the company. Still I go back to the proposition that there is no negligence on the part of a *cestui que trust* in allowing all the instruments of title to remain in the custody of the trustee.

The learned Judge points out also that the defendants did not investigate the title, and if they had done so the trust would have been disclosed. This decision is approved by the Court of Appeal in *Taylor* v. *London and County Banking Co.*, [1901] 2 Ch. 231, 262. I cannot see that the defendant here made any stronger representation than was made by the plaintiff in *Ortigosa* v. *Brown, Janson and Co.*, 38 L.T. 145, or indeed by the appellants in *Shropshire Union* v. *The Queen*, L.R. 7 H.L. 496, when they certified that Holyoake was the owner of the shares. The present case is stronger in the defendant's favour than any of the three cases I have cited because she remained all along the owner of the legal estate, and retained in her own possession and control the certificate of title; and this circumstance, I think, constitutes the essential point of distinction between the present case and *Rimmer* v. *Webster*, [1902] 2 Ch. 163, upon which the respondent relies, and upon which the judgment below was based. In *Rimmer* v. *Webster*, [1902] 2 Ch. 163, the plaintiff had conveyed his legal estate to Hall, his fraudulent agent. Farwell, J., held that the defendant was not bound by a limitation placed upon the agent's authority, and distinguished *Shropshire Union* v. *The Queen*, L.R. 7 H.L. 496, on the ground that there the agent trustee who held the legal title had no authority to deal with the shares at all. But in the present case, I am of opinion that the retention of the legal estate and of the evidence of it, furnished by the certificate of title was in itself sufficient notice of a limitation upon the husband's authority. So far from the transfer being a representation that the husband could pledge the legal estate it was on the face of it notice that he had no legal estate to pledge, and it furnished the very gravest reasons for suspecting that he had no equitable estate to pledge either.

In my opinion, it would bring about an altogether too

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dangerous inroad upon the protection intended to be afforded by our Land Titles Act and the certificates issued under it, if a registered owner who retains the certificate of title in his own possession, but for a limited purpose places an unregistered and, until the certificate is forthcoming, unregisterable, transfer in the hands of an agent for a limited purpose, were to be exposed to the danger of losing his legal estate and any equity he may possess through the fraudulent excess of authority on the part of the agent to as full an extent as if he, the owner, had absolutely conveyed the legal estate to the agent and left it entirely in his hands without visible restriction. I am glad to be able to conclude that such is not the law.

Indeed I am quite prepared to go further. Even if the husband did not exceed his authority, even if the defendant agreed that he was to give security for the whole debt, the plaintiffs are, I think, driven into a dilemma. The case of *Rimmer* v. *Webster*, [1902] 2 Ch. 163, proceeds on the basis of agency. Now if the plaintiffs' contention is based on the assumption that Huxley was his wife's agent, then the idea must be that it was her estate that he was pledging. We here come back again to the insurmountable obstacle in the plaintiff's way, viz., that he did nothing which could be called a pledge or equitable mortgage of her estate. No title deed of hers was deposited, as I have before pointed out. It is said that the transfer constituted a representation of some kind, but I am not aware that an equitable mortgage can be created by the deposit of a representation, or by a mere representation alone, hanging by itself in the air.

Beyond this we have nothing more than verbal agreements, whatever they may have been. The defendant may have verbally told her husband that he could pledge her estate, and the husband may have verbally done so, but I know of no authority for the creation of an equitable charge in such a fashion.

Finally, section 44 of the Land Titles Act makes the certificate of title conclusive evidence of title, except in the case of fraud in which the owner has participated or colluded. There is no finding and no evidence of fraud on the part of the defendant. On the contrary, the certificate is here invoked, not to cover, but to defeat a fraud, in which the plaintiffs it is true, did not participate, but of which they are seeking to get the benefit.

The appeal should be allowed with costs, the order below set aside, and judgment entered dismissing the application with costs.

SIMMONS, J., concurred with STUART, J.

Appeal dismissed on an equal division of the Court.

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DUGGAN (plaintiff) v. WADLEIGH and RANKIN (defendants).

Alberta Supreme Court, Harvey, C.J., Stuart and Simmons, JJ. February 3, 1912.

1. VENDOR AND PURCHASER (§ I—3*a*)—SUB-PURCHASER—PAYMENT TO OBTAIN TITLE FROM OWNER.

Where the purchaser in a contract for the sale of a block of land, before completing his payments and acquiring title contracted to sell a lot from the same to a sub-purchaser and then defaulted in his payments, after which he directed the sub-purchaser to pay instalments of purchase money to the owner, who refused to take payment from or to give title to the sub-purchaser unless the latter paid a bonus in addition to what he had contracted with the original purchaser, an agreement to pay such bonus will not be set aside on the ground that such circumstances constitute duress nor will a mortgage given therefor by the sub-purchaser to the owner be declared invalid.

2. GUARANTY (§ I—9)—LAND SALES—SUB-PURCHASER.

Where a sub-purchaser of one lot of a block of land sold by the owner to the original purchaser has been directed by his vendor to pay his purchase money to the owner and get title from him direct, but the owner declines to accept payment or to convey unless paid a bonus in addition, the original purchaser may be ordered to indemnify his sub-purchaser in respect of a reasonable bonus paid to the owner in order to obtain title.

[*Rankin* v. *Wadleigh*, 2 Alta. L.R. 469, discussed.]

APPEAL from the judgment at trial in favour of plaintiff against both defendants in an action to set aside a mortgage given by plaintiff to defendant Rankin for $200 claimed as a bonus by Rankin on conveying to plaintiff as a sub-purchaser of one lot of the block of land which he had agreed to sell to Wadleigh, his co-defendant, and which single lot Wadleigh had agreed to sell to the plaintiff.

The judgment against defendant Rankin was set aside and the mortgage held to be valid and judgment was granted against defendant Wadleigh on this appeal for indemnity to the plaintiff in respect of its payment.

H. H. Parlee, for plaintiff.

F. C. Jamieson, for defendant Rankin.

H. A. Mackie, for defendant Wadleigh.

HARVEY, C.J.:—The defendant Rankin was the owner of certain lots which in 1906 he agreed to sell to one Magrath. A few months later the said Magrath entered into an agreement with the defendant Wadleigh to sell him these lots at an increased price, the purchaser agreeing to make the payments to the vendor Rankin according to the terms of his agreement with Magrath. The defendant Wadleigh entered into agreements for sale with various persons for different lots comprising a part of the lots sold to him, the plaintiff being the purchaser of one lot. Wadleigh thereafter became in default in his payments, which fact becoming known to his sub-purchasers and they becoming alarmed, a meeting was called for the purpose of taking steps to protect their interests. The plaintiff and the defend-

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ant Rankin were both present at the meeting which was held in January, 1908. A second meeting was held a few weeks after at which certain arrangements were made. In pursuance of these and other arrangements the defendant Rankin formally released Magrath and took Wadleigh in substitution and on the same day, viz., 28th March, 1908, Wadleigh, through his attorney, by letter authorized and requested Rankin to collect the moneys unpaid on the said agreements including the one from the plaintiff and to credit the amounts received on his indebtedness to Rankin, at the same time requesting him to give title when the balance was paid at his direction and on such terms as he thought best.

The plaintiff was not present at the second meeting referred to, but he says he learned in February that the position defendant Rankin had taken was that he was not bound to give title to any of the purchasers from Wadleigh, but that he would agree to do so if paid in addition to the amount remaining unpaid on the agreement, the sum of $200 in respect of certain of the lots, of which plaintiff was one, and $100 in respect of the others. Shortly after this plaintiff had an interview with defendant Rankin when Rankin told him the same thing and also that he would be losing money otherwise. Other interviews took place in which plaintiff endeavoured to get title without paying this $200, but without further success than an offer to take a mortgage for $200 on the lot instead of cash.

No effort was made apparently to collect from the plaintiff the balance on his agreement, and at one of the interviews plaintiff says that after threatening that if the sub-purchaser did not comply with his terms he would have to take proceedings against Wadleigh on his agreement and they would all be foreclosed, Rankin said, "that as soon as his suit came off with Mr. Wadleigh, that Mr. Wadleigh would be compelled to see the thing all right, to see us fellows through, that I needn't worry or think any more about it."

Plaintiff also says that Rankin told him if he didn't want to pay he had better see a solicitor and that he did see Mr. Wadleigh's solicitor, who told him the matter was out of his hands, but he saw no other solicitor about the matter other than Rankin's solicitor when he paid the balance and gave the mortgage. After some months, on the 8th of July, 1908, plaintiff, having decided to give the mortgage, went to Rankin's solicitor, told him he had come to give the mortgage, gave him instructions for it and after it was prepared executed it and paid up on the agreement. A transfer to the plaintiff was given and registered and the mortgage registered against the plaintiff's title.

The plaintiff alleges by his statement of claim that the mortgage was obtained by duress and claims damages, indemnity from defendant Wadleigh and cancellation of the mortgage. The

action was tried before His Honour Judge Taylor, who gave judgment for the plaintiff both for indemnity and for cancellation. The defendant Rankin appeals from this judgment and the defendant Wadleigh, though not appearing as an appellant by the appeal book, by consent also appeals.

In *Rankin* v. *Wadleigh*, 2 Alta. L.R. 469, an action between these two defendants, to which the learned trial Judge refers, Mr. Justice Beck expressed the opinion that the additional payments made by Wadleigh's sub-purchasers to Rankin were involuntary and could be recovered back. It must be observed, however, that what was before Mr. Justice Beck was simply the pleadings in that action. He had no evidence of the facts and the report leads to the inference that the learned Judge's conclusion was that Rankin after receiving the balance of the purchase money refused to convey without a further payment and that having taken the benefit of the agreements he was bound to give effect to them, whereas the evidence in the present case shews that before Rankin received any money under the agreements there was an arrangement, or at least an understanding, with the purchasers that he would only convey on being paid the additional sum demanded.

There seems no doubt that the purchasers had no direct claim on Rankin under their agreements with Wadleigh and he appears to have been very careful to avoid giving them any such claim except on the terms which he was willing to grant. The plaintiff was not required to give this mortgage unless he preferred to do it in order to get the title which Rankin was not bound to convey to him. Wadleigh, however, was bound to see that he got title on payment of the purchase money according to the terms of the agreement and, as he authorized and directed the money to be paid to Rankin, he should be required to indemnify plaintiff against any further expense he was put to to obtain what he was entitled to call on Wadleigh to furnish him. The question of the accounting between Rankin and Wadleigh and the plaintiff's interest in it do not arise and cannot be dealt with here. This indemnity, however, only goes to the extent of the mortgage and cannot include the costs of either the claim against Rankin, which is wrong, or of the claim on the mortgage the necessity for which the plaintiff should have prevented by payment.

The claim for judgment on the mortgage is set up by counterclaim. There is no formal judgment in the appeal book, though one is indexed, but the counterclaim naturally failed under the judgment given. As, however, the mortgage is a good and valid security and is in default, the defendant Rankin is entitled to succeed on his claim to enforce it. In the result the appeal of the defendant Rankin should be allowed with costs, except the costs of the appeal book (which is no credit to the solicitors who

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filed it) and the appeal of the defendant Wadleigh dismissed with costs and there should be judgment in the Court below dismissing the plaintiff's action against the defendant Rankin with costs and in the plaintiff's favour against the defendant Wadleigh for indemnity as above mentioned with such costs as are properly apportionable to that portion of the action. On the counterclaim there should be judgment for the defendant Rankin for the amount of the mortgage and for sale on default, in the usual terms, with costs.

SIMMONS, J.:—I concur.

STUART, J.:—With great respect to the opinion of the learned District Judge who tried this case, I am of opinion, that this appeal must be allowed. The idea which seems to underlie both the judgment appealed from and the statement of claim in the action itself seems to me to be one of the lamentable results of an utterly vicious tendency which is abroad in the land, and has, I regret to see, crept into the Courts, towards not ordinary purchasers of property who buy it to use it, but towards speculating sub-purchasers and sub-subpurchasers who are caught in the contagion of real estate frenzy and buy a lot or two from somebody without knowing whether he owns it or not or can ever give title to it or not. The present plaintiff admits that for fourteen months after he had made his agreement with Wadleigh and after he had paid over five hundrd dollars to Wadleigh it never struck him to inquire whether Wadleigh had title to the property or not. If he had gone to the Land Titles Office in the first place, as it appears he very easily did on his own account in the end, he would have saved himself all his troubles and his five hundred dollars as well.

This case is a very good example of the utterly perverted ideas as to right and wrong which are entertained by people who go into speculation of this kind. The plaintiff in his evidence in numerous places seems to imagine that he had some real complaint against Rankin with whom he had never had any business relation whatever. However unjustly Wadleigh may have treated the plaintiff it is difficult to see why Wadleigh's sins should be thrown upon Rankin.

The simple question involved in the case is whether if. A. agrees to sell an estate to B. and B. agrees to sell part of it to C. and if then B. assigns to A. the debt which is owing to him, B., from C., does that put C. in a position to sue A. for specific performance? It seems to me that it is impossible to contend anything of the kind. Even if we were to admit, which is very doubtful, that the letter principally in question here constituted an assignment of Duggan's debt to Wadleigh by Wadleigh to Rankin, I cannot understand how that could be said

to have given Duggan a right to sue Rankin for specific performance of his, namely, Duggan's contract with Wadleigh.

I am quite ready to admit that if Rankin had taken money from Duggan which he knew to be part of the purchase price of some property which Duggan owed to Wadleigh, and knowing at the same time that Wadleigh was unable to give title then Duggan would undoubtedly have some equitable right against Rankin, but the evidence of the plaintiff himself is clear that Rankin refused to take his money. Duggan himself says: "I asked him. I was prepared to meet all my payments now. I asked him if he would not, he said, No, I can't do it, I am out of pocket now, he says, on this." There is not a tittle of evidence to shew that Rankin ever attempted to enforce any rights he may have had under the letter from Wadleigh. He never asked Duggan for money. He never sued him. Duggan was at all times perfectly free to keep his money or to pay it to Wadleigh and to look to Wadleigh for his title. Instead of doing that when he found out that Wadleigh could not give him title he went to Rankin, the original vendor, imagining he had some grievance against him and some rights against him. All that Rankin told him was, that, "If you will pay me what you owe to Wadleigh and give me two hundred dollars more, I will give you title to your lots." Duggan was perfectly free to accept that proposition or to reject it. He chose to accept it, and although he had not the additional two hundred dollars available he chose to give a mortgage to secure it and the mortgage was given on the 9th July, 1908, and almost two years afterwards the plaintiff brings this action to set the mortgage aside because, as he said, it was obtained by duress and extortion and was given without consideration.

In my opinion the claim is utterly untenable. The plaintiff neither at the trial nor on the argument before us ever attempted to raise the question as to whether Rankin had been paid in full by Wadleigh. Surely if such a position was possible to be taken the plaintiff would have raised it at the trial. No evidence was tendered by the plaintiff upon the point, and the argument upon the appeal proceeded entirely upon the assumption that Rankin had not been paid in full. In my view it is now too late to raise any question of that kind. The appeal should be allowed and the judgment below discharged and judgment entered for the defendant Rankin dismissing the plaintiff's action as against him with costs, with judgment on the counterclaim for foreclosure in the usual way and for costs.

The respondent should also pay the costs of this appeal as between himself and Rankin, except the costs of the appeal book. As between the appellant and the defendant Wadleigh I think the appeal should be dismissed. As I read the judgment of the learned District Judge he holds that Duggan is entitled

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to be indemnified by Wadleigh against the mortgage. As the payment of two hundred dollars or the giving of a mortgage to secure it was necessary and was practically part of the costs of securing title, it seems to me that the plaintiff is entitled to be indemnified by Wadleigh. The appeal by Wadleigh should, therefore, be dismissed with costs. I do not think that Wadleigh should be asked to pay the costs for an utterly unfounded action which the plaintiff saw fit to bring against Rankin; the plaintiff should bear the burden of this himself, but the judgment which the plaintiff is entitled to enter against Wadleigh in the Court below should be for the amount of the mortgage and interest thereon to be entered only when the plaintiff satisfies a Judge that he has paid the mortgage and for the costs of the action as against Wadleigh himself and for the costs of this appeal in so far as these costs have been occasioned to the respondent by the appeal of Wadleigh.

Action dismissed as against Rankin, and sustained as against Wadleigh.

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Apl. 13.

BALKE v. CITY OF EDMONTON.

Alberta Supreme Court, Harvey, C.J., Scott, Stuart, Beck, and Simmons, JJ. April 13, 1912.

1. NEGLIGENCE (§ II A—75)—COLLISION WITH STREET CAR—DUTY OF ONE DRIVING ON STREET.

One driving upon city streets knowing that there are crossings where street cars are passing but owing to the darkness is ignorant as to where the crossings exactly are, is bound to keep a good lookout and to be on guard as to conveyances coming his way, and his failure so to do and his blindly trusting to those driving ahead of him constitutes contributory negligence precluding him from recovering for injuries caused by collision with a street car even though those in charge of the car were negligent in its management.

[See, to same effect, *Carleton* v. *City of Regina*, 1 D.L.R. 778, and Annotation to same, *ante* pp. 783-786.]

APPEAL by plaintiff from the judgment at trial dismissing his action for damages for personal injuries.

H. A. Mackie, for plaintiff (appellant).

J. C. F. Bown, for defendant (respondent).

STUART, J.:—I think this appeal should be dismissed. I was at first inclined to think that there was sufficient evidence to justify us in concluding that the defendant corporation through its servants in charge of the street car and the street car system were guilty of negligence in not having a better light than they apparently did have at the front of the car, in not ringing the gong sooner than they apparently did, although it is not definitely proven when it began to ring, and in going at ten miles an hour, which was the rate found by the trial Judge, over the crossing of what was apparently a well-travelled street

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when the night was dark and there was no light to enable the motorman to observe conditions at the crossing. And I do not say that, if it were necessary for a decision of the appeal, that I would not on some or one of these grounds, conclude that negligence on the part of the defendant corporation had in fact been shewn. The trial Judge, however, was of opinion that the plaintiff himself was guilty of negligence which directly contributed to the accident. After some hesitation I have become convinced that the trial Judge was right. The plaintiff knew he was still in the city limits. He knew that there were street crossings every few hundred feet. He knew that at some of these crossings there were street cars running. Nevertheless, he blindly followed one or two teams which were ahead of him and seems to have made no attempt to keep his wits about him and indeed not to have appreciated in any way the necessity of doing so. At one time I thought that he may not have known that he was coming to a street crossing where there was a railway running and so might have been excused for not looking to see if a car was coming. But in view of the knowledge as to his whereabouts which he did have I do not think he was justified in moving along blindly or in trusting as he apparently did to those in front of him. When a man knows he is driving upon city streets and owing to darkness does not know where the crossings exactly are, there is all the greater obligation upon him, in my opinion to keep a good look-out and to be on his guard as to conveyances which may be coming in his way. The plaintiff on his own confession did not do this and I think there was sufficient evidence to justify the trial Judge in concluding as he apparently did conclude that if he had done so he would have become aware of the approaching car.

For these reasons I do not think we can interfere with the judgment below and the appeal should, in my opinion, be dismissed with costs.

HARVEY, C.J., SCOTT, and SIMMONS, JJ., concurred with STUART, J.

BECK, J.:—I dissent, being of the opinion that there was no contributory negligence on the part of the plaintiff.

Appeal dismissed.

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THE KING v. BLEILER.

Alberta Supreme Court, Harvey, C.J., Scott, Beck, and Simmons, JJ.
April 13, 1912.

1. EVIDENCE (§ XII F—952)—AUTHORITY TO PERFORM MARRIAGE CEREMONY.

In a prosecution for bigamy the clergyman who performed the marriage ceremony is competent to testify that he was an ordained minister and therefore authorized to perform such ceremony.

2. EVIDENCE (§ VII H—632)—FOREIGN LAW.

In a prosecution for bigamy the clergyman who, in a foreign country performed the marriage ceremony is competent to give expert evidence regarding the statute from which he derived his authority.

[See also Phipson on Evidence, 4th ed., p. 356, Wharton's Cr. Evid. 10th ed., p. 414.]

3. BIGAMY (§ I—12)—BELIEF IN DIVORCE.

An honest belief on the part of the defendant that he was divorced constitutes no defence to the charge of bigamy either at common law or under secs. 16 and 307 of the Criminal Code (1906).

[*R.* v. *Brinkley*, 14 O.L.R. 434, followed; *R.* v. *Sellars*, 9 Can. Cr. Cas. 153, disapproved.]

THE accused was tried and convicted on a charge of bigamy before Mr. Justice Stuart and a jury. This is an appeal by the accused from the trial Judge's refusal to reserve the following points of law:—

(*a*) Was there sufficient or any competent evidence to prove the first marriage in accordance with the laws of the State of Wisconsin?

(*b*) Was there sufficient or any proper evidence that Messerschmidt (who it is alleged performed the marriage) was a clergyman?

(*c*) Was there proper evidence that if he were a clergyman, he was authorized to solemnize marriage in the State of Wisconsin?

(*d*) Was there sufficient proof that the form of marriage alleged to have been gone through with was valid according to the law in force in the State of Wisconsin at the time?

(*e*) Must not the law of Wisconsin, being a foreign law, be proved by an expert witness?

(*f*) Was there sufficient evidence that Messerschmidt was an expert on the law of Wisconsin?

(*g*) Was the learned trial Judge right in directing the jury that if the defendant did honestly believe he was divorced, it would be no defence to the charge of bigamy?

W. J. Loggie, for the accused.
L. F. Clarry, D.A.-G., for the Crown.

HARVEY, C.J.:—At the close of the argument we decided that the first six questions should all be answered in the affirmative and that the appeal to that extent should be dismissed. In addition to the evidence of the first wife the evidence as to all of these was the sworn statement of the person who performed the marriage ceremony that he was an ordained minister of the gospel of the Evangelical Association, a church denomination and that during seven years prior to 1890 he had been performing the marriage ceremony in Wisconsin and that in 1890 he

married the accused to the first wife in that state and that by the law of Wisconsin any ordained minister was authorized to perform the marriage ceremony.

It is hard to see what better evidence could be given of the fact that the person who performed the ceremony was an ordained minister than his own testimony and it is quite clear that anyone is competent to give expert evidence of the foreign law though not a professional lawyer if he is the holder of a position requiring and therefore implying a knowledge of the law. See Phipson on Evidence (4th ed.) 356, also *The Sussex Peerage Case*, 11 C. & F. 85, at 124. There is no doubt that it is the duty of any one performing the marriage ceremony to acquaint himself with the law under which his act is authorized and he is therefore competent to give evidence regarding it.

In regard to the last question on which judgment was not given it is contended that a guilty intent which is frequently referred to under the term "*mens rea*" is necessary to constitute the crime of bigamy and that by virtue of sec. 16 of the Criminal Code any defence that would have been available at common law is still a good excuse as well as the excuses mentioned in sec. 307. Sec. 16 does not save all common law defences, but only those which are not altered by or inconsistent with the provisions of the Code.

In *R.* v. *Sellars* (1905), 9 Can. Crim. Cas. 153, Wallace, C.J., held that the *mens rea* was still essential and that the defendant having shewn an honest and reasonable belief that she was unmarried was free from the crime.

In *The Queen* v. *Tolson* (1889), 23 Q.B.D. 168, it was held by a majority of nine Judges to five, that though the statute under consideration only excused a person whose consort had been absent for seven years and within that time not known to be alive, yet a bona fide and reasonable belief in the death of the consort without the seven years' absence constituted a good defence. Stephen, J., however, who was one of the majority, points out the misleading nature of the theory of "*mens rea*" which can have no application as generally viewed in many cases.

By sec. 307, what was held in that case to be a good defence is made a valid excuse, as is also what was an excuse by the act then under consideration. There is also a further one in the following words:—

> (c) If he or she has been divorced from the bond of the first marriage.

To establish a defence under this provision it is necessary to shew a valid divorce. What would be the necessity for this provision if a belief in the existence of such divorce alone were sufficient? These provisions declaring an honest belief in death and an existing valid divorce good defences are, in my opinion,

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inconsistent with a defence of merely a belief, no matter how honest or reasonable, in a divorce, and if such ever constituted a defence it is not continued by sec. 16.

No authority is cited to shew that it ever did constitute a valid defence other than the general theory of "*mens rea*." I find, however, in the report of *Sherras* v. *De Rutzen*, [1895] 1 Q.B. 918 at p. 921, Wright, J., states that one of the most remarkable exceptions to the theory of "*mens rea*" was in the case of bigamy and that it was held by all the Judges in *Lolley's Case*, R. & R. 237, 15 R.R. 737, that a man was rightly convicted of bigamy who had married after an invalid Scotch divorce, which had been obtained in good faith and the validity of which he had no reason to doubt. That case is a direct authority against the contention that the suggested defence was a valid defence at common law.

The case of *R.* v. *Brinkley* (1907), 14 O.L.R. 434, is a decision of the Ontario Court of Appeal that it is not a defence under sec. 307 of the Code. In that case a divorce had actually been obtained, but it was one which the Court decided was not valid in Canada. The accused, however, had before the second marriage, consulted a lawyer and had been advised that the divorce was binding and that he was at liberty to marry again, but it was held that the conviction was right. As I have before stated, this appears to me to be the only reasonable interpretation of the section. The appeal should be dismissed.

SCOTT, BECK and SIMMONS, JJ., concurred.

Appeal dismissed.

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WATEROUS ENGINE WORKS v. KELLER.

Alberta Supreme Court, Harvey, C.J., Scott, Stuart, and Beck, JJ. February 3, 1912.

TRIAL (V C—280)—VERDICT OF JURY—SUFFICIENCY.

The verdict of a jury will not be disturbed if it was one that reasonable men might have found even though the trial Judge was of a different opinion.

[*Metropolitan R. Co.* v. *Wright*, 11 A.C. 152, and *Cox* v. *English S. and A. Bank*, [1905] A.C. 168, applied.]

APPEAL from the judgment at trial, dismissing the action.

The plaintiff's claim was on a promissory note for $600 for one of the instalments of the purchase-price of some threshing machinery. One of the defences was that the defendant received the machinery on trial and having tried it rejected it and there was, therefore, never any contract or any consideration for the notes. The action was tried before Simmons, J., with a jury. Certain questions agreed upon by counsel were submitted to the jury, the first two of which were:—

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1. Was there a contract to purchase between plaintiff and defendant when notes were delivered by defendant to Mr. Switzer?
2. If not, was there a contract at any time?

The learned trial Judge in his charge to the jury directed them that if they found there was no contract they need not answer the other questions (set out in full in the opinion of Stuart, J., which follows).

On the jury being asked for their verdict the foreman answered: "That there was no contract at the time the notes were delivered by the defendant, so say we all." The appeal book indicated that thereupon, before anything further was said, counsel for plaintiff applied to the Judge to refuse to accept that verdict as unsupported by the evidence and perverse. The Judge refused, stating that he had instructed the jury that if they answered that question in the negative no answer was required to the other questions. No further objection being made the jury was discharged, and judgment was subsequently directed dismissing the action.

The plaintiff's appeal to the Court *en banc* was dismissed.

O. M. Biggar, K.C., for plaintiffs (appellants).

G. H. Ross, for defendant (respondent).

HARVEY, C.J.:—In the notice of appeal the only ground of appeal raised is that the verdict cannot be supported by the evidence and in appellant's factum it is stated that the jury answered the first two questions in the negative. On the argument it was pointed out from the Bench that the second question did not appear to have been answered and that the answer to the first question alone did not appear to be a sufficient finding of fact. No explanation was offered but the point was not pressed by counsel.

In view of the circumstances, it appears to me it should be now assumed that the jury intended to answer both questions in the negative. There is no doubt that was the opinion of both Judge and counsel and it is possible that the error is in the appeal book in not shewing the answer to the second question but if not, counsel did not point this out before the jury was discharged, when it could have been remedied, and has not relied on it since, and there is no room for doubt on the evidence that the jury would have answered the second question in the negative if they had been required to answer it. The only question to consider, then, is whether the verdict of the jury that there was no contract can be supported by the evidence. The learned Judge plainly intimated to the jury that his own view was against that conclusion so that the possibility of their having been misled by anything he said in the defendant's favour is eliminated.

In *Cox* v. *English, Scottish and Australian Bank*, [1905] A.C. 168, Lord Davey in delivering the judgment of the Judi-

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cial Committee of the Privy Council, on p. 170, quotes Lord Selborne as enunciating the principle applicable to such cases in *Metropolitan Ry. Co.* v. *Wright*, 11 App. Cas. 152, as follows:—

> In many case the principles on which new trials should be granted on the ground of difference of opinion which may exist as to the effect of the evidence have been considered, both in the House of Lords, and in the lower Courts, and I have always understood that it is not enough that the Judge who tried the case might have come to a different conclusion on the evidence than the jury, or that the Judges in the Court where the new trial is moved for, might have come to a different conclusion; but there must be such a preponderance of evidence, assuming there is evidence on both sides to go to the jury, as to make unreasonable, and almost perverse, that the jury, when instructed and assisted properly by the Judge, should return such a verdict.

Acting on that principle, it appears to me to be impossible to say that this verdict is one which should be set aside. The defendant swore definitely to the facts alleged in his defence and although he was flatly contradicted by Switzer, plaintiff's agent, and although there were other circumstances in connection with his acts which one would not expect to find if his statements were true, yet it cannot be said that reasonable men could not come to the conclusion the jury did and in *Metropolitan Ry. Co.* v. *Wright*, 11 App. Cas. 152, above mentioned, Lord Halsbury, at p. 156, says:—

> If reasonable men might find the verdict which has been found, I think no Court has jurisdiction to disturb a decision of fact which the law has confided to juries, not to Judges.

There is no question of misdirection or of the jury having possibly been misled or of improper or incomplete evidence and there is no reason to suppose that a new trial would necessarily lead to any other result. If it did not the plaintiff would then have as much right to ask for another trial and we might have a chain of trials with no end in sight.

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

SCOTT, and BECK, JJ., concurred with HARVEY, C.J.

STUART, J. (dissenting):—The plaintiffs sue upon a promissory note given to them by the defendant for the sum of $600 and interest. The note is the first of a series of four, the remaining three being for $800 each, given in payment of the purchase-price of a steam engine, separator and attachments which the plaintiffs allege were sold by them to the defendant.

The signing and delivery of the agreement and of the notes is not denied by the defendant but he alleges that such delivery was merely to the plaintiff's agent in escrow and subject to the condition precedent that the machinery should after a period of trial do good work in which case the documents were to be

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delivered to the plaintiffs by their agent but that if the machinery should fail to do good work then they were to be re-delivered to the defendant.

The action was tried at Macleod, by Mr. Justice Simmons and a jury. After consultation with counsel for both parties and with their assent, the learned Judge left the following questions to the jury:—

1. Was there a contract to purchase between the plaintiff and defendant when notes were delivered by defendant to Switzer (the agent)?

2. If not, was there a contract at any time?

3. If there was a contract (*a*) was the machine according to the warranty, that is, as good as new; (*b*) was it capable of doing as good work as any of its size sold in Canada?

4. Was it reasonably fit for the purposes for which it was sold, viz., plowing and threshing purposes?

5. If not, then how much less was it worth than the contract-price for such purposes?

Upon the return of the jury the following occurred:—

The clerk: Gentlemen of the jury, have you decided on your verdict?

Foreman: We have.

Clerk: How do you find?

Foreman: That there was no contract at the time the notes were delivered by the defendant, so say we all.

Mr. Biggar (counsel for the plaintiff): I was going to ask your Lordship whether you could possibly accept that verdict, it is obviously contrary to the evidence given on both sides.

His Lordship: It is in answer to the question and I have instructed them that if they answered that question in the negative there was no answer required to the other questions. I hold that they have answered that in the negative.

Mr. Biggar: What I would suggest is this, my Lord, that there was clearly upon the evidence of the defendant himself a contract and that the verdict is perverse.

His Lordship: I cannot accept that view of it. However, you will have a chance to argue that on motion for judgment.

Upon the subsequent motion by defendant for judgment the learned Judge dismissed the action with costs.

The evidence of the defendant in respect to the manner in which the contract was given was as follows: "I told him (Switzer) that I would sign the contract and he was to hold it until the ten days was up so I could prove the machine was satisfactory," and again, "Now, I said you hold this contract until the ten days' guarantee is up and then I will make settlement with the notes and he told me right there that if that machine did not work satisfactorily to pull her out but he didn't say where to pull her to. . . . I took it to mean to quit it if it didn't work satisfactorily. . . . I told him to hold the contract and he says I will and I said I want you to hold it until the ten days' trial is up and then I will make settle-

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ment about the notes; and he says, "All right." He says, "If things are not all O.K. you will get your papers back."

This occurred on August 24th, 1909, before the machine was delivered. After delivery of the machine and (as the defendant says), on the first day of threshing with it (the second day according to Switzer) the defendant signed the notes referred to. The following is his account of how he came to do this:—

> That day, that was it, he came in and wanted me to make settlement, to sign up the notes. I said, "Look here, I was to have 10 days." He then shewed me on the contract that the purchaser should make settlement at delivery, he said he and his wife wanted to start for California, and he says I would like to have you sign these notes up and we will make this machine go. We have a man in Calgary named Oliver, he can do it with a pocket-knife. He had been our engineer in Brantford, Ontario, for 8 or 12 years, and thoroughly understands this separator, we will send him down if she ain't right. Then she will go all right. I would like to go out this evening, and if you can sign these notes it will let me up. I said I supposed I was getting 10 days' trial on the machine. Well, he says, so you are, and I says, all right, I will hold the notes for 10 days and if the machine does not give satisfaction you are likely to have trouble in collecting the notes. He says the machine will give satisfaction, he says I will hold them until the guarantee is out, so I said if the machine works right you will have no trouble in collecting the notes. He says I will do that, I will be glad to get off and I signed the notes, that was about 8 o'clock, it was after supper, and we talked there likely an hour about, and as soon as I signed the notes he put them in his pocket and said he wanted to get off to Cayley to catch the morning train.

The agent of the plaintiffs, Switzer, denied, inferentially at least, that any condition was attached to the delivery of the contract and the notes. The plaintiffs rested simply on the warranty clause in the contract itself which reads as follows:—

> The said machinery is sold upon and subject to the following mutual and interdependent conditions, namely:—
>
> It is warranted to be made of good material and durable with good care, and with proper usage and skilful management to do as good work as any of the same size sold in Canada. If the purchaser, after trial, cannot make it satisfy the above warranty, written notice shall within ten days after starting be given to the company at Winnipeg and the agent through whom purchased, stating wherein it fails to satisfy the warranty, and reasonable time shall be given to the company to remedy the difficulty, the purchasers rendering necessary and friendly assistance, together with requisite men and horses; the company reserving the right to replace any defective part or parts, and if then the machinery, or any of it, cannot be made to satisfy the warranty, it is to be returned by the purchasers free of charge to the place where received, and another substituted therefor that shall satisfy the warranty, or the money and notes immediately returned and this contract cancelled, neither party in such case to have or make any claim against the other. And if no such notice is

given within such time, that shall be conclusive evidence that said machinery is as warranted under this agreement, and that the machinery is satisfactory to the purchasers. If the company shall, at purchaser's request, render assistance of any kind in operating said machinery or any part thereof, or in remedying any defects, such assistance shall in no case be deemed a waiver of any term or provision of this agreement, or excuse for any failure of the purchasers to fully keep and perform the conditions of this warranty. When, at the request of the purchasers a man is sent to operate the above machinery, which is found to have been carelessly or improperly handled, said company putting same in working order again, the expenses incurred by the company shall be paid by said purchasers. It is also agreed that the purchasers will employ a competent man to operate said machinery. THIS WARRANTY DOES NOT APPLY TO SECOND-HAND MACHINERY.

There are no other warranties or guarantees, promises or agreements, than those contained herein.

According to the evidence of the defendant the machine was started without grain on Monday the 13th September, and actual threshing began on Tuesday the 14th, and continued with some interruptions until the 23rd. Both Switzer and Oliver, an expert of the plaintiffs, were in attendance on the machine during a portion of this time and swore that it worked fairly well. The defendant and a number of men who were working at the machine swore that it worked very unsatisfactorily. On September 23rd, the defendant wrote the following letter to the plaintiffs:—

September 23rd, 1909.

Waterous Engine Company,
Winnipeg.

Dear Sir,—As I have served about the limit of time trying to get the McCloskey separator to work, and have failed to do so, will notify you and am sending Mr. Switzer work to Wetaskiwan, when I bought this rig it was supposed to get a rig that had only been run seven days last season, but I find this rig has run one full season and as your agent has knocked me out of several hundred dollars, I have pulled the outfit out and paid my men off and am not going to take it, this is an old bummed up outfit and not the new rig I was supposed to get from Switzer, it has never given a day's satisfaction since it landed on the ranch. You will hear from Mr. Forsyth, my solicitor, later from High River.

Yours truly,
E. A. KELLER, Cayley.

A few days later Switzer came to the defendant's place with another expert and said he was prepared to make the machine work properly but the defendant refused to have anything more to do with it.

The learned trial Judge said in his charge to the jury:—

The plaintiffs say they sold the machine in the ordinary way with this exception that it was a second-hand machine that they provided for that in the contract, but guaranteed it to be in as good working order

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as new and the defendant signed this contract, then when the same had been submitted to the company at Winnipeg and approved, on the request of the plaintiff's agent, Mr. Switzer, he apparently completed the transaction by executing the notes which the contract says he should execute and which shall be taken as evidence of acceptance of the machine. Defendant now says that was not the arrangement, he says that the arrangement between the parties was that there would be no contract to purchase until he had had 10 days' trial of the machine, and then he should have the privilege of getting back his notes if not suited with the machine. Thus you will have to decide practically between his evidence and that of Mr. Switzer as to the truth or untruth of that contention. If that contention were true there was no contract between these parties at all, no purchase of the machine unless he afterwards certified his acceptance in the way he says it was intended. Now when the parties set up a contention like that after executing a contract, delivered it to the other party, and then executed notes, signed notes, which the contract contemplated, you are bound to examine very closely a contention of that kind because that is not the way in which ordinary business men conduct their business. My opinion is not binding on you, I am simply expressing my opinion there. You will have to find first which is the proper construction to put on the deal between these parties. Was there an agreement to purchase that machine as evidenced by the contract and notes, or an arrangement to purchase after something was done. The ordinary business man does not sign notes in that way and deliver them in escrow as you know and you must take that into consideration, and further it does not seem that there is any evidence that he demanded the return of the notes which an ordinary business man might do, that is an inference which I would draw which is not binding upon you. You will have to find whether his contention is the actual one or whether the statement of Mr. Switzer is a statement of the actual dealings between these men with this view that you have the contract and notes as supporting the contention of Mr. Switzer. Now, I have observed if you hold there is no contract, that these notes were not delivered on the condition or in escrow then you do not need to answer any more of the questions, but if you draw the same inference that I would draw that there was a contract then you must deal with the other questions.

The plaintiffs now move to set aside the verdict and for a new trial and in their notice of appeal they give the following main grounds:—

(2) That the defendant having given evidence of the contract between himself and the plaintiff and having shewn that he did not comply with the conditions of the warranty therein contained, a verdict should have been directed or judgment entered for the plaintiff.

(3) That the said verdict of the jury was perverse and contrary to the uncontradicted evidence.

It is undoubtedly the case that, although counsel for both parties seem to have assented to the form of the questions to be put to the jury, the exact wording of them turns out to be rather unfortunate. The first question was no doubt intended to cover the defendant's contention that he delivered both

contract and notes in escrow or upon a condition precedent, that, in fact, it was agreed that there should be no binding contract of purchase until the trial had proved satisfactory. At first the question would appear sufficient but the point seems to have been overlooked that a contract with a condition precedent is still in one sense a contract. It is an agreement that if an event happens then there shall be a contract. It is in this sense that counsel for the plaintiff, immediately after the verdict and again upon appeal, contended that the verdict of the jury, their answer to the first question, to the effect that there was no contract at all at the time of the delivery of the notes, was perverse. There can, of course, be no question upon the evidence but that this contention is correct. But I am not sure that the jury were to blame for this. Neither in the form in which the first question was submitted to them, nor in the Judge's charge (I cannot speak of the addresses of counsel for these are not before us) was this distinction, this exact point, brought to their attention. And yet the first question must have been intended as an inquiry whether the delivery of the contract and the notes was or was not purely conditional upon the machinery proving satisfactory. Otherwise it is difficult to understand the purpose of the second question. Obviously the second question was meant as an enquiry whether the machinery did in fact work satisfactorily, *i.e.*, whether the condition impliedly referred to in the first question had been fulfilled or not. If the first question was really meant to ask whether a contract finally binding had been made at the time of the delivery of the notes then a negative answer would not necessarily determine it in the defendant's favour. A negative answer to the second question was also clearly needed before the defendant could be said to have succeeded. It does not very clearly appear from the Judge's charge that the jury were told very definitely that they need only answer the first question if their answer to it was in the negative, although from what occurred after the verdict was given, from what passed then between counsel and the Court it is clear that both Court and counsel then understood that the negative answer given to the first question did in fact settle the matter in the defendant's favour. Yet it is clear that it did not so settle it unless we take the answer to mean that there was not even a conditional contract made, in which sense, of course, the answer was obviously perverse and repugnant to the defendant's own evidence. It is difficult to understand why counsel for plaintiff did not insist on an answer to the second question as well as the first, unless the first question was really understood to be an enquiry into something which was not really in dispute at all, viz., whether defendant had or had not agreed even conditionally to buy the machinery; in which latter case it is difficult to see why the

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question was, apparently with plaintiffs' consent, framed in the way it was framed. I notice that one of the jurymen took part in the examination of Switzer as follows:—

> Q. I would like to ask you if at the time that you went there with this company's expert and Mr. Keller refused to get the help for you to try the machine, was that after the 10 days' trial was up?
>
> A. No, it had been 10 days after he started the machine, it was more than 10 days.
>
> Q. As I understand it then when this company's expert arrived, Mr. Keller's time of trial had expired.
>
> A. No answer.
>
> Q. At the time you came with this company's expert and Mr. Keller refused to help was not his time of trial expired?
>
> A. Well, it was more than 10 days from the time he had started the machine.

Noticing this and reading the Judge's charge I am very strongly of the opinion that the jury must have understood the first question to be whether or not at the date of the delivery of the notes there was an absolute final contract or not and that what they meant by their negative answer was that they found that the defendant's story was true and that he only agreed to buy on the condition that the machine did good work. Why a negative answer to this was treated as settling the matter I am unable to understand. I notice that in the plaintiff's factum it is said that the two first questions were answered in the negative. This suggests the question whether all parties at the trial did not look upon the two first questions as really one question in two parts. Yet the answer says there was no contract "*at the time* of the delivery of the notes."

I do not see any advantage in endeavouring to explain how such a misunderstanding of the position arose. It is sufficient to point out that taking the first question in the sense which must have been attached to it by every one at the time and taking the only answer given by the jury with the ordinary meaning that its words must bear there was certainly not a sufficient finding of fact made by the jury to base a judgment upon. The law is clear that there may be contract to sell goods conditional upon their proving satisfactory to the purchaser. It was in order to apply this law that the second question was asked. And it was not answered. Upon that second question the jury should, I think, have had some direction upon the law as to whether if they found the facts to be so and so the defendant had a right to reject arbitrarily, to express dissatisfaction arbitrarily, or whether if the machine did in fact work with reasonable satisfaction a contract should not then be held to have been concluded, and also upon the point whether the defendant was or was not bound, assuming his version of the affair to be correct, to return the machine to the plaintiffs, and, in the absence of his doing so, whether he should or should not

be held to have accepted it notwithstanding his letter of rejection.

This being so I do not think a judgment founded merely upon the answer given to the first question ought to stand.

The only question is whether there should be a new trial or whether this Court sitting in appeal has not power to deal with the case and find the facts itself.

Rule 507 of the Judicature Ordinance, says in part:—

> On appeal . . . the Court shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been made and to make such further or other order as the case may require.

This is taken from the English order 58, rule 4, which refers to the power of the Court of Appeal in England. The meaning of this rule has been much discussed. The latest decision is that of the House of Lords in *Paquin, Limited* v. *Beauclerk*, [1906] A.C. 148.

In that case, at page 160 of the report, Lord Loreburn, L.J., said:—

> The proper construction of order 58, rule 4, had been the subject of criticism in *Millar* v. *Toulmin*, 17 Q.B.D. 603, 12 A.C. 746, and *Allcock* v. *Hall*, [1891] 1 Q.B.D. 444. In the latter case all the Judges of the Court of Appeal concurred in the opinion that they were at liberty to draw inferences of fact and enter a judgment in cases where no jury could properly find a different verdict. Obviously the Court of Appeal is not at liberty to usurp the province of a jury; yet if the evidence be such that only one conclusion can properly be drawn I agree that the Court may enter judgment. The distinction between cases where there is no evidence and those where there is some evidence though not enough properly to be acted upon by a jury is a fine distinction and the power is not unattended by danger. But if cautiously exercised it cannot fail to be of value.

It is clear from this decision and from the expression of opinion in *Allcock* v. *Hall*, [1891] 1 Q.B.D. 444, to which the Lord Chancellor refers that we have no need to consider whether order 40, rule 10, is in force here. Our own rule 507 gives all the power given by order 40, rule 10, and more. It covers the whole field, and is the only rule to be considered.

Now if the appellants had asked for judgment or in the alternative for a new trial we should have had to consider whether any jury could, upon the evidence, reasonably give a verdict for the defendant and if we were of opinion that they could not I think we could have entered judgment for the plaintiff ourselves though we should also have to determine the question of the defendant's claim for damages. But as the appellants have not asked for judgment and the matter was not argued on that ground it is useless even to consider the case from that point of view.

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On the other hand the defendant opposes the motion for a new trial and asks that the judgment dismissing the action be not disturbed. There is no doubt that under the decisions quoted we have power to consider whether any jury could reasonably give a verdict for the plaintiff.

Upon almost every point in the case there is conflicting evidence. It is true that as the trial Judge said to the jury the evidence is strongly in favour of the defendant as to the working of the machine but that I think is not sufficient to justify us in taking the matter in our own hands.

Even if we were bound to accept the jury's finding upon the first question and make no enquiry for ourselves at all upon the point involved in it, I do not think we ought simply to weigh the evidence referable to the second question and say that because it points strongly to the conclusion that the machine did not work satisfactorily therefore no reasonable jury could come to any other conclusion. There may be no doubt, indeed I have no doubt at all, as to what the jury who did answer the first question would have answered to the second. But another jury might possibly take another view and I cannot say that they would be unreasonable if they did so.

Whether the machine worked in fact with reasonable satisfaction was a question upon which the verdict of the jury should, I think, have been taken. See *Parsons* v. *Sexton et al.*, 16 L.J.C.P. 181; *Dallman* v. *King*, 7 L.J.C.P. 6.

Moreover, where it is clear that the jury has not found sufficient facts to base a verdict upon I think it is open to the Court to question the one finding that was made and on a new trial the whole case would be re-opened. It is quite possible in view of the peculiar form of the defendant's story and its obvious inconsistency with the written agreement that another jury might come to an entirely different conclusion even upon the first question. Indeed the same questions would not probably be asked. At least the first one should as I have indicated be modified so as to make its meaning more clear.

Ordinarily these reasons should be quite sufficient to justify the Court in ordering a new trial. The difficulty which, in the opinion of the other members of the Court, stands in the way of the appellants is that it was assumed at the trial that a negative answer to the second question had been given, that their counsel did not insist on an answer that in their factum they make the same assumption that in their notice of appeal they do not raise the point and did not do so on the argument. Notwithstanding all this, the fact remains that there is really no finding by the jury upon which a final verdict for the defendant can properly rest. I think that real justice would be done rather by ordering a new trial upon the condition that the plaintiffs pay the costs of the first trial and of the appeal.

Appeal dismissed, STUART, J., *dissenting*.

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Alberta Supreme Court, Harvey, C.J., Scott, Beck and Simmons, JJ. February 3, 1912.

1. MASTER AND SERVANT (§ II A—70)—DUTY TO GUARD DANGEROUS MACHINERY—USE OF GUARD IN OTHER LOCALITIES.

Apart from any statutory obligation, no negligence is shewn on the part of an employer by his failure to place a guard on a dangerous machine where its presence would not have avoided the accident for which suit was brought, though such guard was afterwards placed on the machine, and it appeared that guards had been used in other localities prior to the accident.

[*Williams* v. *Western Planing Mills Co.*, 16 W.L.R. 13, specially referred to.]

2. LIMITATION OF ACTIONS (§ III F—131)—WORKMEN'S COMPENSATION—RIGHT TO COMPENSATION AFTER FAILURE OF ACTION FOR NEGLIGENCE.

Under the Alberta Workmen's Compensation Act, providing that a claim for compensation thereunder must be made within six months from the occurrence of the accident causing the injury and permitting the injured person notwithstanding his failure in an action for negligence to ask for compensation provided the action is brought within the time limited by the Act for taking proceedings, no compensation can be fixed by the Court in an action begun more than six months after the accident.

[*Cribb* v. *Kynoch, Ltd.* (No. 2), [1908] 2 K.B. 551, followed.]

APPEAL from the judgment of Stuart, J., dismissing the plaintiff's action for negligence and declining to assess compensation under the Workmen's Compensation Act.

The appeal was dismissed.

H. A. Mackie, for plaintiff, appellant.

G. B. Henwood, for defendant, respondent.

HARVEY, C.J.:—The plaintiff while operating a lath machine in the saw mill of defendants was injured by being struck in the eye whereby he lost the sight of his eye. The action is for damages for negligence and was dismissed by my brother Stuart, who came to the conclusion that no negligence had been shewn.

The lath machine in question consisted of several saws which sawed up into laths bolts of wood which being started by the operator under a feed roller were fed by it to the saw. The plaintiff was engaged in operating this machine at the feeding end, his work requiring him to place the end of the bolt of wood on the feeding table up immediately against the end of a bolt being fed under the feed roller so that there would be a continuous line of bolts passing through. To obtain the bolts to place on the table he was required to reach over to where they were, in which act he would bend his whole body. While in the act of reaching the accident occurred. No one saw it but the plaintiff and naturally he can give no very clear account of it, but the conclusion apparently reached by the only expert called by the plaintiff, and which seems, on the evidence, to be probably correct, is that for some reason the bolt was forced back by the saws under the feed roller (the plaintiff says it was

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crushed up and the roller jumped up) and a splinter from it driven with such force as to cause the injury.

The plaintiff was not an expert and spoke little English, but when he was employed the foreman pointed out to him the danger of bolts becoming fast and shewed him how to raise the roller and pointed out the necessity of keeping out of the way when they were forced back. After he was employed each day the foreman watched his work, though apparently he found it unnecessary to give him any further instructions. After the accident a shield was placed on the side of the roller which, no doubt, deflected many splinters, but if the accident were caused as above indicated it could have had no effect in preventing this accident even if it had been in place then. A heavier weight was placed on the roller also, but it is doubtful whether it could have had any effect for, from the evidence, it is clear that there is no way of avoiding bolts becoming stuck and being driven back.

The expert mentioned says:—

> A lath machine, the best you can do with them, the best guard you can put on, they are a dangerous machine to deal with.

And again:—

> Q. That is one of your principal dangers, being in the way when a bolt flies out?
>
> A. Yes.

He also says:—

> If I were operating that machine, or even managing it, I would put a shield, probably a 16-inch shield, right on that place you see there, and I would let it go down so low that if the feed did rise it would catch the flying parts driven back by the saw.

Whatever the witness intended, it is apparent that, since a sufficient space must be left open to permit the bolt to pass in and also to let it pass back when it gets fast, no shield could guard that space which the evidence satisfies me is most probably the space through which the splinter that did the injury came.

In *McArthur* v. *Dominion Cartridge Co.*, [1905] A.C. 72; *Dominion Natural Gas Co.* v. *Collins*, [1909] A.C. 640, and *Caledonia Milling Co.* v. *G. T. R. Co.*, 14 O.W.R 394, the jury had found negligence causing the injury and the Court held that there was evidence to justify the finding. The question I have to consider here is not whether there is evidence which would justify a jury's finding of negligence, but whether on the facts of the case I, as a juror, would conclude that the defendants had been guilty of negligence from which the injury resulted, and I have no hesitation in saying that I quite agree with the trial Judge that the evidence does not establish negligence. I do not find it necessary to consider whether any of the suggested improvements ought reasonably to have been made by the defendants before the accident for, in my opinion, even if they

had been made they would have had no effect in preventing the accident. The defendants appear also to have discharged their duty in the instructions and oversight they gave to the plaintiff. The case appears to me to be an even stronger one in the defendants' favour than that of *Williams* v. *Western Planing Mills Co.* (1910), 16 W.L.R. 13, in which this Court held there was no negligence shewn, in that, in the present case, a more probable inference of the nature of the accident can be made.

Having failed to establish negligence the plaintiff's counsel applied under sec. 3, sub-sec. 4, of the Workmen's Compensation Act (ch. 12, 1908). This application was refused on the ground that the Court's jurisdiction to fix compensation was limited to cases in which the action had been brought within six months of the date of the accident, being the time prescribed by sec. 4 within which the claim for compensation under the Act is to be made. The Act distinctly provides (sec. 3, sub-sec. 2(6)) that an injured person may either claim compensation under the Act or may claim damages for negligence without regard to the Act. It also provides (sec. 3, sub-sec. 4), that, if having elected the second alternative and having failed on that, he may still ask for compensation, but only on the conditions mentioned, namely, if the action is brought within the time limited by the Act for taking proceedings. The only limit of time fixed by the Act is that in the next section, which provides for a notice of accident, as soon as practicable, and a claim for compensation within six months. In *Powell* v. *Main Colliery Co.*, [1900] A.C. 366, it was held that the making of an informal claim for compensation within six months was a sufficient commencement of proceedings and in *Cribb* v. *Kynoch, Ltd.* (No. 2), [1908] 2 K.B. 551, the opinion was expressed that in an action such as this begun after the six months the Judge would have no jurisdiction to fix compensation under the Act, the English Act being in the same terms. It is urged that this opinion being *obiter* is not binding on this Court. I should hesitate, however, to disregard the opinion of the Judges of the Court of Appeal, even though I held a different view, but I have no hesitation in accepting it when it appears to me the only reasonable interpretation that can be given to the wording of the provision.

The appeal should be dismissed with costs.

SCOTT and SIMMONS, JJ., concurred with HARVEY, C.J.

BECK, J.:—The learned trial Judge stated that he rests his judgment on the question of negligence on the ground that "it was not established to his satisfaction that the accident would not have occurred if the guard, which is now there, had been there when the accident happened." The learned Judge in an earlier place says that with a good deal of hesitation he had

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come to the conclusion that the defendant did provide reasonably safe machinery. It seems, however, that in coming to this hesitating conclusion the learned Judge took a view with regard to the duty of operators of dangerous machinery which, with due respect, is in my opinion incorrect. The guard which the learned Judge refers to was attached to the machinery after the accident. He was not satisfied that such a guard as that would have prevented the accident. It is, however, particularly to his view, expressed as follows, that I take exception. He adds:—

> Indeed, so far as the evidence goes it was not shewn that in this country, at any rate, it was ever the custom to have guards on such machinery as that. There was some reference to guards being used in Montana, but the evidence in regard to the custom in Ontario and Alberta is that it is not common upon such a machine—is not used.

The evidence is that a shield similar to the one now attached to the machine, but higher, and covering also the greater portion of the feed wheel next to the operator, has been in use for 15 years or so in Montana and is insisted upon. The learned Judge in referring to this evidence in no way suggests that he does not believe it. He takes it as correct and says the evidence is that such a guard is not used in Ontario or Alberta. This evidence is to my mind of the vaguest character as to Ontario, and covers one or two miles in remote parts only. But it seems to me that the machine, being obviously a dangerous one, and known devices being in use for the protection of workmen for a sufficient length of time to become generally heard of, it is the duty of an employer of ordinary prudence to make use of them, and the fact of his not investigating and keeping up to date in his knowledge of such things should not excuse him, nor the fact that in some localities such improvements are not yet adopted. Feeling that the learned trial Judge gave too much force to the evidence—which, to my mind, was very vague and unsatisfactory—of the alleged custom in Ontario and Alberta against the use of shields on such machines as that in question here, and seeing that even so his conclusion was arrived at with hesitation, I venture to differ from him in his finding that the defendant did provide reasonably safe machinery. He goes on to say that he has the gravest doubt whether a guard would have prevented the accident. In the first place it seems he was referring only to such a guard as was afterwards put on, and not to such a guard as the witness who spoke of what was common in Montana described.

I would hold the defendant responsible on this ground: the machine was obviously dangerous; the workman (the plaintiff) was inexperienced; a means for protecting the operator had long been known and in use; the employer ought to have known of it and used it; it would in all probability have prevented the acci-

dent; the accident occurred in a moment and it is not possible to say with certainty what was the cause of the accident; under these circumstances the onus is on the defendant to relieve himself of responsibility: *McArthur* v. *Dominion Cartridge Co.*, [1905] A.C. 72; *Dominion Natural Gas Co.* v. *Collins*, [1909] A. C. 640; *Caledonia Milling Co.* v. *Grand Trunk Railway Co.*, 14 O.W.R. 394; *Lindsay* v. *Davidson*, 17 W.L.R. 588, 19 W.L.R. 433.

In my opinion, therefore, the appeal should be allowed and judgment entered for the plaintiff with costs in the Court below and the costs of the appeal and the case be sent back for an assessment of damages.

As the majority of the Court take the view that the appeal should be dismissed, I express an opinion on the other branch of the case with which, in that event, it is necessary the Court should deal.

The learned trial Judge having dismissed the action counsel for defendant then applied to the Judge to fix compensation under the Workmen's Compensation Act (ch. 12, 1908). This was refused on the ground that compensation can be fixed in such a case (sec. 3, sub-sec. 4) only if the action which is dismissed is brought "within the time hereinafter in this Act limited for taking proceedings," and was not brought within that time. Section 4 of the Act provides that "proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless notice in writing of the accident has been given as soon as practicable after the happening thereof, and before the workman has voluntarily left the employment in which he was injured and unless the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing the injury." Then follow provisions which declare that some of a variety of circumstances will cure the want of, a defect or an inaccuracy in the notice. It was virtually admitted on the argument that the plaintiff was entitled to the benefit of these curative provisions with regard to notice, and the argument was virtually directed to the point that "the claim for compensation" was not made within six months from the occurrence of the accident.

Powell v. *The Main Colliery Co.*, [1900] A.C. 366 (H.L.), held that "the claim for compensation" means, not the initiation of proceedings before the tribunal by which compensation is to be assessed, but a notice of claim for compensation given to the employer.

Lowe v. *M. Myers & Sons*, [1906] 2 K.B. 265 (C.A.), held that "the claim for compensation" need not even be in writing.

Thompson v. *Goold & Co.*, [1910] A.C. 409 (H.L.), held that the claim need not specify any sum.

Section 4, provision (*c*), provides that failure to make a

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claim (*i.e.*, a claim for compensation as distinguished from notice of accident) within the period above specified (*i.e.*, six months from the occurrence of the accident) shall not be a bar to the maintenance of such proceedings (*i.e.*, "proceedings for the recovery under this Act of compensation") if it is found that the failure was occasioned by mistake, absence from the province or other reasonable cause: see *Roberts* v. *The Crystal Palace Football Club*, 3 Butt. W.C.C. 51 (C.A.).

Cribb v. *Kynoch, Ltd.* (No. 2), [1908] 2 K.B. 551 (C.A.), held that the latter proviso could not be given effect to, so as to sustain proceedings under the Act after the dismissal of an action for negligence in respect of the same occurrence.

It would seem that all the members of the Court were of opinion that, as was the case there, the action having been brought after the lapse of six months from the occurrence of the accident, the plaintiff had had no right to have an assessment of compensation under the Act made in the action inasmuch as that right is given only under sec. 3, sub-sec. (4), wherein that right is limited "if, within the time hereinafter in this Act limited for taking proceedings (*i.e.*, under the Act) an action is brought to recover damages independently of the Act. The question was not before the Court whether the words "within the time hereinafter . . . limited" refer solely to the words "six months" occurring in sec. 4, or embrace also the words of the proviso (*b*) (which I have already quoted) to that section, whereby it is provided that the failure to make a claim "within the period specified above shall not be a bar, if it is found (as a fact) that the failure was occasioned by mistake, etc. With some little hesitation I have come to the conclusion that in order to entitle a plaintiff to an assessment of damages in an action, the action must be brought within six months of the occurrence of the accident, and that there is not in the Act anything which for that purpose extends that period or enables it to be extended. The plaintiff's action was brought after the lapse of six months from the occurrence of the accident, and on this ground, therefore, I concur in the opinion that he cannot succeed in his claim for compensation under the Act.

Appeal dismissed.

MEMORANDUM DECISIONS.

Memoranda of less important Cases disposed of in superior and appellate Courts without written opinions or upon short memorandum decisions and of selected Cases decided by local or district Judges, Masters and Referees.

LUM YET v. HUGILL.

Ontario High Court, Cartwright, M.C. January 10, 1912.

PLEADINGS (§ II L—252)—*Statement of Claim—Negligence.*]—This action was brought to recover damages for the death of the plaintiff's son, who was admittedly killed by the defendant's motor-car. The plaintiff by the statement of claim alleged negligence on the part of the defendant; and the defendant moved, before pleading, for particulars of the alleged negligence. The Master said that the plaintiff need only set out in his statement of claim the material facts on which he relies, and which, if not disapproved or otherwise sufficiently answered, would entitle him to judgment. The provisions of 6 Edw. VII. ch. 46, sec. 18 (O.), throws upon the defendant, in such a case as the present, the onus of disproving negligence on his part. See Verral v. Dominion Automobile Co., 3 O.W.N. 108, 24 O.L. R. 551. The plaintiff can, therefore, rely on the doctrine of res ipsa loquitur, and is not bound in any way to account for the fatal injury to his son. See Smith v. Reid, 17 O.L.R. 265. It was probably unnecessary to allege negligence; and, though this was done, particulars need not be given. See Con. Rule 279. Motion dismissed; costs in the cause. J. A. Macintosh, for the defendant. E. F. Raney, for the plaintiff.

WARFIELD v. BUGG.

Ontario High Court, Falconbridge, C.J.K.B. January 10, 1912.

EVIDENCE (§ II E F—196)—*Contract—Interest in Company-shares.*]—The plaintiff, an engineer, claimed an interest in 100,000 shares of the capital stock of the People's Railway Company, under an alleged agreement between him and the defendant Bugg. The learned Chief Justice said that the plaintiff had failed to discharge the burthen of proof; and, this finding was made without reference to demeanour of witnesses, as to which there was nothing to choose. The agreement set up by the plaintiff was one of manifest impropriety, of doubtful legality, and, in the opinion of the Chief Justice, quite unenforceable. Action dismissed. R. S. Robertson, for the plaintiff. J. A. Scellen, for the defendants.

WARFIELD v. PEOPLE'S RAILWAY CO.

Ontario High Court, Falconbridge, C.J.K.B. January 10, 1912.

CONTRACTS (§ II D 4—185)—*Remuneration for Services—Company-shares Received.*]—Action to recover $3,099.80 and in-

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terest for services as engineer of the defendants. The learned Chief Justice said that the decision in the previous case practically disposed of this one, even if the plaintiff should succeed in establishing that these defendants ever hired him or otherwise became in law bound to pay him, because he must give credit for the $3,000 stock received by him. The defendants held an assignment from the Central Securities Company; but the Chief Justice did not give effect to their claim of a balance in their favour. The action and the counterclaim should both be dismissed. In view of the relations of the parties and their peculiar methods of dealing, no costs were given to any one. R. S. Robertson, for the plaintiff. J. A. Scellen, for the defendants.

MANNHEIMER v. FORMAN.

Ontario Divisional Court, Boyd, C., Riddell and Sutherland, JJ. January 10, 1912.

SALE (II A—27)—*Action for price — Defence — Counterclaim—Appeal—Costs.*]—Appeal by the defendant from the judgment of the County Court of the County of York, in favour of the plaintiff, for the recovery of $102.10, in an action for a balance of the price of goods sold. The defendant set up that the goods received were not according to contract, and counterclaimed for $200 damages. The Court dismissed the appeal with costs. RIDDELL, J., dissented as to costs, saying that, while he thought that the defendant had not been well treated, he could not see that he had made out a case for the allowance of his appeal—and the appeal should be dismissed; but, under all the circumstances, there should be no costs of the appeal. S. G. McKay, K.C., for the defendant. G. M. Clark, for the plaintiff.

CALDWELL v. HUGHES.

Ontario High Court, Cartwright, M.C. January 31, 1912.

PLEADING (§ I J—65)—*Statement of Defence and Counterclaim — Postponement till after Examination of Defendant for Discovery — Leave to Examine before Pleading to Counterclaim.*]—Motion by the plaintiff for further particulars of the statement of defence and counterclaim. The action was brought by the plaintiff, as administratrix, to obtain a settlement for the business done by her deceased husband with the defendant. The whole matter was one of account, and, the Master said, would probably be referred, unless some settlement should be reached by the parties. The statement of defence and counterclaim consisted of 30 paragraphs, and was very unusually minute and detailed. Particulars were demanded of 17 of these, and had

been furnished as to some of them. There was no written agreement between the deceased and the defendant. The Master said that the best disposition of the motion would be to let it stand until after examination of the defendant for discovery. The plaintiff could plead now, and have leave to amend afterwards, if necessary, or, if preferred by the plaintiff, the examination could be had before pleading, following the principle of Townsend v. Northern Crown Bank, 1 O.W.N. 69, 19 O.L.R. 489. It was to be remembered that particulars at this stage were asked for the purpose of pleading; and, the plaintiff not being aware of the facts, was entitled to all necessary information, and this could be best obtained by discovery. H. E. Rose, K.C., for the plaintiff. D. Inglis Grant, for the defendant.

RE SOLICITOR.

Ontario High Court, Cartwright, M.C. February 5, 1912.

SOLICITORS (§ II—21)—*Change—Right of Majority of Administrators to Choose Solicitor for Estate — Solicitor's Charges.*]—Motion by two administrators for delivery of papers by a solicitor. The solicitor was originally retained by three administrators. Two of them afterwards employed another solicitor, but the remaining administrator still adhered to the first choice, and forbade the delivery of the papers and documents of the deceased to the new solicitor. The original solicitor's costs had been paid, as he admitted, except the charge for publication of an advertisement for creditors. This, the Master thought, should be paid, as it was a proper step and necessary for the protection of the sureties. The Master said that he had not found any authority on the question, and none was cited. But it would seem on principle that the will of the majority must prevail. The solicitor would probably act on this without the formality of an order. In that case, there would be no costs of this motion, leaving the matter to be dealt with when the estate should be wound up and the compensation of the administrators settled. H. T. Beck, for the applicants. H. J. Martin, for the solicitor.

SKILL v. LOUGHEED.

Ontario High Court, Cartwright, M.C. February 5, 1912.

COSTS (§ I—14)—*Action Brought by Creditor in Name of Assignee for Creditors—Creditor out of the Jurisdiction—Affidavit of Assignee—Dispute as to Place of Residence.*]—Motion by the defendant Frances M. Lougheed for an order for security for costs. By an order made by a County Court Judge on

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the 6th December, 1911, a creditor of the defendant J. Lougheed was authorised (at his, the creditor's, own risk and expense) to bring this action, in the name of the assignee, to set aside a conveyance of land made by the defendant J. Lougheed to his wife, the defendant Frances M. Lougheed. The order provided that the assignee should be indemnified by the creditor; and this had been done. The main support of the motion was an affidavit from the assignee and nominal plaintiff. He had already refused to bring this action, and was supported in that view by the three inspectors of the estate. In his affidavit, he said that the assignment from Lougheed was made on the 17th June, 1908, five months after the conveyance attacked in the present action. He gave no information as to what dividend was paid, or if the estate had been wound up. He said that for some time past he had been employed as a traveller in Western Canada, and that his "permanent place of residence is at Winnipeg, so far as a traveller can have a permanent place of residence." This affidavit was made in Toronto, to which, he said, he returned occasionally, but at rare intervals, and he was not transacting any business in Ontario. He also said that he had no property in Ontario, and had no interest in the litigation, and was not in a position to pay and did not intend to pay any costs of the same. The affidavit in answer of the plaintiff's solicitor stated that the moving creditor had indemnified the plaintiff, and also said that Mr. Skill was and for a long time had been a resident of Toronto. The Master said that the matter came up in rather an unsatisfactory way, and one which raised an uncomfortable suspicion that Skill was not unwilling to hamper the creditor. Upon the special facts, the best disposition of the motion would seem to be to direct the plaintiff to assign to the defendant Frances M. Lougheed the indemnity which the plaintiff had from the creditor, assuming that it would give her as much protection as security according to the usual practice of the Court. Failing this, it would seem right to require security to be given in the usual way, as the creditor resided at Montreal. Costs in the cause. J. W. Mitchell, for the applicant. George Kerr, for the plaintiff.

COYNE v. METROPOLITAN LIFE INSURANCE CO.

Ontario High Court, Cartwright, M.C. February 6, 1912.

COSTS (§ I—14)—*Plaintiff out of the Jurisdiction—Con. Rule* 1198(*a*)—*Moneys in Hands of Defendants—Reduction of Amount of Security.*]—Motion by the defendants, under Con. Rule 1198(*a*), for an order requiring the plaintiff to give security for the costs of the action, which was brought to recover the amount of a policy on the life of the plaintiff's husband. The

Master said that the plaintiff, after her husband's death, left Ontario and went to British Columbia. She made her affidavit of documents at Vancouver on the 17th October. So far as appeared, she had never returned to Ontario; and the affidavits filed in support of the motion made it reasonably certain that she did not intend to do so. The policy was for $1,000, and the plaintiff's husband died 13 months after it was issued. Only $43.65 was paid in premiums during the husband's life. The Master said, with regard to the amount of security, that it might be a question whether the defendants, if successful, would be bound to return the premiums. That could not be decided now; but the plaintiff would be entitled to the benefit of the sum of $43.65; and should be allowed to proceed with the action on paying into Court $150 or giving a bond for $300, in the usual time. Michaelsen v. Miller, 13 O.W.R. 422, referred to. F. S. Mearns, for the defendants. H. H. Davis, for the plaintiff.

BRODIE v. PATTERSON.

Ontario High Court, Cartwright, M.C. February 9, 1912.

MORTGAGE (§ VII C—155)—*Redemption—Extension of Time for.*]—Motion by the owner of the equity of redemption in certain islands in Lake Superior, valued by him at $50,000, to extend the time for redemption until the 9th March next, with a view to enable him to redeem by a fresh loan or a sale. By the report, $12,125.31 was found to be due. The Master said that a similar motion was successfully made, not only once but three times, in Imperial Trusts Co. v. New York Securities Co., 9 O.W.R. 45, 98, 730. So, too, in Mitchell v. Kowalsky, 14 O.W.R. 792. In the latter instance the time was extended until the 4th February, 1910, and again on that date to the 14th March. Then, as in the Imperial Trusts case, the mortgage was paid off. The mortgagees in each case got their money with all proper and just allowances and costs, and the mortgagors either received a substantial balance, as in the first case, or recovered the property, as in the other. The only question, therefore, was, on what terms should the reasonable request of the mortgagor be granted? Here the facts, as stated on the argument, were more favourable to the application than were those of the two reported cases. The mortgage here was not of such long standing as that of the Imperial Trusts Company, and it had been reduced by the liquidation of a collateral security. An order was, therefore, made extending the time as asked; interest to be paid at the rate of 5 per cent. upon the aggregate amount fixed in the report, which would be settled and inserted in the order. To this would be added the costs of

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this motion, fixed at $20—making a total of $12,200. J. B. Clarke, K.C., for the applicant. J. J. Maclennan, for the plaintiff.

WEBER v. BOWMAN.

Ontario High Court, Sutherland, J. February 10, 1912.

WATERS (§ II D—95)—*Dam—Obstruction of Stream—Flooding Lands — Damages — Injunction.*] — Action by a farmer against a miller for damages for the obstruction of the waters of a stream flowing through the plaintiff's land, and for an injunction. The learned Judge finds, upon the evidence, that the dam constructed by the defendant in 1911 is higher than either of the former dams existing at or near the locus of the defendant's dam. He also finds that the plaintiff's lands have, since the erection of the dam by the defendant, and in consequence of its being higher than the former dams, been subjected to a greater quantity of water than would naturally come there; and that, in consequence, the plaintiff has suffered damage. The damage was confined to 7 or 8 acres of land, worth about $6 an acre. Judgment for the plaintiff for an injunction restraining the defendant from obstructing the flow of the stream to such an extent as to overflow the land mentioned, and for damages assessed at $25, subject to a reference, if either party objects to that amount; in which case the costs of the reference will be in the discretion of the Master. The plaintiff to have his costs of the action on the County Court scale without any right of set-off to the defendant. A. B. McBride, for the plaintiff. W. M. Cram, for the defendant.

RICHARDS v. CARNEGIE.

Ontario Divisional Court, Boyd, C., Latchford, and Middleton, JJ. February 12, 1912.

TRESPASS (§ I—5)—*Damages—Right to Possession—Landlord and Tenant.*]—An appeal by the plaintiff from the judgment of the County Court of the County of Bruce, dismissing an action for damages for trespass alleged to have been committed by the defendant upon lands demised to the plaintiff. The judgment of the Court was delivered by BOYD, C., who said that, having read the evidence, he thought the Judge made a right disposition of the case by dismissing it. The whole claim was of a trumpery kind, at most being for some possible damages that the plaintiff might have sustained by not engaging in gathering ashes to put in an ash-heap on the premises for thirteen days. There was no evidence that there were any ashes to be gathered during that time, or that the plaintiff could have

got any ashes. Then the plaintiff's case failed as to his being legally in possession of the land. There was no evidence of a yearly holding. Johnson, who let the plaintiff on at first, had no authority to act for the owner; but, being in charge of the place to make a sale of it, he allowed the plaintiff, out of compassion, to gather ashes on it for one year at $5. When this was told to the owner, he objected, and said that the plaintiff must be ordered to leave. This was in the summer of 1910, and after the expiry of the year. The plaintiff, however, kept on till the end of September, and then paid rent for the extra few months, and took a receipt on the 28th September, expressed to be for rent up to the 30th September, 1910. Carnegie, by his act in receiving the money, validated that extent of holding, no doubt; but what was done was against his wish, and could not be carried beyond the very letter of what was done. There was nothing to go to the jury at the close of the plaintiff's case, and it certainly was not strengthened by the defence. Appeal dismissed with costs. G. H. Kilmer, K.C., for the plaintiff. O. E. Klein, for the defendant.

ALLEN v. GRAND VALLEY R. CO.

Ontario High Court, Cartwright, M.C. February 13, 1912.

DISCOVERY (§ IV—20)—*Examination of Foreign Defendant on Commission—Con. Rule 477—Payment of Conduct-money to Bring Defendant to Ontario.*]—Motion by the plaintiff for a commission to examine the defendant Verner at New York, for discovery. It was contended, for the defendant Verner, that the Master had power, under Con. Rule 477, to order that this examination should take place in Toronto, and that the plaintiff should pay the necessary conduct-money. The Master said that there was no authority for such an order. It did not seem reasonable that a party exercising his undoubted right should be required to advance money to save expense and inconvenience to the opposite party and his legal advisers. The Rule admitted only of such orders as were made in Lick v. Rivers, 1 O.L.R. 57; Lefurgey v. Great West Land Co., 11 O.L.R. 617; and Cox v. Prior, 18 P.R. 492. It was stated on the argument that the defendant Verner would sooner attend at Toronto in any case. If so, the Master said, the defendant must do so at his own expense meantime. If this was agreed to, the motion would be dismissed; costs in the cause. Otherwise, the order must go, on the usual terms. G. H. Sedgewick, for the plaintiff. Grayson Smith, for the defendant Verner.

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HARRISON v. KNOWLES.

Ontario High Court, Cartwright, M.C. February 13, 1912.

COSTS (§ I—14)—*Property in Jurisdiction — Onus.*]—Motion by the plaintiff to set aside a præcipe order for security for costs. The motion was based on the ground that the plaintiff had adequate assets in the jurisdiction. It was supported only by the affidavit of the plaintiff's solicitor, which stated that the action was on promissory notes given for the purchase of an automatic lithographing press, said to be worth at least $1,000. The defendant by his affidavit admitted that the notes given in payment were overdue, but stated that they had not been paid because the machine was not complete and was not, and, in his opinion, never would be, able to do the work which it was warranted to do. It was also subject to the usual lien agreement, which the defendant conceded gave the right to the plaintiff to retake possession at any time and to remove out of the province. The Master said that the onus was on the applicant, and he did not think it was satisfied. A chattel of that kind, in such a doubtful state of efficiency, could not be held to satisfy the conditions in Bready v. Robertson, 14 P.R. 7; Feaster v. Cooney, 15 P.R. 290; Daniel v. Birkbeck Loan and Savings Co., 5 O.W.R. 757. Motion dismissed with costs to the defendant in the cause. O. H. King, for the plaintiff. S. G. Crowell, for the defendant.

BANK OF OTTAWA v. BRADFIELD.

Ontario High Court, Sutherland, J. February 13, 1912.

BILLS AND NOTES (§ III B—63)—*Accommodation Indorsement—Mental Condition of Indorser—Inability to Appreciate Transaction—Knowledge of Holders of Notes—Fraud and Undue Influence of Maker of Notes—Counterclaim—Moneys Applied by Bank on Indebtedness of Maker—Evidence.*]—Action for the balance due upon two promissory notes indorsed by the defendant for the accommodation of his son. The defendant was represented by a guardian ad litem appointed by the Court. In the statement of defence it was alleged that, if the defendant did at any time indorse the promissory notes sued on, he was, at the time he so indorsed, of unsound mind and incapable of making any contract or understanding the nature of what he was doing, as the plaintiffs well knew. The defendant counterclaimed for moneys deposited by him with the plaintiffs which he alleged was wrongfully applied by the plaintiffs towards the payment of notes made by his son. The learned Judge, after setting out the facts at length, and referring to portions of the evidence, said that he had come to the conclusion, upon the evidence, that the defendant had been failing mentally for some

years past, and had gradually become incapable of intelligently appreciating business matters. It was fairly well established that, at all events after the death of another son in 1908, the defendant was not competent to understand a business transaction; and the finding must be that anything the defendant did, in the way of signing or indorsing notes or renewals, consents or waivers, in connection with the notes in question, was done at times when his mental condition was such that he could not understand or appreciate what he was doing or the liability he was incurring. It was charged on behalf of the defendant that Graham, the plaintiffs' manager, induced the defendant to sign or indorse the renewal note dated the 29th July, 1909, for $2,437.45. The learned Judge said that he was satisfied from the evidence that Graham had had opportunity before this of learning and that he knew that the defendant was not in such a mental condition as to enable him to transact business or realise the liability he was incurring. And it was equally clear, from the evidence, that, when the note dated the 25th November, 1909, for $2,500, was indorsed by the defendant, he was not mentally fit to do business or understand the nature of the transaction. It was his son, H. H. Bradfield, who apparently induced him to indorse this note; and he did so knowing of his father's incapacity; and the defendant's indorsement of that note and his indorsement of its subsequent renewals down to the one now in question were obtained by the son by fraud and undue influence and in each case when the defendant was not competent to transact business or understand the liability he was incurring. Reference to Re James, 9 P.R. 88; Weinbach's Executor v. First National Bank of Easton, 21 Am. Law Reg. N.S. 29. Action dismissed with costs. As to the counterclaim, the learned Judge said that, in view of his determination of the plaintiffs' rights against the defendant in connection with the notes in question, they had no authority or right to appropriate the sum of $2,774.69, deposited with them by the defendant, and apply it on the notes; and the defendant was entitled to judgment for that amount and interest against the plaintiffs. The defendant was also entitled to recover from the plaintiffs two sums of $623.10 and $552.45 obtained by the plaintiffs from the assignee of the son's estate, with interest. The defendant also asked that a sum of $2,800 withdrawn by the plaintiffs from the defendant's account, without his authority, and applied in payment of a promissory note of the son, on or about the 9th May, 1908, should be repaid to him. As to this, the learned Judge said that, while he was not at all certain that the defendant was not, even then, so unfit to transact business as to render it impossible for him, with any true appreciation of what he was doing, to consent to the withdrawal of his money to pay the note of another, the evidence

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was not so clear as to enable him to determine that satisfactorily. And so, as to this portion of the counterclaim, the defendant must fail. The defendant to have costs of the action and of the portions of the counterclaim upon which he succeeded; no costs to either party of the portion of the counterclaim upon which the defendant failed. D. B. Maclennan, K.C., for the plaintiffs. R. A. Pringle, K.C., for the defendant.

CANADIAN KNOWLES CO. v. LOVELL-McCONNELL CO.

Ontario High Court, Cartwright, M.C. February 14, 1912.

DISCOVERY AND INSPECTION (§ I—2)—*Examination of Officer of Defendant — Scope of Examination — Production of Books — Evidence — Admissibility.*] — The plaintiffs, having issued a commission to examine witnesses at New York, one of them being the manager of the defendant company, and proposing to ask certain questions and to ask for production of the books and records of the defendant company, moved for a direction as to their right to have such discovery. The plaintiffs, by the statement of claim, alleged an agreement with the assignor of the plaintiffs to appoint him sole selling agent of the defendants for Canada until the 1st April, 1911, and to deliver to him $10,000 worth of their products, and that this contract was broken by the defendants in both respects; and claimed $5,000 damages. The defendants, by their statement of defence, specifically denied these material allegations and put the plaintiffs to the proof thereof; and also alleged failure on the part of the plaintiffs to comply with the terms of the contract. The Master said that the matter came before him now, as he understood, as if the questions had been asked and the witness had refused to answer or make production. If the examination was by way of interrogatories, there would certainly be no power to limit them: see Toronto Industrial Exhibition Association v. Houston, 9 O.L.R. 527, and cases cited; and the same principle applied to the present case. The Master thought also that the plaintiffs were entitled to shew that their allegations which the defendants had denied were true, and to prove by the defendants' books (if it were the fact) that sales were made in Canada prior to the 1st April, 1911, and subsequent thereto also—the latter inquiry being relevant to the damages, if the Court should hold the plaintiffs entitled to recover. It was said by the defendants' counsel that the plaintiffs should not be allowed to investigate the defendants' business and find out the names of their customers; but this objection could not prevail to defeat the plaintiffs' right to such discovery as might assist their case. The amount of sales made by the defendants and the prices obtained would be the best evidence

as to the damages, if any, which the plaintiffs could recover. Such questions should be answered and information given, leaving it to the trial Judge to pass on the question of admissibility, as was said by Denman, C.J., in Small v. Nairne (1849), 13 Q.B. 840. M. L. Gordon, for the plaintiffs. W. Proudfoot, K.C., for the defendants.

CLARKE v. BARTRAM.

Ontario High Court, Middleton, J., in Chambers. February 14, 1912.

PARTIES (§ I B—55)—*Addition of Plaintiff—Assignment—Joinder of Parties and Causes of Action.*]—An appeal by the plaintiff from an order of the Master in Chambers refusing to add Thomas Crawford as a co-plaintiff. MIDDLETON, J., said that Clark might have a cause of action or might not; it would be premature to discuss that question; but from what was said by Clarke during the examination of Crawford, it was clear that what was sought was to add Crawford so that he might in this action repudiate a release which, it was said, he gave Bartram of the personal claim against him. Crawford executed the assignment to Clarke, not for the purpose of enabling Clarke to attack Bartram upon any such ground, but to enable Clarke more effectually to assert his own claims; and Crawford did not now assert that he was in any way defrauded by Bartram; but, as Clarke said: "He does not know; when the facts come out it will shew he has a cause of action." The suggested cause of action is not one that can be properly joined with the main claim of Clarke. If the assignment from Crawford to Clarke was supposed to convey this cause of action, it, no doubt, failed to carry out this intention; and Clarke cannot successfully set up this claim; but he should not now be aided by the Court adding a plaintiff in an action brought by one without title—the plaintiff who alone can sue—particularly when this would result in an improper joinder. Appeal dismissed, with costs to the defendant in any event of the cause. J. Shilton, for the plaintiff. F. E. Hodgins, K.C., for the defendant.

HEWITT ALLEN CO. v. ADAMS.

Ontario High Court, Middleton, J. February 17, 1912.

INJUNCTION (§ II—134)—*Claim to Hay—Remedy in Damages.*]—Motion for an injunction to restrain the defendant until the trial from disposing of certain hay. The learned Judge said that the case appeared to him to be one in which damages were the appropriate remedy, and that there was no title in the plaintiffs to the specific hay. So that the parties might not be prejudiced, he did not now determine this, and enlarged

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the motion to the trial, which, as arranged and as now directed, was to take place at the Brockville sittings on the 12th March—and he made no order meanwhile. Grayson Smith, for the plaintiffs. W. E. Raney, K.C., for the defendant.

GUEST v. LINDEN.

Ontario High Court, Cartwright, M.C. February 21, 1912.

MECHANICS' LIEN (§ VIII—75)—*Enforcing Lien—Defendant not Appearing—Judgment of Official Referee—Motion to Set aside—Jurisdiction of Master in Chambers—Con. Rules* 42(17)(*d*), 778—*Jurisdiction of Referee.*]—In this proceeding under the Mechanics' Lien Act, a motion was made by the defendant to set aside a judgment given by an Official Referee on a trial before him, at which the defendant did not appear. It was objected that the Master had no jurisdiction to entertain the motion. Con. Rule 42 defines the powers of the Master in Chambers, and sub-clause (*d*) of clause 17 of that Rule excepts from his jurisdiction "staying proceedings after verdict, or on judgment after trial or hearing before a Judge." No mention is made of setting aside such a judgment, in any case, even by consent. The Master said that, if the defendant here had any remedy, it would seem to be under Con. Rule 778. The power given thereby could probably be exercised, in a proper case, by the Official Referee. See sec. 34 of the Act. Here the ground of attack was, that no written notice of trial was served, as required by the Act. It would be for the Referee to say whether notice was served, and, if not, what relief should be given to the defendant. Motion dismissed with costs, fixed at $10, to be added to the plaintiff's claim. T. Hislop, for the defendant. R. D. Moorhead, for the plaintiff.

CARRY v. TORONTO BELT LINE R. CO.

Ontario High Court, Cartwright, M.C. February 21, 1912.

DISCOVERY AND INSPECTION (§ I—2)—*Production of Documents—Action on Judgment—Inquiry as to Property of Judgment Debtors—Company—Production of Minute-books and Accounts.*] — Motion by the plaintiff for a further and better affidavit on production from the defendants. The action was on a judgment against the defendants, recovered on the 9th June, 1893, for a sum which, with interest, amounted to nearly $5,000 at the issue of the writ in June, 1911. The plaintiff claimed: (1) the appointment of a receiver; (2) full discovery by the defendants of their real and personal property; (3) a sale of the railway and

a reference to ascertain prior incumbrances; (4) a reference to ascertain value and amount of the property of the defendants exigible under the plaintiff's judgment. The defendants were incorporated by the Act 52 Viet. ch. 82 (O.) The affidavit already made by the secretary of the defendants produced only three documents: (1) agreement dated the 20th January, 1890, between the defendants and the Grand Trunk Railway Company; (2) agreement dated the 28th February, 1891, between the defendants and the Grand Trunk Railway Company; (3) mortgage deed of trust dated the 2nd April, 1890, between the defendants and two trustees. A copy of this last document was put in. It recited the agreement of the 20th January, 1890, and stated that it was as well a lease for forty years from the 1st July, 1891, to the Grand Trunk Railway Company, at a rent of $18,500, payable half-yearly, as an agreement with the Grand Trunk Railway Company to mortgage the property and franchise of the defendants to secure an issue of $650,000 first mortgage bonds, payable in forty years from date of issue, with interest at four per cent. half-yearly; and that, of these, $462,500 should be used by the defendants for the construction of the road (the interest on this at four per cent. being exactly $18,500). Reference to the Act of incorporation shewed that, by sec. 15, the above agreement had to be approved of at a special general meeting of the shareholders called for that purpose. The Master said that it seemed to follow from this that the defendants must produce their minute-books and all other material necessary to shew that the terms of the Act of incorporation in this respect were complied with. It was further contended by Mr. Gordon that the accounts of the defendants should also be open to his inspection. He supported this argument by the fact that the plaintiff asked, not only payment of his admitted judgment, but also the appointment of a receiver and discovery as to assets and liabilities, to enable the Court to see if it was a proper case for a receiver. He cited Bray on Discovery, pp. 571, 609, and cases cited; Yearly Practice (Red Book) 1912, vol. 1, p. 370. The Master said that the appointment of a receiver is a matter of discretion. Such a remedy is only granted on a proper case being made for the interference of the Court. On the principle that discovery extends to everything that may, not which must, assist the case of the applicant, it would seem that here the plaintiff is entitled to all such production and examination as will shew whether he has made out his case for the relief he asks, under any of the branches of the prayer for relief in the statement of claim. This is analogous to the examination of a judgment debtor, as pointed out in Bray, supra, pp. 570, 571, in the chapter intituled "Discovery in Aid of Execution." Order made for a better affidavit; costs to be in the cause, as the point was new so far as appeared. M. L. Gordon, for the plaintiff. Frank McCarthy, for the defendants.

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UNION BANK OF CANADA v. AYMER.

Ontario High Court, Cartwright, M.C. February 24, 1912.

JUDGMENT (§ I F—46)*Rule 603 — Application by Defendant for Reference under Con. Rule 607—Practice.*]—Motion by the plaintiffs for summary judgment under Con. Rule 603. The action was brought to recover $1,548.37 due by the defendant to the plaintiffs, as set out in the indorsement of the writ of summons and affidavit of the plaintiffs' manager filed on the motion. The defendant made affidavit that he believed that the above amount was not correct, without giving any reasons for this belief, and desired to have a reference to ascertain the amount. He did not deny the affidavit of the manager that he (the defendant) "repeatedly admitted his liability in respect of the indebtedness sued for herein." The Master said that all that the defendant was entitled to know could be found out on cross-examination of the manager upon which books and vouchers would be produced. There was as yet no defence disclosed under Rule 607. This was all that the defendant could ask for; and the motion would be adjourned for that purpose. A reference is not to be had in those cases merely because the defendant wishes for it. The other party is not to be put to the resulting expense and delay without some good reason being shewn for such a proceeding. A. H. F. Lefroy, K.C., for the plaintiffs. F. J. Hughes, for the defendant.

DOMINION BELTING CO. v. JEFFREY MANUFACTURING CO.

Ontario High Court, Cartwright, M.C. February 24, 1912.

PARTIES (§ III—124)—*Claim against for Relief over—No Connection with Main Action.*]—Motion, before appearance, by third parties to set aside the order for the issue of the third party notice. The facts, as shewn in the third party notice and the affidavit on which the order was granted were as follows. The defendants Archer and Gerow were sales agents of the defendants the Jeffrey Manufacturing Company. As such agents, they ordered from the plaintiffs belting to the value of $1,520, to fill an order which they had obtained from the third parties on the 23rd June, 1910. This order was filled, and the full price paid by the third parties to Archer and Gerow at the end of September, 1910, by the acceptance of a draft of Archer and Gerow, which was met at maturity. But the proceeds were never paid to the plaintiffs or to the Jeffrey company. There was no suggestion that the plaintiffs or the third parties were in any way aware of the precise relations between the Jeffrey company and their agents. Nor was there any defence set up which the third parties would be interested in supporting. All the Jeffrey company could say was, that Archer and Gerow had

no authority to pledge their credit to the plaintiffs, as appeared from the statement of claim. The Master said that there was here, admittedly, no case either of contribution or indemnity, and it did not appear to be one of other relief over. There was no question raised as between the Jeffrey company and the third parties which could be decided in the action as originally instituted. The Jeffrey company admitted by the affidavit of their solicitor that the plaintiffs had not been paid, though the price of the goods was paid to Archer and Gerow by the third parties. The question, therefore, as between the Jeffrey company and the third parties was simply whether this payment to Archer and Gerow discharged the third parties. This had nothing at all to do with the main action. It was the common case—who is to bear the loss occasioned by a defaulting agent? All that the Jeffrey company could usefully do would be to notify the third parties of the facts, and state that they did not recognise the payment to Archer and Gerow, so that the third parties might, if so advised, aid them in settling with the plaintiffs without the Jeffrey company being obliged to take action against the third parties. This did not require the formality of a third party notice. Order made setting aside the order and notice, with costs to the plaintiffs in any event and to the third parties forthwith after taxation, unless the defendants consent to their being fixed at $25. The Master referred to what he said in Wade v. Pakenham, 2 O.W.R. 1183, that the test is: "Are there any common questions or question between all the parties, which, if decided in favour of the plaintiff, would give the defendant a right to indemnity (or other relief) against the third party?" There was nothing in the present case to meet that condition. Grayson Smith, for the third parties. H. McKenna, for the defendants. E. C. Cattanach, for the plaintiffs.

TRADERS BANK OF CANADA v. BINGHAM.

Ontario Divisional Court, Falconbridge, C.J.K.B., Britton and Middleton, JJ. February 24, 1912.

CONTRACTS (§ II A—127)—*Sale of Goods—Agent for Sale or Purchaser—"Time of Sale."*]—Appeal by the defendant from the judgment of the Senior Judge of the County Court of the County of Middlesex, in favour of the plaintiffs, in an action upon a money claim assigned to them. The judgment of the Court was delivered by MIDDLETON, J., who said that the sole question was, whether, upon the true construction of the agreement of the 6th June, 1910, the defendant was merely appointed agent for the Folding Bath Manufacturing Company (the plaintiffs' assignors), or whether he became the purchaser of the baths in question. The County Court Judge

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took the view that, under that agreement, the defendant became the purchaser, and undertook to pay for the baths within thirty days from the date of invoice. The Court was unable to agree in this. By the agreement, the company gave Bingham the selling rights of the bath in question for certain counties; and Bingham agreed to pay $4 for each bath-tub supplied "to him or his agents, in cash at the time of sale, or notes or drafts due in thirty days from the date of invoice," and the company "to accept, in payment for bath-tubs, reliable customers' paper in settlement of accounts." Bingham was to be entitled to retain for himself the difference between the $4 and the price for which the bath was sold; and he further agreed to "handle" not less than twenty-five bath-tubs per month. The agreement was terminated, and Bingham was paid for all the baths sold by him, and desired to return the baths on hand. These had been tendered and refused. The Court thought that the agreement as a whole indicated that Bingham was merely an agent, and that the property in the tubs had not passed to him; and, upon the termination of the agency, it would follow that he had a right to return the goods on hand, and was not bound to keep and pay for them. The "time of sale" means the time of sale to a purchaser. The appeal should be allowed, with costs throughout. There was no appeal as to the counterclaim, but only as to the claim for $120. The plaintiffs should have the $23 paid into Court, but this would not interfere with their liability for costs of the action. J. M. McEvoy, for the defendant. G. N. Weekes, for the plaintiffs.

UNION BANK OF CANADA v. AYMER.

Ontario High Court, Cartwright, M.C. February 28, 1912.

JUDGMENT (§ I F—46)—*Rule 603—Application by Defendant for Reference under Con. Rule 607—Doubt as to Accuracy of Affidavit—Omission.*]—After the disposition of the motion for summary judgment made on the 24th February (3 O.W.N. 771), it was discovered by the defendant, and admitted by the plaintiffs, that a dividend of $167.92, under an assignment for the benefit of creditors made by the defendant in June last, and paid to the plaintiffs on the 30th November last, ought to have been credited to the defendant on his indebtedness. On the motion being brought on again before the Master, he said that he thought that this threw sufficient doubt on the accuracy of the affidavit in support of the motion for judgment, and disclosed such facts as were sufficient to entitle the defendant to have the accounts investigated on a reference, if the defendant still thought it would be of any advantage to him to be saddled with the costs of that proceeding. The Master suggested, however, that

it would be better, even now, to have an examination of the plaintiffs' books and see what was the real liability of the defendant, who was said to be only an accommodation maker or indorser. The defendant should elect as to this in four days. In view of his financial position, the delay would not seriously prejudice the plaintiffs, who could not complain if the important omission above-mentioned gave them some trouble. The very recent case of Symons v. Palmers, [1911] 11 K.B. 259, shews how strictly plaintiffs should comply with the requirements of Con. Rule 603. A. H. F. Lefroy, K.C., for the plaintiffs. F. J. Hughes, for the defendant.

KING MILLING CO. v. NORTHERN ISLANDS PULPWOOD CO.

Ontario High Court, Cartwright, M.C. February 28, 1912.

PLEADING (§ II O—275)—*Statement of Claim—Action by Creditors of Company to Set aside Transfers of Property—Want of Authority of Officers of Company.*]—This action was brought on behalf of the creditors of the defendant pulpwood company to set aside certain transfers made by that company to the defendants the Imperial Bank of Canada, on the usual grounds. By the 9th paragraph of the statement of claim the plaintiffs alleged that these transfers were executed by the officers of the company without authority. The defendants the Imperial Bank of Canada moved to have this paragraph struck out as embarrassing. The Master said that the motion was entitled to prevail, as these plaintiffs had no locus standi to bring any such action. That could only be done by the company itself or by some of the shareholders, if they could not obtain the use of the name of the company as plaintiff. See International Wrecking Co. v. Murphy, 12 P.R. 423, and cases cited. The paragraph in question with the corresponding prayer for relief must be struck out with costs to the moving defendants in any event. M. L. Gordon, for the applicants. Featherston Aylesworth, for the plaintiffs.

WELLAND COUNTY LIME WORKS CO. v. SHURR.

Ontario Divisional Court, Falconbridge, C.J.K.B., Britton and Middleton, JJ. February 29, 1912.

MINES (§ II B—52)—*Construction—Supply of Natural Gas—Joint or Several Contract—Oil and Gas Lease—Enforcement of Contract.*]—Appeal by the defendant from the judgment of SUTHERLAND, J., 3 O.W.N. 398. The Court was unable to agree with the conclusion of the trial Judge. MIDDLETON, J., said that, in the opinion of the Court, the matter must be determined upon the terms of the written memorandum of the 20th November, 1903. In it must be found the term for

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which the leases mentioned were to be granted. Augustine and Shurr were to lease their respective farms; but the lease was "to continue so long as the parties of the second part continue to comply with the conditions agreed upon." The condition agreed upon was "to supply, free of charge, sufficient gas to heat the houses of the parties of the first part." This clause could not be read as meaning that each lease was to continue so long as the company supplied to each lessor sufficient gas to heat his house. It was rather an agreement on the part of these two land-owners with the company that the company should be at liberty to sink wells upon the land of either, provided the company should supply sufficient gas to heat the houses of both. On the fact of the agreement, there was a joint venture on the part of these two farmers. They jointly contributed the money necessary for the laying of the pipe line; and the agreement was, that gas should be supplied to both. The plaintiffs were not now entitled to demand a lease from Shurr; they had ceased to supply gas to Augustine; and, therefore, the term on which the lease was to be granted had been ended by the action of the plaintiffs. If the evidence were referred to, it went to shew that this was the true construction and the real agreement between the parties; but the case fell to be determined entirely upon the written document; and it was not necessary to deal with the defendant's claim for the reformation of the agreement, as the agreement accurately expressed the intent. BRITTON, J., gave reasons in writing for the same conclusion. FALCONBRIDGE, C.J., concurred. Appeal allowed with costs, and action dismissed with costs. S. H. Bradford, K.C., for the defendant. W. M. German, K.C., for the plaintiffs.

REX v. CHILMAN.

Court of Appeal, Moss, C.J.O., Garrow, Maclaren and Magee, JJ.A., and Latchford, J. March 4, 1912.

APPEAL (§ XI—721)—*Receiving Stolen Money—Evidence—Judge's Charge — Application for Stated Case.*]—Application on behalf of the prisoner by way of appeal from the refusal of TEETZEL, J., the trial Judge, to state a case, and for a direction to him to state a case, for the opinion of the Court, under the provisions of secs. 1015 and 1016 of the Criminal Code, raising the questions whether there was evidence upon which the jury might properly find the prisoner guilty on the 3rd count of the indictment (for receiving stolen money), and whether the Judge rightly directed the jury in respect of such evidence. The prisoner was acquitted upon the other two counts, robbery with violence, and theft.

The judgment of the Court was delivered by Moss, C.J.O.:—Upon the hearing of the application both the facts and law were

discussed at considerable length. We have since considered the matter and referred to the evidence and the learned Judge's charge, and are of opinion that it would serve no useful purpose now to grant leave to appeal and direct the learned Judge to reserve the questions. The application is, therefore, refused. G. Lynch-Staunton, K.C., and C. W. Bell, for the prisoner. H. D. Gamble, K.C., for the Crown.

WARNER v. NORRINGTON.

Ontario High Court, Cartwright, M.C. March 1, 1912.

COSTS (§ I—14)—*Con. Rule 1198 (d)—Costs of Former Action Unpaid.*] — Motion by the defendant for security for costs under Con. Rule 1198 (d): "Security for costs may be ordered . . . (d) Where the plaintiff . . . has had judgment or order passed against him, in another action or proceeding for the same cause in Ontario or in any other country, with costs, and such costs have not been paid." The action of Norrington v. Warner was tried at the sittings of the District Court of Nipissing in June, 1911. It was on an agreement between the parties, as to which there was no defence. But Warner set up in his statement of defence a right to an account from Norrington in respect of another mining claim, not included in the agreement. This was the subject of the present action, brought in the High Court. It was not set up by way of counterclaim in the former action, and the trial Judge refused to give any effect to it, nor did he in any way pass upon it. He said: "It was a private enterprise not covered by the agreement." The Master said that this action did not seem to be within the Rule; and the motion should be dismissed, but without costs, as the pleadings should have been amended either by having the claim of Warner struck out or set up as a counterclaim—in which case it would have taken the whole matter into the High Court under sec. 186 of the Judicature Act, if desired by either party. See Henders v. Parker, 11 O.W.R. 211, 315, and case cited. McDonald (Day, Ferguson, & O'Sullivan), for the defendant. Cuddy (W. M. Douglas), for the plaintiff.

FARMERS BANK OF CANADA v. HEATH.

Ontario High Court, Clute, J., in Chambers. March 1, 1912.

WRIT AND PROCESS (§ II A—16)—*Service out of the Jurisdiction — Cause of Action, where Arising — Conditional Appearance.*]—Appeal by the defendants from the order of the Master in Chambers, 3 O.W.N. 682, in one of the actions only, that upon the 1909 policy. CLUTE, J., dismissed the appeal with costs. Shirley Denison, K.C., for the defendants. M. L. Gordon, for the plaintiffs.

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IRWIN v. STEPHENS.

Ontario High Court, Cartwright, M.C. March 2, 1912.

TRIAL (§ VI—320)—*Postponement—Change of Venue—Con. Rule 529 (d)—Convenience—Foreign Commission—Costs.*]—Motion by the defendant for an order postponing the trial, notice of trial having been given by the plaintiff for the sittings at Cobourg on the 5th March, and for a commission to take the evidence of a witness residing at Calgary. The action was for libel of the plaintiff, alleged to be injurious to him in respect of his business as an undertaker. It arose from an incident on the 6th January, 1912, over the removal from the Campbellford station of the body of the father of the absent witness. Through some mistake, both undertakers had been instructed to take charge of the corpse. The plaintiff and defendant both resided at Campbellford, so that the case came within Con. Rule 529(*d*), and the venue was properly laid at Cobourg in the first instance. The plaintiff alleged that the publications complained of were causing him much damage, and that it was essential that he should be vindicated as speedily as possible. He offered to have the trial at the Peterborough sittings commencing on the 9th April. He said that that place was just as convenient for the witnesses and parties as Cobourg. The Master said that this was corroborated by the railway time tables, and the expense of the journey from Campbellford to Cobourg would appear to be more than twice that of the journey to Peterborough. If the trial took place there, the witnesses and parties would have to stay a night. But, if it was at Cobourg, they would have to spend one night there and be travelling the next night so to reach home on the third day of absence. In these circumstances, the Master thought, a case was made out under Con. Rule 529(*d*), as defined in Pollard v. Wright, 16 P.R. 505, and other cases, to change the place of trial to Peterborough as a term of granting the commission asked for by the defendant, and postponing the trial until the 9th April to allow the evidence to be returned. The order should require the commission to be despatched from Calgary not later than the 25th March, so as to be available to the parties in good time. The costs of this motion to be in the cause, and the other costs of the commission to be in the taxing officer's discretion, unless dealt with by the trial Judge.

BROTHERS v. McGRATH.

Ontario Divisional Court, Falconbridge, C.J.K.B., Teetzel and Middleton, JJ. March 5, 1912.

SALE (§ II C—37)—*Fraud — Warranty.*]—An appeal by the plaintiff from the judgment of the County Court of the

County of Perth dismissing an action to recover $353, the price paid by the plaintiff to the defendant for a horse and for $200 damages for breach of warranty. The plaintiff alleged that the horse was unsound, to the knowledge of the defendant. The judgment of the Court was delivered by TEETZEL, J., who said that the learned County Court Judge, at the close of the plaintiff's case, was of opinion that the plaintiff had failed to establish either that the defendant was guilty of fraud, or that there was any warranty, express or implied, that the horse was sound; and he dismissed the action without calling upon the defendant. A careful consideration of the evidence and of the argument upon the appeal, had failed to convince the Court that the judgment was wrong. The appeal was, therefore, dismissed with costs. R. T. Harding, for the plaintiff. F. H. Thompson, K.C., for the defendant.

RE CAMERON AND HULL.

Ontario High Court, Sutherland, J. March 6, 1912.

WILLS (§ III G—125)—*Title to Land—Application under Vendors and Purchasers Act—Doubtful Question of Construction of Will.*] — An application by a vendor under the Vendors and Purchasers Act to have it declared that an objection made by the purchaser to the title to land contracted to be sold by agreement dated the 8th November, 1911, were invalid. The purchaser's objection was, that the fee in the land did not, under the will of Andrew Henderson, deceased, vest in Samuel James Henderson, through whom the plaintiff derived title. The clause in the will relied on by the vendor was this: "I give to my mother Mary Jane Henderson and to my brother Samuel James Henderson jointly the share I have in the farm on which we live, to have and to use or to sell as they may choose, each to be entitled to the benefits of one-half of the product of my share in the farm and chattels—but it is hereby clearly understood and designed that my mother shall have no power to sell or convey any part . . . but is only to have a share of the proceeds for her use during her life—and at my mother's death then the whole of my interest in this estate and whatever else I may die possessed of is to be given to my brother Samuel James Henderson, as above, to have and to hold as and for his own or to dispose of as he may wish." By an interim order made by a Judge of the High Court on the 17th February, 1912, in the matter of the application under the Act, reciting that Mary Jane Henderson was dead and had left certain named children and grandchildren, and directing that one of the children and two of the grandchildren should represent in the proceeding the children and grandchildren and heirs and next

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of kin of Mary Jane Henderson, who should be bound by any order which might be made. The representatives named were served, but did not appear. There was a dispute as to whether the vendor had released the purchaser from the agreement. SUTHERLAND, J., said that he was inclined to the opinion that, under the clause quoted, Mary Jane Henderson took merely a life estate, but was unable to say that a different opinion might not be fairly and reasonably come to by another; and he was not at all clear that parties could, on an application of this kind, be brought in as under the order of the 17th February. He could not, therefore, come to the conclusion that the application should be granted; and he dismissed it with costs, leaving the vendor to seek such other remedy, if any, as he might be advised. G. N. Weekes, for the vendor. T. G. Meredith, K.C., for the purchaser.

DEAN v. WRIGHT.

Ontario High Court, Sutherland, J. March 6, 1912.

CONTEMPT (§ I C—14) — *Disobedience of Injunction—Punishment Limited to Payment of Part of Costs of Motion.*]—Motion by the plaintiff to commit the defendants for contempt of Court. SUTHERLAND, J., said that the defendants were in contempt for disregarding the terms of an interim injunction order, apparently regular. An affidavit of their solicitor was filed by which it was sought to explain that any violation by the defendants of the terms of the order was but for one day, and in the circumstances set out therein. The learned Judge was of opinion that the excuse was not altogether adequate; but he did not think that it was a case in which the defendants ought to be committed. They should, however, pay in part the costs of the motion. When it came on first, the plaintiff's proceedings were not regular. The notice had been given for a Chambers instead of a Court day. Leave was asked and granted to bring on the motion in Court, and, if necessary and if the defendants required, after the service of a new notice. In these circumstances, the motion should be dismissed, but costs, fixed at $5, should be paid by the defendants to the plaintiff. Eric N. Armour, for the plaintiff. R. McKay, K.C., for the defendants.

CLARKSON v. McNAUGHT (Decision No. 3).

Ontario High Court, Cartwright, M.C. March 7, 1912.

ACTION OR SUIT (§ II B—45)—*Consolidation of Actions—Order for Trial of Actions together—Terms—Costs.*]—Motion by the defendants in the above action and three other

action (the facts of which appear in the notes 3 O.W.N. 638, 670, 741) for an order consolidating the four actions, similar to the order made in Campbell v. Sovereign Bank of Canada, 3 O.W.N. 334, which was affirmed by Falconbridge, C.J.K.B., on the 22nd December, 1911. The plaintiff contended that the cases were quite different, and that the proper and only order to be made—an order to which he was willing to consent—was that made by the Master in Clarkson v. Allen, on the 8th January, 1912, which, on appeal by the defendants, was not interfered with by the Chancellor, but simply referred to the trial Judge. The Master said that in the present actions the object was to recover one sum of $60,000 for which the four defendants were primâ facie liable and for which notes had been given as security, amounting in all to nearly $120,000; and these facts made it desirable that the whole matter should be investigated at one and the same time. The only question for decision was, how that was to be done. These cases were more like Clarkson v. Allen than Campbell v. Sovereign Bank of Canada. It was not clear how the four actions could be consolidated, as the liabilities of the defendants were not identical, and the results of the trial might be different in each case—some might be held to be liable and some not. An order should, therefore, be made as in Clarkson v. Allen, counsel for the plaintiff consenting that (subject to the direction of the trial Judge) the four actions be tried together, and counsel for all parties consenting that only one set of costs shall, in that event, be taxable in respect of the trial of the four actions. Upon these terms, motion dismissed; costs in the cause. F. Arnoldi, K.C., for the defendants. F. R. MacKelcan, for the plaintiff.

BARBER v. SANDWICH, WINDSOR AND AMHERSTBURG R. CO.

Ontario High Court, Cartwright, M.C. March 7, 1912.

DISCOVERY AND INSPECTION (§ II—7)—*Postponement of Trial — Action for Damages for Personal Injuries.*] — Motion by the defendants to postpone the trial, for the surgical examination of the plaintiff, and for further examination of the plaintiff for discovery. The action was for damages for injuries sustained by the plaintiff by reason of a collision of two of the defendants' cars, in one of which he was being carried. Notice of trial had been given by the plaintiff for the Sandwich jury sittings beginning on the 11th March. The Master said that liability was admitted, and it was only a question of what damages, if any, the plaintiff was entitled to recover. The plaintiff did not object to being examined by a surgeon on behalf of the defendants, and this examination could be held at once. There did not seem to

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be any necessity for postponing the trial. At the argument, the Master thought that it might be right to direct a trial at Chatham on the 9th April; but, in view of the possible inability of the plaintiff to get his witnesses there (as pointed out in McDonald v. Dawson, 8 O.L.R. 72), he now thought the motion should be referred to the trial Judge at Sandwich, if a trial should become necessary. The trial Judge could then, if he saw fit, impose such terms as were approved of in Seaman v. Perry, 9 O.W.R. 537, 761, and in other cases not reported. The main, if not the whole, evidence here would be that of three or four medical gentlemen. It would be a serious matter for the plaintiff, earning only $2.50 a day, to take these witnesses nearly 50 miles away from Windsor, with a possibility of being kept there one or even two days or longer. As said in McDonald's case, 8 O.L.R. at p. 73, "the plaintiff's difficulty is to get to a distant place of trial." Featherston Aylesworth, for the defendants. Frank McCarthy, for the plaintiff.

POWELL-REES LIMITED v. ANGLO-CANADIAN MORTGAGE CORPORATION.

Ontario High Court, Cartwright, M.C. March 8, 1912.

WRIT AND PROCESS (§ II B—26 (*a*))—*Foreign Corporation Defendant—Service on Person in Ontario—Motion by Person Served to Set aside—Affidavit Denying Connection with Company—Insufficiency.*]—It was stated that the defendants were incorporated in England, but as yet had not a license to do business in this Province. The action was on a judgment recovered in England against the company, for over $15,000, on the 9th February, 1912. The writ of summons was served on E. R. Reynolds, who moved to set it aside, supporting his motion by his own affidavit in which he said that he was not an officer of the defendant company nor in any way authorised to accept service for them. There was no affidavit in answer, and an offer to enlarge the motion so as to allow of Mr. Reynolds's cross examination was declined. It was contended that the motion must fail on two grounds: (1) because it should have been made by the company; and (2) that the affidavit filed was insufficient because it did not say that, *at the time of service*, the deponent was not an officer of the defendant company. Counsel for the plaintiff asserted that Mr. Reynolds was the president, and that the plaintiff had dealt with him for the past two or three months on that understanding. The Master agreed with the contention that the motion could only be made on behalf of the company. He referred to Burnett v. General Accident Assurance Corporation, 6 O.W.R. 144; Mackenzie v. Fleming H. Revell Co., 7 O.W.R. 414. This was not, he pointed out, the case of substituted service, when, in some cases, it may be per-

missible to move (see Taylor v. Taylor, 6 O.L.R. 545), or take the steps suggested in Bound v. Bell, 9 O.W.R. 541. Here, if the service had been improperly made, the plaintiff would proceed at his peril. But he must be left to do as he might be advised. The second objection, the Master said, was also well taken; and the motion could not succeed, and should be dismissed. Costs reserved until the case has proceeded further, and light has been obtained as to the relations (if any) between the applicant and the defendant company. John MacGregor, for the applicant. M. C. Cameron, for the plaintiff.

HUCKELL v. POMMERVILLE.

Ontario High Court, Sutherland, J. March 8, 1912.

ENCROACHMENT (§ I—10)—*Buildings — Injury to Adjacent Property — Water from Roof — Injunction — Damages — Destruction of Line Fence — Costs.*] — The plaintiff is and for years past has been the owner of the easterly part of lot No. 37 on the north side of Cooper street, a residential street in the city of Ottawa, upon which is erected a substantial brick house, the easterly wall of which extends to or very close to the westerly limit of lot 38 adjoining. The defendant in August, 1910, bought lot 38, which also has on it, towards the easterly side, a brick residence. There was between the two houses a considerable space of vacant ground, which, before the purchase by the defendant, had been a lawn. Later, the defendant sold the easterly part of lot 38 and the brick house thereon to one Frazer. In the spring of 1911, the defendant began to excavate the westerly or vacant portion of his lot to erect an apartment house thereon, but was stopped. Later, he erected a building or buildings running north from Cooper street, close to or on the line between the two lots, as shewn on a plan. The first building, marked on the plan "office," is of wood, with metal sheeting, having a frontage on Cooper street of 22 feet by a depth of 16 feet. Immediately north, is a long wooden shed, metal-sheeted, and open to the east. Immediately north, is a large wooden stable, metal-sheeted. The west walls (or wall) of these three buildings forms a continuous line running north from the north line of Cooper street, and begins at a point a number of feet in front of the southerly face of the verandah on the south or front side of the plaintiff's house. There had been a fence for years on or near the line between the two lots, which each party asserted to be on his property. It was torn down by the defendant or his men in excavating for the apartment house. On the 24th June, 1911, the defendant executed a lease in writing in favour of one Duklow of part of lot 38, being the part at the rear having the stable upon it. Duklow, when the stable was

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completed, went into possession about the 1st August, 1911, and continued therein for upwards of two months. He carried on business as the keeper of a livery stable or boarding and exchange stable. The plaintiff claimed, in respect of the fence and excavation, damages to the amount of $100. He also alleged that the buildings were so erected by the defendant that water from the roofs is thrown on to the plaintiff's property and is affecting the foundation of his dwelling-house and the reasonable use and enjoyment of his verandah and property. He also alleged that, by reason of the odours from the stable, his use of his dwelling-house is seriously interfered with and he has sustained loss and damage. The plaintiff further alleged that the defendant acted improperly and maliciously in the matter of the erection of the buildings, and with a desire and intention of compelling the plaintiff to purchase the westerly 33 feet of his lot at an exorbitant price. And he sought an order compelling the defendant to remove the buildings erected by him on the property in question, restraining him from discharging rainwater from the roofs of his buildings to the detriment of the plaintiff and his property, and from carrying on or permitting to be carried on the livery business. SUTHERLAND, J., said that, while the defendant's conduct does not appear to have been very neighbourly, and while the buildings were certainly not such as one would expect to see erected on a residential property, he could not see that the defendant was not within his right in erecting them. It appeared that, subsequent to the issue of the writ, Duklow was obliged to discontinue his livery or exchange business, through some action taken by the municipal authorities. He was permitted by the defendant to give up his lease. The building that was being used as a stable is apparently now a garage. The office building was naturally distasteful to the plaintiff, and very much curtailed the view along the street in an easterly direction from his verandah. Upon the whole evidence, the learned Judge found that the fence was a line fence between the two lots, and had been so considered and used by the parties to the action and their predecessors in title. The defendant was not warranted in taking the fence down and destroying it, as he did, without the consent of the plaintiff. The value of the fence was not very satisfactorily proved at the trial. The excavation of which the plaintiff complained was filled up again, and apparently he suffered no damage in consequence thereof. At the request of counsel, the learned Judge had a view of the property, and came to the conclusion, from that and the evidence adduced at the trial, that the buildings of the defendant were so constructed as existing as to shed water upon the plaintiff's verandah and against his house. The damage and inconvenience thus far caused to the plaintiff in respect to this had not been great; but he was entitled to have the

defendant enjoined from a continuance of it. Judgment for the plaintiff against the defendant as follows: (1) restraining the defendant from discharging rain-water from the roofs of his buildings upon the plaintiff's property and for $5 damages for the injuries already sustained in this connection; (2) for $20 damages for the destruction of the plaintiff's share of the fence, less $15 paid into Court by the defendant; (3) for the plaintiff's costs of suit on the High Court scale.

CROCKFORD v. GRAND TRUNK R. CO.

Ontario High Court. Trial before Falconbridge, C.J.K.B. March 11, 1912.

MASTER AND SERVANT (§ II A 3—58)—*Negligence — Condition of Premises—Dangerous Work—Infant—Absence of Warning—Contributory Negligence — Findings of Jury.*]—Action by a servant of the defendants, employed in their roundhouse at London, to recover damages for personal injuries caused, as alleged, by the defective condition of the platform of the turn-table. The Chief Justice said that the jury had the advantage of inspecting the locus in quo, and saw the condition of the ways, which was practically the same at the time of the view as at the time of the accident, and had expressly found negligence in regard to the same. They had also found negligence of the defendants by reason of the failure properly to instruct the plaintiff, an infant engaged in a dangerous work; and they expressly negatived negligence of the plaintiff. It could not be said that there was no evidence to support all these findings; and the plaintiff was entitled to judgment for $1,500 with full costs. Sir George Gibbons, K.C., and G. S. Gibbons, for the plaintiff. I. F. Hellmuth, K.C., and W. E. Foster, for the defendants.

McINTOSH v. GRIMSHAW.

Ontario High Court, Cartwright, M.C. March 12, 1912.

TRIAL (§ VI—320)—*Order to Expedite—Plaintiff not in Default—Rule* 243.]—Motion by the defendant, under Con. Rule 243, for an order expediting the trial. An action by the vendor for cancellation of an agreement for the sale of land and for possession of the land. The action was begun on the 21st February, 1912. The Master said that it was open to the defendant to have commenced an action for specific performance of the agreement nearly three months ago; and there was no reason given for his not having done so. Counsel for the plaintiff stated that he had been expecting this to be done; and had commenced the present action only in order to have the matter brought to a termination. The plaintiff was not in any way

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adverse to a speedy trial, and offered to have the case tried by a Referee—an offer which counsel for the defendant was not prepared to accept. Armstrong v. Toronto and Richmond Hill Street R.W. Co., 15 P.R. 449, shews that an order such as is asked here may be granted in a proper case; but, when the plaintiff is not in any default, it cannot lightly be made against his protest. As, however, the plaintiff did not object, an order should be made for delivery of the statement of claim in a week or ten days, and with such other terms as the plaintiff might concede. Costs to the plaintiff in the cause. A. J. Russell Snow, K.C., for the defendant. K. F. Mackenzie, for the plaintiff.

BINDER v. MAHON.

Ontario Divisional Court, Mulock, C.J.Ex.D., Clute, and Sutherland, JJ. March 13, 1912.

BILLS AND NOTES (§ V B—137)—*Promissory Note—Equity Attaching to, in Hands of Holder Acquiring after Maturity—Renewals—Advance—Notice of Claim—Evidence.*]—An appeal by the defendants the José Gatti Company from the judgment of MIDDLETON, J., 3 O.W.N. 318. The Court dismissed the appeal with costs. J. M. McEvoy and E. W. M. Flock, for the appellants. T. G. Meredith, K.C., for the plaintiff.

MACDONALD v. SOVEREIGN BANK OF CANADA.

Ontario High Court, Cartwright, M.C. March 14, 1912.

DEPOSITIONS (§ II—6)—*Foreign Commission — Application for—Information and Belief—Rule 518—Unnecessary Testimony—Admission.*]—This action was brought for a declaration that the plaintiff was not the owner of 70½ shares of the stock of the defendant bank standing in his name, alleging that the defendants were and always had been the real owners of the same. The statement of defence denied the plaintiff's allegations, and set up that the shares in question were all duly transferred to the plaintiff by the previous holders. The matters in question are thoroughly elucidated in the cognate action of Stavert v. McMillan, 21 O.L.R. 245, 24 O.L.R. 456. The defendants now moved for a commission to Los Angeles, in California, to take the evidence of one A. E. Webb, a broker formerly doing business in Toronto, whose name appears in the evidence in Stavert v. McMillan. The Master said that there was no intimation of what Webb was expected to prove. The only affidavit in support of the motion was one by the defendants' solicitor, in which he said of A. E. Webb: "Who, I am informed and believe, purchased the stock which is the subject of the action for Randolph

Macdonald, the father of the plaintiff." No grounds of such information and belief were given; and the affidavit was, therefore, not strictly admissible (Rule 518). But, waiving that objection, a very full affidavit was filed in answer by the plaintiff's solicitor, setting out the whole transaction, as given in the appendix in the McMillan case, and shewing that the shares in question had passed into the name of the plaintiff before Webb appeared in this connection. The whole onus was on the plaintiff, and he was willing to admit that none of the shares, the subject-matter of this action, were transferred from A. E. Webb & Co. to the plaintiff, or to any of his alleged predecessors as holders of the shares now in question. This, the Master said, rendered it unnecessary to issue the commission; and, according to the judgment of a Divisional Court in Hawes Gibson & Co. v. Hawes, 3 O.W.N. 312, it should, therefore, not be granted. Motion dismissed with costs in the cause to the plaintiff. W. J. Boland, for the defendants. G. H. Kilmer, K.C., for the plaintiff.

RE ANCIENT ORDER OF UNITED WORKMEN AND RIDDELL.

Ontario High Court, Cartwright, M.C. March 15, 1912.

INTERPLEADER (§ II—20)—*Benefit Certificate in Favour of Granddaughter — Change to Brother — Preferred Class.*] — Motion by the society for leave to pay into Court $1,000, less costs, in the following circumstances. A benefit certificate for $1,000 upon the life of one Riddell was issued first in favour of Adelia Pray; afterwards, in May, 1905, it was changed, and, as it appeared, the beneficiaries therein designated were the two claimants, "John Riddell, a brother, and Adelia Riddell, a granddaughter"—to receive $500 each. By indorsement dated the 20th April, 1909, the insured revoked this first direction, and gave the whole sum secured to John Riddell. On this was a pencil memorandum of Mr. Carder, the Grand Recorder, that, a granddaughter being in the preferred class, and a brother only in the ordinary class, this change could not be made unless she was of full age and assenting. Whether any and what investigation was made by the Local Recorder as to this, did not appear on the material. By his will, dated the 16th June, 1910, the insured left the whole $1,000 in question to the brother. To Adelia Pray (she having since married), and was there called "my granddaughter Adelia Riddell," he left a piano. It was now alleged that Adelia was not the granddaughter of the deceased, but only of his wife, and that the testator spoke of her as his granddaughter to please the grandmother. The Master said that an issue must be directed, and the trial should be at the next sittings at Cayuga, or some other convenient place. In this John Riddell should be

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plaintiff, and Adelia Pray, defendant—the issue being simply whether or not she is a granddaughter of the deceased. As she was always so-called by him, the onus to disprove this was on John Riddell, who must shew her real ancestry. Under the authority of Knickerbocker Trust Co. of New York v. Webster, 17 P.R. 189, and cases cited, Mrs. Pray, though resident out of the jurisdiction, could not be required to give security for costs. See Rhodes v. Dawson, 16 Q.B.D. 548, cited and approved in the Knickerbocker case. The Master said that this emphasised the distinction to be made according as an interpleader issue arises out of a Sheriff's application, or as in the present case. A. G. F. Lawrence, for the society. Featherston Aylesworth, for John Riddell. T. N. Phelan, for Adelia Pray.

MITCHELL v. HEINTZMAN.

Ontario High Court, Cartwright, M.C. March 16, 1912.

PLEADINGS (§ I—65)—*Statement of Claim—Negligence — Personal Injuries—Anticipating Defence—Particulars.*]—In an action to recover damages for injuries inflicted by the defendant's automobile, the defendant moved to strike out paragraphs of the statement of claim, and for particulars of injuries and of damages. The paragraphs attacked, the Master said, set out a good many things that might be evidence at the trial, in reply to a statement of defence; but at present they did not seem to be material. The similar case of Lum Yet v. Hugill, 3 O.W.N. 521, shewed all that was necessary in a statement of claim in this action. The best order now to make would be to give the plaintiff leave to deliver an amended statement of claim, omitting the paragraphs attacked and giving particulars of injuries and of special damages alleged in the 9th paragraph. Any defence set up could be answered in the reply. Costs in the cause. T. N. Phelan, for the defendant. J. P. MacGregor, for the plaintiff.

HARRISON v. KNOWLES.

Ontario High Court, Cartwright, M.C. March 16, 1912.

VENUE (§ II—15)—*Motion to Change — Affidavits — Witnesses—Convenience.*]—The facts of this case appear 3 O.W.N. 688. The defendants now moved to change the venue from Toronto to London. One of the defendants made an affidavit in which he said that he himself, T. M. Knowles, and some three or four experts, all from the city of London, would be required at the trial. He also relied on the fact that the machine in ques-

tion was at London. This was answered by a very full affidavit of the plaintiff's solicitor, who carefully complied with the provisions of Con. Rule 518. He said that the plaintiff and some one from his office would have to come from New York, and apparently one or two experts. But two experts resident in Toronto would also be called, and one on a question about a rubber blanket being considered a necessary part of the machine in question. He further said that the fact of the machine being in London was of no importance now, seeing that it had been in use for nearly two years. The shipping bill of the machine and rollers was dated the 10th June, 1910. This, he said, was confirmed by the fact that the defendants had made payments on account on seven different occasions since receiving the machine. The defendants, who were counterclaiming for damages for the alleged inefficiency of the machine, had served a jury notice. The Master said that, if this stood, there could not be a trial either at Toronto or at London until next September. Perhaps, on an application to strike out the jury notice, it might be thought right to do so, unless the defendants would accept the plaintiff's offer to have the case set down now and tried at the current jury sittings at Toronto. Another plan would be to strike out the jury notice and have the case tried at Toronto or at the London non-jury sittings at the end of April. However that might be, at present the Master did not think that any case was made out for the change of venue; and the motion was dismissed with costs in the cause. S. G. Crowell, for the defendants. O. H. King, for the plaintiff.

MEYER v. CLARKE.

Ontario High Court, Cartwright, M.C. March 19, 1912.

DISCOVERY (§ IV—20)—*Examination of Defendant—Libel—Questions as to Similar Statements—Privilege.*]—Motion by the plaintiff for an order requiring the defendant to attend for re-examination for discovery and answer certain questions which he refused to answer upon his examination. The action was for libel. The defendant justified and also pleaded qualified privilege. Questions objected to were as to whether the defendant had written other similar letters or made similar statements respecting the plaintiff to other persons. These, the Master said, should be answered, as they tended to prove "malice in law," and displaced the ground of privilege. See Odgers on Libel and Slander, 8th Eng. ed., pp. 348, 390. The defendant should attend again at his own expense and make answers to these questions. Costs of the motion to the plaintiff in any event. T. N. Phelan, for the plaintiff. J. A. Macintosh, for the defendant.

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