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ANNOTATED

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EDITED BY

C. E. T. FITZGERALD

C. B. LABATT *and*

RUSSEL S. SMART

ASSOCIATE EDITOR OF PATENT AND TRADE MARK CASES

CONSULTING EDITOR

E. DOUGLAS ARMOUR, K.C.

ASSOCIATE EDITOR FOR QUEBEC

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Judicial Committee of the Privy Council, Viscount Haldane, Viscount Cave, Lord Sumner and Lord Parmoor. February 25, 1921.

COMPANIES (§ I A—1)—FEDERAL COMPANY—HOW AFFECTED BY PROVINCIAL LAW—COMPANIES ACT OF CANADA—EXTRA PROVINCIAL CORPORATIONS ACT OF ONTARIO—MANITOBA COMPANIES ACT—SASKATCHEWAN COMPANIES ACT—MORTMAIN ACT (ONTARIO)—VALIDITY.

The Extra Provincial Corporations Act of Ontario, R.S.O. 1914, ch. 174, the real effect of which as expressed or implied is to preclude a company incorporated under the Companies Act of Canada from carrying on business in Ontario unless it first obtains a license to do so from the Government of the Province and provides certain penalties for not doing so is *ultra vires* the Provincial Legislature, although the Province may pass laws of general application regulating matters over which it has jurisdiction under the B.N.A. Act, such as the Mortmain Act, regulating the acquiring and holding of land in the Province and in regard to such an Act a Dominion company is in no better position than any other corporation which desires to hold land in the Province.

Part IV. of the Manitoba Companies Act does not differ in any material particular from the Ontario Act, *inter alia*, a *Dominion* company must take out a license, which it is entitled to receive if it complies with the provisions of the Act and with the regulations to be made by the Lieutenant-Governor in Council, and these sections are *ultra vires* the Manitoba Legislature and the restrictions in the Manitoba statute as to the holding of land cannot be severed from the general provisions as to licensing so as to make these restrictions enforceable as being in the nature of mortmain legislation, there being no Mortmain Act in Manitoba.

Sections 23, 24, 25 of the Saskatchewan Act which require Dominion companies to be registered if they carry on business in Saskatchewan and provide penalties for not registering, and secs. 29 and 30 which empower the registrar in certain cases to strike the company off the register, are also *ultra vires* the Saskatchewan Legislature as encroaching on what is exclusively given to the Parliament of Canada, and in this case also the restrictions on the holding of land are not severable from the licensing provisions and are invalid on that ground.

[*John Deere Plow Co.* v. *Wharton*, 18 D.L.R. 353, [1915] A.C. 330, referred to.]

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CONSOLIDATED APPEALS from the Supreme Court of Canada (1919), 48 D.L.R. 386, 59 Can. S.C.R. 19; 48 D.L.R. 404, 59 Can. S.C.R. 45, and the Supreme Court of Ontario, (1917), 41 D.L.R. 227, 41 O.L.R. 475. Reversed.

The facts of the cases are fully set out in the judgment delivered.

The judgment of the Board was delivered by

VISCOUNT HALDANE:—In this case their Lordships are called on to interpret and apply the implications of a judgment, delivered by the Judicial Committee on November 2, 1914, in *John Deere Plow Co.* v. *Wharton*, and reported in 18 D.L.R. 353, [1915] A.C. 330. It was then laid down that the B.N.A. Act of 1867 had so enabled the Parliament of the Dominion to prescribe the extent of the powers of companies incorporated under Dominion law with objects which extended to the Dominion generally, that the status and powers so far as there in question of one of the three appellant companies could not as matter of principle be validly interfered with by the Provincial Legislature of British Columbia.

It was held that laws which had been passed by the Legislature of that Province, and which sought to compel a Dominion company to obtain a certain kind of provincial license or to be registered in the way brought before the Judicial Committee, as a condition of exercising its powers in the Province or of suing in its Courts, were *ultra vires*. The reason given was that their Lordships interpreted what had been done by the Province in that case as interfering in a manner not consistent with the principles laid down with the status and corporate capacity of a company with Dominion objects to which the Parliament of Canada had given powers to carry on its business in every part of the Dominion.

In the consolidated appeals now before their Lordships analogous questions are raised by legislation in varying forms enacted in three other Provinces, Saskatchewan, Manitoba, and Ontario.

Since the decision in 1914 the Province of Saskatchewan has passed an Act, in 1915 (5 Geo. V., ch. 14), which supersedes its earlier Companies Acts, and apparently seeks to avoid the features in these which might conflict with the decision of this Committee in the *John Deere Plow* case as to the British Columbia legislation. The question raised as regards Manitoba arises out of older legislation of 1913, R.S.M., ch. 35 (subsequently amended and re-enacted in 1916, (6 Geo. V. (Man.), ch. 20)), and as regards Ontario under an older Ontario Companies Act, R.S.O. 1914, ch.

178, and the Extra Provincial Corporations Act of 1914, R.S.O. ch. 179. No question is raised from British Columbia, or from any Provinces other than Saskatchewan, Manitoba and Ontario, on this occasion.

The proceedings out of which the present appeals arise concern several Dominion companies, and are, as to Saskatchewan, two cases before a magistrate for infraction of the provisions of the Provincial Companies Act, and an action by a shareholder in one of the Dominion companies concerned, to restrain it from attempting to carry on its business without complying with the requirements of the Companies Act of the Province, (1916), 30 D.L.R. 640. The main issue in all these proceedings is substantially the same.

In Manitoba an analogous question was raised in a shareholder's action, and also in an action by the Attorney-General of the Province.

The main issue in Ontario was similar to that in Saskatchewan, but there was also raised a question as to whether a Dominion company could hold land in the Province without being authorised to do so by its Government, in accordance with Ontario statute law.

In the proceedings referred to judgments were delivered in the Courts of first instance and by the Appellate Courts in Saskatchewan (1917), 33 D.L.R. 363, 10 S.L.R. 231 and Manitoba, (1917), 35 D.L.R. 526, 27 Man. L.R. 576, and by the Courts of first instance, (1917), 40 O.L.R. 290, and the Appellate Court in Ontario, (1917), 41 D.L.R. 227, 41 O.L.R. 475. In the cases in the two former Provinces there was an appeal to the Supreme Court of Canada, (1919), 48 D.L.R. 386, 59 Can. S.C.R. 19; 48 D.L.R. 404, 59 Can. S.C.R. 45, but in the Ontario litigation the appeal has been brought directly to the King in Council from the judgment of the Appellate Court of the Province.

On August 18, 1919, special leave to appeal to the Privy Council was granted, and it was ordered that the appeals, six in number, from judgments which had been adverse to the Dominion companies concerned, should be consolidated and heard together.

It will be convenient, having regard to the course taken in the argument, to consider in the first place the appeal from the Court of Appeal in Ontario.

The Attorneys-General for Canada and for the Provinces have intervened throughout.

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In order to ascertain the real points now in controversy, it is important to refer in some detail to what was actually decided in 1914 in the original case of the *John Deere Plow Co.*, 18 D.L.R. 353, [1915] A.C. 330.

The British Columbia Companies Act, R.S.B.C., 1911, ch. 39, had provided that, in the case of an incorporated company which was not one incorporated under the laws of the Province, and was called in the Act an extra provincial company, certain conditions must be complied with. If such a company had gain for its object it must be licensed or registered under the law of the Province, and no agent was to carry on its business until this had been done. If this condition were complied with, such an extra provincial company might sue in the Courts of the Province and hold land there. Such a company might also, if it were one duly incorporated under the laws of, among other authorities, the Dominion, and if authorised by its charter to carry out purposes to which the legislative authority of the Province extended, obtain from the Registrar under the general Companies Act of the Province, a license to carry on business within the Province on complying with the provisions of the Act and paying a proper license fee. It was then to have the same powers and privileges in the Province as though incorporated under the provincial Act. If such a company carried on business without a license it was made liable to penalties, and its agents were similarly made liable. So long as unlicensed, the company could not sue in the Courts of the Province in respect of contracts in connection with its business made within the Province. The registrar might refuse a license where the name of the company was identical with or resembled that by which a company, society or firm in existence was carrying on business or had been incorporated, licensed or registered, or where the registrar was of opinion that the name was calculated to deceive or disapproved of it for any other reason.

Their Lordships pointed out that, under the Dominion Companies Act, R.S.C. 1906, ch. 79, which they held to have been validly passed, the charter of the John Deere Plow Co. incorporated it with the powers to which the legislative authority of the Parliament of Canada extended. The Dominion Interpretation Act, R.S.C. 1906, ch. 1, provided that the meaning of such an incorporation included this, that the corporate body created should have power to sue, to contract in its corporate name, and

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to acquire and hold personal property for its purposes. There was in the Dominion Companies Act a provision that such a company should not be incorporated with a name likely to be confounded with the name of any other known company ,incorporated or unincorporated, and it gave the Secretary of State the discretion in this connection. On incorporation the company was to be vested with all the powers, privileges, and immunities, requisite or incidental to the carrying on of its undertaking It was to have an office in the city or town in which its chief place of business in Canada was situated, which should be its legal domicile in Canada, and could establish other offices and agencies elsewhere. No person acting as its agent was to be subjected, if acting within his authority, to individual penalty.

Their Lordships made reference to the circumstance that the concluding words of sec. 91 of the B.N.A. Act, "Any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces," render it necessary to do more than ascertain whether the subject matter in question apparently falls within any of the heads of sec. 92; for if it also falls within any of the enumerated heads of sec. 91, then it cannot be treated as covered by any of those in sec. 92. As is now well settled, the words quoted apply, not only to the merely local or private matters in the Province referred to in the 16th head of sec. 92, but to the whole of the sixteen heads in that section. *Attorney-General for Ontario* v. *Attorney-General for the Dominion, etc.*, [1896] A.C. 348. The effect, as was pointed out in the decision just cited, is to effect a derogation from what might otherwise have been literally the authority of the Provincial Legislatures, to the extent of enabling the Parliament of Canada to deal with matters local and private where, though only where, such legislation is necessarily incidental to the exercise of the enumerated powers conferred on it by sec. 91.

If therefore in legislating for the incorporation of companies under Dominion law and in validly endowing them with powers, the Dominion Parliament has by necessary implication given these companies a status which enables them to exercise these powers in the Provinces, they cannot be interfered with by any provincial law in such a fashion as to derogate from their status

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and their consequent capacities, or, as the result of this restriction, to prevent them from exercising the powers conferred on them by Dominion law. Their Lordships, however, observed that when a company has been incorporated by the Dominion Government with powers to trade in any Province, it may not the less, consistently with the general scheme, be subject to provincial laws of general application, such as laws imposing taxes, or relating to mortmain, or even requiring licenses for certain purposes, or as to the forms of contracts; but they were careful not to say that the sanctions by which such provincial laws might be enforced could validly be so directed by the Provincial Legislatures as indirectly to sterilise or even to effect, if the local laws were not obeyed, the destruction of the capacities and powers which the Dominion had validly conferred. To have said so would have been to misread the scheme of the B.N.A. Act, which is one that establishes interlacing and independent legislative authorities. Within the spheres allotted to them by the Act the Dominion and the Provinces are rendered on general principle co-ordinate Governments. As a consequence, where one has legislative power the other has not, speaking broadly, the capacity to pass laws which will interfere with its exercise. What cannot be done directly cannot be done indirectly. This is a principle which has to be kept closely in view in testing the validity of the provincial legislation under consideration as affecting Dominion companies.

Their Lordships will not repeat what was laid down in the judgment delivered in the *John Deere Plow* case as to the other aspects of the general question there under consideration, but will proceed, in the light of what has just been said, to the consideration of the validity of the Ontario legislation under review.

The general Companies Act of Ontario, R.S.O. 1914, ch. 178, was passed before the decision on the *John Deere Plow* case, and has no special bearing on the question in this appeal. The important statute is the Extra Provincial Corporations Act, R.S.O. 1914, ch. 179, which was also passed before that decision.

The purpose of the latter statute is to provide that certain classes of extra provincial corporations (which mean corporations created otherwise than by or under the authority of an Act of the Ontario Legislature), including those created under any Act of the Dominion and authorised to carry on business in Ontario, must take out a license (sec. 4) under the Ontario statute. On

complying with its provisions a corporation coming within these classes is entitled to receive a license (sec. 5) to carry on its business and exercise its powers within Ontario. In the absence of such a license it is forbidden to do so (sec. 7), and its agents are subjected to a like prohibition. A penalty of $20 a day is imposed for any contravention of this provision. An extra provincial corporation coming within the classes referred to may apply to the Lieutenant-Governor in Council for a license to carry on its business and exercise its powers in Ontario, and no limitations or conditions are to be included in any such license which would interfere with the rights of such a corporation, for example, a Dominion company, to carry on in Ontario all such part of its powers as by its Act or charter of incorporation it may be authorised to carry on and exercise there (sec. 9 (1 and 2)). A corporation receiving a license may, subject to the limitations and conditions of the license, and the provisions of its own constitution, hold and dispose of real estate in Ontario, just as an Ontario company might (sec. 12). A corporation receiving a license may be called on to make returns comprising such information as is required from an Ontario company (sec. 14). The Lieutenant-Governor in Council may make regulations for, among other things, the appointment and continuance by the extra provincial company of a representative in Ontario on whom service of process and notices may be made (sec. 10 (1*b*)). If such a company, having received a license, makes default in complying with the limitations and conditions of the license or of the provision as to returns, or of the regulations respecting the appointment of a representative, its license may be revoked (sec. 15). If such a corporation carries on in Ontario without a license any part of its business, it is to incur a penalty of $50 a day, and is rendered incapable of suing in the Ontario Courts in respect of any contract made in whole or in part within Ontario in relation to business for which it ought to have been licensed (sec. 16). The Lieutenant-Governor in Council may prescribe fees on the transmission of the statement or return required under sec. 14. Such fees are to vary with the capital stock of the company (sec. 20).

It is obvious that the Act thus summarised assumes that the Legislature of the Province can impose on a Dominion company conditions which, if not complied with, will restrict the exercise of its powers within the Province. These conditions do not appear

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to their Lordships to be merely a means for the attainment of some exclusively provincial object, such as direct taxation for provincial purposes. They apparently assume a general right to limit the exercise of the powers of extra provincial companies if they seek to exercise these powers within Ontario. A question of principle is thus raised broadly, and their Lordships now turn to the judgments in the Courts of Ontario in which it has been dealt with. *Currie* v. *Harris Lithographing Co.* (1917), 40 O.L.R. 290; (1917), 41 D.L.R. 227, 41 O.L.R. 475. In these Courts over this question there has been divergence of judicial opinion, and the question itself has been considered there with such thoroughness and ability that it is proper to refer to the diverging reasoning in some detail.

Masten, J., before whom the cases came in the first instance, was of opinion that in passing the Extra Provincial Corporations Act the Legislature of Ontario had exceeded its powers (40 O.L.R. 290). He pointed out that the Dominion Companies Act had vested in the companies incorporated under its provisions all the powers, privileges and immunities requisite or incidental to the carrying on of its undertaking, and that, in view of the decision in the *John Deere Plow* appeal, the power conferred on the Parliament of Canada to regulate trade and commerce, and to that extent to prescribe these capacities in cases affecting the Dominion at large must be taken to be paramount and overriding. He thought (pp. 292-296) that sec. 7 of the Extra Provincial Corporations Act afforded the keynote and the "pith and substance" of that Act, the purpose of which, as applied to Dominion companies, was to preclude them from the exercise of some of their powers and to deprive them of their status in Ontario unless a license were obtained and certain fees paid there. However simple and little oppressive such a process might be it constituted none the less a direct interference. It had been attempted to support this interference as justified by the powers conferred by sec. 92 on the Provinces to raise revenue by direct taxation, to deal with property and civil rights, particularly from the point of view of mortmain, to legislate for the administration of justice, and to impose penalties in furtherance of these ends. But in the opinion of the Judge these aspects of what had been included in the provincial statute, except in the case of the mortmain law, had been introduced into it in reality only as ancilliary to sec. 7, and to the main purpose of asserting

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a direct control over the Dominion companies before permitting them to carry on their business in the Province. This purpose so permeated the whole Act that it was not practicable to hold certain of its sections valid and others invalid. The provision of sec. 9 (2) which excluded from any license to be required limitations or conditions restricting the rights of the company to carry on in Ontario all such parts of its business and powers as by its Act or charter of incorporation it might be authorised to exercise there, did not mend matters. But the provisions of the Ontario Mortmain Act, R.S.O. 1914, ch. 103, stood on a different footing. For the incapacity to hold lands did not arise because of the application of the Extra Provincial Corporations Act, but because of the general scope of the Mortmain Act, itself, a separate statute which the Judge seemingly regarded as within the powers of the Province.

In the Supreme Court of Ontario, which heard the appeal from this decision, 41 D.L.R. 227, 41 O.L.R. 475, and from which an appeal has been brought directly to the Sovereign in Council, opinion was divided. The case was argued before five Judges, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. By a majority of four to one, Ferguson, J.A., dissenting, the judgment of Masten, J., was reversed. It was declared that the Extra Provincial Corporations Act was *intra vires*, excepting as to the words of sec. 16 (1) to the effect that the Dominion companies could not sue unless they had obtained provincial licenses. In agreement with Masten, J., the Court of Appeal held that the companies were bound to comply with the provisions of the Ontario Mortmain Act as a condition of occupying and holding lands in the Province.

Meredith, C.J.O., made an able and exhaustive scrutiny of the legislation. He observed (41 D.L.R., at pp. 235-236) that it was well settled that, notwithstanding the Dominion having conferred on a company of its creation rights and powers, that company was subject to and bound to obey the laws of the Province with regard to taxation for provincial purposes; with regard also to contracts made within the Province, and as to the holding and tenure of land; and that the exercise by the Province of its authority to pass such laws necessarily limits or restricts the power granted to the company by the Dominion. He then summarised (41 D.L.R., at p. 236) the judgment of this Committee in the *John*

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Deere Plow appeal, and stated one of its results as having been that as the provisions of the British Columbia statute there in question sought to compel the John Deere Plow Co. to obtain a license or to be registered in that Province, as a condition of exercising its power of suing in the Court of the Province, these provisions were *ultra vires*.

The Chief Justice went on to interpret the reasons assigned by this Committee for their judgment (41 D.L.R., at pp. 236, 237). (1) Notwithstanding the generality of the expression in sec. 92 of the B.N.A. Act, the words "civil rights" must be regarded as not covering cases expressly dealt with in sec. 91 or even in sec. 92 itself. (2) Notwithstanding that a company has been incorporated by the Dominion with power to trade, it is not the less subject to provincial laws of general application enacted under sec. 92, including laws as to mortmain and payment of taxes, even though in the latter case the form assumed is that of requiring a license to trade affecting Dominion companies in common with other companies, and including laws as to contracts. (3). It might be competent for a Provincial Legislature to pass laws relating to companies without distinction, requiring those not incorporated within the Province to register for limited purposes, such as the furnishing of information or, under a general statute as to procedure, the giving security for costs. Meredith, C.J.O., thought (p. 237), that the key to the decision was that the Judicial Committee were of opinion that the provisions of the British Columbia Act were not of these characters, but were directed to interfering with the status of Dominion companies and to preventing them from exercising the powers conferred on them by the Parliament of Canada. He referred to various earlier decisions of this Committee, and came to the conclusion that what was intended in the *John Deere Plow* case, 18 D.L.R. 353, [1915] A.C. 330, was to lay down "that it was not competent for a Provincial Legislature to single out Dominion corporations and to subject them to laws which were not applicable to all corporations" (41 D.L.R., at p. 238). An important circumstance in that case was, he thought, that the registrar had asserted power to refuse a license unless the name were changed, an interference with the status of the company. As to this circumstance, he drew attention to what he regarded as an important difference between the British Columbia

and the Ontario legislation (p. 240). In the latter, sec. 9 (2) precluded the insertion in the license of any limitation or condition which would limit the rights of a corporation to carry on in Ontario such parts of the business and powers as by its Act or charter of incorporation had been authorised. The Chief Justice notices in passing that, by sec. 15 of the Extra Provincial Corporations Act, if a corporation receiving a license makes default in observing or complying with its conditions or the provisions of sec. 14 as to returns, or any regulations respecting the appointment of a representative in the Province, the license may be revoked. He thinks that since the amendment made in the original form of the Act, which is embodied in sec. 9 (2) just referred to, the words have now no meaning, and would have been eliminated but for the oversight of the draftsman. In his dissenting judgment, however, Ferguson, J.A., takes the view that, even if the new section was meant to restrict the purpose of the Act, the words of sec. 9 (2) do not do so sufficiently to alter that purpose as remaining (41 D.L.R., at pp. 253, 254).

The Chief Justice was of opinion that sec. 16, which imposes a penalty on the extra provincial company for every day upon which it carries on its business without being licensed, was *ultra vires* (p. 244), and in this the other members of the Court appear to have agreed with him. Subject to this exception he thought that the provisions of the enactment in question were of the character of "provincial laws of general application," within the meaning of the decision in the *John Deere Plow* case. What was important was not the form, which need not be uniform. In substance, what was done was to impose a tax which was really lighter than that imposed on provincial companies. The other provisions of the Act were ancillary to this taxation, and it was no valid objection to what was done that, to the extent required for the exercise of powers specifically entrusted to the Provincial Legislatures, it, in a sense, restricted the exercise of powers conferred by Dominion authority. All laws imposing the necessity of obtaining licenses and paying taxes, and of conforming to mortmain requirements, must do so. In the opinion of the Chief Justice the Act was not, in pith and substance, one designed to restrict Dominion companies "in the exercise of the powers conferred on them by the Dominion authority, but an Act lawfully

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passed for purposes as to which the Legislature by which it was enacted had authority to legislate" (p. 246). As to the Mortmain Act, he agreed with Masten, J., that the law was one of general application and was binding on all companies which it purported to include.

Maclaren, Magee, and Hodgins, JJ.A., agreed in substance with the above conclusions.

Ferguson, J.A., in effect agreed with the reasoning of Masten, J. He was of opinion that the Act as originally enacted was passed on the assumption that it was within the legislative authority of the Province to control all extra provincial corporations, and that, notwithstanding that in its existing form amendments had been incorporated into the Act designed to mitigate this, the Act still embodied the object of general control. This was shewn by the power, given by sec. 11 and by the regulations, which purported to enable the Lieutenant-Governor in Council to refuse a license if the name of the company was objectionable in any of various respects (p. 253).

Their Lordships defer making any observations on these judgments until they have dealt with the other cases. They only observe that with certain of the general propositions expressed by Meredith, C.J.O., in his judgment they are in substantial agreement.

Their Lordships turn next to the case which has been brought forward as regards the legislation on the subject in Manitoba. In the Courts of that Province analogous questions were raised in a shareholder's action. *Davidson* v. *Great West Saddlery Co.* (1917), 35 D.L.R. 526, 27 Man. L.R. 576. The Attorney-General of the Province intervened in the course of the subsequent appeal (1919), 48 D.L.R. 404, 59 Can. S.C.R. 45.

In Manitoba there was passed in 1913, R.S.M., ch. 35, a general Companies Act, of which Part IV. deals with extra provincial companies and includes Dominion corporations. Under sec. 108 every such corporation is required to take out a license under this part of the Act, and by sec. 109, *inter alia*, such a corporation on complying with the provisions of that part and with the regulations made under the Act, is entitled to receive a license to carry on its business and exercise its powers in Manitoba. By sec. 111 (*inter alia*) such a corporation may apply to the Lieutenant-Governor

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in Council "for a license to carry on its business or part thereof, and exercise its powers or part thereof, in Manitoba, and upon the granting of such license such corporation may thereafter, while such license is in force, carry on in Manitoba the whole or such parts of its business and exercise in Manitoba the whole or such parts of its powers as may be embraced in the license; subject, however, to the provisions of this part and to such limitations and conditions as may be specified in the license." On such an application the corporation is to file certain evidence and a power of attorney to someone in the Province appointing him to accept service. This is not to apply if the head office is within the Province (sec. 114 (3)). By sec. 118 no such corporation is to carry on within Manitoba any of its business, and no agent is to act for it, until a license has been granted to it, and then only so long as this is in force. Section 120 requires annual returns of information to be made. By sec. 121 the Lieutenant-Governor in Council may suspend or revoke the license for default in observing the provisions of the Act. Section 122 provides, as in the case of the Ontario statute, for penalties for the carrying on of business in the absence of the license, and incapacitates the corporation from suing without it in the Courts of the Province. Section 126 enables the Lieutenant-Governor to fix the fees to be paid. These are for the exchequer of the Province, and are to vary in part according to the nature and importance of the business to be carried on in the Province, and in part according to the amount of the entire capital stock of the corporation. In addition to these provisions, sec. 112 enables a duly licensed corporation to hold real estate in the Province, but limited, in its license, by sec. 113, to such annual value as may have been deemed proper, as fully as if it had been a Manitoba company under the general Act. There is no Mortmain Act in the Province, but the registration of titles to land requires a license and the registration of title to real estate in the case of extra provincial companies.

Thus there does not appear to be anything in the form or substance of the Manitoba Act which differentiates it materially from the corresponding Ontario Act.

The Manitoba case was heard in the Courts of the Province in the same year, 1917, as the Ontario case, but a little earlier. Macdonald, J., the Judge of first instance, decided in favour of the

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validity of the legislation, but apparently without giving reasons. On appeal the Court of Appeal of the Province was evenly divided, with the result that the appeal was dismissed, 35 D.L.R. 526, 27 Man. L.R. 576. Howell, C.J.M., and Cameron, J.A., were for affirming, while Perdue, and Haggart, JJ.A., were for reversing.

Howell, C.J.M., began his judgment by pointing out that the Province derives part of its revenue from charges for the incorporation of companies and for licenses, and that all companies doing business in Manitoba, no matter where incorporated, have to pay what is sometimes called a tax and at others a fee for a license. He thought that the Manitoba statute should be taken to have been enacted (35 D.L.R., at 530) "for the purpose of completing the provincial scheme of direct taxation for the general purposes of the Province by a general charge or tax on all corporations, as in *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575." The decision in that case also disposed, in the view of Howell, C.J.M., of the argument that the discretionary power of prescribing conditions and limitations constituted an objection to the validity of the scheme of the Act, for there was no power to refuse a license generally, like that in the British Columbia statute (p. 532).

Cameron, J.A., also dwelt on this distinction (p. 545), and on the more restricted scope of the Manitoba Act in other points. As to the imposition of penalties, that carried the matter no further, for the true test was whether the substantive provision was authorised by sec. 92. He arrived at the conclusion that the Companies Act was one the legislation in which was of such a general character as was saved by the decision in the *John Deere Plow* case, being in reality wholly directed to subjects entrusted to the Provincial Legislatures by sec. 92 of the B.N.A. Act.

Perdue, J.A., dissented, 35 D.L.R. 533. Section 111, enabling the Lieutenant-Governor in Council to insert in the license limitations and conditions as to the exercise of the company's powers within the Province shewed that there was really no difference in this respect between the Manitoba Act and that declared *ultra vires* in the *John Deere Plow* case. He thought that for the purposes of the question there decided the provisions of the two Acts were indistinguishable. The object of such statute was, in his view, to restrain Dominion companies from exercising within the Province

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the rights conferred on them by their charters, unless licensed. The decisions of the Privy Council in *Bank of Toronto* v. *Lambe*, *supra*, and the *Brewers and Maltsters* case, [1897] A.C. 231, were not really in point, for they only established that what had to be paid was in these cases in the nature of direct taxation. Here the Provincial Legislature had gone further and had failed to confine their legislation within the limits which were settled by the *John Deere Plow* case to be those of what was legitimate.

Haggart, J.A., concurred in this conclusion.

There was in this case, unlike that of Ontario, an appeal to the Supreme Court of Canada, 48 D.L.R. 404, 59 Can. S.C.R. 45, which also heard an appeal from the Supreme Court of Saskatchewan (1919), 48 D.L.R. 386, 59 Can. S.C.R. 19. The judgments of the Supreme Court of Canada, dismissing both appeals, were given on the same date, Idington, Anglin and Brodeur, JJ., taking one view, and Davies, C.J., and Mignault, J., dissenting. It will be convenient to reserve consideration of these judgments until reference has been made to the Saskatchewan cases, which were disposed of along with those from Manitoba.

The four Saskatchewan Companies Acts, now operative, differ from those of Ontario and Manitoba in the circumstance that they were passed in 1915, 1916 and 1917, after the decision in the *John Deere Plow* appeal to this Committee. It is the first of these four Acts that alone is important for the purposes of the present question. This is a general Companies Act, 6 Geo. V., 1915 (Sask.), ch. 14, the provisions in which have nothing unusual in them, but which extends to, *inter alia*, Dominion companies having gain for their object, and carrying on business in the Province. The effect of sec. 23 is that a Dominion company of this nature must be registered under the Act, and that if it does not register, the Dominion company and its representatives are liable to penalties for carrying on business in the Province. The effect of sec. 24 is that registration cannot be refused to a Dominion company. By sec. 25 the company may, on complying with the provisions of the Act, receive an annual license, for which it is to pay fees to the Government of the Province, and may then carry on its business, subject to the provisions of the instrument creating it, as if it had been incorporated under the Act; but a company carrying on business without a license is liable to penalties. By sec. 27 the

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Lieutenant-Governor in Council may prescribe such regulations as he may deem expedient for the registration of all companies, and for fixing the fees payable. By sec. 29 if the registrar thinks that a company registered has ceased to carry on business he may, after finding on enquiry that this is so, strike the company off the register, whereupon it is dissolved; but by an amending Act passed since the commencement of these proceedings the provision as to dissolution is to take effect only as to Saskatchewan companies. By sec. 30 if the prescribed fee is not paid the company may be struck off the register.

Proceedings were taken in Saskatchewan before a Justice of the Peace against a Dominion company for not being licensed or registered, and an action was brought by a shareholder, as in the cases of the other Provinces already referred to. The substantial question was again the validity of the provincial statute, and this statute Elwood, J., the Judge of first instance, held to have been validly enacted. *Harmer* v. *A. Macdonald Co. Ltd.* (1916), 30 D.L.R. 640. On appeal the Supreme Court of Saskatchewan, *en banc*, consisting of Haultain, C.J.S., Newlands, Lamont, Brown and McKay, JJ., dismissed the appeal unanimously (1917), 33 D.L.R. 363, 10 S.L.R. 231. On appeal to the Supreme Court of Canada that Court also unanimously dismissed the appeal, 48 D.L.R. 386, 59 Can. S.C.R. 19.

Elwood, J., thought that the fees imposed were direct taxation, and that there was no prohibition of carrying on business without license or registration, but merely a penalty, which did not interfere with the status of the company.

The judgment of the Supreme Court of Saskatchewan was delivered by Newlands, J. He pointed out, 33 D.L.R., at pp. 364, 365, that the form of the existing Act, which was passed in 1915, after the decision of the Judicial Committee in the *John Deere Plow* case, 18 D.L.R. 353, [1915] A.C. 330, made it evident that the Legislature of the Province had endeavoured to get rid of what might have been held to be objectionable in older legislation. For example, the old provision had been dropped, according to which any company required to be registered should not, while unregistered, be capable of suing in the Courts of the Province. It is true that there was still a provision that every company carrying on business in the Province without a license was to be

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guilty of an offence and liable to a penalty; but this did not necessarily render its contracts void. The prohibition of a particular act under a penalty was altogether different from requiring a general regulation to be complied with under a penalty. It was not really the intention of the Legislature to prevent the company from doing business, but only to designate what companies were to be registered and pay license fees. The status and powers of the Dominion company were therefore not affected.

In the Supreme Court of Canada the decisions in the Saskatchewan and Manitoba cases were reviewed and affirmed, 48 D.L.R. 386, 59 Can. S.C.R. 19, and 48 D.L.R. 404, 59 Can. S.C.R. 45. There was no appeal brought there from the Ontario judgment, but the decision of the Ontario Court of Appeal, 41 D.L.R. 227, 41 O.L.R. 475, had been given more than a year previously and the reasons for it were alluded to in the Supreme Court of Canada in the other cases. It will be convenient to consider together the judgments in the other two cases, which were delivered on the same day.

In the Manitoba appeal, 48 D.L.R. 404, 59 Can. S.C.R. 45, Davies, C.J., dissented and would have reversed. For he took the same view as Perdue, J.A., had expressed in the Court below, 35 D.L.R. 526. He thought that the Manitoba Act, if valid, would deprive the Dominion companies of their status and powers, notwithstanding that sec. 18 of the British Columbia Act, R.S.B.C. 1911, ch. 39, did not occur in it; the section which prohibited the registration of an extra provincial corporation with a name of which the registrar disapproved. But while he formed this opinion about the Manitoba Act he thought otherwise about that of Saskatchewan, which he held (48 D.L.R., at p. 408) had been so framed as to get over the difficulties indicated in the decision in the *John Deere Plow* case. His view was that in the latter Act the provisions were confined to the levying of direct taxation, and that its construction was such that if a Dominion company paid the tax it could carry on business without taking out a license. But while arriving at this conclusion he stated that he had done so with difficulty and doubt, and that he considered the statute objectionable in form, though not in essence.

Anglin, J. (48 D.L.R., at p. 410), expressed an opinion similar

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in doubt as to the Manitoba legislation, but on the whole he thought that the decision in the Manitoba case might be affirmed, though he arrived at that conclusion only after doubt. As to the Saskatchewan appeal he thought the provisions of the Act there distinguishable, and he concurred in the reasons given by his colleagues for the dismissal of the appeal.

Brodeur, J. (48 D.L.R., at pp. 411 *et seq.*), laid much stress in the Manitoba case on the title of the Dominion company to have a license as of right. The license he considered to be a mere method of effecting direct taxation. He took the same view of the Saskatchewan legislation, 48 D.L.R., at pp. 397 *et seq.* The obligation of a Dominion company to take out a license was under a law of general application, and was a mere means of taxation. He concurred in the dismissal of both appeals.

Idington, J., agreed. The cases seemed to him to turn on the same question, whether a Provincial Legislature could tax a Dominion company. He thought the earlier decisions of the Judicial Committee had established that it could do so in this kind of form. No one of the enumerated powers in sec. 91 enabled the Dominion Parliament to entitle a Dominion company to escape from the obligations of a private citizen in the Province, (48 D.L.R.. at pp. 391 *et seq*).

Mignault, J., agreed as regards the Saskatchewan appeal, (48 D.L.R., at pp. 399 *et seq*). The statute there was a pure taxing statute, and the Dominion companies were not prohibited from carrying on business in the Province, but were merely subjected to a penalty for not taking out a license. In the Manitoba case he dissented from the majority, and thought that there should be a reversal, (48 D.L.R., at pp. 415, *et seq*). For the companies were by the statute there compelled to take out a license as a condition of exercising their powers in the Province, and of invoking the jurisdiction of its Courts. He agreed with the view taken by Perdue, J.A., in the Court below.

Their Lordships have thus examined in some detail the course of the proceedings in the cases under consideration, and have stated the substance of the various judgments given. There has been much divergence of opinion in these judgments. It has arisen over the single question which is the crucial one in these appeals. Can the relevant provisions of all or any of the three sets of

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provincial statutes be justified as directed exclusively to the attainment of an object of legislation assigned by sec. 92 of the Legislatures, such as is the collection of direct taxes for provincial purposes; or do these provisions interfere with such powers as are conferred on a Dominion company by the Parliament of Canada to carry on its business anywhere in the Dominion, and so affect its status? The question is one primarily of the interpretation of the B.N.A. Act and in the second place of the meaning of the principle already laid down by this Committee in the *John Deere Plow* case. The constitution of Canada is so framed by the B.N.A. Act that the difficulty was almost certain to arise. For the power of a Province to legislate for the incorporation of companies is limited to companies with provincial objects, and there is no express power conferred to incorporate companies with powers to carry on business throughout the Dominion and in every Province. But such a power is covered by the general enabling words of sec. 91, which, because of the gap, confer it exclusively on the Dominion. It must now be taken as established that sec. 91 enables the Parliament of Canada to incorporate companies with such status and powers as to restrict the Provinces from interfering with the general right of such companies to carry on their business where they choose, and that the effect of the concluding words of sec. 91 is to make the exercise of this capacity of the Dominion Parliament prevail in case of conflict over the exercise by the Provincial Legislatures of their capacities under the enumerated heads of sec. 92. It is clear that the mere power of direct taxation is saved to the Province, for that power is specifically given and is to be taken, so far as necessary, on a proper construction to be an exception from the general language of sec. 91, as was explained by Sir Montague Smith in delivering the judgment of the Judicial Committee in *Citizens Insurance Co.* v. *Parsons* (1881), 7 App. Cas. 96, at p. 108. Nevertheless, the methods by which the direct taxation is to be enforced may be restricted to the bringing of an action, with the usual consequences, which was all that was decided to be legal in *Bank of Toronto* v. *Lambe*, 12 App. Cas. 575. It does not follow that because the Government of the Province can tax that it can put an end to the existence or even the powers of the company it taxes for non-compliance with the demands of the tax-gatherer. Their Lordships find themselves unable to agree

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with an observation made by Meredith, C.J.O., towards the conclusion of his judgment. "It is," he says (41 D.L.R. 227, at p. 249, 41 O.L.R. 475), "I think to be regretted that at the outset it was not determined that the authority of the Parliament of Canada to incorporate companies was limited to creating them and endowing them with capacity to exercise such powers as it might be deemed proper that they should possess, but leaving to each Province the power of determining how far, if at all, those powers should be exercised within its limits." Such a construction would have left an *hiatus* in the B.N.A. Act, for there would have been in the Act so read no power to create a company with effective powers directed to other than merely provincial objects. It was decided as long ago as 1883, in *Colonial Building and Investment Ass'n* v. *Att'y-Gen'l of Quebec*, 9 App. Cas. 157, that there was no such *hiatus*. Nor does it appear, if reference may be made as matter of historical curiosity to the resolutions on which the B.N.A. Act was founded, and which were passed at Quebec on October 10, 1864, for the guidance of the Imperial Parliament in enacting the constitution of 1867, that these resolutions gave countenance to the idea that a different construction on the point in question was desired. Meredith, C.J.O., refers to them without quoting their language. But, in connection with the topic in controversy, all that was desired by the words of these resolutions to be assigned to the Provincial Legislatures was "the incorporation of private or local companies, except such as relate to matters assigned to the General Parliament."

In *Tennant* v. *The Union Bank of Canada*, [1894] A.C. 31, it was decided that the B.N.A. Act must be so construed that sec. 91 conferred powers to legislate which might be fully exercised even though they modified civil rights in a Province, provided that these powers are clearly given. The rule of construction is that general language in the heads of sec. 92 yields to particular expressions in sec. 91, where the latter are unambiguous. The rule may also apply in favour of the Province in construing merely general words in the enumerated heads in sec. 91. For, to take an example, notwithstanding the language used at the end of sec. 91, the heading in that section, "Marriage and Divorce," was interpreted on an appeal to this Committee in the *Marriage Laws* case, 7 D.L.R. 629, [1912] A.C. 880, as being *pro tanto* restricted by the provision

of sec. 92, which entrusted the making of laws relating to the solemnisation of marriage to the Provincial Legislatures. Whether an exception is to be read in in either case depends on the application of the principle that language which is merely general is, as a rule, to be harmonised with expressions that are at once precise and particular by treating the latter as operating by way of exception. The two sections must be read together, and the whole of the scheme for distribution of legislative powers set forth in their language must be taken into account in determining what is merely general and what is particular in applying the rule of construction. For neither the Parliament of Canada nor the Provincial Legislatures have authority under the Act to nullify, by implication any more than expressly, statutes which they could not enact. The decision in *Att'y-Gen'l for Ontario* v. *Att'y-Gen'l for the Dominion etc.*, [1896] A.C. 348, is a good illustration of the fashion in which the rule of construction thus stated has been interpreted and applied.

It is obvious that the question of construction may sometimes prove difficult. The only principle that can be laid down for such cases is that legislation the validity of which has to be tested must be scrutinised in its entirety in order to determine its true character. *Madden* v. *The Nelson, etc. R. Co.*, [1899] A.C. 629, and *C.P.R. Co.* v. *Corp'n of Notre Dame de Bonsecours*, [1899] A.C. 367, are excellent illustrations of how this has been done. In the first-mentioned case a Provincial Legislature, by a Cattle Protection Act, sought to make a Dominion railway company liable for injury to cattle straying on the line within the Province, unless they had erected proper fences. It was held that the Province had no power to impose liability on the Dominion railway companies as such for the provision of works. It was pointed out in the latter case that a very different point really arose, namely, that although any direction by a Provincial Legislature to a Dominion railway company to alter the construction of the drains on its works would be *ultra vires*, still the railway company were not exempted from the obligation of a provincial law applicable to all land owners, without distinction, that they should clean out their ditches so as to prevent nuisance.

In cases such as those referred to the rule of construction above stated has been applied wherever possible. It is only where

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there is actual inconsistency that the effect of the concluding words of sec. 91 can be invoked. *Att'y-Gen'l of Manitoba* v. *Manitoba License Holders' Ass'n*, [1902] A.C. 73, is yet another useful illustration. The Legislature of Manitoba had enacted the prohibition of transactions in liquor to take place wholly within the Province, with the saving of *bonâ fide* transactions between persons in the Province and those in other Provinces or in foreign countries. It was held that such legislation was valid as falling within Head 16 of sec. 92, "matters of a merely local or private nature in the Province," notwithstanding that its effect would be to interfere consequentially with sources of Dominion revenue and with business operations beyond the Province. *Union Colliery Co.* v. *Bryden*, [1899] A.C. 587, and *Cunningham etc.* v. *Tomey Homma etc.*, [1903] A.C. 151, also furnish illustrations of how the rule of construction under consideration has been applied.

The only other decision to which their Lordships desire to make reference is that in *Brewers and Maltsters' Ass'n etc.* v. *Att'y-Gen'l of Ontario*, [1897] A.C. 231. There the Dominion Legislature had previously and validly regulated the manufacture and wholesale vending of spirituous liquors, and provided for the issue of licenses for such manufacture and sale. Ontario had subsequently passed an Act requiring every person so licensed by the Dominion also to obtain a license for sale from the Province, and to pay a fee for it. It was held in the first place that this was direct taxation for provincial purposes, and therefore within the power of the Province, and secondly that the license was such as to be authorised among the "other licenses" included in the general words of Head 9 of sec. 92—"shop, saloon, tavern, auctioneer, and other licenses in order to the raising of a revenue for provincial . . . purposes." Their Lordships think that what is implied in this decision is that while the Dominion Legislature had power to place restrictions throughout Canada on the traffic in liquor, the powers conferred by sec. 91 did not in any way conflict with the positive powers of taxation and licensing for provincial objects, expressly and particularly conferred by sec. 92. These, in so far as there might have been any interference, had been conferred by the Imperial Parliament on the Provinces by way of exception both from the general power of legislation given to the Dominion by the initial

words of sec. 91, and from any purely general enumerated head, such as the regulation of trade and commerce.

The principle of interpretation to be followed in applying the test laid down in the *John Deere Plow Co.* case, that provincial legislation cannot validly destroy the status and powers conferred on a Dominion company by Act of the Parliament of Canada, does not appear to be obscure when read in this light. Turning to its application, the first thing to be observed is the nature of the questions to be answered. Their Lordships will dispose in the first place of a subsidiary matter, which is whether a Dominion company can be precluded from acquiring and holding land in a Province by a provincial law of the nature of a general Mortmain Act. It is clear, both on principle and from previous decisions, that it is within the competence of a Provincial Legislature to enact such legislation, and the question is therefore answered in the affirmative. If there be a provision to this effect, occurring even in a statute which in other respects is *ultra vires*, and that provision be severable, it is valid. In the Ontario case there is therefore no doubt that the broad result of the contention of the Province under this head is well founded; for there the Legislature has passed a Mortmain Act of general application, and in regard to this Act a Dominion company is in no better position than any other corporation which desires to hold land.

In Manitoba there is no general Mortmain Act, but sec. 112 of the Manitoba Companies Act enables a corporation receiving a license under Part IV. of the Act, relating to extra provincial companies, to acquire and hold land as freely as could any company under Part I. of the Act. Even if the provision as to the licensing of extra provincial companies is held to be *ultra vires*, so as to prevent such a provision from being operative, as being inseverable, it is plain that the substance of a provision which is of the character of a mortmain law is within the power of the Province.

In Saskatchewan there is no general Mortmain Act, but the Companies Act of 1915, by sec. 19, enables a company incorporated under the law of the Province to hold land. By sec. 25 a company not so incorporated (and this includes a Dominion company) may, if it has been licensed, carry on its business as if it had been incorporated under the law of the Province. This enables it to hold land unless the provisions as to the grant to it of a license are

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inoperative. Their Lordships do not think that sec. 29 of the Companies Act of Canada, R.S.C. 1906, ch. 79, which purports to enable a Dominion company to acquire and hold real estate requisite for the carrying on of its undertaking, can prevail against any severable provision by a Provincial Legislature restricting the power of corporations generally to acquire or hold real estate in the Province.

Their Lordships now pass to the question of a more general order, which is the main one in these appeals. Had the Provinces of Ontario, Manitoba and Saskatchewan power to impose on Dominion companies the obligation to obtain a license from the Provincial Government as a condition of the exercise in these Provinces respectively of the powers conferred on them by the Dominion?

If the condition of taking out a license had been introduced, not so as to affect the status of the Dominion company, but simply for the purpose of obtaining payment of a direct tax for provincial purposes, or of securing the observance of some restriction as to contracts to be observed by the public generally in the Province, or of causing the doing, by that public generally, of some act of a purely local character only under license, their Lordships would, for reasons already given, have been prepared to regard the condition as one which it was within the power of the Province to impose. Even then it would have been requisite to see, as was pointed out by Lord Herschell, in delivering the judgment of the Judicial Committee in the *Brewers and Maltsters* case, [1897] A.C. 231, at p. 237, that the Provincial Legislature was not, under the guise of imposing such direct taxation, in the form of which he was speaking as being within their power, really doing something else, such as imposing indirect taxation. As to any inquiry in the future whether this or anything analogous has been in substance attempted, their Lordships hold themselves unfettered. If, for example, such a question were to arise hereafter, involving consideration of whether the real effect of the license required by a provincial law has been to abrogate capacity which it was within the power of the Parliament of Canada to bestow, or whether for a breach of conditions a Provincial Legislature could impose, not an ordinary penalty but one extending to the destruction of the status of the company and its capacity in the Province,

nothing that has been here said is intended to prejudice the decision of such a question, should it occur. It is sufficient to observe once more that in such matters what cannot be done directly can no more be effected by indirect methods.

What remains is to apply the principle of the decision in the *John Deere Plow* case, 18 D.L.R. 353, [1915] A.C. 330, as so interpreted to the actual provincial legislation challenged.

As to Ontario, the statute impugned is the Extra Provincial Corporations Act in its application to Dominion companies. Their Lordships have come to the conclusion that the real effect of this Act, as expressed or implied by its provisions, is to preclude companies of this character from exercising the powers of carrying on business in Ontario, to the same extent as in other parts of Canada, unless they comply with a condition sought to be imposed, that of obtaining a license to do so from the Government of the Province. By sec. 7 such companies are expressly prohibited from doing so, and the provision in sec. 9 (2) that no limitations or conditions are to be included in such a license as would limit a Dominion company, for example, from carrying on in the Province all such parts of its business, or from exercising there all such parts of its powers, as its Act or charter of incorporation authorises, does not in their Lordships' opinion sufficiently mend matters. For the assertion remains of the right to impose the obtaining of a license as a condition of doing anything at all in the Province. By sec. 11 the grant of the license is made dependent on compliance with such regulations as may happen to have been made by the Lieutenant-Governor in Council under secs. 2 and 10 of the Act. By sec. 16, and also under sec. 7 itself, an extra provincial corporation required to take out a license is to be fined for not doing so, and, under sec. 16, is to be incapable of suing in the Courts of the Province. Their Lordships are of opinion that these provisions cannot be regarded as confined only to such limited purposes as would be legitimate, and that they are therefore *ultra vires*.

Taking next the Companies Act of Manitoba, Part IV. of this Act deals with extra provincial corporations, including Dominion companies. The effect of the scheme of this part does not appear to their Lordships to differ in any feature that is material from that of the Ontario Act. *Inter alia*, a Dominion company must take out a license, which it is entitled to receive if it complies with the

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provisions of the Act and with regulations to be made by the Lieutenant-Governor in Council. There may, under sec. 111, be limitations and conditions specified in the license, and if the company makes default in complying with these or certain other provisions, the license may be revoked under sec. 121. Unless the company obtains a license it cannot, nor can any of its agents, carry on business in Manitoba. Penalties are imposed for carrying on business without a license, and so long as unlicensed the company cannot invoke the jurisdiction of the Courts of the Province. It does not alter the scope of these provisions that by sec. 126 fees are payable for the license, to be applied to the benefit of the revenue of the Province.

Their Lordships are unable to take the view that these sections regarded together are directed solely to the purposes specified in sec. 92. They interpret them, like those of the Ontario statute, as designed to subject generally to conditions the activity within the Province of companies incorporated under the Act of the Parliament of Canada. The restriction in this statute as to the holding of land cannot be severed from the general provisions as to licensing so as to make those restrictions enforceable as being in the nature of mortmain legislation.

The statute remaining to be considered is that passed by the Legislature of Saskatchewan in 1915, a general Companies Act which, however, contains provisions applicable to Dominion companies. By sec. 23, if such companies carry on business in Saskatchewan, they must be registered under this Act, and if they carry on business without registering, the companies, and also the agents acting for them, are made liable on summary conviction to penalties. By sec. 24 such companies are entitled to be registered on complying with the provisions of the Act and on paying the prescribed fees. There are also payable annual fees. By sec. 25 such companies may upon certain conditions receive a license to carry on business in Saskatchewan, and if they carry on business without a license are guilty of an offence and liable to penalties. By sec. 29, where the registrar satisfies himself in the prescribed manner that a company registered under the Act has ceased to carry on business, he may strike the company off the register, and it is then to be dissolved. By sec. 30, if the registration fees prescribed by the regulations made by the Lieutenant-Governor

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in Council be not paid, the registrar is to strike the company off the register.

Here again their Lordships think that the Provincial Legislature has failed to confine its legislation to the objects prescribed in sec. 92, and has trenched on what is exclusively given by the B.N.A. Act to the Parliament of Canada. If the Act had merely required a Dominion company, within a reasonable time after commencing to carry on business in Saskatchewan, to register its name and other particulars in the provincial register and to pay fees not exceeding those payable by provincial companies, and had imposed upon it a daily penalty for not complying with this obligation, it could (their Lordships think) be supported as legitimate machinery for obtaining information and levying a tax. But the effect of imposing upon such a company a penalty for carrying on business while unregistered is to make it impossible for the company to enter into or to enforce its ordinary business engagements and contracts until registration is effected, and so to destroy for the time being the status and powers conferred upon it by the Dominion. Further, if it is the intention and effect of the Act that a Dominion company when registered in the Province shall be subject (by virtue of the definition section or otherwise) to the general provisions of the Saskatchewan Companies Act or shall become liable to dissolution under sec. 29, the Act would be open to question on that ground; but it is right to say that such a construction was disclaimed by counsel for the Attorney-General of Saskatchewan and (as regards the liability to dissolution) has been excluded by an amending Act passed while these proceedings were pending. Section 25 of the Saskatchewan Act, which requires a Dominion company to obtain a license, stands on the same footing as the enactments in Ontario and Manitoba which have been held void as *ultra vires:* and in this case also the restrictions on the holding of land are not severable from the licensing provisions and are invalid on that ground.

The result is that their Lordships take the view which commended itself to a minority of the Judges in the Courts below, and find themslves unable to agree on the main question argued, either with the preponderating opinion expressed in the Supreme Court of Canada on the Saskatchewan and Manitoba legislation, or with that of the majority of the Court of Appeal in Ontario

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on the validity of the statute of that Province, but that on the subsidiary question as to the Mortmain Act of Ontario they agree with the Ontario Courts.

The proper course will be to allow the appeals and to declare (1) That in the case of all four appellant companies the provisions of the parts of the provincial Companies Acts which were the subject of the proceedings in the Courts of the Provinces of Ontario, Manitoba and Saskatchewan, in so far as they purport to apply to the appellant companies respectively, are *ultra vires* of the Provincial Legislatures in each case, and that these companies are not precluded by reason of not having been licensed or registered under those Acts from carrying on business and exercising their powers in the three Provinces, and are not liable to the penalties prescribed for having so carried on business and exercised their powers. (2) That in the case of the Province of Ontario none of the appellant companies can acquire and hold lands in the Province without a license under the provincial Mortmain Act, and that it is within the power of the other Provincial Legislatures to impose the requirement of a license directed to this purpose. The judgments of Masten, J., in the Ontario cases will be restored, and the other proceedings dismissed.

As regards costs their Lordships were informed that in the cases in the Courts below it was in certain of the proceedings agreed that there should be no costs. Having regard to the character of the questions raised, and to the circumstance that on one important point, that as to mortmain, the whole of the contentions of the appellants have not been successful, they think that there should be no costs for any of the parties, either of these appeals or in any of the Courts below.

They will humbly advise His Majesty in accordance with what has been said. *Appeals allowed.*

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Judicial Committee of the Privy Council, The Lord Chancellor, Viscount Haldane, Viscount Cave, Lord Dunedin, and Lord Moulton.
February 11, 1921.

MARRIAGE (§IIIA—27)—CONSANGUINITY—FOURTH COUSINS—FRENCH RULE PROHIBITING—LEGAL RESTRICTION REMOVED ON CESSION OF CANADA TO ENGLAND—LAW UNCHANGED BY ART. 127 QUEBEC CIVIL CODE—MARRIAGE VALID.

The marriage law of Quebec, which under the rules of the Roman Catholic Church enacted in the year 1215 and in force while the Province was under the French regime, and which made the marriage between cousins of the fourth degree invalid, was done away with, and special terms of religious liberty given to the Roman Catholic subjects of Quebec by the King of England upon the cession of Canada to that country. By these terms the law of marriage in Quebec as affected by relationship between the parties was subject to no legal restriction except such as was imposed by the statute Henry VIII. ch. 38, which enacts "that no reservation or prohibition, God's law excepted, shall trouble or impeach any marriage without Levitical degrees." Article 127 of the Quebec Civil Code leaves this law entirely unchanged, and in the same position as it was before the passing of the Code, and so far as concerns the persons to be married whether Roman Catholic or Protestant, relationship other than such as falls within the Levitical degrees creates no inherent impossibility of marriage.

[Review of legislation and authorities. *Tremblay* v. *Despatie* (1912), 43 Que. S.C. 59, reversed.]

Statement.

APPEAL from a decision of the Superior Court of the Province of Quebec sitting in review (1912), 43 Que. S.C. 59, confirming with a slight modification the decision of the Superior Court (1911), 40 Que. S.C. 429, declaring the marriage between the parties null and void. Reversed.

This case directly raises a point of great importance relating to the marriage laws of the Province of Quebec.

The judgment of the Board was delivered by

Lord Moulton.

LORD MOULTON:—The facts of the case are not in dispute and are as follows:—The appellant and the respondent were married on October 25, 1904, in the Roman Catholic Church of St. Victoire, Richelieu, Quebec. Both parties are and were at the time of the marriage members of the Roman Catholic Church. They were married by their own Curé, and all the formalities required by the laws of the Province of Quebec relating to the solemnisation of marriage were observed. After the solemnisation of the marriage the parties lived together as man and wife for some time and no question was raised as to the validity of the marriage until the year 1910, when the respondent, the husband, made an application to the Roman Catholic Bishop of

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the Diocese to have the marriage declared null and void on the ground of the relationship of the parties.

By that date it had been discovered that the parties are cousins in the fourth degree (ascertained in the ecclesiastical manner) through common ancestors who were married in the year 1781, and who were the great-great-grandparents of the parties. Neither party knew of the relationship at the time of the marriage, which was made in all good faith in the belief that no relationship existed between the parties. In his application to the Roman Catholic Bishop of the Diocese to have the marriage declared null and void on the ground of the relationship of the parties, the respondent alleged a rule of the Roman Catholic Church enacted at the Council of Lateran in the year 1215 which forbade the marriage of Catholics related as cousins in the fourth degree unless a dispensation should be first obtained. It is admitted that no dispensation was in this case granted, or even applied for, by reason of the fact that the parties were entirely ignorant that the relationship existed until a considerable time after the marriage had been solemnised and consummated.

Such is the subject-matter of the suit, and such are the essential facts. It is, however, advisable to state shortly the steps that have been taken in this litigation which are of a nature to raise important questions of procedure.

On February 11, 1910, the Roman Catholic Bishop of the Diocese issued on the application of the respondent what purported to be a decree declaring the marriage null and void because of the said relationship. In May of the same year the respondent took action in the Superior Court against the appellant claiming a declaration that the marriage was null and void. He based his action solely on the existence of the relationship and the decree of the Roman Catholic Bishop. On these materials Bruneau, J., the Judge in the Superior Court, declared the marriage null and void.

On appeal by the present appellant the Court of Review set aside this judgment and remitted the case back to the Superior Court for proof of the facts and of the rules of the Roman Catholic Church. The case was accordingly re-heard by Bruneau, J., who heard evidence on these points and gave a

judgment to the same effect as his previous judgment (1911), 40 Que. S.C. 429. On appeal to the Court of Review (1912), 43 Que. S.C. 59, that judgment was upheld by a majority, Tellier and De Lorimier, JJ., being in favour of supporting the judgment of Bruneau, J., and Archibald, J., being of a contrary opinion. From this judgment of the Court of Review the present appeal is brought by special leave granted on August 12, 1913.

The appeal first came before this Board in May, 1914. The judgment of the Judges of the Court below, in favour of the respondent, had been practically based on their interpretation of art. 127 of the Civil Code, and the same remark applies to the authorities quoted in support of their contentions by either party in the argument before this Board.

The material part of art. 127 reads as follows:—"The other impediments recognized according to the different religious persuasions as resulting from relationship, or affinity, or from other causes, remain subject (*restent soumis*) to the rules hitherto followed in the different churches and religious communities."

This article was treated by the Judges as laying down the law with regard to marriage in a positive form and therefore as being decisive of the question at issue in the case. But on January 23, 1915, this Board pointed out to the parties that there was a view of the proper interpretation of the language of art 127 which required examination and decision before that article could be treated as having the above effect. On that occasion their Lordships said:—

> It may well be argued that the intention of article 127 was to make no change in the marriage law so far as the various religious communities are concerned, but to leave it in the same position as it was before the passing of the Code. In other words, that the effect of article 127 is to leave the marriage law in these respects uncodified and not to create a new marriage law based entirely on the Code.

In view of the great importance to the community of the issues raised in the case, and of the fact that this question had not been substantially dealt with in the argument, their Lordships directed that the appeal should be re-argued, adding:—

> If it should be held that the intention and meaning of article 127 is that the marriage law in these respects should be unchanged, the case will necessarily require to be decided as it would have been prior to the passing of the Code, and it will be necessary to discuss the law as it then existed.

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In consequence of the above directions of their Lordships the case has been fully re-argued, and it remains for their Lordships to give judgment on the whole question.

Further consideration of the language of article 127 of the Civil Code has confirmed their Lordships in the view adumbrated by them as above mentioned, viz., that the intention and effect of this article was to leave the law as to the effect of the impediments to which it refers entirely unchanged. It neither added to nor took away from the effect of these impediments. This is clearly indicated by the use of the word "remain" ("*restent*"). There is nothing in the article which points to any alteration in the nature or effect of the impediments to which it refers. On the contrary everything is left in the same condition as it was before the codification.

Article 127 is an example of what frequently if not generally occurs in the process of forming into a code the laws of any country, either wholly or with regard to some specified subject matter. The essence of a code, whether it relates only to a particular subject or is of a more general character, is that it is a new departure. The codifiers have no doubt the task of examining the various authorities on each point in order to come to a right conclusion from the conflicting decisions as to what is the law upon the subject and their duty is to embody the result in the corresponding clause of the code they are framing. But when they have done this and the code has become a statute, the question whether they were right or wrong in their conclusion becomes immaterial. From thenceforth the law is determined by what is found in the code and not by a consideration of the conclusions which ought to have been drawn from the materials from which it has been framed. The language used by Lord Herschell in the case of *The Governor and Company of the Bank of England* v. *Vagliano Bros*, [1891] App. Cas. 107 at p. 140, has always been accepted as expressing the object of codification. In speaking of the Bills of Exchange Act, 45-46 Vict., 1882, (Imp.), ch. 61, sec. 7, sub-sec. 3, which codified this particular branch of the law, he says, at p. 142: "The purpose of such a statute surely was that on any point specifically dealt with by it the law should be ascertained by interpreting the language used

instead of, as before, by roaming over a vast number of authorities."

It will be noted that Lord Herschell confines his principle to those points which are specifically dealt with by the law. But it almost always happens that in codification there occur particular points where the codifiers find it impossible or for some reason undesirable to deal specifically with the matter, and they leave it to be decided by the law as it previously existed. They accordingly make no pronouncement on these points, so that there is no language in the code which can form a new departure which authoritatively replaces the law as it previously existed. Sometimes this may be done by mere omission to deal with the point, but it may also be done specifically, as for instance by saying that in that particular matter (or more generally that in matters not dealt with by the code) the previous law shall apply. But however it be done the essence is the same. It is a refusal to codify the law on the particular point, *i.e.*, a refusal to substitute for the law as it existed previously a new and authoritative pronouncement which expresses the law that is to operate in the future. Instead of formulating what the law should be in the future it says directly or by implication that it shall remain as it was in the past.

It is not necessary to refer to other cases of codification to substantiate these remarks. A remarkable instance of this mode of procedure occurs in the Code which their Lordships have here to consider. The Commissioners who were charged with the task of codification in dealing with the subject of "Civil Death" proposed that it should be a necessary consequence of perpetual religious vows as defined by them in the article they suggested. But the Legislature would not accept their suggestion, and the only article relating to the effect of religious vows stands in the Code as follows:—

34. The disabilities which result as regards persons professing the catholic religion from religious profession by solemn and perpetual vows made by them in a religious community recognized at the time of the cession of Canada to England and subsequently approved *remain subject to the laws by which they were governed at that period.*

In other words, the Legislature refused to set out in the Code the disabilities arising from such vows, but left them to be

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ascertained by the law as it existed at a particular date. The disabilities must therefore be ascertained by a consideration of what was actually the law at that date, and cannot be ascertained from the Code itself. It happens that the date chosen is in this case the date of the cession, but the principle is the same whatever be the date chosen. It amounts to a refusal to codify on that particular point, *i.e.*, to declare in the Code itself what is to be the law for the future, and leaves it to be decided by the law as it previously existed.

Their Lordships are of opinion that art. 127 of the Code is an example of a like procedure. In lieu of declaring specifically what is to be the law in the future as to the effect of the disabilities to which it refers, it simply expresses the intention to effect no change in the law as then existing on the matter and directs that it should remain unchanged. There is no word indicating an intention to define the impediments or to classify them or to give any new legal effect to any one of them. The dominant word in the article is "remain," ("*restent*"), which indicates clearly that the codifiers intended while leaving the rules obtaining in the various religious communities to have their existing effect as rules of faith and conscience, to make no change in this portion of the law. "As they were so shall they remain" is its decision. The reason is not difficult to seek. By this date there were numerous religious communities of very various types in Quebec, and it would have been a thorny subject to deal with their religious tenets and give to them legal consequences by new and specific provisions. The only safe way was to leave the law as it stood, quite untouched.

If it were permissible to regard the intentions of the codifiers as expressed by their reports, their intention to leave the law unchanged would be equally evident, but this is a dangerous and doubtful proceeding and their Lordships decline to adopt it. The proper course is to look at the article itself, and their Lordships are of opinion that the language used in art. 127 carries out this intention. It may well be that the Commissioners had each of them his own views as to what was the existing law, and it was open to them to express those views in the Code, so as to deal with the matter specifically and by so doing to invite

the Legislature authoritatively to fix the law for the future according to those personal views, whether those views were right or wrong. But they did not elect to do this, and we cannot indulge in conjectures as to what would have been the result of such a course of action. We can only regard what is embodied in the language of the article, and inasmuch as all that is there embodied is that the law in these matters should remain unchanged, that is the only effect of the article.

It follows from the above considerations that art. 127 of the Code does not determine the case before their Lordships, and that so far as regards the matters with which that article is concerned each case must be decided as it would have been had the question arisen immediately prior to the passing of the Code, so that the decision must depend on the laws as they then existed. But this does not affect the rest of the Code, which is positive law, and after examining the laws as they then existed it may be necessary to examine the other provisions of the Code in order to see whether they throw light on the case and whether they affect the conclusions to be drawn from art. 127 considered by itself. The Code must be interpreted as a whole whatever be the form of a particular article.

The immediate result of this is to remove the dominant question in this case from the domain of speculation, and personal views on matters of fact, to the domain of positive law ascertainable by recognised principles of jurisprudence. The laws governing Canada at the date of the formation of the Civil Code are not matters of mere conjecture, but result from the events which made it a British possession and the laws relating to it, which have since been duly passed. Nothing that occurred previously to the cession relative to the matters which are at issue in this case or even to the judicial opinion prevailing at any particular date can help their Lordships much, if at all. It must be remembered that before the cession Canada had been governed by the laws of a country which recognized no religion but the Roman Catholic. Protestants were allowed no civil rights; marriages performed by them were held invalid and the children accounted bastards. When Canada became the possession of a Protestant Power, which though it had permitted the practice of

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the Catholic religion, put Catholics under grave disabilities, all this was of necessity changed. The laws of England would have obtained in Canada unchanged had it not been that stipulations were made in the various Capitulations and in the Act of Cession to secure religious freedom for Catholics. It is from these alone and the subsequent Acts of Parliament relating to Canada that all the rights of Roman Catholics in Canada are derived. Full effect must be given to the engagements thus entered into and the provisions of the laws thus passed. They are definite and ample to secure to the individual full religious liberty, but it is idle and without any justification to attempt to qualify their effect by references to the ancient position of Protestants and Roman Catholics in France under a regime which from the nature of things automatically disappeared when Canada came under British rule.

The aim and effect of the special terms of the Capitulations of Quebec and Montreal, which are contemporary documents of great value, are perfectly clear. What the Catholics sought to secure was freedom to exercise their religion and they obtained it. The meaning attached to this phrase is clear from its use in art. 27 of the Capitulation of Montreal, which reads as follows:—

> The free exercise of the Catholic Apostolic and Roman Religion shall subsist entire in such manner that all the states and the people of the towns and country places and distant parts shall continue to assemble in the churches and to frequent the Sacraments as heretofore without being molested in any way directly or indirectly.

What was happening in France to Churches other than the Roman Catholic had taught them the need of formally securing these rights on passing under the dominion of a Power belonging to a different faith, and therefore they stipulated for and obtained the free exercise of their religion. This is plainly expressed in the Treaty of Paris in 1763 by which the cession of Canada to the British Crown was ultimately accomplished. It is thus expressed in that treaty:—

> His Britannic Majesty on his side agrees to grant the liberty of the Catholic Religion to the inhabitants of Canada. He will consequently give the most precise and most effectual orders that his new Roman Catholic subjects may profess the worship of their religion according to the rites of the Romish Church as far as the laws of Great Britain permit.

But it is not necessary to consider more fully these contem-

porary documents, because the effect of Canada passing under British sovereignty so far as the religious liberty of its Catholic inhabitants is concerned, is authoritatively expressed in the Quebec Act, 14 Geo. III, 1774 (Imp.), ch. 83, sec. 5, which reads as follows:—

> And for the more perfect Security and Ease of the Minds of the Inhabitants of the said Province it is hereby declared, That his Majesty's Subjects professing the Religion of the Church of *Rome* of and in the said Province of *Quebec* may have hold and enjoy the free Exercise of the Religion of the Church of *Rome* subject to the King's supremacy declared and established by an Act made in the first Year of the Reign of Queen *Elizabeth* over all the Dominions and Countries which then did or thereafter should belong to the Imperial Crown of this Realm, and that the Clergy of the said Church may hold receive and enjoy their accustomed Dues and Rights with respect to such Persons only as shall profess the said Religion.

The religious position in the Province of Quebec in 1774, was therefore that every individual had the right to profess and practise the Catholic religion without let or hindrance. But it must be borne in mind that this is a privilege granted to the individual. There is no legislative compulsion of any kind whatever. He may change his religion at will. If he remains in the Roman Catholic community he may, so far as the law is concerned, choose to be orthodox or not, subject to the inherent power of any voluntary community, such as the Roman Catholic Church, to decide the conditions on which he may remain a member of that community unless that power has been limited in some way by the past acts of the community itself. In other words, each member of the Roman Catholic community in Quebec possessed the same privileges as any other citizen so far as religious freedom is concerned, save that he was not subject to any of the disabilities which then and for a long time after, attached to Protestant dissenters. The Legislature did not put over him as a citizen any ecclesiastical jurisdiction. The decisions of the ecclesiastical Courts that existed in the Roman Church bound him solely as a matter of conscience. The Legislature gave to their decrees no civil effect nor bound any of its subjects to obey them. Indeed, the Act in art. 17 expressly reserves to His Majesty the power to set up Courts of ecclesiastical jurisdiction in the Province and to appoint Judges thereof although that power seems never to have been acted upon.

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But what has just been said must not be misunderstood. The law did not interfere in any way with the jurisdiction of any ecclesiastical Courts of the Roman Catholic religion over the members of that communion so far as questions of conscience were concerned. But it gave to them no civil operation. Whether the persons affected chose to recognise those decrees or not was a matter of individual choice which might, or might not, affect their continuance as members of that religious communion. But that was a matter which concerned themselves alone.

It is necessary now to pass in review a long series of legislative Acts relating to marriage, commencing with 35 George III., 1795, (L.C.) ch. 4, and extending to the Consolidating Act of 1861, (C.S.L.C.) ch. 20. They throw strong light on the principles of the marriage law in Canada during that period. They establish conclusively that the law concerned itself primarily with marriage as bearing on social status and only incidentally with any religious questions affecting it. They accordingly manifest the great importance that was attached to the keeping of proper registers of baptisms, marriages and burials, which should be recognised as legal evidence of the matters contained therein and thus be authoritative on these all-important facts of legal status.

To understand these Acts properly one must bear in mind that this was a case of the annexation of a Province in which the Roman Catholic religion had been the established religion to a realm in which the Church of England was the established religion. Accordingly we find that the first of these Acts, viz., 35 George III, 1795, (L.C.) ch. 4, provided for the keeping of registers in each parish church of the Roman Catholic communion and also in each of the Protestant churches or congregations within the Province "by the rector, curate, vicar or other priest or minister doing the parochial or clerical duty thereof." These registers are to be kept in duplicate and one copy is to be deposited in the office of the clerk of the Civil Court of King's Bench or provincial Court of the district, there to remain and be preserved. The copies are to be of equal authority as evidence. There are strict regulations as to what is to be contained in these entries, and they are to be considered as legal evidence in all Courts of justice.

The statutes above referred to which followed in the wake of the above statute extend the privilege of keeping similar registers to other religious communities than the Roman Catholic Church or the Established Church of England. It is unnecessary here to specify the names of these communities, which are very numerous. The Scotch Church, the Congregational Societies, the Methodists and the Methodists New Connexion are examples. In cases such as the Free Will Baptist Church, where infant baptism is not performed, the registrar, instead of recording baptisms, is authorised to record births. The form of these statutes indicates that the authority to keep these registers was taken to carry with it the authority to solemnise marriages, although in some cases the latter was specifically given. The effect of these statutes is finally expressed in the Consolidated Statutes of Lower Canada, 1861, ch. 20, sec. 16, which enacts that "all regularly ordained priests and ministers" of all Protestant Churches in communion with the United Church of England and Ireland, or with the Church of Scotland, "and all regularly ordained priests and ministers of either of the said churches have had and shall have authority validly to solemnize marriage in Lower Canada." It then goes on to enumerate the various religious communities to which the before-mentioned special Acts refer and confirms the powers of their ministers validly to solemnise marriages according to the provisions of those special Acts, and finally creates a universal obligation upon all Protestant communities and all parish churches of the Roman Catholic communion to keep registers in the way described in the Act, which is in all material respects identical with the law previously existing. It re-enumerates the matters which are to be set out in the entries thus to be made in these registers.

The feature of all these Acts which is at once the most remarkable and the most material to the questions raised by this appeal, is that nowhere in this legislation (with the exception of the two Acts relating respectively to the Jews and the Society of Quakers, which will presently be considered specially) is there the slightest reference to the religious views of the persons to be married. The most minute directions are given as to the matters which are to be entered in the registers, and not one of these has any reference

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to the religious community to which the parties or either of them belonged or to the religious beliefs held by them or either of them. This point is so important that it is worth while to set out the specific provisions in the Consolidating Act which are mere repetitions of the provisions in the previous legislation.

6. In the entries of a marriage in the registers aforesaid, mention shall be made in words of the day, month and year on which the marriage was celebrated, with the names, quality or occupation and places of abode of the contracting parties, whether they are of age or minors, and whether married after publication of banns or by dispensation or license, and whether with the consent of their fathers, mothers, tutors or curators—if any they have in the country—also the names of two or more persons present at the marriage, and who, if relations of the husband and wife or either of them, shall declare on what side and in what degree they are related.

It is an irresistible conclusion from the language of these Marriage Acts that the authority given to the Protestant ministers to solemnise marriages was a perfectly general one, and depended in no way upon the religious belief of either or both of the persons to be married. The same is true of the priests of the Roman Catholic communion. They were never under any legal disability as to their solemnising marriage between persons one or both of whom did not belong to their faith. With regard to the priests of the Roman Catholic communion it is clear that even under their own ecclesiastical law they were permitted to solemnise marriage where one of the contracting parties was not a Roman Catholic. It does not appear whether or not their ecclesiastical law permitted them to solemnise marriage between persons neither of whom belonged to their own communion, but this question is irrelevant. The Catholics of Canada were individually given freedom to exercise their religion, but they were not in any respect compelled to do so, and seeing that from the very first the ministers of the English Church and subsequently those of other Protestant communities, had authority to solemnise marriages without any restriction as to the religious views of the persons seeking to be married, it was open to Catholics as well as Protestants to avail themselves of the rights thus given them. Such was the position established in Canada by positive legislation, and even if French ordinances could be found bearing on this matter, they would not affect in any way the above con-

clusions. They were ordinances of a country where Protestant marriages were regarded as invalid. As has been already pointed out, this state of things ceased automatically when Quebec came under British rule. It needed no legislation to put an end to it.

The two exceptional cases of this class of Acts are 9-10 Geo. IV., 1829, (L.C.) ch. 75, relating to the Jews, and 23 Vict., 1860, (Can.), ch. 11, relating to Quakers, and although in some respects peculiar, they strongly confirm the conclusions to be drawn from the other legislation on these subjects. In the case of the Jews, (sec. 7) power is given to every minister duly licensed to keep in duplicate a register "of all marriages and burials performed by him, and of all births which he may be required to record in such Register by any person professing the Jewish Religion." No other reference to the faith of the persons to whom the Act relates is contained in the Act, except a temporary provision that persons of the Jewish religion shall have the right to require the births and deaths of their children to be registered within a certain period after the election of the trustees. Even here there is no restriction on the faith of either or even of both of the persons so married. The second case relates to the marriages of Quakers, who, as is well known, do not recognise any ministers and have very special formalities with regard to marriages. Here there is a certain degree of limitation in the case of those who desired to be married according to the forms peculiar to Quakers. The law validates marriages solemnised "according to the rites, usages and customs of the Religious Society of Friends," both in the past and in future, "between persons professing the faith of the said Religious Society of Friends, commonly called Quakers, or of whom one may belong to that denomination"; and it then proceeds to extend to that denomination the general legislation as to the keeping of registers "so far as the same is applicable." In no other Act authorising any marriage to be solemnised is there any reference to or limitation in respect of the religious belief of the parties to be married, and the reason for this exception is evident.

Before leaving this subject and drawing the proper conclusions from the matters already dealt with, it is advisable to refer to the Act which recognised and formally confirmed the existence

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of religious liberty in Canada, viz., 14-15 Vict., ch. 175. The preamble is as follows:

> Whereas the recognition of legal equality among all religious denominations is an admitted principle of colonial legislation: And whereas in the state and condition of this province to which such a principle is peculiarly applicable it is desirable that the same should receive the sanction of direct legislative authority, recognizing and declaring the same as a fundamental principle of our civil polity;

it declares and enacts

> That the free exercise and enjoyment of religious profession and worship without discrimination or preference, so as the same be not made an excuse for acts of licentiousness or a justification of practices inconsistent with the peace and safety of the province, is by the constitution and laws of this province allowed to all Her Majesty's subjects within the same.

The position of the law as to marriage at the time of the formation of the Civil Code in Quebec was, therefore, as follows: The Roman Catholic curés, Protestant clergymen and ministers of a large number of denominations of Protestants had an equal power to solemnise marriages and to keep registers of acts of civil status. In all cases alike the marriages must be preceded by banns unless they had been dispensed with by a competent authority or a license had been granted. There was no restriction as to the religious faith of those whose marriages they were competent to solemnise. For example, a Protestant might be married to a Roman Catholic either by a Roman Catholic curé or a Protestant minister, or by any other person empowered to solemnise marriages. If the marriage was solemnised by a competent person an entry must be made of it in the register he was authorised to keep and that register was legal evidence of the fact of the marriage. With regard to the validity of the marriage, so far as affected by relationship between the parties, there was no legal restriction, excepting such as was imposed by the statute 32 Henry VIII., ch. 38, which enacts "that no reservation or prohibition, God's Law excepted, shall trouble or impeach any marriage without Levitical degrees." No doubt the Roman Catholic clergy could not be compelled to solemnise any marriage that was according to their religious belief forbidden, but this was by virtue of the liberty that was given to them to exercise and practise their religion uninterfered with, and it is evident from the declaration contained in the Act of 14-15 Vict., ch. 175, that ministers of other denominations might have claimed an

equal right to refuse to solemnise a marriage which was contrary to their religious belief. In this as in all other matters, the rights of Protestants and Roman Catholics were the same so far as they were not directly affected by legislation. But so far as concerned the persons to be married relationship other than such as fell within the Levitical degrees created no inherent impossibility of marriage.

It is in the light of these existing rights established by statute and reigning as law in the Province of Quebec that we must interpret the effect of sec. 127 of the Code. Its object and effect were to leave the law as it then stood in those matters. It is, therefore, impossible to give to it the effect of prohibiting marriage between any two persons who were, according to English law, free to marry. It might prevent them having the act solemnised by ministers of a special denomination, but that would be solely in virtue of the right of the minister to refuse to perform the marriage, and not from any legal incapacity to contract a valid marriage. Article 127, which preserves the consequences of the views of the different religious communities with regard to impediments, has therefore no bearing on any inherent incapacity of the parties to contract a valid marriage (which is regulated by the previous clauses of the chapter in which article 127 appears) but only preserves the right of each religious communion to recognise the impediments which exist according to its faith, and justifies the refusal of a minister of that communion to solemnise any marriage which offended against its rules. This explains why there is no provision in the Code for annulling marriages which might have been objected to under art. 127, although specific provisions are inserted for this purpose in the case of marriages offending against arts. 124, 125 and 126.

In the Code, marriage is treated as an act of civil status, and although there are provisions limiting the persons between whom marriage can take place and providing for infractions of such provisions, yet the care of the Legislature has been mainly expended on providing for the proper solemnisation of marriages and for the preparation of authentic registers of duly solemnised marriages which registers are kept in duplicate and are legal evidence of the marriage having taken place. In this respect

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the existing procedure is in substance retained. These registers are kept by the persons solemnising the marriage, and one copy is deposited with the prothonotary of the district in which the marriage was celebrated. The matters to be entered in the register of marriages are specifically enumerated and, as previously, they contain nothing that relates to the religious faith of the parties. The importance of this is increased by the provisions of sec. 39, C.C. (Que.), which enacts that—"in acts of civil status nothing is to be inserted either by note or recital, but what it is the duty of the parties to declare."

The clauses which deal with the formalities relating to the solemnisation of marriage shew the same absence of any reference to the religious beliefs of the persons to be married. They are principally concerned with securing that they are performed by a proper public functionary, and that due publication of banns has been made or licenses granted in lieu thereof. The vital clauses are:—

128. Marriage must be solemnised openly by a competent officer recognized by law.

129. All priests, rectors, ministers and other officers authorized by law to keep registers of acts of civil status are competent to solemnize marriage.

There is therefore a general power of all such competent officers to solemnise marriages of all kinds. There is, however, an addition of the nature of a proviso to art. 129, which is very instructive as shewing the care exercised by the Legislature in preserving the religious freedom of the individual. But it shews itself (as ought to be the case) in protecting the religious freedom of the officers solemnising the marriages and not in restricting the freedom of the parties seeking to be married. It reads: "But none of the officers thus authorized can be compelled to solemnize a marriage to which any impediment exists according to the doctrine and belief of his religion, and the discipline of the church to which he belongs."

It contemplates therefore not only the possibility of valid marriages to which there are objections according to the creed of any particular religious denomination, but even that an officer holding that creed has authority to solemnise such a marriage though he is not compellable to do so.

The Code then proceeds to deal with the banns which in the absence of a dispensation or license from a competent authority must be published before the marriage can be solemnised. The Code contemplates (as would naturally be the case) that they will generally be published at the churches to which the persons belong, but permits the exemption from such publication by licenses of a competent authority. Such licenses in the case of the solemnisation of marriage by Protestant ministers of the Gospel are issued by the Provincial Secretary under the hand and seal of the Lieutenant-Governor, once more indicating that the Code is concerned with the position of the officer solemnising the marriage and not with any question of the religious belief of the persons to be married.

There remain the two important chapters dealing respectively with "the qualities and conditions necessary for contracting marriage" and "actions for annulling marriage," which must be examined in detail. The first deals with several well-defined cases of parties between whom and the circumstances under which marriage is not permitted. The second deals with the cases in which, the persons at whose instance, and the circumstances under which a marriage has taken place may be contested and annulled. In the former chapter we find express prohibition against marriage under age or without certain consents or within certain degrees of affinity corresponding with the Levitical degrees, followed as to affinity outside those degrees by an article (art. 127), which is in very different terms; and when we turn to the chapter on actions for annulling marriages we find specific provisions how, when and by whom marriages which are infractions of the rules laid down in the chapter which has just been considered can be contested, and it appears that each one of the rules (excepting, of course, art. 127) is considered in turn, and that the circumstances under which the marriage can be contested are specified. Taking them in order, a marriage contracted by a person under the legal age can no longer be contested 6 months after the legal age has been attained, or if, being a woman, she has conceived before that time. In art. 116, it is laid down that there is no marriage when there is no consent (which no doubt includes the case of there being error of

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person). Yet in arts. 148 and 149 it is provided that the marriage can only be contested by the party whose consent was not free, or who was led into error, and then only before 6 months have passed after such person has acquired full liberty or become aware of the error. Impotency is by art. 117 declared to render the marriage null, but it is provided that such nullity can only be invoked by the party who has contracted with the impotent person, and in any case not at any time after 3 years after the marriage.

Articles 119 to 122 provide for the necessity of consent of parents or guardians in the case of minors. Yet in arts. 150 and 151 it is provided that marriages contracted without the proper consent can only be attacked by those whose consent was required, and then only within 6 months of their becoming aware that the marriage has taken place.

Articles 124, 125 and 126 expressly prohibit marriage between persons who are within what are known as the Levitical degrees. An example is art. 126: "126. Marriage is also prohibited between uncle and niece, aunt and nephew." On turning to the chapter of "Actions for Annulling Marriages," we find it is provided that such a marriage may be contested either by the parties themselves or by any of those having an interest therein, but in art. 155 it is provided that that interest must be existing and actual to permit the exercise of the right of action by the grandparents, collateral relatives, children born of another marriage and third persons. In each of these cases, therefore, when the second chapter contains an express prohibition of marriage, provision is made by ch. 4 for deferring and limiting the power to get the marriage annulled; but in respect of marriages which are subject only to the impediments referred to in art. 127 no such provision is made.

Under these circumstances their Lordships are of opinion that it is impossible to resist the conclusion to be drawn from the omission of any reference to art. 127 in the chapter on "Actions for Annulling Marriages." They are of opinion that by deliberately omitting any provision for contesting marriages to which objection might be taken under that article, it was intended that such marriages once solemnised should remain valid. This is in exact conformity with the standard of religious liberty of the

individual already existing. The parties to whom such objections as those referred to in art. 127 would apply, possessed no inherent incompatibility for marriage in the eye of the law. Any such incompatibility was merely a question of conscience or orthodoxy, and would not have prevented their being married by other competent officials or with other rites. It would have been absolutely out of harmony with the other relevant provisions of the Code that marriages of this kind should be allowed to be contested and accordingly we find that there is in the Code no provision for contesting them. Accordingly they with all other duly solemnised marriages come under the provisions of art. 161: "161. When the parties are in possession of the status and the certificate of their marriage is produced, they cannot demand the nullity of such act."

To prevent the application of so stringent a clause as this, there must be some equally explicit provision that in special cases the marriage can be annulled. Nothing less than this can get rid of the operation of its clear and precise provisions.

It remains to apply the law thus enunciated to the circumstances of this case. The marriage was contracted in all good faith. It was solemnised openly by a competent official and after due proclamation of the banns. It may be taken that if all the facts as to the relationship of the parties had been known the officiating priest would have required the parties to obtain a dispensation, seeing that at that date the Roman Catholic Church considered the extremely distant relationship sufficient to make a dispensation necessary, although their Lordships understand that such is no longer the case. Had he refused to solemnise the marriage without such dispensation being obtained he would have been within his rights, and the law would have supported him in his refusal. But nothing of the sort took place. The marriage was performed with all legal formalities, and did not come within any provisions of the Code which deal with questions of nullity. The relationship of the parties was not within the provisions of arts. 124, 125 or 126, in respect of which actions contesting marriages on the ground of relationship can alone be brought. The marriage therefore falls under the absolute rule laid down in art. 185: "Marriage can only be dissolved by the natural death of one of the parties; while both live it is indissoluble."

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Their Lordships are therefore of opinion that this appeal should be allowed, and that the marriage between the parties should be declared valid and subsisting. They will humbly advise His Majesty accordingly. There will be no order as to costs.

Appeal allowed.

VAN HEMELRYCK v. LYALL SHIPBUILDING CO.

Judicial Committee of the Privy Council, Lord Buckmaster, Lord Dunedin, Lord Shaw. January 21, 1921.

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APPEAL (§ XI—720)—CONTRACTS—SUFFICIENCY OF EVIDENCE OF, TO ENABLE COURT TO GRANT APPLICATION—CONTRACT TO BE PERFORMED WITHIN JURISDICTION—MEANING OF.

It is sufficient to enable the Court to exercise its discretion to grant an application under the British Columbia Rule, which provides that leave to issue and serve out of the jurisdiction notice of a writ claiming damages for breach of contract in certain cases, if it appears that there is reasonable evidence of such contract. The Court may grant the application although it does not intend to exclude evidence at the hearing to shew that there was in fact no contract.

The question of whether the contract is to be performed within the jurisdiction is satisfied within the meaning of the rule if there is, in fact, one term that has to be performed within the jurisdiction.

[See annotation, Judicial Discretion, 3 D.L.R. 778.]

Statement.

APPEAL from the judgment of the British Columbia Court of Appeal (1920), 52 D.L.R. 670, affirming the judgment of Murphy, J., refusing to rescind an order giving leave to the plaintiff to issue and serve, out of the jurisdiction, notice of a writ claiming damages for breach of contract. Affirmed.

The judgment of the Board was delivered by

Lord Buckmaster.

LORD BUCKMASTER:—On March 20, 1919, the respondents obtained leave *ex parte* from the Chief Justice of the Supreme Court of British Columbia to issue and serve against the appellant out of the jurisdiction notice of a writ claiming damages for breach of a contract alleged to have been entered into by them with the appellant for the sale and delivery to him of 6 sailing vessels.

The appellant moved to rescind the order, but his application was dismissed by Murphy, J. (1919), 27 B.C.R. 240. On appeal to the Court of Appeal of British Columbia this order was confirmed (1920), 52 D.L.R. 670, and from that judgment by special leave this appeal has been brought. A question arose in the course of these proceedings as to whether an application by the appellant for leave to cross-examine amounted to a submission to the jurisdiction, but this point need not be considered as for other reasons their Lordships think that this appeal must fail.

The rule which permits service out of the jurisdiction in British Columbia is the same as that which exists in this country,

and the relevant part of that rule provides that leave to effect such service may be granted when the action is founded on any breach or alleged breach within the jurisdiction of any contract, wherever made, which according to the terms thereof ought to be performed within the jurisdiction.

The appellant objects in the present case that there is in fact no contract as between himself and the respondents, and, further, that if such contract exists there has been no breach within the jurisdiction of any of its terms.

With regard to the first matter, the difficulty arises in this way. Cablegrams and correspondence passed between the parties during the months from July to October, 1918, as to terms for the purchase by the appellant of the 6 sailing vessels, and ultimately, when an agreement appeared to have been reached, a document was drawn up dated November 7, 1918, putting into full and formal language the arrangements to which the parties ultimately agreed. This document, the appellant states, was delivered as an escrow, and the appellant contends that as the conditions upon which delivery was to be made complete have never in fact been satisfied, he is not liable under its terms. That may be true, but in that event it might, none the less, be also true that he was liable under the previous correspondence and cablegrams which had led up to the making of that contract.

So far as the Courts in British Columbia are concerned, the Judges in the Court of Appeal at least appear to have assumed that the question as to whether or no there was a contract was one which had not been strenuously argued before them. Counsel for the appellant, however, say that this statement must have been due to some misapprehension. Their Lordships only refer to the matter for the purpose of making clear that they do not intend by the opinion which they express to prejudice in any way the right of the appellant to urge at the hearing of these proceedings that in fact no contract existed between himself and the respondents at all. For the purpose, however, of enabling the discretion which is conferred by the rules to be exercised, it is sufficient if there appears reasonable evidence that a contract has been made, unless, indeed, the defendant is in a position to satisfy the Court that such evidence should be disregarded and that in fact there was no contract at all. Their Lordships think

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in the present case that there is sufficient evidence of a contract, to found the jurisdiction, although they do not intend to exclude the appellant from trying to shew at the hearing that no contract in fact exists.

The remaining question is whether, assuming there be a contract, it ought to be performed within the jurisdiction according to its terms. On this point it is well settled that for the purpose of satisfying the rule it is sufficient if there be in fact one term that has to be performed within the jurisdiction; but, as was recently pointed out in the case to which reference has been made in McPhillips, J.'s judgment (52 D.L.R. at 675), *Johnson* v. *Taylor Brothers & Co. Ltd.*, [1920] A.C. 144, that principle cannot be invoked for the purpose of using an artificial cause of action in order to found jurisdiction when the real right of action would be somewhere else.

But even on this assumption there still remained the breach due to refusal to accept the ships, which, though it would follow in sequence the payment of the money, was a real and substantial breach of the contract sufficient to satisfy the rule.

The argument, however, that has been urged in support of the appeal is that here the real breach is non-payment of the money, and that non-payment of the money was a breach that must have taken place, at any rate according to the terms of the formal document, in New York, and that it was that precedent breach that really gave rise to these proceedings. If, however, this document be, as the appellant contends, inoperative, there remains the question as to the contract created by the correspondence, which contains no express condition making payment of the balance of the purchase money a condition precedent to the delivery of the vessels, nor is there any express term as to the place where the balance of the purchase money is to be paid. In the result the appellant has declined to be bound by the contract, and it results that he has refused to accept the vessels which were to be delivered at Vancouver. This refusal is a real and substantial cause of action and satisfies the conditions of the rule.

For these reasons their Lordships think this appeal must fail and should be dismissed with costs. They will humbly advise His Majesty accordingly. The time for entering appearance in the action will be extended to 6 weeks from to-day.

Appeal dismissed.

GOLD SEAL Ltd. v. DOMINION EXPRESS Co.

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Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ. March 11, 1921.

CONSTITUTIONAL LAW (§ II A—233)—INTOXICATING LIQUORS—PROVINCIAL REFERENDUM—PROHIBITION—CANADA TEMPERANCE ACT (1919), 2ND SESS., CH. 8—OPERATION—VALIDITY.

The amendment to the Canada Temperance Act, 1919 2nd sess., ch. 8, is *intra vires* the Dominion Parliament, and is valid and in force in the Province of Alberta, and an express company cannot without breach of the law carry intoxicating liquor into the Province.

[Review of legislation and authorities.]

Statement.

THIS is a case stated by leave of a Judge for the opinion of this Court, and raises the question of the validity of the amendment to the Canada Temperance Act, ch. 8 of 1919 (Can.), 2nd sess., and of the Orders in Council declaring it in force in Alberta and the other Western Provinces.

A. A. McGillivray, K.C., for applicants.

G. A. Walker, K.C., for respondents.

H. H. Parlee, K.C., and *I. B. Howatt*, for Att'y-Gen'l of Alberta.

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HARVEY, C.J.:—A reference to the decisions of this Court in actions between the same parties in (1917), 37 D.L.R. 769, and (1920), 53 D.L.R. 547, 33 Can. Cr. Cas. 234, 15 Alta. L.R. 377, gives an idea of the pioneer work they are accomplishing for the purpose of enabling persons to carry on the liquor traffic in this Province. In the last mentioned report are set out many of the facts which are common to the case then under consideration and the present one and I will not repeat them here. In that case it was held by a majority of the Court that the provincial legislation was invalid insofar as it purported to prohibit the export of liquor. The principle of that decision seems to rest on the ground that the Province has no jurisdiction to prohibit trade between persons in the Province and those outside.

The Canada Temperance Act originally passed by the Parliament of Canada, 41 Vict., 1878 (Can.), ch. 16, and declared *intra vires* in *Russell* v. *The Queen* (1882), 7 App. Cas. 829, being now ch. 152 of R.S.C. 1906, was, in 1919 (10 Geo. V. (Can.), 2nd sess., ch. 8), amended by the addition of a new part called Part IV. The original Act provided that it might be brought into operation, in the method prescribed by the Act, in any municipality which desired. Though applicable to the whole of Canada, it was in force as a prohibitory measure only in the municipalities adopting it and in them the sale of intoxicating liquor for beverage purposes

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was prohibited. The new Part IV. provides a somewhat similar procedure for bringing into force a new prohibition, the unit of application in this case being a Province or the Yukon Territory instead of a municipality and the prohibition being the importation of liquor into the area of the prohibition instead of the prohibition of the sale therein. Section 152 of the new part added by the amendment provides that upon the receipt by the Secretary of State of a certified copy of a resolution of the Legislative Assembly of any Province (or the Council of the Yukon Territory), "in which there is at the time in force a law prohibiting the sale of intoxicating liquors for beverage purposes" requesting that a vote of the electors of the Province be taken the Governor-General may issue a proclamation for a vote containing certain information set out in detail in the section.

Section 153 provides that: "The proceedings after the issue of such proclamation shall be the same as are prescribed by this Act for bringing into force Part II. of this Act, and the provisions of Part I. of this Act shall, as far as applicable, *mutatis mutandis*, apply thereto," and that "The Governor in Council shall by Order in Council declare the prohibition in force if more than one-half of the total number of votes cast in all the electoral districts are in favour of such prohibition."

Under the terms of sec. 152, on July 17, 1920, a proclamation dated April 29, was gazetted. It recited a resolution of the Legislative Assembly of this Province and directed the holding of a vote. On January 1, 1921, an Order in Council was passed and gazetted, which recites the proclamation and the holding of the poll, and the fact that more than half of the votes in all the electoral districts were in favour of the prohibition, viz.: 63,012 in favour and 44,321 against, and the further fact that by the proclamation it was set forth that in the event of the vote being in favour of prohibition it should go into force on a date to be fixed by Order in Council under sec. 109. It then declares that pursuant to sec. 152 and sec. 109 "the importation and bringing of intoxicating liquors into the Province of Alberta shall be and the same is hereby forbidden from and after the expiry of thirty days from the date hereof."

Similar procedure was followed in respect to Saskatchewan and Manitoba with like results, the Order in Council bringing the

prohibition into force in each of those Provinces being of the same date.

On February 1, 1921, the day when the prohibition became effective, the plaintiffs tendered to the defendants for transportation, intoxicating liquor consigned from themselves at Vancouver, B.C., to themselves at Calgary, also liquor consigned by them at Calgary to someone in Saskatchewan and to someone in Manitoba.

All of the consignments were refused on the ground that the defendants could not lawfully carry them into the Provinces of Alberta, Saskatchewan and Manitoba.

The stated case is for the purpose of determining whether the defendant's refusal was justified, it providing that there is to be "judgment in favour of the plaintiff in the sum of $7,260, if in the opinion of the Court, the defendant should have carried the plaintiff's goods."

It was as apparent in this as in the last *Gold Seal* case that the material interests of the parties are more allied than they are opposed and inasmuch as Dominion legislation and Order in Council were attacked the Court directed that before hearing argument, the Minister of Justice of Canada should receive notice. Notice was also required to be given to the Attorney-General of this Province. On the argument we were attended by counsel representing the Attorney-General, but though the notice had been given to the Minister of Justice by the Registrar of the Court by its direction, as the notice stated, no one appeared on behalf of the Minister of Justice, nor was the Court vouchsafed any intimation whether he desired to be heard, though since the argument we have learned from the representative of the Attorney-General that he did not wish to be heard.

The plaintiffs contend that the statute of 1919, 10 Geo. V. (Can.), 2nd sess., ch. 8, amending the Canada Temperance Act is *ultra vires* on several grounds; first, because it is only in aid of provincial legislation for the purpose of making effective provincial laws on a provincial subject and is in effect, therefore, dealing with a matter of a local and private nature in each Province affected; secondly, that it has not a uniform operation throughout Canada as it can be applied only to the Provinces which have a law prohibiting the sale of intoxicating liquor for beverage purposes and

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then only when proceedings have been initiated by a Legislative Assembly, which does not represent the people interested for the purpose of any such resolution; thirdly, that when it is brought into force in any area its operation is not limited to that area because it affects the trade of persons outside that area; fourthly, because it in effect, partially at least, nullifies a valid provincial Act which permits a person to have in his dwelling house a certain quantity of liquor, which can only be obtained under such law by importation, its purchase in the Province being forbidden.

The question of the respective jurisdiction of the Canadian Legislatures on the subject of intoxicating liquor, as I have already stated, came very early in the history of Federal Canada, before the Judicial Committee of the Privy Council and has been before that Committee repeatedly since. In addition to the case referred to of *Russell* v. *The Queen*, 7 App. Cas. 829, reports of its decisions on different aspects are to be found in *Hodge* v. *The Queen* (1883), 9 App. Cas. 117, in *Att'y-Gen'l for Ontario* v. *Att'y-Gen'l for the Dominion, etc.*, [1896] A.C. 348, in *Brewers and Maltsters Ass'n of Ontario* v. *Att'y-Gen'l for Ontario*, [1897] A.C. 231, and in *Att'y-Gen'l of Manitoba* v. *Manitoba License Holders' Ass'n*, [1902] A.C. 73.

Shortly, the result of all these decisions and of another in 1883, reported by Cameron, at p. 67, but not officially reported, is that the Canada Temperance Act is within the jurisdiction of the Dominion Parliament and is effective whenever brought into operation, that wherever it is not in operation a Province has power to legislate, to regulate by license or completely to prohibit the traffic in the Province so long as its legislation is limited to the provincial area and deals with the subject as one of a local and private nature. It has also been definitely settled by these and other decisions of the Committee that the Canadian Legislatures are supreme within their sphere of legislative jurisdiction and do not exercise authority delegated by the Imperial Parliament. It seems also well settled that, with the very limited exceptions declared by the B.N.A. Act, *e.g.*, the subject of education, the only ground upon which legislative Acts of the Canadian Parliament or a Provincial Legislature can be declared invalid is its invasion of the province of the other Legislature, in other words, that one or other can validly legislate in any respect in which a single Parliament with general jurisdiction could legislate.

Unless some of the objections to the validity of the 1919 amendment shew that it differs in essential principle from the original Act, the decision in *Russell* v. *The Queen*, 7 App. Cas. 829, is conclusive of its validity.

One of the objections urged in that case was that the Act had not a general application but was only intended to apply in limited areas. It was held, however, that its validity depended upon its treatment of the subject matter as one of general Dominion-wide concern and that it was capable of operating in any part of the Dominion.

The objection to the amendment that it is only capable of application in portions of Canada because it can be adopted only where there is a prohibitory law in force does not in reality present any distinction in principle, even if it would be a good objection if it did, for it only adds one more condition for bringing it into operation. It is, as has been so often said, a "local option" Act. The option under the amendment is for acceptance by a Province rather than by a municipality but the fact that the Province must first choose a prohibitory law does not change the principle of the Act but merely adds a condition. As being Legislatures with original, rather than delegated authority, it has been repeatedly held that our Legislatures can delegate authority to others or impose any condition precedent to an Act becoming operative.

I think these considerations meet all of the objections raised to the validity of the amending Act itself but it may be added that *Attorney-General for Ontario* v. *Attorney-General for the Dominion, etc.*, [1896] A.C. 348, at p. 349, decided that the question, "Has a Provincial Legislature jurisdiction to prohibit the importation of such [*i.e.*, intoxicating] liquors into the Province?" should be answered in the negative, because, at p. 371, "the exercise by the Provincial Legislature of such jurisdiction in the wide and general terms in which it is expressed would probably trench upon the exclusive authority of the Dominion Parliament." In the last *Gold Seal* case, 53 D.L.R. 547, 33 Can. Cr. Cas. 234, 15 Alta. L.R. 377, my brother Stuart and I expressed the view that, though the Province could not perhaps expressly prohibit importation, it could, in effect, prevent it if the prevention were a necessary consequence of the operation of legislation within its sphere. The judgment of the majority, however, did not agree with this and

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practically held that it was beyond the competence of a Provincial Legislature to stop the import and export of anything. By that judgment we are bound and the consequence is that, directly or indirectly, no Legislature but the Dominion Parliament can enact such legislation as this. The ground of objection was that it concerns trade and commerce. If that view be correct then this legislation can be supported upon the same ground and that it has a limited application would be no valid objection because there can be little doubt that Parliament can legislate as it sees fit generally or particularly on any of the subjects specifically enumerated in sec. 91 of the B.N.A. Act and it is only legislation which derives its validity from the reserved power to legislate generally for "the peace, order and good government of Canada," which requires consideration to see whether it is in reality such legislation. It may also be observed that the Liquor Act of Alberta, 6 Geo. V. 1916 (Alta.), ch. 4, does not expressly authorise a person to have in his dwelling house a certain quantity of liquor. It merely prohibits him from having more than a certain quantity. Though that may be said to imply an authorisation, it is scarcely an authorisation to renew the supply from time to time. An Act which prevents his renewing the supply cannot be said to be in conflict with this provision.

Then it is argued that the amending Act of 1919 cannot be adopted in Alberta because there is no valid prohibitory Act in force here. In the last case of the plaintiffs, one of the Judges expressed this view and another agreed with him in his answers without giving reasons. Three, however, expressed the view that the Liquor Act is valid. But as the decision in that case did not rest on the question of the Act's validity it may perhaps be considered that the point has not been definitely settled. In my opinion our Provincial Liquor Act is a valid prohibitory Act within the meaning of the Act of 1919 and I rest my conclusions on the reasons I gave and concurred in, in that case.

Then it is said that, by sec. 154 of the Act of 1919, it is not to apply to "any intoxicating liquors which under the laws of the Province or Territory in which the prohibition is in force, may be lawfully sold therein," and that under the Liquor Act all kinds of liquors may be sold by certain specified persons named therein and, therefore, this is liquor which may be 'lawfully sold' in the

Province. If this contention were to succeed it would make the whole Act nugatory, and it would only prohibit importation into a Province in which no liquor whatever could be sold, whereas the section itself contemplates that it is to apply to places where liquor "may be lawfully sold."

The fallacy of the argument lies in the fact that the Act says: "liquor" not "kinds of liquor." Liquor, of course, like any other chattel, can be lawfully sold only by its owner or one authorised to sell it and any liquor, therefore, which is not owned by or under the control of a person who can lawfully sell liquor cannot be lawfully sold.

Another objection is that the plaintiff's liquor falls within another exception (sec. 154, sub-sec. 3), for the Act is not to apply to "any intoxicating liquor for sacramental or medicinal purposes or for manufacturing or commercial purposes, other than for the manufacture or use thereof as a beverage." The plaintiff's liquor is admitted by the defendants (though perhaps the Attorney-General is not prepared to make the same admission), to be for *bonâ fide* export purposes. It is contended that this is for commercial purposes and therefore excepted even if "commercial purposes" could be interpreted so as to include traffic in the liquor as a commodity, which, in my opinion, is not intended, it would be necessary to go further and shew that it is not to be used as a beverage because the Act does not say used "as a beverage *in the Province*."

We now come to the proceedings for the purpose of bringing the Act into operation in the Province.

Section 152 provides that the proclamation calling for a vote in the Province or Territory shall set out, amongst other things: "(g) the day on which, in the event of the vote being in favour of prohibition, such prohibition will go into force." This provision was complied with, insofar as it was complied with, in the proclamation in the following words: "In the event that the vote of the electors of the said Province of Alberta shall be in favour of the said prohibition such prohibition shall go into force on such day and date as shall by Order in Council under sec. 109 of the Canada Temperance Act be declared." It is contended that this is not a compliance with the statute, that what para. (g) requires is a specific day which electors voting will know to be the day when if

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the vote is favourable the Act will become operative, not a declaration that the Governor-General shall fix some day by Order in Council which may suit him, even though sec. 109 may impose some limitations on his choice. The argument, when it was presented, appeared to me to have much force and were it not for certain considerations I would feel bound to give effect to it. As already pointed out, sec. 153 provides that the provisions of Part I. shall apply so far as applicable after the issue of the proclamation. The original Act provides for a similar proclamation for a vote in a municipality and para. (i) of the particulars to be set forth in that proclamation as given in sec. 11 of the Act, R.S.C. 1906, ch. 152, is as follows: "(i) the day on which, in the event of the petition being adopted by the electors Part II. of this Act will go into force in the county or city in question." Then we find that sec. 109, which is contained in Part I. and which is preceded by the caption "Order in Council bringing into force" provides that, when a petition has been adopted by the electors, the Governor in Council may, at any time after the expiration of sixty days from the day on which the same was adopted, by order in council published in the *Canada Gazette* declare that Part II. of this Act shall be in force and take effect in such county or city upon, from and after the day on which the annual or semi-annual licenses for the sale of spirituous liquors then in force in such county or city will expire, if such day is not less than ninety days from the day of the date of such order in council; and if it is less then on the like day in the then following year etc. 2. If in any county or city there are no licenses in force . . . Part II. of this Act shall become and be in force and take effect in such county or city after the expiration of thirty days from the day of the date of an order in council to that effect, published in the *Canada Gazette*.

It is apparent that where a poll has to be held there are many circumstances that may cause delay in the definite ascertainment of the result and the greater the number of polls the more the opportunities for delay. The Act provides that the proclamation shall state the day when the returning officer shall declare the result of the voting but it also provides that, if the returning officer cannot declare the result on that day, he may fix a new day. There is also provision for a scrutiny which would delay the determination of the result. The provisions of the Act in this respect were in 1920 superseded by the similar provisions of the Election Act, 10-11 Geo. V. (Can.), ch. 46, but the general result is the same, though for the purpose of the present consideration I take the Act as it was originally and at the time of the amendment in 1919.

Now it seems clear that the provisions of sec. 109 render it almost, if not quite impossible, to fix a definite day at the time of the issue of the proclamation for the bringing of the Act into force and certainly contemplates that no such day shall be fixed. If there are no licenses the day will be 30 days after the issue of the Order in Council, which by the section may be issued at any time within 60 days after the Act has been adopted. If a definite day were fixed, and mentioned in the proclamation, then the Order in Council under sec. 109 must necessarily be made on a day then settled, which would be 30 days before that day but the section definitely states that the Order in Council may be made at any time within the limit specified. It appears to me, therefore, necessary to construe paragraph (i) of sec. 11 as not meaning the specific day of the month but the day to be ascertained in the manner provided by the Act or in other words the day to be named by Order in Council under sec. 109 which by that section must be the day when the Act will come into force. I am of opinion that the construction of the similar provision in the 1919 amendment should be the same, both because it is in the same Act for exactly the same purpose and because sec. 109 is made to apply so far as applicable and it is quite as applicable to the amendment as to the provision of the original Act.

The plaintiffs contend that inasmuch as it appears from a notice in the *Canada Gazette* signed by the chief electoral officer that of the thirteen electoral districts of Alberta giving a total vote of 63,012 in favour of the prohibition and 44,321 against, two districts gave a majority against, one of 77 votes and the other of 289, therefore, the requirement of the Act (sec. 153) was not satisfied, which provides that the prohibition shall be in force "if more than one-half of the total number of votes cast in all the electoral districts are in favour of such prohibition."

The argument is that if one district has an adverse majority there is not a favourable majority in all of them and that that is what the section requires. There is no doubt that, "all" is sometimes used to convey the same meaning as "each" but if it is so used one expects to find something in the context to shew it. I have stated the numbers for the purpose of shewing the possibilities of a construction such as is contended for.

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It may be noted too, that the fact that two of the districts gave adverse majorities does not appear by any of the proceedings required by the Act and is only disclosed by a notice which may or may not be required, though no doubt the fact if material, could be proved as any other fact. It is said that if the intention had been not to consider the vote of each district as a distinct unit the expression used would more naturally have been "the Province" instead of "all the electoral districts" but this overlooks the fact that the Yukon Territority is being dealt with as well as the Provinces and the retort is made that if the construction contended for had been intended all that would have been required would be to say "each of" instead of "all."

I can see no reason for attaching any meaning to the words other than the ordinary and usual one which means that the total number of votes cast in the Province or Territory, as the case may be, is all that is contemplated by the words of the section.

For these reasons I am of opinion that the provisions of the proclamation in this respect complied with the requirements of the Act.

The last objection is that the plaintiffs, as well as other exporters, hold a license from the City of Calgary for the year 1921 which does not expire till December 31, 1921, and that, therefore, the Act could not, under sec. 109, R.S.C. 1906, ch. 152, be brought into force until after that date.

There are several answers to this argument. In the first place, the date of the Order in Council is the first day of the year which, as everyone knows, is a legal holiday and it seems almost certain no such license existed when the Order in Council was passed and the stated case does not say that it did. The licenses in sec. 109 are licenses for the sale of liquor. If we adapt that to the vote now under consideration, which is for the prohibition of importation, not for the prohibition of sale, the license to be considered would be a license to import. What license the plaintiffs hold does not appear but it is not suggested that it is a license to import liquor and no reference was made to any law authorising the city to give any license either to export or import and I know of no such authority.

No doubt the license fee was a mere tax in that form imposed on persons carrying on a particular class of business and would not be any authority whatever to carry on such business.

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In my opinion, therefore, none of the objections to the validity or the application of the Act can be supported and the defendants could not, without a breach of the law, carry liquor into this Province. As far as concerns the right to carry it into either the Province of Saskatchewan or the Province of Manitoba I decline to express an opinion. No distinction was made on the argument between the case of Alberta and that of Saskatchewan but, as regards Manitoba, it was pointed out that in one respect the proclamation did not seem to accord with the statute but it is shewn that Orders in Council have been passed declaring the Act to be in force in both those Provinces and that is sufficient to justify us in declaring that the defendants cannot be compelled to take liquor for import into those Provinces where they would be subject to prosecution for penalties. If they want an opinion as to whether those prosecutions would succeed they should apply to counsel. It would, I think, be quite improper for us to venture an opinion which would have no binding effect whatever on the Courts or executive officers who are charged with the duty of declaring and enforcing the laws of these Provinces. Though the special case does provide that, in the event of our finding that the defendants should have carried the goods, a judgment for a large sum of money is to be given against them, it does not authorise us to dismiss the action in the event of the contrary result and consequently no order can be now made as the result of the conclusions I have reached.

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STUART, J., concurs with HARVEY, C.J.

Stuart, J.

BECK, J. (dissenting):—This case involves a consideration of the validity of ch. 8, 10 Geo. V. 1919 (Can.), 2nd sess., amending the Canada Temperance Act, R.S.C. 1906, ch. 152, and of a proclamation of the Governor in Council pursuant thereto purporting to bring into force in this Province the prohibitive provisions of the amending Act of 1919.

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The Canada Temperance Act, 1878, 41 Vict. (Can.), ch. 16, was held by the Judicial Committee of the Privy Council in *Russell* v. *The Queen* (1882), 7 App. Cas. 829, to be valid Dominion legislation. According to the head-note, which is sufficient for my present purpose, that decision held that that Act, "which in effect, wherever throughout the Dominion it is put in force, uniformly prohibits the sale of intoxicating liquors, except in

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wholesale quantities and for certain specified purposes, regulates the traffic in the excepted cases, makes sales of liquors in violation of the prohibitions and regulations contained in the Act criminal offences, punishable by fine and for the third or subsequent offence by imprisonment, is within the legislative competence of the Dominion Parliament;" that "the objects and scope of the Act are general, viz., to promote temperance by means of a uniform law throughout the Dominion;" that "they relate to the peace, order and good government of Canada, and not to the class of subjects 'property and civil rights;'" and that "Provision for the special application of the Act to particular places does not alter its character as general legislation."

The Canada Temperance Act having been passed before 1905, when the Provinces of Alberta and Saskatchewan were established out of the North-West Territories and those Territories, by the fact of their being Territories, being subject directly to the legislative jurisdiction of the Parliament of Canada in all respects, unlimited by the legislative restrictions of the B.N.A. Act, its provisions, though purporting to be applicable to all the Provinces of Canada were found to be, at least somewhat inappropriate to the conditions of delimitations of localities and their denomination, and consequently in 1914 (4-5 Geo. V. (Can.), ch. 53), the Act was expressly made applicable to the two new Provinces.

By the amendment of 1919 several sections, numbered from 152 to 156, are added. Section 152, so far as is material to our present purpose, enacts as follows:—

> Subject to sub-section two of section one hundred and fifty-six, upon the receipt by the Secretary of State of Canada of a duly certified copy of a resolution passed by the Legislative Assembly of any Province . . . in which there is at the time in force *a law prohibiting the sale of intoxicating liquor for beverage purposes* requesting that the votes of the electors in *all* the electoral districts of the Province may be taken for or against the following prohibition, that is to say
>
> That the importation and the bringing of intoxicating liquors into such Province may be forbidden;
>
> the Governor in Council may issue a proclamation in which shall be set forth:
>
> . . . . .
>
> (g) the *day* on which, in the event of the vote being in favour of the prohibition, such prohibition will go into force.

Doubtless the Dominion Parliament in the exercise of its jurisdiction to legislate with respect to any of the enumerated subjects listed in sec. 91 of the B.N.A. Act, as placed exclusively

under its jurisdiction, has power to discriminate between the different Provinces of the Confederation of Canada and deal with the same subject in a different manner in each or any of the Provinces or to refrain from making the enactment applicable to one or more of the Provinces, but when the Dominion Parliament is exercising the general jurisdiction reserved to it of making laws for the peace, order and good government of Canada in relation to matters not coming within the classes of subjects assigned by the Act to the exclusive jurisdiction of the Provincial Legislature, it would seem to me that by the very terms in which jurisdiction is given it is not within the jurisdiction of the Dominion Parliament to discriminate, at least in respect of the substance of its enactment, between different Provinces.

The *Russell* case, 7 App. Cas. 829, held that the Canada Temperance Act was applicable to all the Provinces of Canada because the benefits of the Act were available throughout all the Provinces of Canada; but obviously because those benefits were so available without let or hindrance from any Provincial Legislature and by virtue of the overriding jurisdiction of the Dominion.

In the case of the amending Act of 1919 there seems to me to be a partial refusal of the legislative jurisdiction on the part of Parliament co-extensive with the refusal or neglect of any Province to pass a law prohibitive of the use of intoxicating liquors as a beverage, an abdication of jurisdiction dependent upon the action of a constitutional body having no legislative or other jurisdiction over the subject matter of Dominion legislation.

It is true that "the powers distributed between the Dominion on the one hand and the Provinces on the other covered the whole area of self government within the whole area of Canada." (*Att'y-Gen'l for the Province of Ontario, etc.* v. *Att'y-Gen'l for the Dominion of Canada, etc.*, 3 D.L.R. 509, at p. 511, [1912] A.C. 571, at p. 581).

The subject of import into and export from a Province is admittedly not within the legislative jurisdiction of a Province. They, therefore, fall within the legislative jurisdiction of the Dominion; but the Dominion Parliament must, it seems to me, in exercising its jurisdiction, legislate for the Dominion as a unit of territory. That was admittedly done by the Canada Temperance Act.

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The case with regard to the provisions introduced by section 152 and the following sections introduced in 1919 is not the same. It is said that, inasmuch as a Provincial Legislature in legislating within its jurisdiction can discriminate between different parts of the Province, consequently the Dominion Parliament, under whatever authority it exercises its jurisdiction may discriminate between different parts of Canada; but the cases are not entirely alike. A Provincial Legislature can exercise its jurisdiction only upon the subjects listed in sec. 92 as placed exclusively within its jurisdiction and in so doing has plenary jurisdiction. The same can be said of the Dominion Parliament when legislating upon the subjects listed in sec. 91 as placed exclusively within its jurisdiction; but when the Dominion Parliament is exercising its general jurisdiction to make laws for the peace, order and good government of Canada, the very terms in which the jurisdiction is conferred imply, it would seem, the necessity for the general application of the legislation, at least so far as it is a matter of substantive law, to the Dominion as a whole; and the attempted application of it to one Province or some of the Provinces only would seem to carry on its face the inference that it is not for the peace, order and good government of Canada, but only of such one or more selected Provinces.

The whole question is discussed by Lefroy in his "Legislative Power in Canada," under his Proposition 51, pp. 567-8, where he expresses an opinion—admittedly without express decision to support it—contrary to that which I have ventured to express. My opinion is necessarily one which in the absence of a decision of the Judicial Committee of the Privy Council, or at least of the Supreme Court of Canada, to support it, is, I am quite ready to confess, of little value.

As to the question of the validity of the proclamation with which Harvey, C.J., has dealt at length, my view shortly is this.

The provision of sec. 152 (g) means what the literal words in their natural sense mean, namely, that a precise date shall be stated in the proclamation. The fulfilment of the terms of that clause are an essential condition precedent to the validity of the proceedings following the proclamation.

Section 109 has no application to the vote taken under sec. 152, because its possible application is excluded by the fact that the

prohibition law contemplated by sec. 152 excludes the possibility of the conditions contemplated by sec. 109 existing.

As to the application of sec. 109 to a proclamation issued under sec. 11 of the Act, I think sec. 109 contemplates a variation by Order in Council of the date originally fixed, in the event of its being brought to the attention of the Government that existing licenses would be unjustly interfered with by adherence to the original vote.

In expressing my opinion upon the foregoing points I do so without intending to abandon the view I have already expressed in the *Gold Seal Ltd.* v. *Dominion Express Co.*, 53 D.L.R. 547, 33 Can. Cr. Cas. 234, 15 Alta. L.R. 377, and repeated in *Rex* v. *Nat Bell Liquors Ltd.* (1921), 56 D.L.R. 523, that the Alberta Liquor Act is *ultra vires* of the Provincial Legislature.

I therefore am of the opinion that the plaintiff is entitled to succeed on three grounds: "1. The Act of 1919 is invalid because the expressed condition of its effectiveness is the existence of a provincial law prohibiting the sale of liquor for beverage purposes and there exists no such law. 2. The Act of 1919 is itself *ultra vires* of the Dominion Parliament. 3. The proclamation preliminary to the voting under the Act of 1919 was invalid in not fixing a precise date upon which the Act was to come into force.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Latchford, Middleton and Lennox, JJ. March 11, 1921.

HIGHWAYS (§ IVA—115)—REPAIR—GRADING—UNEVENNESS—STATUTORY DUTY—ONTARIO MUNICIPAL ACT, R.S.O. 1914, CH. 192—ACCIDENT—LIABILITY—DAMAGES.

In considering what is proper repair of a highway, regard must be had to the locality in which it is situated, and if in a township, to the situation of the road therein, and whether it is required to be used by many or few, and how long it has been open for travel and if the road, considering its situation, is kept in such reasonable repair that those requiring to use it may pass to and fro upon it in safety by using ordinary care, the statutory duty imposed on the township to keep the highway in a proper state of repair has been satisfied.

A crown of eight inches or one foot in a width of eight feet in the travelled part of a comparatively little used township mud road in low lying lands cannot be considered dangerous for automobile travel in dry weather.

[*Mills* v. *Armstrong* (1888), 13 App. Cas. 10, *Foley* v. *Tp. of East Flamborough* (1899), 26 A.R. (Ont.) 43, *Raymond* v. *Tp. of Bosanquet* (1919), 50 D.L.R. 560, 59 Can. S.C.R. 452; *Fafard* v. *Quebec* (1917), 39 D.L.R. 717, 55 Can. S.C.R. 615, followed. See annotation, Liability of Municipality for Defective Highways and Bridges, 46 D.L.R. 133.]

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APPEAL by the defendant township from the judgment of Orde, J., in an action for damages for the death of the plaintiff's daughter caused by the alleged negligence of the defendant, appellant, in failing to keep a highway in a proper state of repair. Reversed.

The judgment appealed from is as follows:—

The action is brought to recover damages for the death of the plaintiff's daughter caused as alleged by the negligence of the defendants. At the conclusion of the trial, counsel for the plaintiff admitted that he could not recover against the Dominion Canners Ltd., and, that company not desiring costs, the action was dismissed as against them without costs. It now remains to determine whether or not the municipality of Harwich is liable.

On September 25, 1919, one Harry Havens, about 17 years of age, an employee of the Dominion Canners Ltd., got leave from his father, the manager of the company, to take a Ford motor car belonging to the company for use that evening. He had frequently driven the car in the performance of his duties in the course of his employment and was, so far as the evidence shews, quite competent to handle the car.

Havens at the time was paying attention to one Edna Burk, a daughter of the plaintiff, who was visiting some relations named Jenners who lived on a road known as "Old Talbot street" or "The Old street." About 7 o'clock that evening Havens called at the plaintiff's house with the motor car for Rita Burk, another daughter of the plaintiff, and drove with her to the Jenners' home.

On his way to the Jenners' house Havens had gone from the town of Blenheim, where the plaintiff lived, down a well travelled highway known as the Communication road to Old Talbot street. On their return journey Havens and Rita Burk left the Jenners' house about 9 p.m., but instead of returning by the Communication road they took a shorter cut towards Blenheim over a side road known as the Centre road extension which had been opened up for some years, but which had not been as well travelled as the communication road. Along the westerly side of that part of the Centre road extension where the accident happened was an open ditch originally constructed about 1890 and known as the "McArthur Drain extension." While passing along the highway the car was overturned into this ditch and Rita Burk was killed.

The plaintiff alleges that the accident was caused by the want of repair of the highway and by its dangerous condition due to the default and neglect of the defendant municipality.

At the point where the accident happened the travelled way of the Centre road extension is about 20 ft. wide and as it proceeds northerly from that point gradually narrows to about 18½ ft., where it crosses a culvert which crosses the road at right angles about 100 ft. from where the car began to run off the road. Between the right hand or easterly edge of the travelled way and the fence along the road allowance was grass of a width approximately of 18 ft. On the left hand or westerly side of the travelled way was the ditch known as the "McArthur Drain extension." It is difficult to say just where the easterly edge of this ditch begins, because the grass which separates the left hand or westerly edge of the travelled way from the ditch slopes at different angles from the travelled way into the ditch itself, but the distance between the westerly edge of the travelled way and what the surveyors called the "edge of the fresh cut" is about 8 ft. This grassy slope becomes more pronounced as it approaches the fresh cut, the angle at that point being about 45 degrees. If the edges of the fresh cut are considered as the extreme width of the top of the ditch proper, it was about 9 ft. wide at the top, and about 3 ft. deep, but having in view the sharp slope of the grass from the travelled way to the edge of the fresh cut and the corresponding sharp slope of the grass on the westerly side upwards from the ditch to the westerly fence, the ditch was to all intents and purposes much wider and deeper. The bottom of the ditch was in fact from 6 to 7 ft. lower than the crown of the travelled way.

On December 11, 1916, the township entered into a contract with one Wardle for the cleaning out, repair and improvement of the McArthur Drain extension. This contract called for the completion of the work by January 15, 1917, that is within 35 days of the date of the contract. Notwithstanding this provision of the contract, the work proceeded very slowly, and on December 5, 1919, the township engineer reported to the council that he had inspected the work and that it had been "satisfactorily completed with the exception of the spreading of the earth near the commencement of the open section of the drain."

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Along that portion of the road where the accident happened the contractor had piled the earth which he had excavated from the drain, in a long heap or ridge along the centre or crown of the travelled way.

At a point 100 ft. southerly from the culvert already mentioned this heap or ridge suddenly ended in a drop to the original crown of the road. From that point northerly the contractor had piled the earth on the easterly half of the travelled way so as to form a ridge about 4 ft. from the centre or crown of the road. The reason for this break appears to have been to make it easier for vehicles approaching the culvert to use as much as possible of the original travelled way. The effect of what the contractor had done, however, was to create a break or fault (to use a geological expression) in the continuity of the ridge, the northerly portion of the ridge being shifted about four ft. easterly from the line which it would have taken had it continued along the centre of the road.

The evidence established that while it was possible for vehicles to follow the ordinary line of travel by keeping their wheels on both sides of the southerly portion of the ridge, there had been a tendency to keep to the easterly side of the road along the ridge so that the left hand wheels would be running either on the top of the ridge or upon its easterly slope. This mode of travel rendered it necessary, in order to approach the culvert properly, for the vehicle to turn to the left when the break or fault in the ridge was reached, because to continue along the easterly slope of the northerly portion of the ridge might cause the vehicle to miss the culvert altogether.

Havens, who as already stated had never gone over the road before, says that he noticed the ditch on the left side and as the road appeared more level on the right side, he kept to that side slowing down his car to between 10 and 15 miles an hour. Then he struck what he describes as the "bad place" in the road, in which there were knolls and ruts, when he slowed down to between 5 and 10 miles an hour. He then travelled with the left wheel on the knolls and the right wheel on the level road and while doing so, he suddenly felt the wheels "drop into a hole or hit a knoll" as he expressed it. This threw his front wheels around so that the car headed for the ditch, and notwithstanding his efforts to get the car back on the road it skidded or slid down the grassy slope and

overturned in the ditch at a point 50 or 60 ft. beyond the break in the ridge.

As is usual in all motor car accident cases evidence was adduced by the defence to shew in what space a car going 10 miles an hour can be stopped, in order to establish that the car could have been stopped sooner and the accident avoided if the car had been going as slowly as Havens says it was, and so leading to the conclusion that he must have been driving too rapidly or recklessly. The evidence would indicate that a sudden application of the brakes might possibly have stopped the car before it overturned. Havens did not do this but tried to bring the car back on to the road but found himself unable to do so before the car turned over. This fact accounts for the distance the car travelled before it turned over into the ditch, and disposes in my judgment of any inference that the car was going at a high rate of speed when it dropped off the ridge or struck the knoll. Whether the car could have been stopped in time to avoid any accident must really be a matter of mere speculation. To have applied the brakes suddenly under the circumstances with the car heading for the slope towards the ditch might have prevented the accident which actually happened but have resulted in one that was as bad or worse. Under the circumstances I cannot hold that there was any error of judgment or any negligence on Havens' part in trying to right his car and get back on to the travelled road. Havens says that after striking the knoll the car would not respond to the steering wheel and it may be that the sudden jolt which the car got when it dropped off the ridge broke the radius rod which was afterwards found to be broken. This however is guesswork. The fact is clear that at the point in the road where the continuity of the ridge of excavated earth was broken by the fault, the car suddenly swerved to the left and went into the ditch.

Upon the defence of contributory negligence I find in favour of the plaintiff. There is not in my judgment any evidence that Havens was operating the car in a negligent manner. To hold that he was negligent would be to draw inferences from certain facts which are equally consistent with absence of negligence.

Then was the accident due to the negligence of the township, and to the lack of repair of the road? I am of opinion that it was. The facts almost speak for themselves. Notwithstanding the

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evidence of several witnesses called by the township to prove that the road was quite safe for travel notwithstanding the ridge of earth, it hardly requires evidence to prove that to dump the loose earth from a ditch, in the form of a ridge along the crown of the road, with a distinct break in the ridge such as existed in this case, is not leaving the highway in a fit state for travel. It was admitted by Mr. McCubbin, the engineer called by the township, that the road was in a more dangerous condition after the earth had been dumped on it than it was before. There was evidence that some effort to level the road had been made by going over it with what is known as "a split log drag," but the evidence of the state of the road at the time of the accident, coupled with the photographs which shew the ridge of dumped earth, makes it clear that at a dangerous part of the highway, dangerous, that is, because of the deep ditch along the roadway, the travelled way was left in an unsafe condition for vehicular traffic and especially for motor cars. I do not think the fact that ditches such as this are necessarily common throughout the county of Kent is any answer to the charge of negligence here. In my judgment the road was not in a proper state of repair at the time of the accident, and that lack of repair was due to the neglect of the township. The accident was the direct result of that neglect and the township must be held liable for the damages.

The plaintiff is an employee of the Pere Marquette Railway. He is a widower, and Rita Burk, who was only 14 years of age when she was killed, was one of two daughters, and he depended upon these girls for his housekeeping. The other daughter had been taken ill before the trial, and he had had to employ a housekeeper. Rita had just left school shortly before the accident and was working temporarily in the Dominion Canners at the time of the accident. It is not an easy matter to assess damages to a father for the loss of his daughter in a case like this. She would probably have become self-supporting in a short time and so have relieved her father of much expense. But she would undoubtedly have remained at home for some years and have helped in the housekeeping and been of great comfort and assistance to the plaintiff. The best estimate I can make of the damages he has sustained and will sustain is $1,000.

There will therefore be judgment for the plaintiff against the township of Harwich for $1,000 and costs. The plaintiff will not of course be entitled to tax as against the township of Harwich any extra costs which he had incurred by having joined the Dominion Canners Ltd. as defendants.

J. M. Pike, K.C., for appellant; *J. G. Kerr*, for respondent.

MEREDITH, C.J.C.P.:—The usual testimony of witnesses in such a case as this, on the one side that the road was dangerous, and on the other side that it was safe, is seldom, standing alone, very helpful; and in this case it may be disregarded altogether, because the dangers relied upon by the plaintiff consisted only in the inequality of its surface, which it is alleged was the cause of the car running into the ditch, and we have in the plans of the engineer-witnesses the exact extent of such inequality at all parts of the road at which inequalities might have affected the course of the car, and in the photographs filed there is proof of the actual condition of the road at the time of the accident.

The various expressions of counsel and witness for the plaintiff in describing the unevenness of the road, such as "knolls," "ruts," "lumps," "hole," "mound," "summit," should be very alarming but for the photographs, and the actual measurements of the engineer-witnesses. Nowhere does it appear from any such certain evidence that the highest part of the travelled part of the road was more than one foot higher than the edge of such part; and at the very point where the car began its straight line divergence from near the centre of the travelled part of the road to the ditch, a distance of about 60 feet, the plaintiff's engineer-witnesses put it from his actual measurements thus: "In 8 feet there was a difference of 8 inches, in the summit there." So that the plaintiff's position is this: that owing to the crown of the road being 8 inches higher than the edge in a width of 8 feet, that constituted a summit, knoll, mound, or lump which caused the car to run into the ditch 60 feet or so beyond it. All roads must be crowned and 8 inches in mud roads in low lying lands can hardly be considered dangerous in dry weather upon a dry road in the month of September, the month in which this accident happened. It does not appear that this state of unevenness continued all along the road, it is quite clear that it did not, but as I have said the highest "summit" of which there is any accurate testimony was about one foot.

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We are however not concerned in the other inequalities, the inequality which it is alleged caused the divergence from the straight line was only 8 inches

The other inequalities, and mainly the open ditch, no doubt account for the testimony as to the unsafe character of the road and manifestly the open ditch affords ample reason for saying that the road in question on a dark night is a dangerous one for automobile traffic; with horses it is different for then a great factor of safety is afforded in their "road sense."

That which happened in this case is made very plain to me by the straight line of the wheel track of the car in question for a distance of 60 or 70 ft. before it went into the ditch; the tracks are shewn in the plans filed on both sides in substantially the same manner, and they agree with the testimony generally as to them. The tracks make the contention that a jolt threw the car out of its course and into the ditch, worthless: there was not any jolt throwing the car out of its course, but there was a steady and straight line divergence continuing for the 60 ft. or more.

The driver of the car mistaking the true line of the road, or for some other reason, diverged to the left, at an acute angle, which in his new line of travel brought him upon the grass at the side of the road and close to the ditch; realising this he turned to the right, but it was too late. The left hand hind wheel, the driving wheel, sank over the edge of the ditch, overturning the car into it.

There is no evidence that the "radius-rod" broke before the car went into the ditch; it is more than likely that it was broken then.

If there had been a guard rail along the ditch the accident should not have happened; it would have shewn the driver that he was diverging towards the ditch; and if it were the duty of the defendants to have had such a safeguard there I should have no doubt that the plaintiff should succeed in this action; but it was not really contended that the plaintiff should recover on that ground.

Therefore, I am in favour of allowing the appeal and dismissing the action; the accident not being properly attributable to any breach of duty on the part of the defendants to the plaintiff, or to his daughter, whose distressful death, in such an accident, all, who know of it, must deplore.

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Latchford, J.

LATCHFORD, J.:—This action was tried without a jury at Chatham on May 3, 1920, by Orde, J., and was then dismissed as against the Dominion Canners Ltd.

Judgment was reserved as against the township of Harwich. On December 31, 1920, the Judge awarded the plaintiff $1,000 with costs, as against the municipality.

The township now appeals.

The action was brought by the father of a girl who was killed on September 25, 1919, in an automobile accident, alleged to have been caused by a breach of the statutory duty imposed on the township, to maintain the highway on which the accident happened in a proper state of repair. The motor car at the time was being driven by a boy of seventeen named Havens, at whose right the plaintiff's daughter was seated.

After a statement of facts which is not materially questioned, the reasons for judgment proceed:—

Havens, who as already stated had never gone over the road before, says that he noticed the ditch on the left side and as the road appeared more level on the right side, he kept to that side slowing down his car to between 10 and 15 miles an hour. Then he struck what he describes as the "bad place" in the road, in which there were knolls and ruts, when he slowed down to between 5 and 10 miles an hour. He then travelled with the left wheel on the knolls and the right wheel on the level road, and while doing so, he suddenly felt the wheels "drop into a hole or hit a knoll" as he expressed it. This threw his front wheels around so that the car headed for the ditch, and notwithstanding his efforts to get the car back on the road it skidded or slid down the grassy slope and overturned in the ditch at a point 50 or 60 ft. beyond the break in the ridge.

The evidence adduced, that the accident could have been averted if the car was going as slowly as 10 miles an hour, is then referred to, and the conclusion reached that a sudden application of the brakes might have stopped the car before it overturned. Havens is said not to have done this but to have "tried to bring the car back on to the road but found himself unable to do so before the car turned over." This fact is considered to account for the distance—50 to 60 ft.— which the car travelled before it turned over, and disposed in the judgment of his Lordship of any inference that the car was going at an excessive rate of speed when it dropped off the ridge and struck the knoll.

Whether the car could have been stopped in time to avoid the accident was thought to be a matter of mere speculation. His Lordship continues:—

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To have applied the brakes suddenly under the circumstances with the car heading off the slope towards the ditch might have prevented the accident which actually happened, but might have resulted in one that was as bad or worse. Under the circumstances I cannot hold that there was any error of judgment or any negligence on Havens' part in trying to right his car and get back on the travelled road . . . the fact is clear that at the point of the road where the continuity of the ridge of excavated earth was broken by the fault the car suddenly swerved to the left and into the ditch.

Unless negligence on the part of Havens was wholly the cause of the accident it cannot in the circumstances affect the plaintiff's right to recover such damages as were sustained by him owing to the death of his daughter, who had no power of control over the driver. *Mills* v. *Armstrong* (1888), 13 App. Cas., 1 at p. 10, *Foley* v. *Township of East Flamborough* (1899), 26 A.R. (Ont.) 43.

In *Raymond* v. *Township of Bosanquet* (1919), 50 D.L.R. 560, 59 Can. S.C.R. 452, Davies, C.J., stated that the main question on which the decision of the Court must be based was whether or not the curve where the accident occurred was so sharp as to constitute a danger to a motor properly driven with necessary and prudent care.

If, however, the road on which the plaintiff's daughter met her death was not so out of repair as to be dangerous to a motor driven in the manner stated the action should fail. He cannot recover unless the want of repair was the real cause of the accident.

What is proper repair was defined by Armour, C.J., in *The Flamborough* case (1898), 29 O.R. 139, a decision repeatedly approved. Regard must be had to the locality in which the road is situated, if in a township to the situation of the road therein, whether required to be used by many or by few; to how long the particular road has been opened for travel, and to other considerations which need not be mentioned. He says, at p. 141, "If the particular road is kept in such a reasonable state of repair that those requiring to use the road may, using ordinary care, pass to and fro upon it in safety, the requirement of the law is satisfied."

I have perused and analysed the evidence given at the trial, and with the greatest respect for the Judge there presiding I am convinced that the accident was not due to any want of repair in the highway, regard being had to the principles cited.

Harwich is one of the low-lying townships of the county of Kent, and large drainage works have been successfully undertaken.

For as many as 37 miles, the earth excavated from the ditches has been used to form the roads. Such was the case of the ditch and road where the accident occurred. The road until 5 or 6 years ago was not opened up beyond where the ditch came in from the west. In 1918 the ditch north and south of the place where the car ran into it was cleaned out and scraper loads of clay from it were placed in a line near the centre of the road, and left there for a time unlevelled. Complaint having been made by the rural mail carrier and others, in 1919 the pathmaster ran a split log drag over the mounds on two or three occasions smoothing them down but not reducing them to a level with the road on either side—leaving them "wavy" at their summits. In passing north along the road a point was reached where the line of the deposits was interrupted by a level stretch about 20 feet in length. The centre line of the waves thence northerly was more to the right, leaving on the left a level stretch along which vehicles might pass in a direct line towards a culvert across the road.

According to the evidence of Mr. Flater, the engineer called on behalf of the plaintiff, the road in question is one that is very little travelled. Young Havens although living nearby in Blenheim (for how long is not stated, but he had been driving a car there for about a year) had never driven over the road until the night of the accident. His reason for selecting it after 9 o'clock at night, a shortage of gasoline, seems specious. The Communication road, the main artery north and south which he had previously used, was only a mile to the west.

He had doubts as to the condition of the side road, and says that in answer to an inquiry which he made he was told that it was "pretty good." He ran along it, taking no notice of the ditch until he was "quite a way by" where he could have seen it had he been looking. The night was dark but his lights were burning. He says he slowed down when he came to a bad piece of road—knolls, and what seem to be ruts and lumps. Up to a certain spot his right wheels were on level ground and his left on the right track made by vehicles which straddled the way elevations in the centre of the road. Then he says: "It seems I either dropped in a hole or hit that last knoll, I guess right there."

Asked as to his speed he answered: "I suppose about five or ten, seven or ten miles an hour. Q. Now just what happened

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again? A. I hit that knoll and it threw my wheels around there, threw my wheel around and it headed towards the ditch and I pushed my gas as far as it would go, and put on my brakes and tried to right my wheel again." His car was then heading for the ditch. The surface of the road seemed better than that he had just passed over. "There did not seem to be any dirt slung along there."

On cross-examination Havens said, in answer to a question as to why he did not stay on the wagon track part of the road:—

When I hit that last knoll she (the car) took me over and I could not bring her back. Q. Well now Mr. Havens, you say it took you, you were still going fairly well ahead, it did not take you over with any sudden turn, did it? A. Yes, not right sudden. Q. No it was not a sudden turn, you were still going gradually ahead and gradually to the west were you not? A. Yes.

Havens says: "I put the brakes on not just tight when I first hit the knoll, just went over the knoll and went along about 50 or 60 ft. or so, and then after I could not get any control over the car I put them on tight and the back end slewed around."

The evidence of the engineers called on behalf of the respective parties, is virtually in accord. Mr. Flater placed the highest point of the highest wave within 80 ft. south of where Havens turned to his left at 16.72 ft. above a certain datum. At 60 ft. south the summit was 16.49; at 40 ft. 16.25, at 20 ft. 16.13; while the level stretch beyond was 16.09. Thus in the last 20 ft. of the incline the descent was only sixteen one-hundredths of a foot or about 2 inches.

The wheel tracks of the motor car distinctly visible on the afternoon following the accident and shewn on the McCubbin plan demonstrate that the car was not swerved towards the ditch by anything on the highway. There was no sharp or sudden turn into the ditch, Havens was running on a level stretch of a hard, dry road, of ample width for safety, if reasonably travelled, and had not reached any of the knolls to the north when he turned for 30 or 40 ft. along an easy, unbroken curve, farther to his left than anything on the highway required, and only realised the situation in which he had placed himself too late to avert disaster.

Whether his attention was distracted for a second or two by the girl at his side, or he was proceeding at excessive speed, or was otherwise negligent it is unnecessary to determine. What I am

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convinced of is that the road where and when this accident happened was not so out of repair as to constitute a danger to the motor car occupied by Havens and his companion, "if properly driven with necessary and prudent care." The municipality had discharged its duty to use reasonable care to keep this road in a reasonably safe condition for ordinary travel by persons exercising ordinary care for their own safety. *Fafard* v. *Quebec* (1917), 39 D.L.R. 717, 55 Can. S.C.R. 615, *Walker* v. *Township of Southwold and Gosnell* v. *Township of Southwold* (1919), 50 D.L.R. 176, 46 O.L.R. 265.

As the condition of the road was not the cause of the death of the plaintiff's daughter, the appeal should be allowed and the action dismissed with costs here and below.

Middleton, J. Lennox, J.

MIDDLETON, J., and LENNOX, J., concurred in the result.

Appeal allowed.

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Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin, Brodeur and Mignault, JJ. December 19, 1920.

CRIMINAL LAW (§ IIB—49)—OFFENCE PUNISHABLE BY IMPRISONMENT EXCEEDING FIVE YEARS—ELECTION FOR SPEEDY TRIAL—VALIDITY OF ELECTION—JURISDICTION OF COURT OF KING'S BENCH—SPECIAL POWER GIVEN ATTORNEY-GENERAL UNDER SEC. 825 (5) OF CRIM. CODE—TRIAL BY COURT OF KING'S BENCH.

If a person charged with an offence punishable by imprisonment for a period exceeding five years consents to speedy trial by a Judge, the jurisdiction of the Court of King's Bench to try the accused is superseded, and can only be re-established by the Attorney-General personally exercising the special power conferred on him by sec. 825 (5) of the Criminal Code, 8-9 Edw. VII., 1909, ch. 9. If, however, the election for speedy trial is taken before a district magistrate who has no jurisdiction where there is a Judge of the Sessions, before whom it should be taken, there is no valid election and the Attorney-General may under sec. 873 of the Criminal Code bring an indictment before the grand jury.

Statement.

APPEAL under sec. 1024 of the Criminal Code, R.S.C. 1906, ch. 146, the principal question submitted being whether the Court of King's Bench (Quebec) had jurisdiction to try the appellant who had elected for speedy trial before a Judge notwithstanding which he was tried before the Court of King's Bench and convicted.

Fernand Choquette, for appellant.

L. A. Cannon, K.C., for respondent.

Davies, C.J.

DAVIES, C.J.:—At the close of the argument on this appeal, I was of the opinion that the only arguable point requiring con-

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sideration was to the effect that the Attorney-General had not complied with the amendment to sec. 825 of the Crim. Code, 8-9 Edw. VII. 1909 (Can.), ch. 9, which enacted that "where an offence charged is punishable with imprisonment for a period exceeding five years, the Attorney-General may require that the charge be tried by a jury, etc."

It was admitted that the offence charged in the indictment came within this section.

After examining the indictment filed with the record, it seems to me quite clear that there is nothing in this objection.

The indictment appears first to have been signed by the Crown prosecutors on behalf of the Attorney-General under sec. 873, but in addition to this the Attorney-General personally signed a requirement on the back of the indictment that "it should be brought before the Grand Jury." It was so brought, a true bill was found and the prisoner tried before a jury and found guilty.

It seems to me therefore that the amending section of 825 has been fully complied with.

I would dismiss the appeal.

Idington, J.

IDINGTON, J. (dissenting):—The appellant was brought before the magistrate of the District of Quebec upon the accusation of an offence which entitled him to a right of election to be tried by Judge or a jury, and he elected the latter, on April 28, 1920. Thereupon he was duly committed for trial accordingly.

On May 5, following, whilst still in custody of the sheriff, he availed himself of the privilege given by sub-sec. 2 of sec. 828 of the Crim. Code, R.S.C. 1906, ch. 146, which provides as follows:—

> 2. Any prisoner who has elected to be tried by a jury may, notwithstanding such election, at any time before such trial has commenced, and whether an indictment has been preferred against him or not, notify the sheriff that he desires to re-elect, and it shall thereupon be the duty of the sheriff and Judge or prosecuting officer to proceed as directed by section eight hundred and twenty-six.

The sheriff duly notified the Judge of the Sessions of this election.

Some question is now raised, for the first time, as to whether the Judge to whom the notice was delivered in fact was a Judge of the Sessions.

That, to my mind, is quite immaterial. When once the accused has duly made his election in the manner prescribed by the statute

he has duly established his right to be tried by a Judge, unless by virtue of some other provision in the statutes that right has been overruled, or taken away.

There is no pretence herein that any such overruling of his election as was possible, under sub-sec. 3 of the said section, was seriously considered and determined against him. No such contention has been set up. And if any mistake arose in the delivery of the sheriff's notice, when properly addressed as the record before us shews or in the proceedings thereon the prisoner must not suffer for that.

What is relied upon with more assurance is that contained in the Criminal Code Amendment Act, 8-9 Edw. VII. 1909, ch. 9, which, amongst other changes, amended sec. 825 as it theretofore stood by adding sub-sec. 5, which reads as follows:—

5. Where an offence charged is punishable with imprisonment for a period exceeding five years, the Attorney-General may require that the charge be tried by a jury, and may so require notwithstanding that the person charged has consented to be tried by the Judge under this Part, and thereupon the Judge shall have no jurisdiction to try or sentence the accused under this Part.

Under this sub-section undoubtedly the Attorney-General for the Province can overrule the appellant's election.

The sole question with me herein is of one fact. Did the Attorney-General deliberately decide, in light of the foregoing facts, that the appellant should be deprived of his *primâ facie* right of election to trial by a Judge instead of by a jury?

Curiously enough the opinion judgment of Martin, J., seems expressly to admit that the indictment upon which the appellant was convicted by the jury was: "On the 9th of June . . . preferred against the accused before the Grand Jury of the District then in session, upon the order of the Attorney-General of the Province, under the provisions of article 873 of the Criminal Code."

And Pelletier, J., in like manner attributes such action as the Attorney-General took to have been done pursuant to same sec. 873 of the Criminal Code.

That section reads as follows:—

873. The Attorney-General or any one by his direction or any one with the written consent of a Judge of any Court of criminal jurisdiction or of the Attorney-General, may prefer a bill of indictment for any offence before the grand jury of any Court specified in such consent. 2. Any person may prefer any bill of indictment before any Court of criminal jurisdiction by order of such Court. 3. It shall not be necessary to state such consent or order in the indictment and an objection to an indictment for want of such

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consent or order must be taken by motion to quash the indictment before the accused person is given in charge. 4. Except as in this Part previously provided no bill of indictment shall be preferred in any Province of Canada.

If what was done by the Attorney-General in way of the preferment by the indictment in question is attributable to the operation of said section, then, what was done by such preferment certainly does not fall within the meaning of the amendment of sec. 825, by adding sub-sec. 5 above.

Up to the time of this express amendment the Attorney-General could not, nor could anyone on his behalf, take away the right of election given the accused; though the Judge or prosecuting officer before him had long had the power, under sec. 828, sub-sec. 3, of refusing to allow the exercise of the right of re-election in special cases whenever they deemed it would not be in the interests of justice.

The occasion for this, by some mischance, I am unable to understand, possibly never arose. A possibly accidental absence of the Judge qualified to act is one surmise if, as suggested in argument, he who did act was not, but then that could not deprive accused of the election he made by his letter to the sheriff and forwarded by the sheriff's letter to the right Judge.

Be all that as it may, if the accused was not brought up before the right Judge, as the statute requires, that was not the fault of the prosecuting counsel, else we should not have the judicial assent endorsed on the sheriff's letter, and that did not take away this right of the accused, and due regard should have been had to the fact, on the motion to quash the indictment. Any irregularity on the part of the local authorities in the matter could not, as appears by *Regina* v. *Burke* (1893), 24 O.R. 64, affect the appellant's rights.

With great respect, neither of these Judges in appeal, seems to me, accurately to have distinguished that which may rest upon sec. 873 from that which must rest upon sec. 825, sub-sec. 5, added by the amendment of 1909. I agree with them that sec. 873 was all that parties acting had in mind. The former is intended to govern the right to go before a grand jury to prefer an indictment, which right at common law was possessed by all the King's subjects but, by later legislation, was cut down to what the Attorney-General might permit, or the Judge presiding might, on application to him, permit or order.

That modern way of restricting and regulating proceedings before a grand jury was first introduced, so far as I can find, into Canada by an Act respecting Procedure in criminal cases and other matters relating to criminal law, 32-33 Vict. 1869, ch. 29, sec. 28, confined to something like half a dozen offences.

Needless to trace how this at one time known as relating to vexatious indictments was developed until the restriction became complete and was subjected to the requirements of said sec. 873, just quoted.

It is, however, imperatively necessary to bear in mind herein the origin and purpose of that section and its requirements as distinguishable from the origin and purpose of the later enactments of 1909, 8-9 Ed. VII. (Can.), ch. 9, upon which the decision of this appeal should turn.

The mode in which the numerous Attorneys-General of different Provinces carried out the earlier enactment might vary in minor details, and especially in the method of expression adopted for causing those concerned to know and understand that required assent, no doubt differed.

That would, speaking generally, be a matter of minor consequence.

It is a very different object that is to be attained by the action of the Attorney-General upon the new sec. 825, sub-sec. 5, quoted above, which involves the taking away of a right of election given to an accused person and implies the exercise of a kind of judicial power or authority which the Attorney-General is, I submit, expected by the amendment to specially direct his mind to in each case coming up for action. The power is expressly one given to him alone and cannot be transferred to another.

I am unable to see on this record any clear exercise of any such power. What does appear therein seems to me more aptly attributable to the provisions of sec. 873, as by two of the Judges below seems to have been inferred.

What possible reason could exist for the exercise of such a power relative to what seems, at first blush, a very ordinary sort of offence?

And again, if intended to take away the right from an accused of trial before a Judge, I should have expected, I respectfully

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submit, to find it expressed by apt language which would have left no room for argument, and that which we are referred to does not express anything but what is consistent only with a direction under sec. 873.

Moreover, how could there have been left in the minds of anyone concerned in the motion to quash the indictment, before accused was forced to plead thereto, any doubt or difficulty, for if in fact the fiat endorsed was in truth intended to mean what is contended for, surely in the city of Quebec, above all places, that could easily have been set at rest by an affidavit or otherwise.

Those accused of crimes may, in the majority of cases, be at bottom in some minds entitled to very little consideration.

But we must guard their rights as sacredly as possible, and remember that society is not well served by the conviction of any man unless by due process of law strictly adhered to.

I think the appeal should be allowed, for the reasons I have assigned, and that the right to have a case stated should have been given him and, by reason not only of default thereof but under and by virtue of the powers assigned in such event by secs. 1018 and 1024, respectively, to the Court of Appeal and this Court, the conviction should be quashed, or, if the majority of the Court so conclude, referred back to the trial Judge to state such case as he should have stated.

See *The King* v. *Hebert* (1905), 10 Can. Cr. Cas. 288, and *Regina* v. *Hogarth* (1893), 24 O.R. 60, as well as *Regina* v. *Burke* (1893), 24 O.R. 64, already cited.

Duff, J.

DUFF, J.:—I concur with Davies, C.J.

Anglin, J.

ANGLIN, J.:—Only one of the objections to the validity of his conviction taken on behalf of the defendant calls for consideration. It is that based on the alleged absence from the record of anything which establishes the exercise by the Attorney-General of the power conferred on him by sub-sec. 5 of sec. 825 of the Criminal Code (8-9 Edw. VII. 1909, ch. 9, sec. 2), to require that a person charged with an offence punishable by imprisonment for a period exceeding 5 years shall be tried by a jury notwithstanding that he has consented to speedy trial by a Judge. The jurisdiction of the Court of King's Bench in proceeding with the trial of this case is thus challenged. If there was a valid

election by the accused for a speedy trial, the jurisdiction of that Court was thereby superseded (secs. 825, 827 and 833, Crim. Code, R.S.C. 1906, ch. 146, *Reg.* v. *Burke*, 24 O.R. 64; *Rex* v. *Bissonnette* (1919), 47 D.L.R. 414, at p. 415, 31 Can. Cr. Cas. 388, 29 Que. K.B. 323, *per* Lamothe, C.J.), and could be re-established only by the Attorney-General personally exercising the special power conferred on him by sub-sec. 5 of sec. 825. Being a condition of jurisdiction the fact that the authority had been exercised should appear on the face of the proceedings. The ordinary presumption in favour of the jurisdiction of a Superior Court scarcely covers such a case.

The law does not prescribe any particular method in which the Attorney-General is to act. Neither is notice to any person or body required. Nor is it necessary that the Attorney-General should make his requisition in open Court. I am satisfied that the endorsement over his signature on the indictment of his authorisation for its presentment, provided it is couched in terms which unmistakably imply action under sub-sec. 5 of sec. 825, will suffice.

But sec. 873 likewise provides for the preferring of indictments by or on behalf of the Attorney-General before a grand jury. The power which that section confers, however, should not be exercised where the accused has already elected for speedy trial, and he may so elect after an indictment has been preferred under it. *Giroux* v. *The King* (1917), 39 D.L.R. 190, 29 Can. Cr. Cas. 258, 56 Can. S.C.R. 63. This latter step was not taken in the present case, counsel for the prisoner relying on what he assumed to have been a valid election for speedy trial already made in the Court of Sessions of the Peace, and the case appears to have proceeded in the Court of Appeal on the footing that such an election had been duly made.

Counsel for the Attorney-General very frankly stated, in answer to a direct question put by me, that if the indictment now before us had been preferred under the authority of sec. 873 it would have been in its present form and might have carried precisely the endorsement found upon it, namely:

Le présant acte d'accusation "indictment" est porté devant le grand jury par or dre du soussigné procureur général de la Province de Québec.
9 Juin, 1920. (Signé): L. A. Taschereau,
Proc. Général de la Prov. de Quebec.

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In other words, so far as the proceedings shew, the action taken by the Attorney-General in regard to the presentation of this indictment is referable quite as readily to sec. 873 as to sub-sec. 5 of sec. 825. It is therefore impossible to say that it imports a requisition under the latter provision. Under these circumstances, if there had been a valid election for speedy trial, in my opinion it would be extremely doubtful to say the least, whether the conviction could stand and whether the motion to quash the indictment made on behalf of the accused before plea should not have prevailed.

But I find it unnecessary to determine this question since, in addition to relying on the endorsement on the indictment as sufficient evidence of the exercise of the power conferred by sub-sec. 5 of sec. 825, counsel representing the Attorney-General now insists, as it is quite within his right to do (a respondent may support the judgment *a quo* on any ground), that there was no valid election for a speedy trial because the attempt of the accused to make such an election did not take place before the Judge of the Sessions of the Peace as contemplated by sec. 827 Crim. Code. Election before the prosecuting officer (sub-sec. 2) is not suggested.

The district magistrate, Corriveau, before whom the records shew the accused was brought to make his election, was without jurisdiction to receive it because there was at that time a Judge of the Sessions of the Peace for the District of Quebec (sec. 823 ii), as appears in the record and is admitted by counsel for the appellant.

I cannot accede to the suggestion that the notice to the sheriff, not required in this case (sec. 826), but provided for in other cases by secs. 825 (6), 828 (2), and 830 (2), itself constitutes an election. Where it is made part of the procedure, that notice is a preliminary step leading to the accused being given an opportunity to make his election by being brought before the proper officer for that purpose. But the statute makes it very clear that the election itself must take place before the Judge or the prosecuting officer (secs. 825 (7), 826 and 827).

There was therefore no election by the accused for a speedy trial sufficient to bring either sub-secs. 3 and 4 of sec. 827 or sec. 833 into operation. It follows that, the jurisdiction of the Court

of King's Bench never having been superseded, its re-establishment by action of the Attorney-General under sec. 825 (5) was not necessary. The indictment can be supported under sec. 873.

I regard this rather as a case of first election within sec. 826 (7), than as a case of re-election within sec. 828. Sec. 830 (2) would be applicable, however, if the accused upon withdrawing his original election for a summary trial had elected to be tried by a jury and the warrant of committal for trial had so stated. That warrant is not in the record, however, and the election which preceded it is stated in the proceedings to have been merely to proceed by preliminary investigation in lieu of summary trial.

There was evidence on which a jury could find the defendant guilty of the charge laid against him. Taken as a whole, as it must be, the charge is not open to the objections raised. The sentence imposed, while apparently severe, was within the jurisdiction of the Court. It is not within our province to review its propriety.

The defendant may have a real grievance in that he was not given the opportunity to which he was entitled of making an election for a speedy trial before a competent judicial officer. But I know of no redress for that grievance which it is open to us to accord him in this appeal.

Brodeur, J.

BRODEUR, J.:—The Crown submits that the appellant never made a valid election, and that even if there was one the Attorney-General had the right to prosecute him by indictment before the Court of King's Bench under sec. 825, sub-sec. 5, of the Criminal Code, R.S.C. 1906, ch. 146. To this the accused replies that the Attorney-General does not appear to have made regularly the demand of which sec. 825, sub-sec. 5, speaks.

Was there election by the accused for a speedy trial? The documents which we have before us are not very clear on this point. It is quite evident, however, that the accused wished to have a speedy trial under the dispositions of Part XVIII. of the Criminal Code. In fact, after the district magistrate who had held the preliminary enquiry had on May 5, 1920, judged the proof sufficient to put the accused on his trial (sec. 690), and had sent him to prison to be there detained to await his trial, his lawyers on the same day notified the sheriff, who had the custody of the accused, that he elected for a speedy trial, and to bring him

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before "the Court of the Sessions within the shortest delay possible in order for him to make his declaration to that effect."

The sheriff, on May 6, informs the Judge of the Sessions, by letter, according to sec. 826 of the Criminal Code, that Minguy now declares that he makes election for "a speedy trial." This letter from the sheriff has been placed in the record and we there see on its back the following entry:—

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Signé: T. & G.
G.P.

The month is not mentioned, but the parties admit that it is the month of May, and the initials T. & G. are those of Talbot and Gendron, Clerks of the Peace.

We see then on the back of the same letter, the following entry:—

Quebec, 7 mai, 1920

Présent: M. le Juge Corriveau,
M.D.D.

Le prévenu étant présent, la décision sur son option pour procès expéditif est ajournée au 10 mai, 1920.

Gus. Chouinard,
D.G.P.

The initials M.D.D. mean *magistrat de district*, and D.G.P. mean *Député Greffier de la Paix*.

These two entries, which we find on the back of the sheriff's letter, seem to me hardly explicit or correct.

In the first place, on May 5, there could not be an election for speedy trial because at that date the accused had not yet been brought before the Judge of the Sessions. The sheriff's letter addressed to the Judge of the Sessions was only sent on May 6, and it was only on the 7th that the accused appeared before a Judge, who is not however the Judge of the Sessions but a district magistrate, the same one in fact who had committed the accused for trial.

It is admitted by both parties that there is a Judge of the Sessions at Quebec.

In virtue of the Criminal Code (Part XVIII.), elections for speedy trial must take place before the Judge who is defined by sec. 823 as being the Judge of the Sessions. The district magistrate, according to this last article, has jurisdiction only in the

case where there is no Judge of the Sessions. The district magistrate, Mr. Corriveau, had then no jurisdiction in the district of Quebec, where there was a Judge of the Sessions. In consequence the accused was not then able to make a valid election for a speedy trial.

Moreover, did he make an election which took away from the Court of King's Bench all jurisdiction?

The entry dated May 7 on the sheriff's letter shews that there was no adjudication on the accused's election for speedy trial. The entry probably does not explain correctly what took place. From what happened subsequently I should be inclined to believe that on that day, May 7, the Crown made a request or manifested the intention to have a jury trial, and that the question of whether the accused would be tried by the Court of Sessions or the Criminal Court was left in suspense.

Before the amendment of 1909 (8-9 Edw. VII. (Can.), ch. 9, sec. 2), the privilege of the accused to choose a speedy trial was absolute, and from the moment that his consent for a speedy trial was inscribed in the record his trial had to take place in conformity with the dispositions of Part XIII. of the Criminal Code (sec. 825, sub-secs. 2, 3 and 4, Criminal Code, R.S.C. 1906, ch. 146), that is to say before the Judge of the Sessions of the Peace.

The amendments of 1909 added several other sub-sections to sec. 825, notably one to the effect that the Attorney-General could make a demand that the trial take place before a jury.

It seems to me that this demand, if it cannot be refused as the respondent maintains, must be at least filed in the record of the case in order to evoke the case before the King's Bench, or to take away all jurisdiction from the Judge of the Sessions.

In the present case I am of the opinion that the accused really wished to elect for a speedy trial, but his consent was not made before the competent Judge.

The Attorney-General then could under sec. 873 of the Criminal Code bring an indictment before the grand jury.

The appellant complains also of the illegality of the Judge's instructions to the jury, but there is nothing in these instructions which violates any principle of law. As to new facts which he

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pretends to have discovered since the trial, and as to the severity of the sentence, these are questions which could not justify our intervention.

The appeal should be dismissed.

MIGNAULT, J.:—There are two questions to examine on this appeal, for the other bases of appeal in my opinion are ill-founded: 1. Did the appellant really elect for a speedy trial? 2. If there was such election, does the indictment on which the trial took place shew clearly that the Attorney-General of the Province of Quebec was exercising the power conferred on him by sub-sec. 5 of sec. 825 of the Criminal Code, or that of sec. 873 of the same Code, which permits the Attorney-General or his representative to prefer an indictment before the grand jury?

The power exercised under sec. 825 is considerably stronger than that conferred by sec. 873, because it makes ineffective the election for a speedy trial, but when such an election has not been validly made, it goes without saying that the indictment presented by the Attorney-General under the operation of sec. 873 confers full jurisdiction on the Court which holds the trial. In this case the district magistrate had held the preliminary inquiry, and had declared that there was cause to send the accused for trial, so that the indictment could have been preferred before the grand jury without the order of the Attorney-General.

Now, was there election by the accused for a speedy trial? If I arrive at the conclusion that the reply should be in the negative, I will have no need to express an opinion on the second question.

It is beyond doubt that the appellant desired to have a speedy trial, but the desire is not sufficient. The election itself must be made before a person authorised to receive it. In this regard the parties admit that there is at Quebec a Judge of the Sessions of the Peace, the Honourable Mr. Choquette. There is also a district magistrate, Mr. Phileas Corriveau.

After his arrest the appellant was brought before the Judge of the Sessions of the Peace, where he made election for a summary trial. He was nevertheless later allowed to desist from this option and to proceed by preliminary inquiry. This inquiry, if the magistrate found ground for trial, could according to his choice lead him either to a speedy trial before the Judge of the Sessions of the Peace, or to a trial before the Court of King's Bench,

criminal side. For the first, a speedy trial, an option by the accused was necessary. For the second, a trial before the Court of King's Bench, no option was necessary.

On May 5, 1920, the district magistrate declared, as I have said, that there was ground for trial. The same day the attorneys of the appellant wrote to the sheriff of Quebec notifying him that their client wished to elect for a speedy trial, and requested him in consequence to bring the accused before the Court of Sessions within the shortest delay possible, in order for him to make his declaration to this effect.

On receipt of this letter the sheriff on May 6 wrote to the Judge of the Sessions of the Peace informing him that the accused "now declares that he elects for a speedy trial."

According to the Criminal Code, sec. 826, sub-sec. 1,

> Every sheriff shall, within twenty-four hours after any prisoner charged as aforesaid is committed to gaol for trial, notify the Judge in writing that such prisoner is so confined, stating his name and the nature of the charge preferred against him, whereupon with as little delay as possible such Judge shall cause the prisoner to be brought before him.

Note that by the expression Judge, the law means in the case of the District of Quebec, the Judge of the Sessions (sec. 823 Criminal Code).

When the accused is brought before the Judge, the Judge after taking communication of the depositions on which the prisoner was so committed, shall state to the prisoner: "(a) That he is charged with the offence, describing it; (b) That he has the option to be tried forthwith before a Judge without the intervention of a jury, or to remain in custody or under bail, as the Court decides, to be tried in the ordinary way by the Court having criminal jurisdiction." (Sec. 827 Criminal Code.)

If at the time of this appearance before the Judge, the accused consents to be tried before him without the intervention of a jury, this trial, which is called speedy trial, takes place before the Judge.

According to sec. 828, sub-sec 2:

> Any prisoner who has elected to be tried by jury may, notwithstanding such election, at any time before such trial has commenced, and whether an indictment has been preferred against him or not, notify the sheriff that he desires to re-elect, and it shall thereupon be the duty of the sheriff and Judge or prosecuting officer to proceed as directed by section eight hundred and twenty-six.

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This notification to the sheriff is made in the case where the accused, who has elected for trial by jury, wishes to change his mind, and then the sheriff and the Judge must proceed according to the procedure laid down by sec. 826, of which I have cited the first sub-section.

In the present case the appellant had not elected in favour of trial by jury, but had chosen a preliminary inquiry, which as I have said might lead either to a speedy trial before the Judge of the Sessions, or to an ordinary trial before a jury.

The second sub-section of sec. 828 supposes that there has been election for trial by jury, which choice the accused wishes to retract. There is a disposition to the same effect, and for the same case of retraction of election in sub-secs. 2 and 3 of sec. 830. There is also a similar disposition in sec. 825, sub-sec. 6, for an accused on bail, but there is there no question of retracting the election, but only of the choice of a speedy trial.

Apparently the procedure in this case was as if the appellant had chosen a trial by jury, and wished to retract this choice, because it is in such a case that the sheriff is addressed when the accused is committed. In the present case the sheriff informed the Judge of the Sessions by writing that the appellant now wished to elect for a speedy trial.

On receipt of this letter, the Judge of the Sessions should have had the accused appear before him, and make the declarations exacted by sec. 827. That was the moment to make an election for a speedy trial. Instead of this on May 7 the appellant was made to appear before the district magistrate, Mr. Corriveau, and an inscription on the back of the sheriff's letter—it seems at least that an entry should have been made in the register—indicates that the accused being present, the decision on his election for speedy trial was adjourned to May 10. There is in fact written:—

Le Roi v. *Alexandre Minguy*, option pour procès expéditif. Prod. le 5, 1920.

with the initials of the Clerks of the Peace at the bottom.

Is it for the reason that Mr. Fernand Choquette, attorney for the appellant, has pointed out to us, namely his relationship with the Honourable Mr. Choquette, Judge of the Sessions, whose son he is, that Mr. Corriveau, the district magistrate, sat on May 7.

The dispositions of the Code of Civil Procedure, which would have hindered Mr. Fernand Choquette from appearing before his father in a judicial matter, evidently do not apply to a trial before a criminal jurisdiction, and though I appreciate highly the sentiment of delicacy invoked by the attorney for the appellant, who has very cleverly pleaded this case, it is evident that one should here follow the procedure indicated by the Criminal Code.

Then, unfortunately, it is before the Judge of the Sessions that election for a speedy trial should be made in reply to the statements which the Judge should make to the accused according to sec. 827; and as it is a question of a matter of jurisdiction of common law and the procedure by way of speedy trial is of an exceptional nature and requires the consent of the accused before the Judge of the Sessions, I cannot arrive at the conclusion that the Court of King's Bench, criminal side, whose jurisdiction is of the common law, was dispossessed of the case by what passed before the district magistrate.

The Judges of the Court of Appeal appear to have taken for granted that there had been election for a speedy trial. The fact that they did not discuss the question of which I have just spoken disposed me to believe that it may not have been raised before them, but evidently this question is prejudicial because if there was not a regular choice of speedy trial it makes no difference whatever that the Attorney-General did not declare expressly that he insisted on trial by jury in spite of the election for a speedy trial.

I need not then express any opinion on the question which the Judges of the Court of Appeal have discussed at length.

The other grounds invoked by the appellant as I have said are in my opinion ill-founded. The appeal must then be dismissed. *Appeal dismissed.*

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Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Magee, Hodgins and Ferguson, JJ.A. December 30, 1920.

CONTRACTS (§ I E—89)—ORAL AGREEMENT TO CONVEY FARM TO SON—CONSIDERATION—POSSESSION—IMPROVEMENTS—PAYMENT OF INCUMBRANCES—FAILURE TO CONVEY—ACTION BY ADMINISTRATRIX TO RECOVER POSSESSION—STATUTE OF FRAUDS—RIGHTS OF PARTIES.

An oral agreement made by a father with his son on the son's marriage, to convey to the son a farm, the son going into possession of the property and making extensive improvements and paying off a mortgage against it, may be enforced after the father's death, the father having died without having made the conveyance. The son's changed circumstances and the assumption by him of the incumbrances, and the making of the promised improvements are valid consideration and the son's possession and the father's acquiescence in it during his lifetime are sufficient to remove any difficulty under the Statute of Frauds. The agreement must, however, be strictly and satisfactorily proved and there must be ample corroboration.

[*Orr* v. *Orr* (1874), 21 Gr. 397, and *Smith* v. *Smith* (1898-99), 29 O.R. 309, 26 A.R. (Ont.) 397, discussed. See annotation, Oral Contracts, Statute of Frauds, 2 D.L.R. 636.]

Statement.

ACTION by the widow and administratrix of the estate of James Alexander Gallinger, deceased, to recover possession of the south-east quarter of lot 24 in the 8th concession of the township of East Nissouri. The defendant Zenas Gallinger counterclaimed for a declaration of his right to possession or for compensation for his improvements.

The judgment appealed from is as follows:—

SUTHERLAND, J.:—James Alexander Gallinger died in the township of East Nissouri, in the county of Oxford, on the 29th December, 1918, intestate, being the registered owner of the south-east quarter of lot 24 in the 8th concession thereof.

Letters of administration were duly issued to his widow, Clarey Gallinger, on the 29th August, 1919. At the time of the testator's death, the adult defendant, Zenas Gallinger, was in possession of the said real estate, and in this action, as originally constituted, the said administratrix as sole plaintiff claimed possession thereof, alleging that he had refused to yield it up to her after claim made.

The defendant in his statement of defence raised some question as to the administratrix not being the proper person to bring action, alleging that it should be the heirs-at-law.

A written consent of the adult heirs, other than the original defendant, namely, George Gallinger, Lillie McDonald, Birdie Feddery, and Mabel Smith, having been filed at the commence-

ment of the trial, agreeing to be added as plaintiffs, they were accordingly added as such, and the only infant heir, namely, Murray Gallinger, was also added as a defendant, and was permitted to file a statement of defence by the Official Guardian *ad litem*, submitting her rights and interests to the protection of the Court, and raising as a defence to the agreement referred to in the statement of defence and counterclaim of the defendant Zenas Gallinger, that it was not sufficient to satisfy the requirements of the Statute of Frauds.

While the paper-title was, at the trial, admitted by counsel for the defendant Zenas Gallinger to be in the intestate, the said defendant sought to support, by evidence in answer to the plaintiff's demand for possession, an agreement or arrangement set out in para. 2 of his statement of defence, as follows:—

"(2) The defendant is a son of James Alexander Gallinger, deceased, who was formerly the owner of the said lands, and at the time of the defendant's marriage the said James Alexander Gallinger, deceased, gave the said lands to the defendant and put the defendant in possession as the owner of the said lands, and upon faith thereof the defendant kept down all charges thereon and greatly improved the said lands and erected costly barns and fences thereon, and has continued in possession ever since."

The said defendant thereafter claimed from his mother, Clarey Gallinger, the plaintiff in the action as originally constituted, a conveyance of the said lands, free from dower and all other claims (if any) of the said plaintiff and the heirs-at-law of the said James Alexander Gallinger, deceased, and that the said plaintiff should be ordered to convey accordingly. He asked, in the alternative, compensation for the improvements which he had put upon the lands.

At the trial he abandoned the claim to have the land conveyed to him free of dower, and conceded that his mother, the plaintiff-administratrix, was entitled to dower therein.

The intestate had, at the time of his death, in addition to the 50 acres of land in question, other 100 acres on which there was a house on which he had been living with his wife and certain of his other children, and the defendant Zenas Gallinger, while claiming to own and be entitled to the 50 acres, is also claiming a share in the 100 acres. He had been residing at home with his father and

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mother on the 100 acres up to the time of his marriage, which occurred on the 9th April, 1913. At the trial he stated that, about a month before this, his father made a verbal bargain with him, by which he gave him the 50 acres in question, telling him "to go on and do with it as he pleased, as it was his." Upon his marriage he went into possession. He also said that part of the bargain was that he should pay the interest on an existing mortgage on the 50 acres, and the principal at its maturity. He further stated that, in compliance with and reliance upon the said agreement, he had ever since remained in possession of the 50 acres, had had entire control thereof, had paid the taxes thereon, and the interest on the mortgage from year to year. He further said that, during the first year after his entry upon the lands, he, with the knowledge of his father, put a barn thereon, costing about $500; that he did 220 rods of fencing, worth 45 cents a rod; and paid $8 a year for several years in connection with a ditch upon the property; and that in the year 1917, again, with the knowledge of his father, he had put up another barn costing about $700. He also said that in the month of January, 1915, his father and he had together gone to the office of a solicitor, named Graham, in the town of St. Mary's, when the father "wanted him" (the solicitor) "to draw up a deed of the land;" that they were to go back at another time, and did, but Graham was not in his office; that later his father had said he would go again and have the deed drawn. He also said that on one occasion, when his father and he went together to pay the interest to Mrs. Sparks, who held the mortgage, his father had told her that his son was to pay the interest and the mortgage, and that the property was his.

He further stated that, when he took possession of the place, it was not in very good condition for farming purposes, and that he had cleaned it up and rendered it much more fit for cultivation. He alleged that the improvements put by him on the property would amount in value to $2,000. He said that on one occasion, 4 or 5 months after his marriage, when his mother was present in the house on the 50 acres in question, where the defendant and his wife were living, he spoke to his father about the condition of the roof, etc., and said to him that he did not know just what to do about making all these improvements, in the shape matters were, there being no deed, and the father in reply said to him, "Go on, the place is yours."

While he produced no receipt for payment of the interest on the mortgage for the first two years after he went into possession, he testified that he had given the money to his father to pay the interest for these years, and he produced receipts for payment of the interest in the subsequent years. He stated that he knew the property was not his because he had not received a deed, but he had thought that his father would make one and intended to, or that he might make provision for carrying out the agreement in his will. He said that, after he and his father went to Graham's office, he spoke to his father a couple of times and asked him for the deed, and was told that he would get it fixed up some time. He was asked if he had not stated to his brother-in-law, Feddery, that his father would not give him the deed, and he would stay in possession and get a title to the lands in that way. His answer was that he could not remember saying this, but he would not say that he had not said it. He also admitted that his mother had never agreed to give up to him any dower interest in the 50 acres, but said that his father had told him several times that she would "sign off." He further said that he was not, under the agreement with his father, to pay any rent, but to go on, and, as he put it, "do business with the property as owner."

It appears that there were two mortgages on the 50 acres, and that in the year 1915, at the request of the mortgagee, Mrs. Sparks, they were discharged, and a new mortgage given and executed by the father to secure the sum of $1,350. The son learned of this mortgage having been given in that year.

Mr. Graham testified that in December, 1914, or January, 1915, the intestate and his son, the defendant Zenas Gallinger, had come to his office, when the former wanted him to prepare a deed to the son of 50 acres, and stated that he was going to give him the property; that they spoke of wanting to go and see the party who had the mortgage on the property, and gave him no description from which he could prepare the deed, but said they would come back; that they did not come back, but he saw the father a few days later and was told by him that he had been back, and that he, Graham, was not in his office; that he then intimated that he would come back again and have the deed prepared, but never did; that he saw him subsequently and he repeated the same thing, but never again came to his office.

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Mrs. Sparks was called and said that it was in May, 1915, that the new mortgage was given to her for the $1,350 by the intestate, but it was dated back to the 1st January in that year. She also testified that in the year 1916 the father came to her to pay the interest on the mortgage and did pay it, the son being present; and that, on her writing out the receipt and handing it to him, he said: "Give it to the boy; he has been a good boy. I have given him the place. He will do business, and pay the interest in the future;" and that thereafter the son paid the interest.

John A. Pearson, a farmer and the father of the wife of the defendant Zenas Gallinger, stated that he had a talk with the intestate when the son was putting up one of the buildings on the 50 acres, and he stated that he could put up what he liked, as he had given him the place.

Christopher J. Howse testified that he had been assessor of the township, and in the year 1914 he went to the property to see about the assessment, when the father told him that he wanted the 50 acres assessed to the son as owner, and that thereafter the son was assessed for the property.

Sarah Gallinger, wife of the defendant Zenas, testified that, during the first year after their marriage, the deceased had told her that her husband was to go on and build on the property as owner, that it was his, and he was going to give him the deed of it, or, as she put it at another place in her evidence, "going to give the deed as soon as he could." She said she did not know why the deceased had not given the deed, that his intentions were good, that her husband was trying to get him to do so, and he would always say, "I am going to," and spoke of fixing a time when he would do it; that this occurred on several occasions.

Several farmers in the locality testified to the value of the property and of the improvements made upon it by the defendant Zenas Gallinger. Russell Urin said that the 50 acres were now worth $3,500; that when the defendant took possession the place was not worth more than $2,000, the difference being attributable to the improvements put on by him; that the increase in value was represented by about $1,400 in improvements and $100 in increased value of the land. He spoke with knowledge of the buildings and improvements put upon the property by Zenas.

Carman Brown thought the farm was worth from $3,500 to $4,000; that the improvements put upon it by the defendant were about $1,400 or $1,500, and that the property was worth, when he took possession of it, about $2,100 or $2,200. Robert Thompson gave similar evidence.

The administratrix was called on behalf of the defendant and stated that her husband had always said that the place was to be Zenas's, and that she had heard him tell Zenas to pay the taxes and the interest on the mortgage, and that he himself would not have anything more to do with the property. She also stated that she did not want to institute this suit, and did not want the defendant put out of the property. Whether this attitude was on account of her son's change of position as to her dower or not was not disclosed. She stated that she had heard her husband say that the place was to be Zenas's at his death; that he was of a secretive disposition and had said quite a while before his death that he would not part with any of his lands until his death. She said that she, herself, had pressed him "to settle up the Zenas affair a year or two before his death, but he would never do it;" that she had heard him state that Zenas could put the improvements on if he wanted to, that the place was to be his at his death, and that he had insisted on Zenas paying the taxes.

McKenzie Feddery, a son-in-law of the deceased, testified that Zenas had told him that his father would not give him any satisfaction about the 50 acres, and that he had taken legal advice and was going to pay the taxes and interest on the mortgage and try and get it by "civil possession." He also said that Zenas told him he had been at his father to give him some writings and he would not do it, and had been at Graham's with his father to get an agreement with him, and made no reference to a deed. His wife, Birdie Feddery, also said that Zenas, her brother, had stated to her that he had tried to make an arrangement with his father to give him writings on the property, and could not get him to come to terms; that he had got legal advice to stay on the place for 10 years and it would be his if he paid the taxes.

It is necessary that a verbal agreement such as that put forward by the defendant Zenas Gallinger should be strictly and satisfactorily proved. One can well understand that, when he

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was about to get married, he would be anxious to know where he would live, and to have a place to take his proposed wife to. On the other hand, one can quite well believe that his father, interested in the son's prospective marriage and future welfare, and having in mind the possibility and perhaps the intention that he would, some day, give him the farm, would say to him, "When you get married, go on the 50 acres and occupy it." There is no doubt, also, that from time to time subsequently he intimated an intention to give the property to his son. It is evident that the son felt uneasy about his position, and was anxious to have his father put the alleged oral bargain in a definite and concluded form, by executing a deed in his favour. It is also plain that the father was putting him off from time to time. According to the mother, he had no intention of parting with the ownership of any of his property until his death. When, in the year 1915, the existing mortgages which the son stated it was part of the bargain between him and his father that he should be responsible for, were discharged, and a new mortgage given, one can well conclude, I think, that, if there had been any bargain which the father recognised as binding upon him, he would have then made a deed in favour of his son, and required the latter to execute and bind himself to pay the new mortgage, rather than himself do so.

While, in so far as the erection of the first barn is concerned, the son might, with some reason, contend that he had built it in reliance on the promise of his father to give him the property, it is, I think, clear that long before he erected the second barn he realised that he had no binding or enforceable agreement. While he made these improvements and the others mentioned, and while he paid interest on the mortgage and taxes, he had, on the other hand, for years the use of the house and buildings and the benefit of all the crops raised by him on the lands.

I am unable to find, upon the evidence as a whole, that the defendant Zenas Gallinger has shewn that the agreement put forward by him in his statement of defence has been proved. I think the Statute of Frauds is a bar to the claim. The alleged acts of part performance are in part equivocal and may be attributable to an expectation on his part that his father would leave the property to him by will. It is clear that the most substantial part of the said improvements was made after he realised that

he had no agreement binding on his father, and had learned and come to the conclusion that his father would not make a deed to him, and the only way he could acquire ownership was through possession for a sufficient length of time to do so: *Orr* v. *Orr* (1874), 21 Gr. 397; *Smith* v. *Smith* (1898), 29 O.R. 309 (affirmed in (1899) 26 A.R. (Ont.) 397).

It seems a pity that this family quarrel was not settled before action. It may well be that, had the defendant Zenas Gallinger not taken the position that he was entitled to the 50 acres, clear of his mother's dower, and that he was entitled to an interest in the other 100 acres as well as to the ownership of the 50 acres clear of his mother's dower, some agreement might have been arrived at. It may be possible yet for this to be done in some way to enable him to secure the advantage of his improvements.

There will be judgment as against him for possession of the 50 acres with costs, and dismissing his counterclaim with costs, inclusive in each case of the costs of the infant defendant.

W. R. Meredith, for appellant.

R. S. Robertson, for respondents.

E. C. Cattanach, for the Official Guardian.

The judgment of the Court was delivered by

HODGINS, J.A.:—Appeal by the defendant Zenas Gallinger from the judgment of Mr. Justice Sutherland whereby he directed the appellant to give up possession of the 50 acres of land in question to the administrator of his father's estate, and dismissed his counterclaim, which sought a conveyance from the estate of the same 50 acres. Hodgins, J.A.

The trial Judge says:—

"I am unable to find, upon the evidence as a whole, that the defendant Zenas Gallinger has shewn that the agreement put forward by him in his statement of defence has been proved. I think the Statute of Frauds is a bar to the claim. The alleged acts of part performance are in part equivocal and may be attributable to an expectation on his part that his father would leave the property to him by will. It is clear that the most substantial part of the said improvements was made after he realised that he had no agreement binding on his father, and had learned and come to the conclusion that his father would not make a deed to him, and that the only way he could acquire ownership was through possession for a sufficient length of time to do so."

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The learned Judge relies on *Orr* v. *Orr*, 21 Gr. 397; *Smith* v. *Smith*, 29 O.R. 309.

This action is brought in the interest of the remaining members of the family, who have been added either as plaintiffs or defendant.

The defence set up by the appellant is that the deceased "gave the said lands to the defendant and put the defendant in possession as the owner of the said lands, and upon the faith thereof the defendant kept down all charges thereon and greatly improved the said lands and erected costly barns and fences thereon, and has continued in possession ever since."

The importance of such cases as *Orr* v. *Orr*, cited by the learned Judge, lies in the rules laid down by Chief Justice Richards and by Vice-Chancellor Blake to be applied in actions of this nature. These rules have been followed ever since. At p. 415 Chief Justice Richards says:—

"Whenever an attempt is made to set up a parol agreement between a parent and child as to the disposition of the property of the parent, I think the only safe rule to adopt in a country like this is, that the agreement shall be sustained by clear and satisfactory evidence. If such agreement is attempted to be enforced after the death of the parent, and the oath of the party desiring to support the agreement is offered for that purpose, his evidence must be sustained by satisfactory proof."

At pp. 425 and 426:—

"Courts ought to require that such agreements shall be established by the clearest evidence; and it should be held to be an almost invariable rule, when a parent tells a child that if he lives with him and works the farm *he will give it to him*, that the child is to understand, unless it is unmistakably shewn that the parent intends to bind himself so that he cannot change that intention, it will be considered that all he means to say is, that those are his views and intentions, but he will feel himself perfectly at liberty to alter that disposition of his property, if he feels his own altered circumstances or want of kindness or affection on the part of his son induces him to change his views."

Blake, V.-C., pp. 445 and 446, says:—

"The Court should be very slow to act upon the statement of one of the parties to a supposed agreement after the death of the other party; and such corroborative evidence should be adduced

as to satisfy the Court of the truth of the story told, which is, as here, to benefit so materially the person telling it. To my mind the circumstances detailed in evidence so far from corroborating the allegations in the bill negative them, and lead to the conclusion that, although apparently the plaintiff is a person worthy of credit, his case must be taken to be disproved. This is apart from the other difficulty in the plaintiff's way, arising from the uncertainty and ambiguity of the alleged agreement."

In other parts of the judgment it is pointed out that a representation that amounts to a mere expression of intention must be distinguished from a representation which amounts to an engagement, and that the mother obviously never intended to yield her control over the premises, or to place the sons in such a position as that they could be independent of her.

In the subsequent cases it will be found that the elements to which I have referred in the *Orr* case are insisted upon as governing transactions of this kind. Spragge, C., who was the trial Judge in *Orr* v. *Orr*, and dissented from the opinion of the majority of the Court of Appeal on the facts, delivered a judgment in *Jibb* v. *Jibb* (1877), 24 Gr. 487, and, after quoting the language of Chief Justice Richards to which I have referred, says at pp. 493 and 494:—

"There seems upon the evidence no doubt that the father purchased this land with the avowed intention of giving it to the son at some future time." And again: "There is nothing in the case made of a promise to make a deed, supposing it to be established."

In *Smith* v. *Smith* (29 O.R. 309 at p. 319):) Street, J., refers to Chief Justice Richards' language, and speaks of the agreement in question in the following words:—

"His father at first said that he would will the place to him, and then he said that they would pay for it, and he would deed it and take a life lease. This, from his evidence, I think, must be taken to have been the final agreement made, if any agreement at all is to be taken to have been made, but he himself, down to the time of his cross-examination, was so little impressed with the exact nature of the arrangement that he had entirely forgotten until then that anything had been said about a deed or a life lease."

I read these cases as emphasising the necessity for clearness and definiteness in the promise and the necessity of ample cor-

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roboration, but not as depriving a son of the right to have relief, provided these conditions are reasonably fulfilled, especially if the transaction takes the form of a change of position and circumstances in the lifetime and with the knowledge of the promisor.

I have the misfortune to differ from the learned trial Judge in the conclusion he draws from the facts proved before him. The promise given by the father is, I think, clear and definite, and is repeated more than once in practically the same terms. The appellant's evidence in chief is as follows:—

"Q. Now at the time you were married, or shortly before you were married, did you make a bargain with your father about this 50 acres? A. Yes.

"Q. When was it? A. Just about a month.

"Q. A month before you were married? A. Yes.

"Q. Now, what was the bargain? A. He gave me the 50 acres and said to go on and do what I pleased with it, it was mine.

"Q. He gave you the 50 acres and told you 'Go on and do as you please,' that it was yours? A. Yes.

"Q. What were you to pay for it? A. What was I———

"Q. What were you to do—what did you agree to do for it. A. What was that? I agreed to go on and do so.

"Q. Do what? A. Build and fix it up.

"Q. Fix it up? A. Pay the interest and pay the mortgage off.

"Q. And the property was to be yours? A. And the property was to be mine."

On cross-examination he said:—

"Q. How did you bring it about? A. I told him I was going to get tied up.

"Q. You told him that you were going to get 'tied up'? A. Yes, sir.

"Q. And what did he say. Just tell me the same way you have told me that, that is what you did say to him, 'I am going to get tied up.' Now then just say what he said when you told him that? A. He said, 'Zenas, that place up there is yours, and you can take possession of it any time you like'.

"Q. 'That place up there is yours and you can take possession of it any time you like'—and that is all there was about it? A. Yes.

"Q. I understand you got married? A. Yes, sir.

"Q. And immediately went down and lived in this house that had been rented to somebody? A. Yes, sir."

The corroboration is, I think, unusually direct. Mr. James Graham, a solicitor living in St. Mary's, was called and says he recollected the father and the appellant coming to him in December, 1914, or January, 1915, and the father giving instructions to prepare a deed from him to the appellant without any conditions; but, as they had no papers with them and no description of the land, they went away, and when the deceased returned Mr. Graham was out, and the deed was never drawn. He says, however, that the father told him that he was going to give the appellant a deed to the property. He saw the deceased afterwards either once or twice, and he on each occasion promised to come in "some of these times, he and Zenas, and get the business finished up."

Mrs. Carrie Sparks, who held a mortgage upon the property, was also called and recollected the deceased and the appellant coming in to see her; she says that when they paid the interest she wrote out a receipt, and that the deceased said: "Give it to the boy. He has been a good boy, and I have given over the place to him, and he will do the business and pay the interest in the future."

Howes, the assessor, deposes to a conversation with the deceased in 1914, in which he wanted a change in the assessment, so that his son Zenas was to be assessed for the 50 acres where he was living, and he and his son George would be assessed for the 100 acres where he, the deceased, lived. The appellant paid the taxes on the 50 acres from the time he took possession.

J. A. Pearson, father-in-law of the appellant, was also called, and remembered a conversation with the deceased when the appellant was putting up the first barn upon the 50 acres. He said that he had a conversation with the deceased, and recollects saying to him that this barn would come in useful for Zenas, to which he answered: "Yes, he can put up what he likes. I have given him the place."

The wife of the appellant also had a talk with her father-in-law, who came to see her about a month after the wedding, when she was living on the 50 acres. She says he "told me that my husband

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was to go and build on the property as owner, that it was his, and that he was going to give him a deed for it."

As against this evidence there is, of course, to be put the fact that the father made a mortgage upon the place, consolidating the other mortgages, in 1916, dating it back, however, in order to cover the time for which interest had not been paid, and that for two years he paid the interest on it. The appellant, however, says that he gave his father the money to pay the interest after he had taken possession of the farm. I do not think the circumstance of the father making the mortgage is of commanding importance. The deed had not been given, and the son could not, therefore, properly make a mortgage: besides this, it would have needed the consent of the mortgagee to the substitution, and it is altogether reasonable to conclude that the father was merely consolidating the mortgages upon the property, relying, however, upon his son's undertaking to pay the incumbrances. He had handed it over to him subject to these mortgage-debts, and was at the time intending to give a deed. On the other hand, this may, of course, be a circumstance quite in line with the attitude the father later seems to have adopted, as testified to by his wife, that the son was not to have a deed of the property till the death of the father. If this ever was a condition, it has now been fulfilled; and, therefore, the evidence of the deceased's wife, if admissible against the appellant, may be disregarded. It certainly appears that the deceased put off the giving of the deed from time to time, on one plausible excuse or another, all of which are given in the evidence, but in no case, except in the evidence of his wife, is there any evidence that he had formed any intention of recalling the gift, but only that he was procrastinating, while intending to get the deed drawn and executed later.

The original promise, or rather gift, was made before the marriage of the appellant, which took place on the 9th April, 1913, and he at once went into possession. His father, he says, gave him possession "from the fellow that was on the place," who moved away. He improved it in various ways, putting up one barn, and erecting another which he brought from a near-by farm. The farmers who were witnesses estimated the improvements done by the appellant at some $1,400.

After considering the evidence as carefully as I can, I feel bound to come to the conclusion that the agreement or gift was

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sufficiently proved, and is well corroborated, the evidence appearing to me to satisfy the requirements of the cases I have discussed. Possession was taken on the faith of that agreement and gift, and would be, undoubtedly, referable to the agreement made with the father, and to nothing else indicated in the case. There is no foundation for the suggestion that the father was to will the farm to the son. The father's subsequent recognition of his possession, and acquiescence in it, and in the putting of visible and substantial improvements upon the property, makes that possession such as will itself remove any difficulty caused by the Statute of Frauds. See *Hodson* v. *Heuland*, [1896] 2 Ch. 428. The erecting of the second barn, while after the continued delay of the father, cannot be said to be with knowledge that he was definitely refusing to give the deed; as he never in fact refused. There is valid consideration in the change in the appellant's circumstances and his assumption of the incumbrances and the making of the promised improvements.

Upon the whole I think the appeal must be allowed and judgment entered dismissing the action with costs, and directing judgment to be entered upon the appellant's counterclaim with costs.

During the argument it was undertaken by counsel for the appellant that, if the 50 acres were held to be the property of the appellant, he would make no claim to share in the 100 acres known as the homestead property. The judgment may, therefore, be prefaced with an undertaking that when the 50 acres in question are conveyed to or vested in the appellant with the assent of the other heirs, no claim will thereafter be made by him to a share in the homestead farm or in the proceeds thereof.

Appeal allowed.

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Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ. March 11, 1921.

SUMMARY CONVICTIONS (§II—20)—OPIUM AND NARCOTIC DRUG ACT, 10-11 GEO. V. (CAN.), CH. 31—TRIAL—ADMISSION OF ACCUSED—CONVICTION WITHOUT HEARING EVIDENCE—DUTY OF MAGISTRATE—CERTIORARI—APPEAL.

Section 721 of the Criminal Code enacts that after stating to the accused the substance of the offence charged, the Justice shall ask him if he has any cause to shew why he should not be convicted, and if the defendant admits the truth of the information and shews insufficient cause why he should not be convicted, the Justice shall convict him, but that if he does not admit the truth of the information evidence shall be taken.

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A conviction under the Opium and Narcotic Drug Act, 10-11 Geo. V., (Can.), ch. 31, where the accused through an interpreter simply said that the parcel found on him was not his, is not an admission of guilt under the above section and a conviction without evidence being taken based on such an alleged admission will be quashed.

[*Rex* v. *Richmond* (1917), 39 D.L.R. 117, 29 Can. Cr. Cas. 89, 12 Alta. L.R. 133, followed.]

Statement.

APPEAL from a refusal of McCarthy, J., to quash a conviction under the Opium and Narcotic Drug Act (Alta.). Reversed.

J. H. Charman, for appellant; *H. W. Lunney*, for respondent.

Harvey, C.J.

HARVEY, C.J. (dissenting):—I am not satisfied that this is a case in which the conviction should be quashed. The charge is practically the same as in the case of *Rex* v. *Richmond* (1917), 39 D.L.R. 117, 29 Can. Cr. Cas. 89, 12 Alta. L.R. 133. As was pointed out in that case *certiorari* is taken away and, therefore, a conviction can be quashed only when the magistrate has acted without jurisdiction or there has been fraud. There is no suggestion that there was fraud and, therefore, for the applicant to succeed he must shew a want of jurisdiction.

The charge is, that the accused had opium in his possession without lawful authority. The name shews that he is a Chinaman and the record shews that there was an interpreter and that accused pleaded guilty.

An application was made to McCarthy, J., to quash the conviction and on the application an affidavit of the accused was produced in which he swears that upon being charged with the offence: "I said to the interpreter that the parcel found on me was not mine, and nothing more." He also swears that he was not aware of the contents of the parcel.

This last statement naturally raises a desire to give the accused a chance to establish his innocence, but unless there is legal ground for quashing the conviction the opportunity cannot be given in these proceedings. The application was dismissed by McCarthy, J.

We have not before us the notice of appeal from his judgment, but the only ground raised before us was what is disclosed by the affidavit. In the *Richmond* case it was admitted that the accused stated to the magistrate, that he did not know the contents of the parcel, which meant that though he had stated that he was guilty he was not so in fact, because he lacked the knowledge necessary to constitute guilt and the magistrate, having been so notified, had no jurisdiction to enter a conviction since the statute, Crim.

Code, R.S.C. 1906, ch. 146, sec. 721 (2), gives him the right to do that only when the defendant "admits the truth of the information and shews no sufficient cause why he should not be convicted."

The present case is quite different. Counsel for the Crown states that the magistrate has no recollection of the case and we have nothing, therefore, but the record and the sworn statement of the accused, which are really, in no way, in conflict. It appears to me that the only conclusion to be drawn is that the interpreter interpreted to the Court the answer of the accused as a plea of guilty, in which event, of course, there was no question of the magistrate's jurisdiction to enter a conviction. We all know that interpreters very frequently interpret not the exact words, but what they understand to be the substance, and inasmuch as the statement that the parcel found on him, which the accused no doubt considered to be the parcel he was charged with having in his possession, was not his, in no way touches the question of guilt, it is quite understandable that the interpreter might have considered the answer as equivalent to a plea of guilty and so interpreted it. But be that as it may, I do not see what there is upon which to base a finding that the magistrate had no jurisdiction to make the conviction.

One regrets that this leaves a possibly innocent person to suffer punishment, but as was pointed out in the *Richmond* case the Act provides a right of appeal when the merits may be all considered and justice done so that mistakes of this sort are not without remedy if resort is had to the proper procedure.

I think the appeal should be dismissed with costs.

STUART, J.:—Appeal from McCarthy, J., who dismissed an application to quash a conviction under the Opium and Narcotic Drug Act, 10-11 Geo. V. (Can.), ch. 31. Stuart, J.

The charge was apparently read to the accused through an interpreter. The accused in his affidavit swears that all that he told the interpreter was that the parcel found in his possession did not belong to him. The documents sent up by the magistrate shew merely that the accused pleaded guilty through the interpreter. He was thereupon convicted and sentenced. Section 721 of the Crim. Code enacts that after stating to the accused the substance of the offence charged, the Justice shall ask him if he has any cause to shew why he should not be convicted, that if

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the defendant admits the truth of the information and shews no sufficient cause why he should not be convicted the Justice shall convict him, but that if he does not admit the truth of the information, evidence shall be taken.

If we assume the truth of the accused's statement in his affidavit that all the words he spoke to the interpreter were, that the parcel found on him was not his, can it be said that he thereby admitted his guilt? I doubt it very much indeed. In the first place, it may be asked where there is to be found, in the words used, an admission that the parcel found on him contained opium at all? There is none whatever. From what source did the magistrate, or perhaps one should say the interpreter, learn or assume that it contained opium? If it be said that it was from the omission to deny it can only be answered that this omission does not fulfil the requirements of sec. 721. If the accused had stood silent he would have had to be tried. That the answer he did give furnished no defence does not, I think, justify the assumption that he admitted his guilt. I think that admission must be express and not by implication. If we assume the truth of the accused's affidavit, it seems to me, that the interpreter had no right to tell the magistrate that the accused admitted the truth of the information, or in other words, pleaded guilty. Counsel for the prosecution informed us that the magistrate now says that he has no recollection whatever of what occurred owing to the lapse of three months or so since the conviction. This is natural enough, and nothing else could reasonably be expected. But it was not the magistrate to whose memory alone resort could have been had. Indeed it was more properly from the interpreter that an affidavit in contradiction of the accused should or might have been sought. No such affidavit is forthcoming and no suggestion was made that an attempt had been made to obtain one.

It is true considerable time has elapsed since the conviction, but R. 829 expressly allows 6 months as the time within which an application to quash can be made and I doubt, therefore, if the Court ought to be influenced by the fact of delay in its consideration of the case. It seems to me we cannot very well do otherwise than treat the case just as we would have done if it had been brought promptly unless it can be shewn that the delay has been unnecessary and has in some real way prejudiced the case for the

prosecution. Counsel for the accused did give a fairly reasonable explanation for the delay and on the other side it has not been really shewn that the prosecution was prejudiced thereby because, although the magistrate has now naturally forgotten what occurred, it is not what the interpreter told him but what the accused told the interpreter that is involved. As to that, the magistrate could say nothing in any case and no suggestion was made that the interpreter could not be found or could not remember what occurred.

In the circumstances we are bound to assume the truth of the uncontradicted affidavit of the accused. Accepting that as true it appears that the interpreter wrongly informed the magistrate that the accused pleaded guilty and upon this ground I think the conviction cannot stand.

It is true there has been delay, but the accused has been in jail all the time and has suffered most therefrom if he should happen to be innocent.

I am quite conscious that there is perhaps a growing feeling that the Court is interfering too frequently by *certiorari* with convictions in the magistrate's Courts and I am not an entire stranger to that feeling myself. But all one can do here is to act on the material before one. That material and the nature of the case, being one of a charge where there is a maximum penalty of $1,000 and one year's imprisonment and where the accused requires an interpreter and has no counsel representing him, lead me to suggest with the utmost respect, that it is usual in such a case, at any rate at the Criminal Sittings of the Supreme Court, to make careful enquiries by repeated questions so as to put it beyond all doubt that such an accused does really mean and intend to admit the truth of the charge made against him. No doubt with vagrants and drunken persons, who are to be given small penalties, expedition and rapidity of work is both necessary and safe, but with serious crimes, I venture again, with all respect, to suggest that due caution requires the necessary and proper consumption of a reasonable time. I do not regret, therefore, in this case quashing the conviction, not on account of the accused with whose guilt or innocence we really have nothing to do and who undoubtedly may have no real defence and be entirely guilty, but on account of the principle involved as applied to the

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facts stated in the affidavit of the accused upon which alone we can act.

On the other hand, I am not content, in this case, with a mere quashing of the conviction and discharge of the accused. I think it would be quite improper on the bald statement of the accused, after this lapse of time, to order his final discharge. The case should certainly be retried unless the evidence for the prosecution has disappeared so as to make it impossible. There are now so many applications to quash by *certiorari* that I think it is time the Court took some slight initiative in suggesting new trials. This is a very proper case for that course. The writ of *procedendo* is not with us a familiar proceeding, but it is undoubtedly still available.

I would allow the appeal and order the conviction quashed but would remand the accused to his original custody and order the magistrate to proceed with the information again or a writ of *procedendo* to issue to that effect if it is formally necessary, which, no doubt, will not be the case. With regard to costs, I would reserve them for a further application to be made after the result of any further proceedings is known.

There should be also an order protecting the magistrate.

Since writing the foregoing, I have hesitated greatly whether I should not, after all, adopt the view expressed by Harvey, C.J. But on consideration I cannot see any distinction in principle, between this case and that of *Rex* v. *Richmond*, 39 D.L.R. 117, 29 Can. Cr. Cas. 89, 12 Alta. L.R. 133. The facts as to what occurred before the magistrate were there proven by affidavit, although the magistrate's affidavit there practically admitted what the defendant alleged to have occurred. The magistrate's Court is not a Court of record and the precedents undoubtedly shew that affidavits in regard to such matters may be admitted.

It is much to be regretted that no attempt was made by the Crown to secure an affidavit from the interpreter. I should have thought, that in view of the affidavit of the accused that would have been the first thing thought of. But we have no such affidavit and no explanation of why one was not obtained.

Upon the whole, as the accused has already been in confinement for nearly 4 months, I see no serious danger to the due administration of justice in adhering to the view I have expressed. Perhaps

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I may venture to point out that the acceptance by the accused of the course I suggest by taking out the order is open to some risk as upon a second conviction he may receive at least the same punishment and his 4 months' confinement may go for naught.

BECK, J.:—The defendant was charged before Saunders, P.M., Calgary, with having opium in his possession without lawful authority contrary to sub-sec. 2 (e) of sec. 5A of the Opium and Narcotic Drug Act, 10-11 Geo. V. (Can.), ch. 31.

The magistrate convicted on a statement of the accused.

The statutory provision referred to is to be found in 10-11 Geo. V., 1920 (Can.), ch. 31, amending ch. 17 of 1911.

Section 5A, sub-sec. 2 (e), says:—

> Any person who has in his possession without lawful authority or manufactures, sells, gives away or distributes any drug without first obtaining a license from the Minister shall be guilty of a criminal offence and shall be liable on summary conviction, etc.

A motion by way of *certiorari* and *habeas corpus* was made to McCarthy, J., for the purpose of quashing the conviction. He refused the motion and this is an appeal from his decision.

There are several grounds: One is that the defendant shews, by affidavit, that he did not admit the truth of the charge, and that, nevertheless, without evidence, he was found guilty.

The affidavit states in substance: That on being charged before the magistrate: "I said to the interpreter" (the magistrate has noted on the information that there was an interpreter) "that the parcel on me was not mine" and nothing more and no other or further evidence was adduced before the magistrate; that the parcel found in his possession was "given me by a friend in Calgary to take to a friend Yet Sam, near Assiniboia, in the Province of Saskatchewan, and was wrapped up in paper when given to me and I was not aware of its contents at any time before the same was taken from me by the police officers at Calgary; that I did not, when charged before the magistrate, plead guilty nor did I intend to do so, and I did not, thereupon, or at any time, admit that the parcel was mine or that I was aware of its contents; that my knowledge of the English language is very limited and imperfect."

The original of this affidavit is produced and shews that care was used by the Commissioner in understanding what the deponent meant to say and in expressing it correctly. Some, more or less,

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formal parts being in typewriting, with a number of alterations made in the handwriting of the Commissioner and the greater part of the affidavit being in his handwriting. The counsel for the Crown stated that the magistrate had informed him that he had no recollection of the case.

On these facts, I think the conviction should be quashed. The statement by the accused that "the parcel found on me was not mine" was not, in my opinion, sufficient to give the magistrate jurisdiction to convict. As was pointed out in *Rex* v. *Richmond*, 39 D.L.R. 117, 29 Can. Cr. Cas. 89, 12 Alta. L.R. 133:

> There are no formal pleas under the summary conviction procedure. Sec. 721 (2) of the Crim. Code says: If the defendant thereupon admits the truth of the information and shews no cause why he should not be convicted, etc., . . .
>
> If the defendant does not admit the truth of the information or complaint, the Justice shall proceed to inquire into the charge.

The fact of the accused merely saying, "the package you found on me was not mine" was, to my mind, clearly no admission of the charge. No doubt it was an admission that the package was found in his possession, but that admission was no admission that the package contained opium and there was no evidence given of its contents.

Furthermore, by sub-secs. 3-4 of sec. 5A, there are persons and preparations of opium to whom and to which sub-sec. 2 (e) are declared not to be applicable.

Before a magistrate can convict without evidence he ought to be quite certain that the accused makes, and means to make, a complete admission of having committed the offence with which he is charged. His obligation in this respect is obviously greater than in ordinary cases, where the accused is not familiar with the English language—a thing which was quite clear in the present case, as an interpreter was, in fact, engaged and apparently sworn. There is not, in the present case, the slightest suggestion of any intentional departure from what doubtless the magistrate himself regards as the proper course, but it seems quite clear that there was a misunderstanding upon his part of what the accused intended to convey to him or of the effect of what the accused did in fact say.

The conviction is attacked, not only on the ground that the accused did not plead guilty to the charge; but also on the ground

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that there was no evidence. What I have said is, I think, sufficient to sustain either ground.

I would, therefore, quash the conviction, but agree with the further disposition of the matter as proposed by my brother Stuart. *Appeal allowed.*

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Supreme Court of Canada, Idington, Duff, Anglin, Brodeur and Mignault, JJ. May 4, 1920.

1. APPEAL (§ II A—35)—JOINDER OF ACTIONS—SEPARATE ADJUDICATION AS TO EACH—ONE ACTION NOT INVOLVING $2,000—JURISDICTION OF SUPREME COURT OF CANADA TO HEAR APPEAL.

Joinder of actions for the taking of evidence has for its object the saving of costs and does not result in the creation of one action only, and where separate damages are awarded in respect of each cause, and in one of the actions the matter in controversy does not involve at least $2,000, the Supreme Court of Canada is without jurisdiction to entertain an appeal as regards such action.

2. MUNICIPAL CORPORATIONS (§ II G—236)—CONSTRUCTION OF SEWER—DEFECTS—NEGLIGENT CONNECTION WITH CELLAR—UNUSUAL FLOW OF WATER—FLOODING OF CELLAR—DAMAGES—LIABILITY—VIS MAJOR.

A rainstorm which is extraordinary but not unprecedented, nor of such violence that it could not reasonably have been anticipated, does not constitute *vis major* and a municipality in Quebec is liable under the Quebec Civil Code, arts. 1053, 1054, for damages caused by the sewer on the street overflowing and flooding plaintiff's cellar, such flooding being caused by improper connections, and failure to put in proper automatic closing and opening valves and to the inability of the sewer to carry off the unusual flow of water.

[Construction of arts. 1053 and 1054, Quebec Civil Code and *Quebec Railway Light Heat and Power Co.* v. *Vandry*, 52 D.L.R. 136, [1920] A.C. 662, discussed.]

Statement.

APPEAL by plaintiff from the judgment of the Quebec Court of King's Bench (1919), 29 Que. K.B. 338, reversing the judgment of the Superior Court and dismissing an action for damages caused by defendant's sewer overflowing and flooding plaintiff's cellar. Reversed.

A. Wainwright, K.C., and *A. H. Elder*, for appellant.

C. Laurendeau, K.C., and *G. St. Pierre*, K.C., for the respondent.

Idington, J.

IDINGTON, J.:—The appellant herein brought two actions to recover from respondent damages suffered by reason of water flowing from a sewer of respondent into the cellar of appellant connected therewith.

The first was in respect of damages, not amounting to $2,000, for an occurrence of that nature in March, 1917.

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The second arose out of an overflow on the night of 29th and morning of 30th July, 1917.

An order was made for the consolidation, so called, of the two actions after issues had been joined.

The result was the trial of both actions together and a judgment of the trial Judge which, after the recital of the pleadings in each case respectively awarded separate damages in respect of each cause of action, namely, the sum of $1,178.83 arising out of the occurrence in March, and the sum of $3,015.23 for that arising out of the occurrence in July.

The appeal from that judgment to the Court of King's Bench, 29 Que. K.B. 338, was prosecuted by a like preservation of distinction between the two causes of action and the determinate result.

There was never an amendment of the pleadings such as to produce any other result.

Hence, on the appeal here, we cannot say as to the result founded on the March occurrence there is a matter in controversy which can be said to involve at least $2,000.

And if we turn to the pleadings and the amount claimed thereby which often has to be, and here must be, our guide, we find nothing but the claim for $1,178.83.

It was therefore decided during the course of the argument herein that we had no jurisdiction to hear the appeal relative to the claim for damages in March, 1917. That branch of this appeal being thus eliminated, we must confine our attention to the alleged damages suffered in July, 1917.

The respondent is a municipal corporation created and operated by virtue of a special charter which enabled it to construct sewers and pursuant thereto it constructed in 1887 a main sewer, known as the "Commissioners Street Sewer" furnishing an outlet for the drainage through numerous other sewers draining an area of over 38 acres in said city.

In 1896 the owners of the property, of which the appellant later, on January 1, 1913, became tenants, obtained permission to make the necessary connections between said property and the sewer in question.

The respondent's engineer in charge of the sewer pumping station, testifies as follows as to that:—

Q. First of all, Mr. Dowd, have you got with you the records of the Sewer Department of the City of Montreal shewing the permit issued by the city for the private drain from the premises at the northwest corner of St. Gabriel street and Commissioners street, connecting with the Commissioners street sewer? A. Yes, it is in the book that I shewed you the other day. Q. So that here is a permit for a private drain from these premises to connect with the Commissioners street sewer? A. Yes, there is a permit; it is in book No. 10, page 40, permit No. 206, issued on the fourteenth of October eighteen hundred and ninety-six. Q. Does your record in reference to this permit shew the particulars as to the location and size of the drain? A. Yes, they are all shewn in the book, which I did not bring with me. Q. Then, there is no dispute between us on that point that there is a private drain from these premises to connect with the Commissioners street sewer? A. No. Q. There is no dispute as to that? A. Oh no, there is a private drain. Q. If I remember rightly, your records shew the location of the drain, its size and grade? A. Yes. Q. And you say you have not got that particular book with you? A. No, I did not bring it; I forgot to bring it.

There seems to be no doubt of the power controlling all incidental thereto being with the respondent as appears by sec. 42 of its charter as it existed at that time, which is as follows:—

42. To regulate the sewerage of the city, and to assess proprietors of real estate to such amount as may be necessary to defray the expenses of making any common sewer in any street of the city, in which such proprietors own property, and for regulating the mode in which such assessment shall be made, collected and paid

and which was expanded in the charter as renewed by 62 Vict., 1899 (Que.), ch. 58, for which expansion see secs. 94, 96 and 97 of art. 300.

Pursuant thereto by-laws were enacted as follows:—

By-law No. 239.

1. The city, by resolution of its council, is authorised to place automatic safety valves at the connection of sewers for the drainage of any land situated within limits of its territory. This work, however, shall not be commenced before it has been declared necessary by a report of the Road Committee, accompanied by a detailed statement from the city surveyor, containing the name of the proprietor, the lot or cadastral subdivision, the name of the street, the probable cost of the work to be performed, and by a certificate to the effect that such work is necessary in order to prevent the floods resulting from the public sewer existing in any street where such land is situated.

2. The expenditure to be incurred for the manufacture and putting in of said safety valves shall be borne and paid one-half by the city, and the other half by the proprietors of such lands.

. . . . .

6. The cost of repairing and maintaining said safety valves shall be payable by the city, which is hereby authorised to appoint any persons or officials of the Road Department to do the work required for that purpose on said lands.

It became, I submit, the respondent's duty to see that due care was taken in executing the purposes of these provisions.

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Section 95 of the later enactment provided as follows:—

95. To permit the city to provide, where it may be necessary, suitable automatic safety valves at connections in sewerage for the drainage of any lands, the expense thereof to be borne one-half by the city and one-half by the owner of the property, and such cost shall be recovered according to the statement prepared by the officer designated for that purpose by the board of commissioners and approved by the latter and to provide for the inspection of the same by the city; but for all other buildings the expense shall be borne entirely by the city.

There is most emphatic evidence by an engineer in the employment of the city and, I think, others, that the instalment of such automatic valves is the efficient remedy.

Vanier, an engineer employed by the city, speaks as follows:—
[The Judge here quoted the evidence and continued.]

We heard a great deal in argument about *force majeure* as if to pronounce these words should charm away any common sense method of looking at the real questions involved therein.

The exaggerated demands made on the one side thus met by the other, do not seem to me to furnish the way to the solution of the real problems presented.

The city had, 7 years before the building of this sewer, a storm which, I suspect, was much more severe than that of July, 1914, now in question. That was followed later and meantime by very severe storms in July, 1906, June, 1907, and June, 1911, which would suggest a much greater downpour of rain than this sewer could take absolute care of if we have regard to the evidence of Blanchard, one of the city's engineers, who testified as follows:—
[The Judge here quoted the evidence and continued.]

To put beyond peradventure as it were there is set forth in the appellant's declaration an instance as follows:—

11. The defendant had previously recognized and admitted its liability for loss and damage occurring under circumstances such as those hereinabove mentioned, having previously compensated plaintiff on a previous occasion for loss suffered by it from the same cause and under similar circumstances, namely, in the sum of $91.20 on the 24th day of July, 1913, the whole as is well known to defendant.

Though denied in the respondent's plea, this was admitted on argument and no explanation why except for sake of peace. A mere surmise, I suspect, of counsel.

This last incident, to my mind, acts two ways.

It seems to deprive appellant of being entirely free from blame in failing to ask for the installation of the necessary valve. And

at the same time robs respondent of any reasonable excuse for failing to point out, as was its duty, the true remedy.

That seems to me to present the common sense view. And it was within the power of the city alone to supply its application.

I entirely disagree with the ground taken in respondent's factum that it cannot refuse a ratepayer to connect with the sewer. It not only can refuse, but it is its duty to refuse unless and until all reasonable conditions have been complied with and the measure of such presumably are those provided in its by-laws.

I must also express my dissent from the misapplication sought to be made in same factum of the decision in the case of *Roy* v. *City of Montreal* (1892), 2 Que. S.C. 305.

The by-laws in question herein are of an entirely different character from that in question therein, and deal with the subject matters of the relations between the city and those connecting their property with the city sewers, and are obligatory on both.

Every brief storm such as those in question brings with it the risk of far more damage than the cost of these valves would be. And the brief storm if intense would leave on the streets and vacant places a temporary degree of discomfort which may have to be borne.

Hence I do not dwell on the issue of *force majeure* which from my point of view is beside the question at issue, or should be, if we apply common sense.

The primary duty rested on respondent which was in control of the works it had undertaken to construct, and did construct, and the responsibility devolved on it to see that they were so efficient in all details as not to injure any one else either in relation to person or to property.

The respondent did not exercise that due care which it was bound to have exercised.

Exhibit P2 filed herein as the permit given the owner in 1896 to make the connection is not very illuminating. Resort must be had to the by-laws for any delimitation of the respective rights and obligations of the parties concerned. The citizen who is presented with the due consideration of such a problem is not faultless if he fails to remonstrate when having occasion to complain.

I would, therefore, allow this appeal with costs, but divide the damages, four-fifths to be borne by respondent and one-fifth by

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appellant, and award it judgment accordingly with costs in the Court below on the Superior Court scale throughout against respondent.

The appeal as to the other case having been quashed we ought not to interfere with anything relative to same beyond the costs of motion to quash.

DUFF, J.:—I concur with Idington, J.

ANGLIN, J.:—I concur with my brother Mignault.

BRODEUR, J. (dissenting):—The appellant has taken two separate actions against the City of Montreal for damages caused by the flooding of its cellars in March, 1917, and in July of the same year. It is claimed that these floods were due to the insufficiency of the sewer constructed by the city.

The first action, for the March flood, was for the sum of $1,178.83, and the second for $3,015.23. As the questions raised by these two actions were in some respects substantially the same, the Court ordered that they be tried and decided on the same evidence, arts. 291 and 292 C.C.P.

The judgment of the Superior Court maintained both actions, holding that the city was guilty of negligence in each case. This judgment was reversed in appeal, 29 Que. K.B. 338.

Watt and Scott Ltd. have appealed to this Court in both cases.

We have first to decide whether the first case is within our jurisdiction, the amount claimed being less than $2,000.

The joinder of actions for the taking of evidence has for its object the saving of costs and does not result in the creation of one action only. The actions do not lose their identity after judgment, and it often happens that one is maintained and the other dismissed. Thus in the case before us the Court of Appeal was unanimous as to the defendant's responsibility in the second action, but was divided as to the first. Circumstances that could be invoked in one of these cases could not be invoked in the other.

Fuzier-Herman in his Repertoire, Joinder of Actions, refers in the following terms to the effects of joinder.

No. 77. It must however be admitted that the judgment, ordering the joinder of two actions that cannot be considered as forming one action only, leaves to each action its original character, so that it remains under the same rules as to jurisdiction. The nature and effects of each demand remain unaltered, and the two cases must be considered separately in determining the Court of last resort.

No. 83. The joinder of two actions taken under separate writs of summons does not modify their nature. They do not lose their separate identity and do not become moulded into one form. Each action, after the judgment ordering joinder, retains its original character and is governed by the same rules as to jurisdiction.

In order to determine the jurisdiction of this Court we must, therefore, see what is the amount claimed in these two actions. A recent judgment of this Court, *"L'Autorite" Ltd.* v. *Ibbotson* (1918), 43 D.L.R. 761, 57 Can. S.C.R. 340, held that where eleven persons joined in a single action, claiming $22,000 as damages, payable $2,000 to each, this was to be considered as though there were in reality eleven different actions. The following decisions of this Court are to the same effect: *Glen Falls Ins. Co.* v. *Adams* (1916), 32 D.L.R. 399, 54 Can. S.C.R. 88; *Ontario Bank* v. *McAllister* (1909), Cameron's Practice, 2nd ed., p. 265.

It was argued that arts. 291 and 292 C.C.P., were new law, and were adopted from the Rules of the Exchequer Court of Canada in maritime cases. I must say, however, that the practice of joining actions has always been recognised both by the authors and by the Courts: *Foley* v. *Tarratt* (1865), 15 L.C.R. 245; *Hébert* v. *Quesnel* (1866), 10 L.C. Jur. 83; *Chrétien* v. *Crowley* (1882), 2 Dor. Q.B. 385; *Larivière* v. *Choquet* (1882), M.L.R. 1 S.C. 461; *Dépatie* v. *Gibb* (1891), 35 L.C. Jur. 60; Guyot, Repertoire, tit. Connexite, p. 480; Ferrière, Introduction à la Pratique, p. 91, tit. Jonction; Rolland de Villargues, tit. Connexite, p. 100.

For the above reasons I am of the opinion that we have no jurisdiction as regards the first action, and that the appeal must be dismissed with costs.

On the merits of the second action, I am of the opinion that the judgment of the Court of Appeal is well founded.

The fact in issue is whether the flood of July, 1917, was due to a fortuitous event that could not be foreseen, or to a *vis major*. No fault can be charged to anyone who suffers the action of a fortuitous event, or a *vis major*. In the case of a fortuitous event or of a *vis major*, there is no responsibility incurred for the damage caused by a thing which a person has under his care.

It cannot be questioned that the accidents of nature are due to a cause foreign to any person sought to be held responsible for their effects, and constitute fortuitous events, but it is not in every case that they relieve him of responsibility. The circum-

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stances must be such as to be unforeseeable by the use of ordinary wisdom. Thus it is quite true that rain is an act of nature, but it is so frequently repeated, that obligations must be carried out in such manner as to provide against it. If, however, rain develops into storm, and if such storm exceeds what might be foreseen by ordinary prudence, then it falls into the category of fortuitous events that relieve from responsibility. Mignault, Droit Civil Canadien, vol. 6, p. 362; *Sawyer* v. *Ives* (1895), 4 Que. Q.B. 374.

In the case now under consideration, there was a torrential rain on the night of July 30, 1917. As to its intensity and duration, there was no greater storm within the memory of man, except in one case 37 years ago, and even in that case the measuring instruments then in use were not as accurate as those in use on July 30, 1917.

On this point, Mr. Weir, officer in charge of the McGill University Observatory and records, was examined as to the storm in question in the present action. It appears that the storm lasted 78 minutes, during which there was a rainfall of 1.51 inches. The intensity varied. For instance, in the five-minute period during which the intensity was greatest, there was a fall of 0.26 inches. If the intensity had been the same for the whole storm, 4.05 inches would have fallen in 78 minutes, being at the rate of 3.12 per hour. This meteorologist further unhesitatingly said:—

I should say that as regard the intensities they are extraordinary, that is, the shortest period of intensities are not extraordinary, but the amount of water during the duration of the downfall is extraordinary.

From the McGill records he proves that there have been three great storms in the years preceding the storm in question:—

	Maximum intensity 5 minutes.	Intensity for entire storm.	Duration.
1. July 30, 1906	0.35	0.78	60 min.
2. June 26, 1907	0.35	0.59	60 min.
3. June 11, 1911	0.35	0.77	60 min.
4. July, 29, 1917	0.26	1.51	78 min.

Mr. Weir states that there is no comparison between the storms of July 30, 1906, and July 29, 1917. Although in the first case the intensity for a five-minute period was greater, the latter must be considered more severe on account of its duration. In

order to determine the strain to which a storm exposes a drain, the duration must then be considered, and this is only natural. Indeed, if the storm lasts only a few minutes, the drain can accommodate all the water without danger of flooding. But should the storm last for a long time, the drain fills up, becomes insufficient, and produces a flood. The factor to be considered is not therefore the maximum intensity for a few minutes but to the rainfall during the entire storm.

Mr. Weir also tells us that the only storm that can be compared to the one which caused the flood is that of June 11, 1911, in which case the intensity was 0.35 for five minutes, 0.77 in an hour, and 1.98 for the eleven hours, the period of the storm. A careful examination of these figures shews that for an hour there was a fall of 0.77 inches, whereas in the storm of July, 1917, there was a fall of 1.51 inches in an hour and eighteen minutes. The last storm seems to me to have been more severe. The figure of 1.98 covers 11 hours. The drain is supposed to provide ordinarily for 1.50 inches per hour, and could in consequence easily carry away all the rainfall.

According to Mr. Weir, the worst storm on record is that of 1880; but he states that the measuring was not then as accurately conducted as it is at present with modern instruments.

This evidence is not contradicted and is accepted by both parties. We are not then dealing with more or less established facts as in *Sawyer* v. *Ives*, 4 Que. Q.B. 374, but with facts that are incontestable.

In short, I find that the storm causing the flood was the worst within the memory of man, save for the storm of 1880; and that in 1880 the measuring instruments were not very accurate. In any event there was no such storm for 37 years.

Plaintiff's expert, St. George, constructed the sewer in question while he was defendant's engineer. He states that it was constructed according to scientific principles, and was sufficient to drain the lands it served. It is true that he tried to shew that the defendant was at fault for making certain changes, but he failed to convince the lower Courts that his pretensions were on this head well founded.

This sewer had a capacity of 1.42 inches per hour. In the case of *Faulkner* v. *City of Ottawa* (1909), 41 Can. S.C.R. 190, this Court

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held on the proof therein made "that a fall of 1½ inches of water per hour is considered as meeting the requirements of good engineering and is the standard adopted by all the cities of Canada and the Northern States."

The slight difference of 8-100 of an inch should not be considered sufficient to engage defendant's responsibility, particularly as the evidence given in the *Faulkner* case was not given in this, but on the contrary the experts on both sides were of the opinion that the sewer was scientifically constructed and sufficient.

In order to become responsible the defendant must have contributed to the damage caused. There is no doubt that the flooding was caused by a torrential rain, that is to say, by a force foreign to the will of the defendant. Defendant, after Government authorisation and for purposes of public health, deemed it necessary to build sewers. It was its duty to make them large enough to accommodate the rainfall that might reasonably be foreseen by the application of human wisdom. Now we have here such a storm as only happened once within the memory of man, a storm that upsets all the calculations of the experts. Can there be any responsibility on the part of defendant? I have no hesitation in finding that this constituted *vis major*, and that defendant incurred no responsibility.

In a recent case of *Benard* v. *Hingston* (1917), 39 D.L.R. 137, 56 Can. S.C.R. 17, we went into this question of *vis major*, and Davies, J. [now C.J.], said (39 D.L.R. at p. 138):—

> The damages were caused by a combination of a very heavy rainfall and an abnormal overflow of the River St. Lawrence. It is not necessary to bring such an event within the scope and the meaning of the words *vis major* or the act of God that such an event should never have happened before: it is sufficient that its happening could not have been reasonably expected.

Anglin, J., in the same case said that if the flooding was so unusual that it should not have been anticipated, there was then a *vis major* (39 D.L.R., at p. 139).

In the case of *Benard* v. *Hingston*, *supra*, the floodings discussed were much more frequent, than the storm occurring in July, 1917, which had not been surpassed in intensity and duration within the memory of man, except in one case 37 years ago.

The jurisprudence in Quebec appears well settled to the effect that a municipal corporation is not responsible for the flooding of

cellars, if it has constructed its sewerage system according to the plans of experienced engineers and has taken good care of them. *Riopel* v. *City of Montreal* (1880), 3 Leg. News. 320; *The A.M.C. Medicine Co.* v. *City of Montreal* (1899), 15 Que. S.C. 594. This last judgment was confirmed in appeal.

I therefore think that we should unhesitatingly declare that in the present case there was a fortuitous event and a *vis major*, and that the corporation incurred no responsibility.

Brodeur, J.

To sum up, the appeal should be dismissed with costs.

MIGNAULT, J.:—The appellant company took two actions against the City of Montreal for damages caused by two floodings of its cellar on Commissioners street, through the insufficiency of the civic sewer on the street to carry off the drainage and surface waters, so that the water of the sewer backed into the appellant's cellar which was used for purposes of storage in connection with its business.

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The first flooding occurred in March, 1917, and the appellant in the first action claimed $1,178.83. The second flooding was during the night of the 29th and 30th July, 1917, and for this flooding the appellant sued for $3,015.23 by a second action against the city. These two actions were consolidated for purposes of trial, and were both maintained by the Superior Court, Weir, J., for the full amount, no contradiction of the appellant's proof of damages having been made. On appeal, both actions were dismissed by the Court of King's Bench, appeal side, 29 Que. K.B. 338, the first by a majority judgment, the second unanimously.

The appellant took one appeal to this Court as to the two actions, and the respondent having moved to quash the appeal for want of jurisdiction as to the first action, the motion was reserved for hearing at the same time as the merits. At the hearing the Court intimated that it had not jurisdiction in so far as the appeal in the first action was concerned, which appeal is quashed, and the appeal was restricted to the second action for $3,015.23 for the July flooding, which is the only one to be considered.

I have carefully read the voluminous evidence. The sewer in question was built in 1887 and runs along Commissioners street, emptying into a main sewer which itself discharges into Elgin Basin in the Montreal harbour, some distance to the west. The Commissioners street sewer drains a drainage area of 38 8-100 acres, and

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has a capacity of 1.42 inches per hour. Its size is 4 by 2.8 feet. The main sewer carries the sewage and surface waters from the western part of the city, the volume of the sewage and surface waters thus carried being very considerable, and in comparison with it the sewage drained by the Commissioners street sewer is, according to the expression of one of the witnesses, a mere bucketful. Some years after the construction of the latter sewer, the city decided to install a pumping station at Youville Square, the object of which was to divert the sewage coming from the west by way of St. Sulpice street into the Craig street sewer, and for the purposes of the pumping station a small dam was built in the main sewer so as to have sufficient water to work the pumps. However, the pumps when constructed were found not to have been properly built and the city refused to accept them as satisfying the contract for their construction and they were never put in operation. It is pretended by St. George, expert witness for the appellant, that this dam obstructed the flow of sewage from the Commissioners street sewer, but this is denied by the respondent's experts, and the trial Judge did not find that this dam contributed to the flooding complained of.

The appellant's cellar was connected with the Commissioners street sewer by a private drain constructed under the inspection of the respondent's officers and must be taken to have been a proper connection. For this reason I do not think that the respondent can claim that the appellant's cellar was too low for efficient drainage. It is common ground, however, that no automatic safety valve was placed by the appellant or the respondent in the appellant's connecting drain, and the respondent's evidence shews that had such a valve been installed it would have been closed by the overflow from the street sewer and no flooding would have occurred.

The July flooding was caused by a very heavy rainstorm, and the evidence is that the water backed up from the street sewer into the appellant's premises. The question under these circumstances is whether the respondent is liable for the appellant's damages. The Court of King's Bench, referring to the two floodings, held that it was not because the appellant had not proved that the respondent's sewers were defectively constructed or were insufficient, and because "les inondations dont se plaigent les demandeurs intimés

sont dues à des causes fortuites ne pouvant être prévues et constituant des causes de force majeure."

If this latter *considérant* at the judgment is well founded it disposes of the appellant's action.

In the Superior Court the trial Judge held the respondent liable for three reasons:—

1. The sewer on Commissioners street was not of sufficient capacity to drain the surface area in times of exceptional rainstorms which have been proved to have fallen on the locality at various times from the year 1880 onwards, and the damages were caused by such a storm. 2. The sewer was insufficient for the further reason that the flooding through the private drain could have been prevented by the defendant if it had equipped the sewer at its connection with the private drain with automatically closing and opening valves as described in its plea. 3. The defendant, knowing the possibility of such rainstorms occurring in the summer months, should have equipped and operated the Youville pumping station in such manner as to have aided the functions of the Commissioners street sewer in carrying off the unusual water flow, which it neglected to do.

The trial Judge treats the rainstorm in question as having been "exceptional" or "unusual," but finds expressly that such storms have fallen on this locality at various times, and, in his reasons for judgment, he instances a rainstorm of greater intensity and quantity on August 9 of the same year, when the appellant's cellar was again flooded, another on June 11, 1911, comparable to the one in question and a heavier one—the heaviest rainfall ever recorded in Montreal—on July 20, 1880, when 1.58 inches of rain fell in 46 minutes, as opposed to 1.51 inches in 78 minutes during the storm in question. He, therefore, holds that the rain in question was not unprecedented.

In 1895, the Quebec Court of Queen's Bench in *Sawyer* v. *Ives*, 4 Que. Q.B. 374, held that a rainstorm extraordinary but not unprecedented, nor of such violence that it could not reasonably have been anticipated, does not constitute *vis major*. I must accept this holding as being in conformity with the definition of *force majeure* or of *cas fortuit*, as "tout évènement que la prudence humaine ne peut prévoir et auquel on ne peut résister quand on l'a prévu." (Pandectes françaises, vo. Obligations, no. 1774.)

My opinion is, therefore, that the plea of *force majeure* is not made out, and I may add that the position taken by the respondent is that Commissioners street sewer was sufficient for ordinary needs, the inference being that it is not obliged to provide a sewer

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which can take care of extraordinary rainstorms, though not unprecedented or unforseeable. I will examine whether this pretension is founded in law, for I am of the opinion that the respondent cannot rely on its plea of *force majeure*.

There remains, therefore, the question whether the respondent, having constructed a sewer sufficient for the ordinary requirements of the population of the district to be drained, is liable for a flooding caused by an exceptional or unusual rainstorm not coming within the definition of a *cas fortuit* or a *force majeure*.

Besides citing several decisions of the Quebec Courts which are not binding on us, and of which some support the respondent's position, while others were influenced by the fact that the flooded premises were built after the construction of the sewer (a number of these decisions favourable or unfavourable to the respondent, may be found in Beauchamp's Repertoire, tit. Responsabilité, nos. 407 and following), the respondent relies on the judgment of this Court in *Faulkner* v. *City of Ottawa*, 41 Can. S.C.R. 190, by which it was decided that where a city has constructed a sewer capable of carrying off 1½ inches of water per hour, which is considered as meeting the requirements of good engineering and which is the standard adopted by all the cities of Canada and the Northern States, the city is not liable for a flooding caused by a rainstorm which, during nine minutes, fell at an intensity of 3 inches per hour and was one which could not reasonably be expected.

Judging by the evidence in this case, the rainstorm was not as violent as the one in *Faulkner* v. *The City of Ottawa*. Moreover, the liability of the respondent must be determined according to the rules laid down by C.C. (Que.), arts. 1053, 1054, so I do not think that the matter would necessarily be concluded by the decision of this Court in the *Faulkner* case, were it on all fours with the case at Bar.

The respondent also cited the judgment of this Court in *Bénard* v. *Hingston*, 39 D.L.R. 137, 56 Can. S.C.R. 17, a Quebec case. I do not think that this decision helps the respondent, for the litigation arose between a tenant and a landlord, and the latter, after having been condemned to pay damages to her tenant for a previous flooding, had adopted the very measure of precaution indicated by the tenant's experts and the best possible professional

advice, which she herself had obtained. Moreover, the flooding there was caused by an ice shove in the River St. Lawrence, coinciding with a very heavy rainstorm, which might reasonably be considered as a *cas fortuit*, and the question was as to the contractual liability of the landlord under C.C. (Que.), art. 1614.

As I have said, the question of liability or non-liability of the respondent must be determined according to arts. 1053 and 1054 of the Quebec C.C., and as to the construction of the latter article we are bound by the recent decision of the Judicial Committee of the Privy Council in *Quebec Railway, Light, Heat and Power Co. v. Vandry*, 52 D.L.R. 136, [1920] A.C. 662, 26 Rev. Leg. 244.

In that case the Judicial Committee held that the first paragraph of art. 1054 C.C. stating that: "He [*i.e.*, every person capable of distinguishing right from wrong] is responsible not only for the damage caused by his own fault, but also for that caused by the fault of persons under his control and by things which he has under his care," does not, in the case of damage caused by a thing which a person has under his care (52 D.L.R., at pp. 143, 144), raise a mere presumption of *faute*, which the defendant may rebut by proving affirmatively that he was guilty of no *faute*. It establishes a liability, unless, in cases where the exculpatory paragraph applies, the defendant brings himself within its terms. There is a difference, slight in fact but clear in law, between a rebuttable presumption of *faute* and a liability defeasible by proof of inability to prevent the damage.

Perhaps I may be permitted to observe that holding that art. 1054 establishes a legal liability does not entirely do away with the idea of fault, for this legal liability is evidently imposed because of a presumed fault, that is to say, a negligence in respect of the care of the thing which caused the damage.

Their Lordships also hold (52 D.L.R., at p. 141) that by the "exculpatory paragraph," the penultimate paragraph of art. 1054 C.C. (Que.), "the responsibility attaches in the above cases only when the person subject to it fails to establish that he was unable to prevent the act which has caused the damage," applies to the first paragraph of the article as well as to the four next succeeding paragraphs concerning the vicarious liability of fathers and mothers, tutors, curators, school masters and artisans. This is an absolutely new construction, and in adopting it preference was given to the French version of article 1054 C.C. without apparently considering the rule of construction laid down by art. 2615 C.C.,

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that when a difference exists between the English and French texts of any article of the Code, "that version shall prevail which is most consistent with the provisions of the existing laws on which the article is founded."

Hitherto it had always been considered that the "exculpatory paragraph" of art. 1054 C.C. referred merely to the specific cases mentioned in the four preceding paragraphs, this being more consistent with the provisions of the existing laws (see Pothier, Obligations, Bugnet, ed. no. 121), while a similar excuse was not open to masters and employers when held liable for the damage caused by their servants and workmen in the performance of the work for which they were employed. The extension of the "exculpatory clause" to the first paragraph of art. 1054 may now give rise to new questions of construction.

Deferring to the Privy Council decision in *Quebec Railway, Light, Heat and Power Co.* v. *Vandry*, 52 D.L.R. 136, [1920] A.C. 662, 26 Rev. Leg. 244, I must hold that the inquiry in this case should be whether the appellant's damage was caused by a thing which the respondent had under its care, and whether the respondent has failed to establish that it was unable to prevent the act (*empêcher le fait*) which has caused the damage.

The respondent undoubtedly had the Commissioners street sewer under its care, and this sewer collected the rain water of the area drained by it. The damage was caused by the water from this sewer backing into the appellant's cellar, which was the act (*le fait*) which caused the damage. This establishes against the respondent a liability defeasable only by proof of its inability to prevent the damage.

Has the respondent established this inability? Its own plea states that had an automatic valve been placed in the appellant's private drain connecting with the street sewer, the water would not have backed into the cellar, and the respondent's own evidence establishes this fact. Could not the respondent have installed such a valve and thus prevented the damage?

The City Charter, 62 Vict., 1899, ch. 58, sec. 300, sub-sec. 95, gives the city council the power

to permit the city to provide, where it may be necessary, suitable automatic safety valves at connections in sewerage for the drainage of any lands, the expense thereof to be borne one half by the city, and the other half by the owner of the property, and said cost shall be recovered as per statement pre-

pared by the city surveyor, and to provide for the inspection of the same by the city; but for all other buildings, the expense shall be borne entirely by the city.

The city passed a by-law in 1899, numbered 239, sec. 1, of which provides that

the city, by resolution of its council, is authorized to place automatic safety valves at the connection of sewers for the drainage of any land situated within limits of its territory. This work, however, shall not be commenced before it has been declared necessary by a report of the Road Committee, accompanied by a detailed statement from the City Surveyor, containing the name of the proprietor, the lot or cadastral subdivision, the name of the street, the probable cost of the work to be performed, and by a certificate to the effect that such work is necessary in order to prevent the floods resulting from the public sewer existing in any street where such land is situated.

The words "any lands" and "all other buildings" in sub-sec. 95 are very vague, but the respondent did not contend that it could not have placed an automatic safety valve in the appellant's private drain, but merely that it was discretionary on its part to do so.

If, therefore, the installation of such a valve would have prevented the act which has caused the damage, the respondent has not brought itself within the "exculpatory paragraph" of art. 1054 C.C., and is liable under paragraph one of this article.

The respondent contended that, under the statute and by-law, it could only install an automatic safety valve at the connection of the appellant's private drain with the street sewer, and not in the appellant's cellar, and that had it installed such a valve at the sewer connection, the filling up of the sewer would have closed the valve and the rain water from the appellant's roof (which drains by means of a pipe inside the building into the private drain and thence into the sewer) would have been unable to get into the sewer and would have flooded the appellant's cellar. The answer is that so long as the sewer was not filled the rain water from the roof would freely flow into it, and that if it could not get away and backed into the cellar, it would not be on account of the valve but because the sewer was filled and, valve or no valve, the rain water could not have gone into the sewer and must have backed into the cellar. It follows therefore that the flooding of the cellar by the rain water would be caused not by the valve, but because the sewer was completely full, and could carry no more water. And because the valve was not there, not only the rain water from the roof but the sewer water as well backed into the appellant's cellar.

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It may be useful to add that under arts. 1382-1384 of the Code Napoleon, similar to our own articles as to damages caused by things, the liability of a *commune* for the flooding of a house connected with a public sewer, through the insufficiency of the public sewer, is fully recognised. Thus the Conseil d'Etat decided in 1895, in a case of *Ville de Paris* c. *Nissou*, Sirey, 1897. 3. 77, that

l'inondation des caves d'une maison par suite du débordement des eaux d'un égout dont la capacité n'était pas suffisante, constitue un dommage provenant de l'exécution d'un travail public, et dont la ville, qui a construit l'égout, doit réparation au propriétaire (L. 28 Pluv. an 8, art. 4).

See also the note appended to this decision.

The law referred to (loi du 29 Pluviose, an 8, 17 février, 1800) has no bearing on the question of liability for flooding, but merely determines the jurisdiction of the *conseil de préfecture* to pronounce on questions arising as to damages caused by the construction of public works.

And in another case, *Deloison* c. *Ville de Paris*, Dalloz., 1900. 3. 63, it was also held by the *Conseil d'Etat* that

la commune est responsable des dommage causés par une inondation survenue dans les caves d'un immeuble et provenant du refoulement des eaux de l'égout public qui ont débordé par le nanchon des tinettes filtrantes placées dans ces caves, alors cette inondation a eu pour cause, d'une part, l'insuffisance de l'égout, et, d'autre part, les conditions dans lesquelles la commune a autorisé la pose des tinettes et dans lesquelles elle a contracté à leur sujet un abonnement.

See also Fabrequette, Public and Private Waters, vol. 2, p. 394, note 1.

I take it therefore that the liability of the respondent for the July flooding admits of no doubt. The only question is whether the respondent is alone answerable for the whole amount of the damages suffered by the appellant. If the latter contributed to these damages, if it neglected any precaution which it should have taken to avoid the flooding of its cellar by an overflow from the street sewer, the rule of the civil law is that there being common fault, the injured party should bear a share of the damages proportionate to its own fault.

See *Price* v. *Roy* (1899), 29 Can. S.C.R. 494, also Planiol, Droit Civil, 7th ed., vol. 2, no. 899, and, as having a bearing on cases of flooding, *Epoux Laugier c. Delarbre*, Cassation, 11 novembre, 1896, Dalloz, 1897, 1, 315.

The evidence shews that automatic safety valves are in common use in Montreal and are installed by the owners of buildings

with deep cellars so as to prevent an overflow from the street sewers. The appellant well knew that its deep cellar rendered a flooding probable in case of heavy rains, for it alleges that its cellar had previously been flooded, and after its experience in the previous March, it acted most imprudently in storing thousands of dollars worth of perishable goods in its cellar and in not resorting to the simple device of placing an automatic safety valve on the sewer connection. I do not think that the appellant was justified in thus neglecting to adopt a well-known precautionary measure and in expecting at the same time to be fully compensated by the city for any damage caused to its goods. To my mind, the rule is well stated by Sourdat, Responsabilité, 6th ed., vol. 1, no. 660, as follows:—

> Si la partie lésée a elle-même offert occasion au dommage par une faute personnelle, est-elle recevable à s'en plaindre?
>
> La Cour de Cassation décide que cette circonstance ne fait pas disparaître la responsabilité, mais a seulement pour effet de l'atténuer.
>
> Nous pensons, pour notre part, qu'il ne peut y avoir à cet égard de règle absolue. Il n'en est plus ici comme dans l'hypothèse d'un délit. Celui qui, dans une intention malveillante, commet un acte de nature à nuire à autrui, en est responsable alors même que la victime du dommage y aurait contribué par sa faute. Mais les conséquences d'une simple imprudence, d'une légère inattention, peuvent être absorbées complètement par celles de l'imprudence plus grave, de la faute lourde, et surtout du délit commis par la partie lésée. C'est aux tribunaux à apprécier si la faute imputable au plaignant est seulement de nature à atténuer la responsabilité du défendeur, ou si elle est assez grave pour rendre la personne lésée complètement irrecevable à se plaindre du préjudice éprouvé.

Even accepting the doctrine of the Judicial Committee that the liability here is one imposed by the law irrespective of any presumption of fault, I cannot think that the conduct of the injured party, in so far as it may have contributed to the damage, should be disregarded. It is no doubt difficult in a case like this to divide the damages so that each party shall bear a share exactly proportioned to its own fault or imprudence, but I am convinced that here the appellant should assume a substantial part of the damages it could easily have prevented. After due consideration, I think that justice will be done to both parties if the liability for the damages caused by the July flooding is equally divided between them.

I would therefore allow the appeal and condemn the respondent to pay to the appellant $1,507.61 with interest and the costs of an

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action for that amount in the Superior Court, except the cost of evidence. The action for the March flooding was dismissed with costs by the Court of King's Bench, 29 Que. K.B. 338, and the appeal to this Court is quashed for lack of jurisdiction, so that this part of the judgment of the Court of King's Bench stands. The evidence dealt with both floodings, and I think in view of the result that each party should bear the expense of its own evidence. As but one appeal was taken in the Court of King's Bench and in this Court, and as one action stands dismissed and the other is partially maintained, my opinion is that each party should bear its own costs both in this Court and in the Court of King's Bench.

Appeal allowed.

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MOYNEUR v. DOMINION SUGAR CO.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. April 1, 1921.

CONTRACTS (§ IV B—329)—CONSTRUCTION—DELIVERY IN UNITED STATES—EMBARGO—IMPOSSIBILITY OF PERFORMANCE—LIABILITY.

Where a contract for the sale and delivery of goods contains a clause that: "No liability is to attach to sell under this contract for conditions arising over which the seller has no control, such as *force majeure*, embargoes, demands or modifications by the Government of Canada or the U.S. of America" and it is clear upon a proper construction of the contract that the goods were sold for delivery in the United States and nowhere else, an embargo existing for the whole period during which, according to the contract, shipment should be made absolves the seller from liability for non-delivery.

Statement.

APPEAL by the plaintiff from the judgment of Rose, J., after the trial before him sitting without a jury at Ottawa, in an action brought by the appellant suing as assignee of F. W. Lipps & Co. to recover damages for an alleged breach by the respondent of a contract, entered into with Lipps & Co., for the sale to that company of 500 tons of fine granulated sugar. Affirmed.

The judgment appealed from is as follows:—

Rose, J.

ROSE, J.:—I think that on the contract it is perfectly plain that the goods were sold for delivery in the United States and nowhere else. I think it is impossible to read the words of the first exhibit and take any other meaning from them. The action will have to be dismissed with costs.

H. S. White, and *A. Clark*, for appellant.

W. Nesbitt, K.C., and *J. M. Pike*, K.C., for respondent.

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MEREDITH, C.J.O.:—The contract is in writing and consists of a sold note dated New York, November 21, and signed by the respondent's brokers and an acceptance on it signed by the Lipps Co. The sold note states that F. W. Lipps & Co. are the buyers and that its address is Baltimore, Md., that the seller is the respondent whose address is Chatham, Ont., that the shipment is to be in equal quantities during February, March, April, May, 1920; that the sugar is to be barrels or bags at seller's option; that the price is 12.10 net cash in bond f.o.b. shipping point which is stated to be f.o.b. refinery at Chatham or Wallaceburg, Ont.; that

> No liability is to attach to sell under this contract for conditions arising over which the seller has no control such as *force majeure*, embargoes, demands or modifications by the Government of Canada and of the U.S. of America; and that the buyer is to furnish immediately a margin of 2c. per lb. attaching cheque to order Dominion Sugar Co. to accept contract, forwarding both to Lamborn & Co., New York, or open an irrevocable letter of credit in New York Exchange in favour of the Dominion Sugar Co., Chatham, Ont.

The contract was made in the United States and the Lipps Co. elected to furnish the letter of credit for which the sold note provided. The letter of credit which was furnished was issued by The Commerce Trust Co. of Baltimore and covers a shipment of one million pounds of fine granulated sugar f.o.b. refinery Chatham, Ontario, or Wallaceburg, Ontario.

Drafts at sight under this letter of credit will be honoured when accompanied by bills of lading endorsed by the Dominion Sugar Co. provided these bills of lading bear evidence of the goods in question having been consigned to Baltimore, Maryland, together with invoices in triplicate.

The contention of the respondent is that the essence of the contract was that the sugar was to be shipped in bond to Baltimore and that the respondent was ready and willing to so ship it but was prevented from doing it by an embargo placed by the Government of Canada on the shipment of such sugar to the United States of America.

It is not open to question that such an embargo existed for the whole period during which it was provided by the contract that shipment should be made nor is it open to question that if the contract is what the respondent contends that it is the respondent is by the terms of the contract absolved from liability for non-delivery.

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It is clear I think that the respondent's contention is well founded. The contract was made in the United States. The buyer lived in Baltimore and the shipment was to be in bond. The fair meaning of this is that the shipment was to be made to the buyer and to Baltimore. In addition to this, why if it were otherwise the condition as to embargoes, demands or modifications by the Government of Canada and of the United States of America.

If there could be any doubt as to the meaning of the contract being what I take it to be all doubt would be removed by the terms of the letter of credit. It was obtained by the Lipps Co. and evidence its understanding of what the bargain was; the sold note is to be read in the light of it; the letter of credit was the security the respondent was to have for the price of the sugar, and if the contention of the appellant that the buyer was entitled to have the sugar shipped to any point in Canada or elsewhere he might name and he had named some point in Canada and the sugar had been shipped as he desired, the letter of credit would have been of no more value to the respondent than that of the paper on which it is written.

What I have said is sufficient to dispose of the appeal adversely to the appellant but it is proper to notice another argument advanced by the appellant's counsel; it was that the provision as to shipment in bond was a provision in favour of the buyer which he might waive. The answer to that contention is a simple one, the provision was not for the benefit of the buyer alone but was very much for the benefit of the respondent because if the sugar were shipped to Baltimore the respondent would be entitled to receive from the Government $1.50 for each 100 lbs. so shipped if the sugar was manufactured from raw sugar imported into Canada as the respondent's sugar was.

I would dismiss the appeal with costs.

Maclaren, J.A. Magee, J.A. Hodgins, J.A.

MACLAREN, MAGEE and HODGINS, JJ.A., agreed with Meredith, C.J.O.

Ferguson, J.A.

FERGUSON, J.A. (dissenting):—I do not think the question in this appeal is: Was it the intention of the parties at the time the contract was entered into that the goods purchased and sold should be shipped to the United States? But rather that the question is: Was it the intention of the parties that the purchaser

could not call for delivery of the goods in Canada, or for delivery unless the goods were consigned to the United States in bond, and does the contract express such an intention and agreement?

The contract between the parties is one required by the Statute of Frauds to be in writing. It was reduced to writing, and it seems to me that the rights of the parties must be determined by interpreting the writing, considering the circumstances surrounding the parties at the time it was entered into, and not by reference to the conditions at the date fixed for delivery.

Primarily the meaning and effect of the stipulations in the contract "f.o.b. cars" and "in bond" are stipulations imposing a duty and obligation on the vendor for the benefit of the purchaser, which the purchaser could waive. So, under the guarantee, the undertaking of the vendor to ship in bond and receive payment in Baltimore were burdens assumed and imposed on the vendors for the benefit of and in ease of the purchasers.

On the evidence adduced at the trial, the market price of the goods sold for delivery was at the date of contract less in Canada than for delivery in the United States, and it seems to me to follow, in the absence of evidence to the contrary, that the vendors would have been glad to sell for delivery in Canada at the price named in the contract, payment in New York funds. But conditions and prices had changed before the time for delivery had arrived. Prices in Canada were then much higher than the contract price, and the Government embargo was being rigidly enforced. These changed conditions enabled the defendants to claim that they could not deliver in United States bond, and prices being higher in Canada than the contract price, they were naturally unwilling to deliver in Canada unless they had clearly contracted to do so.

The purchasers offered and were willing and ready to pay the purchase price in New York funds, and take delivery in Canada, but the defendants refused to accept such payment and to make such delivery, and the question is: What does the written contract mean?

On the hearing of the appeal, Mr. Nesbitt urged that the words "in bond" meant that the goods must be exported. I think the defendants failed to establish either that the words "in bond" meant that goods in bond cannot be diverted to some place in Canada before they reach the United States, or that

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bonded goods might not be shipped from one point in Canada to another point in Canada, passing, *en route*, through the United States, nor do I think that at the time the contract was entered into, it was by these words intended to place an obligation on the purchaser to export, or with the object and intent of being a stipulation inserted for the benefit of the vendors.

Though no such evidence was adduced at the trial, Mr. Nesbitt, on the hearing of the appeal, informed us that it could be shewn that had the sugar been exported, the vendors would have been entitled to a substantial customs rebate, and this, he argued, would shew that the stipulation that the goods were to be delivered f.o.b. "in bond" was a stipulation for the benefit of the vendors. Since the hearing, a motion to allow this fact to be proved by affidavit was made and allowed. I have considered the affidavit, and from it we learn that the customs rebate is only collectible when the sugar is manufactured from imported raw material. The affidavit seems to fall short of establishing that the parties contracted on the basis that the sugar should be refined and made from imported raw material, or that the purchasers knew of the customs rebate and intended to contract and did contract to export the sugar so as to give the defendants a right to collect the customs rebate.

I would allow the appeal and direct a reference to assess the damages. *Appeal dismissed.*

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BANK OF NOVA SCOTIA v. HATFIELD.

New Brunswick King's Bench, Chandler, J. January, 1921.

PRINCIPAL AND AGENT (§ III—34)—FALSE REPRESENTATION OF AGENCY—CONTRACT WITH PRINCIPAL INDUCED BY—DAMAGES—LIABILITY OF AGENT.

If a person represents himself as the agent of another and so induces a third party to enter into a contract with him as such agent, he is personally liable for any damages which such party may sustain by reason of such representation being untrue. The fact that the professed agent honestly believes that he has authority when entering into the contract does not affect his liability.

Statement.

ACTION to recover the amount of a bill of exchange discounted by the plaintiff on the representations of the defendant that he was the agent of an incorporated company which, in fact, was not incorporated, and which afterwards repudiated the defendant's authority and for damages.

W. H. Harrison, and *M. G. Teed*, K.C., for plaintiff.

M. L. Hayward, and *W. P. Jones*, K.C., for defendant.

CHANDLER J.:—The plaintiff claims that the defendant on or about December 10, 1917, represented and warranted that Hatfield & Scott Company, Limited, were an incorporated company and, assuming to be the agent of Hatfield & Scott Co., Ltd., induced the plaintiff to discount a certain bill of exchange drawn by one Edward Harrison upon the said Hatfield & Scott Co., Ltd., at Montreal, in the Province of Quebec, which said bill of exchange was dated at Kentville, Nova Scotia, December 8, 1917, and was drawn at sight payable to the order of the plaintiff for the sum of $927.50, with interest and exchange; and asserted and warranted impliedly to the plaintiff that he, the defendant, was authorised by the said Hatfield & Scott Co., Ltd., to accept said bill of exchange as their agent and did so accept said bill of exchange in the name of Hatfield & Scott Co., Ltd. That the plaintiff upon the faith of such assertion and warranty, on or about December 10, 1917, discounted the said draft and at the request of said Heber H. Hatfield paid the proceeds thereof to the said Harrison, the drawer thereof; but the said Hatfield & Scott Co., Ltd., were not an incorporated company and the defendant was not authorised by the said Hatfield & Scott Co., Ltd., to accept the said draft as their agent. That the said Hatfield & Scott Co., Ltd., repudiated the authority of the defendant to accept said draft and the plaintiff was unable to enforce payment of the said draft by the said Hatfield & Scott Co., Ltd.

There is no doubt that the defendant, Heber H. Hatfield, who was at that time a member of the firm of Hatfield & Scott, carrying on business at Hartland, in the county of Carleton, in the Province of New Brunswick, and at Montreal, in the Province of Quebec, did accept the draft mentioned in the statement of claim by writing at the foot of the draft the following : "O.K. Hatfield & Scott Co., Ltd., per H. H. Hatfield."

The evidence shews that on or about December 8, 1917, the defendant and Harrison called upon the agent of the Bank of Nova Scotia at Kentville, Nova Scotia, and one of them stated to the agent of the bank that Harrison wanted some money. Roy, the agent of the bank at Kentville, Nova Scotia, says that he filled in the date, namely, December 8, 1917, in a form of

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draft and also the words "at sight." Whether Harrison signed the draft as drawer then or at a later date does not appear, but at all events the defendant accepted the draft as it then was, as stated above, and the draft was afterwards filled in for the sum of $927.50, the draft being drawn on Hatfield & Scott, Ltd., Montreal, P.Q. The draft was discounted by the Bank of Nova Scotia and the proceeds of the draft placed to the credit of Harrison on December 10, 1917.

The defendant does not deny accepting the draft in the manner mentioned above, but he does deny that he intended to accept the draft at all, his idea being that he was merely asked to O.K. the draft.

There is a conflict of testimony between Roy, agent for the bank at Kentville, and the defendant Hatfield, as to the date when this draft was drawn and accepted. Roy says that the draft was drawn and accepted on December 8, 1917, but Hatfield says that he was at the office of the bank at Kentville, Nova Scotia, on December 6, 1917, with Harrison, and that 5 drafts were produced not wholly filled up, all of which he O.K.'d or accepted. He says he wrote what he did write on the draft sued on below the name of Edward Harrison by mistake. The other drafts he O.K.'d or accepted by writing "O.K. Hatfield & Scott Co., Ltd., per H. H. Hatfield" across the face of the drafts.

Hatfield also claims that the draft sued on was accepted by him conditionally, the condition being that the draft was not to be sent forward to Montreal until a bill of lading for a carload of apples was attached to it, the draft being intended to cover the price of a carload of apples to be shipped by Harrison to Hatfield & Scott at Montreal.

Hatfield also says that Roy promised to attach a bill of lading for a carload of apples to this draft, that the draft should not exceed $900 and that an invoice for the carload of apples should be sent forward with the draft.

All this is denied by Roy, who says that no conditions were attached to the acceptance of the draft and that nothing was said as to his procuring a bill of lading for a carload of apples or an invoice for such carload to be sent forward with the draft.

There is a direct conflict of testimony between these two persons, Roy and the defendant, as to what took place when

the draft was accepted. In the first place, while Hatfield says he did not intend to accept the draft, I do not think he can claim this now, as what he did was clearly an acceptance of the draft. It later transpired that there was no such incorporated company as Hatfield & Scott Co. Limited., in December, 1917. It seems that Hatfield & Scott had previously been carrying on business at Hartland, New Brunswick, and Montreal, P.Q., the members of the firm being Heber H. Hatfield and Frederick G. Scott. In August, 1917, Heber H. Hatfield, Frederick G. Scott and some other persons, applied for incorporation under the Dominion Companies Act, R.S.C. 1906, ch. 79, and letters of incorporation were granted to these persons on January 9, 1918, who were incorporated under the name of Hatfield & Scott Company, Limited. For some reason or other, between August, 1917, and January 9, 1918, the firm of Hatfield & Scott carried on business under the name of Hatfield & Scott Co., Ltd., they being under the impression that a company with that name had been duly incorporated, but this of course was a mistake.

The draft sued on was forwarded to Montreal by the plaintiff bank, but was not paid as no apples were sent forward to meet this particular draft by Harrison and for this reason Frederick G. Scott, who was in charge of the business at Montreal, refused payment of the draft.

An action was subsequently brought in the Province of Nova Scotia upon the draft now sued upon by the bank against Hatfield & Scott Co., Ltd., as an incorporated company. On September 24, 1918, on which day evidence was taken under a commission at Woodstock, New Brunswick, it transpired apparently for the first time, so far as the plaintiff knew anything about the matter, that when this particular draft was accepted there was no such incorporated company as Hatfield & Scott Co., Ltd., in existence. On October 8, 1918, the action brought by the bank in the Province of Nova Scotia on the draft in question was dismissed with costs, without prejudice, however, to any action that might be taken by the plaintiff against any person or persons whatever, on or in respect to the bill of exchange sued on in the Nova Scotia action. The costs of the unsuccessful action brought by the plaintiff against Hatfield & Scott Co., Ltd., in the Province of Nova Scotia amounted to $288.30 and the

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bank also paid its solicitors in the said action costs amounting to the sum of $120.80.

On October 9, 1917, the manager of the Bank of Montreal at Hartland, N.B., wrote a letter to the Bank of Nova Scotia at Kentville, N.S., in which he says:—

Hatfield & Scott Co. Ltd., valued customers of ours, are buying apples in your district this season through Edward Harrison who will draw on the firm sight drafts with bills of lading attached. These drafts will be paid by Hatfield & Scott on presentation here without regard to the arrival of goods.

This is the first mention of such a company as Hatfield & Scott Co., Ltd., as far as the plaintiff bank is concerned.

When the draft sued on was refused payment at Montreal, correspondence passed between the Bank of Nova Scotia at Kentville and Hatfield & Scott at Montreal. In a telegram from the Bank of Nova Scotia to Hatfield & Scott dated January 11, 1918, the plaintiff says: "Referring your telegram $929.00 was for car 67224 from St. John, $902.00 not referred to yesterday, car 285450. Buckingham items accepted Hatfield for reasons no ladings attached and to cover such contingency."

Hatfield & Scott replied to this telegram of January 11, 1918, as follows: "Answering have received no apples for draft nine hundred and twenty-nine dollars accepted. Hatfield."

In a subsequent letter January 14, 1918, from Roy, the manager at Kentville, Nova Scotia, to Hatfield & Scott, Ltd., at Montreal, Roy says: "I understood the drafts to be accepted by Mr. Hatfield to secure us. Nothing was mentioned about bills of lading and we only negotiated them because Mr. Hatfield had evidenced by his acceptance that they were in order."

In a letter from Hatfield & Scott Co., Ltd., to the Bank of Nova Scotia at Kentville, dated January 16, 1918, the writer, Mr. Scott, says: "We understood from Mr. Hatfield that he O.K.'d some drafts with the understanding that they were to be used and that the amount of the invoice was to be written in. We took this matter up with Mr. Hatfield at Hartland and have asked him to go down to Kentville and try and straighten matters out." The only contention made by Hatfield & Scott through Mr. Scott in this correspondence was that the apples had not gone forward to meet the draft sued on, and he therefore refused to pay it.

Considering that Hatfield knew when he accepted the draft

sued on that it was to be used immediately in order to put Edward Harrison in funds and that it was absolutely useless and futile for Hatfield to accept the draft if the draft was not to be valid or used until a bill of lading for a carload of apples was attached to it and that this particular draft was discounted by the bank and the proceeds placed to the credit of Harrison's account on December 10, 1917, I have come to the conclusion that the draft was not accepted by Hatfield conditionally as contended by him. If the draft was not to be used, that is, discounted by the bank, until a bill of lading for apples was attached to it, what was the use of Hatfield's acceptance? In the course of business between Harrison and Hatfield & Scott prior to this date, and in accordance with what is stated in the letter from the Bank of Montreal to the Bank of Nova Scotia mentioned above, any drafts drawn by Harrison on Hatfield & Scott Co., Ltd., to which bills of lading were attached were paid by Hatfield & Scott at Montreal on presentation and if this particular draft was to be held until a bill of lading was attached to it in order to secure payment, all that took place between Hatfield and Roy at Kentville when this draft was in part prepared and accepted by Hatfield amounts to nothing whatever, and has no effect.

It does not seem reasonable to suppose that the manager of the bank at Kentville, knowing that the object of getting his particular draft accepted was to have it used immediately, would agree that the draft should not be valid and should not be used until Harrison brought in a bill of lading for a carload of apples to be attached to this draft. Roy in his telegrams and letters to Hatfield & Scott maintains that this draft was accepted by Hatfield because there was no bill of lading to attach to it and in his letter of January 14 he says: "Nothing was mentioned about bills of lading (speaking of the drafts) and we only negotiated them because Hatfield had evidenced by his acceptance that they were in order." Again Scott in his letter of January 16, says: "We understood from Mr. Hatfield that he O.K.'d some drafts with the understanding that they were to be used and that the amount of the invoice was to be written in." This particular draft sued on could not be used at all for Harrison's benefit if the bank had to wait for a bill of lading, as it appears from the evidence that while Harrison had cars of apples either loaded or being loaded

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in or near Kentville at the time, the cars could not be shipped for lack of heaters which could not be obtained immediately; and it seems to me that this expedient of getting Hatfield's acceptance was adopted to get over this difficulty about the absence of a bill of lading and to enable the bank to discount the draft immediately for the benefit of Harrison, as was done.

I am therefore of the opinion that this contention of Hatfield's that the draft was accepted conditionally and that the condition upon which it was accepted by him was never fulfilled, must fail. If I am correct in this view, the draft sued on was perfectly good were it not for the fact that Hatfield admittedly had no authority to accept any draft in the name of Hatfield & Scott Co., Ltd., a non-existent corporation.

If, as stated by Hatfield, Roy had waited until Harrison had brought in a bill of lading to be attached to the draft accepted by Hatfield before sending it forward for payment, the bank would have lost the benefit of the bill of lading as security for the payment of the draft.

Sec. 90 of the Bank Act, R.S.C. 1906, ch. 29, provides that the bank shall not acquire or hold any warehouse receipt or bill of lading or any such security as aforesaid to secure the payment of any bill, note, debt or liability, unless such bill, note, debt or liability is negotiated or contracted at the time of the acquisition thereof by the bank.

If Roy, the manager of the bank, had acted as Hatfield claims he agreed to do, the bank would have lost the security of the bill of lading as the draft accepted by Hatfield was negotiated or discounted on December 10, at which time admittedly there was no bill of lading available to be attached to the draft and to secure its payment. It is unlikely that Roy had altogether overlooked the provisions of sec. 90 of the Bank Act in connection with this transaction.

The plaintiff contends that Hatfield by his acceptance of this draft in the name of a non-existing corporation warranted and represented that there was such a corporation in existence and that he, Hatfield, had authority to accept the draft for that company. The plaintiff further contends that Hatfield, not having any such authority as he represented and warranted, is personally liable under the circumstances of this case for the amount

of the draft and for the costs and expenses incurred by the plaintiff in endeavouring to collect the draft from Hatfield & Scott Co., Ltd.

It seems to me that the contention of the plaintiff as to the liability of the defendant in this matter is correct. In the case of *Collen* v. *Wright* (1857), 8 El. & Bl. 647, at pp. 657, 658, 120 E.R. 241, at p. 245, Willes, J., says:

> A person who induces another to contract with him as the agent of a third party by an unqualified assertion of his being authorized to act as such agent, is answerable to the person who so contracts for any damages which he may sustain by reason of the assertion of authority being untrue. The fact that the professed agent honestly thinks that he has authority affects the moral character of his act, but his moral innocence, so far as the person whom he has induced to contract is concerned, in no way aids such person or alleviates the inconvenience and damage which he sustains. The obligation arising in such a case is well expressed by saying that a person professing to contract as an agent for another, impliedly, if not expressly, undertakes to or promises the person who enters into such contract upon the faith of the professed agent being duly authorized, that the authority which he professes to have does in point of fact exist.

It is true that Cockburn, C.J., disagrees with this judgment of Willes, J., which was the judgment of the Court, but this case of *Collen* v. *Wright* has been followed in several subsequent cases as laying down a correct principle of law. See the case of *Spedding* v. *Nevell* (1869) L.R. 4 C.P. 211; *Cherry* v. *Colonial Bank of Australasia* (1869), L.R. 3 P.C. 24, 6 Moo. P.C. (N.S.) 235, 16 E.R. 714. In this last case reference is made in the judgment of the Privy Council to the case of *Downman* v. *Williams* (1845), 7 Q.B. 103, 115 E.R. 427; in which the following statement of the Law of Agency by Story, J., is quoted, 6 Moo. P.C. (N.S.) at pp. 244-245, 16 E.R. 718: "For every person so acting for another by a natural if not by a necessary implication, holds himself out as having competent authority to do the act, and he thereby draws the other party into a reciprocal engagement." Sir J. Napier, in delivering the judgment of the Privy Council in *Cherry* v. *Colonial Bank of Australasia*, says that the decision of the Court of Exchequer Chamber in *Collen* v. *Wright*, 8 El. & Bl. 647, 120 E.R. 241, must be considered to have settled the law upon the subject in conformity with the view of Story, J. See also the case of *Godwin* v. *Francis* (1870), 5 C.P. 295. Also the case of *Hughes* v. *Graeme* (1863), 12 W.R. 857.

Assuming that the principles of law applicable to this particular

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case are correctly laid down in the cases cited, I think that the defendant Hatfield is liable by reason of his representation that he had authority to accept the draft sued upon as agent for Hatfield & Scott Co., Ltd., and that by his conduct he warranted that he had such authority. Though Hatfield does not seem to have been aware of the fact at the time, there was no such corporation as Hatfield & Scott Co., Ltd., in existence on the date when the draft sued upon was accepted, but the ignorance of Hatfield on this point does not affect his liability, according to the cases cited above.

Assuming that Hatfield is liable as having represented and warranted that he was the agent of Hatfield & Scott Co., Ltd., and so authorised to accept the draft sued upon, the question of the measure of the damages for which Hatfield is liable must be discussed. According to the principle laid down in the judgment in the case of *Spedding* v. *Nevell*, *supra*, I think the plaintiff is entitled to be placed in the same position as it would have been in had the defendant been duly authorised to accept the draft and therefore the defendant is liable in the first place to pay the amount of the draft sued upon, with interest and exchange, amounting to $929.85. See *Crane* v. *Lavoie* (1912), 4 D.L.R. 175, 22 Man. L.R. 330. I think he is also liable to pay the costs of the unsuccessful action brought in the Province of Nova Scotia by the bank against Hatfield & Scott Co., Ltd., in an attempt to recover the amount of the bill of exchange sued upon. I think the bank acted reasonably in bringing this action in Nova Scotia, and the action only failed because Hatfield & Scott Co., Ltd., set up that Hatfield had no authority to accept the draft sued upon, as the company was not in existence when the draft was accepted. It was under these circumstances impossible for the bank to successfully proceed with the action in Nova Scotia.

The costs paid by the bank in this unsuccessful action amounted to $288.30. As the plaintiff bank became aware on September 24, 1918, of the fact that the corporation of Hatfield & Scott, Ltd., only came into existence in January, 1918, I do not think the plaintiff is entitled to recover in this action any costs incurred in the action brought in Nova Scotia subsequent to this date of September 24, 1918. On that day the plaintiff was in a position to judge as to the result of the Nova Scotia action, and in view

of the testimony given under a commission at Woodstock, New Brunswick, on September 24, 1918, it should not have further proceeded with the Nova Scotia action. I do not know just what costs were incurred by the plaintiff in the Nova Scotia action subsequent to September 24, 1918, and if the parties in this action cannot agree as to the amount of the costs, if any, to be deducted from this sum of $288.30, the matter will have to be dealt with by me. I also think that the defendant is liable to pay the costs paid by the bank to its solicitor in connection with the proceedings in Nova Scotia. This amount is $120.80, but if the plaintiff paid to its solicitor any costs for the proceedings taken subsequent to September 24, 1918, this amount, if any, should be deducted from the sum of $120.80. In the absence of any agreement between the parties this last item must also be dealt with by me. I think the plaintiff is also entitled to recover from the defendant interest on the sum of $927.50, the amount of the draft sued on from the date of its maturity until judgment in this case. The plaintiff is entitled to the costs of this action to be taxed.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. December 30, 1920.

1. APPEAL (§ VII M—588)—COLLISION—AUTOMOBILE AND STREET CAR—ACTION FOR DAMAGES—CONTRIBUTORY NEGLIGENCE—SUFFICIENCY OF JUDGE'S CHARGE TO JURY.

In an action to recover damages for injuries to a motor car resulting from a collision between it and a street car at a city intersection, the trial Judge's charge to the jury is not open to objection if it is a clear and accurate statement of the law and of the duty of the jury in dealing with the question of contributory negligence and if there was nothing in the charge to mislead the jury and where it is clearly pointed out to them that if they thought the driver of the automobile should have looked again before crossing the intersection they should answer the question as to contributory negligence in the affirmative.

[*Grand Trunk R. Co.* v. *McAlpine*, 13 D.L.R. 618, [1913] A.C. 838, referred to.]

2. STATUTES (§ II A—104)—MOTOR VEHICLES ACT (ONT.)—CONSTRUCTION—APPROACHING INTERSECTION OR CURVE—MEANING OF.

The Motor Vehicles Act (Ont.), sec. 11 (1), as enacted by 9 Geo. V., ch. 57, sec. 3, means that at a street intersection or curve the speed of the car must be slackened to 10 miles unless the driver has a clear view of approaching traffic and there is nothing approaching to render it unsafe to proceed at the normal speed of 20 miles an hour.

[See annotation, Automobiles and Motor Vehicles, 39 D.L.R. 4.]

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APPEAL by the defendant company from the judgment of the County Court of the County of York. Affirmed.

The facts of the case are as follo

The action is brought to recover damages for injury to the respondent's automobile resulting from a collision between it and a street car of the appellant, caused, as the respondent alleges, by the negligence of the appellant's servants.

The facts are not seriously in dispute except perhaps as to one point to which I shall afterwards refer.

The collision occurred on the 18th October, 1919. The respondent was driving his automobile in a northerly direction on Markham street, and it was struck by an east-bound street car of the Harbord line. The negligence charged was that the street car was being driven at an excessive rate of speed, and that the motorman had not the car under control.

In saying that the facts are not seriously in dispute, I do not include the facts as to the negligence of the motorman; there was as to this a conflict of testimony, but that question was settled by the findings of the jury on the 1st and 2nd questions. Those questions and the answers of the jury to them are as follows:—

1. Were the plaintiff's damages caused by the negligence of the defendants? A. Yes.

2. If so, in what did it consist? A. Going at too fast a speed and not giving warning and sounding gong soon enough.

The facts bearing on the other branch of the case were that the automobile was being driven at a speed of between 12 and 15 miles an hour, and the speed was, when the automobile reached the intersection, about 12 miles an hour, the driver having slackened its speed; that the driver looked to the west when he was about 40 feet from Harbord street, that he could then see 90 feet on that street (whether he meant 90 feet from the line of Markham street or from his automobile is open to doubt), and there was no traffic coming from the west; that he then looked to the east, and there was no traffic coming from that direction; he first saw the street car when the radiator of the automobile was "level with the intersection" and about 15 feet from the south rail of the street car track, and it was about its length from him, and, according to his testimony, was going at the rate of 30 to 35 miles an hour, and the gong was not sounded. Seeing this, he put on the brake,

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disconnected the gear, and turning his automobile sharply to the east brought it to a stop at a point where the rear wheels were about 18 inches south of the south rail and the front wheels about 9 inches north of the south rail, and at that point the automobile was struck by the street car.

The other questions left to the jury and their answers were as follows:—

3. Was the plaintiff guilty of any negligence that contributed to the collision? A. No.

4. If so, in what did such negligence consist?

5. At what sum do you assess the damages? A. $300.

6. Could the motorman, after he first became aware that danger was imminent, have stopped the street car in time to avoid the collision by using ordinary prudent care? A. Yes.

Judgment was entered for the plaintiff upon the findings of the jury for the recovery of $300 and costs; and the defendant company appealed.

D. L. McCarthy, K.C., for appellant.

W. D. M. Shorey, for respondent.

MEREDITH, C.J.O. (after stating the facts):—The contention of counsel in support of the appeal was that:— Meredith, C.J.O.

1. The charge of the learned Judge to the jury as to the duty of the driver of the automobile when approaching a street intersection was calculated to lead the jury to think that there was no duty to look out for an approaching street car.

2. The automobile was being driven at the intersection at a greater rate of speed than that allowed by law, and the learned Judge should have ruled that this disentitled the respondent to recover, and at all events that it amounted to contributory negligence, and that the jury should have been so instructed.

The learned Judge told the jury:—

"Of course, any one knows that a man in an automobile who approaches a street on which cars run must exercise due and prudent care, and one would think that prudent care would demand looking in both directions to see if a car was coming, and listening for a gong, and if he fails to look and goes on the street car tracks without looking and is struck at a time before the motorman had time to stop his car the answer is plain that he has himself to blame. I will go farther than that, although it does not perhaps

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apply to this case: if a man is approaching a street on which the cars run, in his automobile, and he sees a car coming and he mistakes the speed that the car is running and goes on the tracks in front of the car, I think even then he is to blame. It should not be done."

And, after referring to the respondent's testimony as to his looking, the learned Judge went on:—

"Ought he to have looked again? Did he exercise due care in failing to do that or in not doing it? There is no inflexible rule of law which says that he must look again, but there is a law based upon common sense that he shall use due care; and, if it were necessary to do that in using good care, then he ought to have done it. If you think that this plaintiff was negligent in the way in which he approached Harbord street, either in failing to look again or in any other way, you will answer 'yes'" (i.e., to the question as to contributory negligence).

In my judgment, the charge is not open to objection, but was a clear and accurate statement of the law and of the duty of the jury in dealing with the question of contributory negligence, and it follows that there was nothing in the charge to mislead the jury, but it was clearly pointed out to them that if they thought that the driver of the automobile should have looked again they should answer the question in the affirmative. Nothing that was decided or was said in *Grand Trunk R.W. Co.* v. *McAlpine*, 13 D.L.R. 618, 16 Can. Ry. Cas. 186, [1913] A.C. 838, is opposed to that view. What was held was that it is not the English law that "it is sufficient if a party . . . looks both ways on approaching the track. He need not necessarily look again." Lord Atkinson, after so stating, went on to say, 13 D.L.R. at p. 623 ([1913] A.C. at p. 845): "Whether, in a case of this character, the plaintiff's negligence was the sole cause of his own misfortune, or whether he was guilty of contributory negligence, are questions of fact to be decided in each case on the facts proved in that case."

The second objection is based upon the alleged failure of the driver of the automobile to obey the provisions of sec. 11 (1) of the Motor Vehicles Act, as enacted by 9 Geo. V. ch. 57, sec. 3, which provides that:—

"No motor vehicle shall be driven upon any highway . . . at a street intersection or curve where the driver of the vehicle has not a clear view of approaching traffic at a greater speed than 10 miles per hour in a city, town, or village . . ."

Mr. McCarthy argued that the words "where the driver . . . has not a clear view of approaching traffic" qualify only the word "curve," but I am not of that opinion. Grammatically they apply to an intersection as well as to a curve, and the purpose in view in providing for the exception is as applicable to a street intersection as it is to a curve. What was meant, no doubt, although the section does not in terms say so, was that the speed must be slackened to 10 miles unless the driver has a clear view of approaching traffic, and there is nothing approaching to render it unsafe to cross the intersection at the normal speed of 20 miles an hour.

There was evidence that the driver had a clear view of approaching traffic; and if, as they no doubt did, the jury found that to be proved, there was no obligation on the driver to reduce his speed to 10 miles an hour, and the second objection is not entitled to prevail.

Assuming, however, that the driver was not entitled to traverse the intersection at a greater speed than 10 miles an hour, it does not follow that the finding as to contributory negligence should have been against the respondent. It does not follow that, because he was travelling at the rate of 12 miles an hour as he entered upon the intersection, the driver was guilty of contributory negligence. Contributory negligence involves not only a finding of negligence but of such negligence as that but for it the accident would not have happened; and it by no means follows that because the driver was disobeying the law he was guilty of contributory negligence. Whether or not he was guilty of it was a question to be determined on the facts proved, and it was the function of the jury to decide that question.

Lord Atkinson in the *McAlpine* case, 13 D.L.R. at p. 623, [1913] A.C. at pp. 845-846, speaks thus of contributory negligence, in referring to what is called, erroneously as Lord Sumner thinks, ultimate negligence:—

"A plaintiff whose negligence has directly contributed to the accident, that is, that his action formed a material part of the

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cause of it, can recover, provided it be shewn that the defendant could by the exercise of ordinary care and caution on his part have avoided the consequence of the plaintiff's negligence."

I would, for these reasons, dismiss the appeal with costs.

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I have dealt with the first objection although it was not strictly open to the appellant. At the trial no objection as to the charge in respect of what is now alleged to be misdirection was taken, nor in the notice of appeal is it raised.

Maclaren, J.A.

MACLAREN, J.A., agreed with MEREDITH, C.J.O.

Magee, J.A.

MAGEE, J.A.:—The evidence shews that at the street intersection here in question the buildings at the south-west corner come close to the street, and thus hinder an early view along the cross-street. There was evidence, if the jury chose to believe it, that the defendant company's street car approached that corner going east at the rate of 30 miles per hour. The motorman of that car himself said that he did not see the plaintiff's car till the motorman was at that corner or indeed a foot or two east of the building. The plaintiff stated that, when 40 feet south of the south kerb on Harbord street, he had been able to see along that street 90 feet west of the west kerb on Markham street, along which he was driving, on the east side. The motorman's evidence was that he had been sounding the gong, but a passenger called by the defendant company had heard no gong till the motorman applied the brakes on sight of the plaintiff, and the jury may well have considered that it was not sounded sooner. There was no other traffic on either street. It was therefore open for them to find that he approached that corner at that great rate of speed without giving any warning and without looking throughout that distance of almost 90 feet, when he would have had the plaintiff in plain view. The plaintiff's evidence was that, seeing nothing on that 90 feet, which would be over 120 feet west of his side of Markham street, he turned to look for any traffic coming from the east on Harbord street; and, when he turned again, the street car was within 25 feet of him, and only by swerving to the east did he avoid worse injury. Whatever the plaintiff's speed at the south kerb of Harbord street, which he admits to have been 12 miles per hour, it was open to the jury to answer as they did, and I do not see that their findings can be disturbed, whether I should have come to the same conclusion or not. It is not

necessary, in this view, to consider whether the plaintiff was breaking the provision of sec. 11 (1) of the Motor Vehicles Act, as substituted in 1919, by 9 Geo. V. ch. 57, sec. 3, which forbids driving a motor vehicle "at a street intersection or curve where the driver of the vehicle has not a clear view of approaching traffic at a greater rate of speed than 10 miles per hour in a city." The jury may well have considered that, having a view of 120 feet, he had a clear view for any traffic which he ought to be called upon to expect. The reference in that section to "clear view" applies, I think, to a street intersection as well as a curve. The non-repetition of either the proposition "at" or the article "a," as well as the propriety of such construction, leads me to that interpretation. At either there may or may not be a clear view over the adjoining land. But, inasmuch as a street may curve for a mile or more, with houses or trees obstructing the view, the "clear view" must necessarily be confined to a clear view for such a distance as is reasonably necessary to have a view of approaching traffic. And, inasmuch as at the intersection itself, where there is no curve, one always has a clear view along each street, it would seem evident that the restriction of speed is not confined to the intersection, but must extend to the approaches, or else the section would have no effect at all. The intention would seem to be to prescribe caution where there is not a clear view. The word "at" has various significations, depending upon the subject and context. "Used in reference to place, 'at' often means 'on' or 'within,' but its primary idea is 'nearness' or 'proximity,' and it is commonly used as the equivalent of 'near' or 'about:'" 4 Cyc. 366.

If there is a clear view, then the driver must take only such precautions as are necessary against the known, but until then must take the statutory precaution against the unknown. Here the jury could consider the statute as complied with.

I agree with my Lord the Chief Justice that the instructions to the jury are not open to objection, and I would dismiss the appeal.

HODGINS, J.A., (dissenting):—I agree with the judgment of my Lord the Chief Justice, except as to the ground of contributory negligence. Hodgins, J.A.

The learned trial Judge, in charging the jury as to negligence by reason of the appellant's motorman running his car at an

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excessive speed in approaching the intersection in question, and in not sounding the gong, refers to the intersection thus: "The houses were built pretty well up to the street;" and, "Here we have a street, Markham street, coming into Harbord, with the houses built up close to the corner. Having regard to that speed, should the motorman at that stage have sounded his gong before coming to Markham street in order to warn people on Markham street, north or south, that the car was approaching, so that they could govern themselves accordingly?"

When dealing with the statute of 1919, 9 Geo. V. ch. 57, sec. 3, which provides that "no motor vehicle shall be driven . . . at a street intersection or curve where the driver has not a clear view of approaching traffic at a greater rate of speed than 10 miles an hour in a city, town, or village," the learned trial Judge says:—

"This is undoubtedly an intersection. The other language, about having a clear view of approaching traffic, whether that applies to the curve or intersection may be open to some doubt, but here was there a clear view? We are told that the houses are built pretty well up to the street; he says that he was going 12 miles an hour approaching this intersection; if you think that this is a place which comes under this law, then he should have approached it at 10 miles an hour, and if he had approached it at 10 miles an hour, would this accident have happened? In other words, if he had complied with the law would that accident have happened? That is all."

The respondent, on stating that he had a view up and down the tracks of 90 feet, was asked: "You think that is a clear view?" and answered: "It is as clear a view as you have anywheres in the city, on an average." It is nowhere suggested to him that a view of the approaching traffic is or may be something quite different from a clear view of a limited portion of the street, nor does he in any way distinguish between the two.

Upon this evidence and the charge as above set out, the jury acquitted the respondent of contributory negligence.

I think the charge failed in two particulars: first, in telling the jury that it was doubtful whether the provision as to a clear view applied to this intersection, and leaving them to determine the contributory negligence of the respondent *if they thought that*

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this was a place which came under this statute as requiring a clear view to be obtained; and, secondly, in not pointing out that there must be a clear view of the traffic approaching upon the street, and not merely of that section of the street immediately visible to the driver of the automobile, before a greater speed than 10 miles an hour can be justified.

The learned trial Judge was bound to construe the statute as applying to the intersection, and not to leave it in doubt, and as a matter for the jury to decide. He should also have explained to them what the words "clear view of approaching traffic" meant. There is no evidence beyond that quoted, and that takes no heed of the element or range of approaching traffic. It is not a clear view of part of the street, here 90 feet, as is deposed to, but of the approaching traffic. The two things are or may be quite different, and, while one may be had, the other may and generally does require a much greater spread on each side of clear ground. Where the houses come close up to the street-line, as put by the learned Judge, the proper meaning and effect of the provision should have been clearly left to the jury, with the pronouncement that the section did apply, and it would then be for them to say whether at this intersection there was or was not such a clear view actually obtained as would include the traffic, or want of traffic, approaching, that its position and speed could be gauged by the respondent, so as to justify him in being within the limits of the intersection at a speed exceeding 10 miles an hour, as he admits he was.

While the ground of contributory negligence is for the jury, their finding must be based upon a proper charge; and I do not think that, under the circumstances, the case was properly presented to them in the aspects I have mentioned.

For this reason, I think there should be another trial; costs to be in the cause. *Appeal dismissed.*

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CANADIAN NORTHERN R. Co. v. HORNER.

Supreme Court of Canada, Idington, Duff, Anglin, Brodeur and Mignault, JJ. February 24, 1921.

1. MASTER AND SERVANT (§ II D—80)—DOCTRINE OF COMMON EMPLOYMENT ABOLISHED—APPLICATION OF DOCTRINE OF RES IPSA LOQUITUR.
In Alberta where the doctrine of common employment has been abolished the doctrine of *res ipsa loquitur* does not depend on any general rule and may be applied in actions for negligence between master and servant if the case is one in which it would otherwise apply.
2. EVIDENCE (§ II B—95)—ACCIDENT—DEATH—IMPOSSIBILITY OF ESTABLISHING PRECISE FAULT—ESTABLISHING CLAIM—RES IPSA LOQUITUR.
In a case to which the doctrine of *res ipsa loquitur* applies and in which it is impossible to say what was the precise fault which caused the injury, it is not necessary for the plaintiff to prove it and an attempt on the part of the jury to answer the question which is not to the point should be disregarded as valueless, an express finding of negligence by the jury being sufficient to support a verdict for the plaintiff which is only reviewable and reversible by an appellate Court if it is such as no jury could reasonably arrive at on the evidence presented.
[*Horner* v. *Canadian Northern R. Co.* (1920), 55 D.L.R. 340, affirmed.]

Statement.

APPEAL by defendant from the judgment of the Alberta Supreme Court, Appellate Division (1920), 55 D.L.R. 340, in an action for damages under the ordinance respecting compensation to the families of persons killed by accidents. Affirmed.

D. L. McCarthy, K.C., and *N. D. Maclean*, for appellant.

D. Campbell, for respondent.

Idington, J.

IDINGTON, J.:—The respondent sued as the widow of a brakeman killed in an accident on appellant's railway. That accident and the consequent death of respondent's late husband were caused by the train on which he was serving having been derailed in passing a switch which was found unlocked.

There can be no doubt of the derailment having been the result of the switch having been unlocked.

Primâ facie that condition of things must be attributable to the open switch and that in turn to the negligence of appellant. The burden of proof that it was due to some other cause than such negligence thus rested upon the appellant. Until that was established by such clear evidence that the jury could not, as reasonable men, refuse to accept and act upon it, the presumption arising from the circumstances, expressed in the maxim *res ipsa loquitur*, stands as the guide for the jurors.

The sole substantial question raised by this appeal is whether or not the jury has by acting upon the said presumption, and unreasonably, either impliedly refusing to believe, or so far as believed to accept as a satisfactory rebuttal of such presumption

the evidence adduced by the appellant tending to shew that appellant's servants absolutely discharged their respective duties and that the discharge thereof would cover all that may be involved in the charge of negligence.

Now it is the province of the jury to decide as to the credibility of each and every witness and the measure of credibility to be given to the evidence of each witness.

The jury may properly disregard the evidence of each witness from many points of view. It may find from his demeanour or otherwise that he is entirely unworthy of credit.

In this case there does not seem to be anything for applying such an extreme view as to any of the witnesses; especially in view of the expressions in the trial Judge's charge. There is, however, very much in the ordinary experience of life which the jury could well apply in this case, and that is that he on whom the duty is cast and is daily many times discharging, with absolute care and accuracy, may from time to time through a great variety of causes omit to discharge.

Such a man in good faith is apt to persuade himself that he had actually discharged his duty when, as a matter of fact, he had entirely forgotten to do so, or failed from some cause to perform it.

Yet in such a case of failure his master may be legally liable for the negligence involved, if injury to another results therefrom.

The jury in such a case must use the best judgment it can and its verdict is only reviewable and reversible by an appellate Court if such as no twelve men could reasonably arrive at on the evidence presented.

In this case or any other where the jury may have been of a less number, I do not regard the exact number of twelve jurors as governing, though I present it as what has been so often presented by the highest Courts in England where twelve is the number of a jury selected to try an issue of fact.

The jury was confronted with the problem of deciding whether the unlocked switch was the result of neg igence on the part of some one of the servants of the appellant, or a criminal interference by some stranger.

The evidence tendered to rebut the former depended, in almost every instance bearing on that aspect of the case, upon the unsup-

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ported evidence of a single witness, who may have been mistaken. If any link in that chain of events thus failed the whole defence fails.

And we should not forget the very serious consequences presented to the mind of each of such witnesses tempting him to persuade himself that he must have discharged his duty, when in fact he may have failed to do so.

As to the possibilities of the switch being left unlocked, Farrell, a witness for the appellant who had been a brakeman on its trains, testified that he had found switches unlocked "but not very often."

I should have preferred to have seen this point pressed upon others. For what it is worth it shews that appellant's servants are not quite as infallible as it pretends herein.

The alternative question presented to the jury, of whether or not the unlocking in question herein was the result of strangers to the service having improperly meddled with the lock, seems unsupportable by any evidence worth considering.

The fact of someone having taken, on the Sunday in question, a hand car used by the section foreman, and apparently ridden on it for some miles away to a point where it was found later, is relied upon as if important.

One can easily understand how and why some idle men or boys, on a Sunday or holiday, might be tempted to do such a thing. It seems, however, an incident quite incapable of explaining why they, or such like idlers, should engage in the far more serious criminal conduct of unlocking the switch and deliberately planning the wrecking of the train in question or any other passing over the point in question.

Moreover, the switch was at a point in the country 5 or 6 miles away from any habitation but one, other than that of its foreman, and there was not the slightest effort made to attach blame to that party, or indeed to any party.

If there had been any reason to believe that it was the work of any persons designing to wreck the train, some trace would probably have been found of such persons.

The death of three men, and the ruin of property in cars and otherwise, which must have resulted, would have so aroused public attention and the public authorities as to have disclosed

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if any foundation in fact for such a theory, something more than a commonplace incident of someone taking a ride on a hand-car—left as it was to tempt the idlers to so use it.

There was never, I suspect, such a search made for the criminal unlocking of the switch. Probably nobody believed that theory and it was only looked on as fit to ask Judges and juries to accept it.

To my mind the whole of the hints thus thrown out as to the cause of the accident are not deserving of serious consideration as an alternative to the possibilities indeed probabilities of the unlocked switch being the result of neglect.

Before parting with the hand-car incident I cannot forebear remarking that its exposure to such use was apparently the result of carelessness on the part of the foreman on whose inspection of the switch so much reliance is placed. Alternatively he seems to have felt he was in such a deserted district, so remote from possible marauders, that he was quite safe in doing so.

Yet we are asked to presume on such a slender thread of evidence as adduced that the jury coming to a like conclusion were, in doing so, acting as no set of reasonable men could do and hence set aside their verdict.

The point was made in argument here that other trains had passed over unhurt.

It is admitted in evidence that such going in one direction would not be affected by the condition of the switch but contended that one had preceeded the one in question and passed in safety going in same direction.

Hence it is argued that assuming we have an account of all trains run on the part of the road in question there was nothing happened for at least 24 hours, out of which could have arisen the neglect of duty in question.

That would be a cogent, though by no means conclusive, argument had the appellant proven, as it should have done if possible, that there was no other train passing which needed to use the switch, and left it unlocked.

It is said by counsel for appellant that no such point was made in argument below.

Whether that be correct or not does not matter. It is the evidence we have to be guided by and not the argument of counsel.

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I doubt much, however, if it was not present to the minds of the Judges in the Court below, 55 D.L.R. 340, for I find Ives, J., in writing his judgment, had properly looked for such evidence and found it in the answer of Irwin, a superintendent of appellant, on his examination for discovery, as follows:—

224. Q. When prior to the accident was the switch in question last operated. A. 17.20 K., July 5th, that would be 5.20 p.m.

225. Q. And that train proceeded out of the "Y" upon the main track, going west? A. Yes, Sir, I presume it did; I don't know whether it went in and backed through or went into the other switch first and came out of this. My opinion is they would head into this switch and back through the other one, but I am not prepared to say.

Ives, J., held that this answer to 224 having been put in by respondent's counsel is sufficient. It seems to me quite clear that the party so testifying could not swear to that needed to make effective proof meeting the point raised, and is only assuming it.

I am unable, with great respect, to agree with that view of Ives, J., as to the weight to be attached to this, but pleased to find that he felt as I do the need of some such evidence to make any possible defence for appellant out of the movement of trains.

I may remark in passing that Harvey, C.J., relied on other grounds entirely, in which, with respect, I cannot agree.

I am quite unable to understand why or by what process of reasoning a fellow servant who had nothing to do with the switch in question, could be debarred or his representatives be debarred from reliance on the maxim of *res ipsa loquitur* which is nothing but a concise expression of common sense applied to circumstantial evidence.

It is equally applicable to every phase of common sense use of circumstantial evidence.

It could hardly be applied to the case of a man in charge of a switch injured by his own neglect or his representatives founding an action on such injury.

There are many other things incidental to the inquiry which I should have liked, before giving a favourable ear to appellant, to have heard a good deal more relative to.

One of these was the question of the light on this switch and the angle at which the target was set when the train was approaching the point in question; and another as to the results found after the accident in the situation of the switch and light in something more tangible and satisfactory than what appears in evidence.

The frame in which the switch was set is sworn to have been undisturbed after the accident. If so, why was the light so found, as it was, not giving light, and the target turned as it was?

And if not the result of the accident why was it passed instead of stopping?

And again the neglect of someone to lock the switch after using it may have been productive of much in its many possible movements as the result of trains passing over the point in question either way.

On these points the evidence is left in a rather unsatisfactory condition.

The following evidence is worth considering:—

Q. A JURYMAN. You state this train was the first one that went over the switch before the accident. If you went over that and that switch was apparently open would it have any effect on your train? A. None whatever. Q. Your train would not close the switch or throw it wider open? A. Well, it might; it would, but it would spring back to about half way. Q. It would not affect your train at all? A. No.

It suggests in the first place that the jury was possibly quite as alive to the several questions thus raised as we can be, and that the passage of the trains upon which so much reliance is placed by appellant, may have had much to do with the changes in the switch's position if left unlocked. Such shaking and disturbance of the switches unchained may have much more serious results upon an unlocked switch in relation to the accident in question than the evidence disclosed.

In conclusion I should say that for a great many years this Court has refused in any way to interfere with the measure of damages as left by the Courts below, even when we have felt them excessive. If the Courts below cannot find therein a ground for granting a new trial then we should not interfere.

There must be an end, if possible, to litigation being prolonged.

I agree so fully with what has been well said by the Judges below taking the view I do of this case that I rely thereon as well as on the foregoing reasons in reaching the conclusion that this appeal should be dismissed with costs here and below.

DUFF, J.:—This appeal was argued by Mr. McCarthy with his usual force and ingenuity, but it is unnecessary, in my judgment, to enter upon any of the interesting general questions discussed. I agree with the majority of the Appellate Division

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that from the circumstances in evidence the jury might properly infer that the condition of the switch was due to the negligence of somebody for whom the appellants are responsible; and I think the jury, by their finding, expressed this conclusion with sufficient clearness.

ANGLIN, J.:—Read together, as I think they should be, the answers of the jury to the first and second questions submitted to them cover findings: (a) That the cause of the derailment which resulted in the death of Horner was the switch in question "not being properly set and locked;" (b) That the existence of this state of affairs was attributable to the defendants; and (c) That it amounted to actionable negligence.

These findings, unless they are not sustainable, sufficed in my opinion, to warrant the entry of judgment for the plaintiff for such damages as she was entitled to recover.

That the derailment was caused by an unlocked switch being partly open is common ground. The plaintiff offered no evidence to shew how the switch came to be in that condition, invoking the doctrine *res ipsa loquitur* to establish *primâ facie* responsibility of the defendant for its being so. That, if attributable to an act or default of it or its servants, the position of the switch amounted to actionable negligence is neither questioned nor questionable.

Nor does it seem open to doubt that, if the plaintiff's husband had been a passenger—if the relation of master and servant had not subsisted between him and the defendant company—upon the fact that the derailment was caused by a partly open switch being established or admitted, the applicability of the doctrine *res ipsa loquitur* would have been incontestible. The switch belonged to and was under the management of the defendant; in the ordinary course of things it could not have been half open as it was unless the defendant's servants in charge of it had failed in some respect to use proper care; in the absence of explanation by the defendants it would be reasonable for a jury to infer that the switch was not properly closed and locked because of some want of care on the part of those servants. *Scott* v. *London & St. Katherine Docks Co.* (1865), 3 H. & C. 596, 159 E.R. 665; *Flannery* v. *The Waterford & Limerick R. Co.* (1877), I.R. 11 C.L. 30.

Mr. McCarthy strongly contended, however, that the fact that Horner was an employee of the defendant excludes the applicability of *res ipsa loquitur*. That and the sufficiency of the evidence adduced by the defendant to establish that it and its servants had fully discharged its duty in regard to the switch and thus to lead to the inference that its admittedly improper position was ascribable to the intervention of some foreign agency for which it was not accountable, or at least to render unwarrantable the inference that it was attributable to it, were the main grounds of the appeal.

That *res ipsa loquitur* cannot ordinarily be invoked by a servant seeking to hold his master liable for injuries sustained in the course of his employment is due to the fact that the injury may have been caused by the fault of a fellow servant for which at common law the master would not be liable or, it may be, to the fault of the servant himself. Where it is equally probable that the master may or may not be liable no presumption of liability can arise. But when, as in Alberta, the defence of common employment has been taken away by statute and the master is liable to a servant for injuries due to the neglect of a fellow employee if the servant injured was himself neither responsible for nor in a position to know the existence of the danger which caused the injury complained of, there seems to be no reason why he should not be entitled to invoke the doctrine *res ipsa loquitur* as if he were a stranger. In my opinion upon the admitted facts of this case the plaintiff was clearly justified in invoking that doctrine. In all probability the switch would not have been unlocked and partly open as it was found immediately after the derailment unless there had been neglect of duty by some servant of the defendant. At least that was an inference which a tribunal of fact could properly draw.

The sufficiency of the evidence adduced by the defendant to rebut the inference by shewing that its servant had fully discharged its duty in regard to the position of the switch was eminently a matter for the jury. The credibility of the witnesses who deposed to the discharge of their several duties in regard to the closing of the switch or seeing that it was closed was for the jury to determine. Counsel for the respondent very properly

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pointed out that while there was the positive evidence of Neil Macdonald, a brakeman on a train which had used the switch 24 hours before the derailment, that he had closed and locked it, the conductor of that train upon whom the company's rules cast the duty of seeing that every switch used by his train is left in proper position was not called as a witness, and there was no satisfactory evidence that other trains had not used the switch in the interval. Mr. McCarthy answers that the train despatcher's sheet was produced and shewed every train operating in the division during the period in question. He also stated that the failure to call either the conductor or the train despatcher is urged here for the first time. It is impossible to know whether the jury discredited the evidence of Neil Macdonald, and that of Jordan, the section foreman, who testified that he saw the switch locked on the morning of the day of the accident, or whether they inferred *proprio motu* from the failure to call the train despatcher that some other train or engine had used the switch during the day of the accident.

Mr. McCarthy also relied very much on evidence given to them that another train travelling in the same direction as that on which the unfortunate Horner was engaged had safely passed over the switch about eleven hours before the derailment. This is no doubt cogent evidence but its conclusiveness depends wholly on the sufficiency of the proof that there had been no legitimate use of the switch during the intervening 11 hours.

It is common ground that the opening of the switch by accident, if it were locked, was an impossibility. Interference with it by mischievous boys, as was suggested, would be, to say the least, highly improbable. The opening of it by design by any unauthorised adult would be a criminal act as should not be presumed. While, if trying the case on the evidence in the record and without seeing the witnesses, I might have been disposed to consider that the presumption of actionable fault arising under the doctrine *res ipsa loquitur* was sufficiently met, I am unable to say that a jury properly instructed, as the jury in this case admittedly was, could not reasonably have reached the contrary conclusion.

While the verdict was undoubtedly large, having regard to the facts that the man who was killed was only 26 years of age, that he was in good health and in good standing as a railroad man,

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that he had been already promoted to the rank of conductor and apparently had excellent prospects for future advancement, that he was earning at the time of his death about $175 a month, and that the plaintiff, aged 23 years, and two children of tender age survive him, I am not prepared to say that the amount of the judgment is so excessive that we would be justified in setting it aside on that ground.

The appeal in my opinion fails.

Brodeur, J.

BRODEUR, J.:—This is a railway accident. The plaintiff's husband was on one of the appellant's trains. The train was an eastbound train and it derailed at a switch west of Peace River station. Three men were killed, amongst them was this brakeman. In inspecting the wreck it was found that the switch was half opened and that the derailment was due to that.

The plaintiff proved her case in establishing the accident and the condition of the switch and of the railway line at this place. She rested her case on the maxim, or, as I prefer to call it, on the rule of evidence *res ipsa loquitur*.

The defendant company then moved for a non-suit on the ground that this rule of evidence does not apply as between master and servant. The trial Judge dismissed the defendant's application and the company called evidence.

This evidence shews that the switch had been opened the night before for the passage of a train and that it had been properly locked after closing it. During the daytime of the accident, some trains passed in both directions and nothing strange was seen in connection with this switch which appeared in good order.

About an hour before the accident happened a train going west passed at that place and the switch looked all right. But when the eastbound train on which the brakeman Horner was working, the switch was, after the accident, found half open.

Now how this change in the switch came to happen, no evidence is adduced to shew. It was left to the jury as a question of inference. If the verdict had been a general verdict, it would have, without doubt, to be sustained, because there is enough of evidence to leave to the jury the inference that the accident was due to the negligence of the company. But the verdict was not a general one. It is stated that the defendant was guilty of negligence: and they assign as a cause of the negligence that the switch

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was not properly set and locked and that it caused the derailment and wreck of the train. In other words, the answer looks to be a finding of the cause of the accident rather than a fixing of the responsibility for it.

But they have in answer to the first question found expressly that there was negligence on the part of the railway company. That may be due to the fact that they may not have believed some of the witnesses for the defence or they may have drawn the inference that the accident was due to the fault of the employees of the company.

As to the rule of evidence *res ipsa loquitur*, it should be observed that the exclusion of the rule in the case of master and servant is based upon the doctrine of common employment. In Alberta, legislation was passed by which this doctrine of common employment has been discarded; and I am of the view then, that the rule of evidence should be fully observed in a system of legislation where the doctrine of common employment is no more in force.

For these reasons I would dismiss the appeal with costs.

Mignault, J.

MIGNAULT, J. (dissenting):—The respondent's husband was killed in an accident on the appellant's railway, and, in a suit against the appellant she obtained from the jury a verdict for $25,000 which, subsequent to the appeal by the appellant to the Appellate Division of Alberta, she reduced to $20,000.

The facts fortunately give rise to no dispute between the parties. Late at night on Sunday, July 6, 1919, a freight train known as Extra East No. 2047 of the appellant was derailed at Peace River Junction, a place where there is practically no settlement, and the respondent's husband, who, as head end brakeman was riding in the cab of the engine, was killed, as were also the engineer and fireman. At the place where the locomotive was derailed a loop line known as the "Y", used to permit trains to change their direction, leaves the main line and extends to a branch of the railway to the north, which branch also leaves the main line a short distance further east. The cause of the derailment was discovered immediately by the conductor, the rear end brakeman and an employee who was riding as a passenger, all three of whom were in the "caboose" and were uninjured, the rear part of the train not having left the rails. This cause was that the switch connecting with the "Y" was about half open, so

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that the wheels of the engine, the tender and the first fifteen cars left the rails, and the engine in which Horner was riding was thrown over onto its right side. The switch, or rather the lever handle by which it was operated, was usually held in place by a locked padlock, but after the accident this padlock was found unlocked. The lamp of the switch was not burning after the accident and, as a matter of fact, it then received a blow which would have sufficed to put out the light had it been burning. The switch lever handle was raised and was pointing across the main line, while the target was very nearly parallel with the main line. At that place there is a curve and the evidence seems to shew that from the engine of train No. 2047 approaching the switch the lamp would have shewn green if it were then lighted, as it must have been, for otherwise it would have been the duty of the engineer, who had full view of the switch for a mile and a half before he reached it, to stop his train. It is therefore not unreasonable to assume that the light was then burning and shewed green. This, however, is, and can only be, a surmise, for none of the ill-fated occupants of the locomotive cab survived to tell the story.

In her action claiming on her behalf and on behalf of her children $30,000 damages for her husband's death, the respondent alleged three grounds of negligence against the appellant:—

(a) In running the said train at the time and place of the said occurrence at an excessive and dangerous speed. (b) In permitting or causing the said "Y" switch to be set or placed improperly to allow the said train to pass along and upon the main track safely. (c) In having a defective switch and railway tracks at the time and place of said occurrence, whereby the said locomotive was caused or allowed to leave the railway tracks aforesaid.

Of these three grounds the first and third may be disregarded because none of them were found by the jury.

At the trial the respondent made formal evidence of the accident, by calling a physician to prove the cause of death and by putting in parts of the examination on discovery of Irwin, superintendent of the first division western district of the appellant's railway, and also of the damages claimed by her, and then declared that she rested her case and relied on the doctrine of *res ipsa loquitur*. The appellant having moved for non-suit, the question of this doctrine and its applicability between master and servant was argued and the trial was adjourned to give the trial

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Judge time to examine the authorities. The following day the trial Judge refused the motion, but the respondent nevertheless decided to put in additional parts of the examination of Mr. Irwin with the object apparently of further establishing negligence on the part of the appellant. The motion for non-suit was renewed at what was termed the second close of the respondent's case and was again denied.

The appellant then proceeded to call witnesses, to wit, its servants and officials, in order to rebut any *primâ facie* case resulting from the rule *res ipsa loquitur*, assuming its applicability in a case like this. I will have to discuss this evidence in detail, so I will immediately quote the answers made by the jury to the questions submitted by the trial Judge:

1. Was the death of Horner caused by the negligence of the defendant? A. Yes. 2. If so, in what did such negligence consist? A. Of switch known as west main track switch leading to the "Y" at Peace River Junction not being properly set and locked causing the derailment and wreck of train known as Extra East No. 2047. 3. If the plaintiff is entitled to recover, what amount of damages is she entitled to recover? A. $25,000 (Twenty-five thousand dollars).

Before discussing the rule of evidence *res ipsa loquitur*, the first point to be considered is whether it applies in a master and servant case like this one, having regard to the state of the law in the Province of Alberta.

It is broadly stated in text books such as Beven on Negligence, 3rd ed., p. 130, and Hals. Laws of England, vol. 21, p. 439, note M, that this rule does not apply between master and servant. But on referring to the cases cited by them: *Paterson* v. *Wallace & Co.* (1854), 1 Macq. (H.L. Sc.) 748; *Lovegrove* v. *London Brighton & South Coast R. Co.* (1864), 16 C.B. (N.S.) 669, 143 E.R. 1289, where a dictum of Willes, J., at p. 692 [E.R. p. 1298] is quoted, it is seen that the fellow servant rule was there applied, and, in cases governed by that rule, it is clear, as stated by Willes, J., that,

it is not enough for the plaintiff to shew that he has sustained an injury under circumstances that may lead to a suspicion, or even a fair inference, that there may have been negligence on the part of the defendant; but he must go on and give evidence of some specific act of negligence on the part of the person against whom he seeks compensation.

And the same eminent Judge, at p. 691 of the same report, [E.R. p. 1298] said that, "there can be no doubt that the person injured and the person whose negligence caused the injury were fellow servants."

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I am therefore disposed to think that because of the fellow servant rule, which applies (except in matters governed by Workmen's Compensation Acts), in almost every jurisdiction subject to the common law, the maxim *res ipsa loquitur*—which is no more than a presumption of negligence that the defendant must rebut—has been considered inapplicable in master and servant cases. But the fellow servant rule has been excluded in Alberta by the Workmen's Compensation Ordinance, Ord. Alta. (1911), ch. 98, whereby it was enacted that:—

2. It shall not be a good defence in law to any action against an employer or the successor or legal representative of an employer for damages for the injury or death of an employee of such employer that such injury or death resulted from the negligence of an employee engaged in a common employment with the injured employee, any contract or agreement to the contrary notwithstanding.

Therefore, inasmuch as the liability of the master for injuries suffered by his servant is in Alberta the same as his liability for injuries inflicted on a stranger, I would not be disposed to qualify the application of the maxim *res ipsa loquitur* by distinguishing one case from another. And there is no authority that I know of which excludes this maxim between master and servant in a jurisdiction where the rule as to common employment has been repealed by statute. This point now stands to be determined by this Court for the first time, and I think it must be determined against the contention of the appellant.

Now as to the rule *res ipsa loquitur*, a rule of evidence I have said, and a very reasonable one, it is now firmly established, and its scope is well shewn by the following quotations from the opinions of eminent Judges:

In *Christie* v. *Griggs*, 2 Camp. 79 (1809), Mansfield, C.J., observed that, (at pp. 80-81)

when the breaking down or overturning of a coach is proved, negligence on the part of the owner is implied. He has always the means to rebut this presumption, if it is unfounded; and it is now incumbent on the defendant to make out that the damages in this case arose from what the law considers *a mere accident.*

The defendant in that case having made evidence concerning the cause of the accident, Mansfield, C.J., said, at p. 81:—

There was a difference between a contract to carry goods, and a contract to carry passengers. For the goods the carrier was answerable at all events. But he did not warrant the safety of the passengers. His undertaking, as to them, went no further than this, that as far as human care and foresight could

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go, he would provide for their safe conveyance. Therefore, if the breaking down of a coach was purely accidental, the plaintiff had no remedy for the misfortune he has encountered.

In *Carpue* v. *London & Brighton R. Co.* (1844), 5 Q.B. 747, at p. 751, 114 E.R. 1431, at p. 1433, Lord Denman said:—

It having been shewn that the exclusive management, both of the machinery and the railway, was in the hands of the defendants, it was presumable that the accident arose from their want of care, unless they gave some explanation of the cause by which it was produced; which explanation the plaintiff, not having the same means of knowledge, could not reasonably be expected to give.

In *Byrne* v. *Boadle* (1863), 2 H. & C. 722, 159 E.R. 299, the case of a barrel falling from a building onto the plaintiff, Pollock, C.B., expressed himself as follows, at p. 728, [E.R. p. 301]:—

The fact of its falling is *prim facie* evidence of negligence and the plaintiff who was injured by it is not bound to shew that it could not fall without negligence, but if there are any facts inconsistent with negligence it is for the defendant to prove them.

In *Scott* v. *London & St. Katherine Docks Co.*, 3 H. & C. 596 at p. 601, 159 E.R. 665, at p 667., Erle, C.J., said:—

There must be reasonable evidence of negligence. But where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.

In *Kearney* v. *London & Brighton & South Coast R. Co.* (1870), L.R. 5 Q.B. 411, a case of a brick falling from a bridge and injuring a person passing under it, Cockburn, C.J., stated, at p. 415:—

Where it is the duty of persons to do their best to keep premises, or a structure of whatever kind it may be, in a proper condition, and we find it out of condition, and an accident happens therefrom, it is incumbent upon them to shew that they used that reasonable care and diligence which they were bound to use, and the absence of which it seems to me may fairly be presumed by the fact that there was the defect from which the accident has arisen. Therefore there was some evidence to go to the jury, however slight it may have been, of this accident having arisen from the negligence of the defendants; and it was incumbent on the defendants to give evidence rebutting the inference arising from the undisputed facts.

In *Flannery* v. *The Waterford & Limerick R. Co.*, I.R. 11 C.L. 30, the plaintiff had been injured by the derailment of a train in which he was travelling. Polles, C.B., followed *Scott* v. *London & St. Katherine Docks Co.*, 3 H. & C. 596, 159 E.R. 665, and, at p. 39 said.—

I am of opinion that as the railway, the engine and the waggon were under the defendants' management, and as the circumstance of the waggon leaving the rails does not happen in the ordinary course of things if due care is used, the fact of the accident was sufficient evidence to call upon the defendants to shew that there was no negligence on their part.

I think therefore that the circumstances of this case and the fact of the open and unlocked switch which undoubtedly caused the derailment, suffice to establish a *primâ facie* case of negligence making it incumbent on the defendant to rebut the presumption of fault resulting therefrom.

If the appellant had sufficiently rebutted this presumption there is no doubt that it cannot be held liable for Horner's death, *Christie* v. *Griggs*, 2 Camp. 79; *Readhead* v. *Midland R. Co.* (1867), L.R. 2 Q.B. 412. This is therefore the question that must be determined by carefully examining the evidence adduced by the appellant.

In so far as the switch was concerned—and in view of the jury's finding I need not consider the other grounds of negligence set up in the respondent's statement of claim, but I may say that the appellant established that the equipment of the train, its air brakes as well as the railway itself were in perfect condition—it was proved to be one of the best switches on the line. It was last used in connection with the "Y" the evening before the accident. Six miles west of the switch is a summer resort, Alberta Beach, and an excursion train had run from Edmonton to this resort on Saturday, July 5, without stopping at Peace River Junction. On the return trip this train left Alberta Beach about 8.45 P.M. and stopped at this switch to go into the "Y" in order to turn the train. Neil Macdonald, the head end brakeman, on this train, opened the switch to let the train go onto the "Y" track. He swore that after the train had passed on this track, he set the switch in normal position, parallel with the main line, placed the lever handle down and locked it. This witness was not cross-examined by the respondent.

The next day, Sunday, July 6, the day of the accident, Jordan, the appellant's section foreman, as was his duty, inspected the switch between 10 and 11 o'clock in the forenoon. He testified that it was in good condition then, that the lever handle and lock were in proper place, properly locked, and that the switch was set for the main line. He said that on Sundays people are often on the track—it is to be remembered that Alberta Beach is 6 miles away—and that his hand car, which was some distance east, was stolen that afternoon and taken to near St. Albert, also to the east of the switch. The switch lamp was then burning. He had often inspected the switch and never found it unlocked.

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Another freight train of the appellant, known as Extra 2147 West, had twice passed the switch along the main line that Sunday. First coming from Edson, which is west of Peace River Junction, it passed the switch about noon, going east, without stopping. The engineer of this train, Fallon, swore that the switch then was all right, and that had it been wrong the train would have been derailed, for it was going in the same direction as Horner's train went that same night. Returning towards Alberta Beach that evening, his train passed the switch between 8 and 9 o'clock, and went on to Alberta Beach, where it was crossed by Horner's train No. 2047, which did not stop at Alberta Beach and continued on to the east and was derailed at the switch as already stated. Fallon, the engineer of train 2147, being on the north side of the locomotive—the switch was on the south side of the line—could not see the switch when he went on that evening to Alberta Beach, but the fireman, Wellington, and the head end brakeman, Farrel, of train 2147 were in position to see the switch as they passed, and both swore that the switch was then all right, the target shewing all right for the main line, and Farrel said that had the switch handle been in a horizontal position facing north he would have noticed it, and that he saw nothing like that. It was however stated by Wellington that if the switch was open an inch or two as his train went west, it would not affect the train at all, and that the flanges of the wheels would bring it over into its proper place. As to this, another witness of the appellant, Jordan, confirmed this last statement, saying that a train going west would close the switch, but that it would spring to a certain extent afterwards. None of the men on the train 2147 could say whether the switch light was burning when this train passed the switch going west that evening, for it was not then dark enough to notice the light.

As I have said, train 2047 on which Horner was riding passed train 2147 at Alberta Beach, going east. It was derailed at the switch about half an hour afterwards, and I have described the condition in which the switch was then found, unlocked, the lever handle raised and pointing to the north across the main line.

Of the witnesses called by the appellant, the trial Judge said in his address to the jury:—

Now I think I may say with perfect propriety that in my opinion the railway company has acted with great candour and with great fairness in

the number and class of the witnesses whom it has placed before you. It seems to me that they practically exhausted the witnesses who were able to cast any light upon this tragedy, and it is to be commended for that. Those men who were called were without exception all employees of the railway company. There had not been a suggestion made against their perfect honesty, and I am very glad that that is so. These men struck me as being fair minded, honest, intelligent men, who gave evidence they did with perfect candour and straightforwardness. You may have a different opinion. That is my opinion of them. I am simply expressing my own opinion, but there is no suggestion that simply because they are employees of the railway company they twisted their evidence to suit the purpose of their employer. We all know, in these days at any rate, that the sympathies of railway men are just as apt to be with each other as they are with their employer. However, Mr. Campbell was exceedingly fair in his conduct of this case and has not made the slightest imputation against the perfect honesty of the various witnesses called by the defence. So that you have had these men before you, you have heard from them their story, and it is for you to say now upon a review of all the evidence whether in your opinion this unfortunate accident occurred through the negligence of the railway company.

Elsewhere the trial Judge said:—

I feel quite justified in saying that in my opinion all the evidence that could be given has been given in this case, except, perhaps, the evidence of the man by whom this switch was opened and who apparently is not known to any person, and you are entitled to draw such inference from all that evidence as that evidence will justify.

It was contended on behalf of the respondent that the jury may not have believed the testimony of these witnesses, whose credibility however was in no way impeached by her counsel, and that the straightforwardness of whose evidence was testified to by the trial Judge; that they may not have believed Macdonald who said that he set and locked the switch for the main line on the Saturday evening, and he was not cross-examined by the respondent's counsel—nor Jordan who on Sunday forenoon found the switch locked and set for the main line—nor the train crew of train 2147. If the jury did not believe this evidence there is nothing in the verdict to shew it, for the negligence which they found was that the switch was not properly set and locked, which obviously refers to its condition at the time of the derailment and involves no necessary disbelief in the testimony of Macdonald and Jordan that it had been properly set and locked the evening previous and was so set and locked on the forenoon of Sunday. And this testimony was conclusively corroborated by the fact that train 2147 passed the switch safely at noon on Sunday going east, for had the switch been in the condition in which it was that evening at the time of the derailment, this train would unquestionably have been derailed.

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The only possible difficulty to my mind is that it might perhaps be said that the open and unlocked condition of the switch at the time of the accident justified the inference that Macdonald, when he said that he had closed it the night before, and Jordan, when he testified that it was closed and locked between 10 and 11 of the forenoon of Sunday, were mistaken and should be discredited. That inference might have had some weight had train 2147 not passed the switch safely going east at noon on Sunday, but with this fact standing out I would not think that any jury would be justified in disregarding the positive evidence made by the appellant that the switch had been properly set and locked. Indeed, the evidence as to the prior condition of the switch is all one way and is so strongly corroborated that it would seem almost a mockery if a verdict finding that the switch had not been properly set and locked when last used could be supported by suggesting that perhaps the jury had not believed this evidence. And, as I have already said, I construe the jury's answer as referring merely to the condition of the switch at the time of the accident and not to its previous condition that day and the evening before.

I think that taken with what the trial Judge said to the jury when they were recalled after discussion of objections to the charge, the jury's answer to question 2 must bear this construction. The trial Judge said:—

> I told you at the start of my charge that the plaintiff by a simple proof of the fact that this accident had occurred had imposed upon the company the onus of proving that it did not occur through its negligence. I think I made myself quite plain as to that. And it follows from that, of course, that if the company has not satisfied you that the accident did not occur through its negligence then it did not discharge that onus, and the plaintiff is entitled to a verdict.

The appellant's counsel did not object to this direction, which, in my judgment, may I say so with deference, goes beyond what is incumbent on the defendant in such cases, see *Christie* v. *Griggs*, 2 Camp. 79, and *Readhead* v. *Midland R. Co.*, L.R. 2 Q.B. 412. But the jury being told that the simple proof of the accident imposed on the company the onus of proving that the accident did not occur through its negligence, and that if the company did not prove this the plaintiff was entitled to a verdict, naturally considered the open and unlocked switch which caused the accident as being itself the negligence they found against the defendant in answer to the first question, and that is the verdict they rendered.

So we have this result, if the respondent's contention is sound, that because the jury finds that the switch was unlocked and unset at the time of the accident, evidence of regular inspection of the switch, positive proof that when inspected that day it was locked and set for the main line, in fact evidence that the appellant used reasonable care and diligence and did all that human care and foresight could suggest to ensure the safety of its line, is all of no avail to rebut what obviously is a mere presumption under the rule *res ipsa loquitur*.

I cannot concur in this result which would impose on the railway company the obligation of an insurer towards those who travel on its lines. For it is obvious that the best organised and most carefully guarded human systems may and do occasionally fail. But when the railway company has done all that human care and foresight can suggest to render its lines safe to the public and to its own employees, an occurrence like the one under consideration is as much a pure accident as is the breaking of an axle-tree through a hidden flaw in its welding. And where there has been, as here, regular and careful inspection of the switches of the railway, unless it be held that the appellant is obliged to have an employee in constant attendance at each of its switches, I must find that the appellant's evidence completely rebuts and destroys the *primâ facie* case—for it is only a *primâ facie* case—which results from the rule *res ipsa loquitur*. The respondent was thus without evidence of the negligence which she alleged and which was the very basis of her right of action, and the appellant was entitled to a verdict in its favour. Under these circumstances, the verdict for the respondent appears to me entirely perverse.

I may add that at the argument I asked counsel for the appellant what criticism he had to make of the evidence adduced by the appellant. He said first that the conductor of Macdonald's train, whose duty it was, as well as of Macdonald himself, to see that the switch opened for that train had been properly closed and locked, should have been called to corroborate Macdonald. In view of the fact that possibly the conductor did not verify this, for otherwise he would no doubt have been called, his testimony would have been useless, and the counsel who had not even cross-examined Macdonald, should not therefore criticise the non-

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calling of this conductor. A second criticism was that the appellant had not proved that no train since Macdonald's train had used this switch. The counsel probably forgot that he had himself proved this fact by putting in question and answer No. 224 of Irwin's testimony on discovery which read as follows: "Q. When prior to the accident was the switch in question last operated? A. 17.20 K. July 5th, that would be 5.20 P.M."

I would therefore allow the appeal and dismiss the respondent's action. *Appeal dismissed.*

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Quebec King's Bench, Lavergne, Cross, Carroll, Pelletier and Martin, JJ. June 26, 1919.

HIGHWAYS (§ I A—2)—EXTENSION OF STREETS—LINES HOMOLOGATED BY CITY—DELAY—IMPROVEMENTS TO LAND—COMPENSATION—PUBLIC STREET—CITY OF MONTREAL CHARTER ACTS, 410-418, 421—EXPROPRIATION—DEDICATION.

Article 410 of the charter of the City of Montreal, which provides that a street which has been open to the public for 10 years shall be considered a public street does not apply where the circumstances clearly indicate that it was not the intention of the owner to make a gift of his property to the city although he has allowed the public to pass over it for the necessary time.

Under art. 418 of the charter the fact that the city has homologated lines for the extension of certain streets does not prevent the owner from claiming compensation for improvements made after the lines have been homologated and before the time of final expropriation.

Statement.

APPEAL by defendant from a judgment of the Quebec Court of Review in an action for damages for the value of land which the defendant had taken without expropriating it. Affirmed.

In 1878 the City of Montreal, in view of the prolongation of Hutchison St., established an homologated line upon the immovable, officially numbered 46, of the St. Laurent Quarter, the property of the respondents. On March 26, 1903, the latter sold the north-east part of this lot fronting upon the homologated line with a right of way upon the part of the land covered by the homologated line. The vendors and the purchaser caused drains to be made at their common cost. The respondents had placed upon this right of way a writing, bearing the words "Private Road," and caused a fence to be placed at the northern limit separating their property from that of a neighbour "Succession Peck." In December, 1913, the City of Montreal caused Hutchison St. to be entered in the registry of public streets by virtue of art.

410 of its charter. In 1914, it took possession of the land reserved for the homologated line, removed the fence, expropriated the adjoining land of the Peck Succession, opened the street to the public and laid down permanent sidewalks. In June, 1915, the respondent sued the City of Montreal, claiming from it $28,682.25 for the value of the land of which it had taken possession without expropriating it.

The appellant pleaded: 1. Donation to the public by the respondents; 2. Prescription of ten years; 3. Non-value of the land in question on account of the right of way created by the respondents.

Laurendeau, Archambault, Damphousse, etc., for appellant.

Campbell, McMaster and *Papineau*, for defendants.

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CARROLL, J.:—There were only the lands of the Kerry Succession which would become, according to the claim of the city, public property. The principles governing the matter are well known. No one is presumed to give away his property even for purposes of public utility. It is necessary then to ascertain whether or not the interested parties abandoned this land to the City of Montreal.

There is no contract to that effect between the parties and we must be guided by the facts and circumstances of the case to find out if the owner wished to give away his property. It appears that in 1903 when Collins took possession of these lots, he caused to be placed upon this projected street, drains and water pipes. It was provided in the contract of sale that the vendors and the purchaser should pay in equal shares the cost of these works. These works were made with the assent and under the direction of officials of the City of Montreal, but the charter permits these works to be done even in private streets. In taking possession of the property Collins worked a little on the land forming the front of these lots.

Until 1911 or 1912 the owners posted a writing indicating that the street was private. This writing had fallen off and had not been put back in its place. In 1904 the owners guaranteed the city against all damages that might result from the placing of electric wires in the houses. In 1913 the City of Montreal inscribed this street in its Register of Public Streets. In 1914, it removed the fence which separated the Collins land from the

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Peck land and performed the necessary work to give communication with the Avenue des Pins. In 1915 the present action was brought. The action concludes by asking that the city be compelled to replace the fence at the place where it had been, or to pay the owner the above-mentioned amount.

The city relies principally upon the prescription provided for by art. 410 of the charter, 62 Vict., 1899 (Que.), ch. 58. This article provides that a street which has been opened to the public for ten years should be considered a public way. In view of the facts above set out, can it be said that the public had the use of this street as a public way for ten years?

This art. 410 of the charter, in my opinion, is no wider than was the Act, 18 Vict. 1855 (Can.), ch. 100, art. 39, sub-sec. 9, decreeing also a prescription of 10 years for roads governed by the Municipal Code. This Act, 18 Vict., provided that if a road was open and frequented by the public for 10 years it should be considered to be a public road. The fact that the public passed over the road during 10 years is not sufficient, in my opinion, to constitute it a public street if the facts shew a contrary intention on the part of the owner of this street or road. It would be exorbitant in common law to provide a prescription of this nature and to cause considerable rights to be lost when the owner frequently would have had only a sentiment of acquiescence and of good-will towards the public. It is necessary that the circumstances should clearly indicate the intention of the owner to make a gift of his property.

There have been cited to us the cases of *City of Westmount* v. *Warminton* (1898), 9 Que. Q.B. 101; and *City of Montreal* v. *Léveillé* (1895), 4 Que. Q.B. 210, the judgments of which seem contradictory; that is not the case, however, because the facts of the two causes are not similar.

The principle is general and well known but the application of it is difficult. I have arrived at the conclusion that the facts of this case indicate that the owners had not intended to give their property gratuitously to the City of Montreal. But it is said that the Kerry Succession had no claim against the city because at the time of the sale to Collins it had agreed to a right of way within the homologated lines and that this right of way deprived the property of all market value. Article 421 of the charter

provides that in case of expropriation the indemnity will be the actual value of the land. Art. 418 of the charter provides that the city will pay no indemnity for constructions or improvements made by an owner after homologation of a plan of a street. Is it correct to say that the owners have no right to claim the value of their land and that the homologation of the servitudes of passage should be taken into account?

To arrive at this conclusion it is necessary that the provisions of the charter should be very plain, for there cannot be attributed to the Legislature the intention to expropriate lands without paying their value. The meaning of art. 418 of the charter would be this: When the City of Montreal proposes to open a street and has the lines homologated, the adjoining owners cannot increase the indemnity by doing work in the interval and up to the final expropriation. The powers conferred on the city are exceptional and can very often turn to the disadvantage of adjoining owners. Thus the homologated lines can be maintained for an indefinite period and during this time the owners cannot make any improvements. To decide that the lands between the homologated lines have no longer any value because of the right of way, is contrary to general principles upon the matter and especially to art. 407 C.C. which says: "No one can be compelled to convey his property except for public utility and in consideration of a just indemnity previously paid."

I believe then that the owners have the right to claim the value of the land as if the homologated lines had never been established. No doubt in estimating the damages it is necessary to take into account the increased value that the opening of these streets may give to the adjoining lots. Even if it would be necessary to consider the servitudes established, I believe that the moderate valuation made by the Court of Review should be maintained. The evidence of Ferns is exaggerated and he is the only one who testifies in favour of the city. As against that we have the evidence of the plaintiffs and that of Bernard, a real estate agent, who values this land at much more than the Court has awarded. I would confirm.

PELLETIER, J. (dissenting):—The defendant invokes three main grounds. It says first that there has been dedication; it

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next sets up the fact that the street having been opened to the public for more than ten years it has become the property of the City of Montreal, since all the formalities of its inscription as a street have been observed; in the third place, the defendant says that the land of this street is and was without value for the respondent, and that even if the first two grounds are not well founded they have no right to indemnity in the circumstances we have before us.

1. I do not consider at length the question of dedication; if it appeared to me necessary to decide it I believe that I would arrive at the conclusion that in conveying the lands which border on the homologated line the plaintiffs did not thereby intend to gratuitously give the land of the street to the City of Montreal. But I pass quickly over this question in view of the conclusion at which I have arrived upon the two other points.

2. Reading of the evidence leaves no doubt whatever that at the time of service of the action Hutchison St. was a public street, open to the public as such for more than 10 years with the consent and acquiescence of the plaintiffs.

The facts shewn generally at the hearing are made much more clear by a reading of the evidence. The impression remains with me that the works upon the street were only made by the city in 1911 and 1912, but this is not the proof that we have before us. However contradictory this proof may be in certain respects I accept the version of the witness Collins, first because he is a witness for the plaintiffs and, therefore, all that he has said has force against them, and in the second place, because his evidence appears to me to deserve much consideration.

Collins is the first transferee who purchased from the plaintiffs in 1903 lands bordering on the homologated line; it is shewn on the record by one of the plaintiffs that the greater part of the works done upon this projected street after the sale by the plaintiffs to Collins (the deed of sale from the plaintiffs to Collins provided for the works in question) have cost a sum of only $100, of which Collins and the plaintiffs have each paid a half. With this small amount a passage was opened since the land of the plaintiffs was enclosed and this passage, which has now become Hutchison St., permitted communication with other streets of the city. But the witness Collins tells us that since this year 1903, the city has placed on Hutchison St. drains, water-service, cement sidewalks;

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that it has introduced gas and electricity and that the greater part of this was done in 1903 and the rest in 1904. All this could not have been done without the knowledge and consent, at least tacit, of the plaintiffs.

In 1908 macadam was laid down. It is certain, then, that since 1903 the City of Montreal put in execution its homologated line opening Hutchison St., and that it has been constantly open since that time. The plaintiffs reply that they have since 1903 and up to 1911, had a notice upon a tree indicating that the street was a private road. There is only their own affirmation as to that and I do not believe that they are perjuring themselves, but what is certain is that this sign or this notice (placed upon a tree in some part of the grounds) was arranged in such a manner that the fact could be invoked later at need, but that it was not so placed that the public could see it. In fact, there is abundant proof that this notice, or board, has never been seen by any of those who pass or work there; there is even evidence establishing that there never was any such sign and that if there had been one it would have been seen. That in my opinion is not sufficient to indicate that the place remained a private road. And I conclude from it that at the time of the action this street had been acquired by the city under its charter, 62 Vict., 1899 (Que.), ch. 58. It is, however, upon the last of the three points raised by the defence that I have the least doubt. I am under the very clear impression that the plaintiffs never had the intention to do what was necessary to enable them to claim the value of this land; they have, perhaps, secretly cherished this desire and this hope, but the record shews us very clearly that they have been willing to enter into a speculation which lacks a foundation. As I said above the land of the plaintiffs was enclosed; but as they found that the City of Montreal delayed the opening of the street projected by the homologated line they in consequence decided to put the shoulder to the wheel that things might go forward. For that they made a conveyance to Collins first, then to others; Collins built apartments which gave lodging to a certain number of persons; it was necessary that these persons should have a route to reach the other streets of the city; then—it was very necessary—the city came to the help of these persons and gave them their street. The city did not proceed to expropriate any land because it understood that the

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plaintiffs had no claim in this respect; they had good reason for arriving at this conclusion since the plaintiffs permitted them to construct works in the street making no declaration and acquiescing in everything by an eloquent silence.

It was in 1903 that the city took possession. If the plaintiffs have a right to anything for the value of the land it is the value in 1903, that is to say at the time of taking possession. But in 1903 the plaintiffs themselves valued their land. How and at what price? It is sufficient for this to refer to the sale by the plaintiffs to Collins and to set out the following:

The plaintiffs sold to Collins 13,730 ft. for a price of $13,733 ($1 per ft.), but they could not have sold to Collins and Collins would not have bought, if by another clause of the same deed, the plaintiffs had not given to Collins a right of way over all that now forms Hutchison St. Monsieur Ferns, the head of the Board of Valuators, tells us that the land of the plaintiffs without the street was worth at this time, 42c. a foot and I do not believe that this evidence can be seriously contradicted. But if the plaintiffs have succeeded in selling for $1 a foot what was worth only 42c., it is because they conveyed at the same time the 6,000 ft. of Hutchison St. as a right of way for the benefit of Collins.

The plaintiffs have then received from Collins both the 42c. a foot that the land was worth and the 58c. additional to compensate them for the fact that they ceased from that time to have the use and ownership of the street and to be able to use it in any manner whatever.

By their sale to Collins the plaintiffs have then received the full value both of the land conveyed and of the land of the street; they find themselves in the position of having abandoned this street for purposes which prevent them from enjoying it themselves. This is the first aspect of this question.

In the notes of one of the Judges forming the majority of the Court of Review I see the following:

> But the land is affected by the right of passage of those who have acquired lots abutting on it; thereby this land has lost a great part of its value; the amount awarded should be correspondingly reduced. My view would be to reverse the judgment and grant the plaintiff a modified indemnity, $6,747, that is to say, $6,737 for the land and $10 for the old wooden fence.

I subscribe *pro tanto* to this declaration but I go much farther; not only has this land lost a great part of its value but, from the

point of view of the plaintiffs, it has no longer any value whatever; they can no longer receive any profit from it; the Judge found that in consequence the amount awarded should be proportionately diminished and modified; the amount awarded is $1 a foot, that is to say, the same price that Collins paid in 1903 both for his land conveyed and for the use of all the land comprising the street within the homologated lines. In consequence the majority of the Court of Review, which intended to award an amount diminished and modified, has given to the plaintiffs by error a higher price than the plaintiffs themselve sold for to Collins in 1903. This is evidently an oversight.

One of the plaintiffs, R. A. Kerry, was asked what he would think of the fact that all the work constructed by the city would be destroyed and the land restored in the condition in which it was, and his reply is that he is not ready to answer this question at present, that he wished to wait and see how the present action will turn out.

That is not all. The plaintiffs, by their deed of grant to Collins, undertook to pay half of the price necessary for the work of opening the street. But it is the city which did this work; it has the right to charge the cost of this expropriation to the owners of the land. But, according to the deed of sale to Collins, it was the respondents who should themselves pay the cost of opening the street. If they had had the right to anything for the expropriation they were in turn obliged to pay at least the same amount if not more, for the work of opening. Then how can they make the claim they do in the present cause? It is the actual value of the street that the plaintiffs claim to be entitled to. Their counsel even told us at the hearing that they did not object to take back the street because they would acquire its value. There were two answers to this: 1. If the plaintiffs wished and were able to take back the street it would be necessary for them first to repay the expenditures that the city has made in good faith; 2. We are here within the terms of the second paragraph of the art. 417 C.C., which governs the question. Lastly, Ferns has summed up all this litigation when he says, that for the plaintiffs the land where the street is has no value whatever. Once again, in fact, property has value only so far as it can be utilised. In granting to Collins as a right of way all the land of the homologated lines the plaintiffs

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have taken away from the whole of Hutchison St. all utility whatsoever except for the benefit of those to whom the street was given as a right of way; then on this head, how can the respondents claim it?

There remains the question of the $10 for the old wooden fence. I find that in the circumstances this falls within the rule *de minimus non curat practor*.

The plaintiffs have received the full value and much more than the value of the opening of this street by the city, and they would be paid twice if the present action is maintained.

I would reverse the judgment of the Court of Review and restore that of the Superior Court.

Martin, J.

MARTIN, J.:—The general principles of law that a proprietor may be divested of his property for the purposes of a street by dedication and by public user, do not admit of any difficulty. The application of these principles to special cases must depend on the facts and circumstances established in evidence in each case. For instance, this Court in the case of *City of Westmount* v. *Warminton* (1898), 9 Que. Q.B. 101, decided that where Warminton had laid out streets on the subdivision plan made by himself for the advantage of his property and sold lots fronting on such streets; there was gratuitous dedication of such streets as public streets. Archibald, Acting C.J., appears to have based his dissenting opinion largely on this case.

See *City of Montreal* v. *Léveillé* (1895), 4 Que. Q.B. 210; *Warminton* v. *Heaton* (1897), 7 Que. Q.B. 234; *The Dominion Textile Co.* v. *Harvey*, 1916 25 Que. K.B. 294, affirmed (1918), 50 D.L.R. 746, 59 Can. S.C.R. 508.

Section 410 of the City Charter says:

> It shall be the duty of the city surveyor to cause such of the streets, lanes, highways and public squares or any part thereof, as have been acquired by the city or have been open for public use for ten years, and not heretofore recorded, or sufficiently described, to be described and recorded in a book or register, to be kept exclusively for such purpose, and such streets, lanes, highways, and squares, when entered of record, shall be deemed to be public highways.

The controlling words that private property shall be deemed to be a public highway is that it shall have been "open for public use for ten years." No one can be compelled to give up his property, except for public utility and in consideration of a just

indemnity previously paid, art. 407 C.C., and the giving up of the property by dedication and public user must appear from clear and unequivocal acts on the part of the proprietor intending to produce that result.

In the present case the facts and circumstances established in evidence as above pointed out do not indicate such intention, but rather point the contrary intention. The location of this proposed street had been established by the appellant by its homologated line of 1878. Of course, it could not be and is not contended that the establishment of this line gave the appellant any proprietary rights in the land in question, but it prevented the respondents from dealing with their property otherwise and compelled them to respect this homologated line.

Collins testifies that he considered that it was a private street. It was a *cul de sac*, closed at one end and with access to Prince Arthur Street at the other end over the property of the Masson estate which the appellant subsequently acquired.

Having acquired by purchase from the Masson estate that part of this street between Prince Arthur St. and the property of the respondents and having acquired by expropriation the part of the street over the property of the Peck estate to the north of the respondents' property, the appellant in effect recognised that the property of the respondents comprised within the homologated line was not and it could not be a public street.

Some stress was laid on the fact that the respondents had allowed drains and water-mains to be laid on this property. This was no doubt required in the interests of public health and the cost thereof was borne by the proprietors as recognised and authorised by sec. 412 of the city charter, 62 Viet. 1899 (Que.), ch. 58.

There only remains for consideration the question of the amount of the alternative monetary condemnation.

The respondents claimed $4.25 per square foot for their property which was the price established by the expropriation proceedings between the city and the Peck estate for the property situate immediately to the north, and it is established in evidence by the chairman of the Board of Assessors of the City of Montreal that the respondents' property had practically the same value as the Peck property apart from the actual corners. The city had paid

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CITY OF MONTREAL v. KERRY.

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the Masson estate $1.25 per ft. in 1910 for the property to the south. At that time the property of the Masson estate was built upon with houses fronting on the projected street similar to the respondents' property.

It is suggested that Collins would not have paid as high a price for the property purchased by him, if he had not considered that the ultimate destination of the property in question was a public street and the respondents had thus obtained value for their property.

There is no doubt that the land in question had lost a part of its real value by reason of the rights of passage over the same granted to Collins and other purchasers. The majority of the Judges in the Court of Review took this situation into account and fixed the indemnity payable in respect to the respondent's property at $1 per foot. In my opinion, such indemnity under the circumstances was just and reasonable.

I would dismiss the appeal and confirm the judgment of the Court of Review with costs.

Appeal dismissed.

MINNEAPOLIS THRESHING MACHINE CO. LTD. v. SCANLIN. (ANNOTATED).

MAN.

C. A.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Fullerton and Dennistoun, JJ.A. January 7, 1921.

Sale (§ID—20) Of farm tractor—Verbal representations by vendor—Written clause in contract—Acceptance and retention—Engine not answering verbal representations—Liability under contract.

A contract for the sale of "one Minneapolis gasoline 20 rated horse-power 4 cylinder farm motor" contained a clause in part as follows:—....and that there are no representations, agreements, obligations or conditions, express or implied, statutory or otherwise relating to the subject matter thereof, other than herein contained, and that this agreement is the sole contract and comprises all agreements between the parties hereto with reference to said goods". The Court held that the purchaser was bound by the written contract notwithstanding verbal representations made by the vendor's agent at the time of sale, that the tractor could be successfully operated on kerosene as well as gasoline and could not appeal to any warranty not contained in the written agreement.

[Case Threshing Machine Co. v. Mitten (1919), 49 D.L.R. 30, 59 Can. S.C.R. 118, followed. See Annotation, Oral Contract, 2 D.L.R. 636.]

APPEAL by plaintiff from a judgment dismissing an action to recover the price of a traction engine sold to the defendant. Reversed.

D. A. Stacpoole and *F. F. Montague*, for appellant.

T. A. Hunt, K.C., and *J. Auld*, for respondent.

The judgment of the Court was delivered by

FULLERTON, J.A.:—This action was brought to recover the balance of the price of a gasoline tractor sold by the plaintiff to the defendant under an agreement in writing dated September 4, 1917. The agreement is for the sale of "One Minneapolis gasoline 20 rated horse-power 4 cylinder farm motor." The substantial defence is that the manager of the plaintiff company at Winnipeg verbally represented to the defendant that the tractor in question could be successfully operated on kerosene as well as on gasoline. The tractor was taken to the defendant's farm at Sahanawan early in September. Lef, his foreman, and a man named Gunderson started to operate the tractor about September 17. They started early in the morning and worked until two o'clock when Lef had to leave for Stonewall where he was in charge of threshing operations being carried on then by the defendant. The defendant was present, as he

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says, "off and on" when the tractor was being tried out and says that it worked very badly. Lef says in his evidence that they started on gasoline and when they got the engine warmed up switched on to kerosene, with the result that "she commenced to stall with us and died or stopped." Lef remained with the machine from 8 o'clock in the morning until 2 in the afternoon. I gather from his evidence that during the 6 hours Lef was attempting to operate the engine on coal oil she invariably would stall after running a short distance. After Lef went away Gunderson continued to operate the tractor until about October 17 or 18, but defendant now suggests that he was using a mixture, half kerosene and half gasoline.

Early in November Lef started to plough and he says in his evidence: "I had trouble, awful bad trouble; she stopped and stopped on me; and I would start her up on gasoline and run a way on the gasoline from the auxiliary tank in front—switch her on to coal oil and she would stop again. Every time you switched her on to coal oil she started to slacken up on the power and then to stop."

Now in spite of the fact that in September and October, 1917, the defendant must have been entirely convinced that the engine would not operate on kerosene he made no complaint whatever to the plaintiff. On the contrary in answer to the demand of the plaintiff for the payment of the first note he wrote to the plaintiff on January 27, 1918, promising to pay as soon as he could dispose of his corn and oats. Again on February 11, 1918, he wrote promising to pay when he had disposed of his corn or hogs. In April he paid the second note for $600 due under the agreement together with interest. In May, 1918, the defendant took a contract to plough land at Kildonan and the tractor in question, together with other tractors belonging to defendant, were used on the job. Defendant and his witnesses swear that on this job the tractor could not be made to work on kerosene. In July 1918 the defendant asked for further time for payment of the note for $400 which fell due on September 14, 1917, and was given time until the fall. In October 1918 when one Barker went to the defendant's farm to collect from him, the defendant for the first time took the position that he had purchased a tractor guaranteed to operate on kerosene, and that as the one delivered would not do so he was entitled to repudiate the contract.

As I have pointed out the contract calls for "One Minneapolis

gasoline 20 rated horse-power 4 cylinder farm motor." In the contract is a clause in red ink under the heading of "Conditions" in part reading as follows:—". . . and that there are no representations, agreements, obligations or conditions, express or implied, statutory or otherwise, relating to the subject matter thereof, other than herein contained, and that this agreement is the sole contract and comprises all agreements between the parties hereto with reference to said goods."

The case of *Case Threshing Machine Co.* v. *Mitten*, (1919), 49 D.L.R. 30, 59 Can. S.C.R. 118 is a complete answer to the defence raised here. There the defendants agreed to purchase from the plaintiff an engine described as "One Case 40 horse-power gas engine." The plaintiff delivered an engine which, however, failed to develop its rated horse power when operated on kerosene, and when operated on gasoline burned an excessive quantity. The agent who sold the engine represented to and assured the defendants that this engine would operate on kerosene. The written contract declared in explicit words that the terms of the agreement between the parties were to be found in the writing and in the writing exclusively. The trial Judge, Taylor, J., held (1918), 11 S.L.R. 238, "that the description of the engine in the order was ambiguous, and that evidence was admissible to show what type of engine was intended and that on the evidence the engine ordered was a kerosene-burning engine that would develop 40 horse power and the vendors had failed to deliver such engine."

An appeal to the Saskatchewan Court of Appeal was dismissed (1918) 44 D.L.R. 40, 12 S.L.R. 1.

On appeal to the Supreme Court, the judgment of the Court of Appeal was reversed. The Court held, 49 D.L.R. 30, "that on the evidence the engine delivered and accepted by the purchaser was the engine described in the contract, that the purchaser was bound by the written contract, notwithstanding certain verbal representations that had been made by the vendor's agent, and that by paying a promissory note given in part payment, and by not returning the engine as required by the above clause, he had forfeited any right he might have had to rescission.."

It appears to me that the facts in this last mentioned case were more favourable to the purchaser than in the case at Bar. There it might reasonably be argued that the description of the engine as "One Case 40 horse-power gas engine" was ambiguous, inasmuch as it did not indicate whether it was a gasoline or kerosene engine,

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and that in consequence evidence to shew which type of engine was intended was admissible. Here the machine is described as a *gasoline* farm motor. In the face of the express provision of the written agreement above quoted, the defendant cannot appeal to any warranty not contained in the written agreement.

The use by the defendant of this tractor for a period of over a year, the repeated promises to pay, and the payment of one of the notes given for the purchase price, clearly establish an acceptance by the defendant of the engine delivered.

I would allow the appeal and direct that judgment be entered in favour of the plaintiff for the amount claimed. The defendant's cross-appeal is also dismissed with costs.

Appeal allowed.

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(ANNOTATION).

SALE OF GOODS; REPRESENTATIONS, CONDITIONS AND WARRANTIES.

By John Delatre Falconbridge, M.A., LL.B., author of *"Law of Sale of Goods."*

1. Special terms of contract excluding other express or implied terms.

The principal case of *Minneapolis Threshing Machine Co. Ltd.* v. *Scanlin*, ante p. 185, was a strong one in favor of the seller. In the contract the subject matter was described as a gasoline motor, but the buyer alleged that the seller's agent had orally represented that the motor could be operated with kerosene. The motor which was supplied was in fact a gasoline motor, and there was therefore no breach of the implied condition that the goods supplied should correspond with the description. The motor could not be operated with kerosene, so that if the representation was a representation of fact as to the capacity or qualities of the motor, it was untrue, and if it was to be regarded as a warranty or as a promissory term of the contract, it was broken. The right, if any, which the buyer originally had to rescind on the ground of material misrepresentation was lost by his conduct—his delay in asserting his right, his continued use of the motor, his payment of part of the price, and his promise to pay the balance, all with knowledge of the defects of the motor. His claim either to rescind for misrepresentation or to claim damages for breach of contract was also precluded by the special terms of the contract. Moreover the alleged representation

or warranty was *prima facie* inconsistent with the description of the motor as a "gasoline motor." ANNOTATION

In *Case Threshing Machine Co.* v. *Mitten* (1919), 49 D.L.R. 30, it was alleged that there was a similar representation that the engine in question could be operated with kerosene. This alleged representation was quite consistent with the description of the subject matter as a "gas engine," and in this respect the case was not so strong a one as *Minneapolis Threshing Machine Co.* v. *Scanlin*. It was nevertheless held that the buyer was precluded from obtaining relief not only by his conduct, but also by the special terms of the contract, which included the following provisions:—

> The whole contract is set forth herein. There are no representations, warranties or conditions, expressed or implied other than those herein contained, nor shall any agreement collateral hereto be binding upon the vendor unless it is in writing hereupon or attached hereto and duly signed on behalf of the vendor at its said home office.
>
> The undersigned hereby acknowledge to have received a full, true and correct copy of this order, and that no promises, representations or agreements have been made to or with me not herein contained.

Case Threshing Machine Co. v. *Mitten* has been followed in Manitoba not only in the principal case of *Minneapolis Threshing Machine Co.* v. *Scanlin* but also in the case of *Mager* v. *Baird Ranch & Co.*, (1921), 57 D.L.R. 283.

In none of the cases above mentioned was there a breach of a condition, that is, of an essential term of the contract. In each case the buyer received something which corresponded with the description—something which was not different in kind from the thing described in the contract—however grievously he was disappointed as to its quality or capacity. None of these cases raises the question whether the seller would have been protected by the special terms of the contract in the event of the thing delivered being different from the thing described in the contract.

One is forcibly reminded of the celebrated case of *Ward* v. *Hobbs*, (1878) 4 App. Cas. 13. The defendant sent 32 pigs to the Newbury market to be there sold by auction. Among the conditions of sale were the following, (at p. 14):—

> The lots, with all faults and errors of description (if any) to be paid for and removed at the buyer's expense immediately after the sale.

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No warranty will be given by the auctioneer with any lot, and, as all lots are open for inspection previous to the commencement of the sale, no compensation shall be made in respect of any fault, or error of description, of any lot in the catalogue.

The plaintiff bought the pigs at the auction, paying a price which was a fair price at the time and place for healthy pigs. The pigs exhibited symptoms of illness on being driven to the plaintiff's farm, and all but one of them afterwards died of typhoid fever. The plaintiff also lost some other pigs by reason, as he alleged, of infection from the defendant's pigs. He thereupon brought an action for damages. In view of the special terms of sale and in the absence of any express warranty in fact, the unfortunate plaintiff was driven to various ingenious arguments,—without success. *Inter alia* it was argued on his behalf that he had bought a lot of pigs and had received a mass of disease, but it was held that pigs had been sold and pigs had been delivered, pigs being none the less pigs because they had typhoid fever. There was therefore no discrepancy or difference in kind between the description in the contract and the thing delivered.

By way of contrast with the foregoing cases may be mentioned others in which there was a breach of condition and the terms of the contract were held not to be sufficient to protect the seller.

A good example is *Wallis* v. *Pratt*, [1911] A.C. 394. This is the leading modern case as to the distinction between a condition and a warranty, and it will be further referred to below. In that case the defendant agreed to sell "common English sainfoin" to the plaintiff, and delivered in its place an inferior article—"giant sainfoin." It was held that as the thing delivered did not correspond with the description, as the defendant had agreed to sell one thing and had delivered another, the defendant was liable in damages notwithstanding the plaintiff's acceptance of the goods and notwithstanding that the contract contained a provision that "sellers give no warranty express or implied as to growth, description or any other matters."

Another example is *Schofield* v. *Emerson Brantingham Implement Co.*, (1918), 43 D.L.R. 509, 57 Can. S.C.R. 203, reversing 38 D.L.R. 528, 11 S.L.R. 11; leave to appeal to Privy Council rescinded, 51 D.L.R. 87, [1920] A.C. 415. The contract (38 D.L.R. 528, 529) was for the sale of "one of your Big Four 30 h.p. gas traction engines," and contained many special terms. It was provided that

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the engine was purchased "upon the following warranty only" (providing for the replacement of defective or worn out parts, and for the replacement of the engine frame in case of the breaking-down or wearing-out of the engine within five years.) There was a provision that "this order and agreement contains all the terms and conditions of the sale and purchase . . . and cannot, in any manner, be changed, altered or modified without the written consent" of the officers of the selling company. There was a stipulation that the engine would develop its rated horse-power and would furnish power to drive any 36-inch cylinder. It was further provided that the retention of the engine for more than two days after the demonstration test should be "proof conclusive" that the engine and its equipment fulfilled its warranty—apparently with reference to the stipulation as to the development of the rated horse-power, etc. In fact the engine was not capable of developing its rated horse-power, and it was held that as the engine did not correspond with the description of the subject matter, that is, as the buyer had not received the thing or the kind of thing which he had bargained for, he was entitled to rescission of the contract and repayment of the purchase money, notwithstanding that he had retained the engine for more than two days after the demonstration test.

The foregoing cases have been mentioned in connection with the question of the scope and validity of special terms purporting to exclude representations, conditions or warranties not expressed in the contract itself. In the remaining portion of this annotation it is proposed to state the leading principles of the law with regard to representations, conditions and warranties as applied to the sale of goods and apart from special terms of the contract. As the Sale of Goods Act is now in force in all the Provinces of Canada except Quebec, the relevant provisions of the statute will be quoted, and reference will be made to illustrative cases.

The various provincial versions of the Sale of Goods Act are the following:—Alberta—C.O.N.W.T. 1898, ch. 39; British Columbia—R.S.B.C. 1911, ch. 203; Manitoba—R.S.M. 1913, ch. 174; New Brunswick—Statutes of 1919, ch. 4; Nova Scotia—Statutes of 1910, ch. 1; Ontario—Statutes of 1920, ch. 40; Prince Edward Island—Statutes of 1919, ch. 11; Saskatchewan—R.S.S. 1920, ch. 197.

Generally speaking, the Ontario statute has the same section-numbering as the Manitoba statute, the Saskatchewan statute has the same section-numbering as the Territories Ordinance in force

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II. Representations.

A contract of sale may include express or implied terms, distinguished as conditions and warranties. These are statements or promises which are incorporated in the contract, and as to terms of this kind the Sale of Goods Act contains various provisions which will be discussed later.

There may also be a statement made by one party which induces the other party to enter into the contract, or which affects the validity of the other party's consent, but which is not made a term of the contract. As to the effect of such a statement the statute makes no provision except that it declares (Alta., Man., and Ont., sec. 58; U. K. and N. B., sec. 61; B. C., sec. 83; N. S., sec. 59; P.E.I., sec. 63; Sask., sec. 57):

> 58.—(1) The rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, and in particular the rules relating to the law of principal and agent and the effect of fraud, misrepresentation, duress or coercion, mistake or other invalidating cause, shall continue to apply to contracts for the sale of goods.

"The Act must be regarded as a single chapter in the general law of contract, and it therefore does not attempt to deal with the law of representations, conditions and warranties, in so far as they are governed by considerations common to the whole field of contract." Chalmers, Sale of Goods, 8th ed. 1920, p. 34.

If a statement of fact, made during the negotiations for a contract of sale or at the time of the making of the contract, is not a mere "flourishing description" of the subject matter or a mere expression of opinion on the seller's part about something upon which the buyer has an opportunity of forming his own opinion, it may be a representation which procures the consent of the other party or it may be a term of the contract. It will not, however, be treated as a term unless it appears that it was the intention of the parties that it should be a term, and the circumstance that the seller assumes to assert as a fact something of which the buyer is ignorant, though valuable as evidence of intention, is not conclusive of the question

Heilbut v. *Buckleton*, [1913] A.C. 30; *Gardner* v. *Merker*,

(1918), 44 D.L.R. 217, 43 O.L.R. 411; *Harrison* v. *Knowles*, [1918] 1 K.B. 608; *Smith* v. *Land and House Property Corporation*, (1884), 28 Ch. D. 7, and cases cited in argument; *Tocher* v. *Thompson* (1913), 15 D.L.R. 31, 23 Man. L.R. 707; *Robertson* v. *Norton* (1916), 30 D.L.R. 369, 44 N.B.R. 49. ANNOTATION

A statement of fact can be binding upon the person making it only as part of a contract, or by way of estoppel, or as amounting to an actionable wrong. If the statement is of something to be performed in the future it must be a promise binding by way of contract, if binding at all. If a statement of fact is not made a term of the contract, and it turns out to be false, the remedies of the person misled will depend in part on whether the misrepresentation was made fraudulently or innocently. The contract may be rescinded on the ground of misrepresentation, fraudulent or innocent. In order to recover damages for deceit, however, the person who was misled must show that the defendant made a false representation knowingly, or without belief in its truth, or recklessly, careless whether it was true or false, and it is not sufficient that the defendant had no reasonable grounds for his belief, if in fact he made the statement in the honest belief that it was true. On the other hand, an innocent misrepresentation will not itself be a ground for an action for damages, but the person who made the representation may be estopped from denying its truth and may thus be disabled from proving his defence to an action based upon the truth of the representation.

Pollock on Contract, 8th ed. 1911, pp. 556-9; *Derry, etc.* v. *Peek*, (1889), 14 App. Cas. 337, esp. at p. 359; *Redgrave* v. *Hurd*, (1881), 20 Ch. D. 1; *Newbigging* v. *Adam*, (1886), 34 Ch. D. 582; Anson on Law of Contract, 15th ed. 1920, pp. 191-197; *Long* v. *Smith*, (1911), 23 O.L.R. 121; *Caldwell* v. *Cockshutt Plow Co.*, (1913), 18 D.L.R. 722, 30 O.L.R. 244; *Dominion Paper Box Co.* v. *Crown Tailoring Co.*, (1918), 43 D.L.R. 557, 42 O.L.R. 249; *Lynch* v. *Jackson*, (1917), 38 D.L.R. 61, 13 Alta. L.R. 344.

As to estoppel see Ewart on Estoppel, ch. 8 (Fraud or bad faith not essential); *Low* v. *Bouverie*, [1891] 3 Ch. 82; *Balkis Consolidated Co.* v. *Tompkinson*, [1893] A.C. 396 at p. 397.

In the last preceding paragraph the commonly accepted view is stated, namely, that a contract may be rescinded on account of misrepresentation, either fraudulent or innocent. There appears, however, to be good ground for questioning the analogy between

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See Benjamin on Sale 6th ed. (1920), by W. C. A. Ker, at pp. 490 ff, where the subject is discussed in detail with special reference to *Kennedy* v. *Panama, etc. Mail Co.*, (1867) L.R. 2 Q.B. 580, and the following Australasian cases: *The Picturesque Atlas Publishing Co.* v. *Phillipson*, (1890), 16 Vict. L.R. 675; *Hynes* v. *Byrne*, (1899), 9 *Queens.* L.J. 154; *Riddiford* v. *Warren*, (1901), 20 N.Z.L.R. 572.

The distinction between fraudulent misrepresentation and innocent misrepresentation is clearly drawn in the case of *Kennedy* v. *Panama, etc., Co.*, (1867), L.R. 2 Q.B. 580, at p. 587, where Blackburn, J., after referring to several cases in each of which a contract had been set aside on the ground that the buyer had not received the thing he had paid for, said:—

> There is, however, a very important difference between cases where a contract may be rescinded on account of fraud, and

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those in which it may be rescinded on the ground that there is a difference in substance between the thing bargained for and that obtained. It is enough to show that there was a fraudulent representation as to *any part* of that which induced the party to enter into the contract which he seeks to rescind; but where there has been an innocent misrepresentation or misapprehension, it does not authorize a rescission, unless it is such as to show that there is a complete difference in substance between what was supposed to be and what was taken, so as to constitute a failure of consideration. For example, where a horse is bought under the belief that it is sound, if the purchaser was induced to buy by a fraudulent representation as to the horse's soundness, the contract may be rescinded. If it was induced by an honest misrepresentation as to its soundness, though it may be clear that both vendor and purchaser thought that they were dealing about a sound horse and were in error, yet the purchaser must pay the whole price, unless there was a warranty; and even if there was a warranty, he cannot return the horse and claim back the whole price, unless there was a condition to that effect in the contract.

III. Conditions and Warranties.

"A representation which is subsequently made part of the contract ceases to be a representation and becomes something more, viz., a *promise* that such a thing is or shall be." Anson on Contract, 15th ed., 1920, p. 182.

The question then arises whether this representation, which has ceased to be a mere representation, and has become a term of the contract, is a condition or is a warranty.

A "warranty" is defined in the Sale of Goods Act as meaning:—

> An agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated.

An earlier definition is that of Lord Abinger in *Chanter* v. *Hopkins*, (1838), 4 M. & W. 399, at p. 404, 150 E.R. 1484:—

> A warranty is an express or implied statement of something which the party undertakes shall be part of a contract; and, though part of the contract, yet collateral to the express object of it.

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A "condition" is not defined in the statute. A condition is a term which is "of the essence" of the contract or, in other words, which is "regarded by the parties as a vital term going to the root of the contract." Anson, *op. cit.*, pp. 183, 186.

A valuable note as to the terms "condition" and "warranty," with quotations from many sources, is contained in Chalmers, Sale of Goods, 8th ed. 1920, pp. 174 ff.

In *Wallis* v. *Pratt*, in a judgment which was approved by the House of Lords, ([1911] A.C. 394), Fletcher Moulton L.J. said ([1910] 2 K.B. 1003, at p. 1012):—

> A party to a contract who has performed, or is ready and willing to perform, his obligations under that contract is entitled to the performance by the other contracting party of all the obligations which rest upon him. But from a very early period of our law it has been recognized that such obligations are not all of equal importance. There are some which go so directly to the substance of the contract, or, in other words, are so essential to its very nature that their non-performance may fairly be considered by the other party as a substantial failure to perform the contract at all. On the other hand there are other obligations which, though they must be performed, are not so vital that a failure to perform them goes to the substance of the contract. Both classes are equally obligations under the contract, and the breach of any one of them entitles the other party to damages. But in the case of the former class he has the alternative of treating the contract as being completely broken by the non-performance and (if he takes the proper steps) he can refuse to perform any of the obligations resting upon himself and sue the other party for a total failure to perform the contract. Although the decisions are fairly consistent in recognizing this distinction between the two classes of obligations under a contract there has not been a similar consistency in the nomenclature applied to them. I do not, however, propose to discuss this matter, because later usage has consecrated the term "condition" to describe an obligation of the former class and "warranty" to describe an obligation of the latter class.

The Sale of Goods Act, (Alta., Man., N. S., Ont., and Sask., sec. 13; U. K. and N. B. sec. 11; B. C. sec. 19; P. E. I. sec. 18) provides:—

> 13.—(2) Whether a stipulation in a contract of sale is a

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condition, the breach of which may give rise to a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract.

In *Bentsen* v. *Taylor* [1893] 2 Q.B. 274, at p. 281, Bowen L.J. said:—

> Of course it is often very difficult to decide as a matter of construction whether a representation which contains a promise, and which can only be explained on the ground that it is in itself a substantive part of the contract, amounts to a condition precedent, or is only a warranty. There is no way of deciding that question except by looking at the contract in the light of the surrounding circumstances, and then making up one's mind whether the intention of the parties, as gathered from the instrument itself, will best be carried out by treating the promise as a warranty sounding only in damages, or as a condition precedent by the failure to perform which the other party is relieved of his liability. In order to decide this question of construction, one of the first things you would look to is, to what extent the accuracy of the statement—the truth of what is promised—would be likely to affect the substance and foundation of the adventure which the contract is intended to carry out.

Examples of conditions:

Behn v. *Burness*, (1863), 3 B. & S. 751, 122 E.R. 281, 6 R.C. 492 (vessel "now in the port of Amsterdam");

Varley v. *Whipp*, [1900] 1 Q.B. 513 (reaping machine described as new the previous year and as having been used to cut only 50 or 60 acres);

Fisher, Reeves & Co. v. *Armour & Co.*, [1920] 3 K.B. 614 (goods "ex store Rotterdam").

Fleming v. *Wilkie* (1919), 49 D.L.R. 27, 12 S.L.R. 393 (engine "to be put in good running order").

Examples of warranties:

New Hamburg Mfg. Co. v. *Webb*, (1911), 23 O.L.R. 44 ("rebuilt" engine);

Cameron v. *McIntyre*, (1915), 26 D.L.R. 638, 35 O.L.R. 206, (promise to give a written warranty that horse sound);

Hart-Parr Co. v. *Wells*, (1918), 43 D.L.R. 686, 57 Can.

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S.C.R. 344, affirming 40 D.L.R. 169, 11 S.L.R. 132 (warranty of good material and certain horse-power capacity);

Laleune v. *Fairweather*, (1915), 25 D.L.R. 23, 25 Man. L.R. 783 ("high grade Alaska seal coat").

IV. Stipulations as to time.

The Sale of Goods Act, (Alta., Man., N. S., Ont. and Sask., sec. 12; U. K. and N. B. sec. 10; B. C. sec. 18; P. E. I. sec 17) provides:—

> 12.—Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract.

In *Hartley* v. *Hymans*, [1920] 3 K.B. 475, at pp. 483-4, McCardie J., referring to the foregoing section, said:—

> This section gives a very slender notion of the existing law, and it is well to remember sec. 61 (Alta., Man., and Ont. sec. 58; U. K. and N. B. sec. 61; B. C. sec. 83; N. S. sec. 59; P. E. I. sec. 63; Sask. sec. 57) which provides *(inter alia)* "The rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act . . . shall continue to apply to contracts for the sale of goods." Now the common law and the law merchant did not make the question whether time was of the essence depend on the terms of the contract, unless indeed those terms were express on the point. It looked rather to the nature of the contract and the character of the goods dealt with. In ordinary commercial contracts for the sale of goods the rule clearly is that time is *prima facie* of the essence with respect to delivery: see per Lord Cairns L.C., in *Bowes* v. *Shand* (1877), 2 App. Cas. 455, 463, 464 (the sale of rice); per Cotton L.J., in *Reuter* v. *Sala* (1879), 4 C.P.D. 239, 249, (sale of pepper); and per Lord Esher M.R., in *Sharp* v. *Christmas* (1892), 8 Times L.R., 687 (the sale of potatoes). In *Paton & Sons* v. *Payne & Co.* (1897), 35 Sc. L.R. 112, however, it was held by the House of Lords that in a contract for the sale and delivery of a printing machine time was not of the essence. This point is not fully dealt with in Benjamin on Sale, 5th ed., pp. 588, et seq., and no general rule appears to be stated in that treatise. But in Blackburn on Sale, 3rd ed., pp. 244 et seq., the matter is

more clearly treated and it is laid down that "In mercantile contracts, stipulations as to time (except as regards time of payment) are usually of the essence of the contract." I may add that the relevant decisions on the point are excellently summarized in Halsbury's Laws of England, vol. XXV p. 152, . . . With the above text books may be contrasted the passage in Addison on Contracts, 11th ed., p. 543.

Now if the time for delivery be of the essence of the contract, as in the present case, it follows that a vendor who has failed to deliver within the stipulated period cannot *prima facie* call upon the buyer to accept delivery after that period has expired. He has himself failed to fulfil the bargain and the buyer can plead the seller's default and assert that he was not ready and willing to carry out his contract. That this is so seems clear. It is, I take it, the essential juristic result when time is of the essence of the contract.

V. Remedies for breach of condition and breach of warranty.

As has already appeared, in the case of a breach of warranty, the injured party is entitled to damages, whereas in the case of a breach of condition, he has the alternative of treating the contract as being completely broken by non-performance.

The fact that the buyer has resold the goods does not necessarily preclude him from exercising his right to reject them for breach of condition if the inspection and rejection take place within a reasonable time.

Niagara Grain Co. v. *Reno* (1916), 32 D.L.R. 576, 38 O.L.R. 159.

The injured party may, however, elect to treat a breach of condition as merely a breach of warranty.

The Sale of Goods Act (Alta., Man., N. S., Ont., and Sask. sec. 13; U. K. and N. B. sec. 11; B. C. sec. 19; P. E. I. sec. 18) provides:

> 13.—(1) Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition or may elect to treat the breach of such condition as a breach of warranty, and not as a ground for treating the contract as repudiated.

In this section the word "or" must be read as a conjunction co-ordinating two phrases which are equivalent one to the other. The meaning seems reasonably plain, namely that the injured party instead of insisting on his right to be discharged on account of the

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other party's breach of condition, and to reject the goods, may waive this right, that is, may content himself with his right of action for damages as on a breach of warranty. Ewart (Waiver Distributed, pp. 148-150) criticises the wording of the section on the ground that it seems to allow an alternative between waiving the condition (that is treating the condition as non-existent) and treating the breach of condition as a breach of warranty, and doubtless the section would be improved if the word "and" were substituted for "or," or if the words "may waive the condition or" were omitted.

Under a contract for the sale of goods to be delivered within a certain period of time, the buyer's right to require delivery within that period may be waived even after that period has expired; but it would seem that where the contract is within the Statute of Frauds, the waiver must be evidenced by writing.

Hartley v. *Hymans*, [1920] 3 K.B. 475 (cases reviewed).

In two cases the injured party may be obliged to treat a breach of condition as a breach of warranty.

The Sale of Goods Act, (Alta., Man., N. S., Ont. and Sask. sec. 13; U. K. and N. B. sec. 11; B. C. sec. 19; P. E. I. sec. 18) provides:

> 13.—(3) Where a contract of sale is not severable, and the buyer has accepted the goods, or part thereof, or where the contract is for specific goods, the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect.
>
> (4) Nothing in this section shall affect the case of any condition or warranty, fulfillment of which is excused by law by reason of impossibility or otherwise.

The statute does not say that what was originally a condition is really degraded or converted into a warranty in either of the two cases mentioned, but merely that the buyer is limited to the remedies available for breach of warranty. Therefore, if a contract contains a stipulation that "sellers give no warranty expressed or implied as to growth, description or any other matters," this stipulation does not prevent the buyers from suing for damages for the breach of condition, even though the buyers have accepted the goods and are consequently obliged to treat the breach of condition

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as a breach of warranty.

Wallis v. *Pratt*, [1911] A.C. 394, [1910] 2 K.B. 1003, Fletcher Moulton L.J., at p. 1015; cf. *Merrill* v. *Waddell*, (1920), 54 D.L.R. 18, 47 O.L.R. 572, (retention and re-sale of goods by buyer); *British American Paint Co.* v. *Fogh* (1915), 24 D.L.R. 61, 22 B.C.R. 97.

The statute mentions two cases in which a buyer may be limited to his remedy as on a breach of warranty, but does not necessarily exclude the possibility that a buyer may in some other way preclude himself from taking advantage of the choice of remedies ordinarily given for breach of condition.

Wallis v. *Pratt*, [1910] 2 K.B. 1003, at p. 1013.

As to the effect of the passing of the property upon the buyer's remedies in case of breach of condition, see *Armand* v. *Noonan*, (1918), 41 D.L.R. 433, 41 O.L.R. 551; *Hallam* v. *Bainton*, (1919), 48 D.L.R. 120, 45 O.L.R. 483, affirmed *sub nom. Bainton* v. *Hallam*, (1920), 54 D.L.R. 537, 60 Can. S.C.R. 325.

The remedies for breach of warranty, (including the cases in which the buyer elects or is compelled to treat a breach of condition as a breach of warranty), are defined in the Sale of Goods Act (Man. and Ont. sec. 52; U. K., N. B. and N. S. sec. 53; Alta. and Sask. sec. 51; B. C. sec. 67; P. E. I. sec. 57) as follows:—

52.—(1) Where there is a breach of warranty by the seller, or where the buyer elects, or is compelled, to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods, but he may *(a)* set up against the seller the breach of warranty in diminution or extinction of the price; or *(b)* maintain an action against the seller for damages for the breach of warranty.

(2) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

(3) In the case of breach of warranty of quality such loss is *prima facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.

(4) The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of warranty if he has suffered further damage.

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In accordance with various provisions of the Sale of Goods Act, conditions and warranties may be implied in a contract of sale. It is, however, provided (Man. and Ont. sec. 54; U. K., N. B. and N. S. sec. 55; Alta. and Sask. sec. 53; B. C. sec. 79; P. E. I. sec. 59) as follows:—

> 54. Where any right, duty or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract.

The Sale of Goods Act (Alta., Man., N. S., Ont., and Sask. sec. 14; U. K. and N. B. sec. 12: B. C. sec. 20; P. E. I. sec. 19) provides:—

> 14. In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is *(a)* an implied condition on the part of the seller that in the case of a sale he has a right to sell the goods and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass; *(b)* an implied warranty that the buyer shall have and enjoy quiet possession of the goods; and *(c)* an implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made.

The rule stated in sub-sec. 1 is in accordance with the better opinion prevailing prior to the passing of the statute, namely, that by a contract of sale the seller impliedly undertakes that he has (or, in the case of an agreement to sell, that he will have) a right to sell the goods, unless the circumstances are such as to show that the seller is transferring only such property as he may have in the goods. There is usually no implied undertaking, for instance, where the seller is selling in a special character, such as a mortgagee or pledgee, or a sheriff under an execution.

Peuchen v. *Imperial Bank* (1890), 20 O.R. 325 (reviewing the cases); *Sims* v. *Marryat* (1851), 17 Q.B. 281, 117 E.R. 1287; *Eicholz* v. *Bannister* (1864), 17 C.B. (N.S.) 708, 144 E.R. 284, 23 R.C. 198, cf. 25 Halsbury, Laws of England, 153; Willis on Sale of Goods, 127-9. As to damages, see *Confederation Life Association* v. *Labatt* (1900), 27 A.R. (Ont.) 321.

The distinction between the condition as to title and the war-

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ranty of quiet possession is similar to that between a covenant for title and one for quiet enjoyment. The former is an assurance by the grantor that he has the very estate in quantity and quality which he purports to convey; the latter is an assurance to the grantee against consequences of a defective title and of any disturbance thereupon. Thus if the title is defective, the buyer may, under the Sale of Goods Act, reject the goods, but if he has accepted them and is afterwards disturbed, he has his remedy by action for breach of warranty. 25 Halsbury, Laws of England, p. 154, note (n).

VII. Sales by description and by sample.

The Sale of Goods Act (Alta., Man., N. S., Ont., and Sask. sec. 15; U. K. and N. B. sec. 13; B. C. sec 21; P. E. I. sec. 20) provides:—

> 15. Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description, and if the sale is by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

The term "sale of goods by description" must apply to all cases where the purchaser has not seen the goods, but is relying on the description alone. It would most frequently apply to unascertained goods, but it may be applicable to specific goods where there is no identification otherwise than by description.

> *Varley* v. *Whipp*, [1900] 1 Q.B. 513, Channel J., at p. 516; sed cf. *New Hamburg Mfg. Co.* v. *Webb*, (1911), 23 O.L.R. 44, at p. 55; *Thornett* v. *Beers & Son*, [1919] 1 K.B. 486, at pp. 488-9.

To say that there is an implied condition that the goods shall correspond with the description is equivalent to saying that the buyer is entitled to get what he bargained for. As Lord Abinger said in *Chanter* v. *Hopkins* (1838), 4 M. & W. 399, at p. 404, 150 E.R. 1484, "If a man offers to buy *peas* of another and he sends him *beans*, he does not perform his contract; . . . the contract is to sell peas, and if he sends him anything else in their stead it is a non-performance of it."

> Cf. Willis, on Sale of Goods, pp. 140, 141; *Bowes* v. *Shand* (1877), 2 App. Cas. 455, at p. 480; but if peas are delivered which correspond with the description (and the sample, in case of sale by sample), the buyer must ordinarily take his

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chances as to the quality.

Examples of contract by description as well as by sample:—

Azemar v. *Casella* (1867), L.R. 2 C.P. 431, 677, 23 R.C. 440 (cotton "guaranteed equal to sealed sample"—buyer entitled to kind of cotton which he bargained for as well as quality equal to sample).

Wallis v. *Pratt*, [1911] A.C. 394, at p. 399, [1910] 2 K.B. 1003 (sale by sample with description added: "common English sainfoin." Seed supplied in accordance with sample, but not with description).

Examples of sales by description:—

Niagara Grain Co. v. *Reno* (1916), 32 D.L.R. 576 (contract for "No. 1 timothy" hay; No. 3 supplied); *Alabastine Co.* v. *Canada Producer, etc., Co.* (1914), 17 D.L.R. 813, 30 O.L.R. 394 (engine of specified type and power); *Schofield* v. *Emerson Brantingham Implement Co.* (1918), 43 D.L.R. 509, reversing 38 D.L.R. 528, 51 D.L.R. 87 ("one of your Big Four 30 h.p. gas traction engines"; engine supplied not capable of developing its rated horse-power); *Fawcett* v. *Hatfield & Scott* (1919), 50 D.L.R. 322, reversing (1916), 31 D.L.R. 498, 44 N.B.R. 339; ("seed potatoes government inspected"); *Mason & Risch Co.* v. *Mooney* (1911), 4 S.L.R. 303 (high grade piano "classic" design); *Twaites* v. *Morrison* (1918), 43 D.L.R. 73, 14 Alta. L.R. 8 (gelding).

The Sale of Goods Act (Alta., Man., N. S., Ont., and Sask. sec. 17; U. K. and N. B. sec. 15; B. C. sec. 23; P. E. I. sec. 22) provides:—

> 17.—(1) A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect.
>
> (2) In the case of a contract for sale by sample, *(a)* there is an implied condition that the bulk shall correspond with the sample in quality; *(b)* there is an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample; and *(c)* there is an implied condition that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

The statute also provides that the "quality" of goods includes their state or condition.

Although a sample is exhibited at the time of the contract,

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it does not follow necessarily that the contract is for sale by sample. If the sample is exhibited merely to show the kind of goods which the seller has to sell, and the contract makes no reference to the sample, the contract may be one for sale by description, but is not one for sale by sample.

Tye v. *Fynmore* (1813) 3 Camp. 462, 23 R.C. 440; *Gardiner* v. *Gray* (1815), 4 Camp. 144; Willis, on Sale of Goods, pp. 145-6; cf. *Re Faulkners Ltd.* (1917), 38 D.L.R. 84, at pp. 89, 90, 40 O.L.R. 75, at pp. 83-4, (sale from samples distinguished from sale by sample); *Dominion Paper Box Co.* v. *Crown Tailoring Co.* (1918), 43 D.L.R. 557.

The fact that there has been such inspection and acceptance of the goods as results in the passing of the property in the goods does not necessarily preclude the buyer from claiming damages on account of the goods not being equal to the sample. This results from the provision of the Sale of Goods Act already quoted (Alta., Man., N. S., Ont., and Sask. sec. 13; U. K. and N. B. sec. 11; B. C. sec. 19; P. E. I. sec. 18), that where a contract of sale is not severable, and the buyer has accepted the goods or part thereof, or where the contract is for specific goods, the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect.

Hallam v. *Bainton* (1919), 48 D.L.R. 120 at p. 123, affirmed *sub nom Bainton* v. *Hallam* (1920), 54 D.L.R. 537; *Merrill* v. *Waddell* (1920), 54 D.L.R. 18; cf. *Morton* v. *Tibbett* (1850), 15 Q.B. 428, 117 E.R. 520; Willis on Sale of Goods, pp. 88 ff.

VIII. Implied conditions as to quality and fitness.

In the case of *Jones* v. *Just* (1868), L.R. 3 Q.B. 197, at pp. 202-3, 23 R.C. 466, at pp. 471-2, Mellor J., delivering the judgment of the Court of Queen's Bench (Cockburn C.J., Blackburn and Mellor JJ.) stated and discussed, with reference to many earlier cases, the following rules:—

First, where goods are in esse, and may be inspected by the buyer, and there is no fraud on the part of the seller, the maxim *caveat emptor* applies, even though the defect which exists in them is latent, and not discoverable on examination, at least where the seller is neither the grower nor the manu-

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facturer: *Parkinson* v. *Lee* (1802), 2 East 314 [102 E.R. 389]. The buyer in such a case has the opportunity of exercising his judgment upon the matter; and if the result of the inspection be unsatisfactory, or if he distrusts his own judgment he may if he chooses require a warranty. In such a case, it is not an implied term of the contract of sale that the goods are of any particular quality or are merchantable. . . .

Secondly, where there is a sale of a definite existing chattel specifically described, the actual condition of which is capable of being ascertained by either party, there is no implied warranty: *Barr* v. *Gibson* (1838), 3 M. & W. 390 [150 E.R. 1196].

Thirdly, where a known, described and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still if the known, described and defined thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer: *Chanter* v. *Hopkins* (1838), 4 M. & W. 399, [150 E.R. 1484], *Ollivant* v. *Bayley* (1843), 5 Q.B. 288, [114 E.R. 1257].

Fourthly, where a manufacturer or dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term or warranty that it shall be reasonably fit for the purpose to which it is to be applied: *Brown* v. *Edgington* (1841), 2 Man. & G. 279, 133 E.R. 751; *Jones* v. *Bright* (1829), 5 Bing. 533 [130 E.R. 1167]. In such case the buyer trusts to the manufacturer or dealer, and relies upon his judgment and not upon his own.

Fifthly, where a manufacturer undertakes to supply goods, manufactured by himself, or in which he deals, but which the vendee has not had the opportunity of inspecting, it is an implied term in the contract that he shall supply a merchantable article. *Laing* v. *Fidgeon* (1815), 4 Camp. 169, 6 Taunt 108, [128 E.R. 974].

These rules have been frequently quoted and discussed in later cases, and they form the basis of the present statutory provisions upon the subject.

It will be noted, however, that the word "warranty" is used in the rules. In accordance with modern usage and with the dis-

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tinction consistently drawn in the Sale of Goods Act between conditions and warranties, the term in question is now more correctly described as a condition.

The Sale of Goods Act (Alta., Man., N. S., Ont. and Sask. sec. 16; U. K. and N. B. sec. 14; B. C. sec. 22; P. E. I. sec. 21) provides:—

> 16. Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:— *(a)* Where the buyer, expressly or by implication makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose; provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose; *(b)* Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality; provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed; *(c)* An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade; *(d)* An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

The statute further provides that the quality of goods includes their state or condition.

Prior to the passing of the Sale of Goods Act it was held that where there was a contract for the sale of goods by a manufacturer, as such, and not as a dealer, there was an implied condition that the goods were of the seller's own manufacture. *Johnson* v. *Raylton* (1881), 7 Q.B.D. 438; followed in Ontario in *Randall* v. *Sawyer-Massey Co.* (1918), 43 O.L.R. 602. A provision to the same effect was contained in the Sale of Goods Act as originally drawn by Chalmers, but was struck out in the House of Lords. Apart from any usage of trade such a condition may still be implied,

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Examples of the application of the rule *caveat emptor*.

Ward v. *Hobbs* (1878), 4 App. Cas. 13 (diseased pigs); cf. *McKay* v. *Davey* (1913), 12 D.L.R. 458, 28 O.L.R. 322; *O'Mealey* v. *Swartz* (1918), 11 S.L.R. 376.

Borthwick v. *Young* (1886), 12 A.R. (Ont.) 671 (apples; opportunity for inspection);

Oldrieve v. *C. G. Anderson Co.* (1916), 27 D.L.R. 231, 35 O.L.R. 396 (goods in esse inspected and accepted);

Hall Motors v. *Rogers & Co.* (1918), 46 D.L.R. 639, 44 O.L.R. 327 (second-hand motor trucks).

Examples of exclusion of implied conditions or warranties by express term:

Dickson v. *Zizinia* (1851), 10 C.B. 602, 138 E.R. 238, 23 R.C. 493 at 494; *Ward* v. *Hobbs* (1878), 4 App. Cas. 13 (diseased pigs sold "with all faults"—"no warranty will be given").

The Sawyer & Massey Co. v. *Ritchie* (1910), 43 Can. S.C.R. 614; *Clark* v. *Waterloo Mfg. Co.* (1910), 20 Man. L.R. 289; *Advance Rumely Thresher Co.* v. *Keene* (1919) 47 D.L.R. 251, 12 S.L.R. 259.

Examples of implied condition of fitness for particular purpose:—*Randall* v. *Newson*, (1877), 2 Q.B.D. 102, 23 R.C. 480 *(pole for carriage)*; *Preist* v. *Last*, [1903] 2 K.B. 148 (hot water bottle); *Frost* v. *Aylesbury Dairy Co.*, [1905] 1 K.B. 608 at p. 609 (milk); *Bristol Tramways, etc. Co.* v. *Fiat Motors* [1910] 2 K.B. 831 (motor omnibus); *Geddling* v. *Marsh*, [1920] 1 K.B. 668 (bottle containing mineral water); *Grocers Wholesale Co.* v. *Bostock*, (1910), 22 O.L.R. 130 (goods sold for human consumption); *The Sims Packing Co.* v. *Corkum & Ritcey*, (1920), 53 D.L.R. 445, 53 N.S.R. 539; *Canadian Gas Power* v. *Orr*, (1911), 23 O.L.R. 616, 46 Can. S.C.R. 636 (engine and dynamo); *Hill* v. *Rice Lewis & Son*, (1913), 12 D.L.R. 588, 28 O.L.R. 366 (box of cartridges; buyer relying on his own judgment); *Hopkins* v. *Jannison*, (1914), 18 D.L.R. 88, 30 O.L.R. 305 (steam shovel); *Alabastine Co.* v. *Canada Producer etc. Co.*, 17 D.L.R. 813 (gas engine); *Wood* v. *Anderson* (1915), 21 D.L.R. 247, 33 O.L.R. 143 (stallion); cf. *Winslow* v.

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Jenson, (1920), 55 D.L.R. 314, 16 Alta. L.R. 65, (buyer relying on his own judgment); *Dominion Paper Box Co.* v. *Crown Tailoring Co.*, 43 D.L.R. 557, (paper boxes); *Randall* v. *Sawyer-Massey Co.* (1918), 43 O.L.R. 602 (motor truck).

With regard to the implied condition of fitness for a particular purpose it is to be noted that the Saskatchewan Sale of Goods Act omits the proviso that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose. The proviso is, however, merely "a branch of the larger rule that a buyer buys on his own judgment where he defines the thing he requires for his stated purposes." (25 Hals. 159, note *(h)* and the omission of the proviso leaves open the question whether in any particular case the circumstances are such as to shew that the buyer buys in reliance of his own judgment or on that of the seller. *Marshall* v. *The Ryan Motors*, (1921), 57 D.L.R. 305 (Sask.).

Examples of implied condition that goods shall be of merchantable quality:—

Wren v. *Holt*, [1903] 1 K.B. 610 (sale of beer over counter); *Mooers* v. *Gooderham & Worts*, (1887), 14 O.R. 451 (rye).

With regard to the implied condition that goods shall be of merchantable quality, and the proviso that *if the buyer has examined the goods*, there shall be no implied condition as regards defects which such examination ought to have revealed, it is to be observed that prior to the passing of the statute the law was as laid down in *Jones* v. *Just*, *supra*, that is, that "where goods are in use and *may be inspected by the buyer*, and there is no fraud on the part of the seller, the maxim *caveat emptor* applies." Under the present wording of the proviso, it is not sufficient that the buyer should have had an opportunity of examining the goods, he must have examined them. This was pointed out in *Thornett* v. *Beers* [1919] 1 K.B. 486. In that case the buyer by arrangement with the seller, went to the warehouse where the goods were stored, for the purpose of inspecting them. Every facility for inspection was offered to the buyer, but, being pressed for time, he merely looked at the outside of the barrels containing the goods, and did not have any of them opened. It was held that the buyer had "examined the goods" within the meaning of the proviso. As pointed out in Law Notes (Northport, N.Y.) for June, 1919, p. 56, this decision virtually means that opportunity for examination is equivalent to examination, unless, as seems better, the case is based upon the ground that the buyer waived examination.

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MAILLET, applicant, appellant v. BOARD OF GOVERNORS OF THE COLLEGE OF DENTAL SURGEONS of the PROVINCE OF QUEBEC, defendants, respondents, FORTIN, party added, respondent, and THE COLLEGE OF DENTAL SURGEONS of the PROVINCE OF QUEBEC, party added, respondent.

Quebec King's Bench, Lamothe, C.J., Lavergne, Pelletier, Martin and McDougall (ad hoc) JJ. February 24, 1919.

1. **Prohibition (§IV—15)—Inferior Tribunal—Board Exercising Statutory Powers—Discipline of Licensed Dentists—Member of Board as Prosecutor.**

The principle that no one can, at the same time be both accuser and Judge, prevents a Board of Governors of a liberal profession charged, by law, with judging and punishing its members who have acted in a manner derogatory to the honour, dignity and discipline of the profession, from hearing and judging a complaint laid against one of its members, when it is laid by a member of the Board and upon evidence furnished by the Board and at its expense, even if the complainant does not sit as one of the Judges.

2. **Prohibition (§IV—15)—Professional Disciplinary Board Exercising Statutory Powers—Prohibition — Cases in which Similar Charges Are Laid by Different Members of the Tribunal.**

If several members of a professional disciplinary Board exercising statutory powers each lay a complaint against different persons, they cannot sit as Judges either in the cases in which they are respectively complainants, or in cases in which others of their colleagues have laid similar complaints. Prohibition will lie to prevent their so doing.

APPEAL from the Superior Court.

The facts of the case are as follows:—

On June 30th, 1917, the appellant obtained from Allard, J. authority to obtain the issue of a preliminary writ of prohibition against the Board of Governors of the College of Dental Surgeons "for the purpose of preventing it from proceeding to enquire into the alleged unprofessional conduct of the appellant."

On September 20th, 1917, the application for the writ of prohibition was refused by Duclos, J. on the ground that the Board was not a body politic and corporate, and has not, as such, any legal existence.

The Court of Appeal reversed this judgment and held that a writ of prohibition was a competent proceeding against the said Board of Governors as an inferior tribunal. (Maillet v. Board of Governors (1918), 27 Que. K.B. 364.)

On June 4th, 1918, the Superior Court, Duclos, J. gave judgment on the merits of the application for prohibition and refused it with costs. From the judgment the present appeal was taken. The appeal was allowed and prohibition ordered. The following opinions were delivered.

Eugene Lafleur, K.C. for appellant.

Aime Geoffrion, K.C. for respondents.

PELLETIER, J.:—Divested of all oratorical effect and of all artificial language, the application for a writ of prohibition is based upon the very grave and serious allegation that the prosecution of Maillet by Fortin before the Board of Governors is not litigation between Fortin and Maillet; that Fortin is only a nominal party and that the real plaintiff against Maillet is the Board of Governors itself; that it cannot be at the same time plaintiff or defendant in a case and be a Judge in the same case, and that, consequently, if the Board of Governors is actually a party to the case it has not jurisdiction to hear and decide it. If these facts are true, it seems to me that the question submitted to us is easy to decide. If, in short, anyone should present himself before us in order to maintain that a plaintiff or a defendant might be the Judge, or even one of the Judges, in a case in which he is, at the same time, a party, we would consider that the one who submitted such a proposition to us had little respect for our Court, for there are some questions which are not even open for discussion, and that is one of them.

Let us, then, look into the question of fact, putting aside, for the moment, what the appellant tells us and taking only what the witnesses tell us. [The Judge enters into the examination of the evidence in order to shew that it was really the Board of Governors which, in the name of the said Fortin, had laid the complaint and furnished the evidence.]

It is,therefore, absolutely true and absolutely certain that without having before it the written complaint imperatively demanded by art. 5054, R.S.Q. (1909) the Board of Governors substitutes an oral complaint, instructs its attorney to, what the factum calls, "take another action," and what Drs. Fortin, Goyette and Desilets call "bring an action", namely commence and carry on a law suit.

[The Judge proceeds with the examination of the facts admitted in the respondent's factum.]

Is it humanly possible to arrive at another conclusion in face of all that, namely that Fortin is only a nominal party and that the real complainant against the appellant is the Board of Governors

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itself?

If, moreover, there was any possible doubt on this point, what reasonable man can, under the circumstances before us, deny that the Board of Governors is the instigator of the proceedings against Maillet?

Can one be anything else than the instigator of proceedings when he decides that they shall be taken, and that, not having evidence therefor, he employs spotters to get it; that he thus procures written evidence, and when he has obtained such evidence, he delegates to three members of his own Board—members who are Judges in the litigation about to commence—the curious and extraordinary mission of laying complaints.

These three Judges lend themselves to all this, but their intuition—upon which they are to be congratulated—tells them that their colleagues, the other Judges, should certainly not be present when the complaint is drawn up; they go into the adjoining room. Fortunately they had an adjoining room, otherwise they would have had to go elsewhere, and the other Judges would have had to wait a longer time until their colleagues returned. I ask what the other Judges could, indeed, have thought, done and said while in the adjoining room, three of their colleagues so worked in their absence and without their knowledge. Happily their curiosity was quickly satisfied, since, returning from the adjoining room—a room which evidently does not keep its secrets—the other Judges could, after all, take knowledge of what happened behind their backs.

I admit that it is difficult for me to understand, in face of all that how anyone can seriously urge before us that some members of the Board of Governors were not instigators of the complaint against Dr. Maillet. They were so just as certainly and as clearly as sunlight at noon. Now, I presume that, among all civilized peoples, it is now admitted that the instigators of proceedings cannot claim to sit in that very case, and dream for a single moment of being themselves the Judges.

If the members of the Board of Governors had taken the precaution of reading their charter again, it would have sufficed to prove to them that the important power entrusted to them of judging their colleagues ceased to have the nobility which is necessary for it, if they constituted themselves an actual Court of inquisition.

We have here dentists who administer the affairs of the corporation, and who, at the same time, are the Judges of the professional honour of its members. Three of their colleagues are going to be

dragged before them and perhaps disgraced, and these three Judges descend from the Bench to become their accusers. If there had been eleven dentists accused, as were Doctors Maillet, Robert and Masson, the eleven Judges would have taken one each, and the only difference would have been that there would have been no need of the small adjoining room in which to draw up the complaints.

Is that what the dentists' charter means? I have already mentioned art. 5054, R.S.Q. (1909), which requires a previous complaint in writing. In this case there is none, and, moreover must not such complaint in writing be made by another than one of those who will be called to decide upon it. Art. 5054 is sufficiently convincing on that point.

Dr. Fortin and his colleagues have, in my opinion, committed a fundamental error. In short, Dr. Fortin tells us—"That he laid the complaint because it was necessary that a complaint be laid by one of the members of the Board." The dentists' charter seems to me to say absolutely the opposite. Moreover, we see a little of what the duties of the Board of Governors are in a matter similar to that with which we are concerned,—duties clearly indicated by arts. 5054, 5055 and 5056. We have already seen what art. 5054 says.

Under para. 3 of art. 5055 the Governors hear both parties. Is that possible if one of the parties is the Board itself or three of its members specially delegated to be the complainants? This same paragraph adds something very significant, for it says that it is the duty of the Board, if circumstances allow to conciliate and reconcile the parties. Does that mean that in this case the Board of Governors would have had to conciliate and reconcile itself?

Paragraph 4 of the same article says that the Board of Governors may grant or refuse permission to the complainant to proceed with his complaint. Would the Board of Governors be free to grant or refuse such permission if it brought the action itself? Para. 4 of art. 5056 says that when the proof is completed the parties are heard upon the merits of the complaint. Is that possible if one of the parties is the Board itself, or if the Board is the instigator of the proceedings?

There is still, in this respect, an element of proof in the attitude of the Governors, and particularly of their President when they sat to begin to hear the case. All the objections of the accused were unfounded, and all the claims of the prosecution were law. It will be sufficient to point out one instance. The accused was sworn in order to make use of his evidence against himself. The dentists'

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charter allows this, but with this special reservation, reproduced from our Code of Civil Procedure, that the accused might refuse to answer in a case where his answer might incriminate him. Dr. Maillet raised his objection, but the President of the tribunal persisted in ignoring it, and on five different occasions he ordered the accused to answer; and for this he did not even consult the other "Judges" who acquiesced by their silence.

There even fell from the lips of the President of the tribunal a very significant expression. The advocate employed by the Board of Governors questions Goyette,—the witness who used to extract teeth with the dentist's money, money of which Maillet paid his share like the rest—and he made him produce a newspaper which published the advertisement of the Franco-American Medical Institute. We find here the oral complaint of Dr. Larseneur, but as the complaint in writing of Dr. Fortin does not in any way refer to a non-professional advertisement, and that it is not based thereon, the accused's advocate naturally objects. What does the President do? Not only does he admit that the claim of the advocate of the accused is well founded in fact, but he adds "That is perfectly right; there is no harm in that." Then, undoubtedly seeing that he went too far in permitting evidence of an offence other than that which was alleged, he takes it back, and, expressing himself now in English, says "we just want to prove the address." This is not only to seek a pretext to admit even illegal evidence, but it constitutes an admission, "We want to prove." What is he who uses such words in an audience chamber if he is not a party to the case, who states what he wants to prove. The impartial Judge who presides does not make this formal admission, that it is he who directs the prosecution and who is the real prosecutor.

Who are the "we" if it is not the Judge himself and his Governors—the Judges in the case? And these other Judges—there are ten of them—they say nothing; not one among them protests against this word, which evidently appears to them—under the circumstances—quite natural.

Shew us a Judge, worthy of the name hearing a worthless complaint, because oral only summoning an advocate, giving him money to hire detectives in order that these detectives may find evidence for him which would justify a written complaint, and, when such evidence is found to the satisfaction of such Judge, charging one of his colleagues to become plaintiff, and himself going to hear and decide the case with his colleagues who have been his coadjutors in

all this. Thus it was under the Terror, Fouquier, Tinville, the famous procurer for the guillotine, but, in Canada, a Judge who so acted would be brought before the Senate by impeachment.

Moreover, let us look at another aspect of the question and let us put this other elementary question: If a Judge has not carried on the suit, if he has known outside of the Court only the facts which are going to be proved before him, and if he has formed his opinion on these facts, will such Judge sit? To put this question is to supply the answer. Now in this case, the advocate who employed the detectives makes his report; he shews to these Judges the evidence so obtained, and that at the time there was not the previous indispensable and necessary written complaint, and these Judges delegate three of themselves to make three complaints. It is then that they are convinced that the complaint will be upheld; three of them will descend from the Bench to state, under oath, that it is well founded and two of them will then remount the Bench to hear and decide the case.

If, generally speaking, there could be any doubt on this point, if, for example, it could be said that all that is *prima facie*, and that the Judges will change their opinion when they cease to be the prosecutors in order to become the Judges. Such doubt would quickly disappear in the present case in the light of two important facts. The advocate employed by the Board of Governors has frankly admitted under oath, that he had advised his clients—the Board of Governors—that this practice of Maillet was illegal. It was upon that advice that the Governors acted, and who is it that urges upon us the oral argument? The same advocate tells us that Maillet has, from the commencement of the proceedings, persisted in this illegality and that his conduct is a defiance of the Board of Governors, which is significant:—he was interrupted to be told that such evidence is not on the record, and his answer then was that the matter is one of common knowledge.

We therefore have the Governors—for they speak through their attorney—telling us that their opinion is formed, that what Maillet did is illegal, and that he defies their authority, etc. I honestly think that the appellant is condemned beforehand.

I want to be clearly understood: I do not think that the Governors were guilty of bad faith. They may be and probably are, animated with the best intentions. I will go farther—and it is right that I should say it—they probably have a sincere desire to punish and to prevent anything which they consider to be derogatory to the

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honour of the profession of which they are the guardians,—which is very laudable. But this desire carries them too far, and incites in them an absolutely erroneous and regrettable conception of their position ,their rights and their duties; they think that they can be—at the same time and at once,—crown counsel, public prosecutor, and Judge, a body of public prosecutors and a judicial magistracy. This is their error, and it saps at its base the intangible principle of impartial justice.

There is another fact to underline; when the Governors in presence of their advocate, appointed Fortin, Dohan and Kent to be the accusers, this same advocate became automatically the advocate of the latter without ceasing to be the advocate of the Board. It is evidently understood then that, as the Board and the accuser were one, this question was entirely settled without any discussion.

I, therefore, come to the conclusion that the Board of Governors could not try the complaint; that, in view of their attitude and their active participation in carrying on the proceedings it was out of the question for them to think of deciding upon this complaint, and, consequently, they were absolutely incompetent.

A solution is proposed, or rather a remedy is suggested to us: The judgment of the Board of Governors being subject to appeal the appellant might, it is said, protect himself in this way. That is as good as saying, if I do not deceive myself, that the accused can be left to the mercy of a prejudiced tribunal, because the judgment of this tribunal being appealable, the injustice can be remedied after it has been committed.

I do not think that a similar suggestion merits being discussed at length so I will dispose of it briefly. I prefer, for my part, to prevent the evil rather than delude myself with the hope that it will perhaps be cured. An ounce of prevention is better than a pound of cure. When the applicant has been disgraced, he will extricate himself as best he can. Has he not an appeal? But if the applicant prefers not to run all the very considerable risks of a first disgrace, is it not his right?

Whatever may be the opinion of the members of this Court as to all the foregoing, there is in any case a point upon which we are unanimous; we all consider that, in view of the precisely similar complaint laid by Doctors Dohan and Kent aginst Doctors Masson and Robert, the presence of these two gentlemen as members of the Board to judge the similar case of Fortin against Maillet disqualifies the whole Court. The Board of Governors does not admit this. See

what it tells us, on this point, in its factum (p. 4):—"The legal adviser of the college gave the members of the Board of Governors to understand that those members of the Board who also laid complaints could not sit as members of the tribunal which should hear the case in which they were complainants."

Explaining further to the Court, the Board of Governors told us then that Drs. Dohan and Kent could sit to try Robert, and that Dr. Dohan and Dr. Fortin could sit to try Masson. This was also the position taken by the defendant in his plea, as we shall see later on.

Nevertheless Drs. Dohan and Robert have a complaint drawn up literally word for word the same as that of Dr. Fortin against Maillet.

They have, therefore, a similar proceeding pending before the same tribunal, and, yet, these members of the Board of Governors find that these two other complainants with like complaints, in my humble opinion disqualifies them. In short, if, as I stated above, there were 11 accused and that each of the members of the Board of Governors should have taken one under his charge, there would always be 10 Judges having similar cases which they would have been called upon to judge, mutually, one after the other. Not only have Drs. Dohan and Kent—like the others also— formed their opinion, but they have, in addition, given it under oath and yet they sit to try the case.

The case had to come before us in order to declare that it is time to attempt to make it clear to the Board of Governors and to Messrs. Fortin, Dohan and Kent that complainants in similar cases cannot sit as Judges, for the Judge of first instance does not appear to have seen any objection to it, and,—into the bargain,—the attorney for the governors, who supports the first judgment, maintains before us that they can sit.

If we confirm the existing judgment without settling this point, these gentlemen will sit, unless, however, they begin to see the light which is now, for the first time, suggested to them upon this point, but in order that this can take place, the present appeal was necessary, without which these "Judges" would have sat like the others. From this point of view alone, the appeal was therefore necessary; it was the only possible protection.

There remains a last question which arises from an incident in the Court. One of our colleagues asked whether—seeing that it was a question of capacity or jurisdiction,—the lack of jurisdiction had been raised before the Board of Governors. And then the defendant,

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who saw his ship sinking, adopted with alacrity this ground which was not alleged or suggested in his plea, which does not appear to have been in question in the Superior Court, and of which, in any case, the factum before us does not say a word. And observe that the action is put in a different position from what it had occupied up to that time. Let us look at it under this new aspect. It seems to me indubitable that the want of jurisdiction *ratione personae* should be set up when it is known and that principles as well as jurisprudence are to the effect that such want of jurisdiction should be set up before the pronouncing of judgment on the merits. If, on the other hand, the want of jurisdiction is *ratione materiae* it is never too late to set it up, since Judges are bound to state it of their own accord, even when it is not pleaded.

Here, at first sight, the want of competence is *ratione materiae*. But, if it is true that the Board of Governors is the instigator of the proceedings, that it is the real plaintiff hidden behind the nominal one, I ask if it would not be proper for the Judges to order that a thing like this should be prevented, even when it was not set up *in limine*.

"If they have done that," says Allard, J., "there would be abuse of power on their part, an arbitrary and unjust exercise of their powers in persisting in making themselves the Judges of a complaint of which they were the authors and instigators."

Can the highest Court of the Province,—whose judgment is here, without appeal, since the Supreme Court (except on a constitutional question) declares itself to be incompetent upon a writ of prohibition—permit this? I put this question which appears to me to be important, but I do not discuss it—as it would have only an academic interest,—in view of the conclusion I arrive at.

I think that in this case the question of jurisdiction was raised, 1. *In limine;* 2.As soon as it was possible to do so. 3. By the only procedure which could be an efficacious and appropriate remedy.

The defendants' judgment on the merits is not rendered; the appellant was unaware of all that it contained; it is the beginning of the enquiry which took place that made it known to him and immediately he sets up this ground. He is, therefore, *in limine,* and he is not late. He might, perhaps, have filed his exception to the jurisdiction before the Board of Governors, but it might be said what good would it do? We can see, without a great effort of imagination the smile or the shrug of the shoulders with which this plea would have been received. It would, therefore, have been a mere form-

ality.

Moreover was not the question of want of jurisdiction submitted to the Board of Governors? To set it up by his application for the writ of prohibition served upon the defendant, was it not to submit it for the consideration of the defendant? And they have considered it, since they met together, and deciding, *ex parte* that they had jurisdiction.—without even hearing the appellant,—they decided to defend. They could then say to the appellant: Do not present your application, we admit the want of jurisdiction. They go too far; they instruct their attorney to come and tell us that they have jurisdiction. They have, therefore, themselves decided that they had jurisdiction.

The defendants have done more; it was suggested to them here —in the Court of Appeal—that, in every case it is indubitable that the presence of Drs. Dohan and Kent disqualifies the tribunal; they maintain this opinion before us. What would they have decided on this point? And should they not, at least, when the application was served on them, state, either before the litigation or, at least, in their plea, that they had undertaken that the other two appellant accusers would not sit as Judges on the contrary, what do they do? Paragraph 16 of the particulars of the application reads as follows:— "That other complaints of the same nature have been laid against other members of the corporation of the College of Dental Surgeons of the Province of Quebec, by various members composing the Board of Governors who, by this fact alone, are prejudiced against your petitioner."

Instead of admitting this true and undeniable fact, and of offering to remedy it, the defendant denies it in the seventh paragraph of his plea, and in para. 14 he alleges that the applicants' proceedings are vexatious and only made for the purpose of delaying the hearing of the complaint. This is the judgment of the Governors upon the question of jurisdiction.

It is, moreover, in order that the Court *a quo* may have an opportunity to pronounce upon the question of jurisdiction that some authors tell us that the question should be raised before them. Here the Governors have had the advantage and the opportunity of pronouncing upon it, and they have done so. There was, therefore, no possible remedy more appropriate and efficacious than the writ of prohibition, and, consequently, I am of the opinion that this writ should be maintained.

LAMOTHE, C. J. (dissenting):—I would confirm the judgment

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refusing the application for prohibition. My reasons are as follows:—

1. The application is directed against "The Board of Governors" the organization constituting the disciplinary council of the dental profession. The dental corporation itself, "The College of Dental Surgeons of the Province of Quebec," was added as a party to the action. The members of the Board of Governors are not parties, except the complainant Fortin. The Court is asked to prevent the Board of Governors from taking over a complaint accusing the appellant of having committed an act derogatory to the professional honour. The application for prohibition is based on two grounds: (a) The Board of Governors has not jurisdiction in the matter; (b) the members of this Board are liable to challenge *(récusables)*.

The first reason, if well founded, would subvert the authority of the Board of Governors in a like case. With so radical an allegation, the proceedings were properly directed against "The Board of Governors." The decision of this Court, upon the former appeal [Maillet v. Board of Governors, 27 Que. K.B. 364] proves this.

2. It is not so as to the second reason. The recusation (challenge) of the Judges should be individual and personal. Judges cannot be recused by proceedings directed against a body or against a corporation. Every Judge has a right to give his explanations; he can admit the facts charged against him and cease to sit; or he can deny them, extenuate the circumstance, etc., and an enquiry is then made upon such facts. In the present proceedings, the members of the Board of Governors are not added individually as parties; they are not called upon to justify themselves. The facts cannot be the same in each case; a portion of the facts complained of would have occurred outside of the regular meetings of the Board of Governors. Who was present? Was the Board complete? No light has been shed on this. At the meeting on May 31st when the Board decided to go on with the complaint against the appellant, the Board was composed of seven members and not of eleven, for example.

3. What happened in regular meeting is not sufficient in my opinion, to constitute a valid case of recusation. The members of the Board have stated "that there was a matter for litigation": they did not pronounce upon the truth of the facts charged against the appellant. Advertisements contrary to the rules of the dental profession were notoriously published at Montreal; an incorporated company invited the public, they say, to go to its parlors for operations which exclusively concerned the dental profession. Dentists

ought, of course, to assist this company. Who were these dentists? There were rumors but rumors are not *prima facie* proof. Although upon the complaint of Dr. Larseneur giving notice of the notorious breach of the by-laws, without being able to point out positively the guilty persons, the Board of Governors had given instructions to its attorney to ascertain what dentists were operating in the company's parlors. This fact does not imply that those hereafter accused ought to be condemned. That this attorney had had recourse to spotters or informers ought not to cause surprise; in such a case exact information could not be obtained otherwise. If the Council of the Bar, for example, sees that an incorporated company does things which concern the advocates' profession, it can give instructions to its Syndic to ascertain, by means of detectives or otherwise what person conceals himself under the name of the company; and, after having obtained sufficient preliminary information, the council of the Bar can give instructions to the Syndic to lay a complaint before it,—without, thereby, jeopardizing its impartiality. To prevent the disciplinary council using these means while charging it with seeing that professional rules are respected, would be to create an illogical situation, and would render its action ineffectual and impossible in a great many cases. The disciplinary councils have administrative functions, judicial functions or quasi-judicial; each category is as important as the other. The Legislature has so constituted them. It is not necessary that the exercise of judicial functions prevents or embarasses the exercise of administrative functions.

The Board of Governors, after this police information, found that there was matter for litigation, and it caused a complaint to be laid in order that the enquiry should be brought on, in order, as Dr. Fortin says, to see the bottom of the affair. To conclude therefrom that all the members of the Board of Governors had already formed judgment against the accused, is going too far. This would be to condemn the method followed by the disciplinary councils of all the professions. These councils are charged with making the by-laws respected; where there is a notorious breach it is their duty to enquire into the circumstances, and bring before them the member who is under suspicion. Again, that does not mean that such member will be found guilty; the sentence will depend upon the proof, and each of the members of the council reserves his freedom of judgment. The same thing takes place in the Courts of Correction and in the Criminal Courts. A police magistrate, after having heard the

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evidence on the charge, will decide whether there is sufficient *prima facie* proof, and he will order the accused to undergo his trial. Then the same magistrate, acting as Judge of Sessions, will next hear the full evidence and will liberate the accused if such evidence is not conclusive. Should such Judge of Sessions be recusable? To answer affirmatively would be to deny the entire difference that there is between the fact of finding that there are *prima facie* reasons sufficient to receive a complaint and to hold an enquiry upon such complaint,—otherwise called finding "the matter for litigation"—and the fact of deciding upon such complaint upon the merits: this would be the equivalent of confounding upon an indictment the finding of the Grand Jury, which decides nothing, with the verdict of the Petit Jury which decides nothing.

After admitting each of the facts charged against the Board of Governors, and after considering these facts collectively, I cannot find in them a sufficient reason for recusation of the whole Board of Governors or of each of the Judges composing this Board.

4. The case is different with regard to two members of the Board. Dr. Dohan and Dr. Kent had each laid a complaint of the same nature against two other dentists. It is possible that, at the time of the evidence, the facts concerning these two dentists appeared in a very different light. The evidence against them might be of no value; it might be founded upon a series of facts which were not identical. But, *prima facie* under the circumstances, I am of opinion that these two members of the Board are recusable. They ought to have abstained from sitting, in my opinion, although the question is not void of some doubt. But these two Judges should be recused.

5. It is common law that the recusation of one or more Judges should be made before the tribunal of which they form part. Each of the accused should be given a reasonable time to answer the charge. If they admit the facts charged, they should withdraw, and then the cause of complaint disappears without proceedings. If they persist in sitting, the defendant is not deprived of a remedy. After such persistance is shewn, he can, according to circumstances, apply to the Courts. In the present case, there was no recusation *in limine;* Drs. Dohan and Kent have not had an opportunity to explain, they could neither admit nor deny the facts. On the writ of prohibition, they were not parties to the case, and, consequently, there was neither denial nor admission on their part, and the Court is asked to pronounce their recusation without hearing them. As I

have said above, it is the Board of Governors and the College of Dental Surgeons who are before the Court; these two bodies have no authority to speak in the name of each of these Judges separately and individually. What would be the answer of Dr. Dohan and Dr. Kent? Our rules of procedure do not allow us either to suppose or to presume.

6. Nor must we lose sight of this, that the plaintiff, on a complaint laid against him has a right of appeal to the general meeting of dentists, and that he has besides, recourse to the regular Courts. As a general rule, such right of appeal prevents the remedy by writ of prohibition. This is a settled principle and also law. In the present case, the appeal would be a suitable remedy. The writ of prohibition is an exceptional proceeding. One appeals when the law does not offer any other remedy. The costs upon such a writ are considerable.

The present application cannot be considered as constituting a recusation *in limine*. Besides, one cannot ask that the members of the Board of Governors be recused. The effect of the decision is to prevent the Board of Governors from taking cognizance of the complaint, and not to prevent one or more Judges from sitting. Even if the writ of prohibition is granted, there will not be *res judicata* upon the reasons for recusation, because the recused are not parties to the case, and because no decision is given against them.

7. The Board of Governors is elective; and frequently changes. Since the filing of the complaint against the appellant, this Board has become changed by election. What are the old members who have been re-elected? We know nothing about it. Could we make a permanent prohibition order against the Board of Governors as a body? No. This Board has jurisdiction *ratione materiae*. Can we point out, by individual name, who the persons are who could never sit upon the complaint submitted? No. It seems to me impossible to make distinctions or to give a direction on this subject.

8. In the case of *Lapointe v. L'Association de Bienfaisance et de Retraite de la police de Montreal*, [1906] A. C. 535, 16 Que. K.B. 38 the Privy Council declared void an enquiry made *ex parte*, without Lapointe being summoned and heard. Then, stating that the Board of Directors had pronounced upon the merits of the complaints or charges made against Lapointe, it ordered that the enquiry should be recommenced in a proper manner before persons chosen by the Superior Court, or under the control of that Court. His Majesty's Privy Council has powers which we have not. It is a Court of

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equity as much as a Court of law. The Courts of the Province of Quebec are Courts of law governed by rules of procedure which are more fixed and less elastic. Our Courts are never allowed to go outside of agreements made by the parties, in other words to decide *ultra petita*, or in still other terms, to grant something which is not asked for. If a Court should permit a derogation in this respect, its judgment might be set aside by a petition in revocation of judgment [*requête civile* C.C.P. Que. art. 1177 (31, 1177 (4)]

In the above case of *Lapointe* v. *L'Association de Bienfaisance, etc.* [1906] A.C. 535, 16 Que. K.B. 38, the Privy Council, speaking by Lord Macnaghten, admitted that the Board of Directors would have had the right to obtain information *ex parte* by naming a committee for such purpose; but it could not admit that Lapointe might be tried without being heard. That is common law. But an order that complaints be decided by a Board other than that designated by law is not common law; such an order goes outside of the ordinary rules. The Privy Council could make it. The Court of Appeal is governed by other rules and has not the same power.

The Privy Council as well as the House of Lords interpret and apply an unwritten common law—common law in which precedents as well as traditions and customs play a preponderating part. This common law, with the uses which accompany it, is not in force in the Province of Quebec; it is applied in all the other Provinces of the Dominion. Our system of law and our rules of procedure are copied from those existing in France and in other countries with statute law. Our Courts have less discretionary power, but pleaders are more sheltered from judicial surprises. The two systems have their advantages and disadvantages; they cannot exist together. The Legislature has made its choice; it had to do it. Strict rules of procedure regulate the action of the Courts,—as in France and other countries having statute law. It is our law; we must apply it just as it is,—leaving to other Courts differently organized to exercise more ample discretionary powers and even quasi-legislative powers.

My remarks bear largely upon the procedure followed. I express no opinion upon the complaint laid against the appellant. This complaint may be entirely unfounded, but it is the disciplinary tribunal constituted by law which should pronounce thereon, subject to subsequent appeal.

It remains for me to add that I admit that a member of the Board of Governors, like any other member of the dental profession has the right to lay a complaint against a fellow member. This right

is inherent in the capacity of a regular member of the College of Dental Surgeons of the Province of Quebec. By becoming a "governor" or "director" a member does not lose these rights.

MARTIN J. (dissenting):—Two points were pressed for our consideration: first, that the entire Board of Governors was incompetent to sit and hear and adjudge the complaint against appellant by reason of bias, and that they were exercising their power in an arbitrary and unjust manner, and that they were the real authors and instigators of the proceedings.

The second point urged before us was that Drs. Kent and Dohan, two of the members of the Board who sat to consider the complaint, were disqualified because they had actions pending involving question similar to the one under consideration. C.C.P. Que. art. 237 (2).

With respect to the objections made to the incompetency of the entire Board, I would say it appears to me that the Board was competent to consider this complaint. It is a tribunal given specific statutory authority to hear and decide upon complaints of this character and I do not find in the record any evidence to support the allegation that the members of that Board had prejudiced the case or that they were acting in an arbitrary or unjust manner or that they were the real authors and instigators of this prosecution.

The Board of Governors was entitled to consider complaints for breaches of discipline. It could not consider and determine a complaint of a complainant without hearing the defendant or affording the latter an opportunity of being heard after due notice.

I think it was quite within the province of the Board when any question reflecting on the professional conduct of a confrère was brought to their attention, that they should, before proceeding with the formal complaint, investigate the matter and ascertain if there was a *prima facie* case for enquiry. Now, that is all that they did in this case, and as their Lordships in the Privy Council remarked in the *Lapointe case*. [*Lapointe* v. *Montreal Police Benefit Association* [1906] A.C. 535 at p. 598, 16 Que. K.B. 38 at p. 40]:—

"They first appointed a committee of four from their own body to investigate the reason of Lapointe's resignation. There would have been no objection to this course, if the committee had been deputed to consider and report, whether or not there was a *prima facie* case for enquiry."

Of course, in the *Lapointe* case, the Court criticized the action of the committee in condemning Lapointe without hearing him or

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giving him an opportunity of being heard, but it does not appear to Their Lordships that if the committee had enquired into the question whether or not there was a *prima facie* case for enquiry, that such committee or the Board of Directors of the Association would have been thereby disqualified from considering the complaint on its merits after notification to Lapointe.

It would appear from an examination of the record of proceedings before them that every opportunity and latitude was being afforded the appellant to make full defence to the charge made against him. The mere suspicion that the Board of Governors would not, by reason of their professional interest, decide impartially, is not sufficient. To hold otherwise would be to criticize the wisdom of the Legislature in creating such special tribunal to hear and decide complaints similar to the one under consideration.

I do not find any proof of partiality or unfairness on the part of the Board in considering the complaint in question such as might cast suspicion upon the honour and impartiality of its members.

I agree with the trial Judge that the fact that the College and its attorney employed detectives to obtain evidence in support of the charge, is not sufficient to disqualify the whole Board and if the writ of prohibition is maintained against the Board of Governors, it would be equivalent to putting an end to all enquiries of a like nature and character and render the main object of the statute of incorporation nugatory and inaffective.

The objection to the presence at the enquiry of Drs. Dohan and Kent by reason of their interest in other proceedings of a like character, is more serious, and if such objection had been made before the inferior tribunal when it was established by the record of proceedings that the same existed, and if these two gentlemen had persisted in forming part of the Board to consider and pass upon the complaint, I should hold that a writ of prohibition would lie.

Does the failure to invoke this want of jurisdiction before the inferior tribunal prevent the appellant from applying to the Superior Court for a writ of prohibition? If want of jurisdiction appears on the face of the proceedings, prohibition will lie without first making objection before the inferior tribunal.

If the objection is of the nature of a recusation and incapacity to sit resulting from such grounds of recusation, I think it was the duty of the appellant to invoke these grounds *in limine*. High, Extraordinary Legal Remedies, pp. 708-709 sec. 765, says with reference to prohibition: "Being an extraordinary remedy, however, it

issues only in cases of extreme necessity, and before it will be granted it must appear that the party aggrieved has applied in vain to the inferior tribunal for relief."

See High No. 773, Cyc, Vol. 32 Verbo Prohibition, pp. 602, 607, 610, 612, 624.

In the case of *Havemeyer* v. *Superior Court of the City and County of San Francisco* (1890), 84 Cal. 327 at page 391, the Court said:

"Great reliance is placed by counsel for the respondent upon the decisions of this Court, such as *Chester* v. *Colby* (1877), 52 Cal. 516 at p. 517 and *S. P. R. R. Co.* v. *Superior Court* (1881), 59 Cal. 471 at p. 476, to the effect that when an inferior Court or tribunal is proceeding or threatening to proceed, in excess of its jurisdiction, the objection to its want of jurisdiction must be first submitted to such inferior Court or tribunal, and by it overruled, before resort is had to a higher Court for a writ of prohibition; and, undoubtedly, such is the established rule of practice in this state."

The jurisprudence in our Courts uniformly supports this view: In the case of *Hogle* v. *Rockwell* et al, and *Galer* (1893), 20 Que. S.C. 309, Lynch J. held in 1898, as follows:—"The reasons invoked to demand the Writ of Prohibition based on the excess of jurisdiction of the Inferior Court, should have been raised before the latter."

In the case of *Montreal Street Railway Co. and City of Montreal*, 18 Rev. Leg. 450 at p. 451, the Court of Appeal held in 1889: "That a writ of prohibition only lies for want of jurisdiction and when such want was set up before the lower Court."

It was held by Loranger J. in the case of *Prevost* v. *De Montigney* (1893), 3 Que. S.C. 429 at p. 430: "That, however, recourse to a writ of prohibition can only be had if the applicant had objected before the magistrate to the latter's jurisdiction."

See *Demers* v. *City of Montreal* (1912), 16 Que. P.R. 89; *Simard* v. *The Corporation of the County of Montmorency*, (1877), 4 Q.L.R. 208; *Gaumond & Magistrate's Court of the City of Montreal* (1888), 4 M.L.R. S.C. 444; *Champagne* v. *Simard* (1895), 7 Que. S.C. 40, where it was held by the Court of Review at Quebec that a preliminary plea declining the jurisdiction of the inferior tribunal was necessary before the issue of a writ of prohibition.

In a case decided by this Court in 1915, *Therrien* v. *Mercier*, etc. 24 Que. K.B. 352, Lavergne, J. speaking for the majority of the members of the Court, said at p. 358: "But if there was excess of jurisdiction on its part such excess of jurisdiction ought to have

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been urged *in limine*, and in any event, before the enquiry was ended and the case taken into deliberation. This is the effect of the authorities under art. 1003 of the Code of Procedure. In order to be concise, I refer to the law cited in Beullac under this article."

It appears to be conclusively established by all these authorities and particularly by the citations from Cyc., that the disqualification of a Judge or member of an inferior tribunal amounts to want of jurisdiction and that such objection or recusation should have been made before the inferior tribunal.

The appeal should be dismissed, subject to a change in the considerants of the judgment of the Superior Court.

The formal judgment of the Court of Appeal was entered as follows:

Judgment. Considering that by arts. 5030 et seq. of R. S. Q. 1909, the dentists of this Province are incorporated under the name of "The College of Dental Surgeons of the Province of Quebec."

Considering that the affairs of the said college are administered by a Board called the Board of Governors (art. 5031), that this Board consists of 11 members (art. 5032), that the quorum of this Board is 6 members (art. 5040):

Considering that by arts. 5054 et seq. the said Board of Governors was invested with additional power to bring before it any member of the college charged with violations of the by-laws or of having done any act derogatory to the professional honour:

Considering that the functions of the Governors as administrators are absolutely distinct and different from the additional functions which they are thus called upon to exercise as a tribunal to judge a member of the corporation:

Considering that in exercising the powers of sitting as a Court, the Board of Governors is compelled to observe all the rules of law, with dignity and impartiality, and that the Governors cannot be at the same time prosecutors and that they cannot exercise such judicial functions if they are prejudiced or if their opinion is formed beforehand upon a point that they are going to be appealed to for decision:

Considering that it is clearly proved in this case, by the admissions of the defendant Joseph Hilaire Fortin before and during the enquiry in the proceedings, by the evidence of the witnesses J. A. Desilets and J. A. Goyotte, filed against the appellant; that it appears also by the very factum of the defendants produced before us

and by the wording of the documents on the record: (a) that a verbal complaint having been made against the appellant by Dr. Larseneur, a complaint upon which the Board of Governors could not take action, the Board took the initiative of "making a case" against the appellant; that it employed detectives to find evidence against him; that it paid these detectives out of the money of the corporation; that these detectives made a report to it and brought evidence for conviction; (b) that, furnished with this report of the detectives and the evidence which accompanied it, the Board of Governors sitting with its legal adviser came to the conclusion that a complaint would lie against the defendant, and that it delegated three of its members to lay complaints against three dentists, and that, in particular, the party added, Fortin, was delegated by the Board to become the complainant, against the appellant; (c) that the Board then stopped its meeting, and that three members of the Board delegated by the latter to become the accusers retired to an adjoining room, that they drew up the complaints, and, in particular, that of the party added, Fortin, against the appellant; that they then returned to take their places as members of the Board; that they administered the oath to their respective plaintiffs, and that the Board then ordered the prosecution of the appellant; (d) that the Board of Governors began to hear the case, but that, as it was composed at that moment, there would not have been a quorum if the two other members of the Board who had laid and sworn to complaints against two other dentists, complaints absolutely similar to those brought by Fortin against the appellants, had not sat as members of the tribunal: (e) that it appears from the proceedings from the beginning of the hearing of the case, from what occurred on June 19th and the entire record, that the opinion of the members of the Board who were present was formed beforehand: that they were of the opinion, in accordance with the advice of their legal adviser, that the appellant was guilty and that likewise two of the pretended Judges, who helped to form the quorum, had stated, under oath, that they believed to be guilty two others of the accused against whom the same complaint was laid:

Considering that, in view of this evidence and these facts, the Board of Governors and its members were the real accusers of the appellant; that the defendant, Fortin, was only their mandatory and their representative; that they were the instigators of the complaint which was organized and prepared by them with the money of the corporation of dentists disbursed for this purpose:

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Considering that it is repugnant to all rules of law that any tribunal whatsoever may of itself or by its attorney, be plaintiff in a case or, in any case, instigator of the proceedings which it is going to be called upon to decide:

Considering that all the members of the Board of Governors, instead of sitting as they pretended to do, ought all to excuse themselves without waiting until asked to do so, but that on the contrary, having persisted in sitting with two of their colleagues who were, at their request, complainants in identical cases, they have thereby still more fully shewn that they could not impartially judge the complaint which was before them, and which was there because they were constituted first as a tribunal for inquiry:

Considering that the party added, Fortin, being a member of the Board of Governors, could not be complainant against the appellants:

Considering that, in view of all these circumstances and facts, the Board of Governors not only exceeded its jurisdiction but was without any jurisdiction whatsoever to try the alleged complaint laid against the appellant:

Considering that the appeal permitted from the decision of the Board of Governors, whether to a general meeting of the dentists or to the Superior Court, is not—in the circumstances and in itself,—an appropriate, efficacious and sufficient remedy, seeing that it is the right of a party to an action that his first Judges—even if their decision is appealable—should not be a prejudiced tribunal:

Considering that the Board of Governors ought, under the circumstances, to have divested themselves of the case, before their want of jurisdiction was pleaded, since the want of jurisdiction was so evident and so complete:

Considering moreover, that the want of jurisdiction was set up before and in the course of the enquiry and before the Board had given a decision upon the merits, and that when the particulars of the application *(requête libellée)* in this case were served upon it, it ought to have acknowledged and admitted the want of jurisdiction which was so clearly set up and in sufficient time; considering accordingly that the particularized application in this case is and was well founded:

The Court sets aside the said judgment of June 4th, 1918, and proceeding to render the judgment that the Superior Court ought to have rendered, the prayers of the said application are granted; it is ordered that peremptory writ do issue interdicting the defend-

ant, the Board of Governors, as constituted on May 31st and June 19th from proceeding in the case against the appellant upon the complaint of the added party Fortin, and to abstain from all further proceedings in the said case, and the College of Dental Surgeons of the Province of Quebec is ordered to pay all the costs, both in the Superior Court and in appeal.

Peremptory writ of prohibition ordered.

REX v. KEIR.

Nova Scotia Supreme Court, Harris, C. J., Russell J., Ritchie, E. J., Chisholm and Mellish, JJ., May 2, 1919.

Indecency (§1—5)—Indecent Exposure—Visibility from Place to which Public Have Access—Private Property—Cr. Code Sec. 205.

Indecent exposure of the person made wilfully in sight of persons on the street is an offence under Cr. Code sec. 205 although the accused was upon adjoining private property at the time.

CASE STATED by a justice under Cr. Code sec. 761.

Defendant was tried and convicted by George H. Fielding, Esq., Stipendiary Magistrate of the city of Halifax, on a charge of having on the 13th day of August 1918, in the presence of certain persons, committed an indecent act (exposure of the person) "in a place to which the public have or are permitted to have access." The place where the act was committed is described in the judgments.

The following questions were stated for the opinion of the Court:—1. Is there evidence that the place in question was a place to which the public have, or are permitted to have access?

2. Should I have convicted the accused?

James Terrell, K.C., for the prisoner.

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

HARRIS, C. J.:—The stipendiary magistrate for the City of Halifax has convicted the accused of having in the presence of certain persons committed an indecent act in a place to which the public have or are permitted to have access.

The facts were that the prisoner exposed his person in a private road leading to a garage, the gate between the street and the road being 22 feet wide and open at the time. He could have been seen by anyone passing along the street, and was seen by several young girls on the street or sidewalk near the gate who were less

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than fifty feet away from the prisoner.

Section 205 of the Criminal Code, R.S.C. 1906, ch. 146, reads as follows:—"Everyone is guilty of an offence and liable on summary conviction before two justices to a fine of fifty dollars, or to six months' imprisonment, with, or without hard labour, or to both fine and imprisonment, who wilfully: In the presence of one or more persons does any indecent act in any place to which the public have or are permitted to have access, or does any indecent act in any place intending thereby to insult or offend any person."

Section 197 reads thus: "In this Part unless the context otherwise requires—(c) 'public place' includes any open place to which the public have or are permitted to have access and any place of public resort."

The contention is that the place where the prisoner was, being private grounds to which the public have not access, there is no offence within the Act. If this contention is sound it follows that a man can commit any indecency upon his own property within a few feet of the street and within plain view of the public and not come within the provisions of the Act. This contention cannot be upheld. The well known declaration of Lord Campbell, C.J., in a similar case, *Reg.* v. *Holmes* (1852), 6 Cox C.C. 216 at pp. 217-218, seems apt. He said:—It would be a reproach to the law if this indictment was held not to disclose an offence . . . This would not be a country to live in if such an abominable outrage could go unpunished."

Even if we approach the consideration of the section of the Code in question in the way suggested by Lord Herschell, L.C., I think we must arrive at the conclusion that the offence is covered by the Act. We must in the end apply the well known rules of construction (Chalmers Bills of Exchange 8th ed. pp. 173-4, para. 47, Russell on Bills 5.)

One finds that the point raised in this case has been taken before and on every consideration of it the Courts have reached the conclusion that the publicity contemplated has reference to the persons who may witness the act rather than to locality, and that a place has always been held to be public if it is so situated that it can be seen by the public or any considerable number.

In *Reg.* v. *Thallman* (1863), 9 Cox C.C. 388, at p. 390, Erle, C. J., in giving the judgment of the Court, said:

"We are all clearly of the opinion that in order to be liable to an indictment for indecently exposing the person, it is not neces-

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sary that the man should stand and expose his person in a public highway. If it is in a place where a number of the Queen's subjects can and do see the exposure, that is sufficient."

It was always the law that if this offence was committed in a place visible to any one passing along the streets it was punishable. *Sidley's Case* (1675), 1 Sid. 168, 82 E.R. 1036; *The Queen* v. *Wellard* (1884), 14 Q.B.D. 63 at p. 65.

These cases were not decided under an English statute differing from our Code as was suggested by counsel. Reference may also be made to *Van Houten* v. *State* (1883), 46 N.J. Law 16.

I would answer both questions reserved, in the affirmative.

MELLISH, J.:—The defendant exposed his person when in a yard in the city of Halifax so as to be clearly visible to people then present on the public street through an open gateway 22 feet wide.

I think this was an indecent act done in the street, a place to which the public have access and that the accused was properly convicted. I would therefore answer both the questions submitted in the affirmative. I think a person may do an indecent act in the street without being personally actually upon the street at the time. The gist of the offence is the exposure and if the exposure is wilful and in sight of persons then in a public place, I think it is an exposure in such place and in the presence of such persons within the meaning of sec. 205 of the Code.

RUSSELL, J., RITCHIE, E.J., and CHISHOLM, J., concurred with MELLISH, J.

Conviction affirmed.

Re BRESNIK.

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British Columbia County Court, Swanson, Co. Ct. J., August 5, 1920.

Aliens (§II—10)—Naturalization—Decision on Question of Fitness—Effect of Summary Conviction for Offence Under Indian Act R.S.C. 1906, ch. 81—Supplying Intoxicating Liquor to an Indian—Naturalization Acts 1914 and 1920, Can.

A decision establishing an alien's fitness for naturalization under the Naturalization Acts 1914 Can. 1st session, ch. 44, 1914 2nd session, ch. 7 and 1920, ch. 59 will not necessarily be refused by a county Judge because of the applicant having undergone a sentence of imprisonment of six months in default of paying a fine for supplying intoxicating liquors to an Indian.

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APPLICATION for a decision establishing Frank Bresnik's fitness for naturalization under sec. 19 of the Naturalization Act 1914 Can. as amended 1920 Can. ch. 59, sec. 4 (in force, July 1, 1920.)

SWANSON, Co. Ct. J.:—I have considered carefully the testimony adduced in this case. The applicant is a Jugo-Slav, whose attitude during the war was unobjectionable. He is apparently, like many of his countrymen, (and indeed like some of our own people) fond of drink. This resulted in his once being fined, 1919, for being drunk, and on a former occasion, in 1914, in his being charged with supplying an intoxicant to an Indian and being convicted by Police Magistrate Morgan and fined $150.00 and in default six months' imprisonment. Not having the money he suffered imprisonment. There was apparently the feeling amongst a number of the citizens at the time, that there was grave doubt of Bresnik's guilt and a petition largely signed by citizens was forwarded to the Government. It does not appear what action was taken on this petition. His record is clear otherwise. Undoubtedly he is a hard working industrious man. The report sent in by the officer of the Royal Canadian Mounted Police in the form of answers to questions in a Questionaire must be considered with care. Very often these officers are unduly impressed (or obsessed) with the fact that these applicants are technically "Alien Enemies." I do not consider this man in the class of dangerous "Alien Enemy." He is a Jugo-Slav and Jugo-Slavia is now recognized by the Allies as a friendly sovereign power. I am not in a position to review the justice or injustice of the conviction recorded against this man for supplying an intoxicant to an Indian. In any vent he has purged whatever offence he may have committed against the laws of the land by serving his sentence. That is six years ago—a sufficiently long period of probation in which to judge whether he is given to that sort of conduct and there is nothing whatever to shew that he has been guilty of such an offence again. I do not think it is a principle of British justice that a man having once committed an offence (for which he has paid the penalty awarded by law) should forever after be shut out of participation in the benefits and privileges of civilized society. That may be a principle of ethics with more or less barbarous people, but should not be one recognised by His Majesty's Judges in this year of Grace.

I am inclined therefore, to recommend this man's application to the sympathetic attention of the Honourable the Secretary of State of Canada.

Recommendation granted.

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Nova Scotia Supreme Court, Harris, C. J., Drysdale, Chisholm, and Mellish, JJ., March 15, 1918.

1. **Obstructing Peace Officer (§I—5)—Alternative Procedure of "Summary Conviction" or "Summary Trial"—Cr. Code secs. 169, 773.**

Proceedings under the Summary Convictions clauses of the Code (Part XV) may be taken against a person charged before a magistrate with obstructing a peace officer in the execution of his duty (Cr. Code sec. 169) although there is an alternative mode of procedure of summary trial under Part XVI (Cr. Code sec. 773, R.S.C. 1906, ch. 146) as to which the same magistrate was qualified to act. In such circumstances the accused has no option to elect summary trial because of the offence being punishable either on indictment or on summary conviction.

2. **Obstructing Peace Officer (§I—5)—Officer Making Search Under Nova Scotia Temperance Act 1910, ch. 26 and 1911, ch. 33—Summary Conviction—Jurisdiction of Stipendiary Magistrate.**

A stipendiary magistrate in Nova Scotia has jurisdiction in a summary conviction proceeding, to try a charge of obstructing a peace officer, who is also an inspector under the Nova Scotia Temperance Act 1910 and 1911, in the discharge of his duty under the Act, whether the proceedings are to be considered as taken under the Temperance Act 1910 (N. S.) ch. 26, sec. 29 or the Criminal Code R. S. C. 1906, ch. 146, sec. 169. (Per Longley, J.).

APPEAL from the judgment of Longley, J. refusing a writ of *certiorari* to remove into the Supreme Court a conviction made by the stipendiary magistrate of the town of Dartmouth for unlawfully interfering with a police officer and inspector under the Nova Scotia Temperance Act, while in the discharge of his duty under the Act.

The judgment appealed from was as follows:

LONGLEY, J:—This is a motion for *certiorari* in a case tried in the town Court of Dartmouth. It seems that the chief of police and inspector of the town, McKenzie, entered into the premises of the defendant to make a search and had good reason to suppose there was liquor and drinking on the premises. From the time he entered the building until the end he was obstructed by the defendant and finally set upon by both him and his brother, sufficient at all events to justify his conviction. He was convicted and fined $15. Mr. Terrell considers that he was convicted under section 29 of the Temperance Act of 1910, 10 Edw. VII (N.S.) ch. 26, and that this only applies to that part of the Act. My belief, based upon the amendment of 1911, 1 Geo. V. (N.S.), ch. 33, is that it applies to the

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whole Act and the conviction was rightly made under it.

2nd. It is claimed that section 29 is *ultra vires* and cases are quoted in support of that view. I may state that at present I cannot accept any judgments making the clause *ultra vires*. It is very similar to clauses which are embraced in various other provincial Acts, which give them the effect of punishing crime.

3rd. It was also contended that if the defendant was convicted under section 169 of the Canada Criminal Code, R.S.C. 1906, ch. 146, the conviction was wrong, as he had no opportunity to select which Court he would be tried before. I am of the opinion that there is nothing in the conviction that would make it inapplicable to either section 29 of the Temperance Act or section 169 of the Dominion Criminal Code. It may have been either. In any case I think it would have been proper to have convicted the party without any option whatsoever. I give judgment refusing the order of *certiorari*.

Jas. Terrell, K.C., in support of appeal. The conviction is bad for uncertainty. It does not appear what Act the officer was proceeding under. The act of interfering with a peace officer acting in the discharge of his duty is dealt with in the Criminal Code. Chapter 2, sec. 29 of the Acts of 1910 is therefore *ultra vires*. The inspector admits he was searching without a warrant. He was not performing his duties under the Act of 1910 but under the Act of 1911. Interfering with a police officer in the execution of his duty is a common law offence. If the offence is under the Criminal Code the magistrate could not deal with it summarily. The defendant must be put to his election. As to *ultra vires* of provincial statute, see *Re Beaulien* (1907), 12 Can. Cr. Cas, 346; *Reg.* v. *Lawrence* (1878) 43 U. C. Q. B. 164.

J. J. Power, K. C., *contra*. The conviction is sustainable either under the N. S. Temperance Act or under the Code. It is not a common law offence to do a thing that can only be done by virtue of a local act. Russell on Crimes (Can. ed.) vol. 1 p. 893. There is such a thing as a provincial crime. *R.* v. *McNutt* (1912), 10 D.L.R. 834, 47 Can. S.C.R. 259, 21 Can. Cr. Cas. 157.

The judgment of the Court was delivered by

HARRIS, C. J.:—The appeal will be dismissed with costs. This applies to both cases.

Appeal dismissed with costs.

REX v. ARMSTRONG.

MAN.

C. A.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Fullerton, and Dennistoun, JJ.A., November 29, 1920.

Intoxicating Liquors (§III I—91)—Manitoba Temperance Act, 1916, 6 Geo. V. ch. 112 sec. 49—Three Offences Charged—Conviction for One—Impossibility of Saying Which—Uncertainty—Validity.

A conviction under the Manitoba Temperance Act 6 Geo. V. 1916, ch. 112 sec. 49 which charges one of three offences and imposes a penalty for one offence, it being impossible to say which offence is intended, is bad for uncertainty and cannot be sustained.

[The King v. Salomons (1786), 1 Term. Rep. 249, 99 E. R. 1077; Regina v. Young (1884), 5 O.R. 184 (a); Rex. v. Kaplan (1920), 52 D.L.R. 596, 47 O. L. R. 110, followed.]

APPLICATION to quash a conviction made under section 49 of the Manitoba Temperance Act, 6 Geo. V. 1916 (Man.) ch. 112.

J. P. Foley, K. C., for appellant.

John Allen, K. C., for the Crown.

The judgment of the Court was delivered by

FULLERTON, J. A.:—The offense charged is stated in the conviction as follows:—"For that he, the said Alex. Armstrong, on the 3rd day of October, A. D. 1920, at the City of Portage la Prairie in Province aforesaid, did have keep or give liquor in a place other than the private dwelling house in which he resides without having first obtained a druggist's license authorizing him so to do."

The penalty adjudged "for his said offence" was the sum of $200 and $6.85 costs.

Section 49 clearly covers three distinct offences, viz., to have, to keep, to give.

Under sec. 65 the penalty for each offence is not less than $200 nor more than $1,000. The magistrate has no discretion as to reducing the fine below $200.

The main objection taken to the conviction is that it charges one of three offences, imposes a penalty for one offence and it is impossible to say what offence is intended.

Prior to the passing of 11-12 Vict. 1848 (Imp.) ch. 43, two or more offences could be charged in one information, but when the penalty imposed was in respect of one offence only it was always held that it must shew on the face of the conviction the offence in respect of which the penalty is imposed.

In *The King* v. *Salomons* (1786), 1 Term. Rep. 249, 99 E.R.

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1077, two offences were charged in the information and the conviction was for "the said offence." The Court held the conviction bad on the ground that the defendant was charged with two offences and was convicted of the said offence, so that it did not appear of which offence he was convicted.

In *Regina* v. *Young* (1884), 5 O. R. 184 (a), the defendant was convicted under sec. 41 of R. S. O. (1877) ch. 181, for selling liquor without a license, and under sec. 46 for allowing liquor to be consumed on the premises, and one penalty was inflicted "for his said offence." It was held that the conviction was bad, in not shewing for which offence the penalty was imposed.

Paley's Summary Convictions, 8th ed. p. 196 says:—"Another indispensable property of a conviction is *certainty*. But as there will be occasion to illustrate this more particularly afterwards, it may suffice at present to observe that the same rule holds true with equal strictness in convictions as in indictments, viz., that the charge should be positive and certain, in order that the defendant may be protected from a second accusation for the same fact; and in order also that the judgment may appear appropriate to the offence. An offence, therefore, cannot be charged *disjunctively*, or in the alternative, in a conviction, though it may perhaps be so in an order."

It is clear, therefore, that at common law the conviction in this case is bad. Is there anything in the Manitoba Temperance Act which justifies it? We have been referred to secs. 77, 96, 100 and 101 of the Act. Section 77 authorises several charges of contravention of the Act to be included in one information. Section 96 says that "One conviction for several offences, and providing a separate penalty for each, may be made under the Act although such offences may have been committed on the same day." Neither of these sections helps and I can find nothing in the Act to authorise a conviction in the form in which this conviction is made.

We cannot amend the conviction under sec. 101 for it is impossible to say for which of the three offences charged the defendant has been convicted.

Since writing the above I have found a case practically on all fours with this decided by Meredith, C.J. C. P. in February 1920—*Rex* v. *Kaplan*, 52 D.L.R. 596, 47 O.L.R. 110.

There the defendant was charged that he did unlawfully "have or give liquor."

While in this case there were other grounds upon which the conviction was held bad, Meredith, C. J. C. P. at p. 598, dealing with

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the alternative form of the conviction, said:—"So, too, I have no doubt, the conviction in the alternative form is bad. Convictions must be certain for obvious reasons." After referring to several sections of the Ontario Temperance Act, he proceeds: " . . .. but I have found nothing, and nothing has been referred to, authorising a conviction in the alternative: it would be extraordinary if there were any such power. So that, apart from the question of time, I cannot think that this conviction, being in the alternative, could be sustained."

The conviction should be quashed.

Conviction quashed.

BIETEL v. OUSELEY.

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K. B.

Saskatchewan King's Bench, Embury, J., December 3, 1920.

1. **Appeal (§III D—86)—From Summary Conviction—Justices Amending Recognisance to Accord with the Fact of Acknowledgement by the Cognizors—Cr. Code 8-9 Edw. VII ch. 9 sec. 750.**

If a recognisance on an appeal from a summary conviction omits one of the conditions which had been acknowledged orally before the justices and which they alone had signed, it may properly be amended by such justices before the date of hearing of the appeal and while on file in the Appellate Court so as to correct their omission; and the appeal should not be quashed if the amended recognisance is in due form.

2. **Appeal (§III D—86)—Form of Recognisance on Appeal from Summary Conviction—Condition to Abide by Appellate Decision—Necessary Inclusion of Any Costs Awarded—Deviation from Statutory Form—Interpretation Act, R. S. C. 1906, ch. 1, sec. 31—Cr. Code secs. 750, 1152, Code Form 51.**

The omission of the words "pays such costs as are by the Court awarded" (Code Form 51) from a recognisance under Cr. Code sec. 750 given on an appeal from a summary conviction will not invalidate it if the recognisance is conditioned for the appellant to "abide" the decision on the appeal, for such a condition necessarily includes payment of costs awarded. The deviation from the statutory form in a matter not affecting its substance is cured by the Interpretation Act, R. S. C. 1906, ch. 1, sec. 31.

MOTION under the Crown Practice Rules on the application by Martin Bietel of Bayard, in the Province of Saskatchewan, for a writ of mandamus to compel the respondent, His Honour, F. A. G.

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Ouseley, Judge of the District Court of the Judicial District of Moose Jaw to hear and determine a certain appeal from which notice of appeal was filed and served on the 5th day of June A.D. 1920, for the sittings of the District Court in the City of Moose Jaw, in the Province of Saskatchewan, commencing on the 26th day of October A.D. 1920, from a conviction of the said applicant. The conviction was made at Moose Jaw, Saskatchewan, on the 4th day of June A.D. 1920, by Harold Fletcher and R. F. Jackson, Justices of the Peace in and for the Province of Saskatchewan, for that he, the said Martin Bietel did on the 11th day of March A.D. 1920 at Section 25-12-25, West of the 2nd Meridian, in the Province of Saskatchewan, have in his possession in the said premises, a still, worm, rectifying or other apparatus or part or parts thereof, suitable for the manufacture of spirits without having a license therefor and without giving notice thereof, contrary to the Inland Revenue Act, sub-section E, section 180, and that he the said Martin Bietel was therefore, to wit, on the 11th day of September A.D. 1919 at Svonlea, in the Province of Saskatchewan, by H. D. Munro and George L. Munson, Justices of the Peace, previously convicted by the said Justices of the Peace in and for the Province of Saskatchewan, for that the said Martin Bietel did have in his possession an apparatus and beer wash suitable for the manufacture of spirits without having given notice or obtaining a license for the same, contrary to sub-section E, section 180, chapter 51, 1906 of the Inland Revenue Act of Canada, and for the said offence was adjudged guilty and ordered to pay a fine of $250.00 and costs amounting to $14.35 and in default of payment of the said fine and costs to be imprisoned in the common jail at Regina for thirty days at hard labour. The Justices of the Peace adjudged him guilty for his said offence and ordered that he forfeit and pay the sum of $400 and costs amounting to $21.90, forthwith and in default of payment to serve six months in the common jail at Regina.

Notice of the motion for a writ of mandamus was served on the Judge of the District Court, the Attorney-General of Saskatchewan, and upon William Conklin the informant in the proceedings leading up to the summary conviction in question which was the subject of the appeal launched in the District Court of Moose Jaw.

J. R. B. Graham, for the applicant.

W. G. Ross, for Judge Ouseley the respondent.

EMBURY, J.:—The recognisance is a record of a debt from certain individual subjects to the Crown, which debt is to be satisfied

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by the performance of the conditions. The debt with its accompanying conditions arises when the individuals appear before the two Justices and acknowledge the debt and conditions verbally. The recognisance is the public record of the contract reduced to writing by the Justices and signed by them. In this case, after the recognisance is on file with the appellate tribunal, but before the hearing, it is brought to the attention of the Justices that this recognisance or record is incorrect in that words to the effect "and pays such costs as are by the Court awarded" have been omitted from the condition in the recognisance. The magistrates before the hearing proceed to alter their record, presumably to make it accord with the facts. The appellant, if the altered record is a true record, had done his part to satisfy the statute when the debt was verbally acknowledged in the first place. It was proper that the magistrates having made a false record should seek to correct same and the correction would seem to have been made in good time. See *Bestwick* v. *Bell*, (1889), 1 Terr. L. R. 193. Therefore I think the appeal should be heard.

There is another ground also on which the appeal should be heard. The recognisance is conditioned that the appellant personally appear and prosecute the said appeal and abide the decision of the Court and do not depart the Court without leave but omits the words provided for by the statute as follows, "pays such costs as are awarded by the Court. These last words however do not seem to be necessary. If one "abides the decision" ("abide" having the meaning "abide by" or "endure" he must necessarily "pay the costs," and so these words are properly to be treated as surplusage. The Code sec. 750, R. S. C. 1906, ch. 146, provides that the condition shall be among other things "to abide the judgment" while form 51 provided for such cases by section 750 uses the wording "abides by the judgment." It is therefore plain that it was intended that the word "abide" in sec. 750, as is not uncommonly the case (see New English Dictionary), should bear the meaning "abide by" or "endure."

The form of recognisance under consideration is not strictly in accord with that provided by section 750; but the deviations are slight, and do not affect the substance, and so the matter is covered by sec. 31 (d) of the Interpretation Act, R. S. C. 1906, ch. 1.

There will be no costs.

Order for hearing of appeal.

FORMAL ORDER. The formal order after preliminary recitals was issued in the following form:

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"It is hereby ordered that the respondent herein, the District Court Judge of the Judicial District of Moose Jaw, without the actual issue of a Prerogative Writ of Mandamus, do hear and determine a certain appeal from the conviction made by Harold Fletcher and R. F. Jackson made as before described.

"And it is further ordered that the usual protection be granted to the respondent herein.

"And it is further ordered that there be no costs to either party."

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SCOTT v. THE KING.

Supreme Court of Canada, Idington, Duff, Anglin, Brodeur and Mignault, JJ., February 24, 1921.

1. **Appeal (§I C—25)—Criminal Appeals—Strict Construction of Questions Reserved in Case Stated—Misdirection not Considered on Case Stated Only as to Sufficiency of Evidence—Further Appeal to Supreme Court of Canada on Dissent Below—Cr. Code Secs. 1014-1019, 1024.**

On a further appeal to the Supreme Court of Canada from the affirmance by a provincial Court of Appeal of a conviction for an indictable offence, which further appeal is limited to cases in which the provincial Court was not unanimous, the Supreme Court of Canada will not consider questions which were not properly within the scope of the case presented below in questions reserved for consideration of the Court of Appeal. A question reserved as to whether there was evidence upon which the defendant could properly have been convicted, does raise a question of misdirection of the jury. (Per Duff and Brodeur, JJ.)

2 **Theft (§ I—1)—Misappropriation by Employee—Charge in Respect of Amount of Falsification of Accounts—Testimony Proving Theft of Smaller Amount Obtained Through Same Fraud—Statutory Power of Amending Count—Sufficiency of Evidence to Sustain Conviction—Cr. Code Secs. 359, 889 (1), 1018.**

Where the sole question on a case stated on appeal from a conviction for theft by an employee was whether there was evidence upon which the defendant could properly have been convicted under the indictment, the Court will take into consideration any evidence actually received and properly admissible under the indictment and will support a conviction for theft of a lesser sum than that charged if proved by the evidence and so connected with the larger sum specified in the count as to form part of the same fraud although as to the remainder of the sum charged, the testimony indicated only a falsification of books identical with the falsification which

led up to the theft of the smaller sum of which the accused had obtained possession.

[R. v. Scott (1920) 57 D.L.R 309, 48 O.L.R. 452, 34 Can. Cr. Cas. 180 affirmed. As to power of the Court to amend an indictment to conform with the proofs, see Cr. Code sec. 889 (1), 1018.]

APPEAL under Cr. Code sec. 1024, R.S.C. 1906, ch. 146, by the accused from the affirmance of his conviction for theft on his appeal to the Supreme Court of Ontario, Appellate Division, *R.* v. *Scott* (1920), 57 D.L.R. 309, 34 Can. Cr. Cas. 180, 48 O.L.R. 452. The appeal was dismissed, Anglin and Mignault, JJ., dissenting.

Keith Lennox, for the accused, appellant.

P. J. Brennan, for the Crown, respondent.

IDINGTON, J.:—The appellant was indicted for stealing a sum of money from a firm in whose employment he appears, from the evidence, to have been engaged as an accountant.

On that indictment he was found guilty by the jury before whom he was tried.

The trial Judge submits the single question:—"Was there evidence upon which the said defendant could properly have been convicted?"

On submission of such reserved case to the second Appellate Division of the Court of Appeal for Ontario (1920), 57 D.L.R. 309, 48 O.L.R. 452, 34 Can. Cr. Cas. 180, the majority of the Court answered said question in the affirmative. A dissenting opinion therein has enabled the appellant to come here.*

I have no hesitation in finding in accord with the majority of the said Court of Appeal that there is ample evidence in the case thus submitted upon which the defendant, now appellant, could properly have been so convicted. Section 355, or one of the subsequent sections, of the Criminal Code, R.S.C. 1906, ch. 146, must be applied.

I am therefore of opinion that this appeal should be dismissed.

DUFF, J.:—The question reserved by the direction of the Appellate Division was this:—"Was there evidence upon which the said defendant could properly have been convicted?"

I can attach to this question no other meaning than this:—Was there evidence upon which the accused could properly be convicted under the indictment upon which he was tried?

It is not a question as to the legality or effect of the Judge's charge or of the manner in which the evidence was presented for the

* Cr. Code sec. 1024.

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consideration of the jury by the Judge. None of these things is suggested by the question and I am not aware of any ground upon which we can exclude from our examination in dealing with the question any evidence actually received and properly admissible under the indictment.

So reading the question it is susceptible of only one answer, the answer which has been returned by the Appellate Division.

The function of this Court in criminal appeals is strictly limited and the conclusion having been reached that the Court below rightly decided the only question which was before them I know of no authority enabling this Court to adopt any other course than to dismiss the appeal.

ANGLIN, J. (dissenting):—The defendant was indicted for stealing "about seven thousand eight hundred dollars in money, the property of McMillan, Nicholson and Company," a firm of stock brokers by whom he was employed as clerk and bookkeeper. The evidence before us shews that he had been handed three cheques from customers of the firm aggregating this amount. While he duly deposited these cheques to the firm's credit in its bank, he entered the amounts thereof in its books as having been received from "J. P. Barron," a fictitious name under which he was himself speculating, the firm acting as brokers. It does not appear that he drew out any part of the $7,835 for which he had thus made "J. P. Barron" appear to be a creditor of his employers. The evidence also discloses that he had procured from the firm and cashed five cheques payable to "Cash" aggregating $755 and had used the sums thus obtained for his own purposes. But there is admittedly nothing to shew that the amounts for which these cheques were given formed part of or were connected with the $7,835. Although not definitely established, it seems probable on all the evidence that Scott procured each of the five cheques by representing that the sums for which it was drawn was due to "J. P. Barron" for profits upon stock transactions carried on by the brokers' firm on his account and that he would hand the cheque, or its proceeds, over to his friend Barron.

In submitting the case to the jury the trial Judge made no allusion whatever to the five cheques aggregating $755. He dealt with the receipt of the three cheques for $7,835 and the fraudulent entries of the amounts thereof to the credit of "J. P. Barron" instructing the jury that a theft of the money represented by the three cheques had been thereby committed. After stating the facts of the

receipt and entry of one of these cheques drawn by J. G. Beatty & Co. for $1,000, he said.—"The accused man Scott converts that money to his own use. The money is handed to him as money of the firm, but putting it into the account in that way he converts it into his own use and pays it into the firm as the money of Barron, who is Scott."

Of the second cheque for $2,000 he said:—"The same process went through with J. P. Bickell and Co.'s cheque for $2,000. In other words, he converted to his own account, to his own use, and put in his own account on that day, the 25th of June, $2,000, that, up till the moment it was handed to him, had belonged to Bickell & Co. When it was handed to him it belonged to McMillan, Nicholson & Co. He converted it to his own use and diverted their moneys from the legitimate channel and put them unto his own credit."

Of the third cheque he said:—"On the 7th of August the same thing happened with the Beatty cheque again but the amount then was $4,835. You see the amount was growing larger each time. I need not go through the process again. The same thing was repeated, the $4,835 paid in for McMillan, Nicholson & Co. by Beatty & Co., and appropriated by him to his own use, and instead of being entered in Beatty's account was entered in his own account, and his account was bolstered up that day to the extent of $4,835. He admits all these things."

The only defence preferred was that all this was done with the sanction of one Newton, a member of the brokers' firm. Newton denied all knowledge of it. After discussing the credibility of this story at some length the Judge concluded his charge in these words:—"You want to strip all this mass of material that has been coming before you for the last three or four days and keep these main facts in mind, that there are three items: $1,000, $2,000, and $4,835, which Scott admits were wrongfully appropriated to his own purpose and to his own account. His statement is that Newton advised and suggested it. I say to you, if you believe under all the circumstances that Newton advised and suggested it, then I do not think you ought to convict Scott, but if you do not believe it, then I think your verdict ought to be accordingly."

The prisoner was found guilty.

A reserved case was stated under sec. 1016 of the Crim. Code "by direction of the Appellate Division," the question reserved being formulated in these terms:—"Was there evidence upon which the said defendant could properly have been convicted?"

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The Judges of the Appellate Division, 57 D.L.R. 309, 34 Can. Cr. Cas. 180, 48 O.L.R. 452, held unanimously that the fraudulent entries to the credit of "J. P. Barron" of the amounts of the three cheques aggregating $7,835, which had been deposited in the bank account of McMillan, Nicholson & Co., did not constitute theft. Three of them (Mulock, C.J. Ex., Magee, J.A., and Middleton, J.) were of the opinion, however, that there was evidence of the theft of the moneys represented by the five cheques aggregating $755 and that there was therefore evidence to warrant the conviction. The other two Judges (Riddell and Masten, JJ.) dissented.

"The falsification of the books was undoubtedly the means," they say (57 D.L.R. at p. 312, 34 Can. Cr. Cas. at p. 183), "which enabled the accused Scott to procure these cheques, but a perusal of the evidence and of the Judge's charge shews plainly that the accused has never been indicted or tried for the theft of this $755." The passages from the charge of the trial Judge which I have quoted make it abundantly clear that an accusation of stealing the $755 was not presented to the jury. Not only was no allusion made to those moneys or to the cheques upon which they were obtained, but the jury was definitely instructed to convict if satisfied that the fictitious entries of the three cheques aggregating about $7,800 to the credit of "J. P. Barron" had been made out with the cognisance of Newton, and to acquit if they disbelieved Newton. The conviction must in all fairness be regarded as a conviction for the theft of the $7,835 and not of $755 and, in the admitted absence of evidence to shew that any part of the $755 formed part of or was connected with the $7,835, such a conviction obviously should not be sustained if doing so can be avoided. The appellant may be a rogue. He may be criminally liable for falsification of his employers' books (sec. 415 Crim. Code). He may be guilty of the theft of the $755. But before he can be rightly punished for this latter offence he is entitled to have his guilt of it pronounced by the tribunal to which the law gives him the right to submit it. Section 1019 of the Criminal Code has no application to such a case.

It is urged that the function of this Court is restricted to answering the precise question presented by the reserved case and that the propriety or sufficiency of the charge to the jury is not covered by the submission—that there is evidence of a theft of moneys amounting to the $755 the property of McMillan, Nicholson & Co. and that upon it the appellant could properly be convicted on an indictment charging him with the theft of about $7,800 in

money the property of that firm.

According to this view, which has prevailed, the question submitted would have to be answered in the negative and the conviction affirmed though it were supported only by evidence casually elicited in the course of the trial and not alluded to in the charge that the appellant had on some occasion during the period covered by the indictment pilfered $1 from the petty cash of his employers.

I think that is taking entirely too narrow a view of the question for decision. While the indictment is drawn in general terms, the only case on which the jury was directed to pass and on which we must assume they did pass was the theft of about $7,800 comprised in three cheques of $1,000, $2,000 and $4,835 respectively. That undoubtedly was the theft of which the defendant was convicted and I have no hesitation in saying that there was no evidence on which he could properly have been so convicted—and that, in my opinion, is the real matter on which we are called upon to pronounce. Either the indictment should be read as charging the specific offence on which the jury was instructed to pass or the conviction should be regarded as a conviction for that offence. In either view it is the sufficiency of the evidence to support a conviction for the theft of the three cheques aggregating about $7,800 that the reserved case submits.

Were it otherwise, in order to prevent a clear miscarriage of justice I should be inclined to exercise the power which the Appellate Divisional Court certainly possesses under sub-sec. 3 of sec. 1017 where it has given leave to appeal under sec. 1016 and has directed that a case should be stated, and which I think is likewise conferred on this Court, (it is ordinarily our duty to pronounce the judgment which the Court appealed from should have given) by sub-sec. 2 of sec. 1024, to send the reserved case back for amendment by adding to the question as formulated the words "under my charge," or the words "of the charge on which the jury was directed to pass." To such a question there could be but one answer. But, as already stated, I think that is in substance the question submitted and that amendment is therefore unnecessary.

I would answer the question in the reserved case in the negative.

BRODEUR, J.:—This is a criminal appeal. The appellant was indicted for having stolen "about $7,800 in money, the property of McMillan, Nicholson & Co."

Pursuant to the direction of the Appellate Division, the trial Judge reserved and stated under sec. 1016 of the Criminal Code the

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following question of law:—"Was there evidence upon which the said defendant could properly have been convicted?"

The evidence discloses that the accused was in the employ of the firm of stock brokers, McMillan, Nicholson & Co., as their accountant.

He was looking after the collection of accounts due to the firm, banking operations and the preparation of cheques. The members of the firm were not very much in the office and the appellant had a great deal to do with the clients and the conduct of the business of the firm.

He had an account of stock margin operations opened in the name of J. P. Barron which, it was disclosed later on to the members of the firm, was a fictitious name to cover the speculations which Scott was carrying out for his benefit.

At occasions when the Barron account was apparently in poor condition, the firm received from some of their clients three cheques to the amount of $7,835, and instead of crediting the accounts of these clients with that sum, Scott charged it in the books of the company to the credit of J. P. Barron's account or, in other words, of his own account. The cheques however were deposited in his employers' bank to their credit.

There was on his part an admitted falsification of the books of his employers which would render him guilty of an indictable offence (sec. 415 Crim. Code). About the time he was making these false entries in the books, he had his employers to draw on the same bank in which this money was deposited cheques payable to bearer to the amount of $755 prepared by him on his representation that they were needed for office requirements. These cheques of $755 were payable to bearer. On one of them the words "J. P. Barron" are to be seen in the corner, but they do not form part of the body of the cheque proper.

When the evidence was adduced on the trial all these facts were disclosed.

It is claimed by the appellant that he was tried only for having stolen the $7,835 cheques and that the indictment did not cover and did not intend to cover the $755 transactions, and he quotes in support of his contention the charge made by the trial Judge.

It is true that the trial Judge laid a great deal of stress on the $7,835 cheques and he even stated that the facts disclosed by the evidence would justify an accusation of theft against the appellant with regard to these cheques. It seems to be admitted that in that

respect the trial Judge's charge was erroneous, but at the same time it is proved and established that the accused appropriated to himself the $755 cheques and that if he was not guilty of the total amount mentioned in the indictment, he was guilty of having stolen an amount of $755.

The Appellate Division, 57 D.L.R. 309, came to the conclusion that the verdict should be confirmed and that the answer to the stated question should be that there was evidence upon which the appellant could be properly convicted. I have no doubt, for my part, that this judgment is correct. We have not to decide whether the charge of the trial Judge was right or not. It is not a question of misdirection we have to examine, but we have simply to decide whether the facts disclosed in the evidence justify a verdict of theft.

All the evidence that could be brought as to this $755 cheque was put in. The accused offered all the explanation he could give in that respect. The jury was perfectly justified in not believing his story.

The appeal should be dismissed.

MIGNAULT, J. (dissenting):—Making the indictment and the evidence part of the reserved case, the senior Judge of the County of York, chairman of the general sessions of the peace of the County of York, reserved the following question of law arising out of the trial and conviction for theft of the appellant: "Was there evidence upon which the said defendant (the present appellant) could properly have been convicted?"

The first count of the indictment (the second one need not be mentioned) charged Scott with stealing in the year 1919 "about seven thousand eight hundred dollars in money the property of McMillan, Nicholson & Co., contrary to the Criminal Code."

It was proved at the trial that Scott, who was the bookkeeper and accountant of the firm of McMillan, Nicholson & Co., a stock broking firm of Toronto, in the beginning of May, 1919, opened an account with the firm in the name of J. P. Barron, a non-existent person, the account being in reality his own, with the object of speculating on the New York market. This account required, of course, a margin to protect it. Scott was the employee charged with looking after the margins and, on May 29, a cheque of $1,000 was sent to the firm by a debtor, J. G. Beatty and Co., and, being payable to the firm's order, was duly stamped by Scott and deposited to the firm's credit. In the books however he entered a sim-

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ilar amount to the credit of the Barron account with the object of bolstering it up and making it appear to be fully supported by an adequate margin. On June 25 a cheque to the firm's order for $2,000 came in from J. P. Bickell & Co. and was similarly treated by Scott, being deposited to the firm's credit, but a like amount being entered in the books as a payment by Barron. Finally, on August 7, J. G. Beatty & Co. sent a cheque to the firm's order for $4,835 which was received by Scott and by him stamped and deposited with the firm's bankers but similarly entered in the books to the credit of the Barron account. In the course of the trial it was shewn that Scott drew on the Barron account, presumably as profits, 5 cheques aggregating $755 signed and countersigned on behalf of McMillan, Nicholson & Co.

In the Appellate Division the 5 Judges unanimously held that Scott could not be convicted of stealing the amount of the 3 large cheques, but a majority sustained the conviction on the ground that Scott had drawn out from the Barron account the 5 small cheques aggregating $755 which was considered as forming part of the 3 large cheques. Two of the Judges, Riddell and Masten, JJ., dissented and would have answered in the negative the question submitted by the reserved case, their reason being that, assuming that the $755 was stolen by Scott, they were unable to follow the reasoning that would make it a part of the $7,800 mentioned in the indictment. They also stated that "a perusal of the evidence and of the Judge's charge shews plainly that the accused has never been indicted or tried for the theft of this $755."

On this latter ground, in so far as the trial is concerned, I am of opinion that the question submitted by the trial Judge should be answered in the negative and that the conviction should be set aside.

Since the Court is asked whether there was evidence on which the appellant could properly have been convicted, it becomes necessary to determine what was the offence for which he was convicted. To determine this it is necessary to consider both the evidence and the trial Judge's charge. Looking at this charge it is clear that the question which the trial Judge submitted to the jury was whether the appellant had stolen the amount of the 3 large cheques. He instructed the jury that Scott had converted to his use the amount of these cheques, and said at the end of his charge, in discussing the statement of the appellant that Newton (who was practically a member of the firm in which his wife was interested) advised him

to follow the course he did with regard to these cheques, which statement was emphatically denied by Newton:—"There are three items: $1,000, $2,000, and $4,835, which Scott admits were wrongfully appropriated to his own purpose and to his own account. His statement is that Newton advised and suggested it. I say to you, if you believe under all the circumstances that Newton advised and suggested it, then I do not think you ought to convict Scott, but if you do not believe it, then I think your verdict ought to be accordingly."

There can therefore be no doubt that the appellant was tried and convicted of the crime of stealing and converting to his own use the amount of the 3 large cheques. The Judges of the Appellate Division unanimously held that what Scott did in connection with these 3 cheques did not amount to theft and conversion of the amount of these cheques, and in this I concur. With deference, however, I do not think that the Appellate Division should have affirmed the conviction by relying upon what the appellant did in connection with the 5 small cheques aggregating $755. Assuming, but not deciding, that this amounted to theft under the indictment, it is clear that for this offence Scott was not tried nor found guilty. The conviction brought about by an erroneous direction of the trial Judge was for the theft of the amount of the three large cheques, and therefore this conviction cannot be sustained.

I would in consequence allow the appeal, answer in the negative the question submitted and set aside the conviction.

Appeal dismissed.

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Ontario Supreme Court, Orde J., January 5, 1921.

Husband and Wife (§IIA—50)—Alimony—Adultery of wife—Meaning of Adultery—"Artificial insemination"—Costs—Cash disbursements—Accounting—Rule 388.

The essence of the offence of adultery consists not in the moral turpitude of the act of sexual intercourse, but in the voluntary surrender to another person of the reproductive powers or faculties of the guilty person and any submission of those powers to the service or enjoyment of any person other than the husband or the wife comes within the definition of adultery.

The introduction into the body of a woman by "artificial insemin-

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ation" that is by means of a syringe, of the seed of a man who is not her husband, and without the knowledge of the husband as a result of which she bears a child is adultery which disentitles her to alimony.

THIS was an action for alimony.

The facts of the case are as follows:—

S. J. Birnbaum, for the plaintiff.

W. R. Smyth, K.C., and *E. G. McMillan*, for the defendant.

ORDE, J.:—The plaintiff came to Toronto from England in 1910, met the defendant in 1913, and was married to him in Toronto on the 26th August of that year. They left for England on their wedding-trip a few days later. On the 5th November, 1913, the defendant sailed from England for Canada, leaving the plaintiff with her parents at their home in Weston-super-Mare. It is admitted that, during the period between the wedding and the date when the defendant left England, the marriage was not consummated, owing as the plaintiff says, to the great pain which an attempt at intercourse caused her, and owing to the fact, as she discovered later, that she had a retroflexed uterus. The defendant did not return to England, and the plaintiff remained there until December, 1919, when she returned to Canada; and, upon the defendant, as she alleged, refusing to receive her as his wife, she commenced this action against him on the 19th January, 1920. By her statement of claim, the plaintiff charged the defendant with numerous acts of cruelty upon the wedding trip . . . unnatural practices . . . and adultery.

The admission made by counsel for the defendant that his refusal to take the plaintiff back would render him liable for alimony unless he could establish her adultery rendered it unnecessary for the plaintiff to adduce evidence of the allegations contained in her statement of claim.

The statement of defence, as originally delivered, denied all the charges of cruelty, and alleged that the marriage had not been consummated because of the physical inability of the plaintiff, and that the plaintiff had, by mutual arrangement with the defendant, remained in England for the purpose of affecting a cure of her physical infirmity, but that she had made no effort to do so, and for that reason the defendant refused to take her back as his wife. He also alleged that after her return to Canada she had committed adultery.

Shortly after the 22nd June, 1920, the defendant was informed

that during the period while the plaintiff was in England, between November, 1913, and December, 1919, namely, on the 13th February, 1919, she had given birth to a child and that the father was one G. E. Hodgkinson. The defendant left immediately for England to investigate, and as a result of his inquiries he cabled his brother in Toronto on the 22nd July, 1920, to the effect that a child had been born to Mrs. Orford at a nursing home in London on the day mentioned, and was registered at Somerset House as "Peter Lee Hodgkinson," the father's name being "George Edmund Hodkinson" and the mother's maiden name "Lillian Grace Partridge" (the plaintiff's maiden name).

In July, 1917, the plaintiff rented a flat at 28 Regent street, in London, and it was about this time that she became acquainted with the man Hodgkinson. . . .

The plaintiff admits the birth of a child to her on the 13th February, 1919, and that the defendant is not its father. That admission alone is sufficient to fasten upon her the charge of having committed adultery . . . unless she can establish collusion or connivance or condonation by her husband, or can establish, first, that the child was in fact conceived by what has been termed "artificial insemination," and, secondly, as a matter of law, that even that method of bearing a child to another man, with full knowledge and a deliberate intention to do so, and without the knowledge of her husband, in the circumstances of this case is not adultery.

The plaintiff's explanation of what took place is as follows:—

After her visits to Dr. Rayner in September and November, 1917, she returned to London about the 3rd January, 1918. She says that she had not seen Hodgkinson since the previous August, but that she immediately got in touch with him upon her return . . . ; that he asked her why she had returned to London, that she then told him about her lonely life and the reason why she could not go back to her husband. She says that she told him all about her affliction and her inability to have intercourse with her husband, and that Dr. Rayner had refused to operate without her husband's consent; that she had asked Dr. Rayner if there was any other way by which she might be cured, and that Dr. Rayner had said that the only thing to do was to bear a child, and that it might be done artificially. . . .

The plaintiff says that she told Hodgkinson that she would do anything to cure herself, and that she found that Hodgkinson

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seemed to know "quite a little about insemination," and that he offered to "supply what was necessary" if she would undergo the insemination, and that he would pay all the expenses connected with her pregnancy and confinement and would adopt the child as his own. . . .

As a result of the arrangement, she says, she went to Hodgkinson's flat about two weeks later, and there met Hodgkinson and a physician whose name she does not remember; that she undressed and went to bed and was put under an anæsthetic; and that, after she regained consciousness, she was told by Hodgkinson (not by the physician) how she had been inseminated artificially by means of semen taken from his body and introduced into hers by the physician by means of a syringe. . . . In March or April, the plaintiff discovered that she was not pregnant, and she says that about the 14th May, 1918, the "artificial insemination" was repeated at Hodgkinson's flat, the procedure being the same as before, with the same unknown physician in attendance, and her knowledge of the artificial character of the insemination being communicated to her by Hodgkinson solely. She then . . . became pregnant. . . . The child was born on the 13th February, 1919, and was baptised under the name of "Peter Lee Hodgkinson" on the 13th March, 1919, at All Souls Church, the father's name being given as "George Edmund Hodgkinson" and the mother's name as "Lillian Grace Hodgkinson, formerly Partridge." There is nothing in the register of births to indicate that the child was otherwise than the legitimate issue of its two parents.

The plaintiff throughout the whole course of her extraordinary story seemed to have a very slight appreciation of the gravity of what she had done. She constantly spoke of it as a "medical cure" for her affliction. There was not, of course, anything "medical" about it. Nor was there anything "artificial" about the insemination if it actually took place as she said it did. The insemination was just as real as if it had taken place in the ordinary, natural way. The only thing really artificial about it was the manner in which it was alleged to have been brought about. The plaintiff claimed to justify what she had done by the attitude which her husband had adopted with regard to the abdominal operation which Dr. Rayner had said was necessary. Her husband had declined to come over to England, but had told her to do whatever Dr. Rayner advised. Now, there is no evidence beyond her word, which I do not believe, that Dr. Rayner ever suggested such a thing to her as artificial

insemination as a cure. But, had he done so, it is ridiculous to suppose that any woman would be justified, without the knowledge of her husband, in deliberately undertaking to be "cured" in that manner. To suggest such a thing, seriously, indicates such a failure to understand the basic principles of the marital relationship as to require no answer. That, however, is the ground upon which she tries to justify her conduct, to which ought to be added that it was contended that the whole course of her husband's treatment of her, and his refusal to take her back as his wife so long as she was unable to have sexual intercourse with him, furnished a justification for what she did which deprived it of the character of adultery. As she put it, "I was trying to cure myself for my husband; that was my only excuse."

Though I intend to deal with the legal argument put forward by Mr. White on the theory that her story is true, my conclusion upon the facts . . . is that her story as to the "artificial insemination" is not to be believed. . . .

I find as a fact that the plaintiff was guilty of adultery in that she had sexual intercourse in the ordinary way with Hodgkinson in the month of May, 1918. That the plaintiff had become capable of sexual intercourse at that time is, I think, abundantly clear. Her own letters from November, 1917, onwards, indicate it, and the only conclusion I can come to is that Dr. Stabb either cured her completely, or at all events so improved her condition that the "affliction," as she called it, had practically disappeared. It is difficult to avoid the conclusion that from some time in the latter part of 1917, perhaps as early as July, she had entered upon a course of conduct with Hodgkinson which, if all the facts were known (and I feel that she has failed to disclose them all) would establish that she had become Hodgkinson's mistress.

I might rest my judgment here; but, owing to the unusual character of the plea of justification set up by the plaintiff, and to avoid the suggestion that . . . I have prevented her from establishing as a matter of law that what she asserts that she did does not constitute adultery, I think it proper that I should deal with that aspect of the case also. . . .

The plaintiff contends, first, that it is not adultery for a woman to become "artificially inseminated" or "artificially impregnated" by means of a man other than her husband and without her husband's knowledge, and to bear a child in consequence thereof; and, second, that, even if it might be adultery *per se*, it was not

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so in the circumstances of this case, because what she did was conduced to by the conduct of her husband.

Mr. White argues that to constitute adultery there must be actual sexual intercourse in the ordinary natural way, and he cites many definitions of the word "adultery" from legal dictionaries and text-books in support thereof. He lays stress upon the distinction between the act of adultery and the consequences of it, contending that insemination or pregnancy is merely the result of the act of adultery, and that as a matter of law adultery is confined to the act of sexual intercourse in the ordinary acceptance of that term.

The term "adultery" has never had an exact meaning, nor has its meaning been the same in all countries or under all systems of law. It is not necessary here to draw distinctions between an act of incontinence by a wife and a similar act by a husband, or as to whether or not sexual intercourse between unmarried persons constitutes adultery. All the definitions, whatever may be the system of law, or whatever the country, in which the term calls for definition, use the term "sexual intercourse," or some synonymous expression, to describe one of the necessary ingredients or characteristics of the offence. And the learned counsel for the plaintiff, in referring to these numerous definitions, lays great stress upon this uniform characteristic as supporting his argument that without sexual intercourse there is no adultery. But this argument merely shews the fallacy of relying upon the precise terms of a definition without regard to the circumstances which give rise to it, or to the branch of the law in which the offence of adultery forms an element. Some of the definitions to which reference was made are as follows:—

"Adultery, by the common law, is criminal conversation with a man's wife. . . . By the canon or ecclesiastical law, adultery was sexual connection between a man and a woman, of whom one at least was lawfully married to a third person. The ecclesiastical law regarded adultery as a sin arising out of the marriage relation:" Am. & Eng. Encyc. of Law, 2nd ed., vol. 1, p. 747.

"Adultery, or criminal conversation with a man's wife:" 3 Bl. Comm., p. 139.

"Violation of the marriage bed; the voluntary sexual intercourse of a married person with one of the opposite sex:" Murray's Dictionary.

"The sin of incontinence:" Wharton.

It is, of course, admitted that there is no direct authority upon

the exact point raised here. And a reading of all the definitions makes it clear to my mind that, whenever any stress is laid upon actual sexual intercourse as a necessary ingredient of adultery, it is for the purpose of excluding from the term anything which falls short of that.

Mr. White pointed out that Geary's Law of Marriage and Family Relations (1892), p. 314, lays down that there must be actual sexual intercourse, and that no proof of indecent liberties, etc., would be sufficient, and he referred to some American authorities, in one of which, *State* v. *Frazier* (1895), 54 Kan. 719, 725, 39 Pac. Repr. 819, it was laid down that the words "sexual intercourse" mean "the actual contact of the sexual organs of a man and a woman, and an actual penetration into the body of the latter." But when this case is examined it is found to be one involving the crime of rape, and it is simply an illustration of the well-known principle that the act must have proceeded that far in order to constitute the crime.

Mr. White contended that the essential element of adultery rested in the moral turpitude of the act of sexual intercourse as ordinarily understood. With this I cannot agree. The sin or offence of adultery, as affecting the marriage-tie, may, without going farther back, be traced from the Mosaic law down through the canon or ecclesiastical law to the present date. The jurisdiction of the Supreme Court of Ontario to grant alimony is based upon the ecclesiastical law of England as it stood in 1857: Ontario Judicature Act, R.S.O. 1914, ch. 56, sec. 3; Ontario Judicature Act, R.S.O. 1897, ch. 51, sec. 34; *Nelligan* v. *Nelligan* (1894), 26 O.R. 8. In its essence, adultery was always regarded as an invasion of the marital rights of the husband or the wife. When the incontinence was that of the wife, the offence which she had committed rested upon deeper and more vital ground than that she had merely committed an act of moral turpitude, or had even seen fit to give to another man something to which her husband alone was entitled. The marriage-tie had for its primary object the perpetuation of the human race. For example, the Church of England marriage-service, which in this respect may well serve as the voice of the Ecclesiastical Courts of England, gives as the first of "the causes for which matrimony was ordained" that of "the procreation of children."

That no authority can be found declaring, directly or indirectly, that "artificial insemination" would constitute adultery is not to

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be wondered at. This is probably the first time in history that such a suggestion has been put forward in a Court of justice. But can any one read the Mosaic law against those sins which, whether of adultery or otherwise, in any way affect the sanctity of the reproductive functions of the people of Israel, without being convinced that, had such a thing as "artificial insemination" entered the mind of the lawgiver, it would have been regarded with the utmost horror and detestation as an invasion of the most sacred of the marital rights of husband and wife, and have been the subject of the severest penalties?

In my judgment, the essence of the offence of adultery consists, not in the moral turpitude of the act of sexual intercourse, but in the voluntary surrender to another person of the reproductive powers or faculties of the guilty person; and any submission of those powers to the service or enjoyment of any person other than the husband or the wife comes within the definition of "adultery."

The fact that it has been held that anything short of actual sexual intercourse, no matter how indecent or improper the act may be, does not constitute adultery, really tends to strengthen my view that it is not the moral turpitude that is involved, but the invasion of the reproductive function. So long as nothing takes place which can by any possibility affect that function, there can be no adultery; so that, unless and until there is actual sexual intercourse, there can be no adultery. But to argue, from that, that adultery necessarily begins and ends there is utterly fallacious. Sexual intercourse is adulterous because in the case of the woman it involves the possibility of introducing into the family of the husband a false strain of blood. Any act on the part of the wife which does that would, therefore, be adulterous. That such a thing could be accomplished in any other than the natural manner probably never entered the heads of those who considered the question before. Assuming the plaintiff's story to be true, what took place here was the introduction into her body by unusual means of the seed of a man other than her husband. If it were necessary to do so, I would hold that that in itself was "sexual intercourse." It is conceivable that such an act performed upon a woman against her will might constitute rape.

Mr. White was driven, as a result of his argument, to contend that it would not be adultery for a woman living with her husband to produce by artificial insemination a child of which some man other than her husband was the father! A monstrous conclusion

surely. If such a thing has never before been declared to be adultery, then, on the grounds of public policy, the Court should now declare it so.

But it was further argued on behalf of the plaintiff that, even if what she did constituted adultery in the eyes of the law, the defendant's conduct conduced to her commission of it, and that he cannot rely upon her act of adultery as a defence to her claim for alimony. Her counsel cites certain English cases in support of this contention. But these cases all arise under the present English law of divorce, and have for their foundation that provision of the Matrimonial Causes Act of 1857 (20 & 21 Vict. ch. 85, sec. 31) by which the Court is empowered to refuse a decree for the dissolution of the marriage, notwithstanding the respondent's adultery, if it should find that the petitioner has been guilty "of such wilful neglect or misconduct as has conduced to the adultery." Counsel for the plaintiff was unable to give me and I have been unable to find any authority that this principle had ever been applied in the Ecclesiastical Courts prior to the passing of the Matrimonial Causes Act of 1857. That the Ecclesiastical Courts had never applied any such principle seems fairly clear from the judgment in *Synge* v. *Synge*, [1900] P. 180, at pp. 205, 206, though it is there suggested that the Ecclesiastical Courts might have done so in certain circumstances. I think, however, that it will be found, and the judgment in *Synge* v. *Synge* suggests this also, that the Ecclesiastical Courts would have proceeded in such a case upon the ground of connivance or collusion. See, for example, the reasoning in *Phillips* v. *Phillips* (1844), 1 Rob. Eccl. 144. The connivance must be corrupt. "There must be knowledge, or presumed knowledge, of adultery, or improper familiarities leading thereto" (p. 164). I doubt very much whether any Ecclesiastical Court, prior to 1857, would have recognised evidence of conduct conducing to adultery, such as is now admitted under sec. 31 of the Matrimonial Causes Act in divorce cases, as being any answer to a charge of adultery under the old law. I am, therefore, of the opinion that no such principle is applicable in alimony actions in this Province.

I ought to add, for fear of being misunderstood, that I do not regard the conduct of the defendant, however callous and inconsiderate it may have been, as having in any way justified the plaintiff's conduct in the present case.

The plaintiff's action must be dismissed. The judgment will provide that the defendant shall pay the plaintiff's cash disburse-

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ments, under Rule 383, but only upon the condition that she shall account to the satisfaction of the taxing officer for all moneys already paid to her or her solicitor for disbursements . . . If the plaintiff is not willing so to account, there will be no judgment for her cash disbursements.

Judgment accordingly.

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THE CITY SAFE DEPOSIT AND AGENCY CO. LTD. v. THE CENTRAL R. CO. OF CANADA AND HOGG.

Exchequer Court of Canada, Charles Morse, K. C., Referee.
March 14, 1921.

Railways (§VI—120)—Receivership—Solicitors' fees—Priority—"Working expenditure"—Road never in operation—R.S.C. 1906, ch. 37, sec. 2 sub-sec. 34 (g).

The defendant company was incorporated in 1903 for the purpose of constructing and operating a railway within the Provinces of Quebec and Ontario. The railway was never physically completed and consequently never in operation; but in 1917 it was placed in the hands of a receiver appointed by the Court at the instance of the trustee for the bondholders of the company.

The claimant amongst other creditors, filed his claim against the company. The same was contested by the plaintiff before the Registrar acting as Referee. The claim consisted of an amount representing the balance of an account for solicitor's fees and disbursements in respect of services rendered to the defendant company before the appointment of the receiver, and embraced such items as the preparation and promotion of private acts of Parliament, attendances in England in connection with the floating of bond issues, preparing trust and mortgage deeds, drafting agreements for the construction of the railway, and generally attending to all legal matters pertaining to the business and affairs of the company. For a portion of this time the claimant was a director of the company, but his retainer as solicitor was not adverse to its interests.

Held: by the Referee that notwithstanding that the company was not in operation and never had a revenue account the claim should be regarded as "working expenditure" within the meaning of sec. 2, sub-sec. 34 (g) of the Railway Act, R.S.C. 1906, ch. 37; and as such was entitled to be paid in priority to the claim of bondholders under a trust deed.

THE CLAIM is for the balance due for services rendered to and disbursements made for the defendant company during several years amounting to $6085.65; and praying that the claim be de-

cleared privileged as "working expenditure" and be paid as such out of the fund in Court.

The railway in question was never completed, and became insolvent. A receiver was appointed, and as certain moneys belonging to the company had been paid into Court, the Registrar of the Court, Charles Morse, K.C., was appointed Referee to enquire into and report upon this along with other claims filed by the creditors of the company.

The Referee's report was filed on November 11, 1920, and no appeal was taken from said report in so far as the claim in question was concerned and on March 14, 1921, the claimant moved to confirm the report as regards his claim, and for judgment accordingly. The motion was heard by Audette, J. at Ottawa, and judgment rendered the same day confirming the report of the Referee, as prayed.

W. D. Hogg, K.C., appeared personally in support of his claim.

J. W. Cook, K.C., and *A. Magee*, for the contesting party.

The report of the Referee is as follows:—

CHARLES MORSE, K.C.:—This is a claim for solicitor's fees and disbursements. The claimant acted as solicitor to the defendant company from its organisation in the year 1905 to the end of the year 1917. Upon examination of his claim it will be seen that it consists of fees and expenses arising out of his retainer as solicitor for a portion only of the period mentioned. The services rendered and moneys paid out of pocket relate to a variety of matters, none of which, however, can properly be said to fall outside the ambit of a railway solicitor's employment or practice in Canada. They embrace the drafting of private Acts of Parliament, relating to the company and attending upon both Houses in connection with the passage of the same; attendances in England in looking after the bond issues; preparing mortgage trust deeds for securing bond issues; drawing agreements relating to the construction of the railway; generally attending to all legal matters pertaining to the business and affairs of the company; and advising the company and its officers in relation thereto. For a portion of this time Mr. Hogg was a director of the company; but his retainer as solicitor was not adverse to its interests. *(Re Mimico Sewer Pipe etc. Co.* (1895), 26 O.R. 289; *Pneumatic Gas Co.* v. *Berry* (1885), 113 U.S. 322; *Denman* v. *The Clover Bar Coal Co.* (1912), 7 D.L.R. 96, 6 Alta. L.R. 305). The company does not contest his claim.

Mr. Hogg's fees and expenses were settled and paid in full by

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the company up to the month of August, 1911, and since that date, while he has never had a settlement in full, he has been paid certain sums from time to time on account. At the request of the company, on May 1, 1914, Mr. Hogg prepared a statement of his account showing that there was a balance due claimant at that date of $4,895.09 after giving credit for the sum of $415 paid to him, and that amount was admitted by the company as due the claimant, and entered in the books of the company as a liability. Since the last mentioned date the claimant has rendered professional services and paid out moneys in connection with the business of the company amounting to the sum of $1,275. On account thereof he was paid certain sums, between February 16 and September 25, 1917, amounting in the whole to $85. By adding the sum of $4,895.09 admitted as due on May 1, 1914, to the above-mentioned sum of $1275.56 and deducting from the total the sum of $85 we have the sum of $6085.65, the amount claimed herein.

The claim was filed, in pursuance of my advertisement calling upon creditors to file claims, on April 8, 1919.

[The Referee here discusses certain facts not essential to be stated.]

We now come to the real controversy between the parties to the contestation, namely, the question whether Mr. Hogg's claim is entitled to rank as "working expenditure" under the provisions of sec. 138 of The Railway Act, R.S.C. 1906, ch. 37, read in the light of the interpretation embodied in sec. 2, sub-sec. 34 of the Act.

It is well to mention here as a matter of legislative history that "legal expenses" were first made part of "working expenditure" by sec. 2 (x) of 51 Vict. 1888, (Can.), ch. 29. Before February 1, 1904, when the Act 3 Edw. VII, 1903, (Can.), ch. 58, came into force "working expenditure" was a prior charge, next to penalties, only on the rents and revenues of the company. But by the last mentioned Act, this priority was extended to affect the property and assets as well as the rents and revenues of the company. The last mentioned Act was carried into ch. 37, R.S.C. 1906.

Section 138, thereof, in part, reads as follows:—"The company may secure such securities by a mortgage deed creating such mortgages, charges and encumbrances upon the whole of such property assets, rents and revenues of the company, present or future, or both, as are described therein: Provided that such property, assets, rents and revenues shall be subject, in the first instance, to the payment of any penalty then or thereafter imposed upon the company

for non-compliance with the requirements of this Act, and next, to the payment of the working expenditure of the railway."

Section 2, sub-sec. 34 reads as follows:—"(34) 'working expenditure' means and includes *(a)* all expenses of maintenance of the railway, *(b)* all such tolls, rents or annual sums as are paid in respect of the hire of rolling stock let to the company, or in respect of property leased to or held by the company, apart from the rent of any leased line, *(c)* all rent charges or interest on the purchase money of lands belonging to the company, purchased but not paid for, or not fully paid for, *(d)* all expenses of or incidental to the working of the railway and the traffic thereon, including all necessary repairs and supplies to rolling stock while on the lines of another company, *(e)* all rates, taxes, insurance and compensation for accidents or losses, *(f)* all salaries and wages of persons employed in and about the working of the railway and traffic, *(g)* all office and management expenses, including directors' fees, and agency, legal and other like expenses, *(h)* all costs and expenses of and incidental to the compliance by the company with any order of the Board under this Act, and *(i)* generally, all such charges, if any, not hereinbefore otherwise specified, as, in all cases of English railway companies, are usually carried to the debit of revenue as distinguished from capital account."

Both of the above quoted enactments were amended by 9-10 Geo. V 1919, (Can.), ch. 68, but not so as to affect the questions arising on the proceedings before me.

As there does not appear to have been any penalty imposed upon the company under this section the payment of the "working expenditure" of the railway will take priority over any other of the claims filed under and by virtue of the reference to the undersigned.

Coming now to a determination of the question as to whether Mr. Hogg's claim should be ranked or classified as "working expenditure," it is well to note that light is to be had on this question from the American decisions rather than from the English. This is very clearly pointed out in a dictum by Strong J. in *Wallbridge* v. *Farwell* (1890), 18 Can. S.C.R. 1, at pp. 4-5:

"What I desire to explain, however, is this. In assenting to the judgment of the Court dismissing these appeals I do not by any means intend to preclude myself in future, should the question be raised in proper form and in an appropriate case, from considering whether the principle which is now universally recognised

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in the United States as to the applicability of current earnings to current expenses, incurred either whilst or before railway property comes under the control of the court by being placed at the instance of mortgagees in the hands of a receiver, in preference to mortgage creditors whose security has priority of date over the obligation thus incurred for working expenses, should be adopted by our courts. This doctrine is now firmly settled in the United States, where railway mortgages exactly resemble those in use with us, and which do not at all resemble the securities of debenture holders under the English system of securities for borrowed capital; and the practice referred to is so pregnant with justice, good faith and equity that there may be found strong reasons for applying it here when the question arises."

Mr. Abbott on Railway Law of Canada, at pp. 134, 135 of his work, does not hesitate to disagree with Strong J. as to the desirability of applying the American rule to the construction of the Canadian Act of 1888, which made working expenditure a first charge on "rents and revenues" only. He says, at p. 135, "it seems to the author that the mortgagee is entitled to presume that the income of the company has been properly applied; and it would seem hardly just when he comes to realize his security that he should find it largely impaired by overdue and outstanding debts, taking precedence of his claim on the ground that they were incurred for the "working expenditure" of the railway; and these words in the Act would seem to include only the expenditure necessary to work and carry on the railway, and not past due debts; the author would, therefore, prefer the doctrine laid down in *Gooderham* v. *Toronto & Nipissing R. Co.* (1880), 8 A.R. (Ont.) 685, notwithstanding the very broad language used by the (now Chief Justice of the Supreme Court) in the dictum above cited."

Mr. Jacobs in his work, The Railway Law of Canada, (pp. 191-5) comments at large on the *Wallbridge* case, *supra*. He finds the equitable doctrine prevailing in the United States, referred to by Strong J. in the *Wallbridge* case adequately expressed in Baldwin's American Railroad Law (1904), pp. 555 et seq. But he points out that this American doctrine was disapproved [in an expression of opinion merely] by Killam, J. in *Allan* v. *Manitoba etc. R. Co.* (1894), 10 Man. L.R. 143 at pp. 149-150. On the whole Mr. Jacobs' observations favour Strong J.'s view of the policy of applying the American doctrine. At p. 194 of his work he says:—

"If a retrospective construction is put upon the words "working

expenditure" as occurring in secs. 138 and 141 of this Act, then we have the American doctrine in its entirety, with the added advantage that we have in sec. 2 (34), a very ample definition of what constitutes "working expenditure" * * * * . From the very nature of some of the items set forth in sec. 2 (34), the lien for working expenditure must be retrospective to the appointment of a receiver."

The difference between the English doctrine or principle, and that prevailing in the United States may be usefully demonstrated by taking a single item from Mr. Hogg's claim and finding how it is treated by the Courts of the two countries. One of the items of the claim is for "preparing Bill for Parliament to confirm transfers and for other purposes, attendances at House of Commons and Senate in connection with same," etc. Now Stirling, J., in *Re The Mersey R. Co.* (1895), 72 L.T. (N.S.) 535 refused an application for authority being given to the receiver to pay out of a fund in Court the expense of the promotion of a Bill in Parliament to empower a railway to work its trains by electricity, because he did not think that the expense of promoting such a Bill could be regarded as "working expenditure" under the Railway Companies Act, 1867, 30-31 Vict. (Imp.), ch. 127, sec. 4. On the other hand in *Bayliss* v. *L. M. & B. R. Co.* (1879), 9 Biss. C.C. 90, we have a Judge of one of the Circuit Courts of the United States (Drummond, J.) instancing the services of an attorney in drawing up a Bill for the Legislature concerning the business of a railroad as properly coming within the term "labour" as applied to the operation of the road.

Now as the Railway Act, R.S.C. 1906, ch. 37, sec. 2, sub-sec. 34, expressly makes "legal and other like expenses" part of the "working expenditure" of a railway, there is no need to look for outside aid to determine it to be such; but as Mr. Cook contended that the legal expenses mentioned in the Act were referable only to *railways in operation*, I think it well to refer to such authorities as I have encountered in considering the effect of this contention.

Before doing this, however, I wish to observe that as the test of the priority accorded to claims of this nature is whether the services rendered have benefited the property mortgaged and so improved the security of the mortgagee, (See Beach on Receivers, 2nd ed. by Alderson, sec. 391), it would seem that legal services rendered in conserving the charter of the company and in settling the formalities of its bond issue would respond in the fullest way to this test. As already pointed out, Jacobs in his work on the Railway

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Act thinks that some of the items in sec. 2, sub-sec. 34 contemplate claims accruing before the appointment of the receiver, and he instances the rent of lands transferred to the railway as one of them. Literally *rent* is no more a part of working expenditure than fees payable for legal services of the character above mentioned.

"Operating expenses" as found in the American cases is a phrase tantamount to that of "working expenditure" as used in our Railway Act, for the verb "operate" is derived from the Latin "operari" meaning "to work." Wood on Railroads, (ed. 1894), vol. 3, pp. 1990 *et seq.* says:—"The 'operating expenses' include all taxes, the wages of all employees, officers and agents employed in operating the road, etc. They include also the payment of the annual salary of an attorney which falls due within a short time prior to the receivership. The services of an attorney are very properly considered necessary to the proper protection and administration of the affairs of the company." In *Gurney et al* v. *The Atlantic and Great Western R. Co. et al* (1874), 58 N.Y. 358, there was:—"An order appointing a receiver of a railroad company directed him, among other things, to pay debts "owing to the laborers and employees" of the company "for labor and services actually done in connection with that company's railways." *Held*, that it included a claim of counsel for professional services rendered by him on employment of the company in litigations relating to the railway, its interests and business."

In High on Receivers, 4th ed., pp. 531 *et seq* it is stated:—"As regards claims for construction prior to receivership, when mortgages securing bonds of the company are executed upon its unfinished road, which show upon their face that the work of construction shall be carried to completion and that the mortgage lien shall attach to the road as completed, the new road thus constructed after the execution of the mortgages may be regarded as a "useful improvement" for the purpose of determining the right of creditors for such construction to priority over bondholders. If the road passes into the hands of a receiver before payment for such construction is made, and if the receiver's net income from operation is diverted to payment of interest upon the mortgage bonds and to permanent betterments of the property, priority may be allowed for such construction as against the bondholders. Upon similar grounds claims for labor in construction, operation and maintenance, which are entitled to liens under the laws of the state, may be allowed priority, although incurred more than 6 months

before the receivership." The case of *Bayliss* v. *L. M. & B. R. Co.*, 9 Biss. C.C. 90, already cited, is also useful in this connection. Drummond, J., at pp. 94-95 says:—"Take the case for example of the services performed by counsel in obtaining the right of way on land for depots and other purposes. That may also fairly come within this class of service. It is said that it is part of the construction of the road. That is true in one sense, but it may also be a part of the operation of the road. After a road has its roadbed made, its iron down, and has run cars over it, it is not a finished road. There are always more or less things to be done besides, in order to make the road complete, and to enable the company to operate it successfully. . . . It may be said this is a nice distinction, but one, I think, it is indispensable we should make in a case of this kind, and we must, for the purpose of doing equity, give to some extent a liberal construction to the language the court used on this occasion; and, it seems to me, under this view of the case, the labor performed by counsel may be just as important, indeed more important, than the labor performed by the ordinary laborer, or by the brakeman, engineer or fireman."

Mr. Hogg's claim is wholly anterior in its origin to the appointment of the receiver in this case. Nothing is charged for services or disbursements after the interim appointment of the receiver in December, 1917. That necessitates a consideration of the point as to whether arrears of working expenditure are exigible under the provisions of the Railway Act. On this point we have some assistance from an English case decided by Kay, J., in 1890 under sec. 4 of The Railway Companies Act, 30-31 Vict. 1867, (Imp.), ch. 127. After holding that when a receiver of the undertaking of a railway company has been appointed in pursuance of the above section, the moneys received by him must first be applied by him in providing for the working expenses, Kay, J., in *Re Eastern and Midlands R. Co.* (1890), 45 Ch. D. 367, at p. 386, says:—

"Then it is said that there are certain arrears of these instalment payments, and that although it might be right to make current payments it is not right to pay the arrears. But the answer is a very simple one. Are arrears of working expenses not "working expenses"? They are not the less "working expenses" because they are arrears. "Working expenses" does not mean, necessarily, current payments; and if even arrears are not paid, as I understand, the owners of the rolling stock have power to retake possession of

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it. Therefore, there is just as much reason for paying arrears as there is for paying the current payments." As a creditor, having a first charge or lien upon an insolvent railway, may, under sec. 26 of the Exchequer Court Act, R.S.C. 1906, ch. 140, obtain an order for the sale of the railway, or its rolling stock, etc., this gives the above quoted observations of Kay, J. an important bearing on the case in hand.

The current of authority in the United States as to claims for working expenditure incurred before the appointment of a receiver is in accord with the English case last referred to. The leading case is that of *Fosdick* v. *Schall* (1878), 99 U.S. 235, where Waite, C.J., at p. 254 says:—"It often happens that, in the course of the administration of the cause, the Court is called upon to take income which would otherwise be applied to the payment of old debts for current expenses, and use it to make permanent improvements on the fixed property, or to buy additional equipment. In this way the value of the mortgaged property is not unfrequently materially increased. It is not to be supposed that any such use of the income will be directed by the Court, without giving the parties in interest an opportunity to be heard against it. Generally, as we know both from observation and experience, all such orders are made at the request of the parties or with their consent. Under such circumstances, it is easy to see that there may sometimes be a propriety in paying back to the income from the proceeds of the sale what is thus again diverted from the current debt fund in order to increase the value of the property sold. The same may sometimes be true in respect to expenditures before the receivership. No fixed and inflexible rule can be laid down for the government of the Courts in all cases. Each case will necessarily have its own peculiarities, which must to a greater or less extent influence the Chancellor when he comes to act. The power rests upon the fact, that in the administration of the affairs of the company the mortgage creditors have got possession of that which in equity belonged to the whole or a part of the general creditors. Whatever is done, therefore, must be with a view to a restoration by the mortgage creditors of that which they have thus inequitably obtained."

In the case of *Turner* v. *Indianapolis, Bloomington & Western R. Co.* (1878), 8 Biss. 315, Drummond, J., discusses the reasons for the preference extended to overdue working expenditure, holding that such preference is not based upon the theory that working expenditure is a lien on the road but inheres in the equitable juris-

diction of the Court to protect the claims of those who have enhanced the value of the property by their services, etc.

At p. 320 he says:—"The experience of the Court which, it may be said, has been obtained by the management for many years of immense amounts of this kind of property, has satisfied it that practically it would be well nigh impossible, looking at things as they actually exist, to operate the roads by receivers without some allowance for claims of the character mentioned, existing at the time of their appointment."

In some jurisdictions in the United States the Courts limit the period antecedent to the appointment of the receiver for preference or priority to attach to 6 months. But the weight of authority is against this limitation. In *Northern Pac. R. Co.* v. *Lamont*, *Farmers' Loan & Trust Co.* v. *Same* (1895), 69 Fed. Rep. 23, Caldwell, J., delivering the judgment of the Circuit Court of Appeals (8th Circuit), said at p. 24:—"A preferential debt is not barred though contracted more than six months before the appointment of a receiver. As to such debts there is no arbitrary 'six months' rule, as has been often decided." This opinion is supported by the case of *Hale* v. *Frost* (1878), 99 U.S. 389, where the Supreme Court of the United States gave priority to a claim for materials furnished 3 years before the appointment of the receiver; and by the case of *Burnham* v. *Bowen* (1883), 111 U.S. 776, where the same tribunal gave preference to a debt for coal supplied some 11 months before the receiver was appointed. See 30 Am. L. Rev. at p. 168 for a full discussion of this subject.

Of course this principle does not extend to according preference or priority to working expenditure prescribed by any statute of limitations. This is very succinctly put in Beach on Receivers, sec. 392, p. 414:—

"Just as long as the debt may be, or could have been enforced against the company, it should be considered as retaining its preferential character and entitled to the privilege of preferential debts. Such time is that prescribed by the statute of limitations, which alone should, and reasonably can bar preferential debts."

In the case of *The Minister of Railways and Canals for the Dominion of Canada* v. *The Quebec Southern R. Co. et al* (1905), 10 Can. Ex. 139, the Registrar of this Court (now Audette, J.), sitting as Referee, allowed a claim of Messrs. Greenshields, Greenshields & Heneker for legal services as working expenditure, the same having accrued before the appointment of a receiver

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therein. He also allowed in the same way a claim of Messrs. W. de M. and H. M. Marler for legal services as notaries accrued before the receivership. These rulings have not been published in the official reports of the Court. However, we have a similar decision in a claim for legal expenses by the Registrar, sitting as Referee, in the case of *The Royal Trust Co.* v. *The Atlantic and Lake Superior R. Co. etc.*, (1908), 13 Can. Ex. 42 at p. 50.

In the light of the authorities above-quoted, the undersigned is of opinion that the finding upon the contestation of Mr. Hogg's claim for the sum of $6,085.65 must be that it is entitled to be collocated as a privileged claim for "working expenditure," and, as such, authorised to be paid out of the fund in the hands of the Receiver in priority to the claim of the trustee for the bondholders.

Judgment accordingly.

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Ontario Supreme Court, Appellate Division, Meredith, C. J. O., Magee, Hodgins and Ferguson, JJ.A. December 30, 1920.

Contracts (§IVB—330)—Sale of ore—Breach —Cause beyond reasonable control of seller—Impossibility of performance—Liability in damages—Measure of damages—Duty of purchaser to minimise loss.

A contract for the sale of 3500 tons of chrome ore was made "contingent upon strikes, accidents, delays of carriers or other unforseen circumstances beyond the reasonable control of the sellers, wars of this or other nations, as well as interruption of navigation through strikes or other causes, in which case deliveries against this contract may be suspended." Only 840 tons were delivered out of the 3500 contracted for. The Court held, that the failure to deliver the remainder of the ore contracted for was not due to circumstances beyond the reasonable control of the sellers within the meaning of the above quoted clause and that the defendants were not relieved from performance because they had expended a large amount in reorganising their methods before they could produce the ore in commercial quantities; they were not the sole producers of ore and had sold and diverted to other buyers during the period of the contract and so it could not be said that they had shown that performance was impossible owing to pinching out, or that the expenditure they had made was absolutely necessary before they could substantially fulfil their contract, and that they were liable in damages for the non-delivery

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of the balance of the ore contracted for. As to the amount of damages the purchaser was under the duty of taking all reasonable steps to mitigate the loss to himself consequent on the breach and as each car was diverted from the purchaser and shipped elsewhere that was a repudiation **pro tanto** and was known to be so by the purchaser. As each delivery was to constitute a separate and independent contract, each diversion gave rise to rights which the purchasers in fact exercised; as to the total of these cars the proper measure of damages was the amount it cost the purchasers to supply their place, and it was their duty to have bought against the seller the quantity of which they had been disappointed by each non-delivery. If the purchases which they made in replacing cars diverted from them, or in excess of their requirements under their selling contracts did not extend to 2660 tons, the difference between the contract price and the market price on the day when the seller first definitely repudiated the contracts might be applied as to the residue.

APPEAL by defendants from the judgment of Kelly, J., in an action for damages for breach of two contracts. Affirmed, except as to the measure of damages.

The judgment appealed from is as follows:—

KELLY, J.:—This action was begun on the 1st November, 1918. The plaintiffs claim damages alleging breach of contract by the defendants to deliver a large quantity of Canadian lump chrome ore, under two separate contracts. The first of these was by way of a written proposal of the 25th April, 1917, by the plaintiffs to the defendants to purchase 1,500 gross tons of 2,240 lbs. each; the other was a proposal of a similar kind, dated the 3rd May, 1917, to purchase 2,000 gross tons; both were accepted in writing on the 29th May, 1917. The two contracts are in identical terms except as to date and quantity; they specify the quality to be good, well-prepared chrome ore, at the following prices: "Ore analysing 32 to 35% chromic oxide $23.50; for ore containing over 35% to 38%, $25.75; for ore analysing over 38% up to 39%, $27.50, with a scale of $1.00 for each full unit over 39% and up to 42%, all per gross ton; payment to be made in U.S. gold coin or equivalent. Cash in full to be paid in Black Lake less 25 cents per ton as heretofore;" delivery "f.o.b. cars Quebec Central Railroad Company's tracks between Robertsonville and D'Israeli, P.Q.;" shipments to be as fast as possible; "the entire quantity to be shipped not later than the first of November;" shipping directions to be given "as fast as the ore is loaded;" the purchases being subject to the Canadian Government granting permission to ship to the United States. It was also provided that the sampling and analysing be done by the

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purchasers at their expense, and where their determinations were not satisfactory to the sellers the latter were to have the privilege of disposing of such car-loads, which, however, were to be replaced. There were these further provisions: "Each delivery to constitute a separate and independent contract unless otherwise stated. All agreements contingent upon strikes, accidents, delays of carriers or other unforseen circumstances beyond the reasonable control of the sellers, wars of this or other nations, as well as interruptions of navigation through strikes or other causes, in which case deliveries against this contract may be suspended."

At the trial it was admitted by counsel, for the purposes of the action, that 840 tons out of the total contracted for were delivered. These have been paid for, and no question arises here relating to them. The defendants have set up that, they being the owners of chrome-bearing lands in the Province of Quebec, negotiations were entered into between them and the plaintiffs in or about April, 1917, as a result of which they made conditional agreements with the plaintiffs for the mining and sale to the latter of the two quantities specified in the written agreements above referred to, on the express condition that the defendant's production of chrome ore for the year 1917 should be at least as great as the production during the year 1916 and without special difficulties or increased cost from war conditions or labour troubles; and also that they should have the right to sell a reasonable quantity of chrome ore to customers other than the plaintiffs in order to preserve their trade connections, following which the plaintiffs prepared and sent to them the two documents already mentioned; and they contend that the plaintiffs represented to them that the contingency clauses in the agreements were intended to include and do include the other conditions above set forth (and which it will be observed are not expressly mentioned in the agreement); and that upon these representations and subject to these conditions they made the contracts. Another defence set up is that the deposits of chrome ore belonging to the defendants gradually failed, and the production thereof in 1917 was much reduced; that towards the end of that year these deposits were almost exhausted, and in consequence it became impossible to supply to the plaintiffs 3,500 tons of chrome ore. They also allege that shipments of chrome ore to the United States had been restricted by the Canadian Government; that they were directed by the Munitions Board, acting on behalf of His Majesty the King, to supply this ore to Canadian consumers for use in the preparation

of munitions; and that the sampling and analysing by the plaintiffs of several car-loads was not satisfactory to the defendants, and in consequence these car-loads were not shipped.

The situation as revealed by the evidence is this:—There being an active market for chrome ore early in 1917, the plaintiffs, who are large dealers in that commodity and who had previously made other purchases from the defendants, negotiated for purchase of the quantities covered by the two agreements now in question, the negotiations resulting in the making of the two contracts.

Prior to these negotiations, the defendants had under consideration a large sale to others than the plaintiffs. The plaintiffs were made aware of this, and were also told by the defendants, pending the negotiations, that the negotiations with the other prospective purchasers had not resulted in a sale. The defendants' manager spoke of the prospects of their mining a very large quantity of their ore: 10,000 tons was mentioned.

It is not the fact, as the defendants now allege, that the contracts entered into or their performance depended upon the conditions now set up other than those expressly set out in the written contracts themselves, or that there was any representation, agreement or understanding by the plaintiffs that the contingencies mentioned in the contracts included or were intended to include anything beyond what their language necessarily implies; they are to be construed according to their language and upon the facts as substantiated by the evidence.

The plaintiffs made contracts for sale to their customers of chrome ore which they intended to deliver out of that contracted for with the defendants. They were purchasing ore wherever they could obtain it, and from early in 1917 to October, 1918, were unable to get all they required. The witness Tomlinson, a member of the plaintiff firm, says they were compelled to refuse to quote ore to their customers because of being unable to obtain it. From the beginning the defendants were dilatory in making delivery, so that long before the 1st November—the date fixed for the completion of the deliveries—it became apparent that full delivery would not be made within that time. The plaintiffs did not then stand on their strict right to enforce performance at that time; but, while they were continually pressing for more prompt and larger deliveries than they were getting, the facts warrant the inference that the effect of what happened between them was an extension from time to time of the time for making deliveries until hope for

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further deliveries was ended by a notice of the 21st June, 1918, that the defendants declined to make further shipments to the plaintiffs. Not only is this so, but Mr. Tomlinson makes the statement that the plaintiffs had extended the time for delivery down to the time the defendants repudiated the contracts, which statement has not been contradicted. Soon after the contracts were entered into, prices for chrome ore began to advance, it being in demand for war purposes, and the cost of production was also increasing. Though it is not to be assumed from the contracts that the quantity contracted by the defendants to be sold to the plaintiffs was limited to what their mines would produce, it is well-established that non-delivery was not due to a shortage of ore in the mines. Shortage was not seriously advanced as an excuse for unsatisfactory deliveries, when the plaintiffs were complaining, in 1917 and the early part of 1918, of the manner of deliveries.

At the trial stress was laid upon evidence intended to shew that the reason for the defendants' failure to live up to the contracts was the "pinching out" of the ore in their mines. That I find not to have been the fact. If sufficient for the purposes of these contracts was not obtained from the mines, it was not due to "pinching out" or shortage in the mines. Ample for these contracts could have been produced if the defendants had made reasonable efforts to that end. To obtain the required quantity would have entailed greater expense than they contemplated when they contracted with the plaintiffs; that and the higher price obtainable from other purchasers when the ore advanced in price go a long way to accounting for the defendants' refusal to complete these contracts.

If anything were wanting in other parts of the evidence on which to support this conclusion, it is found in the communications which passed between the defendants or their representatives and the War Trade Board, extending from May until the end of December, 1918. In this connection it should be kept in mind that it was on the 21st June, 1918, that the defendants definitely refused to make further deliveries; the negotiations with the War Trade Board, in which no question of shortage or "pinching out" arose, were practically all subsequent to that date. From this correspondence and from other evidence as well, it is apparent to me that the true reason for delayed deliveries and then for refusal of further deliveries was not the failure to find ore in the mines, but the defendants' unwillingness to produce the requisite quantity

at an increased cost, especially when the selling price of chrome ore had substantially advanced. Prices much in excess of the plaintiffs' contract prices were easily obtainable from other purchasers, and to carry out their obligations to the plaintiffs became correspondingly unprofitable to the defendants, who not unnaturally desired to reap the advantage of these higher prices. Early in 1918 the suggestion came from their representative that deliveries, which were then being delayed would be made if the plaintiffs would pay an additional $5 per ton; the offer was declined. They made sales and deliveries of substantial quantities to other purchasers after their positive refusal further to perform the plaintiffs' contracts, and there is evidence establishing the fact that they had ore to ship, and did ship it, to other purchasers in the latter part of 1918. There being no shortage of ore, it is not necessary to consider what would have been the result if there had been insufficiency of ore requisite to fill all their contracts.

As to the right to export, it is admitted by counsel that there was no restriction by the Canadian Government upon export to the United States. There was no interference by the Imperial Munitions Board either with production or export. The situation which developed between the War Trade Board and the defendants was an insistence by the Board upon increased production and a request by the defendants for financial assistance to meet increased cost of mining, and so aid in bringing about increased production.

The alleged unsatisfactory sampling and analysing of certain car-loads of the ore, if such was the fact, was not a sufficient reason for refusal to deliver. Where the sampling and analysing were unsatisfactory, the defendants availed themselves of their privilege under their contracts of retaining these car-loads; on the other hand, they disposed of other car-loads without first submitting them to the plaintiffs for sampling and analysing.

I cannot find anything in the contracts or in the evidence to support the contention that there was any agreement by the plaintiffs that the defendants should have the right to sell a quantity of chrome ore to other customers. If the defendants had in mind the advisability of such a provision, it forms no part of the contract. It is true that when deliveries were being delayed and the plaintiffs were pressing, the defendants more than once offered as an excuse for non-delivery that they were under obligation to make deliveries to another purchaser; and they promised that when these were completed more satisfactory deliveries would be

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made to the plaintiffs. In a word, the defendants' failure of performance was not due to any of the contingencies provided against in the contracts themselves; nor can it be said that any event happened interfering with that performance which could not reasonably have been anticipated by the contracting parties when the contracts were entered into.

In my opinion, the true explanation of the situation is, as I have already said, the increased cost of getting out the ore and the desire to take advantage of the advanced market-price, sales at which would be extremely profitable to the defendants, as compared with the selling prices in their contracts with the plaintiffs.

That increased cost of production, unless specially provided against, is not a ground for refusal to perform, is well-established, even though it be to the extent of rendering the contracts unprofitable to the vendors. Mere economic unprofitableness is not to be regarded as equivalent to impossibility of performance.

In recent cases arising out of contracts affected by the war the Courts have considered this question, particularly in *Tennants (Lancashire) Limited* v. *C. S. Wilson & Co. Limited*, [1917] A.C. 495, where there are several references to it. That was a case where the sellers, who were sued by the buyers for failure to deliver, claimed to be entitled to suspend delivery under a contract which provided for suspension pending any contingencies beyond the control of the sellers or buyers, causing a short supply of labour, fuel, raw material, or manufactured produce, or otherwise preventing or hindering the manufacture or delivery of the article sold. On the question of increased price as a ground for suspension of delivery, Lord Dunedin said (p. 516): "I do not think that price as price has anything to do with it. Price may be evidence, but it is only one of the many kinds of evidence as to shortage. If the appellants had alleged nothing but advanced price they would have failed." At pp. 522, 523, Lord Shaw said: "A mere fluctuation of price would not constitute such a hindrance; but in the present case the actual article itself is prevented or hindered from coming into the British market;" and Lord Wrenbury, at p. 526: "Rise of price is, I think, irrelevant except that it may be evidence, when coupled with other facts, that there is a short supply." Later decisions have not disturbed this view. I also refer to Trotter's Law of Contract during and after War, 3rd ed., pp. 119, 120. *Peter Dixon & Sons Limited* v. *Henderson, Craig & Co. Limited* (1918), 117 L.T.R. 636, there cited, has been reversed in the Court of Appeal, [1919] 2 K.B.

778, on the ground that the case involved not merely the question of a rise in price, but the position being so changed by the war that the sellers, although not prevented, were hindered from carrying out the contract within the meaning of the *force majeure* clause, and were thereupon entitled to suspend delivery. There was no such prevention or hindrance in the present case.

To what amount of damages, therefore, are the plaintiffs entitled? The mode of dealing between these contracting parties involving delay in deliveries for the convenience of or to suit the purposes of the defendants, and the acquiescence, reluctant though it was, by the plaintiffs, and their forbearance, are sufficient to support the implication of an arrangement for postponement from time to time of the deliveries. There is, in addition to this, the express evidence in the statement, which I have already accepted, of Mr. Tomlinson that the time was extended down to the defendants' repudiation on the 21st June, 1918. No new contract was then substituted for the original written contracts, and the Statute of Frauds does not apply: *Ogle* v. *Earl Vane* (1868), L.R. 3 Q.B. 272.

The further question arises as to the time as of which the damages are to be calculated. When the time for performing a contract for sale has been postponed, at the request of either vendor or purchaser, and the contract is ultimately broken, this has the effect of defining the period at which the breach takes place. The old contract continues, but the date of the breach is shifted, and damages for non-delivery will be calculated at the market-price of such goods on the last day to which the contract was extended, if a date was fixed, or at the date when the plaintiff refused to grant further indulgence, or at a reasonable time after the last grant of an indulgence: Mayne on Damages, 8th ed., p. 214; *Hickman* v. *Haynes* (1875), L.R. 10 C.P. 598. A similar conclusion was arrived at in *Ralli* v. *Rockmore* (1901), 111 Fed. Rep. 874, where the facts strongly resembled those of the present case.

The indulgence of extension to the defendants ended by their own act when they refused, on the 21st June, 1918, to make further deliveries. For the purpose of estimating damages, that must be taken as the date of the breach of the contracts. Where the buyer postpones delivery at the seller's request, and the seller fails to deliver at the later date agreed upon, the measure of damages is the difference between the contract-price and the market-price at such later date, although the price was then greater than at the date originally fixed for delivery: Halsbury's Laws of England, vol.

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10, p. 334, para. 611.

For the lowest grade of ore covered by these contracts, namely, ore analysing 32 per cent. chromic oxide, the contract-price was $23.50 per gross ton of 2,240 lbs. On the 21st June, 1918, the market-value of ore of similar grade, deliverable at the same place and on the same terms as provided for by these contracts, was $53.76 per similar ton, or a difference of $30.26 per ton. The plaintiffs are content that the calculation of their damages should be at this lower grade throughout, though, in view of the increased price of the higher grade, this may be to their disadvantage.

Under the contracts they were entitled to delivery of an additional 2,660 tons. I assess their damages at $80,491.60, for which sum, with costs of action, there will be judgment.

R. S. Cassels, K.C., for appellants.

A. W. Anglin, K.C., and *R. C. H. Cassels*, for respondents.

The judgment of the Court was delivered by

HODGINS, J.A.:—The appellants were owners of 6,000 acres, part of the Black Lake area lying alongside the Quebec Central Railway Company's track between Robertsonville and Disraeli, in the Province of Quebec. They entered into two written contracts with the respondents on the 25th April, 1917, and the 3rd May, 1917, the acceptance of which by the appellants is dated on the 29th May, 1917.

Under these contracts, the respondents bought from the appellants 3,500 gross tons, of 2,340 pounds each, of Canadian lump chrome ore, at prices varying with the analysis of the ore, the lowest grade analysing from 32 to 35 per cent. chromic oxide, and the highest analysing from 39 up to 42 per cent., and the price being $23.50 to 27.50 per ton, with an additional $1 for each full unit over 39 per cent. This ore was to be delivered f.o.b. cars on the Quebec Central Railway Company's tracks between the two points mentioned, shipments to be as fast as possible, and the entire quantity to be shipped not later than the 1st November, 1917, shipping directions for which were to be given as fast as the ore was loaded. The sampling and analysing was to be done at Black Lake by the respondents at their own expense, and where not satisfactory to the appellants the privilege was given to them to dispose of such car-loads elsewhere. These were, however, to be replaced. Each delivery was to constitute a separate and distinct contract, unless otherwise stated. The contracts contained this printed clause:—

"All agreements contingent upon strikes, accidents, delays of carriers or other unforseen circumstances beyond the reasonable control of the sellers, wars of this or other nations, as well as interruption of navigation through strikes or other causes, in which case deliveries against this contract may be suspended."

It was admitted that only 840 tons, out of the total of 3,500 contracted for, were delivered and paid for.

The judgment in appeal assesses damages for the non-delivery of the balance, 2,660 tons, at the sum of $80,431.60, being the market-value on the 21st June, 1918, of similar grade ore deliverable at the same place and on the same terms as mentioned in these contracts. This date is fixed, owing to the fact that the appellants for the first time then definitely and in writing repudiated the contracts, although they had failed to deliver, either before or after the 1st November, 1917, any ore beyond the 840 tons already mentioned. On the argument it was practically conceded that as to 480 tons sent to the Dominion Steel and Iron Company, and 100 tons sent to Lavino, the appellants were liable unless they were relieved upon the grounds urged by them as absolving them from all liability under the contracts.

Two preliminary questions were raised on the appeal, namely: that, the contract being for the ore to be mined from the appellants' property, there was a collateral agreement excusing further performance of the contracts if their supply of chrome ore pinched out, or its production became commercially impossible; and also that the concluding clause in the contracts in itself relieved them from liability under the circumstances which arose. In connection with this second ground it was said that the respondents represented to the appellants that the clause in question was intended to cover and would cover the situation caused by the pinching out of chrome ore pockets.

To deal with this last ground, there is only the affirmative evidence of Murphy, the appellants' mines-manager. He says:—

"In mentioning the tonnage, I objected to any specified quantity, but he [Tomlinson, the respondents' representative] told me there was a clause in his contract, a copy of which he had on file in the old contracts, that would protect us against any loss from shortage of ore, strikes, railway conditions, wars or any other obstacle that might come in our way. On this ground I accepted Mr. Tomlinson's figures of 3,500 tons, provided he took up his option on the 2,000 tons."

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When the correspondence which took place subsequent to this conversation is looked at, it appears that the respondents on the 27th April, 1917, wrote enclosing the first contract and called the appellants' attention to the note printed at the bottom of that contract in reference to strikes, etc., adding these words, "which we trust will cover the points you spoke about." There is no assertion in that letter that the clause does cover any specific point; and, even assuming that shortage of ore was spoken of, the letter does not, as in *In re Hooley Hill Rubber and Chemical Co.* and *Royal Insurance Co.*, [1920] 1 K.B. 257, give any specific opinion as to the meaning of the clause, but is merely an expression of hope that it would cover anything in regard to which the appellants desired to be protected. It was for the appellants themselves to determine whether or not the words used covered the ground they allege to have brought up in conversation. Apparently they accepted it for what it was worth, without calling further attention to it, and must be bound by its terms.

The contention is made that the appellants were contracting to sell chrome ore to be found on their property and in their mines, and that the contracts were not for the sale of a commercial article known as chrome ore, apart from what they themselves produced. I do not find that this contention is at all borne out by what occurred. It is true that Murphy desired to sell the whole output of chrome ore for 1917, and told Tomlinson so before the contracts were made, informing him at the same time that an offer by the appellants to sell the output to other parties had fallen through. Tomlinson, on the contrary, wanted, not the output, but a certain number of tons, and stated that it would be to his advantage to go back to the steel people in the United States and offer them an exact tonnage. Murphy recollects that the amount of the output tonnage for 1917 was mentioned as being about 10,000 tons, and says that Tomlinson was always stating that 3,000 tons was what he wanted.

In view of the estimated output being 10,000 tons, or more than three times what the respondents wanted, it must be taken that, when the contracts were completed, any question of selling the whole output was abandoned, and that a definite amount, namely, 3,500 tons, was actually sold. The contracts themselves provide for "Canadian lump chrome ore" of certain varying analyses.

It is significant that, apart from a statement in February, 1918, that the appellants have no high grade ore to ship, and that there

is no more ore in sight in the pits, neither in the correspondence nor in the final letter of the 21st June, 1918, repudiating the contracts, is there a direct assertion of any such limitation, or that the 3,500 tons was only to be that produced from the appellants' mines. In the letter just referred to, the appellants' position is taken thus:—

"The contracts to which you refer bear *on their face* a ground for termination, namely, the pinching out of ore which unfortunately took place on our properties . . . In addition practically our entire output at the present time is being used for home consumption, and we regret that we cannot make any further shipments to you."

These two excuses are inconsistent, but in the earlier one the appellants take their stand, not upon the fact that the pinching out of ore would in itself relieve them from finishing up their contracts, but upon the fact that the contract itself provided for this contingency, thus relying upon the printed clause already quoted, the effect of which will have to be considered.

This clause includes the contingency of "other unforseen circumstances beyond the reasonable control" of the sellers. This does not provide for a contingency which was clearly within the knowledge, and ought therefore to have been within the foresight, of the appellants. Their witnesses admit that these pockets or deposits of chrome ore do pinch out, and say that this is characteristic of chrome mining.

Morrisette, one of the contractors working under the appellants in 1917, says that, in a few of those pits in which they were working, the chrome ore pinched out so that they had to quit them.

Murphy, in his cross-examination, says that four of the eight pits which were working in September, 1917, pinched out, and that they made efforts to remedy this by offering more money to the contractor to find and produce ore. This, therefore, does not seem to be a matter in which the appellants can fairly claim that the circumstances were unforseen; and it is notable that in October, 1917, they write (exhibit 9) to the respondents attributing the lack of increase in the output of chrome ore to weather conditions and shortage of men, and do not claim consideration on the ground that the ore was pinching out. In November and December, 1917 (exhibits 15 and 17), they assert that the order was being attended to as fast as the chrome could be got out, and add that they had lived up to the contract in every respect with the exception of

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supplying the full tonnage within the time-limit, and that they had some ore ready then for shipment. If, therefore, the exception depends upon an unforseen contingency, and not upon a cause beyond the reasonable control of the appellants, they do not bring themselves within it. The question of reasonable control I will advert to later. The clause in question also contains a provision making the agreements contingent upon interruptions to navigation "and from other causes," in which case deliveries against the contract may be suspended. The proper construction of this provision is that the words "other causes" are referable to interruptions to navigation, and not to anything unconnected with it. As this provision forms part of the printed portion of the contract, which also mentions shipments lost at sea, it is reasonable to conclude that it has no relation to shipments under these contracts, but is a provision dealing with shipments which may have to be made by sea or in barges.

Dealing with the argument that the non-production by the appellants of ore, having regard to the requirements of these contracts was beyond the reasonable control of the appellants, the following facts appear in evidence.

In May and June, 1917, according to Mr. Wooler, who was the resident analyst for the respondents, eight cars were shipped which had not been submitted to him for analysis, and were sent to Lavino & Co. In August and September, 1917, the appellants say (exhibit 10) that the pits are now working and are producing as much ore as is possible to take out per day, and that it is being shipped as quickly as car-loads are ready, and they trust to be able to make larger shipments in the near future. In September, 1917, four pits were working, four others having given out.

In October, 1917, the appellants, in the letter already quoted (exhibit 9), do not set up pinching out, but lay the blame for delayed delivery upon the weather and the shortage of men. The appellants admit sending, in 1917, 17 cars to Lavino & Co., of which three were not submitted to Wooler for analysis, and contend that there was an embargo by the U.S. authorities upon shipments to points named by Wooler—and excuse which is conclusively disposed of by him. In February, 1918, the appellants allege that they have no high grade ore to ship, and say that there is no more ore in sight in the pits. But in March, 1918, at a meeting at Black Lake, an additional payment of $5 per ton is suggested by Murphy, and is not satisfactorily explained by him as being due to improper

analysis by Wooler. In the spring of 1918 it is stated by Wooler that in the Croteau pit there was good ore and that it was worked for two or three months afterwards, and his opinion is that the appellants should have finished supplying the respondents under the contracts by July, 1918. In June, 1918, Morrisette says, there were six pits working, of which three were the largest producers on the property. Ross, the appellants' mining engineer, admits only two at this time, one low grade and one sufficient for commercial use.

Reference must also be made to the correspondence between the appellants' head office and the Black Lake management, in which, on the 7th June, 1918, the local manager reports that they have two pits working not higher than 33 per cent., and that they have sold to the Dominion Iron and Steel Company, in pursuance of admitted instructions from the head office to sell anywhere, four cars of 30 per cent. to 40 per cent. On the 30th July, 1918, the local manager, Murphy, reports to the head office that they are making $50 per ton profit on every ton shipped. It is hard to resist the conclusion that the higher prices which were prevailing in 1918 were the inducement to the appellants to abandon fulfilment of the respondents' contracts in favour of outside purchasers who were willing to pay and did pay much higher prices for chrome ore.

But there is another matter which seems to me to be decisive upon the question as to whether the supply was beyond the reasonable control of the appellants. In May, 1918, the War Board correspondence with the appellants began, and in it are asserted: first, that the property of the appellants is among the richest known deposits of chrome ore; that increased production from the pits mentioned by Morrisette as being the largest producers is probable under new methods of mining; that the number of men employed indicates the absence of proper energetic development; that areas outside those mentioned can be leased by the appellants on a 10 per cent. royalty basis to operators who are prepared to comply with the War Board's requirements for prospecting and development; and that development should be placed under a competent mining engineer.

In answer to these assertions, the appellants agree to lease the other areas as suggested on a 10 per cent. royalty basis, and as to their developed areas say that it produced 14,000 tons in 1916, and, while this decreased very much in 1917, promised better for

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1918. They further agree to undertake intensive operations of one or two groups of pits. They also intimate that they have decided to incur the initial expenditures necessary in connection with areas adjacent to their present pits.

Without going further into the history of their action thus foreshadowed, it appears that, beginning in September, 1918, they spent $80,000 up to July, 1919, with the result that under new methods the appellants retrieved in development work 600 tons up to July, 1919, and afterwards got out 1,000 to 1,200 tons of high grade ore and some low ore, or in all about 2,000 tons, at an average of 30 per cent. It appears that the high grade ore, 40 per cent. and over, is found in large lumps or rocks, and in order to grade a ton down to a lower percentage it is mixed with ore of inferior grade.

This result seems to me, subject to the further ground that the great expense to be incurred brought the appellants within the cases cited dealing with impossibility of performance, to dispose not only of the contention that the alleged deficiency of ore was due to a cause beyond the reasonable control of the appellants within the meaning of the exception, but also of the ground urged that there was in fact an absence of ore sufficient to fill the contracts in question.

But it was contended, and the contention was very strongly pressed, that the appellants were entirely relieved from performance of their contract because the basis upon which it was entered into was radically changed, and that they had to expend $80,000 and entirely to reorganize their methods before they could produce ore in commercial quantities. The ore sold, however, is described as "Canadian lump chrome ore," a commercial article. It can be bought and sold in the market, and was bought in November, 1917, by Donner & Co., in the United States, delivered in Buffalo, and was sold by the respondents in March or April, 1918, to that company. The appellants themselves sold it to several purchasers and the respondents bought it in 1918 in the Black Lake district from other producers. Chrome ore is found in California and New Caledonia, and the market-price of chrome ore in June, 1918, is stated to be $53.76 per ton at the mines, plus $15 for freight from California. The appellants, therefore, were not the sole producers of this ore, altogether apart from the fact that they had and disposed of ore to other parties, diverting it from the respondents' contracts. It appears to be well-proved that they could, by

paying wages as high as they were compelled to pay to their asbestos workers, have compassed the production of the article in question in commercial quantities. The doctrine of frustration depends upon implied contract, and it is said that "no such condition should be implied when it is possible to hold that reasonable men could have contemplated the circumstances as they exist and yet have entered into the bargain expressed in the document:" *per* A. T. Lawrence, J., in *Scottish Navigation Co. Limited* v. *W. A. Souter & Co.*, [1917] 1 K.B. 222, 249. This statement has the approval of Lord Sumner in *Bank Line Limited* v. *Arthur Capel & Co.*, [1919] A.C. 435, 460, and of Bailhache, J., in *Comptoir Commercial Anversois* v. *Power Son & Co.*, [1920] 1 K.B. 868, 879. Here, I think, the parties knew the situation, were aware of the possibility of pits pinching out, and of the existence of other sources of supply, and might very well have made the contracts in question. I am, therefore, unable to conclude either that the appellants have shewn that performance was impossible owing to pinching out, or that the expenditure which they made was, under the circumstances, absolutely necessary to put themselves in a position to fulfil or substantially complete their contracts, or that any implication should be added to the written contracts in case of their performance in the events which happened. I am not, however, to be understood as expressing the opinion that the necessity for making that expenditure or the adoption of new methods would in themselves bring the appellants within the principle of the cases cited where the performance of the contract is held to have become impossible. On this point the cases of *Blythe & Co.* v. *Richards, Turpin & Co.* (1916), 114 L.T. 753 (an extraordinary rise in freights), *Tennants (Lancashire) Limited* v. *C. S. Wilson & Co. Limited*, [1917] A.C. 495 (a heavy rise in prices), and *Blackburn Bobbin Co.* v. *T. W. Allen & Sons Limited*, [1918] 1 K.B. 540, [1918] 2 K.B. 467 (impossibility to get Finland birch), may be referred to on the question of so-called commercial impossibility.

I am therefore against the appellants upon all the grounds raised by them in opposition to the liability imposed by the judgment.

Upon the question of the quantum of damages the case is more difficult. Default was made in supplying the ore by the time named in the contracts, viz., the 1st November, 1917. This time was not then insisted upon by the respondents, who, however, reserved the right to cancel at any time thereafter, should they be supplied else-

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where. The appellants answered this by stating their inability to make larger shipments.

On the 20th and 22nd November (exhibits 13 and 14), the respondents remonstrate against the selling of ore by the appellants to their competitors, and threaten to claim damages, and again in March, 1918, they say that on default of definite advice as to shipments, they will buy ore elsewhere, and apply it on the ore due by the appellants.

Fortunately it is not left to the Court in this case to speculate as to the market. That a market existed is clear, and the prices are or can be established by a reference to the transactions of both parties. The appellants admit selling cars to others at higher prices. This was known to the respondents through Wooler, who was their resident analyst, and who knew intimately the situation and the dealing with each car. The respondents say that they bought chrome ore in the Black Lake district—all they could find, and practically all the ore that came from the Province of Quebec during the period in question. The respondents therefore practically cleared the only market into which the appellants could have profitably gone if they desired to supplement their own production, and thus the respondents got the benefit of the prices which prevailed there during the whole period of default up to July, 1918, when actual repudiation took place. It is quite possible that the respondents were not able to buy the whole 2,660 tons. It is said by their representative that the respondents did not buy against these contracts, but he admits that what he bought went, at all events in part, to fill contracts which the respondents had intended to complete with supplies from the appellants. They did this after notifying the appellants that they would claim damages and that they would buy and charge them with these purchases. I do not think the respondents can, in face of the rule that the injured party is bound, in reason, to minimise his loss, be allowed to assert that their purchases, whether purposely attributed to other contracts or not, should not be a factor in deciding what their loss actually was. "The damages are to be assessed on the basis of reasonable conduct on the part of the purchaser:" *per* Atkin, J. (now L.J.), in *C. Sharpe & Co. Limited* v. *Nosawa & Co.*, [1917] 2 K.B. 814, at p. 820. "He" (the purchaser) "is none the less bound by another principle which imposes on him the duty of taking all reasonable steps to mitigate the loss to himself consequent on the breach:" *per* Lord Haldane in *Hill & Sons* v. *Edwin Showell & Sons Limited* (1918), 87 L.J. (K.B.) 1106, at p.

1103. In our own Courts this has been recognised in such cases as *Cockburn* v. *Trusts and Guarantee Co.* (1917), 37 D.L.R. 701, 55 Can. S.C.R. 264, and *Findlay* v. *Howard* (1919), 47 D.L.R. 441, 53 Can. S.C.R. 516, and by the Privy Council in *Jamal* v. *Moolla Dawood Sons & Co.*, [1916] 1 A.C. 175. The language above quoted is almost identical with that used by the same learned Lord in *British Westinghouse Electric and Manufacturing Co. Limited* v. *Underground Electric Railways Co. of London Limited*, [1912] A.C. 673. As each car was diverted from the respondents and shipped elsewhere, that was a repudiation *pro tanto*, and was known to be so by the respondents, through their agent Wooler. As each delivery was to constitute a separate and independent contract, each diversion gave rise to rights which the respondents in fact exercised, though now disclaiming intention to do so. They never definitely agreed to postpone these deliveries to any specific time, and always demanded shipments, so that it cannot be said that their general attitude of waiting covers the case of these particular cars. As to the total of these cars, I think the proper measure of damage is the amount it cost the respondents to supply their place, and that it was their duty to have bought against them. In *Higgin* v. *Pumpherston Oil Co. Limited* (1893), 20 R. (Ct. of Sess. Cas.) 532, a condition that each separate delivery should constitute a separate contract is said to throw upon the purchaser the duty of buying against the seller the quantity of which he had been disappointed by each non-delivery. See also *Doner* v. *Western Canada Flour Mills Co. Limited* (1917), 41 D.L.R. 476, 41 O.L.R. 503. I think this is also the tendency of the Court's opinion in *Tyers* v. *Rosedale and Ferryhill Iron Co. Limited* (1875), L.R. 10 Ex. 195, if read in the light of what the parties here actually did. See also the Ontario Sale of Goods Act, 10-11 Geo. V., 1920, ch. 40, sec. 31, sub-sec. 2.

The Court, while not taking a sub-sale by the purchaser as fixing damages against a defaulting vendor, yet has admitted such sales as evidence of value or market-price. See *France* v. *Gaudet* (1871), L.R. 6 Q.B. 199, and *Stroud* v. *Austin & Co.* (1883), 1 Cab. & El. 119 (Cave, J.) If the purchases which the respondents made in replacing the cars diverted from them, or in excess of their requirements under their selling contracts on hand from time to time during the period in question, do not extend to 2,660 tons, then the measure adopted by the trial Judge may be applied as to the residue. There should, therefore, be judgment setting aside the award of

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damages, in so far as it involves their measure and amount, and there should be substituted a judgment referring it to the Master in Ordinary here to determine the proper amount of damages, having regard to the foregoing. Otherwise the judgment will be affirmed.

I see no reason why the appellants should not pay the costs of the appeal and reference, as it is entirely their own fault that renders a reference necessary.

Order accordingly.

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Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ. April 2, 1921.

New Trial (§II—5)—Action Against Foreign Administrator—Lands in Alberta—Fraudulent Transfer—Letters not Resealed—No Letters Granted in Alberta—Judge at Trial Appointing Administrator ad litem—Irregularity.

In an action against an administrator, seeking to set aside a transfer of lands situate in Alberta made by a deceased resident of the United States, on the ground that such transfer was fictitious and that the company to which the property was transferred and the deceased were the same, it is a good defence that the letters of administration have not been resealed in Alberta nor letters of administration granted in that Province. The trial Judge is not justified under Rule 30 in appointing an administrator **ad litem** during the course of the trial without the consent of the defendant and without proper notice being given, and where this has been done a new trial will be ordered.

APPEAL by defendant from the judgment of Walsh, J., declaring the plaintiff entitled to certain lands in Alberta sold under agreement and assigned to the party of whose estate defendant is administratrix. Reversed; new trial ordered.

A. McL. Sinclair, K.C., and *J. McCaig*, for appellant.

I. F. Fitch, for respondent.

HARVEY, C.J.:—I would allow this appeal with costs on the ground that the action was never properly constituted for the purpose of determining the issue to be determined.

The judgment is one which affects prejudicially the estate of a deceased person without that estate being adequately represented. I do not say that a Judge may not in any case appoint a person

administrator *ad litem* against his will but, I think, it should be an exceptional case in which it is done. As far as the defendant is concerned in her personal capacity she has, perhaps, no great ground for complaint. She did not apparently in her defence or at any time until about the close of the case, when perhaps she saw it was likely to go against her, seriously protest that she had no right to represent the estate. It might very well be concluded that she would have been willing to succeed if she could without it, but the question is should the estate have a judgment against it without someone with authority representing it being before the Court. She is, of course, the widow of the deceased and the foreign administratrix but it may be that there are creditors with claims against the estate and other next-of-kin who are entitled to be protected in the manner in which protection is given by the Courts before administration is granted. The revenue under the Succession Duties Act (Alta. stats., 1914, ch. 5) is also entitled to be protected.

In her defence she gave notice to the plaintiff that she did not represent the estate in Alberta. He might then have taken the necessary steps to have someone properly appointed for general purposes, or for the purpose of the suit. He did not but went on with his action. I think the Court should not, under these circumstances, have given a judgment prejudicial to the estate. I agree with the conclusions of my brother Stuart as to the details of the judgment.

STUART, J.:—This action has to do with a certain interest in real estate in Alberta of which the Canadian Pacific Railway Co. is the registered owner. One Alfred T. Browns residing in Denver, Colorado, had become the assignee of a certain purchase agreement in respect of the lands. He assigned the agreement, or transferred it in some sort of way, to a company called the B. and S. Investment Co. of which he was president, manager and attorney. That company agreed to sell to the plaintiff. The plaintiff has paid all he owes either to that company or to Browns but the company is insolvent. The defendant Mattie L. Browns was appointed administratrix of the estate of Alfred T. Browns by the Courts of Colorado. No representative of his estate was ever appointed in this Province. Claiming that the assignment to the B. and S. Investment Co. was a mere fiction or that that company was in substance Browns, the plaintiff began an action in this Court against Mattie L. Browns, calling her in the style of cause "administratrix of the estate of Alfred T. Browns, deceased" and asking a declaration that he, the

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plaintiff, is the equitable owner of the quarter section subject to the railway company's rights and an injunction restraining the defendant and her agents from dealing in any way with the land in question.

The defendant in her defence "explained" that she had been appointed administratrix in Colorado but that "the letters of administration have not been resealed in the Province of Alberta nor have letters of administration been granted in the said Province to the estate of the said Alfred T. Browns."

Further than this reference, the question of the proper representation of the estate of Alfred T. Browns was never mentioned afterwards until the argument at the trial. The plaintiff apparently took no notice of the suggested defect in the constitution of the action in the proceedings prior to trial and nothing was said about it either at the opening of the trial or during the taking of evidence. In his oral reasons for judgment the trial Judge after expressing a very emphatic opinion in favour of the plaintiff on the merits, referred to the question of absence of a proper representative and said:—

"Well, I have not worried myself very much about that phase of the case because it is a difficult question and one that can be so easily cured. I think I have the power to direct as I now do that she (the defendant) be appointed administratrix *ad litem* if necessary. A claim was asserted to this land on her own personal behalf but the evidence fails to satisfy me that she had any personal interest in it whatever."

I regret that I am unable to agree that this was a proper practice in the circumstances of this case. I do not think the provisions of R. 30 authorise such a course. If it had been made to appear in the evidence affirmatively either that the estate of Alfred T. Browns was insolvent or that the defendant was the sole beneficiary there might have been some ground for contending that a substantial representation of the estate was unnecessary although even then there would be the rights of possible creditors to be considered. It does seem to me that to appoint an administrator *ad litem*, i.e. for the purposes of a lawsuit, at the very moment that the law suit is over is a rather illogical proceeding. Nor does it appear that the defendant ever consented to the appointment and I doubt if it is proper to make such an appointment without such consent. Substantially what was done was to declare *ex post facto* that representation was unnecessary at all and that the action might

properly proceed without it.

But there was a very important claim made against the defendant, *viz.*, that for an injunction restraining her and her agents from interfering with the estate. There was in my opinion ample reason for asking that relief though no doubt only in the interim until the plaintiff's main claim was properly established.

The defendant actually attempted to get the railway company to issue a new contract to her personally and to disregard entirely the rights of her deceased husband. Of course the plaintiff's right to the injunction depends on the existence of some substantial claim to the land or an interest therein. But while it may be that whatever interest he may once have had may be now lost he certainly has shewn enough to justify at least an interim injunction which should be permanent if on a proper constitution of the action he upholds his claim against the estate.

I think therefore that the judgment so far as it affects the estate of Alfred T. Browns must be set aside but that it should stand as against the defendant in her personal capacity and as Colorado administratrix as an interim injunction until a trial is held upon a proper constitution of the main action.

If within one month general administration of the estate is obtained in Alberta by any one the plaintiff may apply to a Judge to have the administrator made a party defendant in the action. If no general administration is obtained within that time the plaintiff may apply to a Judge to appoint an administrator *ad litem* upon notice to such persons as the Judge may direct. When proper representation of the estate is thus obtained the plaintiff may then proceed to file and serve a statement of claim and the action may then proceed to trial in the regular way. It may be that in order to save costs the parties may agree to adopt the evidence already given but that must be left for all parties to decide as they may be advised.

The respondent should have the costs of the appeal but there should be no costs of the action to either party unless all parties agree to adopt the proceedings subsequent to pleading and the evidence already taken and to move for judgment before this Division, in which case those costs will be dealt with on such application.

BECK, J. (dissenting):—This is an appeal from a judgment of Walsh, J., in favour of the plaintiff, by which he in effect declared the plaintiff entitled to certain lands sold under agreement

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by the Canadian Pacific Railway Co. to one William A. Drake and by the latter assigned to Alfred T. Browns (of whose estate the defendant is alleged to be the administratrix) subject to the claim of the C. P. R. Co. for unpaid purchase money and water rents.

On June 30, 1909, the C. P. R. Co. sold under agreement for sale to Drake that portion north of the creek of the south-east quarter of sec. 17, and part north of the creek of the north-east quarter of sec. 8, in township 26, range 23, west of the 4th meridian. Drake had also purchased in June, 1909, from the said railway company the north-east quarter of said sec. 17. Sometime in the year 1915 there were filed with the railway company an assignment of said contract covering the south-east and an assignment of the contract covering the north-east quarter of sec. 17, from the said William A. Drake to Alfred T. Browns. Browns was the president of a company operating in the State of Colorado under the name of the B. & S. Investment Co., and of this company one P. A. Cushen was secretary.

By an agreement dated January 15, 1914, Browns agreed to sell his equity in the east half of sec. 17, tp. 26, range 23, west of the 4th meridian, to the B. & S. Investment Co. for the sum of $5760.

By an agreement dated March 23, 1914, the B. & S. Investment Co. agreed to sell to the plaintiff the south 3/8 of the south-east quarter of sect. 17. By an agreement dated the same day the B. & S. Investment Co. agreed to sell to one M. J. Welch the north 5/8 of said south-east quarter. Both these agreements are signed on behalf of the company by Alfred T. Browns, as president, and Cushen, as secretary. By the terms of these agreements the balance of the purchase price over the down payment was to be satisfied by what the company could make from the use of the lands during the next 7 years.

By an assignment dated November 28, 1917, M. J. Welch assigned to the plaintiff the last mentioned agreement.

Both the plaintiff and Welch paid the cash payments called for by the agreements entered into by them with the B. & S. Investment Co., the plaintiff claiming that these moneys were received by Alfred T. Browns and retained by him for his personal use and the defendant claiming that the monies were received by and used by the B. & S. Investment Co.

The plaintiff claims a declaration that the assignments from Drake to Browns were fraudulent and void, and a declaration that

the plaintiff is the equitable owner of the south-east quarter of sect. 17 subject to the claim of the C. P. R. Co., for unpaid purchase money and water rent. Walsh, J., gave judgment in favour of the plaintiff.

The B. & S. Investment Co. had no company account. The plaintiff urges that the evidence shews that Alfred T. Browns, deceased, received and disbursed and intermingled with his own personal account, most of the company's funds, that the only revenue derived from the lands was received by A. T. Browns, deceased, from one Carl Browns, a brother of Alfred T. Browns residing in Alberta, near the lands, who cropped the lands for one year and remitted a portion of the proceeds of the crop to Alfred T.Browns and retained the balance to set off against certain moneys of his which A. T. Browns had retained in Denver.

In 1916 after the death of Alfred T. Browns the company was absolutely without funds, and ceased to do business. To keep faith as well as it could, the company gave to the plaintiff a quit-claim of the property.

The Judge finds in effect, as I understand,—and it is the conclusion the evidence brings to my mind,—that Browns owing to his position in the company, which was composed only of himself, his brother, Cushen and one Smith and of which he was president and manager and the most active member, either personally received or was fully aware of the receipt of all moneys paid by or on behalf of the plaintiff and that it was his duty to see that those moneys were, in fact, applied as they were intended to be applied, namely, on account of the land and not in discharge of an alleged liability of the company to Browns himself.

I see no reason to disturb the trial Judge's finding on the facts nor his view of the law applicable.

There remains a question for consideration, namely, whether the plaintiff, assuming the decision of the trial Judge upon the facts is to be sustained, can succeed in view of the fact that the defendant, although alleged in the statement of claim to be the administratrix of Alfred T. Browns, has been appointed such only by the proper Court of the State of Colorado, evidently the deceased's domicil, and that she has never had letters of administration issued to her by the proper Court in this jurisdiction.

The statement of claim, both in the style of cause and in the body of it, describes the defendant as the administratrix of the estate of Alfred T. Browns.

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The statement of defence, which, of course, has the same style of cause, says:—

The defendant explains that she was apointed on July 12, 1916, by the County Court of the County and City of Denver in the State of Colorado, one of the United States of America, administratrix of the estate of Alfred T. Browns, deceased, late of Denver in the State of Colorado aforesaid, but that said letters of administration have not been resealed in the Province of Alberta nor have letters of administration been granted in the said Province to the estate of the said Alfred T. Browns, deceased.

As far as I can see from going over the appeal book, not a word was said with respect to the objection to the defendant's status in this Province until, apparently, the argument, which is not noted in the book, that is, until after the entire evidence on both sides was in; for the only intimation of the taking of the objection is contained in the Judge's reasons for judgment given orally at the conclusion of the evidence. He says:—

"Then there is an objection taken to the right of this Court to entertain this action as against this defendant because she is administratrix in Colorado and she is not the administratrix here. Well, I have not worried myself very much about that phase of the case because it is a difficult question and it is one that can be so easily cured. I think I have the power to direct, as I now do, that she be appointed administratrix *ad litem* if necessary."

The question is whether this order of Walsh, J., is valid and effective. I think it is.

Rule 30 of the Consolidated Rules of Court, 1914, is very wide, more comprehensive, I think, than the corresponding English Rule 168 (O. 18, R. 46) and the Ontario Rule 90 (former 194).

Our rule expressly provides that it shall apply in any action or proceeding commenced or intended to be commenced. The rule is distinct that the Court or a Judge, where it is made to appear that a person who was interested in the matters in question has no legal personal representative, may by order appoint some person to represent the estate of the deceased person for all the purposes of the action, notwithstanding that the estate in question may have a substantial interest in the matters, etc., and that the order so made and all subsequent proceedings shall bind the estate of the deceased person in the same manner in every respect as if there had been a duly appointed legal personal representative of such person; and such legal personal representative had been a party to the

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action or other proceedings and had duly appeared therein. These rules have legislative sanction, *McIntyre* v. *Alberta Pacific Grain Co.* (1918), 43 D.L.R. 682, 14 Alta. L.R. 373.

It seems impossible to say that such a case as the present does not come within the rule; subject only to the question of the person appointed consenting to the act.

It is true that in *In Re Curtis* and *Betts* (1887), W.N. 126, the Court of Appeal said at p. 127, "It was also wrong to appoint to represent an estate a person who was unwilling to act." In that case, a taxation of a solicitor's bill, there fell to the person appointed a duty actively to support on taxation a bill of costs of a person, a solicitor, to represent whom the person in question had been appointed. The order of appointment was attached before he had acted.

It seems to me that it cannot be laid down as an unfailing rule that never will one be appointed to represent the estate of another without the former's assent; that the circumstances of each case must be considered. See *Re Tobin; Cook* v. *Tobin* (1873), 6 P.R. (Ont.) 40; *Hunter* v. *Boyd* (1901), 3 O.L.R. 183, at p. 186. I think that in the present case—all the evidence having been taken on the basis that the estate was sufficiently represented by the foreign administrator, who is in the highest probability largely personally interested in the estate, the Court ought to have the power and in fact has the power to appoint her formally administratrix *ad litem*. The Court has, if occasion arises in the future, the fullest power of direction over the acts of the administratrix *ad litem*.

I would therefore dismiss the appeal with costs.

Appeal allowed; new trial ordered.

LES ALLUMETTES DE DRUMMONDVILLE v. BOIVIN.

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Supreme Court of Canada, Idington, Duff, Anglin, Brodeur and Mignault, JJ. May 4, 1920.

Sale (§IIIC—74)—Of Goods—Named Price for Case Lots—Some Cases Defective—Action for Resiliation—Sale of Part of Goods During Action—Judgment for Resiliation as to Balance—Redhibitory Action—Divisibility.

A purchaser of a number of cases of goods delivery of which is to be made at different periods, the price being for case lots and varying

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according to the quality of the various cases, may bring a redhibitory action for resiliation of the sale of such cases as may be found defective and during the course of the action if some cases for which resiliation is asked are found not to be defective may sell such cases, and the Court may give judgment for dissolution of the sale for the remainder.

APPEAL from the judgment of the Court of King's Bench, Appeal side (1919), 28 Que. K.B. 486, affirming the judgment of the trial Judge (1918), 54 Que. S.C. 337, and maintaining the respondent's, plaintiff's, action. Affirmed.

J. E. Perrault, K.C. and *N. Garceau*, K.C., for appellant.

A. Taschereau, K.C. and *Morin*, for respondent.

IDINGTON, J.:—I am of the opinion for the reasons assigned by the trial Judge (54 Que. S.C. 337) and Carroll and Martin, JJ., in the Court of King's Bench (28 Que. K.B. 486), to which I can add nothing useful, that this appeal should be dismissed with costs.

DUFF, J.:—The appeal, I think, fails.

ANGLIN, J.:—So well does the evidence support the plaintiff's contention that the defects in the 1157 case of matches, in respect of which he has judgment for repayment by the appellants of $5,133.52, were such as to justify their rejection that the attempt to secure a reversal of the finding to that effect, confirmed by the Court of King's Bench, is quite hopeless.

On the questions raised as to the nature of the action and as to the right of the plaintiff to sue for rescission in respect of only a part of the goods purchased and as to the effect of inability to return 57 of the 1,214 cases, to recover the price of which he originally sued, I have had the advantage of reading the judgments prepared by my brothers Brodeur and Mignault and I concur in their conclusions. For the reasons stated by them I am of the opinion that the action is redhibitory in character, that the sales were severable, that an action for rescission is maintainable as to any number of cases proved to have been defective, and that, notwithstanding the sale of the 57 cases pending the action and his consequent inability to return them, the plaintiff may recover the price of the remaining 1,157 cases, which he is prepared to deliver to the defendants on being recouped their cost.

BRODEUR, J.:—This is a redhibitory action brought by the respondent who asks to have the sale annulled of 1214 cases of matches delivered to him by the appellant. Several grounds of defence have been invoked by the appellant. The only one which was particularly discussed at the argument before us is that the

plaintiff did not make a legal tender. Others are mentioned in the appellant's factum but as most of them are based on questions of fact and the lower Courts pronounced against the appellant the latter did not think it necessary, and rightly so, to insist on these grounds at the hearing.

The quantity of matches sold and delivered was much larger than that mentioned in the action. The defendant in fact delivered 5115 cases to the plaintiff although the suit is only for 1214.

In his declaration the plaintiff declares himself ready to return these 1214 cases of goods to the defendant on reimbursement of the price paid.

The Superior Court (54 Que. S.C. 337) pronounced the resiliation of the sale of 1157 cases seeing that during the suit the plaintiff disposed of 57 cases. It also declared that the plaintiff was not obliged to tender the goods in question otherwise than he did, and it condemned the defendant to pay the plaintiff the value, upon delivery to him by the latter, of these 1157 cases.

This judgment was confirmed by the Court of Appeal (28 Que. K.B. 436).

In the Superior Court it was asked whether, when several things were comprised in the same sale a redhibitory vice in one gives rise to the resiliation of the sale for the whole or only for this particular thing. In the present case could the plaintiff who had bought 5115 cases of matches bring his action in rescission for 1214 cases? Or again having sued for 1214 could he sell 57 cases during the suit and obtain judgment of dissolution of the sale for the difference, namely 1157 cases. In other words is the redhibitory action divisible?

The sale and delivery of the goods was made at different periods. The price agreed on was so much a case, and it varied according to the make from $5.75 to $7.20 a case.

Some makes appear to be better than others, and I think therefore that legally a dissolution of the sale can only be claimed for the cases which contain defective goods and that the plaintiff can maintain the sale for the good cases and only demand annulment for the others.

Pothier, on Sale, at Nos. 226 and following discusses this question and says first that if the thing which has the redhibitory vice was alone the principal object of the sale and the others were only sold as accessories, the redhibition of the principal thing involves that of its accessories. But he adds:—

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"When the things sold are equally important, we must see whether they have been sold as forming part of a whole, and that one could not have been sold without the other: for example, in selling two carriage horses, a yoke of oxen, etc.; in this case the redhibitory vice in one of these things gives place to the redhibition of everything sold; therefore the redhibitory action can only be exerted for part.

"But if the objects were sold separately, the redhibitory action can only occur for the one having a vice, even if all might have been sold for the same price; although such a condition added to others helps the presumption that one should not have been sold without the other, yet it is nevertheless not alone decisive. That is why the redhibitory action can be taken for this one object alone, and the seller will be compelled to restore the price of it, following the valuation made on the total."

These principles laid down by Pothier allow us to say that in the present case where the matches were sold for different prices according to the mark on each case there is nothing to prevent a claim for the annulment of a certain number of cases only and the maintaining of the sale for the others. If during the suit the plaintiff also finds that certain cases, of the sale of which he had originally asked the annulment, were not defective, or if for other reasons he has disposed of them, nothing prevents the Court under the circumstances from maintaining the action for the others. There is no doubt as Lamothe, C.J., says that in this case the action *quanti minoris* can be exercised by the creditor. But in view of the opinion of Pothier which I have just recited, it seems to me that the purchaser can also exercise the redhibitory action for the cases which were defective. It has been held by the Court of Cassation that the resolution of the sale of a thing can be pronounced for the part only if the thing sold is susceptible of delivery in part. Dalloz, 1871-1-11. In other words I come to the conclusions that the redhibitory action is divisible under the circumstances.

Should the action necessarily be preceded by a tender? I understand that if it was a case of payment a person could only be freed from the obligation by making a tender in accordance with the provisions of arts. 1162 and following of the Civil Code, which say how tenders may be equivalent, with respect to the debtor, to a payment. But when it is a case of a redhibitory action, is the buyer obliged to dispossess himself of the thing before the price is returned or can he simply ask the Courts to declare that the thing

sold was affected by defects which render the sale annullable?

In the present case he declares himself ready in his action to return the defective goods. He asks by his conclusions that the sale be annulled and that the defendant be obliged to reimburse him the price paid.

The Court annulled the contract, but it added that he could only recover the price paid on delivering the goods. He has now to execute this if he wishes to recover the money. He must make a tender.

On the other hand the defendant can revendicate the goods if the sale is annulled by offering to reimburse what has been paid.

That is the legal situation which has been created between the parties by the judgment.

The appellant invokes art. 1526 of the Civil Code, which says, "The buyer has the option of returning the thing and recovering the price of it, or of keeping the thing and recovering a part of the price according to an estimation of its value."

This article speaks only of the rights of action which the buyer who is deceived can exercise. He has a choice of a redhibitory action or of an action *quanti minoris* according to whether he wishes to keep the thing or not. If he wishes to return the thing and obtain restitution of the price he must take the redhibitory action. He will then be obliged to return the thing if the purchaser reimburses the price. But as long as the money paid by him is not reimbursed he is in the position of an unpaid vendor and according to art. 1496 C.C. (Que.) he is not obliged to deliver the thing as long as he has not been paid.

How can the defendant complain that there was no more formal tender than that mentioned in the declaration? For it contested the plaintiff's right to resiliate the sale, and then so long as the question is not settled what interest has he to complain that the goods were not formally tendered.

Fuzier Herman, under art. 1644 of the Civil Code says:—Si l'acheteur opte pour l'action rédhibitoire et triomphe dans ses prétentions, it doit rendre au vendeur la chose vendue.

He does not make this obligation to return the thing a condition precedent to the exercise of the right of action. The obligation imposed on the plaintiff on the redhibitory action is to return the thing. This obligation or the payment must be executed at his domicile according to art. 1152 C.C. (Que.). And if he wishes to recover the price paid he can then make a tender in accordance with

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articles 1164 and 1165 C.C. (Que.) and obtain a formal judgment of condemnation against the defendant.

I would however be of the opinion that the tender made with the action, although not very explicit, was sufficient. But as the Superior Court only condemned the defendant to pay on delivery and as the plaintiff has declared himself satisfied with this conditional condemnation, I must necessarily come to the conclusion that the appeal is ill founded and must be dismissed with costs.

MIGNAULT, J.:—The only real difficulty in this case is with regard to 57 cases of matches (out of the total of 1214 cases) which the plaintiff sold during the suit and which he therefore cannot return to the defendant. He had bought in all 5115 cases and he only asked for the cancellation of the sale for 1214. In the judgments appealed from, 28 Que. K.B. 486, the nature of the action itself, whether it was redhibitory or *quanti minoris*, was discussed, but the declaration asks for the annulment of the purchases made by the plaintiff from the defendant which shows that the action is redhibitory and not *quanti minoris*.

In any case, whatever be its nature, the action is governed by art. 1526 of the Civil Code which says "the buyer has the option of returning the thing and recovering the price of it, or of keeping the thing and recovering a part of the price according to an estimation of its value," and here I am of opinion that we are in the presence of a redhibitory action.

It is also important to note that as the sales were made at so much a case we can consider that there were as many distinct sales as cases sold so that the purchaser could if a part only of the cases contained defective goods ask for the annulment of these cases and keep the others. This is what he did in this case.

But taking his redhibitory action, the plaintiff should return to the defendant the cases of the sale of which he asked for annulment. That is the condition of the action according to art. 1526 C.C. (Que.). The plaintiff seems to have taken it into account, for para. 7 of his declaration says:—"Le demandeur a toujours été prêt et est encore prêt à remettre la marchandise contre remboursement du prix qu'il a payé."

This is not a formal tender, but the Superior Court considered it as such, for it condemned the defendant to pay the plaintiff $5,133.52 with interest from the date of service of the action and costs, "on delivery by the plaintiff of the 1157 cases of matches which remain of the 1214 cases mentioned in his action." See 54

Que. S.C. 337 at 343.

The real difficulty is this. The plaintiff has elected for the annulment of the sale as regards 1214 cases and declared himself ready to return them on reimbursement of the price paid. It is therefore said that he should keep all these cases and that this was the obligation he assumed by his tender to return them to the defendant. In disposing of these 57 cases he failed in this obligation and in the condition to which his action was subject as a redhibitory action and he accepted the sale and cannot now succeed in his demand. This is the reason for dissent by Lamothe, C.J., Pelletier, J., equally dissenting would have treated the action as if it was a real action of *quanti minoris* and looking at the total of the sale would have granted the plaintiff seven or eight hundred dollars. He does not specify the amount otherwise.

In face of the two judgments which find the goods defective I am not disposed to discuss this point. I do not think either that I should follow the opinion of Pelletier, J., and I will only discuss the ground of the dissent of Lamothe, C.J.

After having seriously considered the matter I think that in the sale by the plaintiff of 57 cases of matches we can see a partial tacit desistment from the action which he brought. There is no doubt that the desistment can be partial only and acknowledge the renunciation of certain items only, or for a distinct part of a divisible demand, and the demand here seems to me to be clearly divisible. Generally a partial desistment is called a *retraxit* but the name given is not important for it is certain that the right to desist partially when the demand is divisible exists in our law. Again the desistment may be tacit. Garsonnet, Procédure, tome 5, No. 1179, p. 792, says:—

"There are 3 kinds of desistment:—1. The amicable desistment made in the conventional form between the parties and without formality, if they agree to it; 2. The tacit desistment which results from an incompatible attitude to the enforcing of an order previously made (denial of the suit brought by a solicitor without special authority and followed to a judgment which has been appealed from, substituting a second appeal for the one which was first lodged, transfer of goods offered by an insolvent who had first asked the homologation of his agreement): this is not presumed but no particular formality is necessary and it verifies itself like any other contract; 3. The legal desistment which does not imply the consent of the parties and exacts 2 or even 3 formalities."

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It is clear that the examples of tacit desistment which Garsonnet gives are not limited, for as he says himself a tacit desistment results from an attitude which is incompatible with the maintenance of a demand. Here the plaintiff during the suit disposes of 57 cases and as his action was divisible he thereby tacitly renounced his demand for the annulment of the sale of these cases, for the fact of disposing of these cases was incompatible with the maintenance of the demand for annulment in so far as these cases were concerned. But that did not take away the plaintiff's right in persisting in his action for the other cases.

The situation would have been absolutely the same if the evidence had shown that 57 cases were all right and the others were bad. The action would not have succeeded for the 57 cases. The plaintiff also, if he had found that these 57 cases were good, could have renounced his demand as regards them and this renunciation would not have prejudiced his demand for the annulment of the other cases. Why then say that the fact of disposing of certain cases during the suit deprived the respondent of the recourse to have the other sales annulled? All that that proves is that the plaintiff was not right in complaining of those 57 cases. That does not say in any way that the other cases were good or that the plaintiff renounced his right.

The objection raised by the defendant seems to me to lack foundation. It has suffered no prejudice from the sale of these few cases, the action against it has been reduced to that extent and both Courts have decided that the other cases were bad. It can hardly wish to escape condemnation because the plaintiff has disposed of an insignificant number of the goods mentioned in his action.

I would dismiss the appeal with costs.

Appeal dismissed.

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IDEAL PHONOGRAPH CO. v. SHAPIRO.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Magee, Hodgins and Ferguson, JJ.A. December 30, 1920.

Damages (§IIIA—64)—Measure of—Lease of Premises—Clause Providing for Installation of Elevator—Construction—Breach by Lessor—Rights of Lessee.

A clause in a lease of property providing that the lessor is to install with all due diligence a rope freight elevator and also providing that

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"should there be any undue delay on the part of the lessor, the lessee shall have the right to install said elevator and deduct any amount paid.....not exceeding in all the sum of $350" is to be read as being inserted for the lessee's benefit and to give them a remedy in addition to and not in substitution for any other remedy they would be entitled to on the lessor's breach of covenant and in an action for breach of covenant they are entitled as damages to what it would cost them to install the elevator and also to damages for delay. The lessees were bound to minimise their loss but not to the extent of installing the elevator and deducting much less than the cost of the installation. [Tarrabain v. Ferring (1917), 35 D.L.R. 632, 12 Alta. L.R. 47, affirmed 52 D.L.R. 687, 59 Can. S.C.R. 670; Erie County Natural Gas and Fuel Co. v. Carroll [1911] A.C. 105, 117 applied; Steven v. Pryce-Jones Ltd. (1913), 13 D.L.R. 746 referred to.]

APPEAL by the defendant from a County Court judgment in an action to enforce an agreement to install a rope elevator on premises leased to the plaintiffs and for damages for breach of the defendant's covenant to install the elevator. The judgment was in the nature of a mandatory order to the defendant to install the elevator within 90 days and for $90 damages, with costs. Varied.

G. T. Walsh, for appellant; *E. E. Wallace*, for respondents.

FERGUSON, J.A.:—The plaintiffs' claim is to enforce an agreement to install an elevator in 53 and 55 Maria street, Toronto, and for damages.

By indenture of lease, under seal, dated the 15th September, 1919, the defendant demised to the plaintiffs the premises known as 53 and 55 Maria street, to hold for a term of 5 years from the 15th October, 1919. The lease is made in pursuance of the Short Forms of Leases Act, R.S.O. (1877), ch. 103, and, in addition to the usual covenants and provisoes, contains the following:—

"The lessor covenants and agrees to and with the lessee that he will, in a location designated by the lessee, install with all due diligence a rope freight elevator. Provided that should there be any undue delay on the part of the lessor in the installation of the said elevator the lessee shall have the right to install said elevator and deduct any amount paid by the said lessee for same, not exceeding in all the sum of three hundred and fifty dollars ($350.00) from the rent herein reserved as the same becomes due."

The plaintiffs entered into possession and requested the defendant to install an elevator, but he refused and neglected to do so; hence this action.

The defendant pleads:—

"(3) At the time the said lease was made it was agreed between

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the plaintiffs and the defendant that the defendant should install on the said premises a rope freight elevator, and, in case of any undue delay on the part of the defendant in the installation thereof, that the plaintiffs should install the same and deduct any amount paid by them for same, not exceeding in all the sum of $350, from the rent of the premises.

"(4) The defendant says that if there was any undue delay in the installation of the said elevator (which the defendant does not admit), the plaintiffs should have themselves forthwith installed or caused to be installed the said elevator and deducted any amount paid by it for the same, not exceeding the sum of $350, from the rent of the said premises."

Though the defendant does not ask to reform the lease, he was permitted, in face of the objection of the plaintiffs, to give in evidence the draft leases and certain verbal communications that passed between the parties in the course of the negotiations leading up to the execution of the lease. I do not think such evidence was properly admitted or can be allowed to affect our interpretation of the words of the covenant. (See *Inglis* v. *Buttery* (1878), 3 App. Cas. 552.)

The findings of the learned trial Judge read:—

"The covenant of the defendant to put in the rope elevator is absolute, and I find that the plaintiffs are entitled to a mandatory order directing the defendant to provide and install a rope freight elevator in the defendant's building at 53 and 55 Maria street, in the city of Toronto, in the location already designated by the plaintiff company's managing director (Edwin A. Stevenson) within ninety (90) days from this date.

"I also find that there has been a breach by the defendant of the contract or terms of the lease of 53 and 55 Maria street, which he entered into with the plaintiffs on or about the 15th September last, and I assess the damages sustained by the plaintiffs, as a result of the defendant's breach of contract, at $90, being the monthly increase of rent of $10, payable on the 15th days of November and December, 1919, and on the 15th days of January to July, 1920. I do not allow the additional rent payable on the 15th October, 1919, considering one month as a reasonable time for the installation of the elevator.

"There will therefore be judgment for the mandatory order directing the defendant to provide and install a rope freight elevator in the said building at 53 and 55 Maria street, in the city of

Toronto, in the location already designated by the plaintiffs, within 90 days from this date, and that the plaintiffs recover from the defendant the sum of $90 for breach of contract, and his costs of this action.

"There will be 20 days' stay."

At the hearing, counsel agreed that, if the plaintiffs were entitled to recover, an order for damages should be substituted for the mandatory order of the trial Judge, and in that event the question for our consideration was the measure of damages.

Mr. Walsh, counsel for the appellant, argued that, by the proviso following the defendant's covenant, the parties had agreed, if not upon an alternative performance, at least upon the measure of the plaintiffs' relief in case the defendant failed to install the elevator.

Mr. Wallace argued that the proviso is not worded as an alternative promise by the defendant, and does not give the defendant any right, much less the right to elect in favour of an alternative manner of performance of his covenant, but is worded and is intended to confer upon the plaintiffs an additional remedy and to give them the right to install the elevator if they did not choose to seek remedy by action; that the election was theirs, and that, having elected to enforce the covenant, they are entitled to such damages as reasonably and naturally result from the breach of the covenant, or, under the circumstances of the peculiar case, as may reasonably be presumed to be in the contemplation of both parties at the time they made the contract as the probable result of the breach of it.

I am of opinion that the proviso should be read as being inserted for the plaintiffs' benefit, and to give them a remedy in addition to and not in substitution for any other remedy they would be entitled to on the defendant's breach of covenant.

This brings us to a consideration of the measure of the damages.

The plaintiffs gave evidence of inconvenience, trouble, expense, and loss suffered in carrying on their business without an elevator. The defendant gave evidence that, at the time the lease was made, both parties estimated the cost of installing the elevator at $350; that subsequent inquiries established that they were mistaken, and that it would cost $748. Calculated on the basis of the plaintiffs' loss and probable loss in carrying on his business without the elevator, the damage would exceed the cost of installing.

The measure of damages has been considered in somewhat

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similar circumstances by the Alberta Courts. See *Steven* v. *Pryce-Jones Limited* (1913), 13 D.L.R. 746, and *Tarrabain* v. *Ferring* (1917), 35 D.L.R. 632, 12 Alta. L.R. 47, in which latter case the Appellate Division of Alberta laid it down that the proper measure of damage for breach of a covenant by the lessor to erect a building suitable for the lessee's purposes is the actual damage sustained, but that the lessee must, as far as reasonably possible, minimise this loss, if that may be done, by having the defects repaired, and that he was entitled to recover from the landlord either his actual loss or the cost or repairing, whichever was the least.

The reasoning in support of that judgment commends itself to me; and, applying it to the case at bar, it seems to me that the plaintiffs are entitled as damages to what it will cost to install the elevator, i.e., $748, and also to damages for delay. These latter damages the trial Judge assessed down to the trial at $90. Owing to the delay occasioned by the appeal, I would increase the damages for delay to $140, and award the plaintiffs judgment for $888, with costs here and below, but on the condition that they install the elevator.

Under the circumstances, I would direct that the entry of judgment be stayed for one month, and if, during that time, the defendant shall have installed the elevator in manner provided for by the covenant, he may apply to have the damages awarded reduced by $748.

MEREDITH, C.J.O., and MAGEE, J.A., agreed with FERGUSON, J.A.

HODGINS, J.A.:—I agree with my brother Ferguson and only desire to add a word as to the argument that the respondents' damages should be limited to $350.

No doubt the respondents were bound to mitigate their loss, and the alternative right given them under the covenant would, *primâ facie*, have formed the proper way of doing so. But I think the rule applicable here is that indicated in *Erie County Natural Gas and Fuel Co.* v. *Carroll*, [1911] A.C. 105, at p. 117, where, after quoting Lord Esher (in *Le Blanche* v. *London and North Western R.W. Co.* (1876), 1 C.P.D. 286, at pp. 302, 303), "We think it may properly be said that, if the party bound to perform a contract does not perform it, the other party may do so for him as reasonably near as may be, and charge him for the reasonable expense incurred in so doing," Lord Atkinson adds, "But whether the thing done was a reasonable thing to do must be determined

having regard to all the circumstances."

Here the cost of installing the elevator was much more than $350, to which amount the respondents would be limited if they themselves installed it, and I cannot think that they were bound to minimise their loss if in doing so they benefited the appellant to the extent of $398, and lost that amount themselves. This difference in cost renders it impossible to apply the cases relied on by Mr. Walsh.

Judgment varied.

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EX PARTE MOORE.

New Brunswick Supreme Court, Barry, J. March 12, 1921.

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Arrest (§IA—I)—Intoxicating Liquor Act—Conviction—Imprisonment—Made on Sunday—Legality.

An arrest upon a commitment for an offence under the New Brunswick Intoxicating Liquor Act is illegal if made on Sunday and the accused will be discharged from custody.

[Act of 29 Car. II ch. 7, sec. 6 considered; Ex Parte Frecker (1897), 33 Can. L.J. 248, Ex Parte Willis (1916), 27 Can. Cr. Cas. 383, 44 N.B. R. 347 followed].

APPLICATION by George B. Moore for release from imprisonment for a second offence under the Intoxicating Liquor Act, 1916, on the ground that the warrant of commitment was executed on a Sunday.

P. J. Hughes shewed cause against the order for release.

R. B. Hanson, K.C., and *C. L. Dougherty*, in support of order.

BARRY, J.:—This is an application for the discharge of the applicant upon *habeas corpus*. He was convicted on January 24 last before Walter Limerick, Police Magistrate of the City of Fredericton, for having, on December 24, 1920, unlawfully sold intoxicating liquor, without a license, contrary to the Intoxicating Liquor Act, 6 Geo. V, 1916, (N.B.), ch. 20, the said offence being a second offence against the Act; and the police magistrate adjudged that for the said second offence, Moore should be imprisoned in the common gaol of the county of York for the space of 6 months.

On Sunday, February 20, Moore was arrested by Fraser Saunders, a sub-inspector under the Intoxicating Liquor Act, by virtue of a commitment issued upon the said conviction, and lodged in the common gaol where he is now incarcerated serving out the

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sentence which the magistrate imposed upon him.

Application is made to me for the release of the prisoner upon the sole ground that his arrest upon the commitment, having been made on a Sunday, was and is illegal, and that his detention has no legal warrant. It has been decided that by the construction of 29 Car. II (1676), ch. 7, sec. 6, which is in force in this Province, and which prohibited the execution of any process, warrant, etc., on the Lord's day (except in cases of treason, felony or breach of the peace) a warrant of commitment for a penalty cannot be executed on a Sunday, that the apprehension on that day is wholly void and that the defendant is entitled to be discharged out of custody. *The King* v. *Myers* (1786), 1 Term. Rep. 265, 99 E.R. 1086. And it was held in this Province that the arrest of an offender upon a warrant, in default of payment of a fine for violation of the Canada Temperance Act, R.S.C. 1906, ch. 152, because of having been made on a Sunday, was void. *Ex parte Frecker* (1897), 33 C.L.J. 248. This decision, though not found in the authorised reports has gone into other reports and digests, and has, I think, been generally regarded as the settled law of the Province upon the point involved in it. I so regarded it at any rate, and followed it, as I felt myself obliged to do, in *Rex* v. *Lawlor; Ex parte Willis* (1916), 27 Can. Cr. Cas. 383, 44 N.B.R. 347, and I feel myself constrained to follow it now.

The offence of which the prisoner was convicted, being neither treason, felony nor a breach of the peace, does not come within the exceptions mentioned in the statute of Charles; neither the Intoxicating Liquor Act nor the Summary Convictions Act, Con. Stat. (N.B.) 1903, ch. 123, which prescribes the procedure to be observed in the prosecution of offences against the former Act, authorises the arrest upon a Sunday of offenders against the Act; it would seem therefore to be fairly obvious that the arrest of the prisoners has no warrant in law to support it. The case cited by Mr. Hughes of an attachment for non-performance of an award upon a Sunday, *Ex parte Whitchurch* (1749), 1 Atk. 55, 26 E.R. 37, has been overruled by subsequent cases; *The King* v. *Myers*, 1 Term. Rep. 265, 99 E.R. 1086.

I am therefore of the opinion that the arrest of the applicant, being upon a Sunday, was void, and that he is entitled to be forthwith discharged from custody. An order will be made exonerating the gaoler from liability.

Judgment accordingly.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. December 30, 1920.

Gift (§II—12)—Cheque—Delivery of Pass-book and Deposit Receipt—Payment after Death of Donor—Donatio mortis causa—Validity.

The deceased who had been separated from his wife for many years, while on his death bed handed the respondent, an intimate friend of his, who had made arrangements for his admission to the hospital and looked after him while there, his savings bank deposit books of two banks and cheques for the amounts to his credit as shewn by them, both cheques being payable to the order of the respondent who cashed them after the donor's death. The majority of the Court held under the circumstances and on the evidence that there was a valid **donatio mortis causa.**

[Review of Authorities.]

APPEAL by plaintiff from a judgment of Latchford, J. (1920), 47 O.L.R. 372, dismissing an action to recover a sum of money withdrawn from the bank by the defendant upon a cheque in her favour signed by the intestate but not presented or paid until after his death. Affirmed.

R. B. Henderson, for appellant.

J. Haverson, K.C., for respondent Bownas.

W. Mulock, for respondent, The Dominion Bank.

MEREDITH, C.J.O.:—This is an appeal by the plaintiff from the judgment, dated the 16th April, 1920, which was directed to be entered by Latchford, J., after the trial before him sitting without a jury on the 1st April, 1920 (47 O.L.R. 372).

The question for decision is, whether or not there was a *donatio mortis causâ* to the respondent Bownas by the deceased, whose personal representative the appellant is, of $803.20 which was at the credit of the deceased in the savings department of the Dominion Bank.

My brother Latchford found all the facts in favour of the respondents and dismissed the action.

It was contended by counsel for the appellant:—

1. That there was not that clear and satisfactory proof of the gift that is necessary to establish a *donatio mortis causâ*.

2. That the gift was of a cheque on the bank, which was not presented for payment until after the death of the deceased, and that the authority to the bank to pay was revoked by the death,

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and the gift was therefore ineffective.

3. That there was not the corroboration of the evidence of the respondent Bownas which is required by sec. 12 of the Evidence Act, R.S.O. 1914, ch. 76.

None of these objections is, in my opinion, entitled to prevail. The learned trial Judge was entirely satisfied of the truthfulness of the respondent Bownas, and was of opinion that the making of the gift had been established by clear and satisfactory evidence.

The testimony of the respondent Bownas was uncontradicted, and the probabilities of the case were all in favour of the truth of it. The deceased had been separated from his wife for many years, and apparently they were not on friendly terms. The respondent Bownas was an intimate friend of his: it was to her that he went when he became ill of the disease of which he died; she it was who consulted a doctor as to his condition and made arrangements for his admission to the Wellesley Hospital and looked after him there; and she it was who made the arrangements for his funeral and paid the expenses of it. His wife did not visit him in his illness or attend his funeral, nor did the appellant, who is his brother, do so.

What was more likely, in these circumstances, than that he should bestow upon the respondent Bownas the comparatively little of the world's goods that he possessed?

It was contended that, accepting as true the story which the respondent Bownas told, it shewed rather an incomplete gift *inter vivos* than a *donatio mortis causâ*. I am of that opinion. If it were necessary to prove that, in handing the cheque and the pass-book, something was said by the deceased indicating that his gift was to be effective only in the event of his death, that evidence was supplied by the testimony of the respondent Bownas in answer to the question, "What was to become of this money in case he recovered?" which was, "Well, he would get it back if he recovered." It is true that she does not say that that was said by the deceased, but, fairly read, her answer means that that was understood between them.

It is not necessary, however, that the donor should, in terms, say that his gift was to be effective only in the event of his death.

In *Gardner* v. *Parker* (1818), 3 Madd. 184, 56 E.R. 478, it was held by Sir John Leach, Vice-Chancellor, that a "gift of a bond by delivering it and saying, 'There take that and keep it,' in the last sickness of the donor, who died two days after, was a *donatio mortis causâ*." Stating his opinion the Vice-Chancellor said: "The doubt

here is, that the donor has not expressed that the bond was to be returned if he recovered. This bond was given in the extremity of sickness, and in contemplation of death; and it is to be inferred that it was the intention of the donor that it should be held as a gift only in case of his death. If a gift is made in expectation of death, there is an implied condition that it is to be held only in the event of death. The cases of *Lawson* v. *Lawson* (1718), 1 P. Wms. 441, [24 E.R. 463]; *Miller* v. *Miller* (1735), 3 P. Wms. 356, 358, [24 E.R. 1099], and *Jones* v. *Selby* (1710), Prec. Ch. 300, [24 E.R. 143], furnish this rule."

Gardner v. *Parker* is referred to in Halsbury's Laws of England, vol. 15, p. 431, para. 857, as authority for the proposition that there is an implied condition that the gift is to be retained only in the event of the death, though the donor does not expressly say so.

I do not understand that the implication spoken of is a presumption of law, but that it is the proper inference from the circumstance that the gift was made in the extremity of sickness, which may be rebutted by proof of other circumstances pointing to a different intention on the part of the donor.

The rule was so treated in *Tate* v. *Leithead* (1854), Kay 658, 662, 69 E.R. 279, by Sir W. Page Wood, Vice-Chancellor, who said (p. 662): "A *donatio mortis causâ* can only be established by a necessary implication, or an expressed intention, that the gift should not take effect except in the event of the death of the donor;" and that he did not see how the circumstance that the donor treated a part of the money which was the subject of the gift "as an executorship fund" could compel him to infer that he intended the gift to be a *donatio mortis causâ*, any more than the payment to Leithead, to whom the donor had given a cheque for £900, payable to Leithead, on which were the words:—

"Harley Robert Johnston.....	£200
"Thomas Leithead, Esq.....	200
"Executorship Fund	500
	"£900"

with directions to Leithead to keep £200 in discharge of a debt owed to him of that amount; to hold £200 for Harley Robert Johnston; and to treat the remaining £500 as part of his general estate. The conclusion of the Vice-Chancellor was that the £200 for Harley Robert Johnston was held in trust for him by Leithead.

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In *In re Beaumont*, [1902] 1 Ch. 889, 892, 893, Buckley, J., speaking of what was necessary to make a valid *donatio mortis causâ*, said: "It must be made so as to take complete effect on the donor's death. The Court must find that the donor intended it to be absolute if he died, but he need not actually say so." He then quoted the language of Sir John Leach in *Gardner* v. *Parker*, which I have quoted, and added: "It is a question of fact: the inference may be drawn that the gift was intended to be absolute, but only in case of death."

See also *McGuire* v. *McGuire* (1917), 33 D.L.R. 103, 50 N.S.R. 477, a decision of the Supreme Court of Nova Scotia.

It is well settled that it is sufficient that the gift is made in contemplation, though not necessarily in expectation, of death: Halsbury, vol. 15, p. 431, para. 857; *Cain* v. *Moon*, [1896] 2 Q.B. 283, 286; *Casnahan* v. *Grice* (1862), 15 Moo. P.C. 215 at p. 222, 15 E.R. 476, in which latter case Lord Chelmsford said: "It must have been given in contemplation of death . . . (of which the fact of her being at the time on her death-bed must be taken to be sufficient proof)."

I will now deal with the second question.

It was stated by Kekewich, J., in *In re Andrews*, [1902] 2 Ch. 394, that the delivery of a Post Office Savings Bank deposit-book may constitute a good *donatio mortis causâ* of the balance standing to the credit of the depositor—though the decision was against the validity of the gift, on the ground that the document which was handed to the donee was not such a deposit-book or the equivalent of it.

Mr. Justice Astbury in *In re Lee*, [1918] 2 Ch. 320, 323, after pointing out a circumstance that differentiated the case with which he was dealing from *In re Andrews*, said that it was difficult to reconcile the decision of it with *In re Dillon* (1890), 44 Ch. D. 76.

In *In re Dillon* the facts were that the testator, who held a banker's deposit-note for £580, in his last illness and very shortly before his death, took out the note, filled in and signed upon a stamp a form of cheque endorsed on the note, "pay self or bearer £580 and interest," and handed the document to a relation attending him in his illness, telling her that she was to give it back if he recovered, and if not she would be all right. It was held that, assuming a *donatio mortis causâ* of a cheque not presented in the drawer's lifetime—as was the case with regard to the cheque which the testator had handed to his relation—to be invalid, the intention

was not merely to give the cheque but the deposit-note; that the gift of a deposit note is a good subject of a *donatio mortis causâ;* and that the gift was not defeated by giving the cheque along with the note.

A similar conclusion, on a slightly different state of facts, was reached by the Supreme Court of Canada in *McDonald* v. *McDonald* (1903), 33 Can. S.C.R. 145, where a very full reference to and discussion of the cases will be found in the opinion of Mills, J., pp. 158-170.

What was handed to the respondent Bownas was a savings bank deposit-book of the Dominion Bank and a cheque for the amount at the credit of the deceased, as shewn by the book, and also a similar book of the Bank of Montreal with a cheque for the amount to the credit of the deceased, as shewn by it; both of these cheques are payable to the order of the respondent Bownas, and the one on the Dominion Bank bears the number 3546, which I take to be the number of the deceased's account; a sample deposit-book of the Dominion Bank similar to the one handed to the respondent Bownas was put in evidence. It contains rules regulating the manner of making deposits and withdrawals: one of which is that the "pass-book" must be produced whenever any "business is transacted." The book also contains a statement of the deposits and of the withdrawals, as well as of the balance from time to time at the credit of the depositor.

The book handed to the respondent Bownas therefore contained an acknowledgment of the indebtedness of the bank to the deceased and a regulation as to the mode in which money at his credit was to be withdrawn, and was in substance and effect an acknowledgment of indebtedness and undertaking to pay in accordance with the regulations. It was therefore in substance and effect a deposit-receipt similar to that which was the subject of the gift in the cases to which I have lastly referred. See also *In re Weston*, [1902] 1 Ch.'680, and *In re Westerton*, [1919]2 Ch. 104, which was the case of a gift *inter vivos*, in which it was held by Sargant, J., that there was, on the following state of facts, a valid and complete gift of the sum on deposit, by way of assignment, under the Judicature Act, 1873: "About a year before his death, which happened in 1917, the testator handed to his landlady Mrs. G. an envelope addressed to her describing it as a present to her. She was about to open it, when he took it from her hand and said he would keep it for her and locked it up in his despatch box.

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After the testator's death there was found in his despatch box an envelope containing: (1) a deposit-receipt for £500 deposited with the bank in 1914; (2) an order in writing signed by the testator directing the bank to pay to Mrs. G. the sum of £500 then on deposit; and (3) a letter addressed to Mrs. G.: 'You have been very kind to me and I desire to make some return by giving you the amount of £500 now on deposit at the . . . bank as per receipt enclosed.' The deposit-receipt was not endorsed by the testator and no notice was given to the bank of any assignment till after his death, the interest on the sum on deposit having been carried by the bank to his current account."

It was also held that the effect of sub-sec. 6 of sec. 25 of the Judicature Act was to enable an equitable assignee to sue in his own name, without regard to whether the assignment was or was not made for valuable consideration.

If this case was rightly decided, as I think it was, the gift in question, if it were not supportable as a *donatio mortis causâ*, could be supported as a valid and complete gift *inter vivos*.

There remains to be considered the question of corroboration. "It may be supplied by the evidence of some other person or by some attendant circumstances or by some facts established *aliunde*:" Halsbury, vol. 15, p. 425, para. 841. The attendant facts and circumstances to which I have referred in dealing with the first question, the possession by the respondent Bownas of the two pass-books and the two cheques, in my opinion afford the corroboration which the statute requires. See *McDonald* v. *McDonald*, *supra*.

If what was done was as consistent with the deceased's intention in delivering the pass-books and the cheques to the respondent Bownas for some purpose other than that of making a *donatio mortis causâ* as with his intention having been to make that donation, doubtless what I rely on as corroboration would not be corroboration; but, in my opinion, any suggestion that the purpose was any other than that of making the *donatio* has no support whatever in any reasonable view of the evidence.

I share the doubt of my brother Latchford, having regard to the provisions of the Bills of Exchange Act, as to the direction to the banker being revoked by the death of the drawer before payment of the cheque, and agree with him that it is at least open to serious question whether the revocation occurs until the banker has notice of the death of his customer. My learned brother's view is supported to some extent by the observation of Lindley, L.J., in

In re Dillon, 44 Ch. D. 76 at p. 83, where he is reported to have said: "It is said that here there was no good *donatio mortis causâ*, because a man cannot make such a gift of his own cheque. I will assume that to be correct, though I think it may some day require consideration."

This observation was not made with reference to the effect of the Bills of Exchange Act, and it is but right to say that in subsequent cases effect was not given to the doubt of the Lord Justice: Halsbury, vol. 15, p. 433, para. 860, note *(e)*.

I would affirm the judgment of the learned trial Judge and dismiss the appeal with costs.

MACLAREN, J.A.:—This is an appeal by the plaintiff against the judgment of Latchford, J., rendered on the 16th of April, 1920, dismissing the plaintiff's action against the respective defendants. The judgment is reported in 47 O.L.R. 372.

The action was brought by the administratrix of the estate of the late Edward Charles Kendrick to recover $803.20 deposited by him in the Dominion Bank to his own credit, and withdrawn by a cheque in favour of the defendant Bownas, signed by the intestate, but not presented or paid until after his death.

The facts proved at the trial are set forth fully in the judgment of the learned trial Judge. As to the bank he held that, as it had paid out the money in good faith on the genuine cheque of the deceased, before it had notice or knowledge of his death, it was relieved from liability under sec. 167 of the Bills of Exchange Act. As to Mrs. Bownas he held that it was proved that the deceased, while he was quite competent to transact business, had given the cheque to her, on the understanding that if he recovered it should be returned to him, but if he died it should belong to her. The learned trial Judge held it to be a good *donatio mortis causâ*.

It was argued before us by Mr. Henderson that the gift of the cheque to Mrs. Bownas was not legally proved, for want of the corroboration required by the Ontario Evidence Act, R.S.O. 1914, ch. 76, sec. 12. This point does not appear to have been taken in the Court below; at least it is not mentioned in the report or in the judgment. In my opinion, it is not entitled to prevail.

Section 165 of the Bills of Exchange Act says: "A cheque is a bill of exchange drawn on a bank, payable on demand." The defendant Mrs. Bownas was the "holder" of this cheque or bill, as it was made payable to her order, and she was in possession of it: sec. 2 *(g)*. One of her rights, as such holder, was that she might

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sue on it in her own name: sec. 74 *(a)*. If any corroboration were needed, it was more than satisfied by the production and proof of the card on which the deceased wrote his signature when he opened his account in the Dominion Bank. The finding of fact on this point should not be disturbed.

The judgment may also be supported for the reasons given by the trial Judge. As to the bank, it is pointed out by him that it was not aware that Kendrick was dead when it paid out the money; and, as to Mrs. Bownas, the gift to her and the competency of Kendrick at the time to make such a gift were abundantly proved. The trial Judge has gone into the authorities so fully that I do not find it necessary to discuss them further.

In my opinion the appeal should be dismissed.

MAGEE and FERGUSON, JJ.A., agreed with MEREDITH, C.J.O.

HODGINS, J.A. (dissenting):—The evidence of a *donatio mortis causâ* in this case is to my mind very weak.

The respondent Bownas was a friend of the deceased, who went to the Wellesley Hospital from her house, and died a few days afterwards. While in the hospital, he sent her to his own house, No. 96 John street, to get his bank-books, certificates of the City Dairy Company, and papers connected with a deposit-account in the T. Eaton Company, out of his trunk.

The respondent Bownas had the key of his house, she having agreed to rent it from him some time before. She did as she was directed, and her account is as follows:—

"He told me to go to the bank, to each bank, before I came back to the hospital and find out what was necessary to transfer money from one account to the other. He told me to open an account in each bank for myself, and said to go to an official and get the cheque and ask him what was absolutely necessary to transfer money from one account to the other."

She says she went to the Dominion Bank and saw the clerk there and asked him what was necessary to transfer money from one account to the other, and that he told her that the signature of the deceased was all that was necessary. She got a cheque from the clerk, and on her return she handed the deceased the bank-books with the cheques accompanying them, as she had also visited another bank for the same purpose. He then signed the cheques, she having filled them in at his request for the amount that was in each bank. When he had done this, he told her to go to the trunk again and make another search for a further certificate from

the City Dairy Company, she having only found one on her first visit. He told her to go to the banks and have the cheques cashed, giving her the bank-books at the same time. She did not do this, intending to go the next day, and the deceased died the next morning.

When asked what she said about the cheques, her answer is: "I said, 'You are going to get better,' and he said, 'I am going to have a hard fight.' He said, 'You do what I want you to do, Irene, and you will be all right.'"

The next morning she took the bank-books and cheques to her solicitor and left them with him. The cheque on the Dominion Bank was cashed after some delay owing to doubt about the signature.

The only other item of information the respondent Bownas gives is in answer to a question from her counsel:—

"What was to become of this money in case he recovered? A. Well, he would get it back if he recovered."

She does not say that he said so or that that was the arrangement.

I fail to see in this case any sufficient evidence to warrant me in coming to the conclusion that there was an actual gift of the money in question, nor am I satisfied that there is any evidence of corroboration. No witness was called as to the purport of the conversations, and apparently neither the nurse nor doctor heard them. The facts testified to amount to nothing more than that the money in the bank was to be transferred from one account to another; that she was to open an account for herself—I presume with this money, though even that is not stated—or that she was to go and cash them, as she says in another place. The respondent Bownas does not say that the deceased definitely gave her the bank-books and the cheques intending them to be her own property, or that he ever said so in so many words. It is suggested that he intended to make her this gift, but she does not say so explicitly—she leaves it to be inferred from the two expressions I have mentioned. Something more is, I think, required to establish a good *donatio mortis causâ:* it must be proved by clear and distinct evidence.

Apart from this, where is there any corroboration of her statements, assuming them to mean that she was to be his beneficiary? The getting of the bank-books and cheques and the delivery of them to her, together with his securities, is consistent either with

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what she wishes the Court to believe or with the idea that he gave these to her for the purpose of transferring them to some one else or making some disposition with which he had made her acquainted. He had a wife and a brother.

The possession of the bank-books, cheques, and certificates, and the handing of them over, cannot be corroborative or conclusive. Whatever he may have intended to do with his money and securities, if he desired her to accomplish it, would necessitate handling of these things, and therefore her possession of them cannot corroborate her story—even if she had established it—that they or what they produced were to belong to her and become her property.

I think, notwithstanding the wide range of evidence which has been admitted as sufficient corroboration in many cases, that no decision has gone so far as to hold that evidence supporting a *donatio mortis causâ*, one element of which is the definite handing over of moneys, cheques, or securities for money, can be corroborated simply by shewing that that element exists in the case.

For these reasons, I think the appeal should be allowed and judgment should be entered for the appellant with costs.

Appeal dismissed.

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FLEMING v. MAIR.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon, JJ.A. April 25, 1921.

Vendor and Purchaser (§IE—27)—Agreement for Sale of Half Section of Land—Rescission of Contract as to One Quarter—Fraud—Misrepresentation—Restitutio in Integrum—Relief Against Improvident Contract—When Granted.

Where an owner has refused to sell less than a half section of land and an agreement is finally arrived at whereby one quarter is to be purchased through the Soldiers' Settlement Board and the other quarter from the owner direct, an agreement being signed for the half section and the Board is given title to the one quarter and advances money on it under an agreement with the purchaser, the sale of the two quarters constitutes one transaction and the purchaser cannot rescind the contract as to one quarter while retaining the other.

[Sheffield, etc. Nickel Co. v. Unwin (1877), 2 Q.B.D. 214; O'Connor v. Sturgeon Lake Lumber Co. (1914), 17 D.L.R. 316, 7 S.L.R. 60, followed.]

APPEAL by defendant from the trial judgment in an action for

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rescission of an agreement for sale as to a portion of the land agreed to be purchased. Reversed.

C. M. Johnston, for appellant; *J. C. Secord*, for respondent.

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

LAMONT, J.A.:—The uncontradicted facts in evidence in this case disclose, in my opinion, a flagrant attempt on part of the plaintiff to get rid of the burden imposed by one part of a transaction while retaining for himself the advantages secured by another part. It is undisputed that in the beginning of the year 1919 the defendant was the owner of 4 quarter sections of land near Maryfield, which he refused to sell except in half-section lots; that the plaintiff, a returned soldier, and another returned soldier, J. J. Brown, were desirous of acquiring land through the assistance of the Soldiers' Settlement Board; that the two returned soldiers interviewed the defendant and, after some negotiation, they agreed to purchase the 4 quarters at $28 per acre, with certain chattels and crops thrown in, and that they settled between themselves the half section each would take by the toss of a coin. By the toss, the north half of 2-9-30-W. 1st fell to the plaintiff. On May 21, 1919, the plaintiff and Brown went down to look over the land. The defendant was unable to go along, but he sent one Walter Burns, a relative of his, along with them. They inspected the N/W quarter and some part of the N/E quarter, but as the roads were bad and they were in an automobile, which the three had jointly hired, they did not travel over very much of the north-east quarter. After making what inspection they did, the plaintiff and Brown obtained forms so as to enable the defendant to give an option to the Soldiers' Settlement Board on the two quarter sections in respect of the purchase of which they were asking the assistance of the Board. Shortly after June 1, the plaintiff interviewed the defendant, and according to the uncontradicted evidence of the defendant, whom the plaintiff called as a witness, the plaintiff said: "Mr. Mair, I think I will drop that half section and not take it," to which the defendant replied, "All right." Some days later, the plaintiff called the defendant on the telephone and, again according to the defendant's uncontradicted evidence, the following conversation took place: "Mr. Mair, when are you going down to get the writings drawn up?" I said, "Mr. Fleming, you told me that you had dropped that half-section." He said to me, "I am going to have the good quarter, the Soldiers' Settlement Board quarter." "Well," I said to him, "Mr. Fleming, I told you all along that I

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would not sell unless you took the half-section, and" I says, "I won't let you have that." He said to me, "I will take it; I have the Soldiers' Settlement Board to back me, and I have the Government to back me, and they will give weight to the war veterans." Later, the plaintiff went to the defendant and said he would take the half-section if the defendant would give him terms on the north-east quarter. Terms were agreed to, and it was arranged that they would go to Regina on July 12 and have the deal for both half-sections closed. On July 12 all parties went to the office of Mr. Cumming, the solicitor acting for the Soldiers' Settlement Board. They were at that office from 9 o'clock a.m. until 1 o'clock. According to the evidence of the defendant, the plaintiff there objected to taking the north-east quarter. There was evidently much discussion, for Cumming turned to the defendant and said, "Mr. Mair, are you willing to drop this deal with Mr. Fleming altogether and go on with the Brown deal if he will take the other half?" The defendant replied that he was. The plaintiff testified that Cumming refused to allow him to sign for the north-west quarter unless he signed for the north-east quarter as well; that he objected to signing for the north-east unless he could get a share of the crop of the south-west quarter. He says the arrangement between himself and Brown was that whoever got the north-east quarter was to get the crop on the south-west quarter in addition, but that when Brown got the south-west quarter he wanted to keep the crop on that quarter for himself. Brown's evidence is as follows:—"Q. What took place when those papers were signed? A. Well, Fleming was wanting to throw up this north-east quarter; he said it was not worth what Mair was asking for it; and Cumming said for him to sign the papers or get out of the office."

The plaintiff also admitted that the defendant was there that day to sell him the half-section or nothing. The plaintiff signed for the north-east quarter, and the deal was closed. Title to the north-west quarter was made to the Soldiers' Settlement Board, which advanced $3600 on it, and the Board gave the plaintiff an agreement of sale for the quarter. On September 8 the plaintiff wrote to the defendant saying that he was throwing up the north-east quarter; the reason being that the defendant had purchased it for $1000 and was charging him $4480 for it and it was not worth it. In October he brought this action, claiming rescission of the agreement as to the north-east quarter, on the ground that the character of the quarter and its value had been misrepresented to

him, and also that the contract was an improvident one. In November the defendant's solicitors wrote to the plaintiff's solicitors offering on behalf of the defendant to take back both the quarters and the chattels, and give the plaintiff therefor $200 more than he had agreed to pay for them, and only asked him to account for half the crop taken from the place. This offer was not accepted.

The evidence established beyond question, and the trial Judge found that the sale of the two quarters constituted one transaction. Notwithstanding this, he rescinded the contract for the north-east quarter for the following reasons:—"There is a vast difference between the purchase price by Mr. Mair of this property and his selling price to Fleming. Also there is such a difference in character between the parties as makes the case similar to that of *Barker* v. *Baker*, reported in [1919] 2 W.W.R. at p. 340. I thoroughly agree with the judgment in that case. There will be judgment for the plaintiff in this action with costs."

With deference, this judgment, in my opinion, cannot be upheld. As the sale of the two quarters constituted a single transaction, they must be dealt with as one, so far, at least, as the plaintiff's interest therein is concerned. Rescission of a contract involves a restitution of the parties to their original rights and property, and, generally speaking, rescission will be granted only so long as this can be done.

In *Sheffield etc. Nickel Co.* v. *Unwin*, (1877), 2 Q.B.D. 214, Lush, J., in giving the judgment of himself and Mellior, J., at p. 223, said:—"A contract cannot be rescinded in part and stand good for the residue. If it cannot be rescinded in toto it cannot be rescinded at all but the party complaining of the non-performance, or the fraud, must resort to an action for damages."

In *O'Connor* v. *Sturgeon Lake Lumber Co.* (1914), 17 D.L.R. 316 at p. 317, 7 S.L.R. 60 at p. 62, Brown J., said:—"Generally speaking, however, there can only be rescission where the transaction can be rescinded in toto and where there can be a *restitutio in integrum*. In this case the plaintiffs must shew ability to re-convey not simply part but all the property which the defendants parted with."

On appeal this judgment was affirmed (1914), 20 D.L.R. 216, 7 S.L.R. 254. The Court there said, at pp. 218-219:—"Before rescission can be granted, the plaintiffs have to be in a position to restore the property to the defendant company."

Now in this case, the plaintiff does not want rescission as to

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both quarters. He wants rescission of the quarter he did not wish to purchase, but he wants the contract to be held good as to the north-west quarter. In other words, he asks the Court to force the defendant to make the very contract which the defendant from first to last refused to make. Had the plaintiff been willing to restore both quarters this litigation might have been prevented, for the defendant was perfectly willing to take them back. It was contended, however, that the plaintiff could not now restore the north-west quarter because the title was vested in the Settlement Board. If the Board was not willing to have the contract rescinded and the parties restored to their original position, there could not, in my opinion, be rescission at all. Furthermore, I am unable to find in the evidence any good ground for rescission, even if the plaintiff was able and willing to make restitution. The evidence in my opinion does not disclose any inability on part of the plaintiff to look after himself in making a contract for this land. He knew the north-east quarter was a poor quarter; this is shewn by his objecting to sign for it on July 12, on the ground that it was not worth the price asked, and also by his own statement that it had been arranged between himself and Brown that whoever got the north-east quarter was to have the crop on the south-west quarter as well. It is quite clear that the plaintiff did not want to purchase the north-east quarter, and he steadily objected to doing so until he was certain he could not obtain the north-west quarter without taking the north-east also. To obtain the north-west quarter at the price fixed, which was below its value, he consented to buy the north-east quarter at a price he knew to be in excess of its value. To allow the plaintiff under these circumstances to retain the north-east [north-west?] quarter and to throw back on the defendant the poor quarter, would be to allow him to perpetrate a fraud on the defendant. The appeal, in my opinion, should be allowed with costs, the judgment below set aside and the plaintiff's action dismissed with costs.

The defendant counterclaims for specific performance. In my opinion he is entitled to an order therefor. There will be a reference to the local registrar to ascertain the amount due under the agreement. The agreement contains a clause by which, in the event of default being made in payment, the whole of the purchase money shall become due and payable. The plaintiff made default; the whole of the purchase money and interest thereon is therefore overdue by virtue of that clause.

Section 25, sub-sec. 9 of The King's Bench Act, R.S.S. 1920, ch.

39, however, provides that the purchaser by paying the arrears in default and the costs to be fixed, may be relieved from immediate payment of that portion of the purchase money which became due and payable by reason of the acceleration clause. The local registrar will therefore compute the payments in arrear under the agreement, and the order will contain a provision that upon payment of these arrears and costs of the counter-claim the plaintiff will be relieved from making further payments, excepting as same may become due under the agreement. Leave should be given to apply further.

TURGEON, J.A.:—I agree with the conclusions arrived at by my brother Lamont. The evidence in this case, as it appears to me, shews that in May, 1919, the defendant was the owner of a half section of land which he was willing to sell to the plaintiff, together with certain machinery and animals thereon, provided the plaintiff would pay him therefor the sum of $8960, which figure was arrived at on an acreage basis by computing 320 acres (the half section) at $28 per acre. The land on the north-west quarter was better for cultivation purposes than the land on the north-east quarter. The plaintiff, a returned soldier, endeavoured to persuade the defendant to sell him the north-west quarter alone, but this the defendant refused to do, as he did not wish to remain with a quarter section on his hands. Finally the plaintiff agreed to buy the whole half section at the price stipulated. He acquired the north-west quarter with the assistance of the Soldiers' Settlement Board, the defendant conveying this quarter to the Board who entered into an agreement of sale with the plaintiff, and at the same time he and the defendant executed an agreement for the sale of the north-east quarter for $28 an acre. These negotiations wre spread over a period of about 2 months, beginninng about May 10 or 12, and ending on July 12, when the necessary documents were signed. The plaintiff now seeks to have the contract concerning the north-east quarter set aside, but desirous to retain the north-west quarter. In any event he could not now return the north-west quarter to the defendant, because the title thereto is vested in the Soldiers' Settlement Board, subject to the plaintiff's agreement to purchase. I am of opinion that, as between the plaintiff and the defendant, the bargain made concerning the two quarters was in reality one transaction, and that the defendant did not commit any fraud. The trial judge at the end of the argument on June 22, 1920, stated that he had come to this same conclusion upon these two points, but he reserved his decision on the

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case until later. On July 14, he gave judgment as follows:—[See judgment of Lamont, J.A., *ante* p. 321.]

I must say that I cannot agree with the decision of the trial Judge. In my opinion the plaintiff's action should be dismissed and the defendant's counterclaim for specific performance allowed.

This case is not all, in my opinion, within the class of cases referred to in the judgment and by counsel for the plaintiff upon the argument, in which equity has come to the relief of victims of improvident or unconscionable contracts. In most of these cases somebody having in interest in property (generally a reversionary interest) but being in distress, or being ignorant and weak and taken by surprise, is seduced by the offer of immediate cash into bartering away his rights at a great undervalue. *Evans* v. *Llewellin*, (1787), 1 Cox 334, 29 E.R. 1191; *Baker* v. *Monk* (1864), 4 De Gex. J.&S. 388, 46 E.R. 968. Or again, a parent or guardian or trustee takes advantage of his position to drive a hard bargain with the very person whom it is his duty to protect. In all these cases there is a relief in equity.

In the case before us there is no fiduciary relationship between the parties, nor was the plaintiff in a position of distress which drove him into the execution of the contract, nor was he taken by surprise or deprived of the means of obtaining proper advice. Nor, again, can I find any evidence to support the statement contained in the judgment that there was such a difference in character between the parties as existed in the case of *Barker* v. *Baker*, *supra*, which would mean that the defendant enjoyed such a superiority of education, business acumen and freedom from anxiety over the plaintiff as would place the plaintiff in reality under his protection. And further to distinguish this case from *Barker* v. *Baker*, I must say that I am not at all satisfied from the evidence that this contract can even be called a hard contract. It is true that the north-east quarter is worth less than $28 per acre, but according to the evidence it is probably true that the north-west quarter is worth more than that figure, and then we have the chattels which went with the land and which must have been of some value. But even if we assume that it was an unwise or improvident contract for the plaintiff to make, I do not find that the other necessary elements exist which must be placed before us before the Court can exercise its equitable jurisdiction and set the contract aside. This jurisdiction should not be exercised, where a fiduciary responsibility is not established, except in a very clear case. We cannot be asked to set aside this

contract on account of mere inadequacy of consideration, or rather, should I say, we cannot be asked to set a portion of this contract aside on account of inadequacy of consideration regarding that portion only, which is all that is alleged. The general rule of Law is that the adequacy of consideration is for the parties to consider at the time of making the agreement, not for the Court when it is sought to be enforced. *Bolton* v. *Madden* (1873), L.R. 9 Q.B. 55. And the rule laid down in equity is that the inadequacy of consideration will not vitiate a contract unless it is such as shocks the conscience and amounts in itself to conclusive and decisive evidence of fraud in the transaction. *Coles* v. *Trecothick* (1804), 9 Ves. Jun. 234, 32 E.R. 592.

An instance of the application of this rule is found in the case of *Harrison* v. *Guest* (1855), 6 De G. M. & G. 424, at p. 435, 43 E.R. 1298 at p. 1302, where in the course of his judgment Lord Chancellor Cranworth said:—"There was a purchase for what turns out to be an extremely inadequate consideration. That, however, is of no consequence, if the parties were in a situation to judge for themselves, and this makes the question as to the poor old man's state of mind, at the time he entered into this bargain, very material. Now after looking at the evidence, I cannot entertain any very serious doubt that he perfectly understood what he was about."

And likewise in this case, whatever may be said of the adequacy of the consideration, I feel convinced from the evidence that the plaintiff (who was not a poor old man but a man well acquainted with farm land and farm life), perfectly understood all that he was about.

All considered, therefore, I can find, to say the least, no such shocking inadequacy of consideration in this contract as is referred to in the *Coles* case, and as I have not found any of the other elements which might entitle an applicant to equitable relief, I do not see how we can interfere on behalf of the plaintiff.

The plaintiff asks in the alternative for damages, which he estimates at $3480, being the difference between the price of the quarter section at $28 per acre ($4480) and $1000, which he says is its real value. I think that, in any case, his only remedy would lie in damages and not in rescission as he cannot now restore the north-west quarter to the defendant. *Clarke* v. *Dickson* (1859), 6 C.B. (N.S.) 453, 141 E.R. 533; *The Sheffield etc. Nickel Co.* v. *Unwin*, 2 Q.B.D. 214. But I cannot find from the evidence that the defendant has committed any breach of the contract which would entitle

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the plaintiff to damages.

I agree with my brother Lamont as to the disposal of the counterclaim.

Judgment accordingly.

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A. D. GORRIE CO., LTD. v. WHITFIELD AND MICHAUD.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Magee, Hodgins and Ferguson, JJA. December 30, 1920.

Bills and Notes (§IA—4)—Promissory Note—Signed on Face—Marked "endorsed"—Intention of Parties—Liability as maker.

The defendant M. had signed a promissory note, under that of W. on the face of the note, and opposite W's name the word "endorsed" was written by a salesman in the employ of the company to whom the note was made payable. The evidence shewed that the defendant M. did not sign the note as endorser but as maker with W. and that this was the intention of all the parties at the time the contract was made and the note signed. The Court held that the defendant could not set up that he had signed as an endorser only and so escape liability on the ground that he had not been given notice of dishonour.

[Ex parte Yates (1857), 2 De G. & J. 191, 44 E.R. 961, distinguished; Young v. Glover (1857), 3 Jur. (N. S.) 637; Stack v. Dowd (1907), 15 O.L.R. 331; Carrique v Beaty (1897), 24 A.R. (Ont.) 302, referred to.]

APPEAL by the plaintiff company from a County Court judgment dismissing as against the defendant Michaud an action upon a promissory note. Reversed.

The facts of the case are fully set out in the judgments following.

F. J. Hughes, for appellant.

H. G. Smith, for Michaud, respondent.

MEREDITH, C.J.O.:—This is an appeal by the plaintiff company from the judgment of the County Court of the County of York, dated the 15th September, 1920, which was directed to be entered by His Honour Judge Elliott, after the trial before him sitting without a jury on that day.

The result of the appeal depends on whether or not the respondent, the defendant Michaud, is liable on the promissory note, to which I shall afterwards refer,as a maker or as an endorser. The holding in the Court below was that he was liable as endorser

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and the action against him was dismissed because there was no notice to him of the dishonour.

The facts are not seriously in dispute now that it has been found that the respondent Michaud did not, as he alleged, sign the note merely as a witness to the signature of the other defendant, Whitfield.

Daniel McKinnon, a salesman in the employ of the appellant, advertised for sale a Ford car of the appellant. Having seen the advertisement, the respondent Michaud came to the sales-room of the appellant, where the car was, and inspected and was satisfied with it and told McKinnon he would buy it if he could dispose of his own car—a Studebaker—and asked McKinnon to go with him to see the defendant Whitfield, with whom Michaud had had some discussion as to selling his car. McKinnon went as requested, and it was there arranged that Whitfield would buy the Studebaker car if the appellant would "finance the deal," and it was arranged that the three of them should meet at the appellant's office the next morning, which they did. What was proposed to be done was submitted to the appellant's manager, Mr. Griffith, who declined it, saying that the price which Whitfield had agreed to pay was more than the value of the car; the arrangement was that Whitfield should pay part cash and the balance in monthly instalments for which he was to give his note, and what was meant by financing the deal was that the appellant should take the note as cash. Mr. Griffith, however, offered to do that if Michaud would sign the note with Whitfield; Michaud agreed to do this; and the transaction was carried out by Whitfield signing an agreement to purchase the Studebaker car from the appellant for $596.10, of which the sum of $206.10 was to be paid in cash and the balance in 10 equal consecutive monthly instalments; by the appellant signing a memorandum stating that the Ford car was "sold" to Michaud in exchange for the Studebaker car; and by the giving of the promissory note in question for $390, which is signed thus:—

Endorsed

C. Whitfield
J. A. Michaud

The word "endorsed" was written by McKinnon in the presence and with the assent of Michaud after he had signed the document. At the trial, Michaud testified that the word was written without his knowledge and that he signed as a witness only.

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McKinnon testified (p. 3 of the notes of evidence) that Griffith would not accept the proposition made to him "unless Mr. Michaud signed the note with him" (i.e., Whitfield), and this he repeated (p. 4). At p. 4 McKinnon says that Michaud was to "sign as a party like the other man." Again on p. 5, "he" (i.e., Griffith) "insisted upon Mr. Michaud becoming a party to the note." On cross-examination McKinnon further testified (p. 9):—

"I told him" (i.e., Michaud) "in order for him to sell his Studebaker car to Mr. Whitfield he must become a party to purchase and become equally responsible to the A. D. Gorrie Company with Mr. Whitfield."

Being asked on cross-examination (p. 14): "But you remember that Mr. Michaud signed the note as an endorser?" McKinnon answered "Yes." Again, at the same page, being asked, "That means that Mr. Michaud paid for the car with his Studebaker?" McKinnon answered, "and endorsed the paper because we would not accept the Studebaker as security . . . ".

Bertha Baker, an employee of the appellant, corroborated the testimony of McKinnon as to what Griffith said and did and as to the signing of the note. As she put it, Griffith said: "We cannot handle the deal unless the papers are endorsed by the party who is buying the Ford car;" and she further testified that the instructions she received from Griffith were: "If Mr. Michaud would endorse the note of Mr. Whitfield it would be quite in order for Mr. McKinnon to put through the deal."

She said again (p. 21) that McKinnon told Michaud "before he could take the Studebaker in on the Ford sale it would be necessary for him to endorse Mr. Whitfield's note."

Griffith corroborated the testimony of McKinnon and Miss Baker. His statement at p. 23 is that he refused to accept the proposition made to him "unless that Mr. Michaud would give a note along with Mr. Whitfield." Later on, he testified that he told McKinnon that he would not "take the deal unless the note was endorsed by Mr. Michaud." And still later (p. 26), he spoke of Michaud's signature to the note as an "endorsement."

On p. 28, Griffith said that he treated Michaud as the maker of the note; and on p. 29 that his instructions were that "Mr. Michaud was to sign the note with Mr. Whitfield."

What then is the effect of the transaction? Did Michaud sign the note only as an endorser or did he sign and is he liable as maker?

It is said that, though endorsement in its literal sense means writing one's name on the back of the bill, the endorsement may be upon any part of it, even on the face.

In *Young* v. *Glover* (1857), 3 Jur. (N.S.) 637, a bill of exchange was drawn by the plaintiff on William Booth, payable to the plaintiff's order and accepted by Booth. Booth was indebted to the plaintiff, and proposed to give his acceptance endorsed to the defendants; the bill was then drawn and accepted by Booth by writing on the face of it the words, "Accepted, William Booth;" the bill was then taken to the defendants, who wrote their names under the name of Booth. The plaintiff sued the defendants as endorsers of the bill, and it was objected on their behalf that, their names being written on the face of the bill, the bill was not endorsed according to the custom of merchants, but the objection did not prevail.

In *Ex parte Yates* (1857), 2 De G. & J. 191, 44 E.R. 961, the facts were that a promissory note payable on demand had been given by Tilden Smith, Richard Smith, and Henry Smith. Some years after the date of the note, Richard Russell placed his name and address at the foot of the note, to the left of the signatures of the three Smiths. Tilden Smith and others had become bankrupts, and the holder of the note sought to prove on the note against the separate estate of Smith, but the proof was rejected on the ground that the effect of adding Russell's name was to make a material alteration. On appeal, this ruling was reversed. The statement of facts is meagre; but, as far as I can gather from it, it was established that the purpose of Russell's signing was to give additional security to the holder of the note.

In *Carrique* v. *Beaty* (1896), 28 O.R. 175, the late Chancellor, following *Ex p. Yates*, held that, where a person had added his name after that of two makers of the note, the object being that the holder should have additional security, that having been done without the knowledge of one of the makers, the effect of this was not to vitiate the note, but that the person who so signed was liable as an endorser. His decision was, however, reversed by the Court of Appeal (1897), 24 A.R. (Ont.) 302, which held that he was an additional maker and not an endorser, and that there was, therefore a material alteration of the note which discharged the accommodation maker. Stating his opinion, Osler, J.A., said (p. 305) that there was "no evidence that he intended to sign as endorser, nor . . . anything on the face of this note to throw doubt upon or qualify the

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character in which it purports to be signed by him, which is that of maker."

The decision of the Court of Appeal was referred to by Riddell, J., in *Stack* v. *Dowd* (1907), 15 O.L.R. 331, 333, who said (p. 334) that it had "not since been questioned and should be followed."

In *Ex p. Yates* it was manifest that Russell signed his name on the bill for the purpose of giving additional security to the holder of it. The effect of that, if he were treated as a maker, would have been to avoid the bill; and, therefore, to give effect to the intention of the parties, it was necessary that he should be treated as an endorser.

In my opinion, the proper conclusion upon the evidence in the case at bar is that Michaud did not sign the note with the intention of thereby endorsing it, but as maker in pursuance of an agreement that he should join as a maker—though as between him and Whitfield only as a surety. It is to be remembered that the transaction which resulted in the giving of the note was initiated by Michaud, who was desirous of purchasing the Ford car but unable or unwilling to buy it unless he could dispose of his Studebaker car; and that he obtained the Ford car upon the agreement that he was to be liable with Whitfield for the balance of the price of the Studebaker car, the form of the transaction being the taking by the appellant of the Studebaker car in exchange for the Ford and the sale of that car to Whitfield.

According to the evidence, the proposition of Michaud and Whitfield was that the appellant should finance the deal, which meant, I assume, should accept Whitfield as their debtor for the price of the Studebaker car at which Michaud had agreed with Whitfield for its sale, but that proposition was declined unless Michaud would join with Whitfield in making the note which Whitfield was to give for the part of the price for which credit was to be given.

It does not lie in the mouth of Michaud to assert that he intended to sign as endorser. His defence was that he signed only as a witness, and that defence he endeavoured to support by his evidence at the trial.

The word "endorsed" was not written by Michaud but by McKinnon, and was, I think, merely a memorandum intended to show that Michaud was a surety. Throughout his testimony, McKinnon seems to treat making of a note, joining in a note, and endorsing a note as synonymous terms. One knows that in common

parlance joining as maker with another for his accommodation is spoken of as "backing his note," and it cannot be that a man who "backs" a note by signing it as a maker is to be treated as an endorser.

I see no reason for assigning to Michaud any other position than that of maker of the note, and no reason for assigning to him the position of endorser, and then letting him escape because notice of dishonour has not been given to him.

Every one concerned seems to have thought him a joint maker, and probably so did the bank in which the note was placed.

In my opinion, the principle acted on in the *Yates* case has no application. In the case at bar no question as to the note being rendered void by the adding of Michaud's name was raised, and the reason that existed in that case for treating Russell as an endorser does not exist.

I would allow the appeal with costs, and substitute for the judgment which has been entered judgment for the appellant for the amount of its claim with costs.

MAGEE and HODGINS, JJ.A., agreed with MEREDITH, C.J.O.

FERGUSON, J. A. (dissenting):—The result of the appeal turns upon the answer to the question: Was the defendant Michaud the maker of the note sued upon, or only an endorser, entitled to notice of dishonour? The learned trial Judge found that he was an endorser only, and had not received notice of dishonour.

I have read the evidence, and am of opinion that there is nothing in it, outside of the fact that the defendant's signature is on the face of the note instead of on the back of it, to lead to the conclusion that he signed as maker. The defendant swore that he signed as witness only; but the evidence of Mr. Griffiths and Miss Baker make it clear that it was a term of the contract that he should endorse the note, and the word "endorsed" was written opposite his name at the time when the note was signed, and the learned trial Judge finds on the evidence of McKinnon and Miss Baker: "I am quite clear the word 'endorsed' was written on the note immediately after it was signed by Whitfield and Michaud, and in their presence and with their approval, and when Michaud denies this I think he is mistaken, and I think, too, that McKinnon did make known to him the new terms on which the deal could go through, and he agreed to it. It was Griffiths who instructed McKinnon, and his evidence is clear that his instructions were that Michaud should endorse the note. There are some statements in McKinnon's exam-

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ination-in-chief to the effect that Michaud was to be liable for the price of the machine in the same way as Whitfield was to be, but his cross-examination, the form of the document of purchase, and the fact that it was McKinnon himself who wrote upon the note the word 'endorsed,' make it clear that he understood that Michaud was merely endorsing the note, and so intended."

I would dismiss the appeal with costs.

Appeal allowed.

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British Columbia Court of Appeal, Macdonald, C.J.A., Galliher, McPhillips and Eberts, JJ.A. April 29, 1921.

Public works (§II—12)—Acquisition of land by Crown for—Public Works Act R.S.B.C. 1911, ch. 189, sec. 3—Order in Council necessary Before Contract can be Enforced.

An agreement for the sale of land to his Majesty as represented by the Minister of Public Works for British Columbia for a purpose within the provisions of the Public Works Act, R. S. B. C. 1911, ch. 189, sec. 3, cannot be enforced when not founded upon an Order in Council.

APPEAL by plaintiff from the judgment at the trial in an action to enforce an agreement of sale of lands to His Majesty as represented by the Minister of Public Works of British Columbia. **Affirmed.**

H. B. Robertson, K.C., for appellant.

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

MACDONALD, C.J.A.:—The appellant entered into what purports to be an agreement of sale of his lands to His Majesty, represented by the Honourable Thomas Taylor, then Provincial Minister of Public Works, the acquisition of the land being for a purpose within the provisions of the Public Works Act, R.S.B.C. 1911, ch. 189. The agreement recites that: "Whereas the Lieutenant-Governor in Council of the Province of British Columbia has deemed it necessary to acquire and take possession of the lands in question," and it is witnessed that the parties to the agreement, namely, the appellant, as vendor, and His Majesty, as purchaser, agreed to the terms and conditions in the agreement mentioned.

The power to acquire land for the purposes aforesaid is given

by sec. 3 of the Public Works Act. The relevant parts of that section are as follows: "The Lieutenant-Governor in Council may acquire and take possession for and in the name of His Majesty of any land . . . which is in his judgment necessary for the use . . . of any public work, . . . and the said Minister (of Public Works) may for such purpose contract with all persons."

The appellant has failed to prove that an Order in Council was passed authorising the acquisition of this land. The evidence is all to the contrary. The question then is: can the agreement with the Minister be enforced when not founded upon an Order in Council? If it can, then the reference to the Lieutenant-Governor in Council mentioned above is negligible and the exercise of his "judgment" in the matter may be dispensed with.

In my opinion, that is not the true meaning of sec. 3, read either alone or in conjunction with the rest of the Act. The statute is a public one and all persons entering into contracts of the character aforesaid are presumed to be acquainted with it.

There was some suggestion in argument that the transaction had the approval of the Cabinet, but there was no suggestion that it had the assent of, or had ever been brought to the notice of the Lieutenant-Governor, so that it is not necessary here to consider whether a verbal Order in Council, something of which I have never heard, if proved, would have sustained the contract. In my opinion the Legislature has clearly made it a condition to the acquisition of such lands as are in question, that the decision of the Council should be signified in the customary way by minutes of council which should then be duly assented to by the Lieutenant-Governor, and that in the absence of such, the Province should not be put under obligation to the party with whom the Minister purported to contract.

None of the several cases to which we were referred are of much assistance, since the decision of the appeal depends upon the construction to be placed on the language of the statute itself. In any case, the appellant cannot get much comfort from them.

In this view of the case it becomes unnecessary to consider the other points raised in the argument.

I would dismiss the appeal.

GALLIHER, J.A.:—I have given very careful consideration to the various points argued by Mr. Robertson, to the Public Works Act and the various authorities cited; and it appears to me that the insuperable obstacle in the way of the applicant's success lies in

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the fact that there was no Order in Council in the first place, and secondly, no ratification of the Minister's act by any body competent to ratify it.

These matters have been dealt with by Macdonald, C.J.A., in whose judgment I concur.

In this view it becomes unnecessary to deal with the other questions upon which the judgment below proceeded.

The appeal should be dismissed.

McPHILLIPS, J.A. (dissenting):—This appeal involves the consideration of a point of law of some nicety, and at first sight would seem to present an insuperable barrier to the success of the appellant. I have, however, after careful consideration arrived at the conclusion that the Public Works Act, R.S.B.C. 1911, ch. 189, in its terms is so framed that it is not a condition precedent to the entry into a contract by the Minister of Public Works, that there should first be passed an Order in Council—where lands are to be acquired and possession taken of them, and even if I were wrong in this—then I am of the opinion that in view of all the surrounding facts, it is not open to the Crown to now contend that by reason of the non-passage of an Order in Council, all is abortive. Section 3 of the Act as amended by 4 Geo. V. 1914 (B.C.), ch. 58, sec. 2, reads as follows:—

"The Lieutenant-Governor in Council may acquire and take possession, for and in the name of His Majesty, of any land, tenements, hereditaments, streams, waters, watercourses, fences, and walls, the appropriation of which is in his judgment necessary for the use, construction, or maintenance of any public work or building, or for the use, construction, or maintenance of hydraulic privileges made or created by, from, or at any public work, or for the enlargement of or improvement of any public work, or for obtaining better access thereto; or for the purpose of establishing a reserve for the protection of any animals, birds or fishes; and the said Minister may, for such purpose, contract with all persons, guardians, tutors, curators, and trustees, whatsoever, not only for themselves, their heirs, successors, executors, administrators, and assigns, but also for and on behalf of those whom they represent, whether infants, absentees, lunatics, married women, or other persons otherwise incapable of contracting, possessed of, or interested in such lands, real property, streams, water, and watercourses; and all such contracts, and all conveyances or other instruments made in pursuance of any such contract, shall be valid to all intents and purposes

whatsoever. R.S. 1897, c. 160, s. 3."

It is also useful to note the interpretation of "Minister" as set forth in sec. 2 of the Act, which reads as follows:—

"In the construction of this Act:—"Minister," "the Minister," "the said Minister," means Minister of Public Works of this Province or the person acting as such for the time being, and every person duly authorized by the Lieutenant-Governor in Council to act as and for the said Minister, and any agent duly appointed in writing by the said Minister for the purposes of this Act. R.S. 1897, c. 160, s. 2."

It is only necessary to give careful reading to the provisions of the Act and it is apparent that the Minister of Public Works has been given by the Legislature in apt words, the authority to enter into contracts for the acquirement of and the taking possession of lands, the contract of the Minister is the statutory method fixed for the Lieutenant-Governor in Council, i.e., the Crown, to acquire the lands and possession thereof; it is to be noted that in sec. 3 of the Act we have these words, "and the said Minister may *for such purpose* contract with all persons." Now *what purpose* does the language refer to? Unquestionably the purpose is, that "the Lieutenant-Governor in Council may acquire and take possession, for and in the name of His Majesty of any land," (these are the opening words of the section) which the Minister has contracted for, and it will be seen that the section further provides in respect to the contracts authorised to be entered into, that, "all such contracts and all conveyances or other instruments made in pursuance of any such contract shall be valid to all intents and purposes whatsoever."

Admittedly, a contract was entered into, it is a well constituted submission to arbitration and it was in the following terms:—

"Memorandum of agreement made in duplicate this twenty-third day of August, in the year of our Lord one thousand nine hundred and sixteen: Between Neil F. Mackay of the City of Victoria in the Province of British Columbia, hereinafter called the "Vendor," of the first part, and His Majesty The King, in right of his Province of British Columbia, (herein represented and acting by the Honourable Thomas Taylor, Minister of Public Works, of the said Province), hereinafter called the "Purchaser," of the second part. Whereas His Honour the Lieutenant-Governor in Council of the Province of British Columbia has deemed it necessary to acquire and take possession of the lands and premises hereinafter described for

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the purpose of the construction of the Johnson Street Bridge, so called, in the City of Victoria, being a proposed public work of the said Province, and has requested such possession thereof without delaying to give the notice required under the provisions of the "Public Works Act" of the said Province, which possession the Vendor has in consideration of the terms of this agreement to give.

Now this agreement witnesseth that in consideration of the mutual covenants and agreements herein contained, the parties hereto covenant and agree each with the other as follows:—1. The vendor agrees to sell to the purchaser, and the purchaser agrees to purchase from the vendor, free from all encumbrances, all those certain parcels or tracts of land and premises situate and lying and being in the City of Victoria, and more particularly described as follows: Lots one hundred and eighty-two "A" (182A), and one hundred and eighty-two "G" (182G), as the said lots are shewn on the official plan of the said City of Victoria. 2. The purchase price of the said lands shall be determined by arbitration, as near as may be in the manner provided by the "Public Works Act," Chapter 189, of the Revised Statutes of British Columbia 1911, for the determination of disputes arising touching claims for money or compensation under the said Act; and except as in this agreement is otherwise provided, the provisions of that Act relating to the appointment of arbitrators, the conduct of the arbitration, and the making of the award thereunder shall mutatis mutandis apply to the arbitration under this agreement for the determination of the said purchase price. 3. The purchase price so fixed shall become due and be paid by the purchaser to the vendor upon delivery of the award under the said arbitration. 4. One half of the costs of the said arbitration shall be borne and paid by the vendor, and the other half of said costs shall be borne and paid by the purchaser. 5. Upon the execution of this agreement, the vendor shall and will suffer and permit the purchaser forthwith to enter into possession of and occupy and enjoy the said lands until default be made in the payment of the said purchase price. 6. The vendor shall not be bound to produce any Abstract of Title, or any copies thereof, or any other evidence of title except such as are in his possession. 7. Upon payment of the said purchase price, fixed as aforesaid, the vendor shall grant and convey the said lands unto the purchaser, in fee simple, free from all encumbrances, save and except the reservations and conditions contained in the original grant from the Crown, and save and except all rates, taxes and assessments whatsoever the said

lands may be rated or taxed with from and after the date of this agreement. 3. All rates, taxes and assessments whatsoever rated or taxed upon the said lands for the current year shall be appointed between the parties hereto as of the date of this agreement.

This agreement shall enure to the benefit of and be binding upon the heirs, executors, administrators, successors and assigns of the vendor and purchaser respectively.

In witness whereof this agreement has been duly executed by the parties hereto.

Signed, sealed and delivered, in the presence of	)	"Thomas Taylor" (s)
Witness to signature of Neil F. Mackay	)	
Avard V. Pineo	)	"Neil F. Mackay" (s)
Witness to signature of Thomas Taylor,	)	Minister of Railways
Tephi Taylor	)	and Public Works."

There can be no question that it was the intention of the Crown to acquire the lands, in fact the Crown was by the agreement given possession of the lands.

The Government of British Columbia desired to acquire the lands and take possession of them in the carrying out of the construction of the Johnson Street Bridge, a public work, and following the agreement arbitrators were duly appointed by the Crown and the appellant, and an award was made in due course.

Some argument was directed to the point that it was not really an arbitration, as there were no disputes or differences, merely the arriving at the value of the lands. It is a fair inference if there is nothing more, that there must have been disputes or differences of opinion, otherwise what need for an arbitration? If I think it necessary I will later advert to this point. The award was in the following terms:—

"In the matter of an arbitration between N. F. Mackay and His Majesty The King, and between K. S. Munn and His Majesty The King, pursuant to the agreements, copies of which are attached hereto:

To The Honourable,
The Minister of Public Works,
of the Province of British Columbia.

We, the undersigned, the arbitrators appointed herein, award that the sum of $46,800.00 shall be paid to the said K. S. Munn for the

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purchase of Lot one hundred and eighty-two "B" (182B); and we award that the sum of $107,400.00 shall be paid to the said N. F. Mackay for the purchase of Lots one hundred and eighty-two "A" (182A), and one hundred and eighty-two "G" (182G). Dated at the City of Victoria, in the Province of British Columbia, this 27th day of September, 1916.

Forty Six Thousand Eight Hundred — Harry F. Bullen
One Hundred and Seven—Four Hundred — J. Musgrave

Later some correspondence took place between the solicitors for the appellant and W. J. Bowser, K.C., the Prime Minister, which read as follows:—

"October 4th, 1916.

Sir:

On the 23rd August, 1916, an agreement was made between His Majesty the King in the Right of the Province represented by the Hon. Thomas Taylor, and Neil F. Mackay, under which Mr. Mackay agreed to sell and His Majesty agreed to purchase Lots 182A and 182G at a price to be determined by arbitration in the manner provided by the Public Works Act, Chap. 189, Revised Statutes of B. C. 1911.

Pursuant to the provisions of the said agreement the arbitration was duly held and the arbitrators have delivered their award in writing to the Minister the Hon. Mr. Taylor.

Clause 3 of the said agreement provides "that the purchase price so fixed shall become due and be paid by His Majesty to Mr. Mackay upon delivery of the award under the said arbitration,"—so that the purchase price determined by the arbitration was due and payable to our client Mr. Mackay on the date of the delivery of the award.

We now ask for payment of the purchase price and our client is prepared to give the deed called for by section 7 of the said agreement.

Clause 4 of the agreement provides for division of costs of the arbitration; and Clause 8 of the said agreement for an apportionment of taxes.

We should be glad if you would let us know when we can have an appointment with you when the matter of costs and taxes can be agreed upon, the purchase money paid over, and we can deliver the deed.

If for any reason the Government is not prepared to pay over the purchase price at the present time, we presume it is only fair that the money should bear interest at seven per cent.

We have the honor to be, Sir,
Your obedient servants,
Bernard, Robertson, Heisterman & Tait,
per.

To The Hon. W. J. Bowser, K.C."

"6th October, 1916.

Messrs. Bernard, Robertson, Heisterman & Tait,
Barristers,
Victoria, B.C.
Dear Sirs:

re Lots 182A and 182G.

I beg to acknowledge receipt of your communication of the 4th inst. in reference to your delivering a deed to above property to the Crown in accordance with the agreement entered into between the Crown as represented by the Hon. the Minister of Public Works and your client, Mr. Neil F. Mackay.

In reply I beg to state that so far as the Government is concerned, we are satisfied with the award but unfortunately we are not in a position to pay over the money or to accept the deed, as it would mean placing before His Honour the Lieutenant-Governor a special warrant for this amount, which under the circumstances, being an outgoing Government, I cannot see my way clear to do; but will suggest to my successor in office that he should follow this course of action.

In the meantime the arbitrators have put in a bill for $600 and as your client is entitled to pay $150 I will be glad if you would forward me a cheque for this amount, when we will pay our share.

The matter of taxes had better remain to be adjusted when the purchase price is paid you.

Yours faithfully,
"W. J. Bowser"
Premier."
"Oct. 11th, 1916.

Hon. W. J. Bowser,
Parliament Buildings,
Victoria, B. C.
Dear Sir:

re Lots 182A and 182G.

We have your letter of the 6th inst. and we now enclose our cheque for $150.00 payable to your order to cover Mr. Mackay's half of the arbitrator's fees. We note what you say with reference

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to taxes.

You do not reply to our suggestion that the Province should pay interest on the purchase price from the date of the award until the amount is paid over—we should be glad to hear from you as to this.

Yours truly,
Bernard, Robertson, Heisterman & Tait,
per.

H.B.R.-W
Encl.

"12th Oct. 1916.

Messrs. Bernard, Robertson, Heisterman & Tait,
Barristers, B. C. Perm. Loan Bldg.,
Victoria.

Dear Sirs:

I beg to acknowledge receipt of your communications of the 11th inst. enclosing your two cheques for $150 each, being your share of the arbitrators' fees in connection with the Johnson Street expropriation.

I will put through a voucher at once for $300.00 to pay our share of the fees and together with your cheques the Department of Public Works will forward them to the valuators.

So far as our paying interest on the purchase price from the date of the award is concerned, I do not see that this would be a matter for our outgoing Government to make any promise in connection with, but one that you should properly take up with the new administration.

Yours faithfully,
"W. J. Bowser"
Premier."

It is to be observed that the Prime Minister says, "we are satisfied with the award," and the fact is that the Crown was represented by counsel at the arbitration, and no question of the validity of the transaction is set up until after a change of Government takes place, then following a petition of right filed by the appellant a fiat is refused upon the ground that there was no supporting Order in Council, that the agreement for the acquisition and possession of the lands was not sealed with the seal of the Department of Public Works, that there were no accepted plans for the bridge and the proposed acquisition of the lands was not justified by the conditions then or previously existing. Later the submission

to arbitration was in accordance with the Supreme Court practice made a rule of the Supreme Court, the order reading as follows:—

"Order making Submission of 23rd August, 1916, a Rule of Court.

Before The Honourable Mr. Justice Gregory,

Monday the 19th day of January, 1920.

Upon motion made unto this Court by Mr. Harold B. Robertson of Counsel for the Applicants, upon hearing read the Notice of Motion herein dated the 19th day of January, 1920, and the affidavits of Neil F. Mackay and Thomas Taylor, sworn and filed herein and the exhibit therein referred to, upon hearing what was alleged by Counsel aforesaid,

This Court doth order that the submission to arbitration dated the 23rd day of August, 1916, and made between Neil F. Mackay of the City of Victoria in the Province of British Columbia, and His Majesty the King, in right of his Province of British Columbia, (herein represented and acting by the Honourable Thomas Taylor, Minister of Public Works, of the said Province), be and the same is hereby made a Rule of the Supreme Court of British Columbia.

By the Court,

"B. H. Tyrwhitt Drake"

Registrar."

Then proceedings were taken against the Crown by way of originating summons to enforce the award.

The application came on for hearing before Gregory, J., and that Judge dismissed the summons to enforce the award and from that judgment this appeal is taken.

The appellant, if not able to succeed in enforcing the award under the provisions of the Public Works Act and the Arbitration Act, R.S.B.C. 1911, ch. 11, is without remedy, as without leave from the Crown, and that leave has been already refused, no action can be brought against the Crown whereby any enforceable judgment against the Crown can be imposed.

In this connection, I would refer to what Lord Buckmaster said in *Esquimalt & Nanaimo R. Co.* v. *Wilson*, 50 D.L.R. 371, at p. 377, [1920] A.C. 358, "In proceedings for which a petition of right is the proper course, the Courts, as already pointed out, would undoubtedly decline to entertain an action brought against the Attorney-General in the ordinary way."

I refer to this point, because the counsel appearing at this Bar

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and representing the Crown, submitted that the proper course for the appellant to take was to sue upon the award by way of an ordinary action at law, and I would further refer to what Sir George Farwell said in delivering the judgment of their Lordships of the Privy Council, in *The Eastern Trust Co.* v. *MacKenzie, Mann and Co. Ltd.*, 22 D.L.R. 410, at pp. 417, 418, [1915] A.C. 750: "The second point taken by Idington, J., is equally untenable and even more important. The non-existence of any right to bring the Crown into Court, such as exists in England by petition of right, and in many of the colonies by the appointment of an officer to sue and be sued on behalf of the Crown, does not give the Crown immunity from all law, or authorise the interference by the Crown with private rights at its own mere will. There is a well-established practice in England in certain cases where no petition of right will lie, under which the Crown can be sued by the Attorney-General, and a declaratory order obtained, as has been recently explained by the Court of Appeal in England in *Attorney-General* v. *Dyson*, [1911] 1 K.B. 410, and in *Attorney-General* v. *Burghest*, [1912] 1 Ch. 173. It is the duty of the Crown and of every branch of the executive to abide by and obey the law. If there is any difficulty in ascertaining it the Courts are open to the Crown to sue, and it is the duty of the executive in cases of doubt to ascertain the law, in order to obey it, not to disregard it. The proper course in the present case would have been either to apply to the Court to determine the question of construction of the contract, and to pay accordingly, or to pay the whole amount over to the receiver and to obtain from the Court an order on the receiver to pay the sums properly payable for labour, and supplies, as to the construction of which their Lordships agree with the Supreme Court of Nova Scotia. The duty of the Crown in such a case is well stated by Lord Abinger in *Deare* v. *Att'y-Gen'l* (1835), 1 Y. & C. (Exch.) 197 at p. 208 [160 E.R. 80]. After pointing out that the Crown always appears (in England) by the Attorney-General in a Court of justice,—especially in a Court of equity,—where the interest of the Crown is concerned, even perhaps in a bill for discovery, he goes on to say: 'It has been the practice, which I hope never will be discontinued, for the officers of the Crown to throw no difficulty in the way of any proceeding for the purpose of bringing matters before a Court of justice where any real point of difficulty that requires judicial decision has occurred.'"

The present case is one to which the maxim *Omnia praesumuntur rite et solemniter esse acta* is applicable; (see per Pollock C.B.,

Reed v. *Lamb* (1860), 6 H. & N. 75 at pp. 85-86, 158 E.R. 32; per Crompton J., *Dawson* v. *Surveyor of Highways for Parish of Willoughby etc* (1864), 5 B. & S. 920 at p. 924, 122 E.R. 1073, but it may be said of course, if necessity there be for an Order in Council that the contrary is shewn. (See per Story, J., *Bank of the United States* v. *Dandridge* (1827), 12 Wheaton 64, at pp. 69, 70; *Davies* v. *Pratt* (1855), 17 C.B. 183, 139 E.R. 1039; *Earl of Derby* v. *The Bury Improvement Commissioners* (1869), L.R. 4 Exch. 222 at p. 226. I do not consider that *The King* v. *Vancouver Lumber Co.* (1919), 50 D.L.R. 6, is conclusive in the present case against the appellant, where it was said in the judgment of their Lordships of the Privy Council, delivered by Viscount Haldane at p. 7, that:—"The grant of this lease was made, not under the Great Seal of Canada, but under a statutory authority, conferred by 57 and 58 Vict. (Canada), ch. 26, which provided that the Governor in Council might authorise the sale or lease of any lands vested in Her Majesty which were not required for public purposes, and for the sale or lease of which there was no other provision in the law. It is obvious that this provision made it necessary that the requisite authority should be conferred by an Order in Council.

The statute 57-58 Vict., 1894, (Can.), ch. 26, there under review was quite different in its terms reading as follows:—"3. The Governor in Council may authorise the sale or lease of any lands vested in Her Majesty which are not required for public purposes and for the sale or lease of which there is no other provision in the law."

Here in the Public Works Act there is provision made in the statute in precise terms, defining the *modus operandi* and giving to the Minister the statutory authority to proceed, acquire and take possession of land for the Crown and the subject was in no way called to look for or deal with any other authority.

The whole question is—had the Minister statutory authority to do what he did? It cannot be said that it is unknown to the law that there can be the sale of lands of the Crown or purchase of lands on behalf of the Crown without an Order in Council supporting the transaction, notably the Commissioners of Woods, Forests and Land Revenues in England, may do so. The statute gives authority, (Crown Lands Act, 1829, 10 Geo. IV, ch. 50), it is true in some cases subject to the consent of the Treasury. The Commissioners of His Majesty's Works and Public Buildings in England are constituted a corporation, the First Commissioner may be a member of

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the House of Commons, (Crown Lands Act, 1851, 14-15 Vict. (Imp.) ch. 42, sec. 20) and the *ex officio* commissioners are invariably members of the Ministry and the Commissioners of Works may purchase and sell lands and no Order in Council would appear to be necessary. 7 Hals., pp. 132-136.

Numerous instances might be cited, but after all the question must be determined upon the particular statute law under which the authority is claimed, and little assistance can be gleaned by reference to cases based on other statute law. Lord Parmoor in *City of London* v. *Associated Newspapers, Ltd.* [1915] A.C. 674 at p. 704, said:—"I do not think that cases decided on other Acts have much bearing on the construction of the Acts or sections on which the present case depends. So far, however, as it is allowable to be governed by decisions in analogous cases, I agree . . . "

It is helpful to observe what the statute law is in England in the course of arriving at a decision of what the intention of the Legislature was, as undoubtedly the Public Works Act as well as the Arbitration Act were framed upon analogous statute laws of England. No observance is due to sec. 3 of the Public Works Act in construing it as a statutory delegation of authority to the Minister; admittedly the Minister must exercise the authority in accordance with the statutory provisions and in the spirit of the statute—this, in my opinion, the facts amply shew. *Richards etc.* v. *Att'y-Gen'l of Jamaica etc.* (1848), 6 Moo. P.C. 381, at p. 389, 13 E.R. 730; *Marshall* v. *Lane* (1843), 5 Q.B. 115, 114 E.R. 1192; *The Gresham Blank Book Co.* v. *The King* (1912), 14 Can. Ex. 236.

The Public Works Act provides for arbitration and the Arbitration Act is applicable generally to all arbitrations under any Act. *In Re Jackson and the Corporation of N. Vancouver* (1913), 16 D.L.R. 400, 19 B.C.R. 147, and specifically to arbitrations, to which the Crown is a party, (R.S.B.C. 1911, ch. 11, sec. 24). Section 37 of the Public Works Act empowering the Minister to enter into contracts calls for the Seal of "his Department." The Minister was not aware that there was any official Seal, and I do not consider that it was established there was; he used the ordinary wafer seal and upon the authorities it is clear in my opinion that the contract was effectively and validly sealed, and it is to be observed that the Department of Public Works Act, R.S.B.C. 1911, ch. 190, does not in any of its provisions mention any Official Seal.

Finally, upon all the facts of the present case, even apart from the view clearly expressed that the statute law supports the validity

of the contract and the award—the facts support estoppel against the Crown—and I would refer to what Atkin, J. (now Lord Justice Atkin) said in *Att'y-Gen'l to the Prince of Wales* v. *Collom*, [1916] 2 K.B. 193, at p. 204:—"A further point was raised that no estoppel binds the Crown and that this equity is based upon estoppel. There is authority for the general proposition so far as estoppel by deed is concerned. I know of no authority for the proposition as applied to estoppel in pais. But I think that it is established that equitable defences such as I consider this to be are available against the Crown: see *Attorney-General for Trinidad and Tobago* v. *Bourne*, [1895] A.C. 83; and this very principle laid down in *Ramsden* v. *Dyson* (1865), L.R. 1 H.L. 129 was applied against a claim of the Crown in a decision of the Judicial Committee in *Plimmer* v. *Mayor &c., of Wellington* (1884), 9 App. Cas. 699."

The award, in my opinion, was a valid award, and is binding upon the Crown and not having been moved against within the required period, (In *Re Kitsilano Arbitration* (1918), 41 D.L.R. 170, 25 B.C.R. 505, 23 Can. Ry. Cas. 324) and the submission having been made a Rule of Court, the award is enforceable, which, with great respect to the trial Judge, should have been the judgment of the Court below. *In re Harper and The Great Eastern R. Co.* (1875), L.R. 20 Eq. 39.

No question of want of title was raised and as I understand it it is admitted that good title can be given the Crown, and that being the case, *(Creelman* v. *Hudson Bay Insurance Co.*, 43 D.L.R. 234, [1920] A.C. 194), the appellant is entitled to be paid by the Crown the compensation awarded. Erle, C.J., in *Re Newbold and the Metropolitan R. Co.* (1863), 14 C. B.(N.S.) 405, at p. 411, 143 E.R. 503, said:—"As at present advised, I think the award of the arbitrators or an umpire under this act, stands in the same position as the assessment of damages by a compensation jury."

The arbitration here was an effective one, in my opinion, and in pursuance of the statute law referred to binding upon the Crown and the aidance of the Court was rightly and properly resorted to. It is instructive upon this point to refer to *Cameron* v. *Cuddy*, 13 D.L.R. 757, [1914] A.C. 651. The headnote reads:—"In an action upon a contract whereby the parties have provided for arbitration as a means of ascertaining the amount due under the contract, if arbitration proceedings have proved abortive, it is the duty of the Court to supply the defect by itself ascertaining the amount due," and I would in particular refer to what Lord Shaw of Dumfermline

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said at p. 759 (13 D.L.R.):—"When an arbitration for any reason becomes abortive, it is the duty of a Court of law, in working out a contract of which such an arbitration is part of the practical machinery, to supply the defect which has occurred. It is the privilege of a Court in such circumstances and it is its duty to come to the assistance of parties by the removal of the *impasse* and the extrication of their rights. This rule is in truth founded upon the soundest principle, it is practical in its character, and it furnishes by an appeal to a Court of justice the means of working out and of preventing the defeat of bargains between parties. It is unnecessary to cite authority on the subject, but the judgment of Lord Watson in *Hamlyn & Co.* v. *Talisker Distillery*, [1894] A.C. 202, might be referred to."

The objection here pressed on the part of the Crown, that because *simpliciter*, no Order in Council was passed there is no liability, admittedly would have force in some cases, but I have endeavoured to shew that it is without force in the present case. One maxim that is pertinent at the moment is that referred to in *Broom's Legal Maxims*, 8th ed., 1911, at p. 34:—"Rex non debet esse sub homine, sed sub Deo et sub lege, quia lex facit regem. (Bract. Lib. i. fo. 5; 12 Rep. 65.) The King is under no man, yet he is under God and the law, for the law makes the king."

It is true there is another maxim which reads:—"Rex non potest peccare, (2 Rolle, R. 304)—The king can do no wrong." (Broom at p. 39), but here we have the requisite statute law to satisfy the further maxim:—"Roi n'est lie per ascun Statute, si il ne soit expressement nosme. (Jenk. Cent. 307)—The king is not bound by any statute, if he be not expressly named to be so bound." (Broom at p. 58).

As we have the Crown specifically named, and the contract to be enforced is the contract of the Minister authorised by Parliament to contract, it follows as a matter of necessary legal sequence, that in the present case, the Crown is bound by the contract and also bound by the award.

I would allow the appeal.

EBERTS, J.A., would dismiss the appeal.

Appeal dismissed.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. December 30, 1920.

Damages—(§IIIA—63)—Sale of Farm—Covenant to Give Immediate Possession—Breach—Crop in Ground—Prospective Crop—Impossibility of Growing.

In an action for damages for breach of the vendor's covenant to give immediate possession in a conveyance of a farm, the vendor knowing that the plaintiff's object in buying the farm was to grow sugar beets on it, the Court held that as grantee of the reversion the purchaser became by the conveyance entitled to the rent payable by a tenant who was in possession, and to the crop which was in the ground at the time of the conveyance and also to the profit which he would have made if he had been let into possession and had carried out his intention of growing sugar beets on the farm, but because the sugar beet crop had been a total failure that year he was not in fact entitled to damages in this respect. The damages in respect of the wheat should be made up of the value of the wheat raised, less the cost of harvesting, threshing and hauling, and also less the proportion of the rent attributable to the 18 acres on which it was grown.

[Hadley v. Baxendale (1854), 9 Exch. 341, 156 E.R. 145 adopted and followed; Marrin v. Graver (1885), 8 O.R. referred to]

APPEAL by the defendant from the judgment of Latchford, J., in an action for damages for breach of covenant and deceit, and cross-appeal by the plaintiff, seeking to have the damages awarded to him increased.

The following is a statement of the facts:—

The appellant was the owner of a farm consisting of the north-east half of lot number 4 in the second concession of the township of Tilbury East, subject to a mortgage, and on the 1st March, 1920, sold it to the respondent for $14,000, the purchase-money to be paid by assuming the mortgage as $4,000, by assigning the respondent's interest in some town lots, and the respondent giving a mortgage on the land sold to him for $3,900.

On the same day the conveyance to the respondent was executed. It is made subject to the mortgage which the respondent was to assume, and contains covenants according to the statutory form.

By a contemporaneous agreement provision is made as to the manner in which the purchase-money is to be paid and as to the time when possession is to be given, which was of the farm on the date of the agreement.

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The respondent alleges in his statement of claim that the appellant "expressly represented to the plaintiff that actual possession and occupation of the" farm "would be given by the defendant to the plaintiff forthwith on the delivery thereof to the defendant, so that the plaintiff might proceed to work the same as farm and agricultural lands and particularly in the preparing of the land and the planting of spring crops."

It is also alleged that as an inducement to make the exchange the respondent agreed to secure a further contract with the Dominion Sugar Company for a sugar beet crop to be raised on the farm during the year 1920, and that he did secure a contract for it, "all with the view to the plaintiff working a large acreage of the said farm in the growing and production of sugar beets therefrom and all based upon his getting immediate and actual possession and occupation thereof forthwith on the delivery of the conveyance."

It is further alleged that in accepting the conveyance the respondent relied upon the representations and assurances made by the appellant "that while the" farm "was then in possession of one James Crawford and his subtenant (one Reaume) under a lease thereof to said Crawford, the lease became finally ended and determined upon the sale or exchange aforesaid, and that the plaintiff would be given and receive at the defendant's hands immediate and actual possession thereof and be in a position forthwith to proceed with and prepare for farming operations thereupon and have the full benefit and advantage of the sugar beet contracts entered into for the growing of sugar beets on the farm;" and it is alleged that these representations were false and were fraudulently made with the view of inducing the respondent to enter into the agreement and to accept the conveyance, and that the facts were that the farm was then and still is under lease to James Crawford and in his possession and that of his sub-tenant Reaume, the lease having "some three years yet to run," and that Crawford, on being requested to give up possession and to permit the respondent to enter and have the actual use and enjoyment of the farm, refused to do so, except upon payment by the appellant of reasonable and proper compensation for so doing, which the appellant refused to do.

The claim of the respondent is for breach of the covenants of the appellant and for deceit, for which damages are claimed.

The defence set up in the pleadings is that what was meant by the giving of immediate possession was that the respondent should be entitled to the rents from the date of conveyance; that

the respondent knew of the lease to Crawford, and "agreed to accept the existing tenancies." The appellant also denies the alleged misrepresentation and pleads that what he did was to inform the respondent that Crawford was willing to give up his tenancy on payment for the work that he had done in preparation for the crop of 1920; and a counterclaim is made for damages for breaches by the respondent of covenants contained in the agreement.

R. L. Brackin, for defendant; *O. L. Lewis*, K.C., for plaintiff.

The judgment of the Court was delivered by

MEREDITH, C.J.O. (after stating the facts):—At the trial the respondent testified on his own behalf, and according to his testimony the bargain between him and the appellant was entered into and carried out by the conveyance and agreement, the appellant knowing that the respondent was buying with the expectation of getting immediate possession for the purpose of growing sugar beets on the farm; that the appellant represented that he could give immediate possession, and said that Crawford was the tenant of the farm, "and the minute the farm was sold he had to get off." The respondent also testified that, after the difficulty arose about the possession, the appellant said to him that he could break the lease because Crawford had sublet, and that he would "go out and break his lease and throw him out."

I think that the fact was that the appellant's idea was that, as he said to the respondent, he could break the lease because Crawford had sublet. Archibald Norrie, who was called as a witness by the respondent, testified to a conversation he had with the appellant in which, in answer to an inquiry by Norrie as to what it would cost to get the tenant out, the appellant said it would not cost him anything, that Crawford had broken his lease by subletting, and he could throw him out.

Apparently not appreciating that the action was brought for damages for deceit, counsel for the appellant, when he called him as a witness, expressly limited his examination of him to the counterclaim, saying that he assumed that there was no object, in the light of what the trial Judge had said as to parol evidence being admissible to contradict the agreement as to the possession, of doing more: this referred to a ruling by the trial Judge that such evidence was not admissible.

Judgment was given by my brother Latchford at the close of the evidence, nothing being said in the shorthand notes as to any argument by counsel. He treated the action as one simply for

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damages for breach of the appellant's covenant to give immediate possession. In assessing these damages he allowed $550 for the loss of a crop of wheat that was in the ground when the conveyance was made, and the difference between that sum and $2,000 as the loss of the profit that the respondent would have made by growing on the farm, as he intended to do, sugar beets, from which the learned Judge deducted $175 in respect of one item of the counter-claim, and gave judgment for the plaintiff accordingly, with costs, but providing that the appellant was to receive the rent for 1920, and pay the taxes, including drainage rates.

No reference was made by the learned trial Judge to the claim in deceit; but, as I said, he treated the claim as one for damages for breach of the respondent's covenant.

Although there was considerable discussion by counsel, both while the opinion was being stated, and after it had been stated for what the judgment was to be entered, no suggestion was made by counsel for the respondent that the damages should be assessed as for deceit; and it must be taken, I think, that he acquiesced in the view in which the trial Judge was dealing with the case. The case based on deceit was a very weak one, and that probably was the reason why it was given the go-by by both Judge and counsel.

What, then, is the proper measure of the respondent's damages?

In *Marrin* v. *Graver* (1885), 8 O.R. 39, it was held, affirming Armour, J., that the measure of damages in an action by a tenant against his landlord for refusing to give him possession is the difference between what the tenant agreed to pay for the premises and what they were really worth, and that it is not open to the tenant to shew that he wanted the premises for the purpose of there carrying on a certain business, of which the landlord was aware; that he could not procure other premises; and to claim the profits which he might have made in that business if he had been let into possession.

In *Rotman* v. *Pennett* (1920), 54 D.L.R. 692, 47 O.L.R. 433, the facts were that the defendant had agreed to make a lease to the plaintiffs of a store and premises for a term of 5 years. There was an existing lease, but the defendant in good faith believed that it could be terminated upon one month's notice to the lessee. This turned out to be a mistaken belief, and the defendant was unable to carry out her agreement. An action was brought to recover damages for breach of the agreement in which the plaintiffs sought to recover damages for the loss of the profits which they would have made in carrying on a business they intended to carry on, on the premises, but

the learned Judge (Lennox, J.) held that they were not entitled to them, but only to their proper and necessary preparatory legal expenses. My brother Lennox referred to the fact that nothing had been said to the defendant as to the plaintiff's plans or the expansion of their trade, or how or for what purpose they intended to use the premises, but did not indicate what his view would have been if the defendant had been informed as to these matters.

In *Grindell* v. *Bass*, [1920] 2 Ch. 487, at p. 494, 36 T.L.R. 867, Russell, J., said: "This is a case, putting it at its highest against Mrs. Bass, of a person contracting to sell real estate knowing that she had no title to it or means of acquiring it. It is directly within the language of Lord Chelmsford, in *Bain* v. *Fothergill* (1874), L.R. 7 H.L. 158, at p. 207. The purchaser cannot recover damages beyond the expenses he has incurred by an action for breach of contract."

Rotman v. *Pennett* and *Grindell* v. *Bass* were both cases of executory contracts, differing in that respect from the case at Bar; in *Marrin* v. *Graver* the contract was executed, but the lessor was unable to give possession to the tenant.

Hadley v. *Baxendale* (1854), 9 Exch. 341, 156 E.R. 145, is the leading case on the subject of the measure of damages for a breach of contract. The rule is that where "two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of a breach of it."

This rule has been criticised, and it has been said that persons entering into a contract do not usually contemplate the consequences of a breach of it, and it has been said in more cases than one that it is difficult of application on the facts of the case under consideration. The rule is, however, well established, and it is the duty of the Court to apply it to the facts of the case it has to deal with as best it may.

The case itself was one where the owners of a flour mill sent a broken iron shaft to an office of the defendants, who were common carriers, to be conveyed by them, and the defendant's clerk, who attended at the office, was told that the mill was stopped, that the shaft must be delivered immediately, and that a special entry, if

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necessary, must be made to hasten its delivery. The shaft was sent to the consignee as a pattern by which to make a new shaft. The delivery of the broken shaft to the consignee was delayed for an unreasonable time; in consequence of which the plaintiffs did not receive the new shaft for several days after the time when it ought to have been received, and in consequence they were unable to work their mill, and thereby suffered a loss of profit. It was held that the loss of profits was not recoverable; and, delivering the judgment of the Court, Alderson, B., pointed out (p. 355) that "the only circumstances here communicated by the plaintiffs to the defendants at the time the contract was made, were, that the article to be carried was the broken shaft of a mill, and that the plaintiffs were the millers of that mill;" and added (pp. 355, 356): "How do these circumstances shew reasonably that the profits of the mill must be stopped by an unreasonable delay in the delivery of the broken shaft by the carriers to the third person? Suppose the plaintiffs had another shaft in their possession put up or putting up at the time, and that they only wished to send back the broken shaft to the engineer who made it; it is clear that this would be quite consistent with the above circumstances, and yet the unreasonable delay in the delivery would have no effect upon the intermediate profits of the mill. Or, again, suppose that, at the time of the delivery to the carrier, the machinery of the mill had been in other respects defective, then, also, the same results would follow. Here it is true that the shaft was actually sent back to serve as a model for a new one, and that the want of the new one was the only cause of the stoppage of the mill, and that the loss of profits really arose from not sending down the new shaft in proper time, and that this arose from the delay in delivering the broken one to serve as a model. But it is obvious that, in the great multitude of cases millers sending off broken shafts to third persons by a carrier under ordinary circumstances, such consequences would not, in all probability, have occurred; and these special circumstances were here never communicated by the plaintiffs to the defendants. It follows, therefore, that the loss of profits here cannot reasonably be considered such a consequence of the breach of contract as could have been fairly and reasonably contemplated by both the parties when they made this contract. For such loss would neither have followed naturally from the breach of this contract in the great multitude of such cases occurring under ordinary circumstances, nor were the special circumstances, which, perhaps, would have made it a reasonable and natural conse-

quence of such breach of contract, communicated to or known by the defendants."

There is, in my opinion, no reason why this rule should not be applied in the case at bar in assessing the damages which the appellant should pay for the breach of his covenant for quiet enjoyment. It was known to the appellant that the purpose of the respondent in buying the farm was to grow sugar beets upon it—as to this there can be no question—and the parties to the contract must have contemplated that the result of the respondent not getting possession would be loss of the profit he would make from growing the beets on the farm, and the appellant is therefore liable for loss which the respondent sustained by not being able to obtain possession.

Nothing that was decided in *Marrin* v. *Graver* is opposed to this view. In that case the special circumstances relied on were not communicated to or known by the defendant.

The cases as to damages for breach of an agreement to sell and convey, arising from defect of title, are not applicable. As was said by Alderson, B., in *Hadley* v. *Baxendale* (p. 355), they are exceptional cases and governed by a conventional rule, and the parties must be supposed to be cognizant of it, and are presumed "to contemplate the estimation of the amount of the damages according to the conventional rule."

In this view it becomes unimportant whether the respondent is entitled to recover for breach of the covenant or for deceit, for the damages would be the same in either case.

As was said by Parke, B., in *Hadley* v. *Baxendale* (p. 346); "Even in the case of non-performance of the contract, resulting from the fraud of the debtor, the damages only comprise so much of the loss sustained by the creditor, and so much of the profit which he has been prevented from acquiring, as directly and immediately results from the non-performance of the contract."

What then are the damages which the respondent is entitled to recover? As grantee of the reversion he became by the conveyance entitled to the rent payable by the tenant Crawford, and he has lost the crop of wheat which was in the ground at the time of the conveyance, and also the profit which he would have made if he had been let into possession and had carried out his intention of growing sugar beets on the farm.

As I have said, the learned trial Judge assessed the damages as to the sugar beet crop at $1,200. With great respect, I am of opinion that he erred in so doing. It is, I think, satisfactorily

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shewn that it was practically impossible to grow sugar beets successfully during the season of 1920. The farm was a wet one and had no drainage. Owing to the wet and the lateness of the season, sugar beets could not be planted at the usual season, and the result of this was that it was impracticable to obtain labourers of the class used for that purpose to cultivate and thin the beets, and without their aid such a crop must prove a failure.

The tenant Crawford was admittedly a good farmer and planted a crop of sugar beets in 1920; but, owing to the conditions I have mentioned, it proved a failure, and he ploughed it in. It is fair to assume that in planting his beets he selected the most suitable part of the farm for the purpose of growing them; and the proper conclusion upon the evidence is that, if the respondent had got possession and had planted a larger area with sugar beets, his crop would have proved a failure; and I am inclined to think that it was a fortunate thing for him in that respect that he did not get possession of the farm.

The damages in respect of the wheat were assessed at $850, made up of the value of the wheat raised, less the cost of harvesting, threshing, and hauling.

What, in my opinion, was the loss the respondent sustained in respect of the wheat, assuming that he is to get the rent for 1920, was not $850, but that sum less the proportion of the rent attributable to the 18 acres on which it was grown. The farm consists of 100 acres and the rent is $625 per annum. The deduction would therefore be $112.50.

I would therefore assess the respondent's damages at $737.50, from which should be deducted the $175 awarded to the appellant for the rental of the Queen street property, and vary the judgment by reducing them to $562.50, and would affirm the judgment with that variation, and I would dismiss the respondent's appeal.

There should be no costs of the appeals to either party.

Judgment below varied accordingly.

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Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin, Brodeur and Mignault, JJ. December 17, 1920.

Taxes (§IIIF—147)—Sale of land for—Purchase by Part Owner—Confirmation—Validity—Action to Set Aside Quebec Municipal Code.

There is no law in Quebec statutory or otherwise which prohibits a part owner of land from buying in such lands at a tax sale. The fact that he has been in occupation of the land and has paid the taxes thereon for a number of years does not create an obligation to continue to pay the share of taxes of his co-owners indefinitely and if the tax sale is properly conducted under the provisions of the Municipal Code (Quebec) and a deed given by the corporation after the period of redemption has expired, the sale will not be set aside.

APPEAL by defendant from the Court of Kings Bench, appeal side, in an action attacking a sale of land for municipal taxes at which he was the purchaser. Reversed; action dismissed.

F. Roy, K.C., for appellant.

A. Lemieux, K.C., and *Robitaille*, for respondent.

DAVIES, C.J. (dissenting):—I am of opinion that this appeal should be dismissed and the judgment of the Appeal Court, (1920), 30 Que. K.B. 252, affirming that of the Superior Court, (1919), 57 Que. S.C. 314, confirmed. I agree generally with the reasons stated by my brother Brodeur, but I prefer to base my opinion on the ground that the non-payment of the taxes on the lands in question and for which they were sold and bought in by the defendants constitute, under the facts in this case, a deliberate fraud on the part of the defendants as against the plaintiff.

These defendants were the owners of the lands in question but subject to a security for the payment of $500 loaned by the plaintiff to one Diana O'Connell, a sister of James O'Connell and a legatee for one eighth of the latter's interest in the lands in question.

The plaintiff was a non-resident in the municipality but the security held by him for the $500 loan was well known to defendants, as clearly appears from the evidence.

The defendants were and had been for years in the possession of these lands and had received whatever revenues they yielded, paying the taxes thereon regularly until the year 1906. They attempted to purchase the plaintiff's claim in an undivided one eighth interest, but the negotiations to that end were not successful. I think the facts proved leave only one fair inference to be drawn, namely, that, after such failure, they determined not to pay the

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accruing taxes and not to notify the plaintiff of their intended default, and in this way to have the lands sold and purchase them at the sale and so destroy and defeat plaintiff's title under his security. By their previous action for years in receiving the revenues and paying the taxes on the lands they had lulled the plaintiff into false security.

Having paid all municipal taxes up to the year 1906 and having failed in their efforts to purchase plaintiff's undivided interest, their secret determination not to pay the accruing taxes and to have the land sold under the statute for their non-payment and bought in by themselves without any notice whatever to the plaintiff and so destroy his security and his interest in the land, amounted, in my opinion, in view of the facts, to a deliberate fraud upon the plaintiff which the law will not sanction or approve.

Lamothe, C.J., of the Court of Appeal, who dissented from the judgment of that Court, 30 Que. K.B. 252, held that, while the dealings and omissions of the defendants in regard to their non-payment of the taxes in order to have the lands sold, "were approaching bad faith, they did not actually constitute fraud."

As I have already stated, in my opinion, this conduct and deliberate neglect on defendants' part without giving plaintiff the slightest notice of their intentions, not only approached bad faith but, under the circumstances of this case, actually constituted fraud.

IDINGTON, J.:—There is nothing in the evidence in this case to establish any legal obligation on the part of the appellants to continue to pay taxes, even if we assume, which is not proven, that they, or some of them, had, for some years, paid taxes for the benefit of respondent and themselves.

Nor is there anything in statute law, or otherwise, prohibiting a part owner from buying at a tax sale lands in which he has merely had an interest. The reliance placed by Martin, J., upon art. 748 C.C.P., which he links up with art. 1591 C.C. (Que.), (30 Que. K.B. at p. 267), with deference, does not seem to me to be warranted. Indeed it seems a straining of the language used, and overlooks the basis for the rule contained in said art. 748 C.C.P.

It no doubt originated in the fact that the parties to such sales as contemplated thereby had often much to do with the conduct of the sale; whereas the tax sale originated in quite another way and is something with the conduct of which the owner or debtor has nothing to do.

I am unable to appreciate, at the value respondent does, the

subtle argument that there must be more than one bidder.

If adopted herein I fear we would be endangering many titles resting upon tax sales.

There is, if my memory serves me right, an Ontario decision setting aside tax sales when the group attending same, agreed, improperly, to refrain from bidding against each other, thereby defeating the purpose of the Act there in question.

All we have here is that the respondent seems to have expected his co-owners in part to have gone on paying the taxes without any contribution from him.

Without more than appears in the evidence it does not become one suffering from his own neglect of duty to complain.

The assessment being made *en bloc* to the estate of somebody, did not seem to me quite regular until I turned to the statute and was surprised to find that it expressly provided for such mode of assessment in such like cases, yet not expressly covering *en bloc* assessments of distinctly separate parcels.

At all events no one speaking judicially seems to have considered it worthy of serious mention, and all assume such an assessment legally possible.

If the assessment in that form was valid when the roll completed, how can the appellant purchasers who had not a common interest with respondent throughout the entire block sold, but only in one item of part thereof, (lot 266) be spoken of as joint owners or co-owners?

And how can they be held to have been impliedly with him, joint debtors to the municipality?

And how can any such assumed legal relationship, under such circumstances, be of any consequence in the disposition of this case?

And how can the debt due the municipality be of any consequence under such circumstances in determining the right of any one or more of such parties to bid and buy the whole block as offered?

They had no joint interest in the whole property sold, they were neither joint owners nor joint debtors.

I see no ground upon which the respondent can say they (the appellants) were, as purchasers, simply relieving him from paying the taxes upon that part in which he had an interest.

With these observations I fully agree in the main with the judgments of Lamothe, C.J., and Greenshields, J., 30 Que. K.B. 252.

I would, therefore, allow the appeal with costs throughout.

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DUFF, J.:—I find myself fully in accord with the views expressed in the judgment of Lamothe, C.J., and Greenshields, J.

The appeal should, I think, be allowed and the action dismissed with costs.

ANGLIN, J.:—I concur in the conclusions reached by my brother Mignault, whose opinion I have had the advantage of reading, and generally in the reasons on which they are founded.

BRODEUR, J. (dissenting):—This is a question of the validity of the sale of an immovable for municipal taxes. This sale is attacked by Lefebvre on the ground that it was tainted with fraud, and that it was conducted illegally. The defendants, appellants, are the acquirers of this immovable.

The Superior Court, 57 Que. S.C. 314, maintained the action for the two reasons which have been invoked, that is fraud and illegality.

The Court of Appeal, 30 Que. K.B. 252, confirmed the *dispositif* of this judgment, without adopting all its *considerants*.

The illegalities invoked were numerous, and gave place to a great divergence of opinion among the Judges of the Court of Appeal. The opinion of the majority is given in the following terms of the judgment of that Court:—

"Considering that the two lots of land numbers two hundred and sixty-six (266) and three hundred and sixty (360) of the cadastre of the parish of Ste-Foy were assessed together in the name of the Estate John O'Connell, whom the appellants represent, and the latter were liable towards the said municipal corporations for the payment of all the municipal taxes due for lot No. 360 and seven eighths of those on lot No. 266, and which the appellants made default to pay;

Considering that, although the proceedings of the sixth of March, 1907, took the form of a tax sale, it was in reality only a payment of the appellants to the said municipal corporation of a debt they and the respondent Lefebvre owed that corporation, and the said tax sale did not under the circumstances disclosed and established in this case vest the appellants with a title to respondent Lefebvre's one undivided eighth interest in said lot 266.

This Court, without adopting all the *considerants* of the judgment appealed from, to wit, the judgment of the Superior Court for the District of Quebec herein rendered on the third day of October, one thousand nine hundred and nineteen, doth confirm the said judgment as to its dispositif."

In other terms the Court of Appeal declared that the sale was simulated and never existed validly, and that the pretended purchase price paid by the appellants constituted after all only the payment of the municipal tax to which the defendants as sole proprietors or joint proprietors of the immovable sold were held.

The Superior Court in its *considerants* had declared that the defendants, appellants, had had possession of this immovable, and had paid the municipal taxes thereon. The majority of the Court of Appeal came to the same conclusion, that is that the defendants were in possession of this immovable and that they had paid the taxes thereon.

Lamothe, C.J., also, who dissented in favour of the appellants, declares the appellants possessed the immovables, and drew the revenues from them—if there was any revenue, which does not appear.

Greenshields, J., who also dissented, does not tell us formally that they were not in possession, but he reports some facts which were not proved. In effect he says:—"Previous to the death of the testator, James O'Connell, the property in question had been entered for taxing purposes in the books of the local Corporation of Ste-Foy under the name of John O'Connell. After his death none of the legatees made any application to have his or her or their names entered upon these books, and none were entered, and the property appeared as belonging to the estate of James O'Connell, and the two lots, 266 and 360 were continuously and without interruption valued by the municipality for taxing purposes *en bloc*, and were assessed as belonging to the estate James O'Connell."

There is not a single word of proof in the case on the manner in which the properties were valued before the death of the testator James O'Connell. In consequence it cannot be said whether the valuation roll bore then the name of John O'Connell rather than that of James O'Connell. I believe that the Judge misinterpreted the proof which was made on this subject.

The only evidence which we have on this point is that of the secretary of the municipal corporation of Ste-Foy, Mr. Robitaille. This officer does not speak at all of the valuation rolls which existed at the death of James O'Connell in 1870. His evidence applies only to the rolls from 1896-1907.

The appellants in spite of the almost unanimous opinion of the inferior Courts on this fact of the possession by the defendants of the immovable in question say that this proof of possession does

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not exist in the roll, and that the *dispositifs* of the two judgments of the inferior Courts being based on these facts, they should therefore be set aside.

Ordinarily we do not reverse judgments on questions of fact when the inferior Courts have come to the same conclusion on them, but as I see that some of my colleagues are of opinion that there is no proof to justify this opinion of the inferior Courts, I find myself compelled to analyze the proof and the facts of the case.

It is true that the direct proof of these facts is not as clear as it should have been, or could have been; but that is due to the apparent bad faith of the defendant in her evidence. The plaintiff examined her as a witness, and she contented herself with saying that she knew nothing, and that everything had been done by her son, the other defendant, who died before the hearing of the witnesses. She even refuses to say if she made certain contracts, when these contracts bear her signature.

I am of opinion that the circumstantial proof is sufficient to create a presumption that the defendants were in possession and that they paid the taxes.

Here are the circumstances revealed by the proof: In 1870 James O'Connell died leaving a will by which he divided his property among his children and grandchildren in unequal parts. Among his property were lots 266 and 360 of the cadastre of Ste-Foy.

One of the daughters of James O'Connell who was called Diana, and had inherited one-eighth of the property, transferred on April 9, 1879, to the defendant Lefebvre her rights in the succession, and especially one-eighth of lot No. 266 in guarantee of a loan which Lefebvre had made her.

She then left to go and live in the United States, as did most of the legatees and heirs of James O'Connell, with the exception of John O'Connell, the husband of the defendant, and the defendant William John O'Connell and his brother and sisters. These latter remained in possession of the property.

We have not the valuation rolls from 1879-1896, but on the roll which was made in 1896 John O'Connell's widow, Mrs John O'Connell, the defendant, was entered as proprietor, and a certain Giroux as tenant.

On the roll made in 1879 [1899?] the name of Giroux appears no longer as tenant, and the name of the proprietor is entered as follows:—"Succession Dame Veuve John O'Connell."

This entry is very singular when it is considered that Mrs.

O'Connell was still living, but this entry can be explained by the fact that the children of John O'Connell, notably the defendant William John, alias James O'Connell, and Mary Maria O'Connell had undivided shares in these immovables, and thus the roll, improperly all the same, described the proprietors as being the Succession Dame Veuve John O'Connell.

Now the testator James O'Connell must not be confounded with John O'Connell, his son, the husband of the defendant. This designation "Succession Dame Veuve John O'Connell," which one finds in the valuation roll of 1879 [1899?], applies evidently to the son John and not to his father, the testator, who was called James, for if one had wished by that to designate the land as belonging to the succession James O'Connell, the property would not first in the valuation roll of 1896 have been carried in the name of Dame Veuve John O'Connell, and afterwards in the roll of 1899 in the name of the "Succession Dame Veuve John O'Connell."

In this same year, 1899, the female defendant tried to buy the rights of Diana O'Connell in this property and the plaintiff himself received from the attorneys of the appellants a letter asking him if he would be ready to sell his rights. No effect was given to these offers.

The defendants were more happy with the greater part of their co-heirs, who sold them their undivided shares by deed passed on March 8, 1902. The undivided shares which are there ceded are there described erroneously, but that could not affect the present litigation.

I note all the same in this deed that "Mrs. Mary Stuart Munroe, widow of the late John O'Connell," that is to say the female defendant, was then co-proprietor with the heirs of James O'Connell. How did she become proprietor? It is not known. But all the same it is well to note this fact as part of the presumptions which tend to establish her possession, and her administration of the immovables in question.

In 1902 the property was still carried on, on the valuation roll made in that year under the name of "Succession Veuve John O'Connell," and it is the same on the roll of 1905.

It is against this succession that the property was sold by the county council for taxes on March 6, 1907.

After this recital of facts it seems to me that it cannot be pretended that the defendants were not in possession of the property. As joint proprietors they were subject to payment of taxes which

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burdened the property. These taxes lay not only against all the property, but against each undivided share of the property (arts. 1983, 2017 C.C. (Que.), 946 Mun. Code). If the defendants had not the title to the whole property they were at least undivided proprietors for the greatest part, probably seven-eighths when the property was taxed and then sold for default in payment of taxes.

The undivided portion then, of which the defendants were proprietors, was subject to the payment of municipal taxes. In the inferior Courts it was taken for granted that the taxes were paid by the defendants until about 1902. They were in possession of the property either personally, as established by the roll of 1896, or as representatives and heirs of John O'Connell. They must have drawn the revenues from the property and these revenues must have paid the municipal taxes since their co-proprietor, the plaintiff, never paid them himself. It would be inconceivable that the municipal corporation had passed twenty years without perceiving the assessments which affected this property. They administered at least the property, which belonged partly to some one else.

Whether their administration was that of *negotiorum gestor* under art. 1043 and following of the Civil Code, or that of mandatories of tacit mandate under art. 1701 and following of the Code, the defendants were bound to bring to the management of the plaintiff's undivided share the care of a prudent administrator. They ought then to have paid the taxes to which the undivided part was subject, seeing that they drew the revenue from it, or at least to have warned the plaintiff to pay them in order that the latter might protect his rights in the property. No, the defendants stopped paying the taxes, kept silent about their default, and then let this property, which was worth several thousands of dollars, be sold for about $100.

I do not hesitate to characterise this conduct as fraudulent.

Bedarride, vol. 2, p. 3, tells us that fraud "est l'art perfide de braver les lois aves l'apparence de la soumission, de violer les traités en paraissant les exécuter, et de tromper par l'exterieur des actes et des faits sinon ceux qu'on dépouille du moins les tribunaux dont ils pourraient invoquer la puissance."

The defendants left the plaintiff in a false security. For years and years they administered his undivided one-eighth in the property. They tried to buy it, but not being able to succeed, they had recourse to default in the payment of municipal taxes. They did not fulfil their own obligations, and did not warn him that their

administration had come to an end. They certainly did not act as prudent administrators. (Arts. 1710, 1709 and 1045 C.C. (Que.))

It is incontestable that the plaintiff suffers a prejudice, and that the fact from which this prejudice results is an illegal or illegitimate fact. (Bedarride, No. 643). The defendants cannot then profit from this municipal sale which they invoke, in order to keep the property of the plaintiff.

Baudry-Lacantinerie, vol. 20, 2nd ed., 536, in speaking of the administration of a common thing says:—"Si l'objet indivis est entre les mains de l'un des communistes, il est vis-à-vis de ses co-propriétaires tenu d'en prendre soin. Il est donc responsable des fautes qu'il commet dans sa gestion."

Domat, in book II, title 5, discusses the reciprocal engagements of those who have something in common without a convention. Thus, speaking of a thing which is common, such as a succession between co-heirs, he adds, p. 253, vol. 3, edition of 1822:—"Thus, he who has a common thing in his hands must take care of it."

He must not therefore let it be sold for failure to pay the land taxes, to which it may be subject, at least without warning his co-proprietor.

If the defendants wished to put an end to the indivision, and to make themselves acquirers of the part withheld by the plaintiff, they should then have provoked a partition, and taken an action in partition under art. 689 and following of the Civil Code, but that would have been too straightforward a way for the defendants. They preferred to have recourse to the procedure of a simulated sale for default to pay municipal taxes, and to acquire at a wretched price a property of value.

I believe then that the sale should be set aside, and that the action of the plaintiff should be maintained.

The appeal of the defendants should be dismissed with costs.

MIGNAULT, J.:—The respondent attacks a sale for municipal taxes, and directs his action against the appellants, who were the acquirers under this sale. He succeeded before the first Judge, 57 Que. S.C. 314, and also before the Court of Appeal, Lamothe, C.J., and Greenshields, J., dissenting, 30 Que. K.B. 252.

The appellants now ask us to reverse these two judgments, and to dismiss the respondent's action.

The property now in question came from the estate of the late James O'Connell; and his daughter Diana O'Connell, wife of Donald McDonald, appears to have succeeded to one-eighth of this estate,

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which included two immovables, Nos. 266 and 360 of the cadastre of the parish of Ste-Foy in the immediate vicinity of the city of Quebec. On April 9, 1879, Diana O'Connell, then a widow, who owed $520 to the respondent, executed a deed of obligation in his favour promising him to pay this sum with interest at 10% in two years. By this deed, to assure the payment of this amount she ceded and transferred to the respondent her rights as heir in her father's estate and more specially an undivided one-eighth of lot No. 266. In 1899 the respondent obtained against Diana O'Connell a judgment on this deed of obligation for a sum of $780, but it does not appear that this judgment was followed by execution.

In 1902 the appellant Mary Stuart Munroe and her son William John O'Connell, the latter a defendant in this action and now deceased, bought the undivided shares of several of the co-legatees of the estate O'Connell, but the share of Diana O'Connell was not bought. In 1907 lots 266 and 360 were sold by the corporation of the county of Quebec for municipal taxes due to the corporation of Ste-Foy, and Mary Stuart Munroe and her son William John O'Connell had the property adjudicated to them for the amount of the taxes and costs. Two years later a deed of sale was executed in their favour, no redemption having been effected. It is this sale which the respondent attacks.

I cannot refrain from saying at the outset that a study of the record as the parties have made it up has been far from satisfying me. The printed record or case is badly done and badly co-ordinated, certain exhibits being placed after the judgment of the Court of Appeal, others before it, and it is evident that the reading of the proofs has been done by an incompetent person. In all respects this "case" does not satisfy the exigencies of the rules practiced by this Court. Moreover the proof made throughout leaves much to be desired, and the respondent is in the meantime reduced to invoking presumptions or inductions to replace the positive proofs which he should have produced at the *enquete*.

But let us see the respondent's grounds of nullity.

I should say at first that to my mind the respondent is in no way the proprietor of an undivided share of lot No. 266, and this in spite of the fact that the attorney for the appellants in his pleading before us expressed the opinion that he was.

The Act of April, 1879, is an act of *antichresis* to which apply art. 1967 of the Civil Code (Que.) as well as the rules of pledge, and the property of the undivided part given in pledge remained in

Diana O'Connell.

An absolutely identical case is that of *Eglauch* v. *Labadie* (1900), 21 Que. S.C. 431, decided by the late Sir Francois Langelier. One should even ask oneself if *antichresis* of an undivided part produced any effect before the partition, a question on which I do not pronounce because, as I have said, the attorney of the appellants had admitted the right of property of the respondent even after I pointed out to him art. 1967, and I dispense with discussing a question which is not put, in view of the attitude taken by the appellants.

The first ground of nullity is fraud. The Judge of first instance decided that defendants for a great number of years had been in possession of lot 266, of which they had received the revenues and paid the expenses, except those for the payment of which the immovables Nos. 266 and 360 were sold; that after the attempts to acquire the plaintiff's interest they had left a certain amount of municipal taxes unpaid, evidently with the object of letting the immovable be sold, and of being themselves the purchasers; then that they were themselves liable for the payment of taxes as possessors and that they could have stopped the sale by paying the amount due, as they actually did at the time of the adjudication.

After an attentive examination of the record, I find the proof of only one fact among those mentioned by the Judge, the attempt to purchase the interest of the respondent. There is nothing to shew that the appellants (I speak of Madame O'Connell and of her son, now deceased and represented by his widow) were in possession of lot No. 266, nor that they had received its revenues, or paid the charges thereon.

Supposing that the respondent was, as he alleges, their co-proprietor, nothing obliges the appellants to pay his part of the taxes, and as to possession the only thing which appears is that a tenant called Giroux was in possession of lots 266 and 360. Giroux, who was well able to pay the taxes, was not examined. Madame O'Connell, an old woman of about 80 years of age, was examined, but nothing was proved by her, for her son attended to all her affairs, and this son died on January 13, 1913.

There is, moreover, in the record no direct proof that the appellants left the taxes unpaid with the object of having the immovable sold and of buying it in. Reasoning *ex post facto*, one can perhaps say that the appellants, who did not pay the taxes for a couple of years—and it has not been proved that they paid them

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before; that is a presumption which it has been desired to draw from the fact that the respondent did not pay them, but it is not impossible that Giroux paid them—wished to let the immovable be sold and to have it adjudicated to themselves.

Supposing that the appellants had had this intention, it does not necessarily result from that that they wished to defraud the respondent. They were proprietors of about two-thirds undivided share in the immovables 266 and 360, the other undivided one-third belonging to the other heirs O'Connell. They did not owe in these circumstances all the taxes, and nothing obliged them to pay the part of their co-proprietors.

Supposing that they had paid all the taxes for several years, they were certainly not held to continue indefinitely for their co-proprietors, and for the respondent if he was truly a co-proprietor, above all when it is not shewn that they received the revenues or rents of these properties. There were for the appellants two ways out of this situation. The action in partition or the sale of the immovables for taxes, and I am of opinion that one cannot accuse the appellants of fraudulent conspiracy because they chose the second way which was much less costly than the first.

It is said that the appellants should have warned the respondent of this sale. The secretary-treasurer of the county council announced the sale as required by the Municipal Code, and without saying that there was a legal obligation on the appellants to give a particular notice to the respondent, which could not be pretended, one cannot tax them with fraud because they had not given this notice.

It was maintained that there had been in this case a management of affairs for the respondent. The truth is that there was incredible negligence on the part of the respondent who lived in Quebec and who did not go once in some forty years to visit this property, of which he pretended to have been co-proprietor, and who never bothered himself to find out if the taxes were paid.

In these circumstances one cannot listen to the respondent when he reproaches the appellants for not having paid the taxes for him, and when he accuses them of fraudulent conspiracy because they have ceased as he says to pay the taxes, and because they have let the property be sold, and then bought it in without having warned him of it.

There is here, if I may be allowed to say, a confusion of ideas. It is true that this confusion can scarcely be avoided, for the re-

spondent proceeds from one supposition to another. First he supposes, and in this I think he is wrong, that he was a co-owner along with the appellants. The judgment he obtained in 1899 against Diana O'Connell in a purely personal action shows that he considered himself a creditor and not a co-owner. Basing himself on this supposed co-ownership, he supposes without any evidence that appellants were in possession of lot 266 and received the revenues. Even that is not enough, for another supposition is still necessary, and this again without evidence, that these revenues were sufficient to meet the taxes. It is then argued that the co-owner in possession is obliged to take care of the common thing and that he is responsible for the faults which he commits in the course of his administration. (Baudry-Lacantinerie, Société, 3rd ed., No. 536.) I am prepared to concede this point. It does not follow, however, that he is under any obligation to his co-owners to pay the taxes and charges affecting the thing, especially for the share of his co-owners. On the contrary the doctrine laid down by the authors is that in the absence of an express agreement, there is no legal tie by which the co-owners are held toward one another, no tacit mandate between them as partners according to art. 1851 of the Civil Code, (Que.) (Baudry-Lacantinerie, Société, No. 539; Fuzier Herman, Indivision, Nos. 137 et seq.), If there is no such legal tie, and no tacit mandate, it is clear that the co-owner in possession does not represent his co-owners, and that he is not actively obliged toward them in any manner, but only passively. He must not abuse his possession or prevent his co-owners from enjoying the common thing with him (Fuzier-Herman, *eodem verbo*, Nos. 73 and 74). As to the debts and charges affecting the thing, each co-owner is held to bear his share (Fuzier-Herman, Nos. 97 and 98) and therefore one of them cannot be obliged to pay for the others. All this is elementary, and it is equally elementary that there is no responsibility where there is no obligation, and no fault where there has been no neglect of duty. If appellants were not bound to pay respondent's taxes, if they were not bound to give him special notice of a publicly advertised sale, and no authority is cited in favour of the necessity of this notice, then it follows that they were not at fault toward him, and that there is no fraud for the reason that no right of the respondent has been violated, and that if he suffers prejudice it is only on account of his own negligence.

I conclude therefore that the charge of fraud is not established, and it must not be overlooked that the burden of proving fraud

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rested on respondent as plaintiff.

Let us now turn to the formalities of the sale, which are those required by the old Municipal Code. The articles I shall quote are the articles of this Code. The respondent attacks the sale on five grounds.

1. There was no bidding, no adjournment of the sale, which was a bulk sale.

This ground was held to be well founded by the Superior Court, which based itself on definitions of a "bid" given by certain repertoires, and on art. 1003 of the Municipal Code which provides for an adjournment of the sale if at the time of the sale no bid is made. In this case the appellants offered to pay the amount of the taxes and the costs. According to art. 1001, "Any person offering then and there" (at the time fixed for the sale) "to pay the amount of the moneys to be raised . . for the smallest portion of such lands, becomes the purchaser thereof, and such portion of the land must be at once adjudged to him by the secretary-treasurer, who sells such portion of the property as appears to him best for the interest of the debtor."

It is therefore clear that if such an offer was made it cannot be said that there was no bid, and art. 1003 therefore does not apply. Under these circumstances there was no reason for adjourning the sale.

Respondent insists on the point that lots Nos. 266 and 360 were sold in bulk, that is to say, that the two lots were sold together for one price.

The evidence shews that these two lots were listed and valued together on the valuation roll. They appear to have been both leased to Giroux. This being the case, I adopt the answer made to this objection in the following terms by Lamothe, C.J., 30 Que. K.B. 252 at pp. 254-5:—"This fact does not constitute a fatal irregularity. Two lots of land, with different cadastral numbers, may be valued and taxed together if they belong to the same proprietor, and form a single unit, etc. They may be sold in bulk in the same cases. When the valuation roll is completed, the joinder of the two lots may be objected to, and should there be no objection, the valuation roll and also the assessment roll are not on that ground rendered null. The seizure is effected in conformity with the municipal roll; it cannot be effected otherwise."

2. The sale was made to the debtors, the respondent says to the parties on whom the property was seized. It is evident that there

were no such parties here, for there was no seizure. When a sale takes place under the provisions of arts. 998 et seq. of the Municipal Code, it takes place without seizure of the immovables subject to taxes,

It is true that under art. 748 C.C.P. the party upon whom the property is sold, if personally liable for the debt, cannot be a bidder at the sale, but I am of the opinion that the validity of sales for municipal taxes must be tested by the dispositions of the Municipal Code only, and this Code contains no disposition similar to art. 748 C.C.P.

Moreover, as everybody knows, the party responsible for the payment in part or in whole of the municipal taxes frequently buys in the land at a municipal sale. Sometimes his object is to obtain a new title, which will constitute him the irrevocable proprietor if there has been no redemption within two years (art. 1007 Mun. Code) and which will have the effect of purging the land from all hypothecs, (art. 1013 Mun. Code). If we should now decide that a party responsible for the payment of taxes cannot buy at a municipal sale, we would implicitly pronounce invalid a considerable number of titles resting on similar sales. I am of the opinion that these titles are good, and I do not wish to seek for more authority than that of the law, for art. 1001, which I have already quoted, uses the expression "any person," which clearly includes the debtor of the taxes among the persons competent to bid.

It is then argued that this person buys from himself. That is not correct; he buys from the county corporation in whose name the deed of sale is granted (art. 1009 Mun. Code). It is of little importance that he pays his debt and the price of sale together. The fault, if there is a fault, is that of the law which does not allow the sale price to exceed the amount of the moneys to be raised, including the costs. For this reason there can be no complaint that the sale was made for a ridiculously low figure, for the price could not exceed the amount of the taxes plus the cost incurred (art. 1001 Mun. Code).

The respondent cites English and American authorities on this point. I think the articles of the Code are sufficiently clear to serve as our sole guide in this matter.

3. There was no previous discussion of the movables of the appellants, the debtors.

My answer to this objection is that the seizure and sale of the debtor's movables, optional according to art. 962 Mun. Code, is not

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a condition precedent to the sale of immovables for the taxes affecting them under arts. 998 et seq. of the Municipal Code.

4. The appellants, debtors of the taxes, paid their own debt in paying the price of sale, and cannot therefore change their title to lots Nos. 266 and 360.

I have dealt with this objection in discussing the second of the respondent's grounds of nullity.

5. The sale was made "*super non domino et non possidente*" and is therefore null.

The evidence shews that in 1896 Nos. 266 and 360 were entered on the valuation roll in the name of the widow of John O'Connell. In 1899 the entry reads "Estate of the widow of John O'Connell." In 1902 it is "Estate Widow John O'Connell." In 1905 it is "Estate John O'Connell." In 1908, after the adjudication but before the deed of sale it is "Dame Mary S. O'Connell and Mr. W. G. O'Connell."

Before discussing this objection it is advisable to outline the main provisions of the Municipal Code bearing on the valuation roll and on the sale of immovable for taxes.

Article 718 Mun. Code requires that the valuation roll must specify the names, surnames, and qualities of the owners of taxable property if they are known. Under art. 723 if the owner of land is unknown, the valuators insert the word "unknown" in the column of names of owners, opposite the description of such land. Under arts. 734 and 735 the valuation roll is examined by the local council, anyone may complain of the entries there made, and the council can correct the names of persons entered therein. This roll serves as the basis for the collection roll which contains, besides other information, the names and quality of each proprietor who is a ratepayer entered on the valuation roll, or the word "unknown" if the proprietor is unknown. (Art. 955).

Now, as to the sale of immovables for taxes, the secretary-treasurer of the local council, if he receives an order to that effect from the council, must, before December 20 in each year, transmit to the office of the county council a list of the persons indebted for municipal or school taxes with the description of the lands liable and the sum total of the taxes affecting them (art. 373).

On receipt of this information, the secretary-treasurer of the county council must, before January 8 in each year prepare a list shewing the description of all lands situated in the county municipality, on account of which municipal or school taxes are due,

together with the names of the owners as mentioned in the valuation roll, and opposite the description of such lands the amount of taxes for which they are liable. Such list is accompanied by a public notice setting forth that such lands are to be sold at public auction, at the place where the sessions of the county council are held, on the first Wednesday of the month of March following, at ten o'clock in the forenoon, in default of the payment of the taxes and the costs incurred (art. 998). The list and the notice must be published in the ordinary manner, and also twice in the Official Gazette, and in one or more newspapers in the month of January (art. 999). At the time appointed for the sale, the secretary-treasurer of the council sells the lands after making known the amount to be raised on each of such lands, including therein the proportionate part of the costs incurred for the sale (art. 1000). Article 1001 indicates the manner of proceeding to the sale, and I quote the article on account of its importance in this case:

"Any person offering then and there to pay the amount of the moneys to be raised, together with the costs, for the smallest portion of such lands, becomes the purchaser thereof, and such portion of the land must be at once adjudged to him by the secretary-treasurer, who sells such portion of the property as appears to him best for the interest of the debtor."

On payment by the purchaser of the amount of his purchase money the secretary-treasurer sets forth, in a certificate made in duplicate and signed by himself, the particulars of the sale, and delivers a duplicate of such certificate to the purchaser. The second paragraph of art. 1004, the first paragraph of which I have substantially rendered above, adds: "The purchaser is thereupon seized and possessed of the land adjudged, and may enter into possession thereof, subject to the same being redeemed within the two years next following, and to the constituted ground rents."

Let us also quote art. 1007: "If, within two years from the day of the adjudication, the land adjudged has not been bought back or redeemed according to the provisions of the following chapter, the purchaser remains the irrevocable proprietor thereof."

The purchaser is then entitled to a deed of sale of the land, which is granted him by the county corporation. Let me add that the sale transfers to the purchaser all the rights of the original owner, and purges the land from all privileges and hypothecs whatsoever to which it may be subject, save for certain exceptions, (art. 1013). Finally the action to annul a sale of land made in virtue of these

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provisions or the right of calling in question the lawfulness thereof, is prescribed by two years from the date of such adjudication. (art. 1015).

When the sale in question was made the lands were entered on the valuation roll in the name of the Estate John O'Connell. These lands came from the Estate James O'Connell, so that there was a mistake as to the Christian name. No one, however, could be led into error by this mistake, least of all the respondent, and the point that in my opinion decides the question is that neither the respondent nor any other interested party ever asked for the correction of the valuation roll. The respondent, if he was indeed a co-owner, and I cannot admit that he was such, should have had his name entered on the valuation roll. He gave the matter no attention, doubtless preferring to have other people pay the municipal taxes. I am therefore of the opinion that the respondent is wrong in saying that the sale was made *super non domino* on account of the land being listed in the name of the Estate John O'Connell.

The formalities required by the Municipal Code in the case of lands sold for municipal taxes seem to have been followed. The notices were published in the *Official Gazette* and also at the church door of the parish of Ste-Foy. I do not find in the record any evidence of the newspaper publication called for by art. 999, but the respondent did not complain before this Court that this formality had not been attended to, and the presumption is that the publication took place. *Omnia praesumuntur rite et solemniter facta donec probetur in contrarium.* Besides, art. 1015 would prevent the respondent from complaining at present, of any such informality. I find that the secretary-treasurer conformed strictly to art. 1001 in making the adjudication. He explains his method of proceeding in the following terms:

"Q. Do you remember the manner in which this sale was conducted? Was it conducted as you tell us? How much did you ask? A. First I put the property up for auction and I ask if anyone offers to pay the amount of the taxes and costs of the property. The first comer says 'I take it for the amount of the taxes and costs.' I ask if there are any other bids. If I am told that there are none, I adjudicate the property. That was the way in which this property was sold. Q. How do you ask for bids? A. Let us say that there are two anxious to buy. The first one says 'I take it for the amount of the taxes and the costs.' The other may say, 'I take three-quarters or one-eighth of it for the same amount.' Q. It was in this manner

that this property was auctioned? A. Of course it was."

It would be impossible to conform more closely to the provisions of the Municipal Code. The secretary-treasurer is not entitled to receive more than the amount of the taxes and the costs. The bids are made, so to say, by taking less. In other words, the sum offered remains the same, the outbidder taking less land for the same amount than the first bidder, and so on. If there is only one bidder, he takes the land or that part which he indicates in his bid for the amount of the taxes and the costs incurred. It is possible that third parties my suffer prejudice, but they are entitled to outbid in the manner I have indicated, and if they are hypothecary creditors they are entitled to receive a notice from the registrar if they have taken the precaution of having their names entered on his address book, (art. 2161 (i) C. C. (Que.)) In any case, the only question for discussion before us, is not the inconvenience which may result from the law, but whether the law was complied with. I can only answer this question in the affirmative. I may add that if the respondent suffers prejudice, it is due solely to his own incredible negligence. *Vigilantibus non dormientibus scripta est lex.*

None of respondent's objections appear to me to be well taken. The appeal is therefore allowed and respondent's action dismissed with costs in all Courts, save for the costs of printing the "case" for the reasons stated above.

Appeal allowed.

McCOOL v. GRANT & DUNN.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Latchford, Middleton, and Lennox, JJ. February 22, 1921.

Contracts—(§IE—97)—Formation—Sale and Delivery of Goods—Several Letters—Conditional Acceptance—Fulfilment of Condition—Breach—Damages.

After negotiations by which the price was arrived at for the sale and purchase of a stock of lumber, the plaintiff in the defendants' office and at the defendants' request, wrote to the defendants a letter offering to buy the lumber at the price agreed upon and setting out the terms, etc., and the defendants thereupon wrote and delivered to him a letter in which they said "referring to our conversation and

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your offer.....will say we are prepared to accept your offer provided you can satisfy our bank that all this stuff will be paid for as per our conversation." The defendants' bankers were in due course satisfied and so informed the plaintiff's bankers. The Court held that there was a completed contract of sale and the plaintiff was entitled to damages for breach of this contract.

APPEAL by plaintiff from the judgment of Rose, J., dismissing an action for damages for breach of a contract for the sale of a quantity of lumber. Reversed.

The judgment appealed from is as follows:

ROSE, J.:—After negotiations by which a price was arrived at, the plaintiff, in the defendants' office, and at the defendants' request, wrote to the defendants a letter offering to buy the lumber at a stated price (which was the price agreed upon), and setting out the terms of payment and the manner in which the lumber was to be sorted, shipped, etc.; and the defendants thereupon write and delivered to him a letter in which they said: "Referring to our conversation and your offer . . . will say we are prepared to accept your offer provided you can satisfy our bank that all this stuff will be paid for as per our conversation."

The plaintiff then saw the defendants' banker, whose name had been announced by the defendants, and the defendants' banker wrote to the plaintiff's banker for information as to the plaintiff's financial standing. The information having been given on the telephone, and the plaintiff's banker having promised to confirm his statement by letter, the defendants' banker informed one of the defendants as to what it was, and afterwards, after the confirming letter had been received, but without instructions from the defendants to do so, wrote to the plaintiff's banker saying: "This report is indeed very satisfactory, not only to us but to our client. We have also had a report as to Messrs. G. A. Grier & Sons, of Montreal, which verifies your statement."

Messrs. Grier & Sons were dealers to whom the plaintiff was reselling the lumber: the defendants say, and the plaintiff denies, that the plaintiff had told the defendants that he was buying as agent for Messrs. Grier & Sons; and the defendants say that what they were concerned about was not so much the financial standing of the plaintiff as the standing of the persons for whom they supposed him to be acting.

The plaintiff's case is, that the defendants' letter above quoted was a conditional acceptance of his offer; that he performed the

condition, by satisfying the bank that the lumber would be paid for; and that, thereupon, there was a binding contract. The defendants say that what they meant was merely to state what they intended to do in case the report obtained by their banker was satisfactory to them; they say that the report obtained was not what they required; and they deny that there ever was a complete contract.

What the defendants say as to the intention with which they wrote their letter is, I take it, immaterial; the question is, what do the words mean, either standing alone or construed in the light of the circumstances in which they were used? That the expression, "I am prepared to accept (a certain price)" may, under certain circumstances, amount to an offer to accept such price appears from Mr. Justice Middleton's judgment in *Canadian Dyers' Association Limited* v. *Burton* (1920), 47 O.L.R. 259; but, after some hesitation, I have reached the conclusion that the words, "we are prepared to accept your offer," used as they were used in the defendants' letter, in this case, do not amount to an acceptance. Both the plaintiff and the defendants were accustomed to dealings in lumber and well knew the necessity for a complete written record of any contract; and this circumstance seems to me to demand that the words used by them in their letters shall be construed almost with the strictness which would be applied in the case of a formal document; and I cannot think that in the interpretation of a formal document a clause to the same affect as the whole sentence quoted from the defendants' letter woud be treated, unless in very exceptional circumstances, as meaning the same thing as "we accept your offer," etc. The words "are prepared to" must have been inserted for some purpose, and it is difficult to give any meaning to them unless the whole sentence is taken to amount to a statement merely that the defendants' intention was to accept the offer at a future time if something happened in the meantime.

There is, perhaps, a further difficulty in the plaintiff's way. If the letter amounts to an acceptance upon condition, the plaintiff must shew strict performance of the condition; and, in doing that, the first thing is to shew exactly what the condition is. Now, reading the letter literally, the condition is that the bank shall be satisfied that the lumber will be paid for *as per the conversation between the parties*. If that was the condition, it would not be possible to find, on the evidence, that it was fulfilled. The plaintiff, therefore, cannot succeed unless it is permissible to read the letter as saying

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what I am inclined to think the writer of it intended to say, viz., "provided, as per our conversation, that you can satisfy our bank that all this stuff will be paid for." However, the question as to the construction to be given to the words "as per our conversation" was not argued, and, as the action fails upon the ground that the letter was not an acceptance of the offer, it is unnecessary to decide this second point.

The action must be dismissed with costs.

J. M. Ferguson, for the appellant.

H. D. Gamble, K.C., for the defendants, respondents.

The judgment of the Court was delivered by

MEREDITH, C.J.C.P.:—That the writings which passed between the parties on the 17th January, 1920, were intended to be binding upon them, seems to me to be beyond doubt. The parties had been bargaining for the purchase and sale of the lumber described in them, and everything had been finally agreed upon and settled between them, except that the sellers desired assurance satisfactory to their bankers, who had some charge upon the lumber, as to the buyer's "financial standing:" the sellers naturally wanted to be made safe in regard to payment for their lumber.

Mr. Grant, who conducted the negotiations for the defendants throughout, was, at the trial, given the fullest opportunity to state, or suggest, any reason for the writings if they were not to be binding upon any one, and, as was to have been expected, was quite unable to do so.

On the 21st January, 1920, the plaintiff wrote to the defendants a letter beginning with the words: "In reference to my contract with you for your cut of jack pine and spruce lumber;" which the defendants answered on the 23rd January, 1920, without a word of repudiation of the assertion of a contract, but objecting to the mode of sorting the lumber which the plaintiff's letter had asked for: and as to the finality of the sale saying only, "I have had no definite information from our bank yet;" and it was not until early in the next following month of February that the defendants shewed any disposition to recede from their agreement.

The grounds upon which the plaintiff failed at the trial appear to have been: that the parties intended that any agreement between them should be in writing; and that the writings which passed between them did not sufficiently prove a completed sale, by reason of the words: "We are prepared to accept your offer provided you can satisfy our bank that all this stuff will be paid for as per our

conversation," contained in the defendants' written answer to the plaintiff's written offer to buy.

But, having regard to all the circumstances, I can perceive no sufficient reason why they may not have the meaning they were intended to have: that the sale was made subject to the bankers being satisfied as to the financial standing of the purchaser.

To give them any other meaning would make the writings, which were intended to be evidence of some bargain, of no effect whatever; and to give them any other meaning would be to give them a meaning which none of the parties thought they had, as their conduct, in writing the offer and answer, and exchanging them, as well as in subsequent correspondence and acts, makes plain.

The defendants' bankers were, in due course, satisfied, as their letter of the 29th January, 1920, shews, in these words: "We thank you for your letter in reference to Mr. McCool's standing. This report is indeed very satisfactory, not only to us but to our client." At the trial the writer of that letter testified that he informed Mr. Grant of the information he had had respecting the plaintiff's financial standing, and that he understood from him that he was satisfied with it, and that it was Mr. Grant's attitude then that prompted him to write the letter from which the words I have quoted are taken. Though, it may be added, the requirements of the contract are only that the bankers should be satisfied.

I am in favour of allowing the appeal and of directing that judgment be entered in the action for the plaintiff.

Appeal allowed.

IN RE WORK & DAY ESTATE.

Alberta Supreme Court, Hyndman, J. April 14, 1921.

Bankruptcy (§1—6)—Seizure of Goods by Sheriff under Landlord's Warrant—Goods in Sheriff's Hands Prior to Date of Assignment—Duty of Sheriff—Costs of Seizure—Rights of Landlord.

A sheriff having made a seizure under a landlord's distress warrant issued before the date of the authorized assignment under the Bankruptcy Act, and being in possession of the goods and chattels of the tenant prior to the date of such authorized assignment is bound under secs. 51 and 52 of the Bankruptcy Act to hand over the goods and chattels to the authorized trustee, on demand after the bank-

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ruptcy and cannot demand his costs at that time, and has recourse only against the landlord who is entitled to add such costs of distress to the three months' rent which he is entitled to be paid in priority to all other debts.

[See Annotations, Bankruptcy Act of Canada: 53 D.L.R. 135; Secured Creditors under the Bankruptcy Act: 56 D.L.R. 104.]*

REFERENCE to determine the rights of the sheriff as against the trustee in bankruptcy in regard to costs of seizure under a landlord's distress warrant issued before the date of the authorised assignment, the sheriff being in possession of the goods and chattels of the tenant prior to the date of such authorised assignment.

The sheriff in person.

E. G. Pescod, for the landlord.

D. M. Stirton, for the trustee in bankruptcy.

HYNDMAN, J.:—It is contended that the sheriff is entitled to insist upon payment of his costs before he can be compelled to hand over the goods and chattels; or at any rate to be paid his costs in the distribution of the bankrupt's estate in preference to the trustee's fees and expenses and other debts.

After a careful consideration of secs. 51 and 52 of the Bankruptcy Act, 9-10 Geo. V, 1919, (Can.), ch. 36, I am of opinion that the sheriff is bound to hand over the goods and chattels to the authorised trustee, on demand after the bankruptcy, and cannot demand his costs at that time, and his recourse only against the landlord who is entitled to add such costs of distress to the three months' rent which the latter is entitled to be paid in priority to all other "debts." The section makes no special provision as regards the sheriff but it deals only with the rights of the landlord himself.

Section 51, sub-sec. 1 in part enacts:—

"Subject to the provisions of the next succeeding section as to rent, in the distribution of the property of the bankrupt or authorised assignor, there shall be paid, in the following order of priority:—Firstly, the fees and expenses of the trustee; secondly, the costs of the execution creditor (including sheriff's fees and disbursements) coming within the provisions of section eleven, sub-sections one and ten; thirdly, all wages, salaries, commission or compensation of any clerk, servant, travelling salesman, labourer or workman in respect of services rendered to the bankrupt or assignor during three months before the date of the receiving order or assignment."

Section 52, sub-sec. 1 in part enacts:—

*An Annotation on the Bankruptcy Act Amendment Act will be published in 59 D.L.R.

"Where the bankrupt or authorised assignor is a tenant having goods or chattels on which the landlord has distrained, or would be entitled to distrain, for rent, the right of the landlord to distrain or realise his rent by distress shall cease from and after the date of the receiving order or authorised assignment and the trustee shall be entitled to immediate possession of all the property of the debtor, but in the distribution of the property of the bankrupt or assignor the trustee shall pay to the landlord in priority to all other debts, an amount not exceeding the value of the distrainable assets, and not exceeding three months' rent accrued due prior to the date of the receiving order or assignment, and the costs of distress, if any."

There is no ambiguity in the wording of these two sections and consequently, it seems to me, in the distribution of the property of the bankrupt or authorised assignor, there shall first be paid the fees and expenses of the trustee. These fees and expenses cannot be regarded as a debt and therefore sec. 52 giving the landlord priority as to his three months' rent and the costs of distress cannot be held to take precedence over such fees and expenses. After these are provided for, however, then must be paid the landlord's rent together with his costs, in priority to all other debts.

The sheriff's costs, I think, ought to include the expense of holding the goods and chattels, calculated from the date of the actual seizure up to the date upon which a proper demand was made for their actual delivery over to the trustee in bankruptcy, and not only up to the date of the authorised assignment.

It seems to me that sec. 52 concerns the landlord only and has no reference to the sheriff "*qua sheriff*." In such a proceeding he acts merely as the agent of the landlord and the matter must be treated as though the landlord were personally in possession.

That being the case then so far as sheriff's costs of distress are concerned, there results a claim for his costs as a "debt" against the landlord personally to which he is entitled to payment forthwith after his duties are terminated by reason of the bankruptcy, and is a purely personal matter as between the sheriff and the landlord, the latter being entitled to add such costs to the rent and to be recouped later out of the estate in priority to all other debts and subject only to the fees and expenses of the trustee.

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DAUGHERTY v. ARMALY.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Magee, Hodgins and Ferguson, JJ.A. February 18, 1921.

1. Landlord and Tenant (§IIB—15)—Lease—Implied Covenant for Quiet Possession—"Rent"—Express Stipulation that Owner to be Allowed to Build Addition to Building.

A covenant for quiet possession may be implied from the use of the word "rent" which is synonymous with "let," but this implied covenant may be displaced by an express stipulation in the letting on the part of the lessor that it should be subject to a condition, that the lessor be allowed to build an addition to the front of the house, and he may interfere with the tenancy sufficiently to carry out such building operations.

[Markham v. Paget, [1908] 1 Ch. 697; Hoare v. Chambers (1895), 11 T.L.R. 185; Jones v. Lavington [1903] 1 K.B. 253; Crawford v. White City Rink, etc. (1913), 29 T.L.R. 318, applied.]

2. Landlord and Tenant (§IIB—10)—Lease—Collateral Agreement to Erect Addition to Premises—Damage to Tenant in Carrying out Building Operations.

A lease of premises subject to a collateral agreement that the owner will have the right to erect a restaurant in front of the house does not give the owner the right to remove a part of the basement wall of the house in the winter time, and allow cold air to enter with the result that it becomes impossible to heat the house and the water pipes become frozen and burst, and for this the tenant is entitled to damages.

APPEAL by the defendants from the judgment of Latchford, J., at the trial, in favour of the plaintiff in an action for trespass, interference with, and injury to a house and premises rented to the plaintiff, and for an injunction; and a cross-appeal by the plaintiff as to the damages. Affirmed.

E. S. Wigle, K.C., for appellants.

A. St. George Ellis, for respondent.

The judgment of the Court was delivered by

MEREDITH, C.J.O.:—This is an appeal by the defendants from the judgment, dated May 3, 1920, which was directed to be entered by Latchford, J., after the trial before him, sitting without a jury, at Sandwich, on that day, and the plaintiff cross-appeals as to the damages.

The respondent was tenant of the appellants under a lease dated November 14, 1919, for one year, at the rent of $55 a month, payable in advance, and her action is brought to recover damages for an alleged interference with her quiet possession of the premises

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by the appellants excavating in the lawn in front of the house, tearing away a cement walk leading to the house, the front steps, and the front porch, and cutting a hole 4 ft. by 14 ft. in the foundation-wall of the house, entirely cutting off the entrance to the front of it, and proceeding to erect a restaurant against the front of the house, the result of which will be to make the house unsightly, to cut off the light from the downstairs front part of it: it is also alleged that this was done during very cold weather and rendered the house almost uninhabitable, injured a piano, and made it necessary in order to heat the house to use a greater quantity of fuel.

The answer made to this claim is that, before the lease of November 14, 1919, was given, the respondent had been, since September 16, of the same year, a monthly tenant of the premises; that, when the place was first rented to her, the appellants would not rent to her the vacant ground in front of the house, because they intended to build upon it a store or restaurant; and that the lease of November 14, 1919, was given "subject to" the appellants' "right to build upon the vacant lot in front of the said house." The appellants also allege that they entered upon the vacant part of the lot and made the excavation complained of, commencing the work on November 28, and that no complaint was made by the respondent until December 12 following, and that they have "not interfered with the tenancy of the plaintiff any more than what was agreed to previous to the time of the renting of the said property."

The lease of November 14, 1919, is an informal document and reads as follows:—

"Nov. 14, 1919.

"Mrs. Daugherty in account with M. D. Armaly.

"I rent the house No. 51 Sandwich St. Ford City for 1 year at $55 per month payable in advance of each 14th the month.

"M. D. Armaly."

The trial Judge found that when the house was first rented by the respondent she understood from the appellant Armaly that it was his intention to put up a restaurant in front of the house; he also found that it was known to the respondent "and was a condition of the lease which she later obtained from Armaly that the restaurant building would be erected in front of the building which she rented from Armaly."

The trial Judge treated the arrangement as to the erection of the restaurant as a collateral agreement, and held that the proof of it was therefore not in violation of the rule which forbids the proof

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by parol of anything which varies a written instrument. My brother held, however, that, although the right to erect the restaurant involved the taking down of the porch, and the respondent could not, therefore, complain of the removal of it, the appellants in doing this work had removed a part of the basement-wall of the house, which caused the cold air to enter, with the result that it became difficult to heat the house, and the pipes leading from a heater in the furnace to the bathroom were frozen, and burst, causing some flooding in the cellar; and, having reached the conclusion that these acts were wrongful, he assessed the respondent's damages at $300.

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

It is open to serious doubt whether, assuming that the appellants had the right to build the restaurant in front of the house, they had any right to interfere with the foundation-wall of the house; but, granting that they had, they had no right to leave the opening which was left, but should have provided means to have prevented the cold air from entering through it under the house, and thereby causing damage to the respondent. I know of no duty which rested upon the respondent to do what the appellants should have done.

There is more difficulty in dealing with the counterclaim, in view of the trial Judge's finding of fact.

There has been considerable diversity of judicial opinion as to whether or not a covenant for quiet possession was to be implied from the use of the word "let," but I think that we should follow *Markham* v. *Paget*, [1908] 1 Ch. 697, in which, after an elaborate review of the cases Swinfen Eady, J., held that a covenant for quiet enjoyment is to be implied from the word "let." It follows that if the covenant may be implied from the use of the word "let" it may be implied from the use of the word "rent," which is a synonymous term.

The next question is, can the implication of the covenant be displaced by an express stipulation in the letting on the part of the lessor that it should be subject to such a condition as that which the appellants set up?

In *Hoare* v. *Chambers* (1895), 11 T.L.R. 185, Charles, J., gave effect to a parol agreement, not embodied in the lease, that it should be subject in all things to the terms and conditions under which the lessor held the premises from his superior landlord, and that there was therefore no unrestricted covenant for title or for

quiet enjoyment.

In *Jones* v. *Lavington*, [1903] 1 K.B. 253, there was an agreement to "let," and it was contended by the landlord that there was a collateral agreement as to quiet enjoyment which could be taken into consideration and enforced. Dealing with that contention the Master of the Rolls said at p. 256:—"That, however, was hardly pressed upon us, because it was obviously untenable. Such an agreement, if there was one, was in reference to the subject-matter of the contract, and must be found in it."

This passage having been cited by Eve, J., in *Crawford* v. *White City Rink (Newcastle-on-Tyne) Ltd.* (1913), 29 T.L.R. 318, that Judge said that in considering that passage one must have regard to the facts of the case, and that he did not think that the Master of the Rolls intended to lay down any general rule that in no case could there be such a collateral agreement, and said that, for instance, if the plaintiff in the case before him had said he would not enter into the contract unless the defendants entered into a collateral contract as to dancing he would have brought his case within the first of the two classes referred to by Vaughan Williams, L.J., in *Newman* v. *Gatti* (1907), 24 T.L.R. 18; that in order to establish whether there was any such precedent agreement it was obvious that the evidence must be admitted, but if the evidence fell short of proving the agreement and only proved a state of things as in *Jones* v. *Lavington* then it was inadmissible. What is here referred to is that there was alleged by the defendant to have been not an express agreement such as he set up, but that such a term was to be implied.

I do not see why on principle the implication of a covenant from the use of the word "let" or the word "rent" may not be displaced by proof of a parol agreement that the right to quiet enjoyment was to be subject to such a condition as that which the appellants set up, just as the implication of a resulting trust may be rebutted; and therefore, if the finding of fact as to the demise to the respondent having been agreed to be subject to the right of the appellants to build on the vacant ground in front of the house stands, the conclusion of the trial Judge was right.

The appellant Armaly testified that, when the lease of November 14, 1919, was being arranged for, it was agreed that the appellants should have the right to build which they claim. The trial Judge accepted this testimony as true and found in accordance with it, and it is impossible for us to reverse that finding.

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The result is that, in my opinion, both appeals should be dismissed with costs.

Appeal and cross-appeal dismissed.

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WALKER v. SHARPE.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, J.A., and Brown, C.J.C.B. March 30, 1921.

Appeal (§XI-720)—To Supreme Court of Canada—Special Leave.

Special leave to appeal to the Supreme Court of Canada will not be granted under sections 35 to 43 of the Supreme Court Act as amended by ch. 32 of the Statutes of Canada, 1920, where the case is not one of public interest and raises no important questions of law.

APPLICATION for special leave to appeal to the Supreme Court of Canada from a judgment of the Court of Appeal of Saskatchewan (1921), 56 D.L.R. 668. Application refused.

W. B. O'Regan, for appellant; *H. Ward*, for respondents.

The judgment of the Court was delivered by

LAMONT, J.A.:—This is an application for special leave to appeal from the judgment of this Court (1921), 56 D.L.R. 668, to the Supreme Court of Canada.

In the action the plaintiffs claimed damages for breach by the defendant of his contract to thresh for them in the fall of 1917. The trial Judge awarded the plaintiffs $284.50, being additional costs incurred by having to get their threshing done by others, and $636 for damage done to the plaintiffs' crop by wild ducks and the weather. On appeal, this Court was equally divided in opinion. Two of the members thereof affirmed the conclusions of the trial Judge, while the other two held that the evidence did not support the inference that the defendant, at the time the contract was made, contemplated, or should have contemplated, that a portion of the plaintiffs' crop would be destroyed by wild ducks if he failed to perform his contract.

The difference of opinion among the members of this Court arises, therefore, not in respect of any question of law, but solely as to what facts the evidence established.

The statutory provisions with respect to the right of appeal to the Supreme Court of Canada are found in secs. 35 to 43 of the Supreme Court Act, as amended by ch. 32 of the Statutes of Canada 1920. Under these provisions, subject to certain exceptions, no appeal lies to the Supreme Court from a judgment rendered in any Provincial Court, unless: (a) the amount or value of the matter in controversy in appeal exceeds the sum of $2000.00; or (b) special leave to appeal is obtained as hereinafter provided.

The amount in controversy in this action does not exceed $2000; therefore, before an appeal will lie, special leave must be granted. As the granting of special leave is in the discretion of the Court, it is important to ascertain the circumstances under which such discretion should be exercised.

In *Lake Erie & Detroit River R. Co.* v. *Marsh* (1904), 35 Can. S.C.R. 197, Nesbitt, J., speaking for the majority of the Court, said at p. 199:—"In applications to this Court for special leave, it is bound to apply judicial discretion to the particular facts and circumstances of each case as presented. Cases vary so widely in their circumstances that the principles upon which an appeal ought to be allowed do not admit of anything approaching to exhaustive definition. No rule can be laid down which would not necessarily be subject to future qualification, and any attempt to formulate any such rule might, therefore, prove misleading. . . .

Where, however, the case involves matter of public interest or some important question of law or the construction of Imperial or Dominion statutes or a conflict of provincial and Dominion authority or questions of law applicable to the whole Dominion, leave may well be granted."

In *The Whyte Packing Co.* v. *Pringle* (1910), 42 Can. S.C.R. 691, the Court said at p. 693:—"In the later case of the *Lake Erie & Detroit River R. Co.* v. *Marsh*, the Court, after deliberation, determined that leave to appeal under this very sub-section should only be granted where the case involved matters of public interest or some important question of law.

In the present case, however important the judgment of the Court of Appeal may be to the parties to the action, it only affects the construction to be placed upon a particular by-law of the respondent municipality, and an agreement entered into between it and the appellant, and the matter is, therefore not one at all within the rule laid down in the case above referred to."

See also *In re Henderson* v. *Missouri* (1911), 46 Can. S.C.R.

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627; *Riley* v. *Curtis's & Harvey* (1919), 50 D.L.R. 281, 59 Can. S.C.R. 206.

In *McCabe* v. *Curtis* (1919), 50 D.L.R. 618, 12 S.L.R. 455, Newlands, J., in giving the judgment of the majority of this Court, said:—"The trial Judge decided on a disputed question of fact that defendant seduced the plaintiff and granted her damages. This Court was equally divided upon the question of fact as to the defendant's liability. . . . The ordinary principle that the Court will not reverse the trial Judge on a disputed question of fact, is, in my opinion, applicable in this case, and the fact that the Court of Appeal was equally divided in their conclusions drawn from this disputed testimony emphasizes the fact that there was a disputed question of fact decided by the trial Judge."

The facts of the case at Bar, in my opinion, bring it squarely within the principle there laid down. The case is not one of public interest, and raises no important questions of law. The only point in dispute is as to what the evidence shews the parties contemplated when they entered into a private contract. A pronouncment upon this point by the Supreme Court of Canada, however important it might be to the parties to the litigation, would be of no assistance in determining the inferences of fact to be drawn from the evidence given in any other case.

The application should, therefore, in my opinion, be refused.

Application refused.

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Supreme Court of Canada, Idington, Duff, Anglin, Brodeur and Mignault, JJ. May 4, 1920.

1. Appeal (§IIA—35)—Workmen's Compensation Act—Action Under—Jurisdiction of Appellate Court to Convert into one for Damages under Common Law.

An Appellate Court has no jurisdiction on an appeal of an action brought under the Workmen's Compensation Act (Quebec) to convert the action into one for damages under the common law, and to give damages for an amount in excess of that allowed under the Act.

2. Master and Servant (§V—350)—Workmen's Compensation—Workman in Employ less than Year—Amount of Compensation—Method of Computing.

The class intended by art. 7328 R.S.Q. 1909 under which the

hypothetical remuneration of a workman claiming compensation under the Workmen's Compensation Act (Quebec) for the time necessary to complete the twelve months, where such workman has been employed less than twelve months before the accident, is that in which he was first employed, not that in which he was employed at the time he received the injury, and the average earnings are the average earnings of workmen of the same class in the establishment to which he belongs, and only when there are no such earnings available should the average earnings of outside workmen be resorted to.

[See Annotation Workmen's Compensation Law in Quebec: 7 D.L.R. 5.]

APPEAL from a judgment of the Quebec Court of King's Bench, appeal side, modifying the judgment of the trial Court and maintaining the respondent's, plaintiff's, action. Reversed; new trial ordered.

E. Lafleur, K.C., and *J. De Witt*, for appellant.

Audet and *Sauvé*, for respondent.

IDINGTON, J. (dissenting):—The enactment R.S.Q. 1909, art. 7238, by which in the last analysis the rights of appellant are to be determined under the Workmen's Compensation Act, reads as follows:—

"The wages upon which the rent is based shall be, in the case of a workman engaged in the business during the twelve months next before the accident, the actual remuneration allowed him during such time, whether in money or in kind.

In the case of workmen employed less than twelve months before the accident, such wages shall be the actual remuneration which they have received since they were employed in the business, plus the average remuneration received by workmen of the same class during the time necessary to complete the twelve months.

If the work is not continuous the year's wages shall be calculated both according to the remuneration received while the work went on, and according to the workman's earnings during the rest of the year."

If the computation designed by this reaches a result whereby it becomes clear that the injured workman has been earning over $1,200 for the year, then he does not fall within the class which the Act was designed to protect according to the scale in force when the accident here in question occurred.

The above quoted section in the first sentence thereof does not directly touch upon what we have to deal with but incidentally both it and the third sentence help to illuminate what the draftsman

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had in view and gives room for a consideration of the total possible earnings of respondent in both classes of work and a comparison of the totals in both classes of work in trying to reach a conclusion as to the average wage that is to be had in view to apply to the remainder of the twelve months. But that will not help respondent unless we go a step further and unsettle things by discarding the rule the Court below in previous ones had settled.

I regret to say that I am unable to put upon the above quoted part of said Act any such interpretation and construction as will when applied to the relevant facts bring the respondent within the provisions of the Act. And such seems to have been also the unanimous opinion of the Court of King's Bench.

A majority of that Court saw its way to give relief independently of the said Act, although the prayer of the declaration is exclusively confined to the claim made in virtue of said Act.

I should not feel much difficulty if the case had clearly been fought out upon all the facts relative to either alternative as the legal basis for recovery, and been heard by a tribunal that the parties had clearly adopted as competent and satisfactory to them for such purpose.

But for the purposes of the Workmen's Compensation Act there can be no trial by jury.

How can I say that appellant by silence or conduct waived in any way that right, when it was thus bound by the provisions of the Act to a trial without a jury of the case made by the declaration and confined by the conclusions thereto so made?

We are told by counsel for appellant that there is no possibility of two such claims being joined according to Quebec law, and I can find nothing in respondent's argument to the contrary except the citation of the provisions of the Act properly reserving the rights of the workman to fall back on his other legal grounds if need be.

That does not seem to allow the trial of the two alternative claims in one action.

I agree with the reasons assigned by Carroll, J.

And though driven to the conclusion that the appeal should be allowed with costs if appellant insists thereon, I hope it will not insist on costs.

DUFF, J., (dissenting):—The appeal, I think, should be allowed.

The manner of compensation in my judgment is this. The average of aggregate earnings of employees of the class to which

the respondent belonged at the time of the accident for each week during the statutory period preceding the accident should be taken and these averages averaged.

The evidence is not specifically pointed to this, but I think there is sufficient in the record to shew that upon this basis the appeal must succeed.

ANGLIN, J.:—The questions for determination on this appeal are whether the Court of King's Bench properly held the appellants liable at common law in this action for damages for personal injuries sustained by the respondent on April 19, 1913, while in their employment, and, if not, whether the respondent, as he claimed and as was held by the trial Judge, Guerin, J., is entitled to recover under the Workmen's Compensation Act of Quebec, R.S.Q. 1909, arts. 7321 et seq., as amended, and, if so, on what basis.

The action was brought and relief claimed distinctly and solely under the Workmen's Compensation Act. The trial was conducted on that footing. Liability at common law does not appear to have entered the mind of either party. That issue was not tried. No evidence was directed to it. The trial Judge found the plaintiff entitled to a rent under the Workmen's Compensation Act, based on an annual remuneration of $960, but his judgment unfortunately leaves us in the dark as to the means or method by which he computed the hypothetical earnings under para. 2 of art. 7328, R.S.Q. for the portion of the twelve months mentioned therein during which the plaintiff was not in the defendant's employment. *Barret c. Société*, etc., D. 1917, 1, 27, (49e espèce). Not only is the judgment of the Court of King's Bench awarding $1,825 as damages at common law *ultra petita*, but it condemns the appellants upon a claim never presented, which they have had no opportunity to meet, and which, if presented, might have been tried by a different tribunal.

With respect, I entirely concur in the dissenting opinion of Carroll, J., on this branch of the case. The judgment rendered by the Court of King's Bench cannot stand. Indeed, the principle of the recent dismissal of the plaintiff's action by that Court in *Canadian Steel Foundries* v. *Stychlinsky* (1919), 25 Rev. Leg. 135 at p. 138, (the converse case) appears to be opposed to it.

But should the plaintiff recover under the Workmen's Compensation Act? That depends on whether his yearly remuneration, calculated as contemplated by that statute, exceeded $1,200 (8 Geo. V. 1918 (Que.), ch. 71, sec. 4). If not, his right to compensation

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under the statute is reasonably clear. The difficulty in the case arises from the facts that the plaintiff had been in the defendant's employment only a little over three months (January 5 to April 19) when injured, and that between January 5 and April 1 he had been employed as a machinist helper, at 32½ cts. an hour, and from the 1st to the 19th of April as an "operator," being paid in that capacity 15 cts. per shell—a somewhat higher rate of pay.

Article 7328 of the statute, R.S.Q. 1909, reads as follows:—

"The wages upon which the rent is based shall be, in the case of a workman engaged in the business during the twelve months next before the accident, the actual remuneration allowed him during such time, whether in money or in kind.

In the case of workmen employed less than twelve months before the accident, such wages shall be the actual remuneration which they have received since they were employed in the business, plus the average remuneration received by workmen of the same class during the time necessary to complete the twelve months.

If the work is not continuous the year's wages shall be calculated both according to the remuneration received while the work went on, and according to the workman's earnings during the rest of the year."

The plaintiff's work having been continuous, the case falls within the second paragraph of the articles.

The ascertainment of the plaintiff's actual earnings from January 5 to April 19 presents no difficulty. They amount to $295.60. Whether "the average remuneration received by workmen of the same class during the time necessary to complete the twelve months" exceeded $904.40 (the balance of $1,200) is the problem presented. What is the proper construction of the statutory language just quoted?

A comparison of their provisions shews that the French Act of April 9, 1898, and the statute first passed in Quebec in 1909 (ch. 66) are couched in substantially the same terms. The latter was, no doubt, taken from the former. In the particular clause under consideration, just quoted, the language of both Acts is identical. The phrase "qu'ont reçu * * * les ouvriers de la même catégorie" [translated "received by workmen of the same class"] of the second paragraph of art. 10 of the French Act of 1898 is reproduced verbatim in the French version of art. 7328 of the Quebec Revised Statutes. That phrase was replaced in France, in 1905, by the words "qu'ils auraient pu recevoir * * * d'après la re-

munération moyenne des ouvriers de la même catégorie * * *" [translated "which they could have received . . . according to the average remuneration received by workmen of the same class"].

Although Loubat says "le nouveau texte du second alinéa de l'art. 10 ne diffère de l'ancien que dans la forme ("Risque professionnel" éd. No. 665)," [translated "The new text of the second paragraph of art. 10 differs only in form from the old (Risque professionnel, 3rd ed. No. 665)," it seems to me that the average earnings actually received by a group of workmen during a given period may differ materially from the average earnings that the same group might have received in the same period. In the one case time lost through causes attributable to the workmen themselves and not to their employer is included in the number of hours, days, or weeks on which the average is computed. In the other it may not be. But, however that may be, subject to allowances for exceptional and involuntary loss of time, as hereinafter explained, it is actual earnings—not possible earnings—that the Quebec statute prescribes as the basis of computation.

The text of the statute does not explicitly require that the category of workmen whose average wages or earnings is to serve as the basis of calculation should be confined to employees of the establishment in which the injured workman was employed. (Loubat, No. 668). In many cases—for instance, where an industry has been recently started, or where there is no other workman of the same class employed in the establishment—that basis is not available and resort must be had to the earnings of workmen of the same class in other establishments. Indeed there is not a little to be said for the view that the hypothetical remuneration of the injured man "for the time necessary to complete the twelve months" should be computed upon the average earnings of all workmen of a similar class in the community during that period. But the French commentators—Loubat, in the work cited No. 668, and Sachet (Législation sur les Accidents du Travail, 5e éd. No. 854)—seem to make it clear that the contrary view had been well established in France before the Quebec statute was passed—that where there were other workmen of the same class as the injured man in the establishment to which he belonged it was the average earnings of those workmen on which his complementary hypothetical remuneration should be computed and that it is only where there are not such earnings available that the average earnings of outside workmen should be resorted to. In adopting the French Act as part of the

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law of Quebec the Legislature may well be taken to have intended that the construction so placed upon it in France should likewise be adopted. I had occasion recently, in *Arnold* v. *The Dominion Trust Co.* (1918), 41 D.L.R. 107 at pp. 117-118, to refer to the authorities bearing on this aspect of the case.

Nor is it unreasonable that an employer should be in a position to ascertain from his own records the basis on which the compensation of an injured workman should be calculated. Moreover, it is that workman's probable earnings which have to be established and it is not unlikely that what the legislators had in mind was what he would have earned had he been in the same establishment during the period for which the estimate is to be made.

Another question, which has been somewhat debated, is whether the class or category intended is that to which the workman belonged at the time he sustained his injuries, or that in which he was placed when he first entered the establishment, or some average of any two or more classes in which he may have worked while there. But when it is borne in mind that the matter to be estimated is the average earnings of workmen of the same class during the period necessary to complete "the twelve months next before the accident" —that the statute is merely intended to provide an artificial rule for cases in which during a part of the twelve months' period the facts necessary to bring the plaintiff within the first paragraph of the article do not exist—it seems fairly clear that resort should be had to the average earnings of workmen of the class in which the injured man was first employed. The law would seem to contemplate it to be probable that had he spent the preceding three, six or nine months (or whatever the time may be) necessary to complete the twelve months' period in the establishment in which he was injured, he would have been employed in that class, though it may well be that if engaged sooner his advance to a higher grade of employment would have come earlier. The view that the original class of employment determines the category is taken by Cabouat ("Accidents du Travail, Vol. 2, No. 581") and has the sanction of a decision of the Cour de Cassation, *Bourdis c. Villard* 1906, 1 Gaz. du Palais 437. The Court of Review in *Pelletier* v. *Montreal Locomotive Works* (1919), 25 Rev. Leg. 76 at pp. 79, 80, took the same view. A contrary opinion of the Court of Appeal at Dijon in *Compagnie des Mines de Blanzy c. Rose*, S. 1901, 2, 293, is adversely criticised by the reporter (n. 1) although favourably received by Sachet (Nos. 847 and 856). Pelletier, J., who delivered the opinion of the ma-

jority of the Court of King's Bench, also adopted it. He says:—"Il faut prendre, comme je l'ai dit tantôt, la moyenne de ce qu'ont gagné les ouvriers de la même catégorie, c'est-à-dire la catégorie dans laquelle se trouvait l'ouvrier lorsque l'accident est arrivé." [translated "As I have just said, the average remuneration of workmen in the same class must be considered, that is to say, the class to which the workman belonged at the time of the accident."]

With respect, in this particular, I prefer the interpretation of M. Cabouat and the Cour de Cassation and in regard to this matter also it may fairly be said that the Legislature in adopting the French statute intended that the same interpretation should be placed upon it as had already been sanctioned by the highest court of France.

There remains the question how the average remuneration of workmen in the defendant's establishment in the same category with the plaintiff during the required period (i.e., from April 19, 1917, to January 5, 1918) is to be computed.

The Court of King's Bench followed the method which it had itself formulated in *St. Maurice Paper Co.* v. *Marcotte* (1918), 27 Que. K.B. 394, stated in the headnote of that case as follows:—"Ce salaire moyen se compute, quand les ouvriers sont payés à l'heure, en divisant le montant total qu'ils ont reçu durant la période complémentaire par le nombre d'heures qu'ils ont travaillé durant la même période." [translated "When the workmen are paid by the hour, the average remuneration is computed by dividing the total amount they have received during the complementary period by the number of hours they have worked during the same period."]

This mode of calculation was again approved by the same Court in *Canadian Steel Foundries Co.* v. *Stychlinsky*, 25 Rev. Leg. 135. With great respect, I cannot think it is correct. By making the divisor the number of hours during which the men actually worked, the element of lost time being entirely ignored, the result attained is not the actual average earnings of the workmen during the entire period but what they might have earned, had there been no loss of time. The Court would appear to have read "qu'ont reçue"]"received"[as the equivalent of "qu'ils auraient pu recevoir." ["which they could have received."] The divisor should have been not the number of hours during which the men actually worked but the number of working hours during the period in question, assuming that all the men were in the defendants' employment for the entire period.

The method prescribed by Sachet (No. 854) is to add together

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the earnings of the workmen of the same class during the complementary period and divide the total number by the number of men engaged. Where all these men have been in the employment of the establishment during the entire period this method would be absolutely fair and would carry out the intent of the statute. Cabouat (Vol. 2, No. 580) prescribes the same method, adding, however, that the earnings of the workmen should be calculated "according to the rules combined in art. 10, paras. 1 and 4, that is to say, taking into account the periods of exceptional and involuntary unemployment." But it cannot be used where the workmen have been employed, some for shorter, some for longer portions of the period in question. That would seem to be the case here as the following table (prepared by Dockrill, the defendant's accountant) of the earnings of each of 15 men employed by the defendant company at the rate of 32½ cents an hour as machinist helpers during the period from April 19, 1917, to January 5, 1918, would indicate.

$211.50	$ 85.95	$247.30
247.90	140.25	77.90
238.65	244.65	157.20
108.85	160.55	380.90
102.50	216.95	226.55

It may be that all the machinist helpers in the defendants' employment who could fairly be held to be in the same category as the plaintiff were paid 32½ cents an hour. Sachet defines the category as including "ceux qui dans un établissement industriel ont à peu près la même emploi et touchent la même salaire que la victime." [translated "those in an industrial establishment who do about the same work and receive the same wages as the victim."] Loubat's definition ignores the element of equality in wages. It is:—"Ceux qui font le même travail ou un travail analogue." ["Those who do the same or similar work."] M. Louis Sarrut in a copious note in D. 1917.1.5. says:—"Les ouvriers de la même catégorie, ce sont ceux qui exercent le même métier, la même profession que l'ouvrier victime de l'accident." [translated "Workmen of the same class are those who work at the same trade, the same business, as the workman who was the victim of the accident."] Cabouat, Vol. 2, No. 581, says:—"Des explications données par M. Poirier, il résulte que l'on doit entendre par ouvriers de la même catégorie que la victime, ceux qui exercent une fonction correspondante à la sienne ou exécutent un même travail sans tenir compte d'ailleurs des inégalités d'aptitude professionnelle susceptibles d'entraîner des inégalités de salaire

* * *" [translated "From the explanations given by Mr. Poirier, it follows that workmen of the same class as the victim must be understood as including those who do the same work as the injured workman or those whose functions correspond with his, without taking any account of the inequalities of professional skill liable to result in differences of salary."]

On this point I respectfully agree in the interpretation of the three last mentioned authors adopted by the late Chief Justice of Quebec in *St. Maurice Paper Co.* v. *Marcotte* (1918), 27 Que K.B. 394 at p. 396. If it might be assumed that the 15 men whose gross earnings Dockrill gives were the only employees of the defendant company in the same category with the plaintiff during the period in question it would still be necessary to have information as to how long each of them remained in the company's employment as a machinist helper.

Unfortunately the record does not contain that information. Moreover, Dockrill states that there were quite a number of other machinist helpers engaged at different rates of pay. His computations of averages are all based on the erroneous view that to ascertain the actual average earnings per hour of a class of workmen during a given period it is only necessary to divide their total earnings during the period by the number of hours of work which they have actually put in, instead of by the number of hours which they might have put in had there been no involuntary and exceptional loss of time.

The burden was on the plaintiff to furnish to the Court the information necessary to enable it to determine the average salary of workmen of his class during the period necessary to complete the twelve months. *Pelletier* v. *Montreal Locomotive Works*, 25 Rev. Leg. 76, at p. 82. He has not done so.

There is nothing to shew that the lacking information cannot readily be obtained. On the contrary Dockrill's testimony rather indicates that it can. There is in my opinion no justification for taking either the wages earned by the plaintiff himself while engaged with the defendants as machinist helper or his earnings in other employment during the rest of the twelve months' period as the basis on which to compute his hypothetical earnings for that time. I agree with Loubat when he says (No. 666):

666. The law does not allow of any equivalent means of computing this second part of the yearly remuneration. The Courts cannot under any pretext, therefore, substitute another method of

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comparison, as for instance by taking the wages the workman would have received during the time required to complete the twelve months, estimated according to his actual remuneration from the date of his employment in the industry (contra, Alais January 5, 1900. Gaz. Pal. 1900-1-230). This method has moreover been condemned, an amendment to the same effect moved by Mr. Felix Martin in the Senate having been rejected, (Sen. Oct. 28, 1895; J. off., p. 870). The wages that the workman would have earned must therefore be determined solely by reference to the average remuneration of workmen in the same class, that is to say according to the average remuneration of workmen in the same class during the period required to complete the twelve months.

Cabouat, (Vol. 2, No. 575) clearly expresses the same opinion. The case must therefore be remitted to the Superior Court to obtain the information necessary to permit of the requirements of the statute being complied with.

In computing the period of service of each workman deduction must be made for loss of time by him which is exceptional and involuntary—"chômages exceptionels non-volontaires" [exceptional and involuntary unemployment"]—whether ascribable to a cause personal to him or to non-operation of the establishment. Thus absence due to serious illness, injury or military service should be allowed for, but not absence attributable to laziness or caprice or to mere casual indisposition such as ordinarily befalls workmen from time to time. So allowance must be made for loss of time occasioned by extensive repairs, *(grosses réparations)* destruction of premises by fire, total or partial, and unusual depression in business, or any other abnormal cause.

These allowances are specifically provided for by para. 4 of art. 10 of the French Act of 1905, stated by Sachet (No. 869) merely to embody the effect of decisions on the French law of 1898, which, like the Quebec Act, did not specifically provide for them. An admirable note of M. Planiol, (D.1904.1.289), deals with this subject.

The determination of the trial Judge as to the deductions to be made for loss of time, and likewise his finding as to what workmen should be classed as belonging to the same category as the plaintiff will be entitled to the greatest weight. Under the French system such matters "appartiennent au juge du fait souverainement." ["are left to the final decision of the trial Judge."] D. 1903.1.572.

In the Superior Court proof must be adduced

(1) to establish what persons engaged as machinist helpers by the defendants during the period from April 19, 1917, to January 5, 1918, were in the same category as the plaintiff, i.e., doing the same class of work, unless the evidence of Dockrill should be accepted as sufficient proof that it comprised the 27 men of whom he speaks and no others;

(2) the number of days during that period for which each of these workmen was in the defendants' employment as a machinist helper, i.e., from the commencement of the period or the later date at which he entered the establishment or was put in that class until he left it or was discharged or the period expired. (From the period of his employment, however, must be deducted any exceptional and involuntary loss of time of the workman as above indicated); and

(3) the total amount of his earnings while so employed.

By adding together the earnings of all these workmen and dividing the total by the sum of the number of days included in their respective terms of employment (computed as aforesaid) added together, the average daily wages of the workmen during the period in question will be ascertained. If the quotient thus obtained be multiplied by 261 (the number of days comprised in the period between April 19, 1917, and January 5, 1918,) the product will be the average earnings during that period of a workman of the category to which the plaintiff belonged. The result will be practically the same as if working days merely had been made the basis of computation in both cases, and the method adopted has the advantage of simplicity. The sum of the amount thus ascertained and the $295.64 earned by the plaintiff between January 5 and April 9, 1918, will be the basic annual remuneration on which, if less than $1200 (as I incline to think it will turn out to be), the rent to which the plaintiff is entitled under the provisions of arts. 7322 and 7326 of the Workmen's Compensation Act must be computed.

In the result the defendants' appeal must be allowed. While the plaintiff cannot have the restoration of the judgment of the Superior Court sought by his cross-appeal, because it is impossible to tell whether in computing the basic annual remuneration at $960 the trial Judge proceeded as I understand the statute to require (the respondent suggests in his factum that for the complementary period he took the plaintiff's earnings in other employment—but I find nothing in the record to warrant the statement that a course so

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contrary to the provisions of the statute was in fact adopted), his action should not be dismissed, as the appellants ask, but will be referred back to the Superior Court to permit of the additional facts being established, knowledge of which is necessary to ascertain, in the manner indicated above, the basic annual remuneration on which the plaintiff's rights must be determined.

Should such annual remuneration be found to exceed $1,200 the action must be dismissed with costs throughout. Should it be found not to exceed $1,200, the plaintiff should have judgment for such amount as the Superior Court may thereupon find him entitled to, with costs of an action in that Court. If the amount of the judgment ultimately entered should not be less than that of Guerin, J.'s former judgment, inasmuch as the plaintiff has been needlessly put to all the subsequent costs—those of the appeals to the Court of Appeal and to this Court—he should also recover these costs in addition as well as any extra costs in the Superior Court occasioned by the second enquête now directed which that Court may allow him. In no event, however, for the reasons indicated by my brother Brodeur, can the respondent have any costs of his factum on the cross-appeal to this Court. Should the ultimate recovery, however, be of an amount less than that originally awarded there should be no costs to either party of any of the proceedings subsequent to the judgment of Mr. Justice Guerin.

BRODEUR, J.:—The present suit is brought under the Workman's Compensation Act (arts. 7321 et seq., R.S.Q. 1909). We have to decide if the plaintiff respondent had a salary of more than $1,200 for if he had a higher salary he would fall under the common law and could not invoke the Compensation Act. We have therefore to interpret the provisions of art. 7328 which reads as follows:—

"The wages upon which the rent is based shall be, in the case of a workman engaged in business, during the twelve months next before the accident, the actual remuneration allowed him during such time, whether in money or in kind.

In the case of workmen employed less than twelve months before the accident, such wages shall be the actual remuneration which they have received since they were employed in the business *plus the average remuneration received by workmen of the same class during the time necessary to complete the twelve months.*

If the work is not continuous, the year's wages shall be calculated both according to the remuneration received while the work

went on, and according to the workmen's earnings during the rest of the year."

The italicised part is that which we must specially examine.

I must add that this art. 7328 is a textual reproduction of art. 10 of the French law of 1898 and consequently jurisprudence and French doctrine can guide us in the interpretation of our text.

The facts are as follows:—

In the year which preceded the accident the plaintiff was for about nine months employed as a stevedore in the port of Montreal at 35 cents an hour. He then worked from January 5 to April 1, 1918, as machinist's helper in the defendant's factory at 32½ cents an hour and then for 19 days he worked as turner at piece work for the defendant which brought him about $26 a week. There are therefore three different periods to consider: (1) from April 19, 1917, to January 5, 1918; (2) from January 5, 1918, to April 1, 1918; (3) from April 1, 1918, to April 19, the same year.

The two last periods which cover from January 5 to April 19 offer no difficulty. The law (art. 7328) says that the salary which forms the basis is that which the workman actually received since he engaged in the business. Therefore as Lewis received during this period $295.60 there is no contestation and this figure is accepted by both parties.

The whole difficulty is to determine the salary to serve as basis for the first period, that is to say from April 19, 1917, to January 5, 1918, about 9 months. Is the salary which the plaintiff received as stevedore, a salary which he received outside the business in which the accident occurred? In other words could we apply the provisions of the third paragraph of art. 7328 which says if the work is not continuous the annual salary is based on the remuneration received during the period of activity and on the workman's earnings during the rest of the year.

The appellant in his factum says that the Judge in the Superior Court "calculated the wage basis as though the employment was a non-continuous operation."

This statement may be true, but unfortunately we have not the Judge's notes and in the judgment we simply see the following reasons:—"Considering that plaintiff has sufficiently proved that the remuneration which must serve as the basis for the calculation of the rent under art. 7328 R.S.Q. is $960."

It is very difficult for me to say what is the remuneration which he used, to arrive at this result. In any case I am of the opinion

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that the present case is one of those where we ought not to apply the third paragraph of art. 7328. An examination of the three paragraphs of this article confirms me in this opinion.

The first paragraph evidently refers to the workman who has worked regularly throughout the year in an industry, for it is stated positively that the salary is that actually paid the workman who was occupied in the industry during twelve preceding months. The first paragraph cannot be invoked in the present case because Lewis was only employed for three months in the business.

The second paragraph of the article speaks of workmen occupied for less than 12 months in the business. This is the case with Lewis who was only in the business for a few months. The base salary should therefore include, in addition to the effective remuneration which he received since his entry, a supplementary sum which is represented by the average remuneration received in the same industry during the period necessary to complete the twelve months by a workman of the same category.

The third paragraph of the article refers to the case where the work is not continuous and in that case it is allowed to add to the remuneration received by the workman the profits realised by him during the year. These provisions refer exclusively to workmen engaged in the industry for more than a year in an intermittent manner. (Dalloz 1903-1-598: Sachet, edition of 1909, Vol. 1er No. 862; Loubat, ed. 1906, Nos. 673 and following). The third paragraph consequently does not cover our case.

It is therefore the second paragraph which applies to our case and the first question is to decide to which category of employees we must have recourse to fix the basis of the salary. Is it the category of turners to which Lewis belonged at the time of the accident or that of the machinists' helpers of which he formed one when he entered the factory. The solution of this question is very important because if it is the turners' salary which should serve as a basis the amount will be higher than the sum permitted in order to bring the workman under the Compensation Act. If on the contrary it is the salary of the machinists' helpers, Lewis could probably recover.

The authors are divided on this point. Some say that if the claimant belonged successively to several different categories his remuneration must be taken in the category in which he was when he entered the establishment and not in the category to which he belonged at the moment of the accident. (Cabouat, Accidents du Travail, Vol. 2, No. 581; Baudry-Lacantinerie, Vol. 21, No. 2090.)

Sachet on the contrary maintains that the salary earned at the moment of the accident should serve as the basis (Sachet edition of 1909, Nos. 847-856). Sirey, 1901-2-293.

There is, however, a judgment of the Court of Cassation which decides the question. This judgment is reported in the Gazette du Palais, 1906-1-437, and decides that:—"When the injured workman, employed for less than a year, has within this period held several different positions in the business at unequal rates of pay, the proper method of completing by fiction of law the twelve months of work which serve to determine the basis of remuneration, is to take into account the wages of the class of workmen with which the plaintiff had first been employed at the time of his engagement, and not the wages he was earning at the time of the accident in his last position."

The Court of Review in the case of *Pelletier* v. *Montreal Locomotive Works*, 25 Rev. Leg. 76, has decided in the same sense.

These judgments appear to me to be well founded. Indeed to determine the annual rent due the victim, the salary gained by him in the year which preceded the accident is sought. He would necessarily hope that in the future he would continue to gain if he remained in the factory a higher salary corresponding to that which he received at the time of the accident. Nevertheless the base salaries are not the realisation of future plans, but the representation of salaries paid in the past either to the workman himself or to his fellow workmen.

In the present case if Lewis had actually worked the whole time for the defendant he would have received as machinist's helper during 11 months and 10 days, 32½ cents an hour. During the last 20 days he would have been paid as turner at 15 cents a piece. He would certainly have earned in the year less than $1,200, taking into account the ordinary and legal stoppages of work. These judgments of the Court of Cassation and the Court of Review only put into execution the principle which should serve as a basis for the determination of the salary effectively paid. It seems to me proper to allow Lewis the salary of the machinists' helpers and not the salary of the turners with whom he had worked during the last 20 days.

I am obliged therefore to differ in opinion from the Court of Appeal, who through Pelletier, J., said:—"The average remuneration of workmen of the same class must be taken into account, that is to say, the class with which the workman was employed at the time

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of the accident."

The judgment of the Court of Appeal is therefore mistaken in applying this principle.

Now should the category of machinist's helper include, in addition to the 15 persons earning the same salary as Lewis, namely 32½ cents an hour, also the machinists' helpers earning a different salary? If we consult the discussions which took place on this point in the French Senate and which we find in Dalloz, 1898-4-74, note 12, it seems evident that the workmen of the same category means those who have the same salary, for the Senator Scheurer-Kestner who was engaged in an industry says in speaking of turners, whom he took for an example, that there are several categories and that this expression is easily understood by those engaged in the industry, and that it is easy to apply. What the reporter then said on the subject elucidates the question. He closed the discussion by saying:—

"As our colleague Mr. Scheurer-Kestner said just now, this means that if we are dealing for instance with turners *earning a certain salary*, the corresponding salary is to be considered in dealing with a workman of the same class."

Sachet. No. 854 of his work, ed. 1909, reports this discussion and adds:—"From this discussion it would appear to follow that by workmen of the same class must be understood those who in a given business do about the same work and earn the same salary as the victim.

I think then that in the present case the average salary of workmen of the same category should be that of the 15 machinists' helpers who received the same salary as Lewis.

Now what is the average salary paid in the defendant's factory to machinists' helpers belonging to the plaintiff's category from April 1, 1917, to January 5, 1918?

The proof on this subject is not very satisfactory. All the machinists' helpers were employed by the hour and it seems to me that the defendant should have had in his possession the number of hours which each employee worked in his factory in order to establish the average of the remuneration received by each of them. The accountant who was responsible tells us that he cannot furnish this statement.

It is however declared in another part of his evidence that the average pay of the machinists' helpers was $25.85 a week and that the turners received $32.64 a week.

How is it he arrived at this result? I cannot easily understand it and it is not clear in his evidence. First of all what does he mean by a week? Is it 6 days or 5½ days? Does each day include 10, 9 or 8 hours? He does not say.

If he has proceeded, as I think he has, to take the time of each man and then add up all these times and say "that constitutes so many weeks," that is an erroneous basis for calculation, for he does not give us the average remuneration. Moreover this calculation would require more information than he gives us. It is also surprising if he proceeded as I suppose that he was not able to say how many hours each one had worked. His calculation does not seem sufficient on which to base a judgment. All his idle hours would be eliminated. (Dalloz 1901-2-178: Sachet, 5th ed., Nos. 853-868). However the workmen in this industry must have had interruptions of work, for he gives the salary paid 15 workmen, machinists' helpers, and none has received more than $380.90. Thus by his method of calculation this workman should have received double that one.

As the defendant is not in a position to furnish exact information on the average remuneration in his business, we must resort to those presumptions which can guide us in cases of this nature. For my part I am disposed to follow the decision of the Court of Cassation, which in examining a similar case, namely, the case where there was difficulty in establishing exactly the actual total of the salaries of all the working days, decided that only what the plaintiff gained in working can be taken as a basis of salary. (Dalloz 1902-1-381).

The salary gained by the plaintiff as machinist's helper from January 5, 1918, to March 23, 1918, (we have not his salary as such from March 23 to April 1, 1918) was $197.20. This period represents for the 78 days elapsed a salary of $2.53 a day. That was the average remuneration while he worked. Now there are 260 days from April 19, 1917, to January 5, 1918. By multiplying these 260 days by $2.53 we arrive at the sum of $657.80.

Adding to this $657.80 the salary gained by the plaintiff from January 5, 1918, to April 19, 1918, namely, $295.60, we arrive at a total of $953.40, which is practically the same amount as that of $960 found by the Superior Court.

The Court of Appeal however found that the amount should be more than $1,200 and consequently the plaintiff according to it would not have had the right to sue under the Workman's Com-

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pensation Act, R.S.Q. 1909, art. 7326, but it gave judgment for the plaintiff under the common law. The plaintiff made a cross appeal and asks the re-establishment of the Superior Court judgment.

For these reasons the appeal should be dismissed and the cross-appeal maintained, the judgment of the Superior Court re-established and that of the Court of Appeal modified and made conformable to that of the Superior Court. The appellant must pay the costs in all Courts less the costs of factum on the cross appeal before this Court.

The following are the reasons for not taxing this factum:—I remarked during the argument that the attorneys for the respondent had cited Sachet as being favourable to their pretentions and for this purpose they had given the first part of No. 856 of this author's work where he gives a summary of the judgment mentioned above and reported in the Gazette du Palais (1906-1-437); but on verifying the matter I found that this citation is incomplete and that in fact Sachet at the end of No. 856 declared that this decision of the Court of Cassation should be accepted with reserve, and virtually he combats it in another paragraph.

Under the circumstances I am of the opinion that the respondent's attorneys have no right to claim the costs or fees for this factum.

I had written the above opinion when I found that two of my colleagues were of the opinion that the plaintiff's action should be dismissed and that my two other colleagues were of the opinion that the case should be sent back to the Superior Court to complete the evidence and bring out certain facts which should have been clearly proved.

As the opinion of the latter is somewhat in accordance with my views I am ready to agree with them in order that a final judgment may be rendered.

Without entirely agreeing with the opinion of my colleague, Anglin, J., I would however be disposed to adopt for the purpose of the present case the conclusions of his judgment. The record must therefore be sent back to the Superior Court to be proceeded with in the way indicated in his opinion.

MIGNAULT, J.:—My colleagues, Anglin, J., and Brodeur, J., have given exhaustive opinions, so that I can express myself very briefly. The Workmen's Compensation Act of Quebec, R.S.Q. 1909, is practically a copy of the French Act of April 9, 1898. There is, however, a marked difference between the two laws. The French

law covers every workman in his dealings with his employer, irrespective of the amount of his salary, (art. 2), while the Quebec law, as it read at the time of the accident, had no application to the case of a workman receiving wages in excess of $1,200 per annum (art. 7326.) The French law thus absolutely excludes the common law action against the employer, while in the Province of Quebec, it was excluded only in cases where the wages were less than $1,200, which figure was raised this year to $1,500.

What is meant by "yearly remuneration" in the last paragraph of art. 7326? Is it the remuneration referred to in art. 7328, which, according to the method of calculation prescribed by this article, is either the actual remuneration allowed to the workman for twelve months of continuous occupation in the industry, or, when the workman has only been employed for a shorter term, the actual remuneration which he has received plus the average remuneration received by workmen of the same class during the time necessary to complete the twelve months, or finally, if the work is not continuous, the remuneration received while the work went on and the workman's earnings elsewhere during the rest of the year.

We cannot seek assistance from the French law, for it contains no disposition corresponding with the second paragraph of art. 7326. However, I cannot bring myself to believe that the yearly remuneration referred to in the two paragraphs of art. 7326 differs from the remuneration which serves as a basis for the calculation of rent. Therefore reference must be had to art. 7328 in determining what yearly remuneration excludes the application of the Workmen's Compensation Act as well as in determining the yearly remuneration which serves as a basis for the calculation of the rent.

We now pass to the next question. What is the "class" mentioned in the second paragraph of art. 7328? I have not been free from some hesitation on this question. I think, however, that we must follow the interpretation given to para. 2 of art. 10 of the French law by the Court of Cassation (Gazette du Palais, 1906, 1st semestre, p. 437), before this provision of the law had been adopted by the Quebec Legislature. In practically the very words of this decision, when the disabled workman has been employed for less than a year and has during this time held positions unequally remunerated, the wages of the first class of workmen, in the number of which plaintiff had first been enrolled at the time of his engagement, and not the wages he was earning at the time of the accident, are to be considered in completing by fiction the work of the twelve

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months.

There still remains to be considered the method of calculating the workman's salary in the cases to which the second paragraph of art. 7328 applies. Here I adopt the method followed by my brother, Anglin, J., in rendering his opinion. He first takes the total number of days of work (for the period during which plaintiff was employed) of all the workmen in the same class. By this I understand workmen doing similar work, and it is not necessary that they should receive exactly the same salary as the plaintiff. We then take the total amount paid them during the time of their engagement. The second figure divided by the first gives the average daily wage, and this, multiplied by the total number of days required to complete the twelve months, gives the salary, which under art. 7328, para. 2, the victim would be presumed to have received during this period. In this manner we necessarily take into account the time lost by workmen, and it is immaterial that Sundays and holidays are included in the figure representing the total number of days of work of all workmen in the same class, as they are also included in the figure representing the number of days required to complete the twelve months, and the calculation is made on the same basis.

For the purposes of this case it is sufficient to indicate this method of calculation. There is of course the question of extraordinary or forced unemployment, which is discussed by my brother, Anglin, J. I can readily see that in each of the cases provided for by art. 7328 there may be extraordinary unemployment, not at all desired by the workmen, and that it would be unjust to take no account of this unemployment in fixing the salary of the disabled workman, thereby reducing by so much the salary which serves as a basis for calculating the rent. I do not want to go further in this case, as I see no indication of any such unemployment in the record. While therefore I concur with the instructions which my colleague thinks we should give to the Superior Court on the subject of unemployment, I only do so for the purposes of the present case, and to allow of a final judgment without further appeals. Should it be discussed again before us in another case, I reserve myself the fullest liberty to consider the entire question of forced or involuntary unemployment.

The proof in the record is not sufficient to allow us to calculate the salary according to the rule of the second paragraph of art. 7328. There were fifteen employees, machinist helpers, receiving the same salary as plaintiff, but there were in all twenty-seven

machinist helpers unequally remunerated. All the workmen of the same class should have been taken into account, without requiring an exact identity of salary. The duration of the work of these machinist helpers nowhere appears, although the total amount paid them is given. Besides, Dockrill's list of fifteen workmen receiving 32½ cents per hour shows such inequalities that evidently some of these workmen must have been employed for a longer time than others. Under these circumstances, and seeing that the trial Judge has not indicated his method of calculation, we have no alternative but to send the case back to the Superior Court, to be dealt with there according to the rules outlined above.

I may add that the judgment of the Court of Appeal cannot be maintained. The action was clearly brought under the Workmen's Compensation Act, 1909 (Que.), ch. 66, and could not be changed into an action at common law. I favour amendments as much as possible, but such an amendment should not be allowed, as it changes the nature of the action, (art. 552 C.C.P.) The Workmen's Compensation Act shews that the recourse under this Act and the recourse at common law cannot exist together between the same parties, employer and workman. They are irreconcilable, and if they were joined in the same action, plaintiff would be forced to choose between them (art. 177 C.C.P., para. 6).

The appeal should therefore be allowed and the record sent back to the Superior Court to be dealt with there according to the instructions contained in the opinion of Anglin, J. I concur in the adjudication of my brother as to the costs of the case.

Appeal allowed, new trial ordered.

TOWNSHIP OF SOUTH GRIMSBY v. COUNTY OF LINCOLN and TOWNSHIP OF NORTH GRIMSBY.

COUNTY OF LINCOLN v. TOWNSHIP OF SOUTH GRIMSBY.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Magee, Hodgins and Ferguson, JJ.A. February 18, 1921.

Highways (§III—100)—Taxes for Maintenance—Act of 1882 (Ont.)—Exemption under—Liability under Highway Improvement Act, R. S. O. 1914, ch. 40.

The Act of 1882 which divided the township of Grimsby into two municipalities and exempted South Grimsby from "any rate, tax,

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liability or expenditure whatsoever, which but for the passing of this Act, would have been assessable, ratable and taxable against the original township of Grimsby in respect or on account of the road known as the Queenston and Grimsby road," is comprehensive enough to relieve the municipality from any liability for taxes required to maintain the road although it is now included in the good roads system under the Highway Improvement Act, R. S. O. 1914, ch. 40.

[Village of Merritton v. County of Lincoln (1917), 39 D.L.R. 328, 41 O.L.R. 6, distinguished.]

APPEAL in the first action by the plaintiff township corporation from the judgment of Orde, J., (1920), 55 D.L.R. 599, 48 O.L.R. 211. Reversed.

APPEAL in the second action by the same township corporation, defendant in that action, from the judgment of the County Court of the County of Lincoln in favour of the plaintiff county corporation in an action to recover the sum of $453.43 levied by the county corporation against the township corporation by a by-law in respect of the Queenston and Grimsby Road. Reversed.

W. S. MacBrayne, for the appellant corporation.

A. W. Marquis, for the county corporation, respondent.

G. S. Kerr, K.C., for the Corporation of the Township of North Grimsby, respondent.

The judgment of the Court was read by

MEREDITH, C.J.O.:—The Corporation of the Township of South Grimsby, the plaintiff in the first action and defendant in the second action, appeals from the judgment of Orde, J., dated September 14, 1920, 55 D.L.R. 599, 48 O.L.R. 211, pronounced after the trial before him sitting without a jury at Toronto on the previous March 19, 1920.

The first action is brought for the purpose of obtaining:—

1. A declaration that the appellant is not liable for any portion of the levy made on it by the respondent Corporation of Lincoln under by-law No. 605, in so far as the levy is made in respect of the Queenston and Grimsby road; that the levy is illegal and void; and that the appellant should not be assessed, rated, or taxed for any portion of the cost of that road under the system of good roads. 2. A declaration that the respondent Corporation of North Grimsby is liable for all assessments in respect of that road, and that the assessments should be made against it. 3. A mandamus to the Corporation of Lincoln to repeal the assessment. 4. An injunction restraining that corporation from levying on or seeking to collect

from the appellant any assessment in respect of that road.

North Grimsby and South Grimsby originally formed one township, bearing the name "Grimsby." By the Act 45 Vict. ch. 33, the township was divided, and the Townships of North Grimsby and South Grimsby were created.

The road in question was acquired by the respondent Corporation of Lincoln on May 17, 1860, and since then has been owned and maintained as a county road. It is the main thoroughfare through the county; it extends from the western boundary of the county to Queenston; no part of it lies within South Grimsby.

One of the provisions of the Act that has been referred to is that:—

"From and after the said last Monday of December, 1882, any rate, tax, liability or expenditure whatsoever, which, but for the passing of this Act, would have been assessable, ratable and taxable against the said original Township of Grimsby, in respect or on account of the road known as the Queenston and Grimsby road, shall be assessed, rated and taxed against the said Township of North Grimsby, and shall be borne and paid by the said Township of North Grimsby solely, and the said Township of South Grimsby shall not thereafter be liable or be rated, assessed or taxed therefor."

Down to 1917, North Grimsby was assessed in respect of the road, and paid its assessments.

On February 3, 1917, the Council of the Corporation of Lincoln, by by-law No. 600, adopted a plan for the improvement of its highways under the provisions of the Highway Improvement Act, R.S.O. 1914, ch. 40, and formed certain of its highways, including the road in question, into a system of highways under that Act, and on June 9, 1917, passed by-law No. 605, which authorised and required the Warden to raise by way of loan on the credit of the corporation $50,000 for the purpose of meeting the expenditure for improvement of the highways mentioned in by-law No. 600, and on the same day passed a by-law, No. 607, imposing and for levying a rate of 55/100 of a mille on all the rateable property in the county for the payment of the interest on the loan of $50,000 and to provide a sinking fund for the payment of the debentures; and the rate assessed against the appellant under this by-law is $450.43. Expenditures amounting to about $300,000, in addition to the $50,000, have been made by the Corporation of Lincoln on the roads forming the good roads system, but when the action was

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begun no rate had been imposed in respect of that additional expenditure, but the Corporation of Lincoln claims that the appellant is liable to be assessed in respect of it; and, if its claim is well founded, the appellant would be liable to pay about one-tenth of the $300,000.

The contention of the appellant is that the expenditures made on the road in question, under the authority of the Highway Improvement Act, are expenditures from which it is relieved by the Act 41 Vict. ch. 33. This is disputed by the respondents, and in support of their contention, they rely on the decision of this Court in *Village of Merritton* v. *County of Lincoln* (1917), 39 D.L.R. 328, 41 O.L.R. 6, and they also contend that the question now raised by the appellant was decided adversely to it in an action in the County Court of the County of Lincoln in which the Corporation of Lincoln was plaintiff and the appellant was defendant, and the Corporation of North Grimsby was a third party, and that the question raised is *res adjudicata*. That action is the one secondly mentioned, and the appellant appeals from the judgment pronounced in the County Court in it.

My brother Orde held that the question was not *res adjudicata*, but that the case was governed by *Village of Merritton* v. *County of Lincoln*, and he dismissed the action, 55 D.L.R. 599.

The question of *res adjudicata* is not important now that the judgment in the County Court action is in appeal before us, and the only question is, whether or not the principle of our decision in *Village of Merritton* v. *County of Lincoln* is applicable to the case at Bar.

With great respect, I am of opinion that this case is not governed by *Village of Merritton* v. *County of Lincoln*, and that the principle of that case is not applicable.

In that case, the liability from which certain municipalities were relieved was "any liability or expenditure *connected with the assumption by the Corporation of the County of Lincoln of the Queenston and Grimsby Road as a county road;*" and the *ratio decidendi* was that the liability under the Highway Improvement Act was not a liability connected with the assumption of the road as a county road, but a different liability arising out of the provisions of that Act.

What by the statute relieving the appellant it was relieved from was, "any rate, tax, liability or expenditure whatsoever, which, but for the passing of this Act, would have been assessable, rateable

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and taxable against the said original Township of Grimsby, in respect or on account of the road known as the Queenston and Grimsby road."

This language is of the most comprehensive character, and not, as in the Act under consideration in *Village of Merritton* v. *County of Lincoln*, limited to liability connected with the assumption of the road as a county road.

The liability from which the appellant seeks to have it declared that it is relieved is, in my opinion, a liability which but for the passing of the Act would have rested on the Corporation of Grimsby in respect or on account of the Queenston and Grimsby road, within the meaning of the special Act. The road is still the Queenston and Grimsby road, although it is maintained as part of the good roads system, and the County Council of Lincoln is still under obligation to maintain it and make its assessments upon the rateable property in the county just as it makes its assessment in the case of any other road under its jurisdiction.

For these reasons, I would allow both appeals with costs, reverse the judgment of the County Court and substitute for it judgment dismissing the action with costs, and reverse the judgment of my brother Orde with costs and substitute for it judgment in the terms of paras. 1, 2, and 4 of the prayer of the statement of claim, and in accordance with the prayer of the 16th paragraph of the statement of defence of the Corporation of Lincoln, declaring that the Corporation of North Grimsby is liable to be assessed in respect of the expenditure to the extent to which it is declared that the appellant is relieved therefrom.

Appeals allowed.

THE MONTREAL TRAMWAYS CO. v. GIRARD.

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Supreme Court of Canada, Idington, Duff, Anglin, Brodeur and Mignault, JJ. June 21, 1920.

Master and Servant (§V—340)—Workmen's Compensation Act (Que.)—Injury Received—"Course of his Work"—Meaning of—R. S. Q. 1909 art. 7321.

An employee who is injured while returning from his work to his home in a tram car provided by his employer and in which he is entitled to be carried free has a right to compensation under the Quebec Workmen's Compensation Act, the injury being received

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"by reason of or in the course of his work" within the meaning of R. S. Q. 1909 article 7361.

[Girard v. Montreal Tramways Co. (1918), 57 Que. S. C. 294, affirmed. See Annotation, Workmen's Compensation Law in Quebec; 7 D.L.R. 5.]

APPEAL from the judgment of the Superior Court, sitting in review at Montreal (1919), 57 Que. S.C. 394, affirming the judgment of the trial Court and maintaining the respondent's action with costs. Affirmed.

A. Vallée, K.C., for appellant; *L. A. Rivet*, K.C., for respondent.

IDINGTON, J.:—There is (at this stage) only one fairly arguable point open for appellant to take by this appeal, and that is whether or not the phrase "accidents happening in the course of their work" used in the first section of the Quebec Workmen's Compensation Act, R.S.Q. 1909, arts. 7321 et seq., is to be construed as the equivalent of the phrase "happening in the course of their employment" in other Acts of a like kind, as, for example, in the English Workmen's Compensation Act.

If so, then there is ample authority for holding that, under the circumstances in question, including the implied engagement of appellant to transport men in their employment to and from their respective places of abode free of charge on the occasion of going to or quitting work, the respondent, by reason of the accident in question, is entitled to recover.

I cannot say that I have any very decided opinion on the question but in such an event I cannot properly reverse the unanimous judgments of the Courts below. I therefore conclude that this appeal should be dismissed with costs.

DUFF, J.:—I am of the opinion that this appeal should be dismissed with costs.

ANGLIN, J.:—This action is brought under the Workmen's Compensation Act of Quebec, R.S.Q. 1909, arts. 7321 et seq. and amendments, and the plaintiff holds a judgment for $2,280, affirmed by the Court of Review, 57 Que. S.C. 394, against which the defendant appeals.

These grounds of appeal are advanced: (1) that the plaintiff's disability is not due to the fall from which he avers it has resulted; (2) that the compensation awarded is excessive; and (3) that the injury was not suffered in the course of his work.

There is abundant evidence to sustain the finding in the plaintiff's favour on the first ground and no case has been made for interference with the amount of the compensation awarded.

The third ground of appeal presents the only debatable question, viz., whether the injury in respect of which the plaintiff claims compensation was occasioned "by reason of *or* in the course of (his) work"—"par le fait du travail, *ou* à l'occasion du travail"—within the meaning of art. 7321 of the R.S.Q. 1909.

When injured the plaintiff was returning from his work to his home in a tramcar of the defendant company on which he was entitled to be carried free, under the following provision in the company's booklet of "Instructions to Conductors and Motormen."

(Instructions to conductors and motormen.)

Montreal Tramways Company, No. 36.—Carriage of employees. —Conductors, motormen, switchmen, and other employees of the company wearing the uniform and carrying their badge prominently exposed, can travel free on the cars of the company in coming to or going from work. These employees must travel in the interior of the car when there is sufficient room, but must not hold seats while other fares are standing, and they must not converse with the employees of the company.

Although it was not expressly made a term of the formal contract between the defendant company and its employees that the latter should be carried free between their homes and the company's sheds in going to and returning from their work, the evidence leaves little room for doubt that this privilege was recognised as an established custom of the defendants and that the right to enjoy it really formed part of the consideration for which the employees gave their services.

I extract the following paragraph from the judgment of the Superior Court, 57 Que. S.C. 394 at pp. 395-396:—

"Considering, on the questions of law, that according to the custom followed and the very regulations of the company-defendant placed in the hands of its employees, every employee engaged in the conduct of the tramways may enter any tramway free of charge in coming to or returning from work; that this provision is for the advantage of the defendant in assuring it of a greater punctuality on the part of its employees, in giving it fresh workmen as it saves them the fatigue resulting from a walk to or from the car sheds; that this provision is likewise for the advantage of the employees, as adding to their wage a sort of bonus over and above the actual money they receive; that it would therefore appear that the coming to and returning from work in the defendant's cars to do the work required from the plaintiff, forms part of the contract of lease and

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hire of services existing between him and defendant, and that under the circumstances the accident which befell the plaintiff arose in the course of his employment, and that the provisions of the Workmen's Compensation Act are therefore applicable."

The evidence supports the conclusions of fact in this passage.

The use of the conjunction "or" in the Quebec statute in lieu of the conjunction "and" in the English Workmen's Compensation Act ("arising out of *and* in the course of the employment") will not have escaped attention. The use of the disjunctive in the French statute of 1898, from which the Quebec law is taken, was deliberate and purposeful (Cabouat, Accidents du Travail, vol. 1, p. 186), and although a commentator in Rec. des Assurances, 1918, at p. 38, says:—

"In order to fall under the Workmen's Compensation Act, the accident must arise in the course of the employment, and bear to it the direct relation of cause and effect," the jurisprudence seems clearly to establish that "it is not necessary that the accident should arise from the very fact of the victim's employment. It is enough that it should arise in the course of this employment: (D.1900.2.181) —that the accident should bear a relation more or less definite to the exercise of the victim's trade."

Otherwise the effect of the two statutes in regard to the matter under consideration appears to me to be the same. I regard "by reason of" as the equivalent of "out of," and "in the course of their work" as identical in effect with "in the course of the employment" and I am prepared to accept as applicable to both statutes the view expressed by Buckley, L.J., in *Fitzgerald* v. *Clarke & Son* (1908), 1 B.W. C.C. 197 at p. 201, that "the words 'out of' point * * to the origin or cause of the accident; the words 'in the course of' to the time, place and circumstances under which the accident takes place."

It follows, I think, that while some cases which are within the Quebec Act may not be covered by the English Act, since it requires that both conditions must be fulfilled, any case within the English Act must necessarily fall within the Quebec statute, which will *ex facie* be satisfied if the accident either arises by reason of, or arises in the course of, the work or employment.

While in view of such decisions as *Davies* v. *Rhymney Iron Co.* (1900), 16 T.L.R. 329; *Walters* v. *Staveley Coal & Iron Co.* (1911), 105 L.T. 119; *Nolan* v. *Porter & Sons* (1909), 2 B.W.C.C. 106; *Edwards* v. *Wingham Agricultural Implement Co* [1913], 3 K.B. 596;

Philbin v. *Hayes* (1918), 87 L.J. (K.B.) 779; and *Gilbert* v. *Owners of Steam Trawler Nizam* [1910], 2 K.B. 555, the question whether upon a state of facts similar to those of the case at Bar an injured employee would be held to fall under the provisions of the English Act may be regarded as debatable, authoritative statements as to the scope of the statute in recent cases such as *Armstrong, Whitworth & Co.* v. *Redford* (1920), 36 T.L.R. 451; *Stewart & Son* v. *Longhurst* [1917], A.C. 249; *Marsh* v. *Pope & Pearson, Ltd.* (1917), 86 L.J. (K.B.) 1349; *Wales* v. *Lambton & Hetton Collieries* (1917), 86 L.J. (K.B.) 1346; *Thom or Simpson* v. *Sinclair*, [1917] A.C. 127; *Walton* v. *Tredegar Iron and Coal Co.* (1913), 6 B.W.C.C. 592; and *Mole* v. *Wadworth* (1913), 6 B.W.C.C. 129; and in such earlier cases as *Gane* v. *Norton Hill Colliery Co.*, [1909] 2 K.B. 539; *Cremins* v. *Guest, Keen & Nettlefolds, Ltd.* [1908] 1 K.B. 469; *Blovelt* v. *Sawyer* [1904], 1 K.B. 271; *Holmes* v. *Great Northern R. Co.* [1900] 2 Q.B. 409; *Hoskins* v. *Lancaster* (1910), 3 B.W.C.C. 476; and *Moore* v. *Manchester Liners Ltd* (1908), 2 B.W.C.C. 87; and the reasoning in *Whittall* v. *Stavely Iron & Coal Co* (1917), 86 L.J. 985, rather incline me to think that under the circumstances such as those of the present case an employee of an English company, injured as the present plaintiff was, would be held to be within the purview of the English statute. As put by Warrington, L.J., in the case last cited at p. 989, "The real question that the Court has to ask itself is: Was it an express or implied term of the contract of service that the workman should do, or should be entitled to do, that which he is doing at the time when the accident happened?"

And as Bankes, L.J., said in the same case at p. 989, "It is necessary to inquire when deciding whether the accident arose in the course of the employment, whether the accident took place upon a way which the workman was using as of right, because then it would be a term either expressed or implied of his engagement that he was to be at liberty so to use it."

It seems to me that, upon the findings of the trial Judge, which the evidence warranted, the case at Bar falls within the principle of the decisions in *Cremins* v. *Guest, Keen & Nettlefords* [1908] 1 K.B. 469, where the workman was held entitled to recover upon a finding that it was an implied term of his contract of service that the train upon which he was being carried should be provided by the employer and that employees should have the right to travel to and fro upon it without charge with the result that the employment was

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taken to begin when they entered the train in the morning and to cease when they left it in the evening, and in the similar case of *Walton* v. *Tredegar Iron and Coal Co*, 6 B.W.C.C. 592, in which there was a like result notwithstanding a special indemnity contract with the employers, rather than within the decision in *Davies* v. *The Rhymney Iron Co.*, 16 T.L.R. 329, where the contrary view was taken although the workman had availed himself of facilities given by his employer to go home, the Court there regarding the service rendered by the employers as purely gratuitous. The decision in *Coldrick* v. *Partridge, Jones & Co.* [1910] A.C. 77, is also in point.

Lord Cozens-Hardy, M.R., laid it down in *Read* v. *Baker* [1916] 1 K.B. 927, at p. 929, that "the facts being admitted or not disputed, it becomes a question of law whether the accident arose out of the employment."

On the other hand Lord Buckmaster said in *Stewart & Son* v. *Longhurst* [1917] A.C. 249, at pp. 258-9, "In my opinion, however, the learned county court judge has fallen into error in his endeavour to obtain from outside cases a fixed standard of measurement by which to test the meaning of the words in the statute 'in the course of' and 'arising out of' employment. Some of the reported cases * * * appear to me to have made the same mistake and to have attempted to define a fixed boundary dividing the cases that are within the statute from those that are without. This it is almost impossible to achieve. No authority can with certainty do more than decide whether a particular case upon particular facts is or is not within the meaning of the phrase."

The facts in the very late case of *Armstrong, Whitworth & Co.* v. *Redford*, 36 T.L.R. 451, bear a curiously close resemblance to those in the recent French case of *Masson* v. *L'Urbaine Seine*, Rec. des Assurances, 1918, p. 37. In both cases the employer provided a canteen for the exclusive but optional use of its employees. In each the canteen had no direct connection with the factory premises and access to it was by a separate entrance and a stairway. In each the employee was injured by falling on the stairs when returning from the mid-day meal to resume work. In the English case the employer was held liable by the House of Lords (Lords Sumner, Parmoor and Wrenbury), on the ground that the employee might be regarded as "in the course of the employment" while descending the stair-case to the actual spot where the work lay. Viscount Finlay and Lord Dunedin dissented. In the French case the Tribunal Civil de la Seine (4ème ch.) dismissed the action on the ground that the

accident had occurred during an interruption of the employment and was "sans relation avec le travail."

Giving to the decided cases the consideration and weight to which I consider them to be entitled it seems to me that the plaintiff may fairly be regarded as having been, when injured, doing something which an implied term of his engagement "entitled him to do"—that he was on the tramcar solely by virtue of his contract of his service—that he was making use of the means provided by his employer to convey him to his home—that he was doing something ancillary or incidental to the work for which he was employed. *Davidson & Co.* v. *McRobb* [1918] A.C. 304, and that the accident which befell him may therefore fairly be said to have "arisen out of and in the course of his employment."

But we are not without French authority directly bearing on the subject which, for the reasons stated in the recent judgment delivered in this Court in *St. Lawrence Bridge Co.* v. *Lewis* (1920), 58 D.L.R. 386, 60 Can. S.C.R. 565, is entitled possibly to even greater weight. The idea that injury sustained by a workman while being taken to and from his place of work in a conveyance provided by his employer as a term of the contract of hiring should be regarded as part of the risk involved in his employment has received judicial approval in France both before and since the enactment of the law of 1898, D. 1898, 2.123; Gaz. du Palais, 1898.2.66; Loubat, No. 464, Sachet, Nos. 322-4. Under the law of 1898 and subsequent legislation, in this respect similar, there have been several applications of this doctrine. Thus in *Lafaye* v. *Chemins de fer de l'Est* 1 Gaz. du Palais, 1901.1.310; D. 1901.2.277, the company was held liable for injury sustained by a workman while proceeding, after his work had been finished, to take his place in a train provided by the company to carry him gratuitously to his home in fulfilment of a term of his engagement. Again in a case before the Cour d'Appel de Grenoble, reported in the Gaz. de Tribunaux, 1904.2.204, and in D. 1905.2.83, the holding was that "Where a workman travelling from his work to his home at his employer's expense meets with an accident, this must be considered as arising in the course of his employment, with which it is connected by an indisputable relation of cause and effect."

The return journey was regarded as part of the period of employment for which the workman's wages were paid. In a recent case in the Cour de Cassation, D. 1917.1.123 (32ème espèce), a workman en route to his work injured while unnecessarily crossing

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some railway tracks in proceeding by a shortcut, which he had, with the knowledge and tacit consent of his employers, been accustomed to use, was held entitled to recover, the Court finding that "the accident took place at an hour when the resumption of work required the presence of the workman in this place," and that "the spot where the accident took place should be considered as an appendage of the place of work."

But in 1910 the Cour de Cassation (Ch. des Req.) decided the case of *Veuve Dauvert* v. *Comp. de Tramways de Cherbourg*, Gaz. des Trib. 1910 (Vol. 2) 1, 143, which seems to me to be indistinguishable from the case at Bar. Dauvert, an employee of the company, was killed by falling from a platform of a tramcar on which he was being taken from the car-sheds to his home. By a general rule of the company employees coming to and leaving their place of employment (the company's car-sheds) were permitted to ride gratuitously in the tramcars between their homes and the car-sheds. The trial Court had taken the view that this rule had been passed with a view to ensuring regularity in service and that it secured moreover an advantage for the employees which constituted a veritable addition to their salaries and which thus presented indisputable characteristics of a stipulation in the contract of employment. The Cour de Cassation found no error in the conclusion of the Court that the accident which had caused the death of Dauvert occurred "à l'occasion du travail," (in the course of his employment) and his widow's recovery was upheld. I think we may safely follow the precedent which the last cited case establishes and in the case at Bar uphold the judgment of the Court of Review, 57 Que. S.C. 394, confirming that of the Superior Court in favour of the plaintiff.

The appeal should be dismissed with costs.

BRODEUR, J.:—This is an action under the Workmen's Compensation Act, R.S.Q. 1909, arts. 7321 et seq., of the Province of Quebec. The plaintiff respondent was employed by the appellant company as a watchman or motorman. His work was over and he had turned in his car at about two o'clock in the morning. He then boarded another of the defendant's cars to return home. When he rose to leave the car, he fell heavily on the icy and slippery floor. He suffered pains in the abdominal region as a result of the fall, but nevertheless returned to work next day after applying bandages to the injured spot. The pains increased in acuteness, and he consulted his doctor, who examined him and found him suffering from

hernias. One of these seemed to be healed when the trial took place, but the other was still present and caused a partial and permanent incapacity.

The principal question in the case is whether an employee of a tramways company, who is the victim of an accident while travelling free of charge from his work, can sue under the Workmen's Compensation Act.

The evidence shows that the employees of the appellant company receive at the time of their engagement a booklet entitled "Instructions to conductors and motor-men." Article 36 of these regulations provides that the employees of the company wearing the uniform may travel on the cars of the company to come to and return from work.

The appellant argues that this regulation is a mere favour, which cannot be construed as constituting an obligation.

I am of the opinion that this free transportation given by the company to its employees is to its own advantage as well as to that of its staff. As Lafontaine, J., so well expresses it, this assures the company of a greater punctuality on the part of its employees, who can thus start their work fresh and vigorous, being saved the fatigue that would result from a walk to the place where they find their car. On the other hand, this constitutes a bonus, forming part of the wages which the company is bound to pay. It would certainly fail in its obligations if it refused to carry its employees to or from work.

The regulations shew that the employees who make use of a tramway in this manner are subject in certain respects to the orders of the conductor in charge, and can only enjoy this privilege on observing certain conditions.

The responsibility resulting from the Workmen's Compensation Act is based on the state of dependence on an employer to which the victim of an accident is reduced. This responsibility is conditional on the existence of a contract of lease and hire of work. A workman calling for his pay at the close of his work would certainly be entitled to compensation if he then met with an accident. The same should hold true of a motorman who boards one of the company's cars to avail himself of the free transportation which forms part of his wages.

The Workmen's Compensation Act applies not only to accidents happening by reason of the work but also to accidents happening in the course of the work, that is to say, those which though not

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directly caused by the victim's work are due to an act connected with and more or less useful to the accomplishment of the work. (Cabouat, vol. 1, No. 150; Aubry & Rau, vol. 5, para. 372b, pp. 477-480; Dalloz, 1900-2-181.

As we know, the language of the French law is the same as that of the law of Quebec. In fact our legislation is taken practically word for word from the French law of 1898. Now it has been held in France by the Court of Cassation, in a case of the *Cherbourg Tramways Co.* v. *Dauvert*, Gaz. des Trib., 1910, vol. 2, p. 143, that an employee, in virtue of a general regulation of a tramway company allowing free passage between the office and their homes to employees coming to or returning from work, may sue under the Workmen's Compensation Act if he meets with an accident as the result of the fall on the platform of the car which was taking him home from work. Revue Judicaire des Accidents du Travail, vol. 11, (1910). Gazette des Tribunaux, 1900-1-143. The Court of Cassation holds that in this case the accident happened in the course of the work.

A decision to the same effect is found in the same review for the year 1913, at p. 143.

I therefore think it is very clear that plaintiff in the present case was entitled to sue under the Workmen's Compensation Act.

The appellant argues that the disability from which he suffers was not caused by the accident. That is a question of fact. The evidence shews that after the accident the employee felt pains, which justified the doctor to come to the conclusion, after examining the patient, that the accident had caused the hernia which had reduced his earning power. I do not think I would be justified in modifying the opinion of the two lower Courts on this question of fact.

The appeal should for these reasons be dismissed with costs.

MIGNAULT, J.:—According to the findings of the trial Judge as to the facts of the case, both by custom and by the regulations placed in the hands of its employees, allows them free carriage on its cars to and from work. This is for the benefit of the appellant as it makes for greater punctuality on the part of the employees and brings them fresh and vigorous to their work. It is for the benefit of the workmen, being sort of addition to their salary.

In the particular case, Girard was returning from work in one of the appellant's cars, when he fell, and according to the findings of the trial Judge on the facts, incurred a permanent and partial disability, entitling him in the opinion of the Superior Court and

the Court of Review, 57 Que. S.C. 394, to sue under the Workmen's Compensation Act of the Province of Quebec.

Did the accident in question happen by reason of or in the course of the respondent's work, in terms of art. 7321 R.S.Q. 1909? Both Courts replied in the affirmative, and the appellant now asks us to reverse the judgments rendered against it.

I have had the advantage of reading the very exhaustive opinion of my brother Anglin, J. He shews that in such a case, both the French and English Courts have held the employer responsible under the respective Workmen's Compensation laws of both countries. My brother, Brodeur, J., is of the same opinion, but bases himself solely on the French jurisprudence, which certainly furnishes a very useful guide in the interpretation of the Quebec statute, itself a copy of the French law, at least as far as I have referred to it above.

I must say, however, that I have not been free from some doubts. The object of the law is to protect the workman from accidents caused by his work or at least in direct relation with it. In this case, in spite of the privilege granted by the appellant to its workmen of free passage on its cars to and from work, whether for the benefit of the workmen or for that of the company, it might be asked whether an accident happening in the course of free transportation is caused by the work of the employee, or what direct relation they bear to each other. Nevertheless the jurisprudence allows the workman his recourse in this case. The case decided by the Court of Cassation on June 9, 1910, cited by my brother, Anglin, J., and reported in the Gazette des Tribunaux, 1910, 2nd semester, 1st part, p. 143, is practically on all fours with the present case for the findings of the trial Judge on the facts allow us to say that it was at least an implied condition of the contract of lease and hire of services that the respondent could travel free on the appellant's cars to and from work. This decision is therefore in favour of the judgment of which appellant complains.

It would be interesting at this point to quote the observations of the reporter of the decision of the Court of Cassation I have just referred to:

"In principle, a workman is not protected by the Workmen's Compensation Law of 1898 when he is the victim of an accident while coming to or returning from work, that is to say, before his day's work is begun or after it is over." C. de Douai, November 25, 1902, (Gaz. des Tribunaux, January 18, 1903); C. de Cassation,

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February 25, 1902, (Rec. Gaz. des Tribunaux, 1902, 2nd sem., 1, 6; Dalloz, 1902, 1, 273); March 3, 1903 (Rec. Gaz. des Tribunaux, 1903, 2nd sem. 1, 61; Dalloz, 1903, 1, 273).

It is otherwise, and the workman comes under the provisions of the Workmen's Compensation Act of 1898, when, owing to the nature of the work or the distance of the workshop, the employer has undertaken the transportation of the workmen. In such a case, the accident which happens to a workman in the course of the transportation, is an accident under the Workmen's Compensation Act. C. de Caen, June 25, 1901 (Rec. Gaz. des Tribunaux, 1901, 2nd sem. 2, 421); C. de Grenoble, May 27, 1904 (Rec. Gaz. des Tribunaux, 1904, 2nd sem., 2, 204; Dalloz, 1905, 2, 83).

Does this exception still hold, when it is no longer a question of transportation at the employer's expense, but the employer has simply granted to his workmen permission to travel free of charge?

This was the question before the Court in the present appeal. It was decided in the affirmative. From the juridical point of view this decision may possibly be correct, in view of the precedents furnished by the jurisprudence, in the case where the employee coming to work is injured in the course of transportation at the employer's charge.

From the practical point of view, it may be asked if the decision just rendered does not confirm the opinion of those who think that when protection goes beyond certain limits, it produces results diametrically opposed to the good effect expected. Indeed it would not be surprising, if in consequence of this decision the tramways company should withdraw from its employees the permission to travel free of charge, being doubtless unwilling that this authorization should be a source of expense. An accident happening in the course of free transportation comes under the Workmen's Compensation Act. Very good, but there will be no more free transportation.

I endorse this opinion in every respect.

The appeal must therefore be dismissed with costs.

Appeal dismissed.

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Ontario Supreme Court, Rose, J. January 7, 1921.

Negligence (§11B—88)—Contributory—Child of eight—Capacity and Intelligence the Test.

There is no law in Ontario that no child of 8 can be held to be guilty of contributory negligence. The test is whether he has displayed such reasonable care as was to be expected of him having regard to his youth and general intelligence.

[Potvin v. Canadian Pacific R. Co. (1904), 4 Can. Ry. Cas. 8; Tabb v. Grand Trunk R. Co. (1904), 8 O.L.R. 203; Moran v. Burroughs (1912), 10 D.L.R. 181, 27 O.L.R. 539; Schwartz v. Winnipeg Electric R. Co. (1913), 12 D.L.R. 56, 23 Man. L. R. 483; Hargrave v. Hart (1912), 9 D.L.R. 521, followed. See Annotation, Negligence 9 D.L.R. 522.]

ACTION for damages for personal injuries to infant by the alleged negligence of the defendants; and for expense incurred by the father, who sued both as next friend and personally.

J. W. Curry, K.C., for plaintiffs.

D. L. McCarthy, K.C., for defendants.

ROSE, J.:—The accident happened on the company's tracks north of Wallace Ave., in Toronto. At the place in question there is a main line track running north and south. West of the main line, and parallel with it, is a long siding. From the main line, and from the siding, switches lead to factory premises on either side.

East of the company's property is a field called by the witnesses "Ward's field." In this the boys living in the neighbourhood play baseball and football and other games. The defendants have had difficulty in maintaining their fence between the field and their own property. Some three years before the accident, a new wire fence was erected, but it was soon broken, in many places, by persons who find this a convenient point at which to cross the tracks on the way from their dwellings on the east to the factories on the west; and the section-foreman says that as soon as the fence is repaired it is broken down. At the time of the accident there was nothing to prevent access from the field, at a point near where the accident happened, to the railway property.

On the day of the accident, the boy, Stewart Downing, whose age was 8 years, was in the field with other boys. Some cars were brought up from the south, to be placed on the factory switches, and he and another boy, a little older, went to watch the operation. There is a little confusion as to the place at which the boys entered the company's property, and as to the sequence of their movements

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thereafter; but this is unimportant. They had separated before the accident, and at the time to which the material evidence relates the older boy was somewhere to the west of the cars, and Stewart Downing was to the east of them. The older boy does not seem to have been seen by any of the railway employees until after the accident.

The cars were pushed by the engine across Wallace Ave. Three of them were then cut off and left on the main line, the brakes being set by the witness Worth, who remained near those cars, while the engine pulled the other cars to the south and then pushed them north, into the long siding, where two of them were left.

While Worth was standing beside the three cars, he saw Stewart Downing to the east of the track, but near it. The boy says he was sitting on the grass a few feet from Worth—he does not know whether in the field or on the company's property—whereas Worth says he was on the fence, off the right of way. The jury seem to have thought he was on the company's property. Wherever he was, there was some conversation between him and Worth. He is probably in error in thinking that it was conversation about a big yellow car which Worth told him was filled with ice cream cones. There seems to have been no car answering the description, and I imagine that he is confusing a conversation which he had on some other occasion with another man with the talk that passed between him and Worth on the day in question. Worth says that the boy had a baseball-glove, and that they talked about baseball, and that he (Worth) told him that if he came about the cars he would not play baseball very long.

When the two cars were being pushed into the siding, Worth walked over to the siding, and, when the two cars were placed, set their brakes. While at the siding, of course, he could not see the boy, who was on the other side of the three cars.

After the two cars had been left on the siding, the engine again went to the south with such cars as were still attached to it, and then pushed these cars northerly on the main line, to couple on to the three which had been left there. At the moment when the cars came together, Stewart Downing, who had decided to rejoin his companion, was crawling across the track between two of the three cars—crawling because he could not otherwise get beneath the couplings—and had got almost across, so that, when the cars moved, a wheel, or some wheels, went over his leg. Apparently, no one connected with the company had seen him between

the time of his talk with Worth and the moment of the accident.

At the close of the plaintiff's case, Mr. McCarthy moved for a nonsuit. Judgment upon the motion was reserved, and the defendants gave evidence, and questions were submitted to and answered by the jury.

The jury found: (1) that the boy was on the defendants' line with the knowledge of the defendants—which means, I take it, with the knowledge of Worth—but not with the permission or on the invitation of the defendants; (2) that children were in the habit of being upon the line, at the place in question, to the knowledge of the defendants; (3) that the defendants objected to their being there, and tried to prevent it—the evidence upon which this finding is based, and which fully supports the finding, has not been referred to in my statement of the facts; (4) that the boy did not know that he ought not to be on the tracks; (5) that the defendants were guilty of a breach of their statutory duty to erect and maintain fences; (6) that the injury suffered by Stewart Downing was a result of such breach; (7) that the injury was caused by the negligence of the defendants; (8) that the negligence consisted in (a) not maintaining a fence, and (b) not ordering the boy off the property when speaking to him; (9) that the boy was guilty of negligence causing or contributing to the casualty; (10) that his negligence was (a) "in crawling under the cars" and (b) "the boy should have observed the engine."

The finding that the boy was negligent seems to me to render it unnecessary to decide either whether effect ought to be given to the motion for a nonsuit, or whether the breach of the statutory duty to maintain fences, or the failure of an employee (who would have no authority to allow the boy to be on the company's property) to order the boy to leave would (if there had been no contributory negligence) have supported a judgment in favour of this boy, who was (as the jury have found) a trespasser, and who was injured, not by anything negligently done by the defendants, but by getting in the way of the cars which were being moved, in the usual course of the company's business, upon the company's property. The case, it may be observed, is quite unlike *Tabb* v. *Grand Trunk R. Co.* (1904), 8 O.L.R. 203, and *Potvin* v. *Canadian Pacific R. Co.* (1904), 4 Can. Ry. Cas. 8, in both of which cases the train which did the damages was being operated unlawfully—the statute enacted that no engine should pass through a thickly peopled portion of a city at a speed exceeding 6 miles an hour unless the track was properly

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fenced; the place was a thickly peopled portion of a city; the track was unfenced; and the speed exceeded 6 miles an hour.

Notwithstanding Mr. Curry's argument to the contrary, I thought that it could not be said that it was the law in Ontario that no child of 8 can be held to be guilty of contributory negligence; and I submitted the question to the jury, telling them more than once that the standard by which the boy's acts were to be judged was not the standard which would be applied in the case of a man, and that what they were to consider was—and in this I used, as I remember it, the words of Moss, C.J.O., in the *Potvin* case—whether the boy had displayed such reasonable care as was to be expected from him, having regard to his youth and general intelligence.

Further consideration has convinced me that it was right to submit the question in the way in which it was submitted; and, of course, if the question was rightly submitted, the answer is conclusive, and the case fails.

Mr. Curry cited *Merritt* v. *Hepenstal* (1895), 25 Can. S.C.R. 150, in which Strong, C.J., at p. 152, adopting the language of Channell, B., in *Gardner* v. *Grace* (1858), 1 F. & F. 359, said: "The doctrine of contributory negligence does not apply to an infant of tender age." What the age was of the infant whose act the Court had to consider in *Merritt* v. *Hepenstal* does not appear from the report; but the age of the *Gardner* child was 3¼ years, and, presumably, the *Hepenstal* child was so young as to make its case analogous to that of the *Gardner* child; at any rate, I cannot read the *Hepenstal* case as deciding that the doctrine can never apply to a child 8 years old. In *Tabb* v. *Grand Trunk R.W. Co.*, *supra*, and in *Moran* v. *Burroughs* (1912), 10 D.L.R. 181, 27 O.L.R. 539, the law is stated much as it is in the *Potvin* case: in each, the capacity of the particular child is treated as the test. And in *Schwartz* v. *Winnipeg Electric R. Co.* (1913), 12 D.L.R. 56, 23 Man. L.R. 483, the Court of Appeal in Manitoba seems to have considered it important to know whether a child 8 years old had any excuse for failing to avoid an approaching car. See also the collection of cases in the note to *Hargrave* v. *Hart* (1912), 9 D.L.R. 521.

The action must be dismissed—with costs if they are demanded.

Action dismissed.

PRICE BROS. CO. LTD. v. MAROIS; VILLENEUVE v. MAROIS; DESBIENS v. MAROIS; BELL v. MAROIS.

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Quebec King's Bench, Lamothe, C.J., Lavergne, Carroll, Pelletier and Martin, JJ. June 27, 1919.

Prohibition (§I—2)—Not Justified by Irregularities Where Magistrate has jurisdiction to hear Complaint—Issues of fact not revised on.

Mere irregularities in the proceedings of an inferior Court, or insufficiency in the statement of the complaint do not justify maintaining a writ of prohibition if it does not appear on the face of the proceedings that there was a lack of jurisdiction in the magistrate to hear the complaint.

The question of necessity or urgency of doing certain industrial work on the Lord's day is a question of fact for the magistrate and his decision on this point cannot be revised or reversed by way of prohibition.

APPEAL from a judgment of the Superior Court dismissing a writ of prohibition. Affirmed.

L. G. Belley, K.C., for appellants.

A. Lachance, K.C., for respondents.

CARROLL, J.:—I have read in these cases the notes of Pelletier and Martin, JJ., and I wish to make a restriction as to one of the reasons given for confirming the judgment.

These actions were brought for violation of the Lord's Day Act, R.S.C. 1906, ch. 153. Sections 5, 6, 12 and 16 of this Act forbid working on Sunday except in case of necessity and it is because work was done without necessity on Sunday in the mills of the appellant that the prosecution was taken.

The magistrate condemned the appellants to pay a fine of $25.

After this judgment was given the appellants obtained a writ of prohibition from a Judge of the Superior Court. This writ of prohibition has been quashed.

The appellants pleaded various irregularities and illegalities in the proceedings before the magistrate, and I agree with the remarks made by my two colleagues as to this; but I respectfully differ as to the last ground taken, namely, that a writ of prohibition is not a proper legal remedy if an appeal exists.

Formerly in England the writ of prohibition was one of prerogative but the jurisprudence has changed it and to-day it is only an ordinary process as shewn by Shortt in his work on the subject. He says that this writ is one as of course and of absolute right in England. See also upon this point Chamier on the Law and Practice

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Relating to County Court Appeals, p. 89—a work published in 1896.

The writ of prohibition is a remedy under English law which was introduced into our Code of Civil Procedure (art. 1003) in the following terms: "A writ of prohibition lies whenever a Court of inferior jurisdiction exceeds its jurisdiction."

This text is clear and without restriction. It is not said that the writ of prohibition will not exist if there is another remedy; I do not see why this addition should be made to art. 1003.

When the Legislature intends to impose conditions in any proceeding it clearly declares so, thus for *mandamus* art. 992 C.C.P. provides: "If there is no other remedy equally convenient, beneficial and effectual, a mandamus lies to enforce the performance of an act or duty in the following cases."

And for *certiorari* art. 1292 says: "In all cases where no appeal is given from the inferior Courts mentioned . . . the case may be revoked by means of a writ of *certiorari*."

No restriction exists for the writ of prohibition, and if certain judgments have declared that recourse cannot be had to this writ when there is an appeal, it is because English or American authorities have been consulted. Article 1003 of our Code of Procedure is different.

PELLETIER, J.:—Here are the sole questions which the appellants submit to us: 1. The complaint does not disclose any violation; 2. It is vague and not precise and consequently a condemnation cannot be founded upon it; 3. The complaint shews two different and distinct violations; 4. It is a case of work by an industry covered by art. 6 of the statute forbidding work on Sunday; 5. This statute does not apply in the Province of Quebec in view of the reservation contained in art. 16.

As to the three first grounds I conclude that the complaint which practically reproduces the terms of the statute is sufficiently framed; that if it was not precise and particular enough the appellants had only *in limine* to demand particulars; that the complaint does not charge two violations as is said, but one of two matters joined which constitute labour on Sunday such as the Act prohibits.

The fourth ground is based on art. 6 of the Act, but it is necessary to read this art. 6 with art. 12, and if they are read together the conclusion follows that art. 6 only speaks of industrial process from the point of view of the twenty-four consecutive hours

of repose for which this art. 6 is exclusively made.

As to the last ground the Act of the Province of 1861 invoked by the appellant forbids certain things, but does not permit work on Sunday and, in consequence, the reservation in art. 16 of the statute does not apply.

Moreover there is now in our provincial statutes an Act the whole of which is almost the equivalent of the Federal Act upon work on Sunday.

The objections of the appellants are not then well founded.

If a writ of prohibition is useful and sometimes indispensable, to prevent the continuation of proceedings in matters as to which the inferior Court has no jurisdiction, or exceeds its jurisdiction, the writ of prohibition is the sole remedy before judgment; but here the four prosecutions are taken by virtue of Part 15 of the Criminal Code, and the appellants had, after judgment, the appeal upon the law and the facts given by sec. 749 of the Criminal Code by virtue of which they could not only procure a revision of the sentence of the magistrate upon all the points which are raised here, but could also recommence and complete all the proof in the Court of first instance; it is a remedy more efficacious and more complete after judgment than that of the writ of prohibition.

In my opinion the four judgments should be affirmed.

MARTIN, J.:—The appellant was prosecuted before the district magistrate of Chicoutimi by the respondent upon leave of the Attorney-General, with having committed an offence against the Lord's Day Act, to wit: "did unlawfully carry on your ordinary calling as manufacturers and in connection with the said ordinary calling for gain to do, employ then and there among other people, George Bell and others, against the form of the statute in such case made and provided."

After a lengthy *enquete*, the appellant was on May 4, 1917, found guilty and fined $25 and costs. Thereupon the appellant applied for and obtained the issue of a writ of prohibition seeking to enjoin further proceedings by the magistrate in the matter of this complaint.

The writ of prohibition was dismissed by judgment of the Superior Court for the district of Chicoutimi, on September 3, 1918. Hence the present appeal.

Several grounds of objection to the judgment were urged by counsel for the appellant, that the complaint was vague and lacked precision and contained two different and distinct offences. These

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were objections which could and should have been properly made before the district magistrate.

It does not appear on the face of the proceedings that there was lack of jurisdiction in the magistrate to hear the complaint. Of course, if there was an entire absence of jurisdiction over the subject matter of the complaint apparent on the face of the proceedings, the appellant would be entitled to relief by prohibition.

The complaint was drafted in the terms of sec. 5 of the Act and the magistrate had jurisdiction. Moreover, it does not appear that the appellant before the magistrate challenged the jurisdiction of the latter or contended that he had no authority to proceed by way of summary conviction. Mere irregularities in the proceedings of an inferior Court, or insufficiency in the statement of the complaint do not justify maintaining a writ of prohibition.

The main argument of counsel for the appellant was to the effect that the industrial process of the appellant was permitted and made legal under secs. 6 and 12 of the Act, and these sections made the provisions of sec. 5 inapplicable to any industrial process.

My interpretation of the Act is that sec. 6 merely creates an exception obliging the employer to give a day's rest in the work of any industrial process in which the regular day's labor is more than eight hours' duration, but the work of any industrial process on the Lord's Day is only permitted in cases of emergency and necessity.

The Revised Statutes of the Province of Quebec, 1888, sec. 3498, do not help the appellant, nor does the subsequent legislation of the Province of Quebec, 7 Ed. VII, ch. 42, (R.S.Q. 1909, art. 4466) and following, even if constitutional, help the appellant as by sec. 4467 industrial work on Sunday, except in cases of necessity or urgency, is forbidden.

It is unnecessary to decide whether this last Act is unconstitutional or not, though probably under the authority of the cases of *Attorney-General for Ontario* v. *Hamilton Street R. Co.* [1903] A.C. 524; *Ouimet* v. *Bazin* (1912), 3 D.L.R. 593, 20 Can. Cr. Cas. 458, 46 Can. S.C.R. 502; *Provincial Sunday Observance Laws* (1905), 35 Can. S.C.R. 581; *Drapeau* v. *Recorder's Court of the City of Quebec* (1918), 43 D.L.R. 309, 27 Que. K.B. 500; *Rodrigue* v. *Corp'n of the Parish of Saint Prosper* (1917), 37 D.L.R. 321, 26 Que. K.B. 396, 23 Rev. de Jur. 308, affirmed (1917), 40 D.L.R. 30, 56 Can. S.C.R. 157, the Provincial Act, 7 Ed. VII, ch. 42, would appear to be unconstitutional.

The question of necessity and urgency was a question of fact for the magistrate to pass upon and decide. We cannot revise or reverse his decision on this point by way of prohibition.

I think the case can be disposed of on another ground, namely, that a writ of prohibition will not lie if there is any other adequate remedy readily available, which there was here, by way of appeal both on questions of law and fact, under arts. 749 and following of the Criminal Code.

The foregoing remarks apply to the appeals of *Bell*, *Villeneuve* and *Desbiens* and the same respondent, and the result is that in my opinion these four appeals should be dismissed and the judgments of the Superior Court confirmed with costs.

Appeals dismissed.

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Ontario Supreme Court, Appellate Division, Mulock, C.J. Ex., Hodgins, J.A., Riddell and Masten, JJ. January 10, 1921.

Search and Seizure (§I—7)—Issue of search warrant—Sec. 629 Criminal Code—Omission of person issuing to give statement required by Form 1—Validity of warrant—Liability of person executing to damages.

Section 629 of the Criminal Code confers jurisdiction upon a Justice of the Peace to issue a search-warrant, provided he is "satisfied by information upon oath in Form 1 that there is reasonable ground for believing that there is in any building.....anything upon or in respect of which any offence against this Act has been or is suspected to have been committed." Form 1 requires the statement of "the causes of suspicion whatever they may be" and where this statement is omitted from the affidavit, the issue of the search warrant is contrary to law and illegal and the party who omitted to give such statement is liable in damages for the illegal search.

[Elsee v. Smith (1822), 1 Dow & Ry. (K.B.) 97; Smith v. Bouchier (1735), 2 Stra. 993, Cunn. 89 and 127, 94 E. R. 1081 and 1105, followed.]

APPEAL by defendant and cross-appeal by plaintiff from the judgment of Rose, J., upon the verdict of a jury, in an action for damages for wrongful dismissal and other wrongs.

The plaintiff alleged that he had been wrongfully dismissed from his employment with the defendant, and the defendant had, falsely and maliciously and without reasonable and probable cause, sworn to an information charging the plaintiff with stealing a

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number of tools, etc., and had also caused to be issued a search-warrant directing that the plaintiff's premises should be searched for these tools; and, further, that the defendant, in the company of two police officers, had unlawfully trespassed upon the premises of the plaintiff and his person and made a search.

At the trial, the claim of the plaintiff for wrongful dismissal was disposed of adversely to him, and the claim for malicious procedure in making the affidavit and issuing the search-warrant was also dismissed; the trial Judge holding that the plaintiff had not shewn that the defendant had not reasonable and probable cause for what he did.

The trial then proceeded as to the alleged trespass upon the plaintiff's property and the search thereon, and the jury assessed the damages at $200, for which amount and costs of the action the trial Judge directed that judgment should be entered for the plaintiff.

The defendant appealed from that part of the judgment; and the plaintiff's cross-appeal was from the dismissal of his other claims.

[The cross-appeal was dismissed upon the hearing.]

A. C. Heighington, for plaintiff.

Daniel O'Connell, for defendant.

HODGINS, J.A.:—Appeal by the defendant from the judgment of Rose, J., sitting with a jury at Toronto, in an action for wrongful dismissal and for $5,000 damages for other wrongs. Those damages were asked because, as was alleged, the defendant had, falsely and maliciously and without reasonable and probable cause, made an affidavit charging the plaintiff with stealing a number of tools, etc., and had also caused to be issued a search-warrant directing that the plaintiff's premises should be searched for these tools, and further that the defendant, in the company of two police officers, unlawfully trespassed upon the premises of the plaintiff and his person and made a search.

At the trial, the claim of the plaintiff for damages for wrongful dismissal was disposed of adversely to him, and the claim for malicious procedure in making the affidavit and issuing the search-warrant was also dismissed, the trial Judge holding that the defendant had reasonable and probable cause for what he did. The action then proceeded as to the alleged trespass upon the plaintiff's property, and the search thereon by virtue of the search-warrant, and the jury assessed the damages at $200. A very earnest argu-

ment was addressed to the Divisional Court, based upon the assumption that the defendant was not liable in trespass, but only in an action on the case, in which malice must be shewn.

It is to be observed that, owing to the ruling of the trial Judge under which he has held that the defendant had reasonable and probable cause for his application to the Justice for the search-warrant and for making his affidavit leading thereto, the only act which could give rise to damage was the entry upon the plaintiff's premises and the search thereon, as nothing else transpired. But it was contended that, even if the warrant was void or defective, the only action in which the defendant could be made liable was one in the case, in which malice must be shewn, and that trespass did not lie, as a warrant, legal on its face, protected the defendant.

The trial Judge in his charge says:—

"As the case went on, certain matters of law were, as you will remember, discussed by counsel. As the result of those discussions I came to the conclusion that there was only one matter for you; that is, the question whether the plaintiff, Hicks, ought to have damages for trespass upon his property."

He then discussed the search-warrant and its validity, and directed the jury that the warrant afforded no defence and did not justify the defendant's entry upon the plaintiff's land. He told the jury that in these cases of trespass they were entitled to consider the conduct of the trespasser when he was upon the property, and, according to what they thought of his conduct when he was there, they were entitled to assess the damages, and that if he was acting from malicious motives they might take that into consideration in fixing the damages for trespass. He pointed out to them that they were not awarding damages for malice, for insult, or for violence as such, but for a trespass and wrongful entry; that those damages, however, might be greater in the case of a person whose conduct was reprehensible in the particulars he mentioned. He then told the jury:—

"Now, unless you get somewhere in the case evidence that he was acting not for his own purpose to recover his own property but with a desire to hurt Hicks, you have not got evidence of malice. Now, I take his preliminary acts, because whatever attitude of mind he had when he went after the search-warrant he probably continued in until the time of the entry into the house. In the house, have you got any evidence of malice, any evidence of ill-will towards Hicks rather than evidence of a desire to get back his own property

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if it is there?"

He then discussed what took place in the house, and upon that charge the jury found the verdict.

My conclusion is that, assuming the trial Judge to have been right in withdrawing the claim for malicious procedure from the jury (and this Court has dismissed the plaintiff's appeal against that ruling), the damages which have been found include every element which could properly have been taken into consideration by the jury, either in trespass or case, if the latter action in any way survived that ruling. The distinction between the cause of action in what is technically known as an action of trespass and an action on the case may be, and in this case is, valuable as a matter of knowledge in considering many of the old cases and in properly appreciating elements which enter into damages under each cause of action. But in this case the distinction does not seem to be material, as *mala fides* in the execution of the warrant was left to the jury as proper for their consideration. See *Cooper v. Booth* (1785), 3 Esp. 135.

In Blackstone's Commentaries (Chitty), 18th ed., bk. III., p. 122, Lewis's ed., p. 122, Vol. III., the difference between these two forms of action is expressed in this way:—

"These are wrongs or injuries unaccompanied by force, for which there is a remedy in damages by a special action of *trespass upon the case*. This action of *trespass*, or transgression, *on the case*, is an universal remedy, given for all personal wrongs and injuries without force; so called because the plaintiff's whole case or cause of complaint is set forth at length in the original writ. For though in general there are methods prescribed, and forms of actions previously settled, for redressing those wrongs, which most usually occur, and in which the very act itself is immediately prejudicial or injurious to the plaintiff's person or property, as battery, non-payment of debts, detaining one's goods, or the like; yet where any special consequential damage arises, which could not be foreseen and provided for in the ordinary course of justice, the party injured is allowed, both by common law and the statute of Westm. 2 c. 24, to bring a special action on his own case, by a writ formed according to the peculiar circumstances of his own particular grievance. For wherever the common law gives a right or prohibits an injury, it also gives a remedy by action; and therefore, wherever a new injury is done, a new method of remedy must be pursued. And it is a settled distinction that where an act is done which is in itself

an *immediate* injury to another's person or property, there the remedy is usually by an action of trespass *vi et armis;* but where there is no act done, but only a culpable omission; or where the act is not immediately injurious, but only by *consequence* and collaterally; there no action of trespass *vi et armis* will lie, but an action on the special case, for the damages consequent on such omission or act."

Stephen on Pleading, pp. 17, 18, says that the action of trespass on the case originated in the power given to the clerks of the Chancery to frame new writs. "Under this power they constructed many writs . . . founded on the peculiar circumstances of the case thus requiring a remedy, and . . . which began, nevertheless, to be viewed as constituting, collectively, a new individual *form of action* . . . "

Judge Stephen in his Commentaries on the Laws of England, 14th ed. (1903), bk. 5, Vol. III, pp. 384, 385, says that the forms of personal actions, latterly recognised, were eight in number, viz., debt, covenant, assumpsit (founded on contract), and detinue, trespass, trover, trespass on the case, and replevin (founded on tort), and adds:—

"And although all forms of action have been abolished, and every action is now a simple action on the case, still every personal action continues to be more or less in the nature of one or other of the eight forms of action just specified."

Since the passing of the Judicature Act and the adoption of Rules consequent thereon, the sharp differences so clearly set out by Blackstone and other writers appear to have lost their importance, though not their significance, but I do not think it is advisable to endeavor to perpetuate them, save as guides to clear thinking. With the departure of scientific pleading, it must be enough if we keep in mind the proof necessary to insure success under the facts detailed in the record or emerging at the trial.

The Supreme Court of Ontario, in the exercise of its jurisdiction, has now power to grant all such remedies as any of the parties may appear to be entitled to, in respect to any and every legal and equitable claim, so that all matters in controversy may be completely and finally determined (Judicature Act, R.S.O. 1914, ch. 56, sec. 16 *(h)*. Pursuant to that very general direction as to the exercise of the Court's jurisdiction, the Act further provides (sec. 60 (1) that a jury may, in the absence of a direction to the contrary by the Judge, give a general or special verdict. The Consolidated Rules provide that the plaintiff shall state the nature of his claim and the relief sought in a pleading to be called the statement

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of claim (R. 109); that pleadings shall contain a concise statement of the material facts upon which the party pleading relies (R. 141); and that the plaintiff may unite in the same action several causes of action (R. 69). And, as already pointed out, it becomes the duty of the Judge, upon the facts proved, completely and finally to determine the matters in issue between the parties.

The distinction, therefore, between the actions of trespass and actions on the case does not seem to me to be vital in determining whether the damages in this case would have been properly recoverable, under the old practice, in an action for trespass or in an action on the case, subject always to this, that it should be clearly pointed out to the jury in any action what damages are properly attributable to each and every cause of action, a matter which is consistently done by Judges at the trial in almost every case. The case of *Clissold* v. *Cratchley*, [1910] 2 K.B. 244, supports the view that the Court is competent under the present practice to deal with cases such as this and can do so without difficulty.

It is true that special provision is made with regard to some actions such as malicious prosecution, libel and slander, and as to damages in these and other cases; but these are not material here, in view of the ruling of the trial Judge.

Dealing now with the arguments addressed to the Court in this case with regard to the effect of the warrant, I have already pointed out that damages have been given by the jury for all the consequences of the issue of the search-warrant, apart from those which might have been recovered in an action for malicious procedure, if that had been successful. I think the plaintiff has no cause to complain in respect to damages awarded, nor do I see any ground upon which the plaintiff can recover any further damages based upon anything that was proved to have occurred. The whole of the issues raised and the consequences flowing therefrom were, as I venture to think, properly presented to the jury.

The defendant, in his affidavit leading to the issue of the search-warrant, failed to comply with the provisions of sec. 629 of the Criminal Code. That section confers jurisdiction upon a Justice of the Peace to issue a search-warrant, provided he is "satisfied by information upon oath in form 1, that there is reasonable ground for believing that there is in any building . . . anything upon or in respect of which any offence against this Act has been or is suspected to have been committed," etc. Form 1 requires the statement on oath of "the causes of suspicion, whatever they may be," and this statement was omitted from the affidavit.

The basis, therefore, upon which alone the Justice could act was faulty in a material respect; and, as his jurisdiction must rest upon his judicial determination or satisfaction that reasonable ground existed for believing that there was in any building anything in respect of which an offence against the Act had been or was suspected to be committed, he could not properly come to this conclusion unless the ground of suspicion were stated: *Cooper* v. *Harding* (1845), 7 Q.B. 928; and, consequently, his issue of the search-warrant was contrary to law or illegal, and therefore void.

At common law, the jurisdiction of the Justice is the same as under the Code, as appears from the following taken from vol. 2 of Hale's Pleas of the Crown, p. 113:—"In case of a complaint and oath of goods stolen, and that he suspects the goods are in such a house, *and shews the cause of his suspicions*, a justice of peace may grant a warrant," etc.

In Burn's Justice of the Peace, 30th ed., vol. 5, p. 1179, the common law jurisdiction of a Justice is set out in the same words.

The statement in 9 Hals., p. 310, para. 625, that a Justice of the Peace has at common law the power, on an information being sworn before him alleging a suspicion that larceny has been committed, to issue a search-warrant, is too broad, as it is founded upon what I have quoted from Hale and Burn and on three other cases which I refer to later, in all of which it is shewn to be essential that the grounds of suspicion must be set out in order to found jurisdiction in the Justice. I know of no general jurisdiction over the subject-matter which would in any way give jurisdiction to the Justice apart from the Criminal Code and the common law.

It has been suggested that the cases of *Regina* v. *Walker* (1887), 13 O.R. 83, and *Rex* v. *Kehr* (1906), 11 O.L.R. 517, indicate that the warrant was merely irregular, and therefore voidable, and not void. Those cases do not, in my judgment, suggest any such conclusion. In both cases the warrant was quashed as having been illegally obtained; and, although the order quashing the search-warrant in the latter case contains, perhaps, an inconsistent provision for the protection of the police magistrate and the officers executing the search-warrant, they both proceed upon the basis that the warrant was *coram non judice*. In the *Walker* case the warrant, signed by one Justice instead of two, is declared wholly void, as being unauthorised, and it would be difficult to find any reason why want of jurisdiction in the one aspect should make a warrant void and not in the other. If the warrant is held

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to be merely voidable, then whatever was done under it until it was declared void would enable the person improperly suing it out to escape all the consequences, unless it were shewn that he, maliciously and without reasonable and probable cause, caused it to be issued.

In the case of *Elsee* v. *Smith* (1822), 1 Dow. & Ry. (K.B.) 97 Holroyd, J., at p. 105, remarks:—

"It is said that the granting the warrant is the act of the magistrate, and that, if any action lies, it is trespass against him, and that the party who made the representation upon which the magistrate acted is not liable. I think otherwise . . . If the warrant was illegal, and the defendant himself went with the officer to execute it, that might make him a guilty trespasser."

In *Smith* v. *Bouchier* (1735), 2 Stra. 993, Cunn. 89 and 127, 94 E.R. 1081 and 1105, a warrant to arrest the plaintiff was granted by the Court of the Vice-Chancellor of the University of Oxford, on the defendant's oath that he "suspected" that the plaintiff would run away. The custom of the Court required that the complainant should swear that he "believes." The plaintiff sued the defendant and also the Vice-Chancellor and the gaoler and officer who arrested him. The Court held all liable, the officer and gaoler for joining in the justification put forward by the Vice-Chancellor and defendant, as to whom the process was adjudged to afford no justification. The case was afterwards argued again for the Judge and officers (Cunn. 127, 94 E.R. 1105), and it was again stated that the Judge had no jurisdiction or power and that there was an absolute want of jurisdiction *in toto*.

In *Perkin* v. *Proctor and Green* (1768), 2 Wils. 382, 95 E.R. 874, the Court expressed its doubts as to the right of the officers and Judge to escape if they had not joined in the defendants' justification, the Chief Justice saying (p. 385, *ad fin.*): "Yet it seems they could not, as the whole proceeding was *coram non judice* and a mere nullity."

In *Andrews* v. *Marris* (1841), 1 Q.B. 1, 113 E.R. 1031, it appears that the Commissioners of a Court of Requests were empowered to make an order for payment of the debt by instalments, and upon proof of default to award execution for the whole debt. The Court held that an order for execution on the original judgment was incompetent, inasmuch as, being made prospectively, it dispensed with proof of default, and so was not merely an irregularity but a nullity.

The head-note in *Polley* v. *Fordham* (1904), 91 L.T.R. 525, before Lord Alverstone, C.J., and Kennedy, J., is:—"*Where it appears upon the face of a summons that a justice has no jurisdiction to entertain the matter . . . the person injured thereby may bring an action without alleging malice or want of reasonable and probable cause.*"

This was very similar in some respects to the present case in regard to the issue of the search-warrant. The conviction was for neglecting to have children vaccinated; and it appeared on the face of the summons that the children were 18 months of age. The statute provided for a conviction only in case the child was not vaccinated within 6 months of its birth, so that there was no jurisdiction in the magistrate to issue the summons. He did not, however, read the summons, nor were the facts brought to his notice before it was issued, and when the defendant was fined. Kennedy, J., at p. 528, says:—

"I have great sympathy with those who, having to discharge multifarious, difficult, and responsible duties, naturally enough rely to a large extent upon the services of their clerks and assistants and the officials whose duty it is to bring certain classes of illegality before the magisterial tribunal, but in fact as I understand the effect of the evidence, which, of course, Mr. Fordham gave frankly and fairly, if he had seen that summons this trouble would never have arisen."

Mr. Fordham in his evidence said:—"A metropolitan magistrate has no time to read all the summonses. An officer comes into the box and says, 'I want thirty summonses.' I say he can take them. Then summonses are made out, they are passed by the chief clerk, who puts a tick upon them, and when I see a tick I assume they are right, and sign without going into them."

Notwithstanding this evidence, the magistrate was held liable to an action because it was "a case which on the face of it the summons shewed that the time had gone by and that the Court had no jurisdiction."

In *Jones* v. *German*, [1896] 2 Q.B. 418, affirmed, [1897] 1 Q.B. 374, the facts were that the plaintiff was the butler of one Wood, who gave him notice to quit. Wood found that the plaintiff had several boxes packed, ready for removal; and, in consequence of information which he received, he requested the plaintiff to allow him to examine the contents of the boxes, which the plaintiff refused to do. Wood went before the defendant, a Justice of the

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Peace, and in the information stated the above facts, and the warrant was issued. The plaintiff, who had been arrested and committed for trial, was at the trial discharged, because Wood, the prosecutor, withdrew from the prosecution; and the plaintiff brought this action for trespass to goods and false imprisonment. Exception was taken to the information on which the search-warrant was grounded as being insufficient. The information was held to be sufficient, because the grounds of suspicion were sufficiently set out.

In my judgment, both upon principle and authority, the search-warrant must be held to have been issued without jurisdiction and to be therefore void.

It was further urged that sec. 25 of the Criminal Code protected the defendant. That section is as follows:—"Every one duly authorised to execute a lawful warrant issued by any court or justice of the peace or other person having jurisdiction to issue such warrant, and every person lawfully assisting him, is justified in executing such warrant."

I am unable to see how this provision can protect the defendant. The warrant not being a lawful warrant, but one which the Justice of the Peace had no jurisdiction to issue, the section is inapplicable. But even in case of a lawful warrant, it would be unreasonable, I think, to hold that the defendant properly came within the words "every person lawfully assisting." A person, if the warrant is a lawful one, is justified in assisting, and is therefore *primâ facie* protected. But if in the issuing of a lawful warrant malice and an indirect motive interpose, then to absolve the person guilty of improper conduct in procuring its issue would be allowing the person so acting to take advantage of his own wrong. If authority was wanted, the case of *Elsee* v. *Smith*, 1 Dow. & Ry. (K.B.) 97, affords one. Bayley, J., there says at p. 104:—

"He makes the charge, and he prevails upon the Justice to issue his warrant; and, upon that warrant being issued, he has no right to say, 'I am not liable for the consequences; because, true it is, I caused and procured the justice to issue his warrant, but the charge was not sufficient to authorise the justice to do what I required him.' I think that affords him no ground of defence."

My conclusion on the whole case is that the defendant, by failing to set out the causes of his suspicion, rendered the magistrate incompetent, for want of jurisdiction, to issue the warrant either at common law or under the Criminal Code. That being so, he, the defendant, was liable for the consequences which followed

from his act. Those consequences were, the warrant being void, that the trespass and search made under it were unlawful, and the defendant, having taken part in them, is liable in damages and is not protected by sec. 25 of the Criminal Code.

I further think, in view of the Judge's ruling at the trial that the action for malicious procedure failed, that the only damages to which the defendant has been shewn to be liable were those consequent upon the trespass and search; that the charge of the trial Judge included all the elements which could properly be taken into consideration by the jury in that respect; and that the judgment appealed from is right.

I would therefore dismiss the defendant's appeal with costs.

The Court has already dealt with the cross-appeal of the plaintiff, which should likewise be dismissed with costs.

MULOCK, C.J. Ex.:—I agree.

MASTEN, J.:—I agree and have nothing to add.

RIDDELL, J. (dissenting):—The plaintiff was in the employ of a company of which the defendant was manager; the relationship ceased for a reason and in a manner not now material. (Following the example of the trial Judge, I shall speak of McCune as the defendant; his company is a co-defendant, but their interests are identical.)

The defendant had missed some deer-skins, toe-cords, and ankle-joints, wrenches and other tools, and opened the plaintiff's box; he found therein four of the company's double wrenches, a toe-cord wrench, and ferules. Then he went to his solicitor, Vandervoort, who took him to McFadden, the Assistant Crown Attorney, to whom he made a statement of the facts so far detailed; he also stated to McFadden that he had been informed by Kelly, one of the company's employees, that the plaintiff "had left and taken a gripful of tools and sundries from the factory." Precisely what then took place is not made clear in the evidence. It was suggested on the argument that McFadden gave the defendant a letter which enabled him without more to obtain a search-warrant. I cannot believe that such a wholly vicious and illegal practice obtains in Toronto. The Criminal Code, sec. 629, requires as a prerequisite of the issue of a search-warrant that the issuing Justice must be satisfied by information upon oath that there is reasonable ground for the warrant. The issue of a search-warrant is a judicial proceeding, and it would be intolerable if the Justice of the Peace were to delegate to any other person his duty in determining whether a search-warrant

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should issue. But we find an information, apparently regularly sworn by the defendant before the Justice of the Peace; and, in the absence of clear evidence, *omnia præsumantur rite acta esse.*

A search-warrant issued, and the defendant accompanied the detective to the premises of the plaintiff. They saw the plaintiff carrying a "grip" of tools from the factory, and, when he arrived at his premises, the detective, shewing his warrant, caused him to open the bag or "grip," and there were found the four leg-wrenches already mentioned. In searching the premises there were found some small articles belonging to the company; but the plaintiff was not arrested or prosecuted.

He brought this action in the Supreme Court claiming damages: (1) for unlawful discharge; (2) malicious procedure in procuring the issue of the search-warrant; and (3) trespass.

At the trial Rose, J., dismissed the first two claims, but allowed the third to go to the jury, with the result that a verdict was rendered and judgment directed to be entered for the plaintiff for $200 for the trespass. Both parties now appeal.

Upon the argument we dismissed the plaintiff's appeal; in actions of malicious procedure, want of reasonable and probable cause is a necessary ingredient: *Brown* v. *Chapman* (1848), 6 C.B. 365, 136 E.R. 1292; *West* v. *Smallwood* (1838), 3 M. & W. 418, 150 E.R. 1208; and here there was not only no want but abundance of reasonable and probable cause proved.

To deal with the defendant's appeal, Rose, J., held that the search-warrant was no protection because the magistrate had no right to issue it at all. Section 629 authorises a magistrate to issue a warrant on being "satisfied by information upon oath in form 1:" the information actually sworn to by the defendant does not fully follow form 1. Form 1, under sec. 1152, not only requires to be set out a description of the goods, but also "the causes of suspicion, whatever they may be." No causes of suspicion were set out, and my brother considered that the necessary information had not been sworn to, that consequently the magistrate acted without jurisdiction, and the warrant was invalid—at all events *quoad* the defendant.

I propose to inquire how the case would stand were the warrant void or only voidable:

At the common law a search-warrant, valid on its face, issued by a magistrate having jurisdiction, under any circumstances is a protection to the officer executing it: *Sleeth* v. *Hurlbert* (1896), 3 Can. Crim. Cas. 197, 25 Can. S.C.R. 620; *Philips* v. *Biron* (1722),

1 Stra. 509, 93 E.R. 667; *Parsons* v. *Lloyd* (1773), 2 Wm. Bl. 845, 3 Wils. 341, 96 E.R. 498; *King* v. *Harrison* (1812), 15 East 612, 104 E.R. 974; *Woolley* v. *Clark* (1822), 5 B. & Ald. 744, 106 E.R. 1363; *Codrington* v. *Lloyd* (1839), 8 Ad. & El. 449, 112 E.R. 909. But the common law affords no protection to him who sued out the warrant.

In *Turner* v. *Felgate* (1663), 1 Lev. 95, 83 E.R. 315, it was decided that a plaintiff suing out a judgment and execution thereon was liable in trespass to goods, after the judgment was vacated. Twysden, J., was not satisfied with this judgment, given in the time of Glyn, Chief Justice (John Glyn, Glynn, or Glynne, C.J., Upper Bench 1655-1660), one reason being that it made "a man a trespasser by relation;" see also 2 Lev. 173, 174, 83 E.R. 504, 505.

In the case of a void writ it was decided in *Perkin* v. *Proctor and Green*, 2 Wils. 382, 95 E.R. 874, that trespass lay against the assignees under a commission of bankruptcy where the alleged bankrupt was a person not liable to be a bankrupt, but that case proceeded on the ground that the commission of bankruptcy was not the process of the King's Court. In the course of the judgment the Court of Common Bench said at p. 385: "Where a judgment is vacated for irregularity, the party is never excused, if an execution is issued thereupon; yet the sheriff's officer is excused, because he has the King's writ to warrant him. *Turner* v. *Felgate*, 1 Lev. 95, 1 Sid. 272. Though these cases have been sometimes grumbled at, yet they are good law. Carth. 275, 2 Stra. 509." See also *Johnson* v. *Norton* (1624), 2 Roll. Rep. 442. *Philips* v. *Biron*, 1 Stra. 509, was a similar case. In *Parsons* v. *Lloyd*, 2 Wm. Bl. 845, 3 Wils. 341, the Court of Common Bench held that in the case of a void writ, "if the defendant is injured, he is entitled to a remedy somewhere; but not against the sheriff or his officer, who are bound to obey the writ issued under sanction of the Court; *Plucknet* v. *Grenes* (1671), 2 Keb. 705, 84 E.R. 444; *Grene* v. *Jones* (1670), 2 Keb 844, 84 E.R. 534; *Chancy* v. *Rutter* (1674), 3 Keb. 213, 84 E.R. 683; 6 Co. Rep. 54a, 77 E.R. 335, 10 Co. Rep. 76a, b, 77 E.R. 1038, 1039. The officer not being liable, the plaintiff must be. He has procured the writ to be sued out and is answerable for all its consequences:" *per* De Grey, C.J., in 2 Wm. Bl. at p. 847.

There are a number of cases in which the matter is discussed, but *Riddell* v. *Pakeman* (1835), 2 C.M. & R. 30, 150 E.R. 13, contains so satisfactory a statement of the law that I do not quote any other. The result is that, where process is irregular only and not

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void, trespass is not maintainable, the action being on the case, and the action of trespass being not maintainable till the process is set aside; but where the process is "void and a mere nullity" trespass lies.

Section 26 of the Code does not affect to change the law in respect of the liability of a person who procures a warrant or other process to issue; and, consequently, I think the defendant liable for damages in trespass irrespective of the fact of his joining in the search, if the warrant was void; while, if the warrant was irregular only, he cannot be so liable unless he becomes liable by reason of the fact of his personal act in joining in the search. Looking now to that Act, sec. 26: "If . . . a warrant is issued by a . . . justice . . . having jurisdiction under any circumstances to issue the warrant, the . . . warrant issued shall be sufficient to justify the officer or person thereby authorised, to execute the same, and every gaoler and person lawfully assisting in executing or carrying out such . . . warrant, although the . . . justice . . . in the particular case had no jurisdiction to issue . . . the warrant . . ." I am unable to follow the argument that he cannot take advantage of his own wrong; *Nullus commodum capere protest de injuriâ suâ propriâ* is a venerable maxim in our law: Broom's Legal Maxims, 8th ed., p. 233. But I have always understood it to mean no more than that no one can put himself in a better position by doing wrong than by doing right. No one can consciously do wrong and thereby be better off than though he had done right. Here there is no pretence of conscious wrong-doing; the defendant did exactly what he was directed to do by Crown Attorney, magistrate, and magistrate's clerk. Moreover, had he done right by filling out the information paper in proper legal form, he would have been in the same position as he was when he left out part of it—his wrongdoing, unconscious wrongdoing, if wrongdoing at all, did not procure him the search-warrant which would have been refused him had he done right.

As is said by Best, J., in *Doe dem. Bryan* v. *Bancks* (1821), 4 B. & Ald. 401, 106 E.R. 984, at pp. 409, 410: "I take it to be an universal principal of law and justice, that no man can take advantage of his own wrong. Now it would be most inconsistent with that principle to permit the defendant to protect himself against the consequences of this action, by afterwards setting up his own wrongful act at a former period."

I see no reason in this regard why he cannot appeal to the protection of sec. 26, if it applies, in respect of his personal act in assisting in the search.

Whether the warrant was irregular or void, this section is operative, and the whole question is, whether "person lawfully assisting" covers the defendant.

In the interpretation of the law we always bear in mind the custom of the community, the circumstances under which the law is passed. Here to interpret the words "person lawfully assisting" we should inquire what are the persons who naturally and usually do or should assist in such cases.

In Hale's Pleas of the Crown, ed. of 1800, vol. 2, ch. XVIII., p. 150, the author says that warrants "ought to be directed to constables and other public officer . . . tho it is fit the party complaining should be present and assistant, because he knows his goods."

In 5 Burn's Justice of the Peace (Maule's edition, 1869), p. 1183, it is said: "The owner of the goods, or some person who can point them out, usually accompanies the officer." See also *Hamilton* v. *Calder* (1883), 23 N.B.R. 373, at p. 383. And this is known to be the usual if not the universal practice; any other would be most inconvenient if not absurd.

I think the owner of the goods, being "present and assisting," must necessarily be a "person lawfully assisting" in executing the warrant. If it were intended to restrict the protection to officers, nothing would have been easier than to do so in so many words.

I think therefore the defendant is protected against liability in respect of his personal act as such. Of course if he is liable for putting the law in motion and issuing a void warrant, the personal act being part of the consequences of the void warrant will or may be matter of special damage, just as though the personal act had been committed by another.

The conclusion I have arrived at is that the defendant if liable at all is liable simply *quâ* prosecutor, and that depends upon whether the warrant was void or only irregular. If the former, nothing in the Code protects him; if the latter, he is protected by the general law.

The verdict proceeded on a wrong basis, and the judgment should, if the defendant desires it, be set aside; but whether the action should be dismissed depends on whether the warrant was void or only irregular.

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There are apparently reasons why we should not hold the warrant to be an absolute nullity. Here the magistrate had jurisdiction over the subject-matter, the facts existed which would justify the issue of the search-warrant, and the only defect was that the facts were not set out in writing on the information.

Moreover, that it was merely irregular and not void, is, I think, suggested in *Rex* v. *Kehr*, 11 O.L.R. 517, which followed *Regina* v. *Walker*, 13 O.R. 83. In the *Walker* case Cameron, C.J., said that, as the grounds of suspicion were not stated in the information, "this warrant was illegally and improperly obtained, and must be quashed" (p. 95)—not "this warrant is void." It will be observed that in *Rex* v. *Kehr* the matter was argued at great length, and the Court gave an elaborate judgment, concluding "that the warrant . . . was . . . illegally and improperly obtained and must be quashed" (p. 524). Moreover, as a term of quashing the search-warrant, it was provided "that no action shall be brought against the police magistrate . . . "—a term apparently inconsistent with the view that it was void.

In *Riddell* v. *Pakeman*, 2 C.M. & R. 30, an affidavit had not been in the statutory form, and a *capias* wrongly issued thereon; but it was held that the process so wrongly issued was only voidable and not void. Alderson, B., at p. 34, indicates the practice followed in *Rex* v. *Kehr* "When process is set aside for irregularity, the Court in general make it part of the terms, that the defendant shall bring no action." But nowhere is there an express decision or even dictum that a search-warrant issued as this was not void, and the authorities seem uniform in the contrary sense.

The American cases cited in 19 Encyc. of Pl. & Pr., pp. 327, 328, wholly support the proposition that a search-warrant issued as this was is void. See also 35 Cyc. 1266; *Grumon* v. *Raymond & Betts* (1814), 1 Conn. 39 at p. 40; *Tracy* v. *Williams* (1821), 4 Conn. 107; *Allen* v. *Gray* (1836), 11 Conn. 95; *White* v. *Wagar* (1898), 83 Ill. App. 592; affirmed in S.C. (1900), 185 Ill. 195.

The ground of such decisions is that inferior Courts must keep within their jurisdiction, and anything done outside that jurisdiction is void, whether there is want of jurisdiction over the person (10 Co. Rep. 70, 77 E.R. 1029), or the offence or the process (Hob. 63, 80 E.R. 211, 212). As is said in *Tracy* v. *Williams*, 4 Conn. at p. 113: "For error in opinion, however palpable and flagrant, no justice . . . is responsible in trespass, if . . . he had jurisdiction, and proceeded regularly. But if he has not jurisdic-

tion over the person, and process, and subject matter, his acts in the assumed capacity of a judge, are void. In the case supposed, he is *not a judge;* and the authority exercised by him, perhaps with the best motives, is nothing better than mere usurpation."

So in *Jones* v. *German*, [1896] 2 Q.B. 418; [1897] 1 Q.B. 374, Lord Russell of Killowen and the Court of Appeal did not doubt that trespass would lie against a magistrate who issued a search-warrant on an insufficient information, though in the particular case they decided that the information was sufficient.

It is true that Holroyd, J., says in *Elsee* v. *Smith*, 1 Dow. & Ry. (K.B.) 97, at pp. 104, 105: "If the warrant issued without due authority on the part of the magistrate, that would be trespass in the magistrate; but it by no means follows that it is trespass in the party who, by laying the information before the magistrate, is the cause or instrument on which the magistrate acts in granting his warrant;" but an examination of the facts of the case shews that there was authority in the magistrate to issue the warrant, and that the action against the party was properly in case not in trespass.

The old and frequently cited case of *Smith* v. *Bouchier*, 2 Stra. 993, seems to me conclusive. The plaintiff sued five defendants in trespass and false imprisonment (a form of trespass): Bouchier, having the privilege of the University of Oxford, made a complaint before the Vice-Chancellor of the University that he had a cause of action against the plaintiff for £1,000, and that he *suspected* he would run away. The Vice-Chancellor issued his warrant and the three other defendants arrested and confined the plaintiff. The Court of the Vice-Chancellor had authority to issue such a warrant on the oath that the complainant *believed* the debtor would not appear but would run away. The Court held that *believe* and *suspect* are not the same; that the Vice-Chancellor had no jurisdiction to issue the warrant; and that, while the officer and gaoler might have been excused had they pleaded properly, the Vice-Chancellor and Bouchier were liable in trespass. The possible excuse of the officer and gaoler has been questioned—*Perkin* v. *Proctor and Green*, 2 Wils. at p. 385—as the proceedings were *coram non judice* and a mere nullity; but I do not find that the judgment against the Vice-Chancellor and the party moving, i.e., Bouchier, has ever been questioned, much less overruled.

I think, therefore, that in the present case an action in trespass lay against not only the magistrate but also the defendant. The damages would be allowed for all the consequences of the issue of

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the search-warrant; and, therefore, the defendant may be well advised to accept the amount awarded rather than ask for a new assessment on a different principle. If so, the appeal should be dismissed with costs. If not, the appeal should be allowed and a new trial ordered. Costs here and below in the cause.

Appeal dismissed.

MAN.
C. A.

THE KING v. SHAW; THE KING v. BROWN.
THE KING v. WHITE OWL DRUG STORES.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Fullerton and Dennistoun, JJ.A. February 8, 1921.

Drugs and Druggists (§1—1)—Liability of Druggist Under Opium and Narcotic Drug Act 1920, 10-11 Geo. V. (Can.) ch. 31—Validity of —Provisions of Minister as Relating to—Druggists not Licensees within the Act.

A druggist carrying on a bona fide business in a shop or store who does not manufacture any drug, is not compelled to become a licensee under the provisions of the Opium and Narcotic Drug Act 1920 10-11 Geo. V. (Can.) ch. 31, and is therefore not subject to the regulations of the Minister presiding over the department of health, which purport to be made under Sec. 5A of the Act and which require a record of receipts and sales to be kept. The regulations only apply to licensees under the Act, and persons who are not licensees are dealt with under the general provisions of the Act and not under the regulations of the Minister.

APPEAL from the judgment of a Police Magistrate, dismissing several prosecutions under the Opium and Narcotic Drug Act. Affirmed.

The judgment appealed from is as follows:—

"I have considered this matter, and have come to this conclusion, that in order to be *intra vires*, Regulations made by a Minister of the Crown, with the approval of the Governor-in-Council, must be no broader than the Act of Parliament permits.

The express powers conferred by Parliament under the Opium and Narcotic Drug Act, 10-11 Geo. V 1920 (Can.), ch. 31, contained in sec. 5A, 1, and sec. 13, which latter is general in its terms, so far as this case is concerned, and is confined to carrying out the intention of the Act.

It is contended on behalf of the Crown that para. (f), sub-sec. 2, of sec. 5A, confers power on the Minister with the approval of the Governor-General-in-Council to make regulations in regard to keeping, and exposing of records by druggists who are not licensees. If this is so, it can only be by inference, and not by express language.

The Parliament of Canada has made it a crime to do certain things, or to omit doing certain things by their own licensees, over whom they have a certain direct control by reason of the license. This is done by express language by Parliament. In the case of persons who are not licensees at all, why should it be left to inference?

My interpretation of (f) is that it means the same as if there were added to the third line thereof the words "Provided there are any such regulations made under the authority of this Act requiring such persons to keep and produce such records."

The Act has not made the failure to keep or to expose records a crime unless and until the regulations are made and approved. It is the act of the Minister with the approval of the Governor-in-Council which finally constitutes the action of the individual a criminal offence, and it seems to me the Act of Parliament permitting such a consummation should do so in more express language than we find in this Act.

I think the Regulations so far as they purport under para. 8 to refer to an unlicensed druggist are *ultra vires*.

The action will be dismissed."

H. P. Blackwood, K.C., for Crown.

The judgment of the Court was delivered by

DENNISTOUN, J.A.:—These cases were argued together, and at the conclusion of the argument the Court expressed its concurrence with the action taken by R. M. Noble, one of His Majesty's Police Magistrates in and for the Province of Manitoba, and agreed with the reasons in writing which he has given in each case for dismissing the prosecutions.

The charges differ in each of the cases but are concerned with the keeping by retail druggists of a record of receipts and sales as provided by Regulation No. 8, under Order of the Privy Council of Canada, No. 2392, and dated October 2, 1920, which purports to be made under the provisions of sec. 5A of the Opium and Narcotic Drug Act, as enacted by ch. 31, 10-11 Geo. V 1920 (Can.).

The regulations in question imposes on every druggist carry-

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ing on a business in a *bona fide* shop or store the duty of making and preserving a record in a suitable book kept for such purpose of the name and quantity of any drug or drugs received, the date of receiving such drug or drugs, and the name and address of the person from whom same were received.

It is admitted that the defendants in these cases are duly authorised to carry on business as druggists and carry on *bona fide* businesses in shops or stores, and that they do not manufacture any drug.

By sec. 5 of the Act "any person who deals in any drug who gives, sells or furnishes any drug to any person other than a duly authorised and practising physician, veterinary surgeon, or dentist, or to a *bona fide* wholesale druggist or to a druggist carrying on business in a *bona fide* drug store, etc., except upon a written order or prescription signed by a duly authorised and practising physician, etc., shall be liable upon summary conviction to a fine, etc., or to imprisonment."

By sec. 5A (1), "With the approval of the Governor-in-Council the Minister presiding over the Department of Health shall have power to issue licenses for the import, export, sale, manufacture and distribution of any drug, etc., to prescribe the record that *shall be kept by any licensee* in connection with the export, import, receipt, sale, disposal and distribution of the drug or drugs mentioned in such license and to make all convenient and necessary regulations with respect to the issue and duration and the terms and forms of the several licenses that may be issued hereunder."

It is under this section of the Act that the regulations referred to, which has been made by the Minister, may be made, and it will be noted that authority is limited to prescribing the record that shall be kept by licensees.

Unless it is necessary for a retail druggist to take out a license under the Act it does not appear that regulations can be made with respect to him or his business.

By section 5A (2) (e), the Act provides that "any person who has in his possession without lawful authority, or manufactures, sells, gives away or distributes any drug without first obtaining a license from the Minister shall be guilty of a criminal offence and shall be liable upon summary conviction to a fine not exceeding one thousand dollars and costs, and not less than two hundred dollars and costs or to imprisonment for a term not exceeding one year or to both fine and imprisonment;" but by the same section (3) "the

provisions of paragraph (e) of this section shall not apply to a duly authorised and practising physician, veterinary surgeon or dentist or any druggist carrying on a *bona fide* business in a shop or store who does not manufacture any drug."

By sec. 13 of the "Act the Governor-in-Council may make such orders and regulations as are deemed necessary or expedient for carrying out the intention of this Act; for the seizure of any drug that there is reason to believe is liable to forfeiture under this Act; and for the use or sale of any drug for scientific purposes."

A perusal of the whole Act leads to the conclusion that the Legislature did not intend to give the Minister presiding over the Health Department power to make regulations except in respect to licensees. To hold that it did would be to credit Parliament with giving the Minister power to create a criminal offence. Possibly that may be done but there should be express language to confer such an extraordinary authority, and it is certainly not to be found in this Act.

Persons who deal in narcotic drugs who are not licensees are dealt with under the general provisions of the Act and not under regulations of the Minister.

The sections of the statute quoted make it clear that a druggist carrying on a *bona fide* business in a shop or store who does not manufacture any drug is not compelled to become a licensee and therefore is not subject to the regulations made by the Minister.

We agree with the conclusion of the magistrate that Regulation No. 8, which imposes the duty upon every druggist of keeping records which are not called for by the Act itself was not authorised by the statute.

This conclusion enables the Court to answer the magistrate's questions in all the cases affirmatively by declaring that he was right in dismissing the several informations which were before him.

Other points which have been raised, and particularly those set up in the White Owl Drug Stores Ltd. cases, do not call for any reply in view of this conclusion.

Appeal dismissed.

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S. C.

REX v. JOHNSTON.

Ontario Supreme Court, Orde, J. January 13, 1921.

Intoxicating liquors (§IIIJ—94)—Unlawful sale of liquor—Second or subsequent offence—Form of information and conviction—Failure to comply with—Sufficiency of proof of first offence—Validity of conviction.

The Form of Information for Second or Subsequent Offence" and "The Form of Conviction for a Second or Subsequent Offence," which are appended to the Ontario Temperance Act, 6 Geo. V. 1916, ch. 50, contemplate that both the information and the conviction shall set out explicitly the date when, the place where, and the name or names of the magistrate or Justices of the Peace before whom the accused was previously convicted, and also the date when and the place where the previous offence was committed and the specific nature of the previous offence, but failure to comply with the requirements of these forms, does not necessarily invalidate the conviction if the previous offence was in fact sufficiently proved and no injustice has been done to the accused.

MOTION, on the return of writs of *habeas corpus* and *certiorari* in aid, for an order for the discharge of the defendant from custody under a warrant of commitment issued pursuant to a magistrate's conviction for an offence against the Ontario Temperance Act.

James Haverson, K.C., for defendant.

F. P. Brennan, for the magistrate.

ORDE, J.:—This is a motion to discharge the accused, who is undergoing imprisonment under a warrant of commitment issued upon a conviction under the Ontario Temperance Act, 6 Geo. V 1916, ch. 50, made upon the return of a writ of *habeas corpus* and a writ of *certiorari* in aid thereof.

The charge laid against the accused before the Police Magistrate for the District of Temiskaming was that, on August 15, 1920, at the town of Cochrane, he "did unlawfully sell liquor contrary to the Ontario Temperance Act made and provided and this being his second offence," and his conviction is that he did "unlawfully sell liquor on the 15th day of August, 1920, at Cochrane, in the district of Temiskaming and this being his second offence;" and the accused was sentenced to six months' imprisonment. The terms of the conviction in the warrant of commitment do not follow those in the conviction itself, the wording of the warrant being "did unlawfully sell liquor contrary to the provisions of the Ontario Temperance Act made this being his second offence" (I think the word "made" is here intended for "and," but in the copy which

accompanies the papers the word is "made"). There is also among the papers a "certificate of conviction," signed by the magistrate, in which the accused is said to have been "duly convicted of having on the 15th day of August, 1920, at the town of Cochrane, unlawfully sold liquor without the license therefor by law required," and no mention is made of the conviction having been for a second offence.

The sole ground upon which the conviction was attacked was that the previous conviction had not been properly proved. The only evidence of the previous conviction is contained in the following note, which appears at the conclusion of the evidence for the prosecution: "Chief Portland draws the attention of the Court that this is the second offence against the defendant. The defendant's counsel admits that he was convicted on April 16, 1920, and paid $500 and costs $8," and in the cross-examination of the accused, where he says, "I was convicted for selling liquor some time ago."

The "Form of Information for Second or Subsequent Offence" and the "Form of Conviction for a Second or Subsequent Offence," which are appended to the Act, contemplate that both the information and the conviction shall set out explicitly the date when, the place where, and the name or names of the magistrate or Justices of the Peace before whom, the accused was previously convicted, and also the date when and the place where the previous offence was committed and the specific nature of the previous offence.

In the present case neither the information nor the conviction complies with any of the requirements of these forms; if the previous conviction was sufficiently proved, then the conviction ought not to be quashed, but if necessary may be amended under sec. 102. In the present case all that was in fact proved or admitted on behalf of the accused was that, on April 16, 1920, he was convicted for selling liquor. No evidence is forthcoming as to the place where the conviction was made, or the name of the convicting magistrate, or the date when or the place where the first offence was committed. Is it essential that these facts should be proved with all the particularity which the forms mentioned would require if they are to be strictly followed? The commission of an offence after a previous conviction is not as an offence different from a first offence, but sec. 58 provides that in such case, the penalty imposed shall be greater. Section 58 makes no distinction as to the character of the offences dealt with by the section (except in the case of an offence by a licensee). The offences covered by the different sections

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mentioned in sec. 58 are all of the same general character, namely, selling or having for sale, except offences under sec. 41. Apparently sec. 58 does not require that the conviction for the previous offence shall have been made under the same section as that under which the second charge is laid. A conviction for an offence under any of the enumerated sections would, in my judgment, render an offence under any other of the enumerated sections a "second offence." For this reason the exact nature of the previous offence is not material, if it is sufficiently established that it falls within any of the enumerated sections. Here the admitted previous offence was that of selling liquor. In my judgment, that sufficiently describes the offence to bring it within sec. 58. Then as to the omission of the name of the magistrate and the place where the previous conviction took place, and of the date when, and the place where the previous offence was committed, I cannot regard this as invalidating the conviction. It is of course desirable that informations and convictions should be much more carefully worded than they were in this case, and I am not deciding that the particulars which were omitted in the present case may be safely omitted in all cases, for there may be cases in which such omission may be unfair to the accused; but, exercising the wide powers given to me by secs. 101 and 102 of the Act, I am unable to see how any injustice has been done to the accused by his conviction in the present case as for a second offence.

The motion will, therefore, be dismissed with costs, but the conviction and warrant of commitment should be amended by setting out those particulars respecting the previous conviction which were in fact proved or admitted before the magistrate.

Motion dismissed.

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THE QUEBEC HARBOUR COMMISSIONERS v. ST. CHARLES PARK.

Supreme Court of Canada, Idington, Duff, Anglin, Brodeur and Mignault, JJ. June 21, 1920.

Arbitration (§III—16)—Jurisdiction of Arbitrator—Submission—Claim for Larger Amount Subsequently Filed—Award Based on Larger Claim—Validity.

An arbitrator has jurisdiction only over the matters at issue which

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are referred to him by the act of submission, but where the arbitrator has been empowered to determine the limits of a parcel of land, the extent of encroachment thereon by the defendants, and finally the indemnity that the plaintiff is entitled to claim on account of such encroachment, the submission is broad enough to empower the arbitrator to allow a larger claim than that originally made on such claim being filed with him.

[Quebec Harbour Commissioners v. St. Charles Park, (1919), 29 Que. K.B. 302, affirmed. See Annotation, Conclusiveness of award; 39 D.L.R. 218.]

APPEAL from the judgment of the Court of King's Bench, appeal side, (1919), 29 Que. K.B. 302, affirming the judgment of Dorion, J., and maintaining the respondent's action with costs.

E. Lafleur, K.C., and *A. Rivard*, K.C., for appellant.

E. Gelly, K.C., and *A. Dion*, K.C., for respondent.

IDINGTON, J.:—The neat question raised herein is whether or not the arbitrator exceeded the terms of the submission.

Having regard to all the surrounding facts and circumstances, by which, if there is any ambiguity, we must be guided in the interpretation thereof, I do not think there is any room for argument.

He was duly appointed to determine how much area the appellant had invaded of the property belonging to respondent, and then to find the value thereof.

It was not the action alone and the limits of its then ambit that was intended to dominate the terms of the submission, though that was rather inaptly referred to in the resolution leading up to the submission, and liable, in default that, to be expanded in its operation by an amendment.

It was doubtless the possibilities of extension or diminution of the size of the area encroached upon that led to a more comprehensive definition in the deed of submission. The terms of the latter must govern.

I, therefore, am of opinion that this appeal should be dismissed with costs.

DUFF, J.:—On the whole, I am of the opinion that the question passed upon was one within the competence of the arbitrator.

ANGLIN, J.:—I concur with my brother, Mignault.

BRODEUR, J.:—The Quebec Harbour Commissioners did some dredging at the mouth of the St. Charles River to improve and enlarge the harbour of that city. The respondent company maintained that this work was done on a beach lot of which it was the owner in virtue of a seigneurial grant to its predecessors in title in the early days of French domination. This beach lot was covered

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with water at high tide. The respondent took action for $96,000, claiming that the Quebec Harbour Commissioners had thus taken possession of 334,000 ft. of its ground. The parties decided to submit the question of ownership to arbitration, and also the amount payable as compensation for all the land of which the Commissioners might have taken possession.

La Compagnie Le Parc St. Charles filed with the arbitrator a claim for not only 384,000 ft., but for almost double that quantity.

The award of the arbitrator condemned the appellant to pay over $50,000.

In the present action the respondent asks that this award be homologated. The Quebec Harbour Commissioners oppose the homologation on the ground that the arbitrator proceeded *ultra petita*, and that he had no right to adjudicate on the value of nearly 600,000 ft. of land when the action submitted to arbitration only dealt with about 400,000 feet.

That is the entire dispute submitted to us. We have no concern with the actual value of this beach lot.

The amount claimed and awarded seems to me excessive. A similar claim was submitted to us in the case of *Belanger* v. *The King*, and we refused to confirm the judgment of the Exchequer Court (1917), 42 D.L.R. 138, 17 Can. Ex. 333, so excessive did the amount awarded seem to us. But in this case we are not concerned with the amount of the indemnity. This has been left to the sovereign discretion of the arbitrator appointed by the parties.

We have merely to decide if the submission refers only to the quantity of land mentioned in the original action, about 400,000 ft., or if it may refer to the land mentioned in the award, about 600,000 feet.

The preamble of the submission speaks first of an action for $96,000, next of the impossibility of an arrangement between the parties to avoid the costs of an action at law, and lastly of an agreement to appoint an arbitrator to give a final decision on the following points:—(a) What is the title of the said company to the lands and the beach lot in question in the said case, known and designated on the official plan and book of reference of the cadastre of St. Roch de Quebec Nord as number 586? (b) The determination of the extent and the extreme limits of the said beach lot No. 586 St. Roch Nord on the side facing the St. Charles and St. Lawrence Rivers. (c) Did the commissioners encroach on the property and on the beach lot No. 586 of the cadastre of St.Roch Nord? Further,

did they take possession of any part of the said lot for the dredging carried on by them at the mouth of the St. Charles River? (d) If it is established to the satisfaction of the said arbitrator that the said encroachments and the said taking of possession took place, what is the amount of the compensation which the said company is entitled to claim and to receive from the said commissioners?

An arbitrator has jurisdiction only over the matters at issue which are referred to him by the act of submission. The jurisprudence has been on the whole very generous in applying the rule which requires the description of the object of the dispute, and the general sense of the decided cases is that the questions at issue may be described in general terms. In the present case, the points for decision have been stated. It was not deemed advisable to limit them to those set forth in the action which gave rise to the arbitration, but the arbitrator was empowered to determine the limits of the beach lot, the extent of the encroachment of the commissioners, and finally the indemnity that the company is entitled to claim on account of this encroachment.

This submission left the door open for a larger claim than that originally made. And a larger one was filed. I think that the arbitrator acted within the limit of his powers.

The appeal should be dismissed, with costs.

MIGNAULT, J.:—The appellants complain of the judgment of the Court of King's Bench, 29 Que. K.B. 302, sitting in appeal, unanimously confirming the judgment of the Superior Court in Quebec, rendered by Dorion, J., which last judgment homologated an award made by Pelletier, J., former Judge of the Superior Court, and named sole arbitrator by the parties, against the appellants.

In July, 1917, the respondent company took action against the appellants for the sum of $96,000, the value of the lands of which the appellants had taken possession in the course of their dredging operations in the St. Charles River in the harbour of Quebec. The declaration, a brief one, read as follows:—"1. Plaintiff is the owner for good and valuable consideration and in virtue of good and sufficient titles of lot No. 586 of the official cadastre of the parish of St. Roch Nord, in the city of Quebec, with all the beach accessory thereto. 2. Plaintiff is further the owner of the said lot and beach, having legally acquired the ownership thereof by prescription through its own possession and that of its predecessors in title for a period of over thirty years, the whole in compliance with the terms of articles 2242 and 2251 of the Civil

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Code of the Province of Quebec. 3. For several years and particularly since the year 1912, defendants have carried on dredging operations in the St. Charles River in the harbour of Quebec, and particularly in front of the property of the plaintiff hereinabove described. 4. In conducting the above operations, defendants encroached on plaintiff's property, took possession thereof, dredged thereon and took away all the land forming a considerable part of the said beach, to wit, over an area of 384,000 square ft., converting the said land to their own use. 5. The value of the land thus removed and appropriated to their own use by defendants is $96,000, at the rate of 25 cents per square foot. 6. The said encroachments and the taking possession of plaintiff's land by defendants, are absolutely illegal, defendants not having proceeded by way of expropriation, in spite of repeated protests on the part of the plaintiff. 7. The defendants have since always remained in possession of the said land. 8. Plaintiff has requested defendants to pay the said sum of $96,000, which defendants have always refused to pay.

Wherefore plaintiff prays for judgment against defendants for the said sum of ninety-six thousand dollars ($96,000) with interest and costs."

Before the action had been contested the parties agreed to submit their differences to arbitration. For this purpose appellants adopted the following resolution on the 10th of August, 1917:

"Resolved: That the action taken by La Compagnie Le Parc St-Charles Limitée, against the Quebec Harbour Commissioners, claiming from them the sum of $96,000 for alleged encroachment upon, and taking possession of that part of their property No. 586 of the official cadastre of St-Roch Nord, under No. 2354 of the Superior Court of Quebec, be submitted to one arbitrator, whose decision shall be final and binding upon both parties, as a final judgment of the Superior Court, without the right of appeal therefrom, said arbitrator to enquire into, and give a decision on the following points:—(a) The titles of the company plaintiff to the land and beach lot No. 586 of St-Roch Nord in question in this case. (b) To determine the extent and extreme limits of said property and beach lot No. 586 of St.Roch Nord on the side of said lot, facing the River St. Charles and the River St. Lawrence. (c) Have the commissioners encroached upon said property and beach lot No. 586 of St-Roch Nord and have they taken possession of any part thereof by dredging operations performed in the estuary of the River St. Charles. (d) In the affirmative, what is the value of the property

so taken, and what compensation is the company plaintiff entitled to receive therefrom. (e) That the cost of said arbitration be borne equally by both parties.

Resolved: That Honourable H. C. Pelletier, retired judge of the Superior Court, be appointed as arbitrator in this case."

On August 14, respondent accepted this proposed arbitration and appointed as its arbitrator, Antoine Gobeil, advocate, of Quebec, but subsequently the parties decided to abide by the decision of H. C. Pelletier as sole arbitrator.

The act of submission was passed on September 6, before J. A. Charlebois, notary, of Quebec, and it described the questions to be settled in the following terms:—"(a) What is the title of the said company to the lands and the beach lot in question in the said case, known and designated on the official plan and book of reference of the cadastre of St. Roch de Quebec Nord as number 586? (b) The determination of the extent and the extreme limits of the said beach lot No. 586 St. Roch Nord on the side facing the St. Charles and St. Lawrence Rivers. (c) Did the commissioners encroach on the property and on the beach lot No. 586 of the cadastre of St. Roch Nord? Further, did they take possession of any part of the said lot for the dredging carried on by them at the mouth of the St. Charles River? (d) If it is established to the satisfaction of the said arbitrator that the said encroachments and the said taking of possession took place, what is the amount of the compensation which the said company is entitled to claim and to receive from the said commissioners?"

It was by this agreement stipulated that the appellants would not be obliged to pay the amount of the award until they had received it from the Federal Government, but that in the meantime they would pay interest thereon at the rate of 6% *per annum*. I must also add that it was provided in the agreement that the parties had decided to submit all the questions raised in the action to the decision of a sole arbitrator and mediator.

During the arbitration proceedings, the respondent, basing itself on certain measurements by Giroux, surveyor, of the land encroached upon, produced a claim for 681,162.1 square ft., at 25 cents a foot, making in all $162,040.50. Appellants objected to this claim on the ground that it altered the nature of the respondent's original demand which was for $96,000 instead of $162,040.50.

On January 19, 1918, the arbitrator gave his decision before Charlebois, notary, declaring that the appellants had taken posses-

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sion of 572,662 square ft. of land the property of respondent, valued at 9 cents a foot, making a total sum of $51,539.58.

The respondent now demands the homologation of this award, and claims from appellants the sum of $3,092.37 for a year's interest on $51,539.58, the Federal Government not yet having provided the appellants with the funds necessary to meet this last amount.

Appellants argue, first, that they had not the power to submit the question raised by respondent's original action to arbitration, and second, that the arbitrator adjudicated *ultra petita* in granting to respondent compensation for 572,662 ft. of land, when it only claimed an indemnity for an encroachment upon 384,000 ft. according to the action submitted to arbitration.

At the hearing before this Court, appellants' attorneys did not insist on their first argument, and we shall therefore confine our attention to the second, namely that the award is *ultra petita*.

In spite of the reasoning of Messrs. Lafleur and Rivard for the appellants, I cannot come to the conclusion that their grievance against the award is well founded. I would admit at once that the award would be absolutely null if the arbitrator had adjudicated on any matters not referred to his judgment by the act of submission. In such a case we could give effect to his award only in so far as it deals with the encroachment referred to him for decision. That, however, is not the case before us.

Appellants' contention is that the action which gave rise to the arbitration dealt only with an encroachment of 384,000 ft., and that whatever the terms of the submission, they must be restricted to the matters at issue in this action. In support of their contention they point to their resolution which I have quoted above.

It is clear that respondent's action could have been amended at any time before judgment, but appellants deny the possibility of any amendment after the act of submission, claiming that one of the parties cannot without the consent of the other, make any alteration in the compromise effected. It is very clear that an act of settlement cannot be altered except by mutual settlement, but in my opinion, there has not been any alteration in the present case.

At the outset, I interpret plaintiff's action, which was settled by the act of submission, as complaining of an encroachment upon cadastral lot No. 586, and claiming by reason of the said encroachment an indemnity of $96,000. It is true that the declaration states that the encroachment covers 384,000 square feet, and that it is in

valuing this land at 25 cents a foot that the sum of $96,000 is arrived at. The area mentioned, however, is not indicated as a distinct block of land. It is a part of lot No. 586, without any defined limits, and in the particular case, the mention of an area of 384,000 ft. cannot have any greater effect than would have the description of the land of which appellants had taken possession. Given that respondent complains of an encroachment upon a lot described by its cadastral number and asks for compensation therefor, if in the course of the trial it should appear that the encroachment was over a greater area than 384,000 feet, I believe—but I express only my personal opinion—that even without amendment, the Court could have indemnified the respondent for the entire encroachment, provided that the amount of the compensation did not exceed the sum of $96,000. In other words the essential part of the action is the allegation of encroachment to the prejudice of lot No. 586 and the claim for an indemnity of $96,000, and if there be an inexact description of the part of the lot encroached upon, I would apply the rule "*falsa demonstratio non nocet.*" In any event there is no doubt that under such circumstances, the Court, *ex abundantia cautela*, could have allowed the amendment of the declaration to agree with the facts proved. In my opinion this amendment would not have been necessary in this case if the total compensation awarded had not exceeded $96,000.

But the ground which the Court adopts as the basis of its judgment dismissing the appeal is that in the act of submission the parties expressly submitted to arbitration the decision of the amount to be awarded to the respondent as compensation for whatever encroachment might have been committed by appellants to the prejudice of lot No. 586, and that in virtue of the express terms of the act of submission, the extent of the encroachment was not limited to 384,000 square ft. mentioned in the action settled by the act of submission. In so far as necessary, the declaration in this action may be considered as having been amended by the act of submission.

The appeal must therefore be dismissed with costs.

Appeal dismissed.

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SMITH v. GURNETT.

Ontario Supreme Court, Rose, J. February 9, 1921.

Specific Performance (§IE—32)—Option Agreement to Purchase—Ambiguity as to Property to be Purchased.

By a lease under seal the defendant leased to the plaintiff for one year the north-east quarter of lot 32 in the 2nd concession of the township of Dawn containing 50 acres more or less, and at the end of the lease there is the following clause: "The lessor reserves the house and about one quarter of an acre around the house also the privilege of using water from the well and using the lane for getting wood from the bush. The lessee shall have the option of buying said lot at the expiration of this lease for the sum of $2100 plus such improvements put on place since this date in cash outlay." The Court held that the plaintiff had within the proper time exercised his option to purchase by a letter written and delivered to the defendant and that no payment of money was necessary to make it valid, but that there was such ambiguity as to the property to be purchased that specific performance could not be enforced.

[Doe d. Webb v. Dixon (1807), 9 East 15, 103 E. R. 478; Barthel v. Scotten (1895), 24 Can. S. C. R. 367 distinguished. See Annotations, Specific Performance—Grounds for refusing, 7 D.L.R. 340; Vague and Uncertain Contracts, 31 D.L.R. 485.]

ACTION for specific performance, by the defendant, of an agreement alleged to have been made by him with the plaintiff for the sale of a farm to the plaintiff.

F. W. Wilson, for plaintiff; *J. R. Logan*, for defendant.

ROSE, J.:—This is a purchaser's action for specific performance.

By a lease under seal, dated August 28, 1919, the defendant leased to the plaintiff for one year commencing on October 15, 1919, and ending on October 15, 1920, "the north-east quarter of lot 32 in the 2nd concession of the township of Dawn, containing 50 acres more or less." At the end of the lease is the following:—

"The lessor reserves the house and about one quarter of an acre around the house. Also the privilege of using water from the well and using the lane for getting wood from the bush. The lessee shall have the option of buying said lot at the expiration of this lease for the sum of $2,100 plus such improvements put on place since this date in cash outlay."

It turned out that there was another tenant in possession whose term did not expire until March 1, 1920. The plaintiff arranged with this tenant for permission to do the autumn ploughing in 1919, and for the privilege of keeping some cattle on the place, and

the plaintiff and the defendant, through one Johnston, a mutual friend, arranged that the plaintiff should have possession of 30 acres of the farm until March 1, 1921. On the copy of the lease held by the plaintiff, Johnston wrote, and the defendant, who is illiterate, signed with his mark, an endorsement which it is difficult to read but which Johnston interprets as follows:—"A. Gurnett reserves centre 20 acres which was plowed in 1919, also the right to feed straw on the place and pasture up to March, 1921. Gurnett to have the privilege of cleaning up the fallow."

On the copy held by the defendant, Johnston wrote, but no one signed, a memorandum reading as follows:—"I, Alec. Gurnett, agree that the party of the second part is to remain in possession of the lands mentioned, until March 1st, 1921, excepting that 20 acres, being the west 20 acres that is cleared."

Of course the meaning of the endorsement on the plaintiff's copy of the lease is obscure, and perhaps the meaning of the two endorsements taken together is obscure. The defendant admits that the intention was that the plaintiff should have possession of the 30 acres until March 1, 1921, but Mr. Wilson argues that the endorsement goes further than this, and has the effect of extending the term created by the lease, so that the time for exercising the option is any time prior to March 1, 1921. I do not think it has this effect; I think that its sole effect is to authorise the plaintiff, as compensation for not having got possession at the time when the lease entitled him to it, to retain possession of a portion of the demised premises for a further time, and I think that the option had to be exercised on or before October 15, 1920. However, as I think the option was exercised within the time limited, the view which I take of the effect of the endorsement is unimportant.

On October 13, 1920, the plaintiff's solicitor wrote and the plaintiff delivered at the defendant's house, and on October 14 the defendant received, a letter in which it was said:—

"I also hereby notify you that Mr. Smith has instructed me to advise you that he has decided to accept the option which you gave him on the farm and the terms of which are set forth in the lease which I now have before me and which bears date the 28th August, 1919. Please let me know at once how you wish the sale to be completed. We are ready at any time within reason that you are prepared to close the matter up. Land is north-east quarter, lot 32, con. 2, Dawn."

The plaintiff's solicitor also wrote on the same day and sent

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by registered mail a letter addressed to the defendant in which he said:—"My client has decided to accept the option now and this is a notice to you that he does accept the option and wishes to carry out the purchase of the farm in accordance with the terms set forth in the lease."

It is said by the defendant, and seems to be admitted, that he did not receive this letter until the 19th. However, the evidence of the receipt seems to be unimportant, as the other letter of the same date and to the same effect was admittedly received on the 14th. No tender of any money was made until after the 15th October.

The defendant paid no attention to the letters from the plaintiff's solicitor, and a writ was issued on October 30, 1920. On November 3, 1920, the defendant's solicitor wrote to the plaintiff's solicitor saying that, in his opinion, the plaintiff had no case for specific performance, but that the defendant appeared to be willing to let the plaintiff have the land upon condition that the plaintiff would pay the costs of the action down to that time. The plaintiff's solicitor answered on the same day saying:—"I feel . . . that if it is only a matter of our paying our own costs as your letter indicates, it would be better to accept your offer and I shall advise my client to do that."

And on November 5 he wrote saying:—"In order that there may be no misunderstanding as to the terms, I would say that . . . Smith will pay his own costs and Gurnett will have to pay any costs he has incurred or will incur with you."

On the same day, November 5, 1920, the defendant's solicitor wrote to the plaintiff's solicitor that the defendant had instructed him to withdraw his offer. The letter of the plaintiff's solicitor of November 5 was posted about noon on the day of its date, and the letter of the defendant's solicitor withdrawing the offer was delivered at the office of the plaintiff's solicitor 2 or 3 hours later. The exact time of the mailing and the delivery of these 2 letters respectively is, however, unimportant, for the letter from the plaintiff's solicitor is not an acceptance of the offer made by the defendant's solicitor; the offer was to convey if the plaintiff would pay all the costs; the purported acceptance was of an offer to convey if the plaintiff would pay his own costs.

Mr. Logan argues that the option was not validly exercised because the money was not tendered on or before October 15. With this argument I do not agree. The cases upon which Mr. Logan

relies— *Lord Ranelagh* v. *Melton* (1864), 2 Drew & Sm. 278, 62 E.R. 627, 34 L.J. (Ch.) 227; *Miller* v. *Allen* (1912), 7 D.L.R. 438, 4 O.W.N. 346; *Cushing* v. *Knight* (1912), 6 D.L.R. 820, 46 Can. S.C.R. 555; *Shafer* v. *Ross* (1914), 7 O.W.N. 81 and similar cases such as *Weston* v. *Collins* (1865), 34 L.J. (Ch.) 353, 13 W.R. 510, are all cases in which the option, either by reference to a cash payment or otherwise, itself made payment of the purchase-money a condition precedent to the creation of a binding contract of sale: whereas the option in this case does not purport to make the payment of the money a condition. To say simply, "I give you an option to buy at such a price" is in effect to say, "I offer to sell to you at such a price," and an option or an offer so worded is exercised or accepted when the person to whom it is addressed says, "I exercise my option" or "I accept your offer" as the case may be. If authority is needed for this statement it can be found in *Mills* v. *Haywood* (1877), 6 Ch.D. 196, where the option was, "Mr. Mills to have the option at any time during the said term to purchase the above premises for £3,500, and such an amount as Mr. Austin shall pay for law and other expenses." The Court said that this clause did not make payment of the purchase-money a condition precedent to the existence of the contract. I think, then, that in the letter of October 14, 1920, there was a valid acceptance of the offer to sell or a valid exercise of the option to purchase, whichever way it is expressed.

There is in *Tilton* v. *Sterling Coal and Coke Co.* (1904), 77 Pac. Rep. 758, discussion of the meaning of the expression "at the expiration of" the term.

The chief difficulty in this case seems to me to be in determining what property the defendant offered to sell. The lease is a lease of the north-east quarter of lot 32, but the lessor "reserves" the house and a quarter of an acre around it. The option given is an option to buy "said lot." "Reserves" was not the right word to use to effect what clearly was the intention as regards the house. See *South Eastern R. Co.* v. *Associated Portland Cement Manufacturers*, [1910] 1 Ch. 12. But there is some authority in *Co. Litt.* 143a. for reading a "reservation" as an "exception" where the context requires it, although in *Doe d. Douglas* v. *Lock* (1835), 2 Ad. & El. 705, at pp. 745, 746, 111 E.R. 271, some doubt seems to be cast upon the accuracy of Lord Coke's statement: see 18 Hals., pp. 427, 428. If it is permissible to read the word "reserves" as meaning "excepts," it seems to me that must be done in this case.

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If it is done, the demised premises are the 50 acres less the quarter acre in which the house stands. And if the "said lot" means "the demised premises," the offer to sell was an offer to sell the 50 acres less the quarter acre.

If the words "the said lot" are given their grammatical construction, they mean "lot 32." That, however, cannot be their real meaning, and the question is whether the real meaning can be ascertained, or whether the words are too vague to be taken as the basis of a contract which can be specifically enforced. Can it be said either that the words certainly mean, "the said north-east quarter of the said lot 32," or that the word "lot" was used as descriptive of the land of which the plaintiff was to be in possession under the lease, i.e., that it was used as meaning "the demised premises?" It is not unusual for persons to speak of buying or selling "a house and lot." Here the house and the farm lands were to be separately enjoyed during the term of the lease; was it the intention that they should be owned separately after the term came to an end if the plaintiff exercised his option and bought the "lot?" It is not suggested by counsel that there is anything other than the lease itself which indicates that the intention was the one thing or the other, and nothing occurs to me as a circumstance to be considered, unless it is the fact that the thing which one would expect a tenant to be given an option on to buy would be the demised premises; and I do not think that I know what the defendant offered to sell, or what the option means.

At first, I was inclined to think that resort might be had to the rule that, "as between the grantor and grantee . . . if the words of the grant . . . are of doubtful import, that construction shall be placed upon them which is most favourable to the grantee," which is Broom's paraphrase of the maxim, *verba fortius accipiuntur contra proferentem:* Broom's Legal Maxims, 8th ed., p. 454. This rule, notwithstanding the observations made upon it by Jessel, M.R., in *Taylor* v. *Corporation of St. Helens* (1877), 6 Ch.D. 264, seems to be still applied in a proper case: see *Neill* v. *Duke of Devonshire* (1882), 8 App. Cas. 135, at p. 149; 10 Hals., art. 778; Pollock on Contract, 8th ed., pp. 271, 272; *Wright* v. *Jackson* (1886), 10 O.R. 470, at p. 474; but compare *Corbett* v. *Harper* (1881), 5 O.R. 93, at p. 95. However, I have not been able to find, even in the earlier cases, an application of the rule in circumstances very closely resembling those in the present case. It was applied in *Manchester College* v. *Trafford* (1679), 2 Show. K.B. 31,

89 E.R. 774, where a lessor had covenanted to grant successive renewals for terms of 21 years, until 99 years should be complete and ended, and the words of the covenant might mean either that the 99 years should be computed from the commencement of the original term or that they should run from the commencement of the first renewal; and the Court, construing the words against the lessor, held the years to run from the later date. And in *Doe d. Webb* v. *Dixon* (1307), 9 East 15, 103 E.R. 478, where the *habendum* was for 14 *or* 7 years, it was held that the lessor, against whom the words were to be construed, could not determine the lease at the end of the 7 years. The case last cited is, however, distinguishable; it seems to belong to the class of cases mentioned by Strong, C.J., in *Barthel* v. *Scotten* (1895), 24 Can. S.C.R. 367, at p. 375, in which the grantor is presumed to leave to the grantee the choice between two alternative grants. *Manchester College* v. *Trafford* seems to be more nearly in point; there does not seem to be much difference in principle between construing against the covenantor a covenant by which he binds himself to grant renewals which will be of longer or shorter duration, according as his words are read in one way or in another, and construing against a grantor a covenant to convey lands of which the area will be greater or less according to the construction put upon the language. But *Barthel* v. *Scotten* seems to me to be a clear and binding authority against applying the rule in the present case, and it may be that if *Manchester College* v. *Trafford* had to be decided now it would not be decided as it was in 1679. In *Barthel* v. *Scotten* the Court had to find what passed under a grant of a strip of land 208 ft. in width, from north to south, described as being part of a certain lot number 43, and as commencing at a point "in the southerly limit of said lot 43, at a distance of 20 feet from the water's edge of the Detroit river," and running westerly 600 ft. more or less to the channel bank. The plaintiff, who claimed through the grantee, contended that the point of commencement was 20 ft. measured *easterly* (i.e., landward) from the water's edge, while the defendant, whose title was derived through a later grant from the same grantor, claimed that the point was 20 ft. measured *westerly* from the water's edge (i.e., that the whole of the land granted was under the water). Lot 43 was described in the original grant from the Crown as bounded on the west by the water's edge, and the Court of Appeal held *(Scotten* v. *Barthel* (1894), 21 A.R. (Ont.) 569), that, as the point of commencement was described in the deed in question as a point in the southerly limit of lot 43, it must be taken

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to be a point east of the water's edge. The Supreme Court reversed this decision, holding, for various reasons, that the deed could not be construed as the Court of Appeal had construed it; and one of these reasons was (as appears by the judgment of the Chief Justice, concurred in by Taschereau and Sedgewick, JJ.), that the rule in question had no application. That case appears to me to be as nearly as possible like this case. In it, if the deed was to be construed against the grantor, the strip of land granted would be 40 ft. longer than it would be if the other construction was adopted; just as, in this case, if the option is construed against the lessor, the 50 acres will pass, whereas, if the other construction is adopted, the lessee will take (if he exercises his option) the 50 acres less the house and the quarter of an acre surrounding it. Strong, C.J., said (24 Can. S.C.R. at pp. 374, 375):—

"However that rule of interpretation may be applied to determine the meaning of particular words or expressions, I can find no instance of its being used to determine the meaning of the parties where the words in which they have expressed themselves have left that meaning *in equilibrio* as to the subject-matter of a conveyance. In short the deed must be construed according to the intention of the parties, and judging from the language they have used they have left the point in dispute undetermined, and the Court cannot on any arbitrary principle determine it one way rather than another."

Then he quoted the remarks made by Jessel, M.R., in *Taylor* v. *Corporation of St. Helens*, already referred to, and proceeded:—

"Then can it be said that this is a case of an uncertainty of description to be determined by the election of the grantee?

"This principle is applied to determine the ambiguity where a description applies equally to different subjects, as where there is a grant of 10 acres of land part of lot A, or a grant of one of the grantor's four horses. In such a case the grantor is presumed to leave the selection to the choice of the grantee. But this is not the case here; the question is whether a larger or a smaller piece of land was intended to be conveyed. The grantor meant either the one or the other, which, he has, it is true, left uncertain, and it would be to do violence to his intention if we were to hold that the grantee should have a right of election. The doctrine has no application to a case like that now before us, where it is manifest that the grantor intended, not that there should be one or the other of two alternative points of commencement either of which the grantee might adopt, but one point only, though that has not been

properly ascertained."

The only distinction that I can draw between the case discussed by the Chief Justice and this case is that what the Supreme Court had to deal with was a grant, whereas what is in question here is an agreement to sell; but that distinction does not help the plaintiff, for the reason applying the rule in the case of a grant seems to be at least as strong as the reason for applying it in a case in which the question is whether there is a contract definite enough to be specifically enforced. The plaintiff here does not desire to have specific performance unless he is entitled to a conveyance of the whole 50 acres, and he cannot have that conveyance unless he can shew a contract clearly entitling him to it. In my opinion he does not shew such a contract, and his action fails.

While the objection to which effect is given is covered by the general denial, in para. 3 of the statement of defence, that there was an agreement for the sale of the lands described in the lease, it was not specifically pleaded; and, when I called attention to it, Mr. Logan, while not formally waiving it, said that, in his own opinion, the words of the option would cover the whole 50 acres. Therefore, although I think that, because the plaintiff has not proved his contract, I am bound to refuse specific performance, I make no order as to costs.

Judgment accordingly.

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Supreme Court of Canada, Idington, Duff, Anglin, Brodeur and Mignault, JJ. June 21, 1920.

Municipal Corporations (§IIIC—66)—Special Meeting—Notice—Absence of Councillor—Closing Road Between Two Municipalities—Consent of County Council—Articles 114, 115, 116, 118, 332, 334, 340, 344, 345, 355, 359, 467, 473, 474, 475, 519 Mun. Code—R.S.Q. (1909) arts. 2064, 2065.

Articles 332 et seq of the Municipal Code (Quebec) require notices of special meetings of a Municipal Council to be prepared and left with the persons to be notified and provide the method of service. Sending the notices through the post office is not a compliance with the sections and verbal evidence cannot be admitted to prove that the notice has been in fact received and where such notice has not been given in conformity with the provisions of the Code and a

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declaration made as required by art. 116 Mun. Code before the meeting proceeds to business the proceedings are an absolute nullity and art. 14 Mun. Code cannot be invoked to support the irregularities.

Held also per Anglin and Mignault, JJ., Duff and Brodeur, JJ., contra and Idington J. expressing no opinion, that it was not necessary for the Municipal council to obtain the consent of the county council before changing the course of a colonisation road, within the limits of the municipality if it did not change the place where it connected with the neighbouring municipality.

APPEAL from a judgment of the Court of King's Bench, appeal side, (1919), 29 Que. K.B. 146, reversing a judgment of the Superior Court, and dismissing the appellant's action with costs. Reversed.

N. A. Belcourt, K.C., and *T. L. Bergeron*, for the appellants.

Aug. Lemieux, K.C., and *S. Lapointe*, K.C., for the respondents.

IDINGTON, J.:—These three appeals were heard together as they involve the same question. For the reasons assigned by my brother Brodeur (with which I agree) relative to the failure of the council of respondent to act in compliance with the statutory provision (other than alleged need of county council's consent) which should have governed it in taking steps to pass such a by-law as in question, I think this appeal should be allowed with costs throughout.

DUFF, J.:—I concur with Brodeur, J.

ANGLIN, J. (dissenting):—I respectfully concur in the unanimous opinion of the Judges of the Court of King's Bench (1919), 29 Que. K.B. 146, which I understand is shared by my brother Mignault, that this case does not fall within art. 519 of the Municipal Code.

I likewise concur in their view that notice of the presentation of the by-law in question was sufficiently given unless the legality of the council meeting of October 27 has been successfully attacked. In my opinion it has not.

Any irregularity that there may have been in the giving of notice of that meeting to councillor Gilbert, who did not attend it, was, I think, cured by art. 14 of the Mun. Code, since it is proved by Gilbert's own admission that he had in fact received notice in due time and the omission to serve it in the prescribed method and to state in the minutes of the meeting that notice had been given in conformity with the requirements of the Mun. Code therefore did not entail any substantial wrong or injustice. I accept the opinion of the Judges of the Court of King's Bench as to the admissibility of this evidence.

With profound respect for the contrary opinion of my brothers Brodeur and Mignault, in which I understand my brothers Idington and Duff are disposed to concur, I also agree with the views of the majority of the Judges of that Court that this irregularity does not fall under the last paragraph of art. 116 of the Municipal Code. I can find no justification for construing the explicit words "if it appear that the notice of meeting has not been served on all the absent members ("s'il appert que l'avis de convocation n'a pas été signifié à tous les membres absents,")" as if they read "if it does not appear that the notice of meeting has been served on all the absent members," and that, with respect, is what is done in maintaining this appeal. If it appears affirmatively that notice of the special meeting has not been given to every absent councillor, the council is, no doubt, obliged to adjourn at once, and, if it does not, nullity of any proceedings taken follows. But if this be not shewn —if, although the usual proof of notice be lacking, the council is otherwise satisfied that every absent member was in fact notified— while its proceedings may be irregular they are not declared null by art. 116 Mun. Code. They are, no doubt, taken at the risk of nullity if the fact should prove to be that any absent councillor had not been notified. But, if he was in fact notified and that can be established, a case is made, in my opinion, for the application of art. 14 Mun. Code which ordains that:—

"No objection founded upon form, or upon the omission of any formality, even imperative, in any act or proceeding relating to municipal matters, can be allowed to prevail in any action, suit or proceeding respecting such matter, unless substantial injustice would be done by rejecting such objection or unless the formality omitted be such that its omission, according to the provisions of this code, would render null the proceedings or other municipal acts requiring such formality."

The omission to serve the notice of the special meeting in the method prescribed by art. 340 Mun. Code, and the omission of the entry in the minutes prescribed by the second paragraph of art. 116 Mun. Code, were in my opinion not informalities which, according to the provisions of the Mun. Code, rendered the proceedings of the council null. The only provision relied upon as entailing nullity is the concluding paragraph of art. 116 Mun. Code. The proceedings would have been null under that paragraph had it appeared that notice of the meeting had in fact not been received by the absent Gilbert. But that did not appear—could not have appeared

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—since the fact was otherwise. I think it is too narrow a construction of the last paragraph of art. 116 Mun. Code to hold that it entails nullity merely because service of notice of the meeting on an absentee has been effected informally, where he has actually received notice in writing.

For these reasons, I am with respect of opinion that the appeal should be dismissed.

BRODEUR, J.:—These three cases have been joined as they involve the same questions. They are confessory actions by which the plaintiffs claim from the corporation defendant the reconstruction of a fence between their farms and the road contiguous thereto. (Articles 505 C.C., (Que.), 473, 474, 475 Mun. Code.)

The defendant pleads that these roads were closed by a municipal by-law dated November 5, 1917, and that the corporation was authorised to remove the fences which it there maintained (art. 467 Mun. Code).

Plaintiffs in their answer to plea alleged that this by-law was null, because it was not preceded by a regular notice of motion (art. 359 Mun. Code), this notice of motion having been given at a special sitting illegally held on October 27, 1917, (art. 116 Mun. Code).

The Superior Court maintained these actions, holding, first, that the notice of motion required by art. 359 of the Mun. Code had not been given, and second that the by-law, ordering the closing of a road leading from one municipality to another (art. 519 Mun. Code), had no force or effect until approved by the county council.

The Court of Appeal, 29 Que. K.B. 146, reversed this judgment and dismissed both actions.

The facts which gave rise to the litigation are the following:

About 35 years ago the Provincial Government began to construct a colonisation road from the Lake St. John region, which lies between the Saguenay and Peribonka rivers, and which covers 6 townships. This road is known as the Archambault road. (Reports of the Commissioner of Agriculture and Public Works for the Province of Quebec, 1887, p. 47. Reports of the Commissioner of Agriculture and Colonisation for Quebec, 1890, p. 170; 1893, p. 136-160; 1894, p. 381; 1896, p. 252).

At certain spots it follows the boundary of the lots of one range and in others it leads from one range to another. At the entrance to the municipality respondent, St. Henri de Taillon, it follows the front of the lands in the second range. It next runs up between

lots 21 and 22, 26 and 27, 30 and 31 of the 3rd, 4th and 5th ranges, till at the boundary of the 6th range it reaches the neighbouring municipality of St. Henri de Taillon West. Plaintiffs are owners of the farms bordering on this road in the 2nd and 3rd range. This is the part of the road which the respondent corporation wishes to close.

The corporation of St. Henri de Taillon recently opened a road more to the east, between lots 14 and 15, in the 2nd, 3rd and 4th ranges; and this new road, running from the Archambault road to the border of the 2nd range, near the church, rejoins the same road by making use of the front road of the 5th range. I shall call the road sought to be closed by the name of the Boily-Fortin road, and the new road as the east road.

In virtue of the law (R.S.Q. 1909, art. 2064), a municipality is obliged to keep the colonisation roads crossing its territory in the same manner as the roads which it opens itself. It cannot close the colonisation roads without the consent of the Minister (art. 2065 R.S.Q. 1909).

It seems that the municipal council of St. Henri de Taillon, on July 9, 1917, adopted a resolution requesting the Minister of Colonisation to close the Boily-Fortin road which forms part of the Archambault road, stating that a new road (the east road) had been opened. This permission was granted them on August 30, 1917.

This projected closing evidently displeased several of the taxpayers, for a meeting of the council was held on October 15, 1917, and after taking a vote of the taxpayers present, it was decided on motion seconded by Adelard Gilbert that the Boily-Fortin road would remain open.

The supporters of the closure did not admit themselves defeated, for the secretary-treasurer, on receiving petitions on their behalf, called a special meeting of the council for October 27, 1917. Instead of serving the notices in the regular manner, as required by arts. 115 and 340 of the Mun. Code, by leaving a copy with each of the councillors in person or at his domicile or place of business, he deposited them in the post office.

On the day fixed for the meeting, Gilbert, who on October 15 had seconded the motion to let the Boily-Fortin road remain open, was absent. The minutes of the meeting do not shew that before proceeding to business, the council set forth that notice of the meeting had been duly served on each member (art. 116 Mun. Code); the meeting was not closed as required by art. 116 Mun.

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Code under the penalty of nullity. On the contrary the other councillors proceeded to adopt two motions, the first revoking the proceedings of October 15, and the second authorising the secretary to give public notices summoning the tax-payers to a meeting declaring that at the said meeting the council would proceed, after examining the petitions, to pass a by-law closing the Boily-Fortin roads. The public notice was given on November 5, 1917; and on that day, the council, Gilbert being present, unanimously adopted a by-law ordering that these roads be closed.

Later, on November 24, the council adopted another resolution authorising the mayor to hire men "to remove the wire from the roads between lots 21 and 22 in the 2nd range, and between lots 26 and 27 in the 3rd and 4th range; the men appointed for this work shall, with the owners' permission, close the roads at each end with a fence."

The persons sent to make arrangements with the neighbouring proprietors removed the fences without their consent.

It will be seen that the council acted in a hesitating and contradictory manner. First of all, they passed a resolution to close the road in August. On October 15 they decided to let it remain open. On October 27 they revoked their resolution of the 15th. On November 5 they passed a by-law to close the road. Finally on November 24 they hired men to remove the fences, but instructed them not to close the road *without the owners' consent.*

The first question before us is to decide if this meeting of October 27 is legal.

The new Mun. Code is evidently inspired by the idea that more severity must be shewn than in the past with regard to these special sittings and the notices to be given. On this head we have only to read the report of the codifiers, dated November 20th, 1912, on the sittings of councils.

Thus in the old Code, the notice of a special sitting to be given to councillors need not be in writing (arts. 126 and 215 of the old Mun. Code), but art. 115 Mun. Code imperatively requires that this special notice be now given in writing. The clear intention of the law is to override the jurisprudence created by the Court of Appeal in the case of *Hudon* v. *Roy dit Desjardins* (1909), 19 Que. K.B. 68, in which it was held that if a sitting of the council was adjourned to a subsequent day for the lack of a quorum, the notice required by art. 139 of the old Code then in force could be given verbally. In a similar case at present, art. 118 of the new Code

requires on the contrary that the notice be in writing.

A by-law could formerly be passed without giving notice of motion; at present art. 359 of the Mun. Code requires a notice of motion.

How must the notice of special sittings be given to councillors? This special notice must be given in writing as I have already said (art. 115 Mun. Code). Article 332 Mun. Code indicates what the notice must contain. Duly certified copies must be prepared and left with the persons to be notified (art. 332 Mun. Code). Article 340 Mun. Code says that the service of such a special notice is made by leaving a copy of the notice with the person to whom it is addressed, in person, or at his domicile or place of business. Article 343 Mun. Code indicates at what hours a special notice may be served, and according to art. 344 Mun. Code, if the doors of the domicile or place of business are closed, a copy of the notice must then be affixed on one of these doors.

The person effecting the service must then give a signed and attested certificate thereof either under his oath of office or under his special oath, giving his name and residence, a summary statement of the manner in which the notice was served, and the place, day, and hour of the service (art. 335 Mun. Code). This certificate must accompany the original of the notice and must be fyled with the archives of the corporation (art. 334 Mun. Code).

In the present case we find the following certificate in the archives of the corporation:—

"I, the undersigned, J. L. Larouche, certify under my oath of office that I have served the special written notice on the above named councillors by leaving a copy for each of them at the Post Office between the hours of .... and .... in the afternoon of the 22nd day of the month of October, 1917.

(Signed) J. L. Larouche."

It is very clear that the service of the special notice was not effected according to the provisions of the law, which requires the person making it to proceed to the domicile or place of business of the councillor, unless he leaves this notice with him elsewhere in person (arts. 340, 344 Mun. Code).

Could verbal evidence be admitted to prove the fact that the notice had nevertheless been delivered to the councillor Gilbert, who was absent at the meeting held on October 27?

I do not think so. This evidence was objected to, and the objection should have been maintained. The Mun. Code requires

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that the certificate of service of the notice should be in writing, and the Courts cannot accept any other proof than that which results from the writing itself. Article 1233 of the Civil Code (Que.) indicates the cases in which proof by testimony is admissible. The fact in question cannot be considered as falling under one of these heads, and art. 1233 C.C. (Que.) adds:—"In all other matters proof must be made by writing or by the oath of the adverse party."

What should the council have done at its sitting of October 27? The answer is given by art. 116 Mun. Code:

"The council, before proceeding to business at such sitting, must set forth and declare in the minutes of the sitting that notice of meeting has been given in conformity with the requirements of this code, to all the members of the council who are not present at the opening of the sitting. If it appears that the notice of meeting has not been served on all the absent members, the sitting must be immediately closed, under penalty of the nullity of all its proceedings."

In the present case Councillor Gilbert was absent. Before proceeding the council should therefore have set forth in the minutes that notice of the sitting had been given him. This was not done, and for an excellent reason. The certificate of service deposited in the archives of the corporation did not shew that the notice had been given him. This certificate did indeed shew that the notice had been deposited in the post office, but there was nothing to shew that he had ever received it. The sitting should therefore have been closed, and as this was not done, the proceedings thereat are affected with nullity. In consequence the summoning of the interested parties as decided at this meeting is null, as well as the notice of motion given that a by-law would be adopted for the closing of the road in question at the next sitting of the council. But it is clear that these delays did not suit the supporters of the closing. They insisted on going on, under the impression that their chances of success were better now than if they waited a little longer.

Article 14 of the Mun. Code was invoked. This article says that the omission of any formality, even imperative, cannot constitute a serious objection, unless it should cause substantial injustice. But article 14 Mun. Code goes on to say: "unless the formality omitted be such that its omission, according to the provisions of this code, would render null the proceedings or other municipal acts requiring such formality."

Now art. 116 Mun. Code explicitly declares that "if it appears that the notice of meeting has not been served on all the absent members, the sitting must be immediately closed, *under penalty of the nullity* of all its proceedings."

The defendant cannot therefore rely upon art. 14 of the Mun. Code in support of its irregularities. The notice of motion for the adoption of a by-law given at that sitting is therefore illegal, and it follows that at the meeting of November 5, defendant adopted a by-law for the closing of the road without the motion required previous thereto. Article 359 Mun. Code declares that every by-law must, on pain of nullity, be preceded by a notice of motion given at a sitting of the council, and it can be passed only at a subsequent sitting. The notice of motion in question was therefore given at a sitting not regularly held, and in consequence it renders null the adoption of the by-law at a subsequent sitting.

Defendant relies upon a judgment of the Court of Appeal in a case of *Hudon* v. *Roy dit Desjardins*, 19 Que. K.B. 68, in which the following was the holding of the Court:—

"When a regular session of a municipal council is adjourned, for want of a quorum, to a subsequent day, the notice of the adjournment to the absent councillors, required under art. 139 M.C., may be given verbally, and, although service of such notice must be established at the resumed session, a mention in the minutes that this was done is not essential to the validity of the proceedings. Hence, a resolution passed at such a resumed session, although the minutes contain no reference to the notice given after adjournment to the absent councillors, if no substantial injustice is shown to result therefrom, will not in view of art. 16 M.C., be declared null and void."

This case was decided in 1909 by a majority of 4 Judges to one. Cimon, J., who dissented, was well acquainted with our municipal laws, seeing that he was Judge in a rural district in which he had practised his profession all his life. The judgment of the Court of Appeal reversed that of the Court of Review, which was composed of Langelier, J., then Acting-Chief Justice; Sir Louis Jette, who later became Chief Justice of the Court of Appeal, and Carroll, J., who is at present a Judge of the Court of Appeal.

Evidently there was a considerable difference of opinion in this case of *Hudon* v. *Roy dit Desjardins*, 19 Que. K.B. 68. Moreover, this case did not turn on the validity of a sitting called by special notice, but on the validity of an adjourned sitting, that is to

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say, under art. 139 of the Mun. Code which was drafted in terms different from those of art. 116 of the present Mun. Code.

Thus, the special notice need not be in writing but might even be given verbally. The certificate of service could also be given verbally before the council and art. 139 of the old Code did not require that the sitting should be immediately closed "if it appears that the notice of meeting has not been served on all the absent members" under pain of nullity. It simply stated that in default of service all the proceedings taken at this sitting at the council were null. Article 116 of the present Code is drafted in terms much more precise and explicit, and therefore I am not inclined to place much reliance upon this decision of *Hudon* v. *Roy dit Desjardins*. According to the new revision of the articles on this subject, the formalities must be more exactly adhered to. The notice cannot be merely verbal but must be written. I think that all this goes to shew that the judgment in the case of *Hudon* v. *Roy dit Desjardins* cannot be relied upon in the present case.

The case of *Mathieu* v. *The Corporation of St. Francis*, 28 Que. K.B. 98, decided in 1918, has also been cited. It held that a resolution of the municipal council ordering the secretary-treasurer to give public notice that at the next general meeting of the council a by-law would be adopted for a purpose indicated, was equivalent to the previous notice of motion required by art. 359 of the Mun. Code.

The by-law discussed in that case had been adopted not precisely under the authority of the Mun. Code but under the Good Roads Act, 3 Geo. V., 1912 (Que.), ch. 21. A by-law was passed, notice of which had been given at a previous meeting. The Court held that a by-law was not essential, but that it was sufficient to proceed by simple resolution, and the regretted Chief Justice Archambault, after expressing in the formal judgment the opinion cited above, said, at p. 102:"Moreover, the Good Roads Act does not oblige the council to proceed by by-law. It authorises it to proceed by resolution, and a resolution need not be preceded by notice of motion. If the document in question is not valid as a by-law, it certainly is as a resolution."

It will be noted that there is no decision bearing precisely on the point that the notice given at the meeting of October 27 could avail as the public notice required by art. 359 of the Mun. Code.

Next, could the Boily-Fortin roads be closed?

These roads form part of a colonisation road known by the

name of the Archambault road, constructed several years ago by the Provincial Government before the creation of the municipality defendant and the surrounding municipalities. When municipalities have been created and there are colonisation roads, these fall within the jurisdiction and control of the municipality and are considered not as county but as local roads. A local road may be under the control of a municipality, but should it be sought to close it, it must first be ascertained if this road leads to another municipality. In that case, although it be a local road, it cannot be closed without the consent of the county council (art. 519 Mun. Code).

The parts of the Archambault road within the limits of the municipality of St. Henri de Taillon did indeed fall under the control of that municipality, but could it close a portion of them without the consent of the county council? If it were a case of an ordinary road, constructed by the municipality and not directly touching on the neighbouring municipality, I take it that the local council could close this road without reference to the county council. But when the case is that of a colonisation road opened for an entire region, this road cannot be diverted without the consent of the county council.

There is evidence in the present case that this road can be used by the tax-payers of the neighbouring municipality, St. Henri de Taillon West, to go to a wharf built by the Federal Government on Lake Saint John at a place called Riviere-a-la-Pipe, (60-61 Vict. 1897, (Can.), ch. 2, para. 33). And now on account of the closing of this road, these tax-payers will be obliged to take a longer road to reach this wharf which was built for the accommodation of all the settlers in the region. Under the circumstances, the question should have been laid before the county council, which would have decided if this closing were to be approved or not.

I am therefore of the opinion that the respondent corporation was at fault in closing this road and removing this fence without obtaining the authorisation of the county council.

For these reasons I am of the opinion that this appeal should be maintained with costs of this Court and in the Court of Appeal and that the judgments of the Superior Court should be restored.

MIGNAULT, J.:—These three cases involve the same questions and were heard together. There was a fourth case, *William Tremblay* v. *The Corporation of St. Henri de Taillon*, in which appeal had also been taken from the judgment of the Court of

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King's Bench sitting in appeal. This last case differed from the three others in that the plaintiff (appellant before this Court) asked for the annulment of the by-law and the other proceedings of the defendant corporation (respondent in this Court) invoked by it in its plea to the three actions, those of Joseph Boily, Amedee Fortin and Joseph Tremblay. A question as to the right of appeal having been raised in this fourth case, this Court made the following order:—

"March 8. Motion to quash stands reserved until after hearing in the other three cases against the above corporation, Boily, Fortin, and J. Tremblay. No further expense to be incurred meanwhile in this case."

The hearing then took place in the three cases only.

The three plaintiff-appellants complained in their action of the removal of a fence separating their properties from a road open to the public, the maintenance of this fence being at the charge of the defendant-respondent as to one half. They alleged the existence of a servitude in favour of their properties, consisting in the obligation imposed upon the respondent by law of fencing its property, and in their conclusions they asked that the respondent be enjoined to make, construct, and maintain a fence sufficient to separate their properties from the said road for one-half of its length at the place where the fence which had been removed formerly stood.

The respondent contested these actions alleging that, according to a by-law passed on November 5, 1917, the road which the appellants claimed to be open to the public was duly closed; that this by-law was preceded by the notices required by law, was duly promulgated, and was still in force; that it was passed according to law and that the respondent was empowered to close the road; that the fence was the property of the respondent and had been removed within the legal delays.

In their answer appellants alleged that the by-law of November 5, 1917, was a radical nullity, not having been preceded by the notice of motion required by law; that the public notices were likewise null, having been given without proper authorisation as the resolution ordering the publication of these notices was carried on October 27, 1917, at a special sitting of the council irregularly called and held in such manner as to affect with nullity all the proceedings adopted thereat; that on October 15, 1917, the council of the respondent decided that the said roads would remain open, and that it was to deceive the appellants and other interested parties

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that a special sitting was called for October 27, which said sitting was irregularly and illegally conducted as aforesaid, and the notices thereof intentionally given in such manner that the parties favourable to the maintenance of the said roads had no knowledge thereof.

From the analysis of the pleadings I have just made, it is evident that the principal ground urged before this Court and Courts of original jurisdiction and appeal, namely, that the roads in question communicated from one municipality to another and could not be closed by the respondent's council without the consent of the county council, was not mentioned in plaintiffs' answer. It may be that the question was brought up in the fourth action (*William Trenblay* v. *The Corporation of St. Henri de Taillon*). I do not express myself on this point, but it is in vain that I search for an allegation as to this ground of nullity in appellants' answer to plea. However, as this question was discussed before us and before the other Courts, I shall treat it as if it had been properly raised. I may say that if I thought this complaint well founded, I would order all such amendments as might be necessary to give it full effect.

First complaint. The by-law in question closed a road leading from one municipality to another and therefore could only come into force with the approval of the county council which was not secured in this case.

The law referred to is found in art. 519 of the Mun. Code, second paragraph, added in 1872 to the old Mun. Code by the statute 36 Vict. 1872 (Que.), ch. 21, sec. 21, which says:—

"Nevertheless, no by-law or *process-verbal* ordering the closing of a road leading into or from any neighbouring local municipality, or for diverting such road at a point where it leads into or from such municipality, has any force or effect until it is approved by a resolution of the county corporation passed by a majority of the members of its council."

I interpret this article, not as applying to a road by which access may be had to another road leading into or from any neighbouring municipality, but as preventing, without the approval of the county council, the closing of the road which itself leads into or from a neighbouring municipality, or its diversion at a point where it leads into or from such municipality. I use the very language of art. 519 Mun. Code, which is rather defective from a grammatical point of view. The intention of the legislator is made very clear by the English text of the article, which speaks of a by-law

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or *process-verbal* ordering "the closing of a road leading into or from any neighbouring local municipality, or for diverting such road at a point where it leads into or from such municipality." What the law forbids, without the approval of the county council, is the depriving interested parties of access to a neighbouring local municipality by the roads leading to it, and this appears to me to be shewn by the words "or for diverting such road *at a point where it leads into or from such municipality*" so that we must see if in this case the appellants are deprived of this access. If the road over which they must travel to reach a neighbouring local municipality is lengthened, without their being deprived of such access, this article does not apply.

Appellants complain of the closing of a road leading to the neighbouring local municipality of Honfleur or Peribonka. It is sufficient to read the evidence of the appellant Boily (and the parties admit that the evidence of the other appellants would be the same) to reach the conclusion that the appellants are not deprived of access to this municipality by the closing of the two ends of the road running beside their lands, although the road they must travel is lengthened. I quote a short passage from the evidence:

"Q. If you wish to go to Honfleur to-day, there is a road you can use? A. There is a road.

Q. A longer one? A. It is longer.

Q. So you have a road leading to the neighbouring municipality, and the closing of this road does not leave you without a road in your municipality? A. This road was constructed when I settled by the side of the road.

Q. It gives you a longer journey? A. Yes, sir.

Q. You still have a complete road to go to Peribonka and the other side? A. Yes, sir.

Q. Only it gives you longer to travel? A. It does."

I am therefore of the opinion that this first complaint is not well founded. I may add that the respondent, before closing the portions of the road, had obtained the authorisation of the Department of Colonization, Mines, and Fisheries of Quebec, which authorisation was necessary as the public monies had been spent on the construction of this road.

Second complaint. This is in connection with the sitting of respondent's council on October 27, 1917, at which public notice was ordered to be given of the by-law passed by the council on

November 5. The trial Judge came to the conclusion that no notice of motion for this by-law had been given as required by art. 359 Mun. Code. He does not discuss further the question of the legality of this meeting. The Court of Appeal was of the opinion that the public notice ordered for this meeting could avail as notice of motion, following its previous decision in the case of *Mathieu* v. *The Corporation of St. Francis*, 28 Que. K.B. 98. As to that, if the meeting of October 27 was regularly called and held, I share the opinion of the Court of Appeal.

This is, however, the main difficulty as to the notice of motion said to have been given. One of the councillors, named Gilbert, was not present at the sitting of October 27, which was a special sitting of the council called by the mayor. The notice to councillors of this sitting was given by the secretary-treasurer by unregistered letter, and his certificate of the dispatch of these letters, dated October 23, appears on record. Pelletier, J., says that this certificate was on the council table at the meeting of October 27. I have not been able to verify this statement from the record. On the contrary I find in the evidence of Larouche, the secretary-treasurer, an admission that this certificate was not produced before the council at the commencement of the sitting, and it was not mentioned in the minutes.

The Court of Appeal based itself on its decision in the case of *Hudon* v. *Roy dit Desjardins*, 19 Que. K.B. 68, in setting aside this objection. In that case it was held, under the old Mun. Code, that when a regular sitting of a municipal council had been adjourned to a subsequent date for lack of a quorum, verbal notice could be given to the absent councillors, and that although the giving of such a notice must be proved at the adjourned sitting, the mention of this formality in the minutes was not required under pain of nullity of the proceedings. In that case, the Court of Appeal reversed the judgment of the Court of Review, and the main argument on which its finding was based was drawn from art. 16 of the old Code, now art. 14 of the new.

In the present case the Court of Appeal was unanimous, but Martin, J., would have been of the opinion that the sitting of October 27 was illegal, if he had not considered himself bound by the decision in *Hudon* v. *Roy dit Desjardins*, *supra*. He did not think it his duty to set aside a jurisprudence that had been established for 10 years.

It is only this last reason which makes me hesitate in this case.

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It is true that the new Code has amended the old in requiring in article 115 Mun. Code that the notice must be in writing, but were it not for the decision in *Hudon* v. *Roy dit Desjardins* the notice required by the old arts. 126 and 127 Mun. Code could be considered as necessarily a written one, for art. 127 Mun. Code speaks of its service. But the effect of this amendment is to make the law still more rigorous, and there is no doubt now that, in spite of *Hudon* v. *Roy dit Desjardins*, the notice of a special sitting of the council must be given in writing. If the statement of the secretary-treasurer is exact, that he did not produce the certificate of his service before the council at the opening of the sitting, and this is neither contradicted nor explained, then the legality of the sitting cannot be defended even by the authority of *Hudon* v. *Roy dit Desjardins*, for the necessity of proving the service at the sitting of the council was admitted in that case.

I am entirely in agreement with the opinion of Martin, J., when he says:—

"It appears to me that the three paragraphs of Article 116 M.C. must be read together and together form one article. Notice of a special meeting must be in writing (M.C. 115) and served by leaving a copy of the notice with the person to whom it is addressed in person or at his domicile or place of business (M.C. 310), and it was the duty of the council before proceeding to the business of the special meeting, to set forth in the minutes of the sitting that notice of meeting had been given to any member not present, in conformity with the requirements of the Municipal Code, and the concluding paragraph of Article 116 to the effect that, if it appears that notice of meeting has not been served on all the absent members, the sitting must be immediately closed under penalty of the nullity of all its proceedings, in my opinion refers to the preceding paragraph indicating the manner in which the evidence of the regularity and sufficiency of the notice is to be set down and established."

Unless we take it upon ourselves to set aside the law completely, we must give effect to the imperative provisions of art. 116 Mun. Code, which entail nullity, that "if it appears that the notice of meeting has not been served on all the absent members, the sitting must be immediately closed, *under penalty of the nullity* of all its proceedings."

The Court of Appeal says that this disposition only applies where it appears that the absent members were not served with the

notice, so that if nothing whatever appears it would follow that the council could continue its sitting. For my part, I do not interpret art. 116 Mun. Code in this manner; and I think that the second and third paragraphs of that article must be read together as they constitute in reality a single provision. The second paragraph requires the mention in the minutes of the service of the notice of meeting upon the members of the council who are absent at the opening of the meeting, and if it appears (evidently from this mention in the minutes) that notice of meeting was not served on all the absent members, the sitting must be immediately closed. Is it not clear that the law requires proof that the notice of meeting has been served on the absent councillors? And that there may be no doubt as to my opinion, I say that I think that the council should before proceeding ascertain if the notice has been served on the absent councillors, and if the service of this notice does not appear, it must immediately close the sitting.

It is true that Gilbert says that he did receive the notice more than 2 days before the notice of the sitting. But objection was taken to this evidence, and in any event there was nothing before the council to shew that Gilbert had received the notice, and it should have suspended its sitting until this proof had been made, or closed it in the absence of sufficient proof that the notice had been duly served on the absent councillor.

If then the resolution adopted on October 27 is considered as a notice of motion, this notice was not given "at a sitting of the council," that is to say, at a sitting of the council legally held, as required by art. 359 Mun. Code, which is new law.

Is it proper at this time to set aside jurisprudence established for over 10 years by the decision of the Court of Appeal in *Hudon* v. *Roy dit Desjardins?* As I have said, no comfort can be obtained from that decision in this case, for it appears, by the evidence of the secretary-treasurer, that he never placed before the council the certificate produced by him, and which would not in any event have shewn that Gilbert had received the letter sent to him through the post. But the new Code overrides this precedent, which contented itself with a verbal notice, and under the circumstances, and considering that we are interpreting a new Municipal Code only recently in force, I think it better for us to express our opinion on the merits of the question. My opinion is therefore that the requirements of arts. 115 and 116 Mun. Code must be met, and consequently I think that the sitting of October 27 was irregularly

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called and held.

This entails the application of art. 359 Mun. Code, and it must be held that the notice of motion for the by-law of November 5, required by art. 359 under pain of nullity, was not given, and the by-law was therefore null.

The appeal in all three cases should therefore be allowed with costs of a single appeal in this Court and in the Court of Appeal, and the judgment of the Superior Court should be restored. I would, however, grant to the appellants all their disbursements in the three cases.

Appeal allowed.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Magee, Hodgins, and Ferguson, JJ.A. February 18, 1921.

Automobiles (§III—440)—Joint Owners—One Owner Guilty of Negligence while Carrying Passenger—Damages—Liability of co-owner under Motor Vehicles Act.

The joint owner of a motor car is liable under secs. 19 and 23 of the Motor Vehicles Act R. S. O. 1914, ch. 207 to a passenger who is injured while being carried by his co-owner by reason of the negligence of such joint owner.

[Gray v. Peterborough Radial R. Co. (1920), 54 D.L.R. 236, 47 O.L.R. 540; Wynne v. Dalby (1913), 16 D.L.R. 710, 30 O.L.R. 67, referred to. See Annotation, Law of Motor Vehicles, 39 D.L.R. 4.]

APPEAL from the judgment of Middleton, J., in an action to recover damages for injuries sustained by the plaintiff while being driven by the defendant Lozina in a motor car owned by the two defendants. Affirmed.

R. T. Harding, for appellants; *T. P. Galt*, K.C., for respondent.

HODGINS, J.A.:—I agree with the judgment appealed from in so far as it awards the plaintiff damages for injuries against the defendant Lozina. As to the defendant Raolovich I am of opinion that he must be held liable as well. The evidence as to the nature of the ownership of the car in question is very slight, and only amounts to this, that these two defendants bought the car together, each contributing one-half of the purchase-money.

Williams, in his Law of Personal Property, 17th ed., p. 451,

says: "The four unities of *possession*, *interest*, *title*, and *time*, which characterise a joint tenancy of real estate, apply also to a joint ownership of chattels . . . If personal property, whether in possession or in action, be given to A. and B. simply, they will be joint owners, having equal rights, as between themselves, during the joint ownership, and being, with respect to all other persons than themselves, in the position of one single owner."

Goodeve on Personal Property, 5th ed., p. 9, says: "Personal property may be owned by several jointly, or in common, or it may be owned by one in severalty, in the same manner as real property."

Blackstone, book II., p. 399, says: "If a horse, or other personal chattel, be given to two or more, absolutely, they are joint tenants hereof . . . if the jointure be severed, as by either of them selling his share, the vendee and the remaining part-owner shall be tenants in common."

The ownership of the defendants is a joint tenancy, and there does not seem to be any doubt that each is an owner, albeit a joint owner.

The Motor Vehicles Act, R.S.O. 1914, ch. 207, sec. 19, amended in 1917 by 7 Geo. V. ch. 49, sec. 14, and in 1918 by 8 Geo. V. ch. 37, sec. 8, reads as follows: "The owner of a motor vehicle shall be responsible for any violation of this Act or of any regulation prescribed by the Lieutenant-Governor in Council, unless at the time of such violation the motor vehicle was in the possession of some person *other than the owner* without his consent, express or implied, not being a person in the employ of the owner, and the driver of a motor vehicle not being the owner shall also be responsible for any such violation."

There is no suggestion that Lozina had not the consent of his co-owner, express or implied, to use the car. Nor was the car in the possession of any person other than the owner of it. Raolovich says that they bought the car for their own use in their spare time. I am quite unable to see why the words of the statute should not be operative, making the owner or owners of a car, if they properly come within that description, liable notwithstanding that the one who was absent at the time at which liability arises is a joint owner. No one is compelled to become a co-owner, and if he does so it is because he has voluntarily chosen to occupy that position. He may, of course, find himself in many an awkward situation if his co-owner is disposed to exercise his full rights and does so, and this

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is such a situation. The Courts, however, do not extend anything beyond sympathy for the position which a co-owner occupies, and apply the law with regard to well-established principles.

Bliss,J., in a Nova Scotia case of *Freeman* v. *Morton* (circa 1856), 3 N.S.R. (2 Thomson) 340, at p. 347, quotes some excellent, though very old, advice, to complaining owners in common, which might well be observed by joint owners: "If two be possessed of chattels personal in common, as of a horse, an ox, or a cow, and if the one takes the whole to himself out of the possession of the other, the latter hath no other remedy but to take this from him who hath done to him the wrong, to occupy in common and when he can see his time."

The statute was evidently intended to enable recovery to be had against the person or persons who owns or own the car, so that persons who are injured by it may not be defeated of their rights by finding that their only remedy is against the driver, who may have no substantial interest either in the car or in anything else. Why should a co-owner not be liable? He has all the rights of an owner, and why not the liabilities?

It is true the word "owner" is a word of flexible meaning, as is said in the case of *Wynne* v. *Dalby* (1913), 16 D.L.R. 710, 30 O.L.R. 67. In that case the word "owner" was extended, and properly so, to cover a person who had contracted to buy a motor car, although the title had not passed to him. Far from circumscribing the word "owner," it extended it, and can therefore form no authority for holding that this defendant is not included in that term.

For these reasons, I think the appeal of both defendants should be dismissed with costs.

MEREDITH, C.J.O.:—I agree with the reasons for judgment of my brother Hodgins.

Nothing that was decided in *Wynne* v. *Dalby* is inconsistent with my brother's conclusion; as in all other cases, the reasons for judgment in that case must be read in the light of the facts of the case. What was there sought by the plaintiff was to fix the liability which the statute creates on a defendant who, though technically the owner of the motor vehicle, had neither the dominion over nor the possession of it.

In the case at Bar, the defendants were joint owners of the motor vehicle, and each of them was in law in possession of the whole and of the half of it, which means that each had access to and

control over every part of it, and each had possession of it in the sense of detention of the whole, though he exercised that control not on behalf of himself alone but partly on behalf of himself in respect of his own share and partly as the representative of his co-owner in respect of his co-owner's share: Markby's Elements of Law, 5th ed., sec. 399, pp. 203, 204.

The question whether an action lies against a person who, under sec. 19 of the principal Act, is made responsible for any violation of the Act or of the regulations made under it, or the liability is limited to the penalties imposed by the Act, was considered by my brother Orde in *Gray* v. *Peterborough Radial R. Co.* (1920), 54 D.L.R. 236, 47 O.L.R. 540, and he came to the conclusion that sec. 19 renders the owner liable to an action as well as to the penalties imposed by the Act. I see no reason for differing from that conclusion.

Looking at the purview of the Act, and that is what is to be looked at for the solution of the question, my view is that secs. 11 and 19 were passed for the protection of the public, and that an action therefore lies; if it had been intended to confine the liability to the penalty, different language would, I think, have been used. The provision of sec. 19 is that the owner "shall be responsible for any violation," and not shall be liable for the penalties provided by the Act, which would be the more apt expression if it was intended to limit the liability as suggested.

Lozina undoubtedly violated sec. 11; and, if his co-defendant was an owner of the motor vehicle within the meaning of sec. 19, he is responsible for that violation, and therefore responsible to the extent to which Lozina is responsible.

The respondent is entitled to treat the injury caused to him by Lozina's negligent act as a wrong done to him; and for that wrong, it being the result of a violation of sec. 11, the other defendant—being, as I have concluded, the owner of the motor vehicle within the meaning of sec. 19—is responsible.

MAGEE, J.A.:—The defendants Lozina and Raolovich were joint owners of a motor car, and the plaintiff, having while being driven in it by Lozina been injured in a collision with a street car through Lozina's want of due care, sues both Lozina and Raolovich.

The plaintiff alleged that he was being driven by Lozina for hire, having paid Lozina a small sum, but this was not believed by the trial Judge, who has found that he was being gratuitously carried or was a guest of Lozina. If he had been believed, there

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would have been a contract, and his action would have been based on contract, and not, as in the case of a mere pedestrian or occupant of another vehicle, based on tort for negligence. He was not believed, but none the less the transaction was a contract, in which Lozina undertook perhaps a somewhat less degree of care than if he had been paid, but for which the plaintiff gave the consideration of entrusting himself to his keeping for the time being: see *Moffatt* v. *Bateman*, [1869] L.R. 3 P.C. 115, where the action was on a contract, but was dismissed because no negligence was shewn; and see *Nightingale* v. *Union Colliery Co. of British Columbia* (1904), 35 Can. S.C.R. 65; *Coughlin* v. *Gillison*, [1899] 1 Q.B. 146; and *Brown* v. *Boorman* (1844), 11 Cl. & Fin. 1, 8 E.R. 1003, affirming the judgment of the Exchequer Chamber in *Boorman* v. *Brown* (1842), 3 Q.B. 511 at p. 525, 114 E.R. 603; just as a gratuitous bailee undertakes a degree of care for the consideration of being entrusted with the goods.

Now in making that contract Lozina could not in any way bind his co-owner. Co-owners or joint owners, whether joint tenants, tenants in common, or partners, may or may not be agents for each other; but unless specially authorised, expressly or impliedly, cannot contract for each other unless they are partners. There is here no ground for holding that these defendants were partners, and no evidence to warrant a finding that either was the agent for the other—or that Lozina was in any way in the service or employment of Raolovich. In using the motor car Lozina was simply exercising his right as an independent part-owner, just as Raolovich in his turn could do whenever he might get the opportunity.

Then, having that contract with Lozina, with which Raolovich had no connection and was not thought by the plaintiff or any one else to have any connection, the plaintiff set out with Lozina on their journey. Lozina did not perform his contract of taking care and the plaintiff was injured. Why should Raolovich be liable? Even against Lozina the plaintiff could not, by bringing his action for negligence, in form for a tort, instead of on contract, increase his rights—"the principle deducible from the authorities being that a man cannot by merely changing the form of action entitle himself to recover damages greater than the amount to which he is in law entitled, according to the true facts of the case and the real nature of the transaction:" *Chinery* v. *Viall* (1860), 5 H. & N. 288, 295, 157 E.R. 1192, 1195.

In *Bigelow* v. *Powers* (1911), 25 O.L.R. 28, where the plaintiff's

barn was negligently burned by sparks from the defective threshing engine of the defendant syndicate, of which the plaintiff was a member, the Court of Appeal held that the right to recover was based on contract and not on tort, in which as a joint tort-feasor the plaintiff might have no rights. So here the right against Lozina is really based on contract. See *Maclenan* v. *Segar*, [1917] 2 K.B. 325; *Brown* v. *Boorman, supra; Moffatt* v. *Bateman, supra;* and Pollock on Torts, 11th ed., pp. 543, 544.

Apart from the Motor Vehicles Act, the plaintiff has not shewn any rights against Raolovich, and it is only upon that Act that the latter has had judgment awarded against him. That Act, in sub-sec. 2 of sec. 11, declares that any one who drives a motor vehicle on a highway recklessly or negligently, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances, shall be guilty of an offence under the Act. Section 24, sub-sec. 1, prescribes the penalty of fine or imprisonment for that offence. But that is the offence against the public law—not the private contract or private right.

Then sec. 19 declares that the owner of a motor vehicle shall be responsible for any violation of the Act, unless the vehicle is then in the possession of some person other than the owner, and not being an employee, without the owner's consent, express or implied. Under the Interpretation Act, R.S.O. 1914, ch. 1, sec. 28 *(i)*, the word "owner" would include owners; and, as Raolovich willingly became part-owner, it cannot I think be said that Lozina had possession without his consent. Therefore Raolovich would be subject to this section. Section 23 deals with the onus of proof when damage is sustained by any person by reason of a motor vehicle on a highway. Any onus of proof here has been satisfied by the evidence. I refer to that section only to say that it would seem questionable whether the motor vehicle it refers to means a motor vehicle occupied by the person damaged.

As regards sec. 19, it was decided by a Divisional Court of this Court, in *Bernstein* v. *Lynch* (1913), 13 D.L.R. 134, 28 O.L.R. 435, that it made the owner of the motor car liable to a bicyclist injured by the car, and was not confined to making the owner liable to the penalties under the Act itself. This construction was not necessary to the decision in that case, for the Court held that the owner was also liable at common law for the act of his servant: see *Wynne* v. *Dalby*, 16 D.L.R. 710, at pp. 715, 716; but it was one of the *rationes decidendi*, and is binding upon this Court. It fol-

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lowed *Verral* v. *Dominion Automobile Co.* (1911), 24 O.L.R. 551, and other cases which were followed by Kelly, J., in *Wynne* v. *Dalby* (1913), 13 D.L.R. 569, 29 O.L.R. 62, the judgment which was affirmed in 16 D.L.R. 710, 30 O.L.R. 67.

I must confess an inclination to share the view of Orde, J., in *Gray* v. *Peterborough Radial R. Co.*, 54 D.L.R. 236, as to the intention of the Act. It seems to me that the language of the section might have been made much more definite, if its meaning has been correctly interpreted as creating a liability to individuals in cases where the existing law would not mae the owner liable, instead of a liability to the public for infraction of the law passed for the public weal. In other statutes, proprietors of premises have been made liable for infraction of the statute and for the penalties resulting.

The case of *Bernstein* v. *Lynch*, however, was one, as are the others, in which the plaintiff's rights rested wholly in tort and were not based on contract. The liability to individuals for violation of the Act arises only on the negligence which is an offence under sub-sec. 2 of sec. 11. I should be inclined to think that the public mentioned and protected in that section are not the occupants of the motor vehicle causing the danger. But, however that may be, if sec. 19 makes a co-owner liable to individuals, it is only for a violation of the Act which is negligence, and the fair meaning is that the co-owner is liable only when the action is based on negligence, and not to one who has deliberately made a contract and whose rights are based on contract and who can look to the party with whom he made it. I would therefore allow the appeal by Raolovich and dismiss the action as against him, with costs here and below.

I do not see any reason upon the evidence for relieving Lozina from the judgment against him, and would therefore dismiss his appeal.

FERGUSON, J.A.:—The grounds of appeal are:—

(1) That the defendants were liable only for gross negligence, and not, as stated by the trial Judge, for failure to exercise due and reasonable care. (2) That, the defendants being co-owners of the automobile, the defendant Raolovich is not liable for the gross negligence of his co-owner. (3) That, in the circumstances of this case, the Motor Vehicles Act, R.S.O. 1914, ch. 207, as amended, is not applicable. (4) That, if applicable to fasten liability on the defendant Lozina, it does not fasten any liability on the defendant Raolovich, in that he is not an "owner" within the meaning of sec.

19 of the Act.

The decision of the Supreme Court of Canada in *Nightingale* v. *Union Colliery Co. of British Columbia*, 35 Can. S.C.R. 65, appears to require evidence of gross negligence on the part of the defendants, and the recent case of *Mitchell* v. *Davis* (1920), 37 Times L.R. 68, in which the authorities cited by the trial Judge were considered, appears to indicate that there may be a substantial difference between negligence and gross negligence; but, on my reading of the evidence and the finding of the cause of the accident, it matters not which standard we apply, for I am of the opinion that it was gross negligence on the part of the defendant Lozina, with his limited knowledge, training, and experience in driving and controlling a motor car, to attempt to drive it in congested traffic such as there was at the place where the accident occurred, and that therefore the defendant Lozina is liable to the plaintiff in contract or in tort: in the former, for breach of a contract to carry with care; in the latter, for breach of duty to care for a passenger whom he had accepted: Pollock on Torts, 11th ed., p. 545.

The defendant Raolovich was not a party to the contract, if any, between the plaintiff and Lozina. He had not authorised the making of a contract or the taking of the plaintiff into the automobile, and he had not dominion or control of the automobile, and cannot, I think, be liable to the plaintiff for the negligence of his co-defendant unless by reason of some statutory provision.

This brings us to the question: Do secs. 11 and 19 of the Motor Vehicles Act impose upon either or both defendants a liability outside of the contract or tort? Section 19 of the Motor Vehicles Act reads:—

"The owner of a motor vehicle shall be responsible for any violation of this Act or of any regulation prescribed by the Lieutenant-Governor in Council, unless at the time of such violation the motor vehicle was in the possession of some person other than the owner without his consent, expressed or implied, not being a person in the employ of the owner, and the driver of a motor vehicle not being the owner shall also be responsible for any such violation."

In a recent case of *Gray* v. *Peterborough Radial R. Co.*, 54 D.L.R. 236, Orde, J., was of opinion that to drive negligently on the highway was a violation of sec. 11 of the Act, and that sec. 19 of the Act fastened liability for such negligence upon the owner of the automobile, not only to the public on the highway, but to

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passengers in the motor vehicle. That decision is not binding on this Court, and counsel for the appellant questioned its correctness; but, on the view I have taken as to the meaning of the word "owner," as used in sec. 19, it is not necessary to consider the correctness of the decision of Orde, J.

The liability of the defendant Lozina is established outside of the Act; and, assuming the correctness of the decision of Orde, J., the question remains: Is the defendant Raolovich an owner within the meaning of sec. 19? I think not, and I base my opinion on the interpretation of that section by the First Divisional Court of the Appellate Division in *Wynne* v. *Dalby*, 16 D.L.R. 710. See the opinion of Meredith, C.J.O., at pp. 715-716, where he says:—

"The purpose of sec. 19 was, I think, to avoid any question being raised as to whether a servant of the owner, who was driving a motor vehicle when the violation of the Act or regulation took place, was acting within the scope of his employment, and to render the person having the dominion over the vehicle, and in that sense the owner of it, answerable for any violation in the commission of which the vehicle was the instrument, by whomsoever it might be driven; and I do not think that it can have been intended to fix the very serious responsibility which the section imposes upon one who, like the respondent, at the time the accident happened, had neither the possession of nor the dominion over the vehicle, although he may have been technically the owner of it in the sense in which the owner of the legal estate in land is the owner of the land."

The defendant Lozina was not an agent or servant of Raolovich; they were co-owners; one did not need the assent of the other to perfect his right to dominion and control of the automobile. Raolovich was not present when the plaintiff became an occupant of the motor car, nor was he present when the accident occurred; he had no knowledge of the accident nor of the circumstances leading up to it; and I am unable to accept the view that, on the true construction of the Motor Vehicles Act, it was intended to fasten liability upon a person who had neither the legal right or power to control nor an opportunity to do so.

I would, for these reasons, dismiss the appeal of the defendant Lozina with costs, and allow the appeal of the defendant Raolovich with costs here and below.

By the unanimous judgment of the Court, the appeal of Lozina was dismissed; and, the Court being divided, the appeal of Raolovich was also dismissed.

ANTONIOU v. ARNETT.

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Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ. April 30, 1921.

1. Contracts (§IIA—125)—Performance—Consultations Necessary Between Parties—Implied Obligation to Follow up Communications—Unnecessary Delay—Damages—Liability.

Where the natural inference to be drawn from a contract is that both parties have agreed that something is to be done which necessitates consultation and discussion between the parties with regard to information to be supplied by one of them and thought to be desirable or actually desired by the other, there is an implied obligation upon each of the parties to follow up any communication by an appropriate response within a reasonable time, and where the parties have of necessity made the mails the means of communication, both are subject to the chances incidental to that method.

2. Damages (§III—KK)—Sale of Goods—Delay in Delivery—Injury to Business—Release from Claim for—Sufficiency of.

A defendant having become liable to the plaintiff in damages by reason of delays in shipping can release himself from his liability only by shewing a contract to that effect either express or implied, and a waiver properly so called is a contract.

A letter which purported to set out an oral arrangement to readjust the dates of a contract which the parties considered as still continuing, and which made no mention of any claim of damage having been put forward was held insufficient as a release.

[See Annotation, Oral Contracts, 2 D.L.R. 636.]

APPEAL by defendant and cross-appeal by plaintiff from the judgment of Ives, J., at the trial in an action for damages for delay in delivering certain store fixtures and fittings. Affirmed with a slight variation.

A. H. Clarke, K.C., and *W. H. Patterson*, for appellant.

J. B. Barron and *S. J. Helman*, for respondent.

HARVEY, C.J.:—With some hesitation I agree in the conclusion reached by the other members of the Court.

My difficulty has been in determining the proper consideration to be given to the agreement between the parties, which is evidenced by the defendant's letter to Woolhouse of June 4. My view is the same as my brother Stuart's, that the defendant had in mind the whole question of damages but that the plaintiff had not; and it is thus left to the legal effect of the agreement. Though I feel some doubt as to this it is not such as to justify me in dissenting.

STUART, J.:—In the first place I think it is clear that the con-

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tract in this case is not within the Statute of Frauds. Inasmuch as the defendant's obligation under it was not only to manufacture the fixtures but to do the work of putting them in place in the store it was not, I think, a mere sale of goods. Furthermore, there was a very substantial payment in cash when the bargain was made. It was, therefore, in my opinion, quite proper for the plaintiff to plead as he did in the seventh paragraph of his statement of claim that the contract was "partly written and partly verbal," that is, I presume, oral. It may be of course that the parties might be found to have acted with such care and deliberation in reducing their agreement to writing that evidence to vary or add to it was not admissible and that there might still be some question as to the possibility of substituting a new contract orally. But this has reference of course merely to the letter of June 4 and its consequences and I defer for the moment further reference to it.

Owing to the special nature of the contract I think there were mutual obligations created in respect to asking and giving the necessary information. The defendant was the expert builder or contractor. He knew what measurements would be required in order to enable him to fulfil his contract. The plaintiff did not. It was therefore the duty of the defendant at least to inform the plaintiff what the particular "final measurements" were which he would require and how precise and accurate they must be.

The promise of Arnett, the defendant's agent, to send back the blue prints which he was to make after returning east, with indications of what he required, was a promise of nothing more than the nature of the contract obliged him to do in any case. Just why he sent these blue prints after he had made them in Winnipeg, to the defendant at his manufactory in Souris and did not send them or one of them at once to the plaintiff at Calgary is not explained in the evidence. Nor is there any explanation of the fact that they were retained in Souris certainly for a considerable time. Of this delay the plaintiff very seriously complains. But he did nothing on his part to urge the matter. He made no request for the information which he needed in order to make the required measurements until March 11. I think the defendant was in the circumstances entitled to assume and very probably did assume that the plaintiff understood that it was too soon to expect accurate measurements to be secured. I do not, therefore, see how the plaintiff can complain of delay in which he acquiesced.

They did, however, on March 11 write a letter enquiring about

the plans. On March 13 the defendant replied saying that they had already gone forward. But they did not reach the plaintiff until the 18th. Just when they were sent is not stated by any witness and I am much inclined to suspect that it was not a very long time before the writing of the letter.

The plaintiff Antoniou said that he returned the blue print after getting Dowler, the architect, to insert in it the required measurements, on the same day as he received it, viz., the 18th. This statement was not accepted by the trial Judge for the reason that Woolhouse stated that he had got two copies of the blue prints from Antoniou on April 16 and that only two copies had ever been sent to the plaintiff.

Antoniou certainly at last stated that he only received two copies, but first he had said "two, *I suppose*." I am, therefore, not convinced that he did not receive three, particularly when no one from Souris testified as to the number sent; and I am, therefore, also not so certain as to the soundness of the finding of fact that Antoniou never returned a copy to Souris.

But this seems to be rather immaterial in any case because the white sheet prepared by Dowler was received as early at least as March 20. I think nothing can be suspected from the tearing of this date on the corner of the sheet because it obviously could not have been either February 20 or April 20. But it was Nuhn, the factory foreman, who marked the date and that was evidently only the date of his first seeing it. I doubt very much whether it ought to be taken as conclusive of the date when it was received by the defendant from the post office. And if Dowler had been able to say with any certainty how long it was before he marked the blue print on the 18th that he had prepared the white sheet, I think it might have been found to be the case that the latter had been received from the mail at Souris much earlier than the 20th although it did not reach Nuhn, the foreman, until that date.

The trial Judge may possibly have been wrong in his conclusion that no sufficient measurements were possible before March 17, but I am neither prepared to find that he was so clearly wrong in that conclusion as to feel compelled to reverse it, nor, even if we could do so, am I prepared to say that the plaintiff was itself entirely free from responsibility for the delay up to March 11 when for the first time he fulfilled his obligation to ask for information when they had not received it.

The plaintiff contends that the measurements on the white

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sheet furnished by Dowler were sufficient, that the defendant could safely have acted upon them and that any slight errors could, with a few hours' work, have been corrected in the operation of setting the fixtures up. Certainly the evidence of Dowler and one or two carpenters seems to support this contention, but it seems to me to have been a matter of opinion or judgment in which the defendant and his foreman may not improperly have taken another view. They were the persons responsible for the character of the work and I see no reason to say that they were much, if any, to blame in not acting on the faith of Dowler's sketch, even if the trial Judge had been so clearly wrong in his finding that the sketch was insufficient as to justify us in reversing it, which in any case I cannot see my way to do.

But as the trial Judge found I think the defendant was clearly to blame in not acting promptly in returning the sketch for correction and was thus responsible for the delay of 11 days between March 25 and April 5.

There is, I think, no possible ground for interfering with the finding of culpable delay between May 23 and June 2 and June 4.

The interview and letter of June 4 require some grave consideration. Antoniou had become impatient with the delays. He went to see Arnett at Souris and a lengthy conversation took place. Finally Arnett dictated a letter to Woolhouse, his agent, in Calgary, in the following terms:—"June 4, 1919. Mr. George H. Woolhouse, Suite 3, Colgrove Apts., Calgary, Alberta. Dear Sir: Mr. Antoniou of the King George Ice Cream Parlors came to Souris yesterday and is leaving for Winnipeg to-day. We have gone over carefully with him all his fixtures, the causes for delay, and arranged with him new shipping dates and terms of payment. All Mr. Antoniou's fixtures will be shipped to him next week, and his first cash payment of $350.00 is to be made on the arrival of the goods in Calgary. Payments of $800.00 a month have then to be made, commencing July 15th. Mr. Antoniou is to pay any freight on goods shipped direct to him and deduct it from his cash payment of $350.00. It has been also arranged with Mr. Antoniou that he will as usual accept his drafts and sign a chattel mortgage on the fixtures before he receives delivery of the fixtures. He wishes, however, that the goods should have arrived in Calgary before he accepts the drafts or signs the chattel mortgage. We are doing everything in our power to give Mr. Antoniou delivery of his goods at the first possible moment and I want you to do all you

can to see that his fixtures are installed promptly and well. I am giving Mr. Antoniou a copy of this letter as it embodies the verbal agreement made by us in the office here to-day. Yours truly, Thomas Lewis Arnett."

This letter was read over by Arnett to Antoniou and a copy was given to him. It was admitted by him that it embodied the arrangement which they had verbally arrived at.

The defendant contends that the making of this arrangement had and has the effect of destroying any right to recover damages for the previous delays which had taken place.

My opinion is that the arrangement cannot be treated as a substitution of a new contract for the old one. The old one was already partly performed. It was a contract for the manufacture, shipment, and installation of fixtures. Much of the manufacturing had already been done and some of the fixtures had been shipped. But the contention that it was the rescission of the old contract and the substitution of a new one was put forward mainly to meet what was conceived to be the state of the law as to the impossibility of varying a written contract by parol. But, as I said at the beginning, it was never a contract which any statute required to be in writing and the plaintiff himself avers that it was originally partly written and partly oral. Therefore, the argument advanced by the defendant seems to me to have been unnecessary so far as the rules of evidence are concerned.

Of course it was also contended that the old contract was gone in any case and that it could only be for a breach of the alleged new one that there would be any liability. This, I think, brings us directly to a question of fact and of the intention of the parties. As I have said, the original contract was already in process of completion. Some fixtures had been shipped. The remainder were well advanced in construction. The time for shipment had elapsed a considerable time. Plaintiff was interviewing his contractor about it. After much discussion it was agreed that the contractor should have a few days more for shipment and that the dates for payment should be rearranged. That was all. I do not think it can fairly be contended that the parties really thought they were rescinding the old contract and substituting a new one for it. They were doing nothing more, in my opinion, than readjusting the dates of a contract which they considered as still to continue.

The crucial questions, therefore, are: Did they intend to deal with the existing liability for previous delay? Was that liability

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wiped out?

It is not referred to in the letter and the letter says that it "embodies the verbal arrangement made." The defendant admits that the question of damages was not discussed at all.

But I am quite satisfied from the evidence that the defendant at least *thought of* the question of liability for the delay. On May 27 he had written to his agent Woolhouse, saying "What I am afraid of is that we are going to have difficulty in settling with this fellow. After he gets the stuff all in he will want damages or something else."

I am quite sure, therefore, that a week later, that is on June 4, when he was talking to Antoniou personally, he had the question of a possible claim for damages in his mind, yet he never mentioned it. Whether Antoniou had the claim in his mind or not we have not such good evidence to shew.

In my opinion it is impossible in these circumstances to hold that the verbal arrangement evidenced by the letter implied an agreement to surrender the claim for damages, at least in the sense that the parties tacitly understood that such would be the result of it.

The question remains then as to whether the verbal arrangement evidenced by the letter had the effect in law of destroying the claim for damages.

We were referred to the case of *Hartley* v. *Hymans*, [1920] 3 K.B. 475, but that was a case of a sale of goods and what was really decided was that after the purchaser had accepted and paid for a number of deliveries of the goods long after the time fixed in the contract for the delivery of the last of them, he could not without notice suddenly determine or cancel the contract and refuse to accept the remainder and he was held liable in damages for refusal to accept. But whether the purchaser could notwithstanding the tacit extension of time have recovered damages from the vendor for the delay is a question which was not raised there at all and yet that would be the really analogous case.

For the reasons I have given I do not think the law as to sale and delivery of goods is the law to be applied. We have here what can be more properly called a building contract, and my brother Beck has cited precedents dealing with the matter in that aspect.

Examine the situation for a moment. Let us suppose the plaintiff had at the interview of June 4 intimated that he refused to allow the defendant to go on and erect the fixtures on the ground

that time was of the essence of the contract which, owing to the circumstances known to the defendant, I think it was. Could he have been allowed to put another order elsewhere and recover damages for the large extra time which this would have involved if the defendant had told him, as he did, that he was prepared to "ship within a week." I think the plaintiff would have been bound either to accept the defendant's proposal, or, if he did not, then he could have recovered only such damages as would have been involved if he had accepted it. He would have been bound to minimise his damage by getting the contract done in the quickest way possible and that undoubtedly was by letting the defendant complete it. Then is it to be said that by doing the best thing to minimise his damage he thereby and *ipso facto* destroyed his right to damages entirely? In my opinion he did not. I feel fairly confident that the defendant was really endeavouring to get the plaintiff to do or say something which would cancel the liability without frankly mentioning the question.

There is, however, one aspect of the case relating to the first delay of 11 days between March 25 and April 5, allowed by the trial Judge, as to which some particular reference should, I think, be made. This was not a delay in shipment after receipt of the final measurement and was, therefore, not strictly a breach of the guarantee given. Liability for this delay must, therefore, rest merely on the breach of an implied obligation to act with promptness and not to cause delay to the plaintiff by any failure to give the information necessary for the securing of the final measurements. Viewing all the circumstances of the case as they were known to Arnett when he secured the contract, I think it is only just that this obligation should be held to have existed and that a breach of it would create liability.

The trial Judge allowed the defendant a week's remission of the continuance of liability but as the letter said "next week" and not "a week from to-day" and as the 13th was in fact "next week" it would appear that no delay after June 4 should be considered.

I would, therefore, not charge any delay after June 4 so far as the mere length of delay is concerned. Certainly the plaintiff ought not to be allowed to charge for any delay after that date because he acquiesced in it and by his acquiescence at least induced the defendant to go on instead of, as he might have done, considering his position and taking some other course. There was also a change made in dates of payment.

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But the trial Judge seems to have miscalculated the period of 6 weeks from April 9. Six weeks from that date is May 21, not the 23rd.

I would, therefore, modify the judgment so as to give damages for 23 days for the shipment of the tables and lunch counter and for 25 days for the remaining fixtures.

Furthermore, the periods should count backward from the date on which the plaintiff's place was opened for business and not onward from May 21. It was business for the 23 and 25 days immediately preceding the day they started that the plaintiff actually lost.

I see no good reason for interfering with the matter of the $75. That should stand.

With the modifications in the judgment above indicated, I think the appeal and the cross-appeal should be dismissed.

The respondent should have the general costs of the appeal but no additional costs on account of the cross appeal.

BECK, J.:—This is an appeal from the judgment of Ives, J., at trial.

He gave the plaintiff judgment for damages in a sum less than that claimed. The defendant appealed and the plaintiff gave notice of a cross-appeal.

The plaintiff was a keeper of a restaurant and "ice cream parlours" at Calgary. The defendant a manufacturer of fixtures and fittings for stores, etc. He carried on his business at Souris, Manitoba.

The ground upon which the plaintiff claims damages is that the defendant having contracted Feb. 10, 1919, to deliver certain fittings in respect of which he "guaranteed shipment six weeks from receipt of final measurements" defaulted in the time of delivery and caused damages to the plaintiff in connection with his business.

The Judge reserved judgment and set out his reasons for judgment at considerable length. I extract a portion of what the Judge said:—

"Previous to the 10th December, 1918, the plaintiff had been doing business in premises having some 14 ft. frontage on 8th Ave. East in Calgary which were situate in the McMillan Block, and which premises he held under a lease. Desiring to enlarge his place of business he entered into an agreement in writing with his landlord, the owner of the McMillan Block, whereby space adjoining on the west in this block would be added to plaintiff's premises so

that he would occupy 33 ft. of frontage, and the whole premises were to be added to and alterations made the cost being under and as provided by an agreement borne equally by the lessor and the plaintiff, who was to accept a lease of the new premises at a rental of $600 per month beginning May 1, 1919. This agreement referred to and had attached to it the plans and specifications for the additions and alterations.

About February 1, 1919, an agent of the defendant called upon the plaintiff, and solicited an order for the fixtures that would be required in the new premises. He was fully conversant with the character of the plaintiff's proposed business and familiarised himself with the agreement and attached plans and specifications that had been entered into by plaintiff, and he visited and inspected the premises then in course of alteration. Thereupon he prepared sketches or plans exhibiting a design of the proposed fixtures and about February 10 the plaintiff agreed to place the order with defendant and did so by a memorandum in writing dated February 10, 1919.

The defendant's agent departed for Winnipeg taking his design sketches with him, where upon arrival, he was to prepare a tracing upon linen from which blue prints could be taken off and forward one or more of those blue prints to plaintiff to enable the plaintiff to have final and exact measurements made and shewn upon the blue print as required by indication. From the evidence I find that the agent did forward blue prints to the defendant's factory at Souris and from there two copies were sent on to defendant with marks made thereon in the shape of circles and arrows by the factory superintendent, indicating what measurements were required. Those blue prints were received by the plaintiff Antoniou about March 18, 1919. He handed a copy to the building architect, who filled in the required measurements and Antoniou says in his evidence, that he mailed this blue print, so completed, to the defendant on March 18. But it was not received by defendant and has not been seen by anyone at Souris since, so far as I can find from the evidence. But the plaintiff did have independent measurements made by his architect on a sketch prepared by the architect and this he must have mailed to defendant about March 18 because it was received at defendant's factory at Souris on March 20, and I am forced to conclude that Antoniou is in error when he says he mailed back the blue print on March 18. He says that he received only two copies of it, one of which he says was lost somewhere on

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the premises, because the completed copy was not received by defendant and further the witness, Woolhouse, says in his evidence that about April 16 Antoniou produced for his use in connection with the final situation of the soda fountain, a blue print in *two* parts, shewing situation of fixtures. Only *two* blue prints were sent plaintiff or at any time in his possession.

I find that final measurements could not be made until about March 17, which was the earliest time at which the building was sufficiently completed to enable measurements to be taken.

It is also clear from the evidence that the measurements which the plaintiff did have prepared and forwarded on or about March 18 were inaccurate and incomplete to an extent that it would have been unreasonable in the defendant to have relied upon them in his manufacture. But he should have returned these measurements at once for correction and if he had done so they would have been in plaintiff's hands again about March 25, instead of which their return was delayed so that they did not reach Calgary until April 5. These measurements were sent to an employee of defendant, in Calgary, a Mr. Woolhouse, who thereupon corrected the measurements, and returned them so that they were received at Souris on April 9, which I think is the date that should be fixed as the date when defendant received the final measurements.

In the contract between the parties defendant guaranteed shipment 6 weeks from receipt of final measurements.

Because of the nature of plaintiff's business, the necessity of fixtures to that business and the financial obligations of the plaintiff, all of which were fully communicated to defendant at the time of his entering into the contract sued upon, it was incumbent on the defendant at all times to act diligently and promptly. The first unnecessary delay then for which I think the defendant is liable is that between March 25 and April 5, 11 days.

Having fixed April 9 as that upon which "final measurements" were received by the defendant he was obliged to ship the fixtures at Souris 6 weeks from that date which would be May 23, instead of which shipment did not take place until June 2 as to the tables and lunch counter and not until June 13 as to the remaining fixtures, that is to say a default of 10 days and 21 days. Therefore, there was delay on the part of the defendant before and after April 9 of 21 days as to the shipment of the tables and lunch counter and of 32 days as to the rest of the order.

But the defendant urges the Winnipeg strike as legally excusing

his delay, if any. The complete answer to this contention is that there was no strike in defendant's factory at Souris and the evidence is that the strike was confined to the city of Winnipeg and defendant made no effort to secure workmen from any other source of supply."

The grounds of the defendants appeal are in substance two:—that the plaintiff's entire claim for damages is discharged by an agreement of June 4, 1919, and that in any case the damages allowed are too large. The plaintiff by his cross-appeal claims that the damages are too small.

The solution of the disputes between the plaintiff and the defendant turns chiefly upon the question of the obligations of one or other of the parties in relation to the ascertaining of the "final measurements"—obligations which I think shifted from one to the other in the course of the communications between them with regard to those measurements.

It seems to me that the natural inference to be drawn from the contract is that the "final measurements" were to be furnished by the plaintiff; but, that the circumstances being such as to necessitate consultation and discussion between the parties with regard to the information to be supplied or actually supplied by the plaintiff and the information thought to be desirable or actually desired by the defendant, there was an implied obligation upon each of the parties to follow up any communication by an appropriate response within a reasonable time; and furthermore that the parties having of necessity made the mails the means of communication were both subject to the chances incidental to that method.

An instance in which such an implied obligation was held to have arisen is the case of *Stuart & Co.* v. *Clarke* (1917), 36 D.L.R. 254, 11 Alta. L.R. 551, where, amongst other cases cited, is to be found the case of *Mackay* v. *Dick* (1881), 6 App. Cas. 251, from which there is extracted the following proposition, at p. 263 *per* Lord Blackburn:—"As a general rule, that where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing though there may be no express words to that effect."

I have made a very careful examination of the evidence, with the views just expressed in mind, and, while in some instances not being inclined to accept some of the incidental observations of the trial Judge, I think his conclusions upon the branch of the case

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dealt with in his reasons already quoted are substantially correct, and need only the slight variation suggested by my brother Stuart.

That means that in my opinion the plaintiff's cross-appeal should be dismissed.

The trial Judge proceeds as follows:—

"But the defendant further contends, that by reason of an arrangement made at Souris with the plaintiff on June 4, he is released from all claims for damages arising out of delay and offers in evidence a letter of his of that date to his Calgary employee, Mr. Woolhouse, which was dictated by him in Antoniou's presence and read over to Antoniou and a copy given to him. This letter makes no mention of any claim of damage having been put forward by Antoniou. It is evident that the causes of delay were discussed and that a new shipping date was arranged, viz., "next week" sic, June 11. This would apply only to the order exclusive of the tables and lunch counter and, I think, relieves the defendant from liability of damage resulting in the delay from June 4 to June 11 and no more.

The defendant in his own evidence says that no mention was made of damages in their discussion."

The defendant having once become liable to the plaintiff in damages by reason of his delays in shipping, can release himself from his liability only by shewing a contract to that effect either express or implied (and a waiver properly so called is a contract) or an estoppel, that is, conduct by the plaintiff to the defendant's prejudice. There seems no reason for contending for an estoppel. Then was there a waiver? I think not.

Cases somewhat similar to this frequently arise. In a recent case in this Court, *Forden* v. *Morris*, to be reported in 59 D.L.R., it was said:—"A buyer of goods who has a claim for damages arising out of the sale has undoubtedly a right to pay the purchase-price in full and then sue the seller for the damages, instead of waiting for the seller to sue for the purchase-price or the balance of it and then setting up his damages by way of set-off or counter claim; but from the course which he in fact takes coupled with additional circumstances the Court may rightly draw inferences of fact."

Other appropriate cases are to be found referred to in Hudson on Building Contracts, 4th ed., vol. 1. I content myself with citing the text at p. 536: "Extension of time does not release the employer from damages for breaches of contract by delay caused by him, unless the builder covenants to accept the extension in satisfaction

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of the claim for damages." (And at p. 540):—"A building owner does not, apart from special provision in the contract, lose his right to liquidated damages by paying the builder moneys otherwise due him or by permitting the completion of the work after the date for completion." (And at p. 541):—"In the American case of *Empire Surety Co.* v. *Hanson* (1911), 134 Fed. Rep. 58, it was laid down that an agreement to extend the time for completion was one without consideration and no defence to an action for failure to complete to time, unless the non-completion to time was induced by the agreement; and this would seem to be consistent with English principles."

The agreement represented by the letter of June 4 does not expressly, and I think does not impliedly, cover the question of damages for the delay. The plaintiff says he did not intend that it should and the defendant says damages were not discussed. It is said that there was a consideration because there was, it is said, some difference made in the terms and method of payment; but even so, the fact, if it is so, does not affect the contents of the agreement, which as a matter of law could be made without in any way interfering with the question of damages.

I would therefore dismiss the defendant's appeal with costs, subject to the slight variation suggested by my brother Stuart.

Appeal dismissed.

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Ontario Supreme Court, Rose, J. February 5, 1921.

Intoxicating Liquors (§III I—91)—Unlawful Sales—Trial of Offenders—Ontario Temperance Act sec. 88—Onus of Proof—Failure to Discharge Onus—Conviction.

Although sec. 88 of the Ontario Temperance Act, 6 Geo. V. 1916, ch. 50, shifts the onus of proof when it is proved that the accused had liquor in his possession concerning which he is being prosecuted, it does not take away the fundamental principle that he is to be presumed innocent until guilt is proved, or deprive him of the right to the benefit of the doubt; but where the onus is on him and he cannot reasonably be said to have discharged that onus, he should be convicted.

[Rex v. Lemaire (1920), 57 D.L.R. 631, 34 Can. Cr. Cas. 254, 48 O.L.R. 475, referred to.]

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MOTION to quash a conviction of the defendant made by a magistrate. Conviction affirmed.

J. W. Curry, K.C., for defendant; *F. P. Brennan*, for magistrate.

ROSE, J.:—This is a motion to quash a conviction made by the Police Magistrate for the City of Windsor for that the defendant did "unlawfully sell or dispose of a quantity of liquor, approximately 108 cases, contrary to the Provincial Act *(sic)* of section 41 of the Ontario Temperance Act."

In November, 1920, the defendant, who lives in a comparatively small house in the township of Sandwich West, at some distance from the town of Sandwich, imported some 110 cases of whisky, each case containing 12 quarts. The whisky was seized, and the accused was called upon, under the Act, to shew cause why it should not be destroyed. He succeeded in convincing the magistrate (who was the magistrate who tried the charge which is in question in these proceedings) that the whisky was not intended to be sold or kept for sale or otherwise in violation of the Act, and the whisky was accordingly delivered to him at the end of November or early in December. He made for it a sort of cellar under his sitting room, the only access to it being by a trap-door, covered by the rug in the sitting room, and stored it there, thus, perhaps, evidencing an intention of keeping it for some time. He says that most of his neighbours knew that he had whisky in his house, and it seems probable that, owing to the publicity given to the fact by the shew cause summons, it would be pretty well known in the neighbourhood that he had been laying in a considerable store.

On December 27, the defendant went to Mr. Mousseau, the License Inspector, and told him that on Christmas Eve some 15 men had attempted to take his whisky from him, but had been frightened away. Mr. Mousseau was sceptical, and expressed the opinion that the defendant would sell as others had done, and that his visit was a method which he was employing to cover his tracks, and, apparently, made no attempt to trace the persons who were supposed to have visited the house on Christmas Eve. Later, the whisky, or all of it but some 18 or 20 bottles, which the defendant says he had consumed, and one case and part of another case which were upstairs, was removed from the house. The defendant says it was stolen on New Year's day, whereas the Crown charges that the removal was with the concurrence of the defendant, and constituted the unlawful sale or disposition of which he has been convicted.

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The defendant says that about 11 o'clock p.m. on Christmas Eve he was sitting reading and his wife was in the kitchen ironing, when a man knocked at the door and asked for water for his motor car; that, being suspicious, he did not open the door, but asked his wife to get him a revolver, which she did, and that he himself got another revolver, and that he told the man to go away; that he heard men talking outside and that they remained for some time after he had refused admittance to the man who knocked, and that while they were still there one Amaley, who was a county constable, came up in a motor car, with one Soulier, jumped out of the car, shouted to the men and began to shoot; that he, the defendant, ran out and also began to shoot, and that a number of men ran away. He says that afterwards he arranged to go away for midday dinner, and possibly for supper, on New Year's day, which was Saturday, and that on the Thursday preceding he communicated with Amaley and engaged him to come and guard the house during his absence.

Amaley says that he went, in accordance with the arrangement, to guard the house, arriving there about 2 p.m.; that at 6 p.m. he went to a water-closet, which is some little distance from the house, first locking the door of the house and putting the key in his pocket, and that he carried with him in his hands two loaded revolvers; that, as he was leaving the water-closet, the revolvers then being one in each of his two hip pockets, he was seized by five men who fastened his hands behind him with a strap and put him back in the closet, where one of them stood guard over him; that one of his revolvers fell to the ground and was allowed to lie there and that the other remained in his pocket; that he was kept under guard in the closet for an hour, during which time he heard five motor cars come up to the house and go away; that the man who was on guard told him that he and his companions had failed to get the whisky on Christmas Eve but were going to get it then; that when the men went away he ran to a neighbouring house, where the strap was taken off his wrists; that he then tried to communicate with some of the police authorities by telephoning, but was unsuccessful; that he got on the telephone a brother-in-law of the defendants, who agreed to come at once to the defendant's house; that he then returned to the house and found that considerable damage had been done by the thieves in the way of breaking windows, etc., and disconnecting the telephone; and that he drove to the house of the father-in-law of the defendant, where the defend-

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ant had been for supper, and notified him, and they went to see whether he could follow the tracks of the motor cars in which the whisky had been removed, but that he was unsuccessful.

The defendant says (and about this there seems to be no doubt) that after Amaley came for him he went to the police authorities at Windsor and Sandwich and thence to policemen in the streets, and, getting no satisfaction from them, finally went to Mr. Mousseau's house and told him.

The conviction which has been quoted above, and which is in the exact words of the information, is defective in that it does not state an offence against the Ontario Temperance Act, 6 Geo. V, 1916, ch. 50. The words "contrary to the Provincial Act of section 41 of the Ontario Temperance Act" are intended to mean, I suppose, "contrary to the provisions of section 41 of the Ontario Temperance Act;" but sec. 41 does not relate to selling or disposing of liquor; it relates merely to having or keeping or giving liquor in a place other than a private dwelling house. The section which makes it an offence to sell or barter or, in consideration of the purchase or transfer of any property, to give liquor, is sec. 40, and I suppose that what was intended was to charge the defendant with and convict him of a breach of sec. 40. The conviction is, therefore, bad on its face. It seems also to be open to the objection that it is in the alternative—"did unlawfully sell *or* dispose of"—see *Rex* v. *Kaplan* (1920), 52 D.L.R. 596, 47 O.L.R. 110.

The conviction being bad on its face, I take it that the question to be determined is whether a case is made out for the application of sec. 101 of the Act, and for the amendment of the conviction. Section 101 provides as follows:—

"No conviction . . . shall be held insufficient or invalid by reason of any . . . defect in form or substance, provided it can be understood from such conviction . . . that the same was made for an offence against some provision of this Act within the jurisdiction of the magistrate . . . who made . . . the same, and provided there be evidence to prove some offence under this Act, and where necessary, every such conviction . . . may be amended in such manner as justice may require."

It can be understood from this conviction that it was made for an offence against a provision of the Act within the jurisdiction of the magistrate. The inquiry, therefore, is whether there is evidence to prove an offence under the Act.

Proof was given that the defendant had had in his possession

the liquor in respect of which he was prosecuted. Therefore, by sec. 88, it was open to the magistrate (subject to the objection as to the form of the information) to convict him unless he proved that he did not commit the offence with which he was charged; and, if the question was whether the magistrate's decision that the defendant had not proved that he had not committed the offence could be supported, it would be impossible to set aside the conviction. That, however, as I have pointed out, is not the question: the question is whether the conviction is to be amended, which it must be if there be evidence to prove some offence. The meaning of the words "provided there be evidence to prove some offence" is not as clear as is the meaning of the corresponding words of sec. 1124 of the Criminal Code, which words are: "if the Court or Judge before which or whom the question is raised, upon perusal of the depositions, is satisfied that an offence of the nature described in the conviction . . . has been committed . . . ;" but I think that the intention of the two sections is the same, and that—as stated by Masten, J., in *Rex* v. *Newton* (1920), 48 O.L.R. 403, at p. 405—a case under the Ontario Act—"the conclusion must depend on whether there is, *in the opinion of the Court* (not the magistrate), evidence to support the proposed amended conviction;" or again to quote Masten, J., in *Rex* v. *Leduc* (1918), 30 Can. Cr. Cas. 246, at p. 248, 43 O.L.R. 290, that "I am not bound by the magistrate's conviction, but that I ought to consider *de novo* the whole evidence, in order to form my own opinion as to whether or not there is evidence to prove some offence under the Act, though no doubt, in so doing, the view entertained by the magistrate is an element for consideration."

This being my view of the duty which I have to perform, I have read the evidence several times, and have considered the cases in which sec. 88 has been discussed.

Section 88 does not say, as sometimes it is assumed to say, that if, in a prosecution to which it relates, proof is given that the accused had in his possession liquor in respect of which he is being prosecuted, he shall be presumed to be guilty until he proves his innocence. What it does say is that upon proof of the finding of the liquor he *may* be convicted unless he proves his innocence. This has been pointed out most clearly by Meredith, C.J.C.P., in *Rex* v. *Lemaire* (1920), 57 D.L.R. 631, at p. 633, 34 Can. Cr. Cas. 254, 48 O.L.R. 475: "It (sec. 88) does not make all the innocent guilty. It must be given a reasonable meaning . . . If any one is

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charged with selling liquor which it is proved he once had, but which now some one else has, he may, not must, be convicted if he fails to shew, as he should be able easily to do if innocent, that the change of possession was lawful."

To say that sec. 88 does not automatically shift the burden of proof, as soon as it appears that the accused has had liquor in respect of which he is being prosecuted, does not mean, as has been shewn, that the provisions of the section are never to be invoked. They are to be invoked in a case in which it is fair and reasonable to invoke them, and it seems to me that a case like this—a case in which a man living in a small house, in a place near to the border of a country in which whisky at present commands a high price, has had, but has not now, a store much in excess of that which most persons, living in similar places, but more remote from a ready market, would probably lay in for their own individual use—is a case in which to invoke them. I therefore approach the evidence with a view to seeing whether the defendant has discharged the onus.

If it was found as a fact that the defendant's story as to what happened on Christmas Eve is true, it would not be difficult to accept his statement that, because of the fright which he had on that occasion, he, in good faith, engaged Amaley to guard the house on New Year's day, and that the whisky was removed without his connivance; and if the last mentioned statement was accepted the defendant ought to be acquitted, even if it was thought that there was reason to doubt the truth of Amaley's statement that he, Amaley, was not a consenting party to the removal of the whisky. It is therefore important to form an opinion as to the truth of the defendant's statement as to what went on on Christmas Eve.

As to the occurrence on Christmas Eve there are some differences between the defendant and Amaley which are worthy of note. In the first place Amaley says that, on his way to Midnight Mass, he passed the defendant's house in his motor car about 7.45 (which, considering that he had not very far to go, was a very early hour, unless he had a good deal to do before reaching the church); that, at that time, he saw a motor car and a motor truck standing in the road not very far from the defendant's house; that he went in and told the defendant that he had better be on his guard; that the defendant asked him to stay with him and that he told the defendant that he would come back as soon as he could; that he did not go to Mass but went to town (i.e., Windsor or Sandwich) and

returned to the defendant's house at about 10.40. The defendant does not speak directly about the earlier visit—perhaps because he was not asked—but, at any rate, he does not speak about it. What he says is that Amaley was "just stopping in—coming back from town and stopping in—just a friendly visit." The defendant says that Amaley stayed with him until 7 o'clock the next morning and Soulier also, whereas Amaley says that he left at 2.30 a.m.. I do not find that Amaley was asked about Soulier.

Besides these differences between the two witnesses, there is the important fact that neither the defendant's wife nor any of his four children (some of whom were probably in the house) nor the man Soulier, who was said to be with Amaley, on his second visit, was called as a witness. In the face of these differences between the witnesses and the absence of those who could have corroborated the story, if it is true, I should hesitate to hold that the defendant's story was to be accepted. There is probably not enough in what I have pointed out to justify a holding that the story is not true, but I do not think that the evidence ought to be taken as proving conclusively that there was, on Christmas Eve, what the defendant believed to be an attempt to steal his whisky. Therefore I approach the evidence as to what happened on New Year's day, without having been able to reach the conclusion that the defendant actually had the reason which he says he had for engaging Amaley as a watchman.

As to the occurrence on New Year's day, there is at least one difference between the defendant and Amaley, in that Amaley says that the defendant told him he was going to leave home early in the morning (by which Amaley understood about 8 o'clock) and that he did not expect to be back on Saturday night, and that Amaley was to remain until Sunday; whereas the defendant says that he mentioned no hours, but told Amaley that he was not going to leave very early, and that he did not say whether he was, or was not, coming back before supper. Also Amaley's story about his arrest by the robbers is not very convincing; for instance, his statement that at the time the revolvers had been transferred to his hip pockets strikes me as improbable, considering the other circumstances stated by him. Of course weaknesses in Amaley's evidence as to the robbery are of importance only in so far as they bear upon the question as to his general credibility as a witness called to corroborate the defendant's evidence; if the defendant engaged Amaley in good faith his defence is made out, as I have said, even if Amaley

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was a party to the theft of the whisky. The statement to which I have referred and some other rather improbable statements made by Amaley do, however, serve to create the impression that the weight attaching to the defendant's story is not very greatly increased by the fact that, in most particulars, it is corroborated by Amaley.

Taking into account the fact that Amaley does not seem to me to be a particularly credible witness, as well as the fact of the difference between the two witnesses as to the arrangements made for New Year's day, I should have liked to hear something from those who were in the house at which the defendant had supper on New Year's day, about what was said between Amaley and the defendant when Amaley came to report to him after the supposed theft of the whisky; it would have been interesting to know whether the defendant seemed to be astonished. As it is, and dealing only with the written record, without having had the advantage of seeing the witnesses, I do not think I should have gone as far as the magistrate did; I should not have said that it would be "exceedingly stupid to take any other view of the matter" than the view that there was collusion between the defendant and Amaley (which is what I understand the magistrate to mean), but I should not have been prepared to find as a fact upon this evidence that the defendant did, in good faith, engage Amaley.

I am not forgetful of what has been pointed out by Meredith, C.J.C.P., in *Rex* v. *McKay* (1919), 32 Can. Cr. Cas. 9 at p. 13, 46 O.L.R. 125, viz., "that guilt must be proved just as much under this enactment as under any other; and that, although the legislation in question aids the accuser much in some respects, in his proof, it has not taken away from the accused and given to the accuser that which is commonly called 'the benefit of the doubt;' and that no court, nor judicial officer, has any power to do so." The right of the accused to the benefit of the doubt entitles him, I imagine, in a case in which the onus is upon him, to be acquitted if the story which he tells is convincing, even if there remains some little doubt in the mind of the Court as to whether that story is really true. But that is not the situation here; my reading of the evidence does not leave me with the feeling that, while there is a possibility that the story may be untrue, it is on the whole reasonably convincing. On the contrary, while I recognise the fact that the story may possibly be true, I cannot say that, notwithstanding the weaknesses in the evidence for the defence to which I have referred, I am so far convinced of the truth of the defendant's story as that I ought—by way of giving

him the benefit of the doubt—to say that it is to be accepted.

I do not think I am doing what Mr. Curry says the magistrate did—convicting the defendant upon suspicion. I think he put himself in a position in which, having regard to sec. 88, it was impossible to hold that the onus of proof did not rest upon him, and I think he has not discharged that onus. Section 101 must, therefore, be applied and the motion dismissed.

The defendant has been sentenced to a month's imprisonment and to a heavy fine, with another two months' imprisonment if he fails to pay. There is, therefore, a good deal of responsibility involved in upholding the conviction, particularly as no appeal lies, as of right, from my decision, but I do not see my way clear to decide otherwise than as has been stated.

The motion must be dismissed.

Motion dismissed.

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New Brunswick Supreme Court, Chancery Division, Grimmer, J. May 11, 1921.

Reformation of Instruments (§I—3)—Lease—Unilateral Mistake—Fraud—Reformation—Right to Reject or Retain Reformed Instrument.

The Court will interfere to rectify an instrument on the ground of mistake, where one party to the transaction being fully aware of the fact of the error, seeks to take advantage of it in such a manner as to suggest fraud or the equivalent thereof. In such a case the Court may give the injured party the option of rejecting the instrument or of retaining it after it has been reformed.

[Review of authorities.]

ACTION for reformation of a lease.

The facts and circumstances are fully set out in the judgment of Grimmer, J.

M. G. Teed, K.C., for plaintiff.

J. B. M. Baxter, K.C., for defendant.

GRIMMER, J.:—The evidence in this case was taken before White, J., in the month of July last, who by reason of disability was unable to hear the argument therein, and by his request and with the consent of counsel representing both sides, I consented to deal with the matters in controversy as best I could, dispensing

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with the advantage of having seen and heard the witnesses on the trial.

The plaintiff alleges that on March 21, 1919, she entered into a verbal agreement with the defendant to lease all the first floor and cellar of a building owned by the defendant and situate on the south side of Main street, in the city of Moncton, known as No. 702 for a term of 5 years from May 1, 1918, at a rental of $75 per month, and that there was no agreement or understanding that the plaintiff should pay any of the insurance premiums, taxes, water rates, improvement rates, sewerage fees or frontage fees wherewith the said building was chargeable during the said term; that a lease was afterwards drawn up and executed by the parties and was duly registered; it was prepared in the office of the plaintiff's solicitor, the formal parts thereof being copied by a clerk from a form, and by mistake or inadvertence the clerk copied or introduced into the plaintiff's lease a clause providing the plaintiff should pay insurance premiums, taxes, etc., in the words following:—"And the tenant shall and will after and from the date of the lease pay all insurance premiums, taxes, water rates, including improvement rates, sewerage rates and frontage wherewith the said land and building thereon may be rated and charged during the period of this lease;" that the said clause was inserted and written in said lease by a mutual mistake and oversight, and was not according to the agreement or intention of the parties, and the plaintiff executed the lease without reading the same, and that if the defendant knew the lease contained the said clause he knew it was not the agreement or intention of the parties, and he fraudulently and deceitfully concealed from the plaintiff that the lease contained the said clause. The plaintiff went into the possession of the premises in May, 1919, without any knowledge that the lease contained the clause requiring her to pay the insurance and taxes, nor did she have any such knowledge until in the month of July the defendant demanded she should pay the insurance premiums on the said building and taxes to the City of Moncton amounting to $175.72. In order to save the discounts allowed, the plaintiff paid $166.94 and requested the defendant to amend and rectify the said lease by striking out the clause relating to taxes and insurance, and tendered him a deed for the purpose, and demanded to be repaid the sum of $166.94 paid the first year, and $218.88 paid the second year, or in all the sum of $385.82, but the defendant refused to amend or rectify the lease, claiming it must stand as it was or be cancelled and rescinded entirely. The

plaintiff asks that the lease be rectified or reformed by striking out the clause providing for the payment of taxes or insurance premiums as having been inserted by mutual mistake or oversight and contrary to the agreement and intention of the parties, or that it shall be stricken out as having been obtained by fraud and fraudulent concealment and deceit; that the defendant be ordered to pay the plaintiff the said sum of $385.82 and that the defendant be restrained from selling, conveying or encumbering the leased premises except as subject to said lease being reformed by having the clause relating to the payment of insurance and taxes eliminated.

The defendant generally denies the plaintiff's allegations in respect to the making of the contract, and states he leased the premises to the plaintiff at $900 per year net to him, over and above all taxes, insurance and other expenses whatever, and that the plaintiff by her agent accepted the offer and afterwards executed the lease for the purpose of carrying out the agreement stated by him; that the clause relating to insurance and taxes was not put in the lease by mutual mistake or oversight, but according to agreement, and that he would not have executed it without this clause, and if the plaintiff executed the lease without knowledge of the clause being in the lease, then it was a unilateral mistake only. Also, that when the plaintiff went into possession she did so with knowledge and notice that the lease contained the said clause respecting insurance and taxes, and that at or before the execution of the lease she knew, either personally or through her agent, the lease contained the said clause. The suit is brought to rectify a mistake which consists of the insertion in the lease of the clause subjecting the plaintiff to the payment of insurance and taxes, water rates, etc., in addition to the annual rent not only on the leased premises but upon the entire building owned by the defendant and occupied by some 4 other tenants besides herself.

The first question is one of fact—whether the mistake was really made and if so by whom and when. That the mistake was made and by the solicitor of the plaintiff in the preparation of the lease is I think clearly proved. Counsel for the defendant on the argument before me admitted or at least recognised that a mistake had been made, though he claimed there was not a single fact to tell how it arose. He stated it was quite clear there was not a common mistake, that the defendant was in no way accountable for it, that he made no misrepresentation, no suggestion, asked no questions and gave no answer that produced the mistake. This language

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certainly recognises the existence of a mistake in the lease and one, too, which if allowed to continue creates a serious burden in addition to the rent contracted for.

The next question is also one of fact. Did the defendant know that the clause relating to the payment of insurance, taxes and water rates inserted in the lease was a mistake? It certainly was not a mistake committed by him, and therefore he claims the case must come to an end, for to enable this Court to rectify a mistake the latter must be mutual, and while as a general rule this would seem to be correct, yet so far as I can gather from the authorities it does not apply to every case, and the Court will, as I understand it, interfere in cases of mistake where one party to the transaction being fully aware of the fact of the error, seeks to take advantage of it in such a manner as to suggest fraud or the equivalent thereof.

Therefore the question, it seems to me, arises here—did the plaintiff know or understand the contract she had entered was that she should take a lease of the premises for five years at $900 per year or $75 per month, and in addition thereto pay all insurance premiums, city taxes, water rates, etc., not only on the store she had leased and occupied but upon the entire building and premises of the defendant in which the store was located? The result of the evidence as I am able to gather on this point is shortly this. Between March 10 and 15, 1919, the plaintiff's husband, acting as her agent, went to the defendant about the leasing of his store at No. 702 Main St. in the city of Moncton, which was on the ground floor of the building owned by the defendant. During the conversation that took place the defendant stated he was willing to lease the store for $75 per month. Nothing was committed to writing, but it was eventually agreed between them that the defendant would make a lease for 5 years at the rental above stated, which was to cover the store on the ground floor and the cellar thereunder. The defendant instructed the plaintiff's agent to get the lease drawn, and agreed that one Reilly, a solicitor, was a suitable person to attend to it.

The plaintiff's agent thereupon called upon Reilly and instructed him, saying he wished a lease drawn of the defendant's store on the south side of Main St., No. 702 for a term of 5 years at $75 per month starting from May 1. The solicitor thereupon called the defendant upon the telephone and asked him if he knew the plaintiff and if he was renting his store and cellar to her. To this the defendant answered yes, for the term of 5 years at $75 a month, the lease to contain the usual covenants and be in the usual form. The

solicitor thereupon instructed a clerk in his office, gave her the particulars and told her to prepare the draft lease. When the draft was submitted to him he discovered therein a clause putting the burden of taxes and water rates upon the lessee. This being as he states a very unusual clause, he bracketed it and wrote the word "omit" opposite it before sending it back to be engrossed. The plaintiff's agent saw the draft as prepared and objected to the clause re the taxes, etc., and he explained that the same would be eliminated. The lease was then completed and the plaintiff called to execute it. The solicitor did not read it over again, but told the plaintiff it covered the premises on the south side of Main St., where the defendant was then conducting a tobacco store. It was for a term of 5 years, with monthly instalments of $75 commencing May 1, 1919, and that she was the tenant. She thereupon executed it and a copy was sent to the defendant, who afterwards went to the solicitor's office and executed and acknowledged the lease, which was thereupon sent to the registry office.

The clerk who prepared the document confirms the solicitor, stating she remembered the time the plaintiff's agent came to the office, and of being called into the solicitor's private office, and hearing the conversation over the telephone between Reilly and the defendant. That she was instructed to draw a lease from the defendant to the plaintiff and was given the description of the property, the amount of rental and the time over which the lease extended, from which she prepared a draft, using a form she then had. That the clause about insurance and rates and taxes was in the form she used and she included it. When the draft came back from Reilly the clause was marked to be omitted, being marked in the margin on the right hand side "omit." That afterwards in preparing the lease she used a heavy guide line that covered the word "omit" and she thus included the objectionable clause in the lease by mistake. That she did not read the lease over after engrossing it, and remembered when the plaintiff and her husband came that Reilly explained the lease to them but did not read it over.

The mistake was not discovered until July 21, 1919, when the plaintiff's husband went to Reilly with a bill for taxes which had been presented to him by the defendant. Being surprised, Reilly looked up the lease and found it contained the clause which had been objected to. He thereupon went to the defendant and told him what had transpired, that the clause was in the lease, that it was a mistake, that it was not the agreement and ought to be rectified, to

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which the defendant replied "That may be but you have got to stand by the lease—that may be but you signed the lease" and that he would not rectify it. He, Reilly, then told the defendant they would pay the taxes under protest in order to save the discount, which he did.

The defendant on the other hand says Bourgeois, the plaintiff's agent, came to him looking for a rental, and asked if his store would be to let, and was told it would be at $900 per year; that nothing was said about $75 per month, and later on he agreed to let the store for 5 years at $900 "a year velvet," which expression he explains as follows: "It simply means net or velvet, clear of expenses so far as I am concerned;" that Reilly called him up and he had a conversation with him. He does not contradict Reilly's statement of that conversation, but says "I think Reilly added something there to it—I thought it just at the time. I know I said yes four or five times, but I don't think there was so many questions asked as Mr. Reilly states there was," and that he understood the object of Reilly's questions was to satisfy himself that Bourgeois had not made a mistake, or something of that kind, and to go ahead and prepare the lease; that the lease came to him about 2 days later; that he read it, saw the clause in question and that it expressed his intention when he made the bargain with Bourgeois and was what he understood to be the bargain. On cross-examination he was asked "Do you swear he ever agreed to pay the taxes on the whole building when he only occupies part," which he answered by asking another question "How would I get my velvet otherwise." Being pressed, however, to answer the question "Did you expect him to pay you what you call velvet on account of property he did not rent" he answered "No." He admitted, however, he was making her pay taxes on property she did not rent, that it was his intention to do so and that he conveyed this idea to Bourgeois when he told him $900 a year velvet.

From this summary it appears there is evidence which is contradictory, and I am compelled to give more credit to the testimony of the witness of the plaintiff than to the testimony of the defendant himself. The result is that in my opinion it was scarcely possible that the defendant could have entertained any doubt as to the fact that the plaintiff had committed an error in inserting in the lease the clause relating to insurance, taxes, water rates, etc., and having read the same executed it without pointing out the error or redressing it. My opinion is that the defendant having discovered the

clause in the lease, felt that if they chose to put it in and were willing to become so voluntarily bound, there was no reason why he should complain, as he would be just so much better off, and there was no point whatever in making objection or putting obstacles in the way of their so doing, and by taking advantage of the mistake which he discovered before he executed the lease he in a manner, which if not fraudulent, was in my opinion certainly equivalent to fraud, required and compelled the plaintiff to pay taxes and insurance premiums to the amount shewn in the statement of claim and by the evidence.

On this state of facts the question of law arises. How is the case to be dealt with? It is one where the document, that is the lease, which constitutes the whole agreement, contains a clause as to rates, taxes, insurance, etc., which was put there by mistake and should not be there. When the plaintiff signed it she supposed it was according to the verbal agreement, but the defendant when he signed it knew the lease contained the objectionable clause, though I am convinced that had the clause not been there he would equally have executed it.

I am of the opinion I cannot compel the plaintiff to be bound by the terms of the lease as it stands, or permit the defendant to derive any advantage from the mistake, and in that respect the plaintiff is entitled to relief.

The case is surrounded by many difficulties which are troublesome , and one of the chief is that there was no actual concluded contract antecedent to the instrument which is here sought to be rectified, and it has been held that an instrument as to which no contract has been entered into will not be rectified so as to prevent it having a legal effect which was not contemplated by the parties. Also that rectification can only be had if the mistake is mutual or common to all parties to the instrument. In the case of the *Earl of Bradford* v. the *Earl of Romney* (1862), 30 Beav. 431, 54 E.R. 956, it was decided that "The Court will only rectify a deed when the mistake is shewn to be an error common to both parties." This was in the year 1862. Later, in *Garrard* v. *Frankel* (1862), 30 Beav. 445, 54 E.R. 961, a case somewhat similar to the present, where the plaintiff had contracted to lease at an annual rental of £230 pounds for 21 years, and by mistake made the amount £130 pounds in the lease, upon the error on the part of the lessor being proved and the Court considering that the lessee must have perceived the discrepancy between the amount of the rent previously stated

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by the plaintiff and specified in the agreement, and that reserved by the lease, it was held that the plaintiff was not entitled to have the lease reformed but the proper relief was to give the lessee the option of taking the reformed lease or of rejecting it, paying in the latter case a rental for the part occupation by substituting the rent of £230 for £130 per annum. The rule so applied was confirmed in *Harris* v. *Pepperell* (1867), L.R. 5 Eq. 1, and later in *Paget* v. *Marshall* (1885), 28 Ch. D. 255. It was held that when there is a mutual mistake in a deed or contract the remedy is to rectify by substituting the terms really agreed to. When the mistake is unilateral the remedy is not rectification but rescission, but the Court may give to a defendant the option of taking what the plaintiff meant to give in lieu of rescission. Bacon, V.C., in his judgment states as follows, at pp. 262, 263:—

"In all these cases on the law of mistake it is very difficult to apply a principle, because you have to rely upon the statement of parties interested, and upon not very accurate recollections of what took place between them. . . . If it is a case of common mistake—a common mistake as to one stipulation out of many provisions contained in a settlement or any other deed, that upon proper evidence may be rectified—the Court has the power to rectify, and that power is very often exercised. The other class of cases is one of what is called unilateral mistake, and there, if the Court is satisfied that the true intention of one of the parties was to do one thing, and he by mistake has signed an agreement to do another, that agreement will not be enforced against him, but the parties will be restored to their original position, and the agreement will be treated as if it had never been entered into. That I take to be the clear conclusion to be drawn from the authorities."

In *May* v. *Platt*, [1900] 1 Ch. D. 616, at p. 623, Farwell, J., says:—"I have always understood the law to be that in order to obtain rectification there must be a mistake common to both parties, and if the mistake is only unilateral there must be fraud or misrepresentation amounting to fraud. It is true that Lord Romley in *Harris* v. *Pepperel*, and *Garrard* v. *Frankel*, and perhaps Bacon V.C. in *Paget* v. *Marshall*, appear to have shrunk from stigmatising the defendants' conduct in terms as fraud, but they treated it as equivalent to fraud, and in my opinion would have had no jurisdiction to grant the relief they did in the absence of fraud. . . . If it were a case of fraud, which unravels everything, there would be no difficulty in looking into the evidence to see how the contract

was induced, as well as how it was carried out."

Following, then, what I take to be the principle well established by the cases referred to, and my finding that the defendant's action in requiring the plaintiff to pay taxes, insurance premiums, etc., was at least equivalent to fraud, I think the proper course to follow in this case is to give the defendant the option of retaining or rejecting the lease. If he retains it, I shall decree the lease to be reformed by eliminating therefrom the clause which provides for the payment of the taxes, insurance premiums and other rates, the defendant returning or refunding to the plaintiff the sum of $385.82, with interest thereon at the rate of 5% per annum since the respective dates of payment, this being the gross amount paid by the plaintiff under the clause inserted by mistake in the lease. In case this option is accepted I direct and order the plaintiff to pay the defendant for the use and occupation of the premises during the time she has had possession of them, at the rate of $75 per month, or $900 per annum, which I find to be the proper rent contracted for and agreed to be paid between the parties. If the defendant does not avail himself of this option, but concludes to reject the lease, then I order that the same shall be delivered up to be cancelled and in this latter case also order that the defendant shall likewise refund or repay to the plaintiff the sum of $385.82 and interest thereon, as declared in and by the first option above herein set forth.

As expressed in *Garrard* v. *Frankel*, 30 Beav. 445, in neither case does it appear to me that I can give costs. The whole difficulty has arisen out of the blunder of the plaintiff, and while I am of the opinion that the conduct of the defendant in demanding or compelling the payment of taxes, etc., by the plaintiff was the equivalent of fraud, yet I do not find his action so wholly fraudulent as to induce me to consider that he ought to be visited with costs in consequence thereof.

Judgment accordingly.

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REX v. MOONEY.

Ontario Supreme Court, Middleton, J. February 7, 1921.

Intoxicating Liquors (§III I—91)—Trial of Offenders—Unlawful Sales—Ontario Temperance Act sec. 88—Proof of Possession—Onus of Proving Innocence—Presumption of Innocence not Taken Away.

Section 88 of the Ontario Temperance Act 6 Geo. V. 1916, ch. 50 shifts the onus of proof that the accused had in his possession the liquor concerning which he is being prosecuted, but the Act does not abolish the fundamental principle that the accused is to be presumed innocent until guilt is proved, nor does it take away the right of the accused to the benefit of the doubt. The fact that the onus is on one side or the other cannot make any difference if upon the whole evidence reasonable men could not have come to the conclusion that the accused was guilty of the charge laid.

[Rex v. McEwan (1920), 19 O.W.N. 149, Rex v. Lemaire (1920), 57 D.L.R. 631, 34 Can. Cr. Cas. 254, 48 O.L.R. 474 followed.]

MOTION to quash the conviction of the defendant by W. D. Beman, Police Magistrate for Essex, for that he, the defendant, on November 22, 1920, at the village of Belle River, in the county of Essex, unlawfully sold or disposed of 150 cases of liquor, contrary to the provisions of the Ontario Temperance Act. The defendant was fined $2,000 and costs, in default of payment of which it was directed that he should be imprisoned in the common gaol for a period of three months. Conviction quashed.

J. M. Bullen, for defendant; *F. P. Brennan*, for the magistrate.

MIDDLETON, J.:—This is another of those unfortunately too frequent cases in which it appears to be plain that those charged with the administration of the Ontario Temperance Act, 6 Geo. V. 1916, ch. 50, can be justly regarded as acting oppressively.

Mooney is a fisherman at Belle River. He appears to have a very substantial business, and to be, comparatively speaking, well-off. He deems it necessary for his well-being to use liquor. When he is out fishing and after taking in his nets, he says, he is invariably wet to the skin, and in danger of a chill, and he then takes a drink of whisky. Finding himself unable to purchase liquor in Ontario, he had been accustomed to buying small quantities in Montreal; but, anticipating that a vote would be taken some time in October rendering it impossible to import liquor, in June he purchased 150 cases for his personal use. This was taken to his residence, and stored by him there. There does not appear to have been anything clandestine in the purchase of this liquor; but, not unnaturally, the liquor inspector was suspicious as to the *bona fides*

of such a large purchase, and frequently visited Mooney's premises for the purpose of satisfying himself that the liquor was not being used for any other purpose than his own personal consumption. In November the inspector made his last inspection, and found that the liquor was intact except some eight cases that had been used by Mooney personally. On November 20, 1920, a Saturday, Mooney left his house in the morning, going to Windsor with a friend in an automobile, for the purpose of transacting some business there. He was followed by his wife, who had stayed at home to attend to domestic affairs, and reached Windsor late on Saturday evening. He and his wife then went to Detroit, and stayed there over Sunday with this friend at his residence there, returning home on Monday morning. The house was then found to have been broken into and the 142 cases of liquor then remaining were missing.

A prosecution was then launched, charging him with having sold this liquor. The evidence for the Crown was that of the inspector, who had called at the house and seen the liquor there on many occasions. He testified that until the 142 cases disappeared there was nothing to complain of; the liquor was being consumed by Mooney personally. Mooney admitted that he had had the liquor. This was the sole evidence given for the Crown.

For the defence Mooney testified to the purchase of the liquor, his reason for buying it, his fear that in the event of the prohibition of importation he might be left stranded, his desire to have enough to last him for a long time, the trip to Detroit, and the finding that the house had been broken into and the whisky stolen upon his return. Upon this he immediately consulted the local police and was referred by them to Windsor; he there consulted the inspector at Windsor, again consulted the local police, but no trace of the missing liquor was found. On cross-examination he stated that the amount the liquor cost him amounted to almost $5,000; that he had had a successful year in his fishing; the fish had been sent to New York, and he had received bills of exchange for American money in payment; that at the time of the purchase he had $3,500 face value of this accumulated, and paid the balance over and above the bills with the premium on them out of his accumulated cash. He describes the way in which the house was broken into, and most emphatically denies that he had ever sold a drop of liquor in his life, or violated any provision of the liquor law. His wife was also examined at length, and she corroborated him in every particular. Huber, the friend who went to Windsor with him, and with whom

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he stayed in Detroit, was examined, corroborating the story, and upon cross-examination denying that he had anything to do with the disappearance of the liquor. Taylor, an old resident of Belle River, gave evidence of the high character of Mooney and his good reputation in the community, and testified to the fact that the building had apparently been broken into in the way described by Mooney. Mousseau, the local constable, also described the condition of the premises, and spoke as to the high character of the accused, and testified to the fact that there had been a number of burglaries in the village at about the time of the disappearance of this liquor, and that at some of these other burglaries liquor had been stolen. Hopgood, an assistant license inspector, was also called and confirmed the appearance of the premises when he inspected them. No evidence was called in reply.

At the close of the case the magistrate said: "I believe the evidence of Mrs. Mooney all right, but there is very little evidence on one side or the other. I will not give my decision to-day, but will give my decision next Saturday. These people were negligent in leaving 142 cases of liquor in their house while they were away for a whole day." On the following Saturday he gave judgment finding the accused guilty and imposing a fine of $2,000, as already mentioned.

The theory upon which the case was argued on behalf of the Crown was that the liquor was bought for the purpose of being sold, possibly and probably by Mooney as agent for some undisclosed principal, and that the supposed robbery was in truth a mode of delivering the whisky, and it is said that once the custody is proved the effect of sec. 88 is that the accused is liable to be found guilty unless he can prove to the satisfaction of the magistrate that he did not commit the offence with which he is charged, i.e., did not sell the liquor.

I cannot think that, rightly understood, the intention of this statute is to do more than shift the onus, I do not think it can have been the intention of the Legislature to deliver the accused person to the tender mercies of the magistrate, without any opportunity of redress, simply because he has done that which the law does not prohibit, possess himself of intoxicating liquor.

In a comparatively recent case, *Rex* v. *McEwan* (1920), 19 O.W.N. 149, 150, I thus expressed my views: "Section 88 shifts the onus, on proof that the accused had in his possession the liquor concerning which he is being prosecuted; but the Act does not

abolish the fundamental principle that the accused is to be presumed innocent until guilt is proved, nor does it take away the right of the accused to the benefit of the doubt."

Meredith, C.J.C.P., in *Rex* v. *Lemaire* (1920), 57 D.L.R. 631 at p. 634, 34 Can. Cr. Cas. 254, 48 O.L.R. 475, said, referring to the contention that once a case is brought within sec. 88 the magistrate's finding is conclusive upon such an application as this, that "the fact that the onus may have been upon one side or the other cannot make any difference, if, upon the whole evidence, reasonable men could not have come to the conclusion to which the magistrate has given effect."

At the conclusion of the hearing the magistrate accepted the evidence of the wife, and this implies that he accepted the evidence of the husband upon all that was material in the case, because her evidence in all vital matters was a mere corroboration of the husband's testimony. He then adds his finding that the accused was negligent in leaving liquor unguarded. This appears to me to negative the finding that the liquor was left unguarded for the purpose of having it taken in pursuance of some collusive scheme. The magistrate now seeks to support his conviction by an affidavit in which he gives his reasons for convicting. He first states that he was unable to certify to the accurateness of the finding taken down and sworn to by the stenographer, but does not say that it is inaccurate. He based his conviction upon an entire disbelief of the evidence concerning the robbery, and he finds that the accused "disposed of the liquor directly or by collusion to some other parties." He then makes the incredible statement that what he said as to the evidence of the wife was, "I believed her evidence only in so far as it relates to unimportant particulars as to her visit to her sister's home and the details of her housekeeping, etc." He also adds that the statement made by the constable that he had made no attempt to recover the liquor "indicated to my mind that he believed it had been disposed of by the accused."

I venture to think that the magistrate's duty is to convict upon his own view, honestly formed, upon the effect of the evidence, and not upon any idea as to what the constable thought. The constable's own explanation was that he told Mooney: "There have been several other cases in which they reported whisky stolen. There have been others trying to trace such stuff and nobody found it . . . We don't get no salary and we ain't on the job like the others."

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Had there been anything in the evidence justifying the disbelief of the story told by Mooney, I should have thought it my duty to refuse to quash the conviction; but I think the judgment of my Lord which I have quoted justifies me in quashing. Here it is clear to me that, upon the whole evidence, no reasonable man could have come to the conclusion to which the magistrate has given effect, more particularly where I find that without any explanation he changes his finding and gives most shifty and evasive explanations of his conduct.

While quashing the conviction, I think it better to provide that the magistrate be protected and that costs should not be awarded against him. I adopt this course with some reluctance, but I think it better to give the magistrate once more the benefit of the doubt.

Conviction quashed.

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DICKEY v. CANADIAN NATIONAL RAILWAY.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ. April 8, 1921.

New Trial (§II—6)—Master and Servant—Exposure of Servant to Obvious Dangers—Failure of Foreman to Anticipate Dangerous Moment and Warn Workman—Evidence of Negligence—Wrongful Withdrawal of Case from Jury.

An employer is not entitled to expose his servants unnecessarily to obvious dangers, which they can escape only by constant vigilance or unfailing alertness, and when men are put to work below a crust of earth to excavate loose earth so that the crust above will break and fall by its own weight a jury may reasonably infer that it is the foreman's duty to anticipate the time when the overhanging crust will fall and to warn the workmen, and the withdrawal of the case from the jury on the ground that there is no evidence of negligence is a ground for a new trial.

[Nelson v. C. P. R. Co. (1917), 39 D.L.R. 760, 55 Can. S.C.R. 626, 24 Can. Ry. Cas 308 referred to.]

APPEAL by plaintiff from a judgment of McCarthy, J., withdrawing a case from the jury and dismissing the action on the ground that there was no evidence of negligence. New trial ordered.

K. C. Mackenzie, for appellant; *N. D. Maclean*, for respondent.

HARVEY, C.J. (dissenting):—The plaintiff was employed by

the defendant as a common labourer in removing earth. It was desired to substitute a new bridge over a stream and in carrying out the operations it was necessary to clear away a portion of the railway embankment at the approach to the bridge for the purpose of putting in an abutment. The embankment was 6 or 8 ft. high and there was a frozen crust of two or three ft. under which was loose earth, gravel, etc. There was a gang of about 20 men employed of whom the plaintiff was one. They had been working several days before the accident and having with their picks and by blasting broken into the loose earth underneath, on the morning of the day of the accident the foreman directed them to remove the loose earth and not to spend their labour in breaking through the frozen part, no doubt because the frozen part would when the earth below was removed, itself fall and break up so that it could be removed with little labour. While plaintiff was working a frozen portion fell and knocked his pick out of his hand and while endeavouring to recover it and get out of the way more earth came down and on him and caught him so that he suffered injury for which he claims damages.

The case came on for trial before McCarthy, J., with a jury and at the close of the evidence for the plaintiff the case was taken from the jury and the action dismissed on the ground that there was no evidence of negligence.

The negligence alleged in the statement of claim is "the wilful neglect and negligence by the defendant in excavating earth too far under the frozen earth or roof and in not keeping the said crust or roof broken down or properly supported to prevent the same from falling on and injuring the workmen employed by the defendants in the said pit."

On the argument for dismissal plaintiff's counsel stated the negligence to be "leaving this man to work in a dangerous position without any precaution, either knowingly or negligently not knowing that he was putting himself in a dangerous position."

Just before closing his examination he had asked the plaintiff: "With regard to the danger; were you aware of any danger?" to which he answered: "I did not think there was any danger existing when I was working under there because I did not go under far enough to create danger."

The plaintiff's evidence is the only evidence of negligence there is. Negligence is the failure to take the precautions which a reasonably prudent man would take. Yet the plaintiff at the last

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moment of the trial states that he did not think there was any danger against which precautions should be taken.

Previously he had said: "It was not dangerous as far as I know. There was no danger apparent from seeing any clods of earth falling down until the pick got knocked out of my hand," and also: "Well I did not go under far enough for to consider that" (i.e., that the frozen part would fall if the portion beneath were excavated.)

The plaintiff was at work 15 ft. from anyone else and at the extreme end next the old pier which was to be removed, and almost at the end of his evidence he gives this explanation of the earth falling: "Well it evidently was because of the fact that I might have removed the last holding place that was holding it up against the pier. The dirt extended between the piling and a little beyond, and it is right in there that I was working at the time of the accident. Evidently that was the last piece that was holding this or the weakest spot. It was less frozen there than at any other place. It was a thinner crust."

I find myself quite at a loss, as the trial Judge was, to appreciate in what respect the defendant failed in its duty. The plaintiff like any other person knew that the frozen earth would fall when the support below was taken away and the purpose of the work was to have it fall so it could be removed. If he did not see any danger and even at the trial could not suggest that there was any danger in what he was doing, how could the defendant have been under an obligation to provide against something not contemplated by a reasonable person?

An accident happened as accidents will happen in many apparently non-hazardous conditions but if we could see even now how by any precautions which the defendant could reasonably be expected to have taken this accident would have been avoided, while it would not necessarily establish negligence, because negligence is to be determined by the knowledge and expectation before the event, not after the experience of the event has been acquired, yet it would assist in enabling us to place a finger on something from which negligence might perhaps be predicated but I admit I can see none.

I have before had occasion to say that whatever might have been the situation in the past, now that our Workmen's Compensation Acts make the employers insurers against accidents to workmen and liable to compensate them in any event there seems little need to extend the rules of common law negligence unduly. It is per-

haps the result of the extension by the Courts of the law or the excessive damages given by juries that we see in the extinction in the latest Acts of the right to damages for negligence no matter how grave or wilful it may be.

I would dismiss the appeal with costs.

STUART, J.:—The fact that the plaintiff was injured without any seriously suggested negligence on his own part and through an occurrence naturally happening in the course of the work from no extraneous cause seems to shew that there was in fact a danger.

The real questions to be decided seem to me to be, first, was the defendant bound to have a greater knowledge or greater anticipation of the possibility of the existence of the danger than the plaintiff and should they have anticipated it in this particular case; secondly, what could have been done to avoid the consequences of the danger, and thirdly could a jury reasonably hold that the defendant's employees ought, as reasonably prudent men, to have done that thing, whatever it was, which would have avoided the accident?

I rather think the first part of the first question is a question of law, the law of the relation of master and servant, and my view is that in this class of work the foremen were under a legal duty to have a keener outlook and to go further in the way of anticipating danger than the day labourers under them could be expected to do. The second part of the first question is I think a question of fact and all we can do is to say whether or not there was evidence from which the jury might reasonably have inferred that the foremen could and should, earlier than the plaintiff, have anticipated the danger. In my opinion there was sufficient evidence for the purpose. The very reason for putting the men at work below was to excavate under the crust so that by its own weight it would break and fall. In my opinion our common knowledge of elementary physical laws would without evidence enable jurymen to infer that a man on top could discern danger more readily than the man working below. A crack would generally appear to be forming before the final break.

As to what could have been done to avoid the danger it seems to me that the jury could properly have held from the evidence that by having a man watching above and either breaking the crust as it became easier to do so owing to removal of earth below with a warning to the man below or watching when the crust was about to break of its own weight and then giving a warning, the accident

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would have been avoided.

The final question is whether a jury could reasonably exact such a standard of care as that which an ordinarily prudent man or master of employees should be expected to live up to and observe? It is not whether we should apply that standard but whether a jury which did apply it would be going beyond any reasonable limit. I am just perhaps a little surprised to find that I cannot really bring myself to say that a jury would be unreasonable if they were to hold that the foreman should have had a man there either breaking the edge off or watching when it was going to fall.

Perhaps the real crux of the case lies in the question whether the workmen, the pick and shovel men, ought to have exercised as much intelligence, as sound a judgment and as careful an anticipation of danger as the foreman himself. Of course if they should the plaintiff cannot possibly succeed. But as I have indicated I think there was a greater duty upon those superintending the work on behalf of the master. Admittedly the frozen crust was intended to fall. Admittedly it would fall at a point or period in the process of under-excavation which was uncertain. I think it was the foreman's duty to anticipate the approach of that moment and to warn the workmen or rather that the jury could reasonably hold that a prudent foreman would have done so.

I would therefore allow the appeal with costs and order a new trial, the costs of the first trial to be costs in the cause.

BECK, J.:—This is an action for damages for negligence. McCarthy, J., at the conclusion of the plaintiff's case dismissed the action on the ground that there was not sufficient evidence of negligence to go to the jury, and discharged the jury. The plaintiff appeals. The facts are as follows: The plaintiff was working for the defendant company as a common labourer using a pick and shovel. He had had no previous experience in this kind of work. He was one of a gang of men working on the making of an excavation being made for the purpose of erecting concrete abutments to carry a steel railway bridge over a gully and a creek to replace a wooden bridge. The foreman actually in charge of this work was one Graham. There were about 20 men in the gang. The plaintiff commenced work about March 24 or 25, 1919. He was injured on March 31. The gang was divided into two parties one working on each side of the ground being excavated. One Hedenstadt was foreman of the party in which the plaintiff was working. The immediate purpose was to excavate so as to make a perpendicular

wall against which an abutment should be erected. The surface of the ground which was largely composed of sand and cinders was frozen to a depth of two or three feet. The men had been working on this surface blasting and doing pick and shovel work but by direction of the foreman on the day of the accident abandoned work there, as owing to its being frozen it was found difficult to break through it and the men were directed to go and work in the soft ground below. The place at which the plaintiff was set to work was 7 or 8 ft. below the level of the surface.

The plaintiff says:—"The instructions to me personally were to dig away dirt that was underlying the frozen part of the dirt and I worked there and kept on working till I practically finished it,—till I reached the piling at the end of the bridge there where the dirt practically stopped; there was no definite line set that I know of that we should follow.

Q. What happened? Did anything happen at all to the ledge while you were working on this softer material? Was that ledge being removed or did it stay where it was? A. Well it stayed there and just about the time that I had reached the piling there to work around the piling there they removed the frozen part that was close to the piling, some large clogs of dirt come down and knocked the pick out of my hand and as I picked the pick up, you might say, or sort of made a grab for it this part of the ledge on the extreme right came down and knocked against this shoulder here and then of course I immediately got out of the way as far as I could and by throwing myself to the left and as I did that I stumbled over the dirt I had already removed which was sort of piled up there in small lumps and as I stumbled over that the dirt that came down piled on me and covered me all over, and a large piece of this dirt, I don't know how long but it was very heavy I know, fell on me and as it fell on me this shoulder was protruding up owing to the position I fell on the ground. Q. And that is how you got your injury? A. Yes with this dirt falling on me after I had endeavoured to get out to a place of safety. Q. How far would this frozen dirt be projecting out over the part you were excavating? A. Well I don't think it was over 2 ft. if it was that. It might have been in some extreme positions, but I do not think the balance of it was over a foot and a half. Q. Was it a regular line or irregular? A. No it was irregular shape all the way there. Q. And you think it would stick out anyway from a foot to two feet? A. Yes. I do not think it was over two feet. Q. Was anything done so far as you saw

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or so far as you were aware of to prevent that frozen crust from falling? A. There was not any precautions taken as I know of. I did not see anything of that nature put up whatever to protect the workmen. Q. Did you have any instructions at all that morning with regard to the frozen crust? A. No, I did not have any particular instructions to do anything with that crust, only to leave it up until further orders from the foreman. Q. Who was it told you to leave the crust alone for the time being? A. Well I received all my instructions from Mr. Hedenstadt. He was the foreman. Q. Just explain exactly what, if anything, was said about the crust? A. Well he told me expressly not to disturb the frozen part, to leave that go until after a while. He might probably not have used those exact words, but that was the understanding I had from him—not to disturb it. Q. You were to attend to the softer part underneath? A. Yes, I was working at the softer as he directed me to. Q. Well as far as you saw while you were working there that morning was anything being done at all with this particular crust? A. There was not anything being done as I know of to remove it. Well I believe there might have possibly been some trials at it in the morning to see if it could be moved with the picks. *That is the first hour, you might say.* Q. Was Hedenstadt with his gang that morning? I mean did he continue with the gang or what happened to him after he gave you those instructions earlier in the morning? A. Well part of the time he was right there near us and part of the time he was away, but where he was when he was away I do not know. But he was not there on our side of the bridge, on the east side of the bridge, all the time. Q. I think you said he was in charge of the gang around on the west side of the bridge too, did you not? A. Well he would be there and still be out of our sight and a good deal of our time out of our hearing. Q. Did you notice him around there much that morning? A. Well I noticed him possibly a couple of times there. I don't know just exactly how many times, but he was there. Q. Off and on? A. Well with the frequency of half an hour or an hour, something like that, apart.

Cross-examination.

Q. You were working on the morning of the accident on a piece of frozen dirt digging underneath it? A. Yes. Q. And that frozen dirt was lying sort of half imbedded in this sand fill? A. As I understand it it was entirely on the top. Q. It was lying on top of the fill? A. Yes on top of the fill. Q. That piece of dirt would be about how big—three or four feet across? A. Yes I

guess it would be more than that from the edge of the ties. Q. It was quite a large sized piece of frozen dirt? A. Yes about 6 ft. broad. Q. And weighed perhaps 200 or 300 pounds? A. Five or six tons I suppose; maybe more than that. Q. And this piece of frozen dirt was near the foot of the fill? A. The dirt was entirely on the top as far as I know. Q. This piece of frozen dirt was up on the top side and you were digging underneath it? A. I was digging underneath it as I was directed to do. Q. And I suppose you realised if you picked sufficiently far underneath it the dirt would come down? A. Well I had no instructions to go— Q. Did you or did you not understand that if you dug the earth from underneath it it would come down? A. It probably would come down if I went in far enough but I did not go in far enough. Q. Now you say that Hedenstadt told you to keep away from the frozen part? A. Not to touch the frozen part. Q. Leave it alone? A. Yes. Q. And you did not leave it alone; you kept on digging? A. I left it alone. I was working on the soft earth underneath. Q. Undermined it more and more? A. Didn't disutrb the frozen part none whatever. Q. You were digging away the soft dirt from underneath? A. That is what I was told to do. Q. And you kept doing that after Hedenstadt told you to leave it alone? A. He didn't give me instructions to leave it alone. Q. He did not? A. I mean to discontinue the movement of the soft dirt. Q. And you were digging away the earth directly underneath this frozen part when it came down on you? A. I was working at one end nearest the piling. Q. You were digging away the earth from underneath when it came down? A. That is what I was directed to do. Q. That is what you were doing at the time it came down? A. That is what I was doing at the extreme end of the bridge. Q. Did anybody on that job have a better view of the work you were doing than you did? A. That I don't know. Q. Well now wouldn't you say that you were in the best position to know when that work was getting dangerous, when you were getting in too far underneath the frozen dirt? A. We had no special distance to go in this. Q. Please answer my question. Didn't you know better than anyone else when it would be dangerous to go in under that frozen dirt? A. That excavation was my first experience I believe in my life of such a nature and leaving a surface on top—you might call it an overhanging roof. Q. Wouldn't you know better than anyone else on that job when it was getting dangerous to go in any further? A. Well I was acting under instructions. Q. Will you answer my

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question? A. I was not acting on my own initiative at all. Q. You were just keeping—digging in, plugging away underneath this frozen dirt and not worrying or caring whether it was getting dangerous or not? A. So far as I knew it was not dangerous. Q. It did come down? A. It did not come down in the sense you mean or in the position you would think it would come down. Q. You say this dirt started to slide and knocked your pick out of your hand? A. That is when I had reached the extreme end of it nearest to the pile. Q. Is that what you say, that the dirt started to slide and knocked your pick out of your hand? A. It knocked my pick out of my hand. Q. And you stooped down to pick up the pick? A. I simply bent over to pick the pick up again; it had not got entirely away out of my reach. Q. And some more dirt came down and caught you? A. And as I reached over the dirt came down—as I bent over to gather the pick the larger piece of dirt struck me on the left shoulder. Q. Did you realize when the first dirt came down and knocked the pick out of your hand that something was falling down there? A. Well of course there might have been just a few pounds or several pounds. Q. You could not tell what was coming? A. Not unless you had seen it, no. Q. And don't you think a wise man would have got out there and got out quick when that dirt came down? A. That is what I did—got away from it as quick as I could. Q. Stooped down to pick up your pick? A. Yes. Q. And got caught doing it. That is how the accident happened. You were excavating underneath a piece of frozen earth and you kept on excavating till you brought it down? That is the whole accident, isn't it? A. Well no, not exactly. I was working under instructions and following instructions exactly as Mr. Hedenstadt told me. Q. To leave that frozen earth alone? A. No, I beg your pardon, sir. I was not disturbing the frozen part; I was digging underneath at the soft dirt. Q. You were not touching the frozen earth; you were merely excavating the soft right underneath it? A. Yes at the far end of it or the bridge end of it. Q. And it never struck you that if you excavated the earth underneath this frozen earth that the frozen part would naturally fall down? A. Well I did not go under far enough for to consider that. Q. Who was to say when you had gone far enough under? A. Well the foreman was really the man to say who was to go under. Q. Wasn't it left to you? A. Not entirely. Q. Didn't you have anything to do with knowing when you had gone far enough under? A. No; I had no line to work to or no point to reach. Q. I want to read to you one

of the questions that were asked you on your examination for discovery. The question is No. 90 on your examination for discovery. Were you asked this question and did you make this answer? (Reading). "Q. Who was to say when you had gone far enough under? A. I suppose that was left to the judgment of the men working." Q. Do you remember being asked that question and making that answer? A. Yes I do. Q. Was it left to your judgment or your foreman's? A. Well now, just a second, when the foreman is not there it is the workman's place to continue working as long as he can until the foreman comes back. That in that case would be—of course we got in there 5 or 6 ft. and got under the track—that would be of course an extreme distance. Q. You were not supposed to work in there under that crust after it got dangerous? A. It was not dangerous as far as I know. There was no danger apparent from seeing any clods of dirt falling down until the pick got knocked out of my hand. Q. And you do not think that you had anything to do in deciding whether or not you had gone in far enough? A. No sir, it was not left to my judgment whatever. Q. You were just to keep plugging in there until the foreman stopped you? A. That is it. Q. No matter whether you saw it was dangerous or thought it was dangerous or not? A. Well I think it is the workman's place to follow out instructions as he is directed to do.

Re-examination.

Q. What were the instructions with regard to the frozen earth as distinguished from the soft earth? A. When we started in that morning of the accident to remove this frozen earth Mr. Hedenstadt he thought it was frozen too hard to take away with the picks. Q. That is you started in at the top? A. Yes, and so he instructed those of us who were working on the east side of the dirt there—on his side of the dirt—to leave the frozen part alone and I understood by that he did not want that done until he had given us particular directions to remove it. Q. With regard to the danger; were you aware of any danger? A. I did not think there was any danger existing when I was working under there because I did not go under far enough to create a danger. Q. Well how had the dirt fallen? A. Well it evidently was because of the fact that I might have removed the last holding place that was holding it up against the pier. The dirt extended between the piling and a little beyond, and it is right in there that I was working at the time of the accident. Evidently that was the last piece that was holding this, or the weak-

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est spot. It was less frozen there than at any other place. It was the thinner crust. Q. You were relying on your own judgment?

Mr. Maclean. (For Defence). I object. That is not a case for re-examination. I object to that question.

Mr. Mackenzie. (For Plaintiff). I did not refer to that at all in my direct examination.

The Court. It is something for the jury to say. You cannot ask your own witness "Were you relying on your own judgment?"

Mr. Mackenzie. It was gone into on cross examination.

Mr. Maclean. And also examination in chief.

The Court. The question whether he was relying on his own judgment or relying on some orders of someone superior, to whose orders he was bound to conform—you can argue that to the jury when you go to address the jury.

The question was disallowed on the ground that it was an improper question at any stage.

I think the trial Judge was quite wrong in refusing to allow the question.

Where the state of mind of a witness is relevant to the issue the witness may unquestionably be asked what his state of mind was; e.g. in an action based on misrepresentation, the witness may be asked and may state whether or not he relied on the representation.

The whole subject of questions of that sort is discussed in Wigmore on Evidence, para. 781 to which there is a long list of cases added and it is also referred to in para. 1966. It is also dealt with at length in Phipson's Law of Evidence, 5th ed., pp. 50 *et seq.*

This improper rejection of evidence is however not taken as one of the grounds of appeal; and perhaps in view of the very full examination of the plaintiff by counsel on both sides it is not of much importance to the case.

But my opinion on the evidence is that there was sufficient to make it obligatory upon the trial Judge to leave the case to the jury.

As I interpret the evidence the accident was caused by a large part of the overhanging surface falling upon the plaintiff preceded by a few seconds by the falling of a portion of it; the plaintiff was a mere labourer under the direction of a foreman; he was placed in a position of danger by being ordered to excavate under the surface; he was not given any discretion; he might well have assumed that the foreman who presumably was considerably more experienced

in that class of work than the men under him would keep watching the progress of the work and the changing conditions resulting from it and give orders accordingly; had the plaintiff been the only one working on the job instead of being one of a gang of 8 or 10, perhaps a larger amount of independent judgment might be properly attributed to him; but as it was he had a right to depend on his superior. I see no ground for attributing to the plaintiff any contributory negligence in stopping as he did, but no doubt almost automatically and unconsciously, to reach for his pick when struck by the smaller portion which first fell.

I think the words of Anglin, J., in *Nelson* v. *C. P. R.* (1917), 39 D.L.R. 760, 55 Can. S.C.R. 626, 24 Can. Ry. Cas. 308, at p. 318, are appropriate: "Employers are not entitled unnecessarily to expose their servants to danger which they can escape only by constant vigilance or unfailing alertness."

I would therefore allow the appeal with costs and direct a new trial, the costs of the former trial to abide the result of the second.

Appeal allowed; new trial ordered.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. January 17, 1921.

Wills (§IIIA—88)—Construction—Intention of Testator—Natural Meaning of Words "Should any of my children predecease me"—Reference to Future—Not Applicable to Child Known to be dead at Time of Making Will.

The duty of the Court in construing a will is to give effect to the intention of the testator and not to depart from the plain grammatical meaning of the words he has used to express that intention, unless there is found in the will that which shows that the words used were not intended to have that meaning. Where a will contained the following clause "should any of my children predecease me I direct that the share of said child so dying before me shall go and be given to and distributed equally amongst the child or children of such child of mine predeceasing me." The Court held that the words "should any of my children predecease me" had plainly reference to futurity, and could not be intended to refer to the death of a daughter who to the testator's knowledge was already dead at the time of making the will. This constitution was also strengthened by the fact that the testator had conferred a direct benefit upon the children of this daughter.

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[Loring v. Thomas (1861), 1 Drew & Sm. 497, 62 E.R. 469; In re Gorringe [1906] 1 Ch. 319 and Gorringe v. Mahlstedt [1907] A. C. 225; Gibbons v. Gibbons (1881), 6 App. Cas. 471; Barraclough v. Cooper [1908] 2 Ch. 121 applied.]

APPEAL by the official guardian on behalf of three infant grandchildren of the testator, from a judgment of Orde, J., on a motion upon originating notice, for the interpretation of a will. Affirmed.

The judgment appealed from is as follows:

The question for determination on this motion has been the cause of many conflicting decisions. George Sheard died on August 18, 1919, leaving a will dated August 13, 1919, which, after appointing executors, declaring that the provisions for his wife, Margaret Sheard, are to be in lieu of dower, and making certain specific bequests, directs the executors to set apart a sufficient sum to provide an annual income of $4,000 for his wife. Then follows this clause:—

"I direct further that the sum of $12,000 in mortgages, bonds, securities or cash in the bank shall be set aside and kept invested . . . and the income thereof shall be paid as follows:—one-third thereof to each of my grandchildren annually upon their arriving at the age of twenty-one years, my said grandchildren being Howard Watt, Rhoda Watt, and Bruce Watt, and upon said grandchildren arriving at the age of twenty-seven years the sum of $4,000 or one-third of said sum of $12,000 shall be paid them. Should any of my said grandchildren die before attaining the age of twenty-seven years, the share or shares of said grandchild or grandchildren so dying before attaining twenty-seven years of age shall be paid to the survivor or survivors, and so also with regard to the interest upon the share or shares of any such grandchild dying before reaching the age of twenty-seven years. I further direct and my will is that until my said three grandchildren arrive at twenty-one years of age, the income from the said sum of $12,000 shall form part of my estate."

Then the will gives the residue of the whole estate "equally amongst all my children share and share alike" followed by the direction that upon the death of his wife the sum set apart to provide her annuity should be distributed likewise "equally amongst my said children," this latter direction being unnecessary, as the remainder in the sum set apart would in any event form part of the residue. Then, after certain provisions as to selling and investment, the will concludes with the clause which requires construction here, namely:—

"Should any of my children predecease me I direct that the share of said child so dying before me shall go and be given to and distributed equally amongst the child or children of such child of mine predeceasing me."

The testator left surviving him his widow, Margaret Sheard, and five children, also the three Watt grandchildren, whose ages then were 19, 14, and 11 years respectively, all children of the testator's daughter Sarah Caroline, who had died on April 5, 1911, eight years before the date of the will. There were no children of any other deceased child.

The question for determination is, whether or not these grandchildren of the testator, whose mother died prior to the making of the will, were intended to enjoy the benefit of the provision for representation of deceased children.

I have set out in detail the provisions of the will, other than the clauses in question, because under the authorities the fact that a testator has already conferred benefits upon the representative class may under certain circumstances exclude them.

The value of the estate at the testator's death is sworn at $176,094.25. After deducting the $12,000 set apart in certain contingencies for the grandchildren, the remaining $164,000, subject to the testamentary expenses and to the widow's annuity of $4,000, would, if the three grandchildren are let in, give them a one-sixth share, or approximately $27,000 in addition to the $12,000 already contingently given them. On the other hand, if they are excluded, the five surviving children would each receive, subject to the widow's annuity, a one-fifth share or approximately $34,000, a sum greatly in excess of the grandchildren's contingent legacy of $12,000.

A great many authorities were cited for and against the contention that the Watt grandchildren, whose mother had predeceased the testator, are entitled to share under the provision for representation or substitution. I have examined them all but no useful purpose would be served by my entering upon a detailed analysis of them. The manner in which this question should be approached is very fully discussed by the House of Lords in *Gorringe* v. *Mahlstedt*, [1907] A.C. 225, and by Younger, J., in *In re Brown*, [1917] 2 Ch. 232. The real difficulty has arisen from the constant endeavour to apply the judgment of Kindersley, V.-C., in *Loring* v. *Thomas* (1861), 1 Drew & Sm. 497, 62 E.R. 469, as if it were a rule of construction in every case where a testator makes a

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substitutional provision for the children of any of a class of beneficiaries who may predecease him, and there are children of one who not only predeceased the testator but was dead when the will was made. In the *Gorringe* case the House of Lords approves of the judgment of Joyce, J., and Romer, L.J., in the Courts below, in *In re Gorringe*, [1906] 1 Ch. 319 and [1906] 2 Ch. 341, at p. 346, both of which contain a very full discussion of the bearing of *Loring* v. *Thomas* upon questions of this character. Romer, L.J., says ([1906] 2 Ch. at pp. 347, 348):—

"The only principle that I find in *Loring* v. *Thomas* and the cases which have followed it is a principle with which I am heartily in accordance, and it is this: that where you have gifts by will to beneficiaries with provisions for the case of the death of those beneficiaries in some such words as these, 'In case any of the beneficiaries shall die,' followed by a provision for issue, those words *primâ facie* point to futurity, but they may refer to the past, and words of that kind are often used by testators not intending to restrict them to the future, but to include the past."

Now, approaching this will in the way in which Lord Halsbury has so often said a will should be approached, by reading it so as to "give the natural meaning to the words and the sentences therein contained," what do we find? The testator, presumably knowing that his daughter Sarah Caroline Watt was dead, makes a will in which, after providing for his widow, he first makes express provision, contingent, it is true, as to both income and capital, upon their attaining 21 and 27 years of age respectively, for the three children of that daughter. Then the residue is given equally to and among his children as a class, and in order to prevent a lapse of the will provides, after some intervening provisions as to investments, for the substitution of the issue of a child dying before him. Now it is first to be noted that the daughter who was dead could not, so far as the testator's intentions were concerned, have been within the scope of his bounty in the gift of the residue to his children, and that consequently, as is pointed out in *Loring* v. *Thomas*, 1 Drew & Sm. at pp. 522 and 523, if the grandchildren take at all they take, not by substitution for a parent who under the terms of the gift to the children could possibly have taken, but as under an original bequest. It does not necessarily follow as of course that, because the provision for issue is primarily intended to be by way of substitution, the issue of one who was dead at the date of the will are always to be excluded. Cases like *Loring* v. *Thomas*, *Barra-*

clough v. *Cooper* (1905), reported in a note beginning at p. 121, to *In re Lambert*, [1908] 2 Ch. 117, *In re Williams*, [1914] 2 Ch. 61, and *Re Kirk* (1915), 113 L.T.R. 1204, all shew that if the intention is to be gathered from the provision that the issue of one who died before the date of the will are intended to benefit, the will is to be so construed. In such cases the Courts interpret the words "shall die" as meaning "shall be dead" or "shall have died," not because they mean that in every case, but because that is the sense in which the testator used them. Here the only word indicating futurity is the would "should" with which the clause commences. "Should any of my children predecease me" has plainly reference to futurity. To say that these words alone could be intended to refer to the death of his daughter, who to his knowledge was already dead, is not giving them their natural meaning. The remaining words of the clause or the context might indicate that the testator intended them to include a child already dead; but not only is there nothing more in the clause itself or in the context to justify an extension of their meaning, but the clause contains one phrase which leaves no doubt in my mind as to what the testator meant. That phrase is "the share of said child." The testator says that "should any of my children predecease me, I direct that the share of said child," etc. It is not "the share which any child of mine who survived me would have taken," or words to the like effect, but a reference to "*the* share," that is, "the share which by this will I have already given to the said child but which because of its death would otherwise go to my other surviving children." The will gave no share in the residue to the mother of the three Watt infants. The whole clause must be considered as a provision for substitution solely, and I can see nothing whatever in it upon which to hold that it must be construed as also intended by way of direct gift to benefit the grandchildren.

The fact that the testator had already conferred a direct benefit upon the grandchildren is an additional argument for excluding them, if any further argument were necessary, to which may also be added the observation that, having made the $12,000 gift contingent, it would have been extremely inconsistent to have made an absolute gift which would vest immediately upon his death of a large share of the residue. Nor do I think that the fact that the share which they get under this construction is less than it would otherwise be is of sufficient weight to override the plain meaning of the language used by the testator. I think it is evident that he

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intended the three grandchildren to have the contingent gift of $12,000 and no more.

To the cases already referred to may be added *Taylor* v. *Ridout* (1862), 9 Gr. 356 and *Re Fleming* (1904), 7 O.L.R. 651.

There will be an order declaring that the three infant grandchildren are not entitled to any share in the residue. The costs of all parties should be paid out of the estate, those of the executors as between solicitor and client.

I. F. Hellmuth, K.C., for the appellant.

W. A. McMaster, for respondents, C. Sheard and A. Sheard.

J. M. Bullen, for L. O. Mitchell, M. Heuson, and L. Braden.

F. H. Snyder, for the executors.

MEREDITH, C.J.O.:—This is an appeal by Howard Watt, Rhoda Watt and Bruce Watt, grandchildren of the testator, George Sheard, and children of a deceased daughter of his, from the order of Orde, J., dated September 17, 1920, declaring that upon the true construction of the testator's will, which bears date August 13, 1919, they are not entitled to share in the residue of the estate.

I am of opinion that the conclusion of my brother is right and that his order should be affirmed.

The provisions of the will and the relevant facts are set out in the opinion of my brother, and I shall not restate them.

No one reading the will without reference to the authorities can doubt that the testator's intention was that the only benefit the appellants were to receive under it was to share in the $12,000 set apart for them, and that they were not intended to take any part of the residue.

The duty of the Court in construing a will is to give effect to the intention of the testator, and not to depart from the plain grammatical meaning of the words he has used to express that intention, unless there is found in the will that which shews that the words used were not intended to have that meaning.

That the words "shall be born in my lifetime," in the absence of any context to explain them, are to be taken as words of futurity, who said in *Gibbons* v. *Gibbons* (1881), 6 App. Cas. 471.

To the same effect is what was said in *Gorringe* v. *Mahlstedt*, [1907] A.C. 225, and by Joyce, J., in the same case, [1906] 1 Ch. 319, and by Romer, L.J., in the same case, [1906] 2 Ch. 311, at p. 346, with reference to which is made by my brother Orde. (Ante p. 542).

In *In re Lambert*, [1908] 2 Ch. 117, at pp. 120, 121, relied on

by the appellants, Eve, J., distinguished *Gorringe* v. *Mahlstedt*, and pointed out that the two exceptions to the rule in *Loring* v. *Thomas*, 1 Drew & Sm. 497, on which the decision was founded were based on two considerations. "In the first place, there was on the face of that will an indication that the testator knew that one of his sons was dead, and he bequeathed legacies to the children of that son, and that looks as if he knew that those children would not come in under the gift of the shares of residue, and so he provided for them by separate legacies. Further, in that will, there was no provision in the substitutional gift pointing to the children attaining twenty-one or being married in order to attain vested interests."

The first of these considerations applies to the will we have to construe.

The Judge was led to his conclusion by the fact that if the opposite one was the right one the result would have been that a child who attained 21 before the date of the will would be excluded and only those who attained 21 after the date of the will would have participated.

In that case the will created a trust of the residuary estate of the testatrix for all her nephews and nieces who should be living at her death, to be equally divided between them, "Provided always that if any nephew or niece of mine shall die in my lifetime leaving a child or children who shall survive me and being a son or sons shall attain the age of twenty-one years or being a daughter or daughters shall attain that age or marry under that age then and in every such case the last mentioned child or children shall take . . . the share which his her or their parent would have taken of and in the residuary trust funds if such persons had survived me."

In most of the cases the attempt on the one side has been to bring them within *Loring* v. *Thomas* and on the other to bring them within *Christopherson* v. *Naylor* (1816), 1 Mer. 320, 35 E.R. 693.

In *In re Hotchkiss' Trusts* (1869), L.R. 8 Eq. 643, at p. 648, James, V. C. said that the distinction between what he termed the principles of the two cases was very obvious; in *Christopherson* v. *Naylor* there was a gift to a class, and a clear gift, by way of substitution, of the legacy which was intended for each person who was then comprised within the class; but in *In re Potter's Trust* (1869), L.R. 8 Eq. 52, which was decided upon the principle of *Loring* v. *Thomas*, and in the cases on which the *Potter* case proceeded, the

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gift was not to a class, followed by a substitution of other persons for dying members of that class, but it was a gift to two classes; first, to one class of children or nephews; and then to the issue of another class of children or nephews.

It may be doubted, in view of the subsequent cases, whether the two cases referred to established any principle or did more than apply well-settled rules to the facts of the cases under consideration.

In some of the cases which have followed *Loring* v. *Thomas*, it has been said that where there is a gift to a class with a provision that if a member of the class shall die his child or children shall take its or their parent's share it is a ground for construing the will as providing for two classes, one the children and the other the grandchildren, because, inasmuch as no child who did not survive the testator can take a share, the gift to the children of their parent's share would be meaningless unless the will is read as providing for two classes and not for one class, followed by a substitution of other persons for dying members of that class.

Then in such a case it was held by Younger, J., in *In re Brown*, [1917] 2 Ch. 232, that the "principle" of *Christopherson* v. *Naylor* should be applied, and it was said, at p. 238, that "there is absolutely nothing in this will which enables the Court to depart from the natural and first meaning of the words used," which is a quotation from the observations of Romer, L.J., in *In re Gorringe*, [1906] 2 Ch. at p. 350, approved of by Lord Macnaghten in the same case, [1907] A.C. at p. 228.

As I have said, I agree with the conclusion of my brother Orde, and I also agree with the reasoning on which it is based.

I would therefore dismiss the appeal and deal with the costs of it as they were dealt with in the Court below.

MACLAREN, HODGINS, and FERGUSON, JJ.A., agreed with MEREDITH, C.J.O.

MAGEE, J.A.:—The appeal is on behalf of the three infant children of Sarah Caroline Watt, deceased, against the order construing the will of George Sheard, deceased, their mother's father, as excluding them from sharing with his other children in the residuary part of his estate. Their mother had died in 1911, eight years before her father's will, which is dated August 13, 1919. He died on August 18, 1919, leaving 5 children surviving him besides these 3 children of the deceased daughter.

The will, among sundry specific legacies, directs a sufficient sum to be set apart to provide a life annuity of $4,000 for the

testator's wife, and then $12,000 to be set aside and invested for these three appellants, by name "children of my daughter Sarah Caroline Watt," on attaining the age of 27 years, with right of survivorship between themselves; the income, however, till they attain 21 years to form part of his estate, and after some specific legacies all the residue of his real and personal estate was to go "equally amongst all my children share and share alike," and upon his wife's death the sum set apart to provide her annuity was also to "go and be distributed likewise equally amongst my said children," and then, after some general provisions, and apparently out of the usual order, there is a final clause which reads thus: "Should any of my children predecease me I direct that the share of said child so dying before me shall go and be given to and distributed equally amongst the child or children of such child of mine predeceasing me." The appellants say that under this last clause they should share with their uncles and aunts. Except the facts already stated, the Court has before it only the statement that the testator's estate amounted to about $176,000. If this should net $168,000—the question is whether these appellants should receive $12,000 and a sixth share of the remaining $156,000, or $38,000 in all, as against each uncle's or aunt's share of $26,000, or should they get only the $12,000 and each uncle or aunt get $31,200. We know nothing of the circumstances or needs of these grandchildren or of the surviving children, or what was operating in the testator's mind, or why the daughter Sarah's children should get less or more than the children of any of her brothers or sisters who might happen to predecease her father. He may have conceived a special affection for her children, or he may have thought that in their father's circumstances they would need less than his other children—whichever way the will be interpreted there is inequality, but no sufficient presumption arises from that consideration. The will gives no indication that the draftsman knew that the daughter Sarah was not living—it is shewn that the testator did know that fact. If the testator expected the will to take effect in a few days, one is left to surmise why that final clause should be added out of its order, if it was not intended for the benefit of the children of his already deceased daughter. If he did intend them to have a share, he made no such precautionary limitation postponing their receipt of it till more mature age as he did with the smaller bequest of $12,000. And another fact, perhaps to be weighed as against this, is that unless they were to share in the residue there is no provision for

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their right to any income at all during minority. There is no special provision for survivorship among the testator's children or their children, as there is among these three grandchildren. We are left then to ascertain what the testator's own intention was and to do so from his own words in the light of the circumstances shewn. We have then a special small contingent deferred provision for these three grandchildren and a devise of the large residue (including the deferred fund for the wife's annuity) to his children, with the separate proviso that the share of any child who should predecease him should go to that child's children.

Two questions in effect arise. First, are the words "Should any of my children predecease me" to be interpreted as meaning "in the case that any of my children shall hereafter predecease me" —or as meaning "in the case that any of my children should have predeceased me"? Secondly—even if the latter meaning be given, does this clause either indicate as meaning living and deceased children those who are meant by the words "my children" to whom the residue is given, or would it indicate that the residue is to have another class to share in it besides the surviving children originally implied?

As to the first question, the words "should any of my children predecease me" ordinarily would refer only to death of a child after the date of the will—although they lend themselves much more readily to a change of inflection than the direct future tense in such phrases as "if any child shall die in my lifetime." Although not wholly inconsiderable, they have seldom stood in the way in interpretation when the rest of the will has indicated an intention such as they would not imply. It is sufficient here to quote the words of Lord Macnaghten and Lord Lindley in *Barraclough* v. *Cooper*, reported in a note to *In re Lambert*, [1908] 2 Ch. at p. 121—where the former said at p. 125: "The words 'shall die . . . have always been construed as not creating any serious difficulty," and Lord Lindley said at p. 126: "The words 'shall die' are an old phrase that has been treated over and over again as equivalent to 'shall be dead' . . . There is no magic in the words; you must look and see what is meant. And when you look at the will as a whole, to cut out this granddaughter from a share of the residue appears as plainly as possible to be the very thing that this testator did not intend."

In the leading case of the line of decisions upon which the appellants rely, *Loring* v. *Thomas*, 1 Drew & Sm. 197, as well as in

Christopher v. *Naylor*, 1 Mer. 320, which may be regarded as heading the list on the other side, "shall die" was construed as "shall have died." The appellants' chief difficulty is on the other question. The will gives the share of the child dying before the testator to that child's children. But what share did that child take? If none, then her children take none. The gift of the residue is to "my children" and "equally," that is, to a class of persons, and that class is to be ascertained at the death of the testator, in the absence of other indication.

Thus, although our Wills Act, R.S.O. 1914, ch. 120, sec. 37, provides that "where any person, being a child or other issue of the testator to whom any real estate or personal estate is devised or bequeathed . . . dies in the lifetime of the testator, leaving issue, and any of the issue of such person are living at the time of the death of the testator, such devise or bequest shall not lapse but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention appears by the will," it has been held that this does not apply to a devise to a class none of whom are named. In *Re Williams* (1903), 5 O.L.R. 345, it was held that upon the authorities the children of a daughter who had died before the will could not benefit under the statute in a share of a bequest "amongst all my children in equal parts." So in *Re Clark* (1904), 8 O.L.R. 599, as to the children of a son who died after the will and before the testator; and again in *Re Moir* (1907), 14 O.L.R. 541, where one child was named for a double share and died before the testator. It may have been in view of this interpretation of the statute that the final clause was added by the draftsman in this will. It would, I think, be giving more effect than would be warranted to hold that the effect of the final clause is to make the words "my children" mean "my children living or dead." In *In re Musther* (1890), 43 Ch. D. 569, Lindley, L.J., said at p. 573, that he could not conceive the testatrix "intending to leave her money to a person who is dead before the date of the will"—no case was cited for such an interpretation.

But then, if the word "children" is not enlarged to include dead children—may not this final clause mean that, in addition to children, the fund must be shared with these grandchildren? A testator might direct a fund to be divided between A., B., and C., and then add a clause that D. or his issue shall share in it. These grandchildren would not in that case be taking a share in substitution for their mother, but taking a share on their own behalf

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on the basis of such a share as their mother would take if she survived the testator. Such an intention would not be an unreasonable one to attribute to a testator, but his words should not be unreasonably twisted to evidence it. That interpretation was adopted in *Loring* v. *Thomas*, where the bequests of each quarter of the fund were to the children (or in one case grandchildren) of a named person, and in case any such child "shall die in my lifetime leaving any child or children who shall attain 21 years then the child or children of each such child so dying in my lifetime shall represent or stand in the place of the parent and be entitled to the same share or shares which the deceased parent would have been entitled to if living at the time of my decease."

Kindersley, V.-C., held that the children of children already dead at the date of the will took in their own right and not a substituted share of their parent. He was able to say in scrutinising the will that the only words tending to exclude issue of predeceased children were the words "shall die," which he felt justified in interpreting as "shall have died" or "shall be dead." This change of tense was more readily arrived at because the will also used the words "shall attain the age of 21 years," which evidently meant "shall have attained" that age, because some were already over that age. There was also the fact that one of the quarters was devised to the children of A. by B., when there was only one child living, the other having died before the will (a bequest to a dead person by the way). But, above all, the Vice Chancellor's opinion seems to have rested on the fact that the issue were not to take the share which the parent "will take or can take, or is intended to take, but the share for themselves, which for the purposes of calculation is called that which the parent would be entitled to if surviving the testator, and he in fact intimates that if the issue were only to take the parent's share they would take nothing. Now that is exactly what is given in the present case—the share of the child so dying. Here the footholds for arriving at the end sought by the appellants and which were available in *Loring* v. *Thomas* are lacking. In addition there is the obstacle of the special legacy to these grandchildren, rendering the less probable the intent that they should share in the general fund. It is not unimportant that only one child had died before the will, and the issue of that one are provided for. Had there been two or more dead, and provision made for the issue of only one, there might be more room for speculation as to the testator's intention. *Loring* v. *Thomas* was approved and followed

by the Court of Appeal, whose judgment was affirmed by the House of Lords, in *Barraclough* v. *Cooper*, [1903] 2 Ch. 121, under a proviso to the like effect. In that case there was only the manifest intention of equality and the wording shewing that the grandchildren were not merely to take the parent's share but a share for themselves.

Notwithstanding that decision, the Court of Appeal in *In re Cope*, [1903] 2 Ch. 1, was able to distinguish a closely similar proviso by reason of another clause indicating that the testator was alive to the meaning of his words of futurity, and they decided against the issue of a child who had died before the will.

The strongest case for the appellants appears to be *Re Kirk*, 113 L.T.R. 1204, where the fund after a daughter Jane's death was given to the testator's children, and in case any of them "shall die" in Jane's lifetime and "leave a child or children" such child or children "shall take their respective parent's share with survivorship if no child left." The will was executed in 1874—the testator died in 1876. Astbury, J., held that the children of a son who had died in 1865 and the child of a daughter who had died in 1873 were entitled to share. He found no sufficient indication that the testator intended to benefit some of his grandchildren and not others, and so he held that all must take a share. That decision, if it be warranted by the authorities, has for its basis, like others, the manifest presumed intention of equality. That basis is here absent, for there is the special provision for the children of Sarah, which of itself would create inequality. In fact this case seems to be governed by the principle of the decision in *Gorringe* v. *Mahlstedt*, [1907] A. C. 225, where, as here, there were legacies to the children of a deceased son (referred to however as deceased), and the residue was given to his children who should be living at his decease and attain 21 years or marry, with a proviso that the children of any child who "shall predecease me should take the share which the parent would have taken if living at the testator's decease." Their Lordships considered that, unless there is something in the context which prevents the ordinary and proper construction of the words in their natural meaning, every Court ought to adhere to that meaning and to give it effect, and Lord Macnaghten found the gift in proviso to be simply a substitutional one and not an independent gift to all the grandchildren.

Upon the ground, therefore, that the substantial special legacy to these appellants, with the special limitations upon its enjoyment,

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shuts out the idea of intended equality among the *stirpes* and removes any reason for not construing the language of the will as having its ordinary meaning both as to the word "predecease" and the words "the share of said child so dying before me"—and therefore that the appellants take no share in the residue—the appeal fails.

Appeal dismissed.

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Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin, Brodeur and Mignault, JJ. February 1, 1921.

1. Assignment (§I—1)—Of part of Chose in Action—Right of Assignee to Recover—Assignor as Necessary Party.

In order that an assignee of a chose in action may recover from the debtor there must be an assignment of the whole chose in action and the assignor must be a party to the action.

[See Annotation, Equitable Assignments of Choses in Action, 10 D.L.R. 275.]

2. Set-off and Counterclaim (§ID—21)—Assignment of Agreement to Purchase Manufacturing Plant—Assumption of Estimated Liabilities—Liabilities Greater than Estimation—Right to Apply Certain Moneys in Liquidation—Rights of Assignee and Assignor—Trust Funds.

An assignment of an agreement for the purchase of an interest in certain manufacturing plants by a company and the promoter of the company containing the following clause "In consideration of the foregoing the purchaser hereby covenants and agrees to assume the obligations and liabilities of the company as set forth in Schedule "B" attached hereto and amounting to the sum of $36,894.38 or thereabouts, and to pay the vendor and the various persons entitled thereto the sum of $5900 upon receiving releases of their respective rights arising from the payment of the money to the vendor, or transfers of the shares in the said company upon which the said amount has been paid by the persons making the said payments or subscribing for shares."

The liabilities of the company aggregated considerably more than the sum mentioned in the schedule and the Court held the purchaser entitled to apply the sum of $5900 mentioned in the clause, in liquidation, in part of these obligations. No trust was disclosed under the agreement, or under the assignment as to this amount and the plaintiffs could not recover except subject to whatever rights arose

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out of the agreement and assignment and counsel for defendant could not by admissions made in Court bind his client to something the document sued on did not warrant him in conceding.

[Best v. Beatty (1920), 53 D.L.R. 44, 47 O.L.R. 265 at 268, reversed.]

APPEAL by defendant from the judgment of the Supreme Court of Ontario, Appellate Division (1920), 53 D.L.R. 44, 47 O.L.R. 265 at p. 268, in an action by plaintiff as assignee of one Ash to recover from the defendant certain sums alleged to be due by the defendant to Ash. Reversed.

The facts of the case are fully set out in the decision appealed from and in the judgments following.

W. J. McCallum, for defendant; *J. J. Gray*, for respondent.

DAVIES, C.J.:—I would allow this appeal and concur in the reasons for judgment stated by Anglin, J.

IDINGTON, J.:—This is an appeal from the judgment of the Second Appellate Division of the Supreme Court of Ontario (1920), 53 D.L.R. 44, 47 O.L.R. 265 at p. 268, against appellant in two actions alleged to have been consolidated, and founded upon an agreement dated May 27, 1919.

That agreement was made between the respondent Ash as vendor, of the first part; appellant as purchaser, of the second part, and the Canadian Drill and Electric Box Co. Ltd., thereinafter called "the company," of the third part.

The recitals set forth his acquisition of the business and assets of two companies and a sale thereof by him to the party of the third part which had by two agreements agreed to issue certain of its capital stock to said vendor who had agreed to pay certain liabilities therein referred to and that the company had purported to carry on business and had "incurred certain obligations, and certain shares of its capital stock have been applied for, sold, issued or allotted or agreed to be sold, issued or allotted either by the company or the vendor, and the vendor has received certain monies from persons who subscribed for shares of the company's capital stock and has paid certain monies either to or for the company.

And whereas the agreements hereinbefore mentioned have not been carried out and default has been made thereunder and the vendor is financially unable to carry out his part of the same and it is inexpedient for the company to insist on the performance of the same, and the company and the vendor have agreed to cancel the agreements between them.

And whereas on the representation, condition and understanding

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that at the date hereof the assets of the company are as set out in Schedule A attached hereto, and that the total liabilities or obligations of the company are as set out in Schedule B attached hereto, and upon all the said assets of the company being transferred and assigned to the purchaser and upon all the shares of the capital stock of the said company which have been sold, issued or allotted and all the interest of the vendor and any other persons in shares which have been agreed to be sold, issued, or allotted, being transferred and assigned to the purchaser or his nominee or nominees and upon the vendor releasing the company and the purchaser from all claims of every nature and kind whatsoever which he may have against the company or under the said agreements or any of them or otherwise howsoever, the purchaser herein called the party of the second part has agreed with the vendor and the company to enter into these presents."

The operative part of the agreement then proceeds in consideration of the premises and of the mutual covenants and agreements to set forth in most comprehensive terms that:—"The vendor doth hereby grant, transfer, assign and set over unto the purchaser all his interest if any in the agreements hereinbefore mentioned and, in the shares of the capital stock of the said company which has been subscribed, applied for, sold, issued or allotted, or agreed to be sold, issued, or allotted,' whether to the vendor himself or to any other person or persons.

The vendor hereby appointing the purchaser his attorney to transfer on the books of the company either in the name of the purchaser or his nominee or nominees, such of the shares as are owned by or as stand in the name of the vendor or in which he is interested in any way.

And the vendor covenanting and agreeing to procure and deliver to the purchaser within thirty days valid and proper transfers or assignments of all shares owned by or standing in the name of, any other persons or in which such persons may be interested in any way.

And the vendor further covenanting and agreeing to procure the execution and delivery by the company of these presents and the approval and ratification of the directors and shareholders of the same.

And the vendor further waives all claims of every nature and kind whatsoever which he may have against the company or under the said agreements or any of them or otherwise howsoever, and

hereby releases and discharges the company and the purchaser from all obligations therefor and thereunder."

Then:—"The company doth hereby grant, transfer, assign and set over unto the purchaser all its right, title and interest, if any, in and to the agreements hereinbefore mentioned and its goodwill, chattels, stock, lands, buildings, fixtures, patents, formulas, blue prints, accounts and bills receivable and particularly the assets as set forth in the Schedule "A" attached hereto, as well as all other assets and claims whatsoever."

That is followed by the covenant of the appellant now sued upon, which reads as follows:—"And in consideration of the foregoing the purchaser hereby covenants and agrees to assume the obligations and liabilities of the company as set forth in Schedule B attached hereto amounting to the sum of $36,894.38 or thereabouts, and to pay to the vendor or the various persons entitled thereto the sum of $5,900.00 upon receiving releases of their respective rights arising from the payment of money to the vendor, or transfers of the shares in the said company upon which the said amount has been paid by the persons making said payments or subscribing for shares."

The respondent Ash presumed to assign $1,000, part of the said $5,900 to Best, his father-in-law, and to Calvert, his brother-in-law, the sum of $900 out of said $5,900.

Then, as the evidence discloses in the following questions and answers:—"Q. Did they instruct the bringing of these actions or did you? A. I instructed my solicitor to take action. Q. For them? A. Yes." He instituted these actions in the respective names of his said friends.

The defendant, now appellant, set up that the liabilities represented in said schedule had substantially exceeded the total represented in said Schedule B and that in some respects the assets had fallen short of the total represented.

The trial Judge arrived at the conclusion that these assignees could not maintain, as mere assignees of the chose in action, any action unless the covenantee Ash was added as party plaintiff. See per Hodgins, J.A., (1919), 53 D.L.R. 44 at p. 47, 47 O.L.R. 265 at p. 268.

He proceeded then at the close of the trial to set forth the difficulties in the way of such plaintiffs, even if Ash were added as a party attempting to recover, and, in any event, inasmuch as that the covenant sued upon, had proceeded upon the implied covenant

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on the part of Ash, relative to the substantial correctness of the Schedules A and B, the defendant, now appellant, was entitled to have the balance, due under his covenant, reduced by the sum of $857.06, and such further sums as a reference might, if desired, disclose.

He then gave the plaintiffs a limited time to procure the consent of Ash to be so added.

It turned out, as represented later to the trial Judge, that Ash had refused to give such consent.

He then, quite properly, proceeded to dismiss the actions and in support of his judgment referred to relevant authorities which support the position he took.

Thereupon, the plaintiffs appealed to the Court of Appeal for Ontario, and, on the case coming up before the Second Appellate Division, that Court properly held Ash was a necessary party, and he consented to be added accordingly. 53 D.L.R. 44, at p. 47, 47 O.L.R. 265 at p. 268.

The appellant seems to have consented to that being done.

The next question that thus arises was whether the said claim of $857.06 could be, as that Court treats it, set off, or, as I prefer, set up by way of defence to the action on the covenant sued upon.

In my opinion an assignment of anything less than a whole chose in action does not entitle the assignee to sue, and these actions should, I submit with respect, have been dismissed on that ground, long before they were.

The statute enabling an assignee of a chose in action to sue, in my opinion, never was intended to enable the possessor of a valuable chose in action to issue a kind of currency, as it were, by dividing up his right into little bits and distributing them amongst his friends, and giving each of them a chance to worry and annoy the debtor.

The Second Division of the Appellate Court, 53 D.L.R. 44, 47 O.L.R. 265 at p. 268, would seem also to have held, at first blush, something akin thereto, else it need never have insisted upon Ash being made a party plaintiff, as it seems to have directed.

Having, however, so directed and allowed the argument to proceed on that basis, it seems to be alleged by the judgment appealed from that counsel for appellant admitted or made some admission from which it had inferred as follows (per Masten, J., 53 D.L.R., at p. 49, 47 O.L.R. at p. 271):—"In the course of promoting the Canadian Drill & Electric Box Company, Limited, Ash went

about seeking subscribers for shares, and obtained $5,900 of money which, it now transpires, he received as trustee for the subscribers in order that he might procure for them shares in the company. No shares were ever issued to these subscribers and Ash remained a trustee of the moneys which he had received amounting to $5,900" and of the $5,900 payable by the defendant under the terms of the agreement in recoupment of these trust moneys which are traced to the defendant.

"This situation does not appear to have been brought to the attention of the trial Judge by counsel for the plaintiff and only transpired in the course of the argument in this Court from the admissions of counsel for the defendant in answer to questions from the Court. This circumstance appears to me to be decisive of the controversy. The issue is as to the right to set off against the $5,900 due by the defendant to Ash as trustee the overpayment made by the defendant on account of general liabilities, for repayment of which Ash is alleged to be personally responsible."

There is nothing in the respondent's case at the trial as presented in the evidence supporting same, or in reply to justify counsel in making any such admission and he stoutly asserts he never did.

It is difficult to see how, after all that had transpired in the trial Court, and the contentions set up there and in appeal, that he should have done so, and given away his client's case.

He may no doubt in argument have conceded something not intended, as young men may almost concede anything and then be mistaken.

I have no hesitation in holding that in such a case as is presented herein, counsel could not bind his client to something the document sued upon does not warrant him in conceding.

I deal, therefore, only with the document and the relevant facts as disclosed at the trial.

Nothing appears therein to constitute a trust or a condition of things involving a trust and notice thereof to appellant.

I fully agree with the law as set forth by the late Street, J., one of the best of Ontario judicial authorities in law, in the following paragraph quoted by the judgment appealed from, as follows (53 D.L.R. at p. 50):—"In all the cases since *Tweddle* v. *Atkinson* (1861), 1 B. & S. 393, 121 E.R. 762, in which a person not a party to a contract has brought an action to recover some benefit stipulated for him in it, he has been driven, in order to avoid being shipwrecked upon the common law rule which confines such an action

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to parties and privies, to seek refuge under the shelter of an alleged trust in his favour: *Mulholland* v. *Merriam* (1872), 19 Gr. 288; *In re Empress Engineering Co.* (1880), 16 Ch. D. 125; *In re Rotherham Alum Co.* (1883), 25 Ch. D. 103, 111; *Gandy* v. *Gandy* (1885), 30 Ch. D. 57; *Henderson* v. *Killey* (1889), 17 A.R. (Ont.) 456; *Osborne* v. *Henderson* (1889), 18 Can. S.C.R. 698; *Robertson* v. *Lonsdale* (1891), 21 O.R. 600."

An examination of the authorities thus cited and what they demonstrate leads me to conclude that a covenanter who is a bare trustee need not be made a party to enable his *cestuis que trustent* to sue; that a covenant to pay to some third party a sum named, or fruit of something being contracted for, does not create such a trust as to entitle the third party to sue; and that the trustee may be made a party if the requirements of justice so demand.

The first of these decisions clearly indicates conclusively the legal truth of the first of the propositions I submit, and the foundation for the next of foregoing propositions is found in the others, as well as the reason for the last, which is merely a safeguard against injustice in executing the equities involved in some complicated cases.

With great respect I cannot agree with the deductions which the Court below appears to have drawn from said decisions.

One more point made on the argument for respondent was that the words "or thereabouts" in the covenant disposed of the claim. No authority was cited, and common sense would perhaps be the best. A trifling or comparatively insignificant sum, which I do not think $857.06 is, even in a large deal, might possibly be covered thereby. Abler Judges than I have refused to go further, or so far, perhaps.

The cases of *Barker* v. *Windle* (1856), 6 El. & Bl. 675, 119 E.R. 1015; *Davis* v. *Shepherd* (1866), L.R. 1 Ch. 410, and *Oddie* v. *Brown* (1859), 4 DeG. & J. 179, 45 E.R. 70, present the use of the phrase.

They seem to refer us to common sense.

I think the trial Judge was right and that this judgment should not have been disturbed, and that this appeal should be allowed with costs herein, and a reference as the trial Judge offered, be again offered if desired by either party, costs thereof to abide the event.

DUFF, J.:—The only question requiring discussion turns upon the effect of certain provisions in the agreement of May 27, 1919.

Among other things it is provided as follows:—"Whereas on the representation, condition and understanding that at the date hereof . . . the total liability or obligations of the company are set out in Schedule B attached hereto . . . the purchaser . . . has agreed with the vendor to enter into these presents . . .

And in consideration of the foregoing the purchaser hereby covenants and agrees to assume the obligations and liabilities of the company as set forth in Schedule B attached hereto amounting to the sum of $36,894.38 or thereabouts, and to pay to the vendor and to the various persons entitled thereto the sum of $5,900 upon receiving releases of their respective rights arising from the payment of the money to the vendor, or transfers of the shares in the said company upon which the said amount has been paid by the persons making the said payments or subscribing for shares."

The liabilities of the company proved in fact to include liabilities not mentioned in the schedule and to be in the aggregate considerably more than the sum mentioned, $36,894.38; the purchaser asserts the right to apply the sum of $5,900 mentioned in the paragraph above quoted in liquidation in part of these obligations.

The Appellate Division has held, 53 D.L.R. 44, 47 O.L.R. 265 at 268, that the vendor was a trustee in respect of this sum of $5,900 because it was made up of sums which the appellant's counsel was understood to have admitted on the hearing of the appeal were owing by the vendor to various persons from whom he received them for the purpose of applying for and securing shares in the company, which shares were never issued; and the conclusion is drawn from these facts that the covenant contained in the paragraph quoted from the operative part of the agreement in respect of this $5,900 is a covenant entered into with the vendor as trustee for these persons and consequently it is said that no part of this sum can be diverted for the purpose of liquidating the undisclosed liabilities.

With respect, I think it is a debatable point whether the covenant in question is a covenant with the vendor and trustee. Assuming that he was accountable to other persons as trustee for these moneys which he received from them for a purpose which was never carried out, it would by no means necessarily follow that the purchaser was contracting with him as trustee. The true meaning of the contract may be that the purchaser agreed with the vendor to indemnify him against these obligations either by paying the vendor or by paying the vendor's creditors.

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However that may be, with great respect, the answer to the respondent's contention is to me abundantly clear that, assuming the covenant as regards this sum of $5,900 to be a covenant exacted by the vendor and entered into by the purchaser for the benefit of other persons, the rights of these other persons must depend upon the terms of the agreement and the rights of the beneficiaries in respect of the fruits of the enforcement of this covenant can be no higher than the rights given by the covenant itself. The beneficiaries' rights whatever they were as against the vendor, could not be affected by the covenant. The covenant itself takes its effect as part of the agreement in which it is found and gives such rights and only such rights as flow from that agreement.

Now the recital quoted above makes the right of the vendor depend upon the condition that the representation mentioned is a true representation. Saving in so far forth as subsequent events may have affected the reciprocal rights of the parties, the condition expressed in the recital is an essential term of every obligation undertaken by the purchaser. Now it is not suggested that anything has happened which has relieved the vendor and the beneficiaries from the exigency of this term to such a degree at all events as to deprive the purchaser of the right to set up the nonfulfilment of it as a defence *pro tanto* against any action on the covenant now sued upon.

The point made upon the words "or thereabouts" in the covenant is without substance. The recital shows that the agreement proceeds upon the representation that the liabilities and obligations of the company are set out in full in Schedule B. There is nothing in the words of the operative part of the agreement to qualify this, the words "or thereabouts" obviously being intended to qualify only the statement as to the aggregate amount of the liabilities and obligations mentioned.

The appeal should be allowed with costs here and in the Appellate Division and I think justice will best be done by making an order in terms of the judgment offered by Hodgins, J.A., at the conclusion of the trial.

ANGLIN J.:—Whatever they may be, the rights of the original plaintiffs, Best and Calvert, or of the added plaintiff, Ash, as against the defendant Beatty in respect of the moneys sued for in these actions arise out of and are subject to the terms and conditions of

the agreement made between Ash and Beatty on May 27, 1919. It is solely under that agreement that any liability exists against Beatty and he is entitled to insist on the terms on which he undertook it being fulfilled. These terms cannot be affected by the relationship between Ash and Best and Calvert.

It may be that the $5,900, if it should reach Ash, would in his hands be subject to a trust for the plaintiffs, Best and Calvert, and others. It does not follow that it was as a trustee that Beatty agreed to pay him this sum. But, assuming that to be the case, Beatty's undertaking to pay it would be subject to the conditions of the agreement whereby he assumed that obligation. Those conditions were, *inter alia*, that the company which Beatty was acquiring possessed certain assets as shewn in Schedule A to the agreement, and that its liabilities did not exceed $36,894.38 "or thereabouts," as shewn in Schedule B. Beatty alleges breaches of both of these conditions.

At common law a breach of either condition would preclude recovery on Beatty's covenant. But in equity on the defendant being put in the same position as if the condition had been strictly observed by deducting from what he has undertaken to pay enough to make good the default, he may be required to pay the balance. The case is not one of set-off in the ordinary sense, but one of inability on the part of the plaintiffs to establish their claim until the conditions of the defendant's obligation have been fulfilled at their expense.

Upon evidence warranting such a finding the trial Judge held that Beatty's claim that the liabilities exceeded $36,894.38 by $857.06 was established. This amount is too large to be covered by such words as "or thereabouts." Having been obliged to expend $857.06 to put himself in the position which he would have held had the condition as to the amount of the company's liabilities been fulfilled, Beatty's obligation to pay $5,900 to Ash "or the various persons entitled thereto" is *pro tanto* reduced. Having already paid $4000 on this account, to "various persons entitled thereto," subject to the further deductions which he asserts a right to make, there remains due from Beatty $1900 less $857.06, or $1042.94.

The defendant also claimed to deduct damages which he alleged he had sustained because certain assets included in Schedule A either did not fulfil representations made as to them or were subject to

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defects in title not disclosed. This claim was rejected by the trial Judge on the ground that the evidence did not sufficiently support it and I am not prepared to overrule that finding.

Another deduction claimed referred to a sum of $425 owing by one Aylesworth to the company whose assets were acquired from Ash. This claim was for money advanced and the record contains a written acknowledgment of it by Aylesworth. All that appears in evidence about this item is a statement by Beatty that Aylesworth demurred when asked by him to pay it on the grounds that he had lost money and time through his connection with the company and that Ash had personally claimed this sum from him. But it is not proved that Beatty is unable to collect this sum from Aylesworth—still less that it was not a valid asset of the company. Ash was not asked about it when he gave evidence. The trial Judge makes no reference to this claim of the defendant, probably either because it was not pressed upon him or because he thought it could not be seriously contended that the evidence established it.

The sole deduction to which the defendant is entitled, therefore, is the sum of $857.06. The disposition of the case proposed by the trial Judge in his opinion of December 12, 1919, seems to have been correct and should now be directed.

The appellant is entitled to have his costs in this Court and the Appellate Division paid him by the respondents.

BRODEUR, J.:—This case has caused very serious misunderstandings. At the conclusion of the trial, the trial Judge expressed his willingness to maintain the action in part if the plaintiffs Best and Calvert would bring in the case G. P. Ash as co-plaintiff with them. But the trial Judge having ascertained that the plaintiffs had declined to add Ash as a party plaintiff, later on dismissed the action. See per Hodgins, J.A., 53 D.L.R. at p. 47, 47 O.L.R. at p. 268.

Then in the Appellate Division, 53 D.L.R. 44, 47 O.L.R. 265 at p. 268, counsel for the plaintiffs stated that he had been misunderstood by the trial Judge and that he was willing to add Ash as a co-plaintiff; he applied to the Appellate Division for an order making Ash co-plaintiff, and the case was argued.

It was contended in appeal that Ash acted with regard to the sum of $5,900 which Beatty undertook to pay by agreement of May 27, 1919, as trustee and that no deduction could be claimed from

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that sum for non-fulfilment on the part of Ash of obligations which he contracted in virtue of this agreement.

The Appellate Division declared that in the course of the argument and from admissions of counsel for Beatty in answer to questions from the Court, it appeared that the said sum of $5,900 was trust money and that this sum could not be set off against claims that Beatty could claim against Ash personally.

As a result the plaintiffs' actions were maintained by the Appellate Division.

Now Beatty appeals to this Court and his counsel virtually states that he never made any admissions which would justify the inferences drawn by the Court below.

It seems to me that all these misunderstandings which have arisen, as well before the trial Judge as before the Appellate Division, should have been brought formally to the attention of the Judge or of the Court before whom the consent or admissions have taken place.

If a judgment is rendered upon alleged refusals or admissions which have, according to the views against whom they were invoked, never occurred, then they should bring the matter before the tribunal where the alleged refusals or admissions have been made, in order that the matter be more conveniently discussed and dealt with.

None of the parties however in this case have been willing to adopt this procedure and the appellant now asks relief from this Court.

The respondent claimed at first that we had no jurisdiction, at least in the case of Calvert, because the amount in controversy did not exceed $1,000 (sec. 48 Supreme Court Act, R.S.C. 1906, ch. 139).

It is to be noticed that the real plaintiff, according to the judgment of the Court below, is the trustee Ash and that the two actions have been consolidated. The defendant Beatty has a judgment against him for an amount exceeding $1,000, *viz.*, $1,962.72.

In these circumstances, this Court has jurisdiction.

As to the merits of the appeal I have not been able to find in the record the evidence that Ash was acting as trustee for the persons who, like Best and Calvert, purchased shares in the company in question. This item of $5,900 should be treated in the same

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way as the rest of the purchase price.

As Ash has not fulfilled the conditions of his agreement the appellant may raise successfully this issue on an action to recover part of the purchase price.

The appellant Beatty claims that he could recover from the plaintiff Ash a sum of $857.06 alleged to be due by him for excess liability which he paid for Ash's benefit. This sum should be deducted from the amount which he still owes to Ash.

There is also a sum of $425 which he claims should be deducted from the $5,900. As to this claim of $425 the evidence is not complete and the matter should be referred to the Master.

MIGNAULT, J.:—Ash, having been added as co-plaintiff in the Appellate Division, 53 D.L.R. 44, 47 O.L.R. 265 at p. 268, the question was whether, under the agreement between Ash and Beatty, the latter, being sued by Best and Calvert in two separate actions for amounts claimed to be due to Best and Calvert as transferees of Ash by virtue of this agreement, could set off against the plaintiff the sum of $857.06, being the amount paid by him, Beatty, in excess of $36,894.38, the amount represented to him as being the liabilities of the Canadian Drill and Electric Box Co., whose assets were sold by Ash to Beatty. The sale agreement in question represented that the liabilities of this company were $36,894.38 or thereabouts, as set out in a schedule attached to the agreement, and Beatty paid liabilities amounting to $857.06 in excess of this amount. The amount payable by him to Ash by virtue of this agreement was $5,900. The two actions were for $1,000 and $900 respectively as a part of this price, and against these actions Beatty claimed that he was entitled to set off the said sum of $857.06.

The Appellate Division refused him this right of set-off for the following reasons which I quote from the judgment of Masten, J., 53 D.L.R. at p. 49, 47 O.L.R. at p. 271.

[See judgment of Idington, J., *ante* p. 556.]

Continuing he says:—"In other words what is claimed is to set off against a debt due to Ash as trustee a claim against him personally. But these are not mutual debts and could not be set off in law or equity. *Ambrose* v. *Fraser* (1887), 14 O.R. 551.

The plaintiffs are therefore entitled to recover the full amount claimed without any set off or deduction in respect of the claim of $857.06."

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With respect, I am of opinion that while undoubtedly a debt due by a person personally cannot be set off against a claim made by him as trustee, this legal principle is without application in this case. Best and Calvert and their co-plaintiff Ash sue for something alleged to be due under this sale agreement between Ash and Beatty. It was a condition and representation of this agreement that the liabilities assumed by Beatty amounted to $36,894.38 or thereabouts, and notwithstanding this condition and representation Beatty had to pay $857.06 in excess of this amount. It is therefore immaterial whether Ash was or was not a trustee for third parties as to the amount payable by Beatty under the agreement. The actions are for an amount due by Beatty as price of this sale and are founded on the agreement which contains this condition and representation. The defence of set-off of Beatty is also based on this agreement. Therefore if Ash or his assignees claim under the agreement, they can be met by any defence arising out of its terms, and it matters not whether they sue as trustees or otherwise. I am therefore of opinion that the defence of set-off was open to Beatty.

I had some doubts whether the excess amount paid by Beatty could come within the words "or thereabouts." But, on reflection, I have come to the conclusion that the difference is too substantial to permit us to exclude it under so vague a clause.

The appeal should, therefore, be allowed with costs here and in the Appellate Division and the judgment should be in the terms of the opinion of Hodgins, J.A., dated the 12th December, 1919.

Appeal allowed.

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Ontario Supreme Court, Kelly, J. February 9, 1921.

Municipal Corporations (§IIC—112)—Early Closing By-law—Grocers and Fruiters—Discrimination—Unreasonableness — Legislative Authority—Quashing.

Bylaw No. 8276 of the City of Toronto passed under the authority of the Factory, Shop and Office Building Act R.S.O. 1914, ch. 229, sec. 84 and requiring the shops of grocers and fruiters in the city of Toronto to be closed within certain hours and by-law No. 8140, which classified for the purposes of sec. 84, and of any by-law

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grocers' shops and fruit shops as one class of shops; being passed under authority of the Legislature which has power to delegate such authority and the authority delegated, not having been exceeded, the bylaw cannot be held to be **ultra vires,** as being unreasonable, or oppressive or in restraint of trade.

[Re Boylan and City of Toronto (1887), 15 O.R. 13, followed; Re Reddock and City of Toronto (1900), 19 P.R. (Ont.) 247 referred to.]

APPLICATION for an order quashing a by-law of the City of Toronto. Dismissed.

J. M. Ferguson, for applicant.

G. R. Geary, K.C., for the city corporation.

KELLY, J.:—The applicant asks for an order quashing by-law No. 8276 of the City of Toronto, passed on December 1, 1919, requiring the shops of grocers and fruiters, in the city of Toronto, to be closed within certain hours.

Several grounds are relied upon: that the by-law is *ultra vires;* that it is unreasonable, unfair, and unjust; that it discriminates between different persons dealing in the same commodities; that it is uncertain, indefinite, and ambiguous; and that it is in restraint of trade and creates a monopoly.

It was passed under the authority of the Factory Shop and Office Building Act, R.S.O. 1914, ch. 229. The provisions of that Act and the course of legislation and of action by the city council, as they affect this by-law, are as follows:—

Sub-section 3 of sec. 84 of ch. 229, prior to the amendment of 1920 hereinafter referred to, provided that "the council of a city, town or village 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."

Sub-section (1) defines "shop" as meaning "a building or portion of a building, booth, stall or place where goods are exposed or offered for sale by retail, and barbers' shops; but not where the only trade or business carried on is that of a licensed hotel or tavern, victualling house or refreshment house," and "closed" as meaning "not open for the serving of any customer."

By sub-sec. 7 of sec. 84, the council is empowered to make regulations by by-law as to certain matters, including the classifi-

cation of shops for the purposes of that section.

On June 2, 1919, the city council passed by-law No. 8140, which, after reciting this sub-sec. 7, enacts (clause vii.) that "for the purposes of the said section 84 and of any by-law passed under said section, and of any application for such by-law, grocers' shops and fruit shops shall be and are classified together as one class of shops."

Sub-section 3 of sec. 84 was amended in 1920 by 10-11 Geo. V. ch. 86, sec. 3, by adding at the end thereof these words: "All by-laws heretofore passed under the authority of this subsection shall on and after the 30th day of April, 1920, cease to be effective in so far as they apply to the sale of fresh fruit, and all by-laws hereafter passed under the provisions of this subsection shall not apply to the sale of fresh fruit."

It was contended that a petition was necessary to initiate the by-law, and that such a course is implied from sub-sec. 7 of sec. 84. That is not the case. Sub-section 3 is permissive; it gives the council a discretion to pass a by-law for the purposes therein set out; while sub-sec. 4 of the same section makes it compulsory upon the council to pass such a by-law when an application therefor has been presented to it, and the council is satisfied that such application is signed by the proper and requisite number of occupiers of shops within the municipality to which such application relates; and in the latter case the council is also empowered, by sub-sec. 7, to make regulations by by-law as to the form of the application and as to the evidence to be produced respecting the proportion of persons signing the same, etc. This part of sub-sec. 7 applies to the procedure under sub-sec. 4, and not to a case where the council, in the exercise of its discretion, passes a by-law under sub-sec. 3.

The right of a municipal council to pass an early closing by-law, of its own motion and without a petition or application such as is referred to in sub-sec. 4, came before the Court in the unreported case of *Re Reddock and City of Toronto*. [See (1900), 19 P.R. (Ont.) 247.] On a consideration of the Ontario Shop Regulation Act, R.S.O. 1897, ch. 257, on a motion to Osler, J.A., for leave to appeal from the judgment of a Divisional Court dismissing an appeal by the applicant from the judgment of Street, J., who refused an application to quash a by-law of the defendants under sec. 44 of that Act, the decision was against the applicant. Sub-sections 3 and

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4 of sec. 84 of R.S.O. 1914, ch. 229, as they stood at the time by-law No. 8276 was passed, were substantially to the same effect as, and almost in the identical language of, sub-secs. 2 and 3 of sec. 44 of the Ontario Shop Regulation Act, R.S.O. 1897, ch. 257, which Osler, J.A., then had under consideration. That judgment supports the view that valid objection cannot be taken to the action of the council in passing this by-law without a petition or an application.

Except as to what may be said of the effect of the amendment made to sub-sec. 3 of sec. 84 by (1920), 10-11 Geo. V. ch. 86, sec. 3, the applicant's other objections are met by previous decisions. It is not questioned that the Legislature had power to confer upon the municipal council authority to pass these by-laws; and, if the council has kept within the authority so conferred upon it, the fact, as it is contended, that the by-law operates severely upon persons affected by it, is not necessarily a ground for valid attack upon it.

In *Re Boylan and City of Toronto* (1887), 15 O.R. 13, Armour, C.J., said at p. 14: "A by-law cannot be held to be unreasonable or oppressive or in restraint of trade if the power to pass such a by-law is duly delegated to the body passing it by a Legislature having the authority to delegate such a power, and if the body passing the by-law has only done that which the delegating Legislature says expressly it may do."

In *In re Smith and The City of Toronto* (1860), 10 U.C.C.P. 225, it was held that the Court will quash a by-law in whole or in part only for illegality; a want of clearness of expression, or a difficulty in construing or applying its provisions, being no sufficient ground to support an application to quash it.

Counsel for the applicant has referred to *Regina* v. *Flory* (1889), 17 O.R. 715. In that case there was an attack upon an early closing by-law of the Town of Amherstburg, which required shops to be closed at 7 p.m., excepting Saturdays, during certain months in the year, and declared that it should not be deemed an infraction of the by-law for a shopkeeper to supply an article after 7 o'clock in the evening to mariners, owners or others of steamboats or vessels calling or staying at the Port of Amherstburg. The by-law was held bad in discriminating between different classes of buyers and different classes of tradesmen and was held to be in contravention of sub-sec. 9 of sec. 2 of the Ontario Shops Regulation Act, 1888, 51 Vict. ch. 33, which declared that a shop in which

trades of two or more classes are carried on should be closed for the purpose of all such trades at the hour at which it is by any such by-law required to be closed for the purpose of that one of such trades which is the principal trade carried on in said shop. It will be observed that in that case there was discrimination in the more favourable treatment accorded to one class of buyers than to others, which was not within the authority conferred by the Legislature upon the municipal council. The case is distinguishable from the present one, and it was not affected by legislation such as is found in 10-11 Geo. V. ch. 86, sec. 3. So too is *Regina* v. *Levy* (1899), 30 O.R. 403, distinguishable where it was held that a statute which provided that the Board of Commissioners of Police should in cities license and regulate second-hand stores and junk stores, did not authorise a by-law to the effect that no keeper of a second-hand store and junk store should receive, purchase, or exchange any goods, articles or things from any person who appeared to be under the age of 18 years; and that such a by-law was bad as partial and unequal in its operation as between different classes, and involving oppressive or gratuitous interference with the rights of those subject to it without reasonable justification.

Under the authority of sub-sec. 7 of sec. 84 of the present revised statute, the council had the power to make regulations as to the classification of shops for the purposes of that section; and, by by-law No. 8140, it did classify grocers' shops and fruit shops together as one class.

The applicant contends, however, that the 1920 amendment (above set out) to sub-sec. 3 of sec. 84 invalidates the whole by-law No. 8140. If the municipal council, without statutory authority, had made or attempted to make the change in the wording of the by-law which the statutory amendment effected, there might be some substantial ground for advancing that argument. It is not, and it could not successfully be, contended that it was beyond the power of the Legislature to make this amendment to sub-sec. 3. The modification so made in the operation of the by-law has legislative sanction just as effectively as if the Legislature had expressly delegated to the council the power so to modify its operation and effect, and the council had then done that which the Legislature expressly said it might do.

The by-law is not, in my opinion, open to attack on the grounds set forth; and the application should be dismissed with costs.

Application dismissed.

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KEAYS v. DOYLE.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., McKeown, C.J., K.B.D., and Grimmer, J. February 18, 1921.

New Trial (§IIIC—23)—Treating Juryman During Progress of Trial—Improper Conduct—Undue Influence.

The fact that the defendant during the progress of a trial, treated one of the jury to a drink of beer, is sufficient to set aside a verdict in his favor, without the Court making any inquiry as to whether the evidence supports the verdict or not, or whether the jury were influenced or not by the conduct of such party.

[McNeil v. Moore (1873), 14 N.B.R. 234; Ferguson v. Troop (1874), 15 N.B.R. 183; Nadeau v. Theriault (1906), 37 N.B.R. 498 followed.]

MOTION by plaintiff to set aside verdict for defendant, and for a new trial on the ground that during the trial one of the jurymen was treated by defendant. New trial ordered.

M. G. Teed, K.C., for appellant; *James Friel*, K.C., *contra*.

The judgment of the Court was delivered by

HAZEN, C.J.:—The appellant in this case asks for a new trial on the ground that during the progress of the trial one of the jurymen was treated by the respondent. Affidavits were read by the appellant in support of this allegation, and by the respondent, in explanation of the act complained of.

Having regard to all these affidavits, it is quite clear that one of the jurymen was treated during the progress of this trial, to a drink in a store in the city of Moncton kept by one Bourgeois. The juryman in question, in his affidavit says that he was in the store and had a drink of beer with some other men, and that the defendant treated; while Leo Cohan, whose affidavit was read on behalf of the defendant, states that he had a drink on defendant's treat, and so did the man whom he knew to be a Mr. Leger, and who was the juryman in question.

This Court has always construed strictly and rigidly the rule against treating of jurymen by parties to litigation during the progress of trial. In *McNeil* v. *Moore* (1873), 14 N.B.R. 234, Allen, C.J., said at pp. 234-5:—"It is of the utmost importance in the administration of justice that the conduct of the jurors should be free from even the suspicion of undue influence; and where a case of improper communication with the jurors is made out, I think, as a general rule, the verdict ought to be set aside without any

inquiry whether the evidence supports the verdict or not; that we ought not to be called upon to ascertain whether the jury were influenced or not by the conduct of the party. The loss of his verdict is a penalty which the party ought to pay for his improper conduct. . . . It is true that the plaintiff's affidavit has been contradicted in some particulars; but the substantial part of it—that some of the jurors dined, or obtained refreshment of some kind at the house of one of the defendants—is unanswered."

In *Ferguson* v. *Troop* (1874), 15 N.B.R. 183, it was held that where there had been an improper communication by the successful party with the jurors a new trial will be granted even though the probable result of a second trial will be the same as that of the first. In delivering judgment Ritchie, C.J., said at p. 184:—"Though we impute no improper motives to the defendant in what he did, we think that all dealings with jurors, which may lead to the suspicion of partiality, ought to be discouraged. . . . It may be that another trial will, as was argued, terminate as this did, and so both parties will be unnecessarily involved in inconvenience and expense, by granting a new trial. But this consideration is an element that ought not to affect our judgment. There has been an irregularity; and the plaintiff is entitled to a regular trial. Neither do we think, that in cases of this kind, we should go into any enquiry whether or not injustice has been done by the verdict. We have acted on that principle on several occasions."

In *Nadeau* v. *Theriault* (1906), 37 N.B.R. 498, it was held that treating one of the jurors during the progress of the trial by the attorney for one of the parties is ground for a new trial. In delivering judgment, Tuck, J., said at p. 499:—"This is a hard case. The verdict appears to be a just one, and was, in my opinion, not affected in the least by the treating, yet the disposition of this Court has always been to adhere rigidly to the rule which forbids any communication between the parties or their attorney and the jury which might possibly tend to influence them. There must be a new trial."

There was also a case of *Gilchrist* v. *Proven* decided in this Court some years ago but which I cannot find reported, in which a new trial, if I remember correctly, was ordered on the ground that the successful party to the suit had during the progress of the trial shewn his heard of Jersey cattle to some members of the jury and it

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was held that this came within the term "treating."

I see no reason, nor do I think it desirable that the rule which has been so strictly and even rigidly enforced in this Court in the past should be relaxed, and I am of opinion, therefore, that on this ground and without expressing any opinion on the other grounds involved in the case, there should be a new trial.

Motion granted.

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CROSWELL v. DABALL.

Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Riddell, Sutherland and Masten, JJ. January 14, 1921.

Collision (§IA—3)—Motor-boats—Inland Waters——Judgment of Trial Judge—Inconsistent Findings—Appeal—Setting Aside—Burden of Proof.

Where a trial Judge properly on the evidence finds that the proximate and efficient cause of a motor boat collision was the disregard by the defendants of Rule 32 of the Rules of the Road, but also finds that the infringement of the Rules of the Road by the plaintiffs in not having lit their white light, could and did contribute to the accident, the latter finding being inconsistent with the first cannot stand. The Ontario Courts have not in inland waters adopted the stringent rule casting upon the plaintiff who has infringed a regulation the burden of proving affirmatively that the fault had no part in occasioning the accident.

APPEAL by defendants from the judgment of Logie, J., (1920), 47 O.L.R. 354.

R. McKay, K.C., for appellants.

McGregor Young, K.C., for respondents.

The judgment of the Court was delivered by

RIDDELL, J.:—A motor-boat owned by the plaintiffs was proceeding westerly between Two Mile Point and Three Mile Point, when it came into collision with a motor-boat owned by the defendant Alonzo W. Daball and operated by the defendant Byron Daball: the former boat was sunk and became a total loss. At the trial before Logie, J., judgment went for the plaintiffs against the defendant Byron Daball for $2,000, interest and costs, and against Alonzo W. Daball for $602.33 and interest without costs.

The defendant Byron Daball now appeals, and the defendant Alonzo W. Daball appeals except as to a sum of $102.33.

Neither motor-boat had a white light near the bow, as required by the Regulations; and the trial Judge holds that "the infringement of the Rules of the Road by the plaintiffs, in not having lit their white light," could and did contribute to the accident: and consequently he holds both vessels delinquent and divides the damages by the rule in Admiralty.

He holds, however, that "the proximate and efficient cause of the collision was the disregard by Byron Daball of Rule 32 of the Rules of the Road."

Upon these apparently inconsistent findings, he holds Byron Daball liable at the common law for the whole of the damages; and Alonzo W. Daball for the limited amount (Canada Shipping Act, R.S.C. 1906, ch. 113, sec. 921), together with $500 loss of profits.

After an attentive reading of the evidence and careful consideration of the arguments of counsel, I am unable to follow the Judge in his findings against the plaintiffs.

Section 916 of the Act provides that a ship shall be deemed in fault "if, in any case of collision, it appears to the court....that such collision was occasioned by the non-observance of any of such regulations...."

I am wholly unable to see how the want of the white light on the plaintiffs' boat had any part in causing the accident: I think the defendant Byron right in his evidence so far as the plaintiffs' captain is concerned:—

"His Lordship: Q. You say that you had not your white light ahead? A. No, sir. Q. Nor had Captain Willett (the plaintiffs' captain)? A. I did not see any white light for the short time I seen him. Q. Would the fact that you had not a white light or that he had not a white light contribute in any respect to the accident as it happened? A. Absolutely none. Q. There would be no possibility of that contributing? A. Absolutely none whatever."

Of course there is no estoppel by evidence, but I think all the evidence conclusively establishes that the absence of the light on the plaintiffs' boat had nothing to do with the collision.

We have not, in our inland waters, adopted the stringent rule casting upon the plaintiff who has infringed a regulation the burden

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of proving affirmatively that the fault had no part in occasioning the accident: *The "Cuba"* v. *McMillan* (1896), 26 Can. S.C.R. 651; *The "Rosalind"* v. *Steamship Senlac Co.* (1908), 41 Can. S.C.R. 54; *The "Porter"* v. *Heminger* (1898), 6 Can. Ex. 208; *The Hamburg Packet Co.* v. *Desrochers, "The Westphalia"* (1903), 8 Can. Ex. 263; *Tucker* v. *The Tecumseh* (1906), 10 Can. Ex. 149; *Montreal Transportation Co.* v. *The Norwalk* (1909), 12 Can. Ex. 434 at p. 451; *The Harbour Commissioners of Montreal* v. *The Albert M. Marshall* (1908), 34 Que. S.C. 299.

I am of opinion that the Judge's finding that "the proximate and efficient cause of the collision was the disregard of Rule 32 of the Rules of the Road by Byron Daball" is right, and that the finding against the plaintiffs, apparently inconsistent therewith, cannot be supported.

It is admitted that in the action against Byron Daball a defence of contributory negligence would be wholly effective; but there was no contributory negligence in this case; and the judgment against him should stand.

As to the appeal of Alonzo W. Daball other considerations apply.

The statute, R.S.C. 1906, ch. 113, sec. 921, provides that "the owners of any ship....shall not, whenever without their actual fault or privity....*(d)* any loss or damage is, by reason of the improper navigation of such ship....caused to any other ship or boat....be answerable in damages in respect of....loss or damage to ships....or other things....to an aggregate amount exceeding thirty-eight dollars and ninety-two cents for each ton of the ship's tonnage.

It was argued—or at least suggested—that this limitation applied only where the owner of the delinquent ship brought action to limit his liability; but no such proposition is even referred to in the leading case of *Sewell* v. *British Columbia Towing and Transportation Co.* (1884), 9 Can. S.C.R. 527; and the defence *pro tanto* succeeded in *Waldie Brothers Ltd.* v. *Fullum etc.* (1909), 12 Can. Ex. 325.

The fact that the agent has been at fault does not preclude the owner who is himself personally blameless from limiting the liability: *The Obey* (1866), L.R. 1 A. & E. 102; *The Yarmouth*, [1909] P. 293.

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The question, then, to be determined is whether the owner can be rendered liable for the incidental or consequential damages proved beyond the amount mentioned in the statute—in the present case the profits expected for the season.

In the first place, the damages recoverable (in the absence of statutory limitation) for loss of a ship by collision, as in the present case, include the estimated earnings of the boat for a reasonable time after the day of the collision, just as the estimated value of a prospective catch of fish was allowed in the case of injury to a fishing vessel in *Rheinhardt* v. *The "Cape Breton"* (1913), 20 D.L.R. 989, 15 Can. Ex. 98.

Accordingly, the statutory limitation must be considered to apply to all damages which without it could have been recovered. It is unnecessary to consider whether without the statutory provision all the $500 allowed could have been recovered—if any part could not, it cannot now be recovered: if it could have been recovered, the statutory limitation applies.

I would allow the appeal of Alonzo W. Daball; the amount of the judgment against him should be according to the statute; if the parties cannot agree there must be a reference; costs in the discretion of the Master.

The same counsel and solicitors representing both defendants, there should be no costs of this appeal—and we do not interfere with the costs below.

Appeal of Byron Daball dismissed: appeal of Alonze W. Daball allowed.

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Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ. March 11, 1921.

Divorce and Separation (§IIIA—15)—Charges of Unfaithfulness Against Wife—Legal Cruelty—Alimony.

A charge of unfaithfulness of the wife, publicly made by a husband, persisted in and unsubstantiated, the wife having left him is not legal cruelty upon which the Court can grant alimony.

[Lee v. Lee (1920), 54 D.L.R. 608, 16 Alta. L.R. 83; Russell v. Russell, [1897] A.C. 395; Whimbey v. Whimbey (1919), 48 D.L.R. 190, 45 O.L.R. 228; Bagshaw v. Bagshaw (1920), 54 D.L.R. 634, 48 O.L.R.

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52; Lloyd v. Lloyd (1914), 19 D.L.R. 502, 7 Alta. L.R. 307, followed. See Annotation, Divorce Law in Canada, 48 D.L.R. 7.]

APPEAL by defendant from the trial judgment granting alimony. Reversed.

A. L. Smith, K.C., for appellant; *M. B. Peacock*, for respondent.

HARVEY, C.J.:—I think this appeal must be allowed. As pointed out in *Lee* v. *Lee* (1920), 54 D.L.R. 608, 16 Alta. L.R. 83, the right to alimony in Alberta exists only under conditions, which in England, would entitle a wife to alimony.

Though we can go back to the middle of the eighteenth century for authorities, there is no case to be found apparently, where a wife in England has been or would be granted alimony under such conditions as exist here.

We must, I think, take the English decisions as authoritative of what the law of England is and has been and in *Russell* v. *Russell*, [1897] A.C. 395, the House of Lords declared that a charge of, in some respects, an even more grievous character than the one in this case was not legal cruelty upon which to found a claim by the spouse charged.

It is true there was great divergence of opinion in that case and, though the opinion of the Court of Appeal and of the House of Lords was the same, it was supported by a majority of only one in each case.

In Ontario, where the statutory right to alimony is in exactly the same terms as with us, that decision has been accepted as conclusive by the highest Court. In the very recent cases, the first of which is almost identical with this, *Whimbey* v. *Whimbey* (1919), 48 D.L.R. 190, 45 O.L.R. 228, and *Bagshaw* v. *Bagshaw* (1920), 54 D.L.R. 634, 48 O.L.R. 52, in which it has been pointed out that ever since Lord Stovell decided *Evans* v. *Evans* (1790), 1 Hag. Con. 35, 161 E.R. 466, it has been accepted in England that legal cruelty to support a wife's claim must be such as to cause danger to life, limb or health present or future. This Division expressed itself to the same effect in *Lloyd* v. *Lloyd* (1914), 19 D.L.R. 502, 7 Alta. L.R. 307.

There may be much room for the dissatisfaction with that state of the law expressed by Meredith, C.J.O., in *Bagshaw* v. *Bagshaw* but that is a matter which can be easily and effectively cured by the legislation if it desires.

I can see no room for finding a greater right in Alberta than exists in England both because of the terms of the statute giving the

right to alimony and because even if we consider the general subject of divorce, etc., it was the law of England on July 15, 1870, that we received, and it is not a question of jurisdiction other than jurisdiction to enforce legal rights.

The claim for alimony should be dismissed as well as the claim for the custody of the two elder children, both because there is nothing to shew that she can properly care for them and because there is no sufficient reason for depriving the defendant of their custody. She should be entitled to the custody of the two younger children if she desires both because of their tender age and because the defendant denies that they are his.

The other claim, which the trial Judge apparently, by oversight, omitted to deal with, should be referred back to him to be disposed of. As is customary, the defendant will bear all the costs.

STUART, J.:—I reluctantly agree that this appeal must be allowed for the reasons given by Harvey, C.J. But I am bound to say that I cannot congratulate upon its wisdom a Legislature which enacted in effect that the right of a woman to a redress of grievous wrongs committed against her by her husband, must depend upon the view of what her rights ought to be, arrived at by Judges in England in the year of grace 1790 and prior thereto. That Legislature is of course now extinct but its successor is able to make a change if it sees fit. As the statute now stands, indeed, it appears very probable that every change made in England even by statute there, would *ipso facto* be in force here. It is not even the law of England as it stood in 1870 that was introduced by the Territorial Ordinance but simply the law of England without reference to any date.

As to the matter overlooked by the trial Judge and as to the children and costs, I also agree with disposition proposed by Harvey, C.J.

BECK, J.:—This is an appeal by the defendant from the judgment of Simmons, J., given at the trial.

The action is for alimony, custody of the infant children and a declaration that the plaintiff is entitled to certain cattle, purchased with $1000 advanced by the plaintiff to the defendant, and their increase or alternatively $1000 and interest.

The last claim seems to have been overlooked by the trial Judge when giving judgment, which he reserved in order to give the parties an opportunity of settling their differences. It being an obvious oversight on the part of the Judge, the formal judgment

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ought not to have been taken out without an opportunity being afforded the Judge of dealing with it.

The Judge gave judgment in favor of the plaintiff for alimony to be fixed and gave the plaintiff the custody and control of four infant children.

On the evidence the Judge said:—"On the ground of the alleged physical violence I do not think that the plaintiff has established any right; but in regard to the charges of unfaithfulness (made by the defendant husband against the plaintiff wife) the defendant admits having made them. . . . I am of opinion that such a charge made by a husband publicly against his wife and unsubstantiated affords her legal ground for the relief which she claims."

The question of law—whether a charge of unfaithfulness of the wife publicly made by the husband, persisted in and unsubstantiated—the wife having left him—is sufficient to enable this Court to decree alimony, requires consideration.

The Court established by the Matrimonial Causes Act, 20-21 Vict. 1857 (Imp.), ch. 85, was given jurisdiction in actions (amongst others) for divorce, restitution of conjugal rights and judicial separation.

Section 2 enacted that "all jurisdiction now exerciseable by any Ecclesiastical Court in *England* in respect of divorces *à mensâ et thoro*, . . . suits for restitution of conjugal rights . . . shall cease to be so exerciseable."

Section 6 enacted that "all jurisdiction now vested in or exerciseable by any Ecclesiastical Court or person in *England* in respect of divorces *à mensâ et thoro* . . . suits for restitution of conjugal rights . . . *shall belong to and be vested in Her Majesty* and such jurisdiction, together with the jurisdiction conferred by this Act, shall be exercised in the name of Her Majesty in a Court of Record to be called "The Court for Divorce and Matrimonial Causes."

Section 7 enacted that "no decree shall hereafter be made for a divorce *à mensâ et thoro*, but in all cases in which a decree for a divorce *à mensâ et thoro* might now be pronounced the Court may pronounce a decree for judicial separation, which shall have the same force and the same consequences as a divorce *à mensâ et thoro*."

Section 22 enacted that "In all suits or proceedings, other than proceedings to dissolve any marriage, the said Court shall proceed and act and give relief *on principles and rules which in the opinion*

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of the said Court shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief, but subject to the provisions herein contained and to the Rules and Orders under this Act."

There are no rules or orders forming part of the Act; but by sec. 53 power is given to the Court to make rules and regulations concerning the practice and procedure under the Act.

Section 32 provided that the Court in a suit for divorce might award alimony; and interim alimony "as it would have in a suit instituted for judicial separation."

In *Goodden* v. *Goodden*, [1892] P. 1, the Court of Appeal held that the Ecclesiastical Courts had power to grant permanent alimony to a wife who was divorced *à mensâ et thoro* on account of her own misconduct; that there is nothing in the Matrimonial Causes Act to prevent this power passing to the new Court thereby established. In the course of the judgment Kay, L.J., said at p. 3:—"A case was put during the argument by Brown, L.J., of a husband who, by the marriage settlement, was entitled during his life to all the income of the wife's property. Can it possibly be the law that the wife must be left totally unprovided for under such circumstances because the Court has no jurisdiction to make a provision for her even out of that which before the marriage was her own property?

Lord Penzance decided in *Covell* v. *Covell* (1872), L.R. 2 P. & D. 411, that the Divorce Court could, after a decree for judicial separation, entertain a petition for alimony and he founded his judgment upon the previous practice in that respect of the Ecclesiastical Courts in cases of divorce *à mensâ et thoro*, citing *Cooke* v. *Cooke* (1812), 2 Phillim 40, [161 E.R. 1072], as a case in which this was done. There seems to be no decision that this might not have been done by the Ecclesiastical Courts when the separation was decreed on account of the misconduct of the wife."

In *Ashcroft* v. *Ashcroft and Roberts*, [1902] P. 270, it was held that the Court had an absolute discretion to order a husband to provide for a guilty wife, if it should be of opinion that the circumstances of the case warrant it, in so doing.

The petition for alimony may be filed after a final decree for divorce or a formal decree for judicial separation. See McQueen on Rights and Liabilities of Husband and Wife, 4th ed., p. 218; *Bradley* v. *Bradley* (1878), 3 P.D. 47, based upon *Sidney* v. *Sidney* (1873), L.R. 17 Eq. 65.

The wife, whether plaintiff or defendant, may apply for interim

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alimony or permanent alimony if a decree for divorce or judicial separation is made; and a husband is sometimes entitled to alimony: See cases already cited and Dixon on Law of Divorce, 4th ed., pp. 223 et seq.

Our Supreme Court Act, 7 Edw. VII 1907 (Alta.), ch. 3, sec. 16, says that "the Court shall have jurisdiction to grant alimony to any wife who would be entitled to alimony by the law of England or to any wife who would be entitled by the law of England to a divorce and to alimony as incident thereto or to any wife whose husband lives separate from her without any sufficient cause and under circumstances which would entitle her by the law of England to a decree for restitution of conjugal rights."

In *Lee* v. *Lee* (1920), 54 D.L.R. 608, this Court held that it had jurisdiction to grant alimony in an action for alimony alone, that is, when alimony is not asked merely as incidental to other relief, asked by the wife.

Then abandoning the order taken in the Supreme Court Act it may be said the Court may grant alimony to a wife: (1) Where the facts necessary in England under the Act of 1857 to entitle her to a decree for divorce are established, namely: incestuous adultery since the marriage, or bigamy with adultery, or rape, or sodomy or bestiality, or adultery coupled with such cruelty as without adultery would have entitled her to a divorce *à mensâ et thoro*, or adultery coupled with desertion, without reasonable excuse, for two years or upwards. (Sec. 27) (2) Where the husband lives separate from his wife without any sufficient excuse and under circumstances entitling the wife, by the law of England, to a decree for restitution of conjugal rights. See for instance *Ferris* v. *Ferris* (1883), 7 O.R. 496, *Howey* v. *Howey* (1879) 27 Gr. 57; *Weir* v. *Weir* (1864), 10 Gr. 565; *Edwards* v. *Edwards* (1873), 20 Gr. 392; *Rae* v. *Rae* (1899), 31 O.R. 321; *Nelligan* v. *Nelligan* (1894), 26 O.R. 8. (3) Where the wife would be entitled to alimony by the law of England.

As will appear from the authorities I have referred to above, there are several other cases than those falling under clauses 1 and 2 in which a wife is entitled to alimony, even where she herself is not without fault. But the ordinary case would doubtless be where grounds exist justifying a decree for judicial separation, which took the place of divorce *à mensâ et thoro*, and the grounds for which are stated in sec. 16 of the Act of 1857 (open both to husband and wife) as: adultery or cruelty or desertion without cause for two years or upwards.

In *Russell* v. *Russell*, [1897] A.C. 395, the House of Lords, by a majority of five to four, held that where a wife persisted in bringing against her husband by word of mouth and in letters written to members of his family and others, a charge of having committed an unnatural offence, the charge not being true nor believed by her to be true, she had not been guilty of such cruelty as would entitle her husband to a decree of *judicial separation*.

In Browne & Watts on Divorce, 8th ed., p. 66, the following observation upon that decision is made:—"The judgment of the House of Lords in this case leaves the question of moral cruelty where it stood before. The only further observation it seems profitable to make is that the distinction must be always carefully borne in mind between a definition of cruelty in a case of judicial separation, where the Court is still hampered by "the principles and rules" of the Ecclesiastical Courts (Matrimonial Causes Act, 20-21 Vict. 1857 (Imp.), ch. 85, sec. 22) and cases of dissolution of marriage such as are most of those above cited where it has a free hand."

The definition of "legal cruelty" given in the Court of Appeal, [1895] P. 315 at p. 329, by Lopes and Lindley L. JJ., must be taken to have been adopted by the House of Lords, namely: "That there must be danger to life, limb, or health, present or proximate, by which we mean a reasonable apprehension of it."

But it will have been observed that the restrictive definition of "cruelty" laid down in *Russell* v. *Russell*, [1897] A.C. 395, was held to apply to a case of judicial separation only because in cases of that sort the Court, that is The Court for Divorce and Matrimonial Causes established by the Act of 1857 (sec. 6) was, by reason of the restrictions placed by the Act upon the powers of that Court, hampered by the principles and rules of the Ecclesiastical Courts (sec. 22). Nor, as the case itself discloses, is it necessary as a defence to an action for restitution of conjugal rights, to establish cruelty of the special kind required to be shewn by the plaintiff in a suit for judicial separation.

Is this Court hampered to the like extent?

It will be observed that the *jurisdiction* at the date of the Act of 1857, vested in and *exerciseable* by any Ecclesiastical Court or person in England, it was enacted, should "*belong to and be vested in Her Majesty*."

On the principle of the decision in *Board* v. *Board*, 48 D.L.R. 13, [1919] A.C. 956 affirming the decision of this Court (1918), 41 D.L.R. 286, 13 Alta. L.R. 362, declaring that this Court had juris-

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diction in divorce, it seems to me that this Court is in no way concerned with the jurisdiction or the practice and procedure of the English Court for Divorce and Matrimonial Causes but that the Supreme Court of this Province has a plenitude of jurisdiction in Matrimonial Causes limited only by the jurisdiction of the old Ecclesiastical Courts and an unlimited authority to make its own rules of practice and procedure.

Board v. *Board* held in effect, as I think, that all the substantive law contained in the Act of 1857 became part of the law of this Province by virtue of the introduction on into the Province of the laws of England as they stood on July 1, 1870, that that substantive law fell for application and administration to the Supreme Court of the Province—it being the Court of the Province possessing all the inherent jurisdiction of the Old English Court of King's Bench; and that it is this latter Court which in this Province has the same unrestricted power of laying down the principles upon which it will exercise its jurisdiction, developing those principles by judicial decision in accordance with new conditions as they come into existence, and of regulating its practice and procedure in respect of that substantive law as of any other law.

A further logical consequence of the decision of the Privy Council is, it seems to me, that it by no means follows as a matter of course that the jurisdiction of this Court is precisely the same as that of the new Statutory Court—the Court for Divorce and Matrimonial Causes—established for the application and administration of that Court in England.

As I have already pointed out the jurisdiction of the English Ecclesiastical Courts was by the Act *vested in Her Majesty*. Had no special Court been established in England to exercise that jurisdiction undoubtedly the English High Court of Justice as being the Court inheriting the powers of the Court of King's Bench would have possessed that jurisdiction in its plenitude. But, in fact, the Act of 1857 did establish a new special Court for the exercise of that jurisdiction but in doing so limited the power of that Court.

For, as I have already pointed out, it was declared that that Court, 20-21 Vict. 1857 (Imp.), ch. 85, sec. 22, "shall proceed and act and give relief on principles and rules which in the opinion of the said Court shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief."

It seems to me to be clear that the words quoted express a true

limitation upon the jurisdiction of the English Statutory Court.

This seems to be the view entertained by Lopes and Lindley L. JJ., who gave the judgment which prevailed in the Court of Appeal on *Russell* v. *Russell*, ([1895] P. 315).

After quoting sec. 22 in which the quoted words occur they say at p. 322:—"It is material, therefore, to consider what, in the view of the Ecclesiastical Courts, constituted legal cruelty for which a divorce *à mensâ et thoro* could be obtained."

Again at p. 332:—"Having regard to the numerous and weighty decisions in those Courts, *and to sec. 22 of the Divorce Act, and to the decisions upon it*, we are not prepared to say that the law can be judicially held to be less rigid than we have stated, except in some cases which will be noticed presently."

I add some extracts from the judgments in the House of Lords of those Lords whose opinions prevailed.

Lord Herschell, [1897] A.C. 395 at p. 445, states the effect of sec. 22 and says:—"The question, therefore, to be solved is: What were the principles and rules upon which the Ecclesiastical Courts acted in granting a divorce *à mensâ et thoro* on the ground of cruelty prior to the year 1858?"

Again at p. 457:—"The Court for Matrimonial Causes is governed and controlled by a distinct statutory injunction. It can only act and give relief on principles and rules as nearly as may be conformable to the "principles and rules" on which the Ecclesiastical Courts had theretofore acted and given relief."

Again at p. 461:—"I cannot bring myself to say that if we were to yield to the appellant's contention we should be acting and giving relief on principles and rules conformable to the principles and rules on which the Ecclesiastical Courts formerly acted. *And this we are by Statute enjoined to do.*"

Lord Shand at p. 462 expressly refers to the provisions of sec. 22.

Lord Davey at p. 468 says:—"My only duty is to say whether the appellant's contention is conformable to the principles on which the Ecclesiastical Courts formerly acted and gave relief."

Can it be said absolutely that the *jurisdiction* which was "*exerciseable*" by the Ecclesiastical Courts and was vested in Her Majesty reaches no farther than the application of "principles and rules" on which those Courts had in fact acted and given relief? Do "rules," however widely interpreted as distinguished from "principles," limit the *jurisdiction* of a Court? Are "principles" of

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action a definitive limitation of *jurisdiction?* Is this Court forever to be bound to enquire whether on any particular suggested *application* of a principle the English Courts have or have not decided that it is or is not in *their* opinion *conformable as nearly as may be* to the principles and rules on which the English Ecclesiastical Courts prior to 1857 acted and gave relief, so that the jurisdiction of this Court shall perpetually be subject to the current decisions of the English Courts from time to time—decisions which by reason of amendment to the English statute, inoperative in this jurisdiction may cease to be given?

I would answer all these suppositious questions negatively; and consequently hold that the decision of the House of Lords in *Russell* v. *Russell*, *supra*, is not applicable as declaratory of the limits of the jurisdiction of this Court.

In coming to the conclusion I have, I am fully aware that my conclusion is not in accord with decisions of the Ontario Courts; but the points of view, from which I have discussed the question—the extent of the jurisdiction of the Supreme Court of this Province as declared in *Board* v. *Board*, 48 D.L.R. 13, and the limitations upon the jurisdiction of the English Statutory Court for Divorce and Matrimonial Causes—were not before the minds of the learned Judges who decided those cases.

In the result I think that Simmons, J., was right in his conclusion that, having found that the husband had made persistently and publicly a charge of unfaithfulness against his wife which was unsubstantiated, that was sufficient in law to constitute cruelty in a case for alimony; but, while it is true that the husband failed to substantiate the truth of the charge he had made against his wife, his counsel stated that he had been unable to obtain the witnesses who, he had expected, would substantiate it, and, on the other hand, although the husband seems still to be convinced of the truth of the charges, he seems to be quite willing to withdraw his charges and refrain from repeating them and to forgive and forget and re-establish the family; and perhaps there is still room to hope that this desirable result may yet be brought about. Having this in view and inasmuch as the trial Judge has, by an oversight, failed to deal with the money claim, which may possibly have some influence in regard to a settlement between the parties, I would, in dismissing the appeal, refer the whole case back to him to continue the trial in such a way as he may deem proper. It will not be difficult for the parties to arrange with him for a special day on which the trial

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may be continued.

If the trial Judge finds that the husband is now really and *bona fide* willing to take the position which, as I have said, he seems willing to take and to express it in due form satisfactory to the Judge, I think the Judge should hold that the ground for the plaintiff's action has ceased to exist and that the wife, if she nevertheless refuses to return to her husband's home, is thenceforth not entitled to alimony. Authority for this course is to be found in the Ontario case of *Ferris* v. *Ferris* (1883), 7 O.R. 496. See also *Edwards* v. *Edwards* (1873), 20 Gr. 392, and *Rae* v. *Rae* (1899), 31 O.R. 321. In cases of cruelty "the *future safety* of the wife from injury to person or health is the ground of the Court's interposition." *Plowden* v. *Plowden* (1870), 18 W.R. 902. It seems reasonable to apply the same principle to cases of charges of personal misconduct.

The costs of this appeal must be borne by the defendant, the husband.

Appeal allowed.

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Ontario Supreme Court, Middleton, J. January 18, 1921.

Solicitors (§IIC—30)—Services Rendered to Government—Government Requested to Fix Reasonable Compensation—Compensation Fixed—Order-in-Council Passed—Payment of Account—Solicitors Act R. S. O. 1914, ch. 159, secs. 34, and 48 et seq.

Where solicitors upon completion of services for the Government there being no denial of the retainer make a copy of their docket entries which shews no money charges for services rendered, but gives full details of all disbursements and forward it to the Minister of Lands, Forests and Mines in whose name the agreement to purchase in connection with which the services were retained was made, and who gave the instructions and suggest that he should submit it to some competent person to settle the fee which should be paid, and the Minister selects a proper and competent person who advises the Minister as to the proper fee, and an Order in Council is passed which is an approval of the adjustment of the account and an acknowledgment of a prior valid retainer and so amounts to an agreement to pay, the Court will order payment of the account, although no bill has been rendered under sec. 34 of the Solicitor's Act R.S.O. 1914, ch. 159,—the offer and the Order in Council being sufficient

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writing to satisfy sec. 49 of the Solicitor's Act as to agreements between solicitor and client.

[In re Stuart, [1893] 2 Q.B. 201; In re Baylis, [1896] 2 Ch. 107, followed; Ray v. Newton [1913] 1 K.B. 249 distinguished.]

PETITION of right by a firm of solicitors to recover from the Crown (Province of Ontario) a sum of money, in the circumstances set out below.

T. R. Ferguson, K.C., for plaintiffs.

Edward Bayly, K.C., for the Crown.

MIDDLETON, J.:—A petition of right by Messrs. Millar, Ferguson, and Hunter, to recover $24,589.33 claimed as a balance in respect of services rendered in connection with the purchase of the assets, undertakings, lands, plants, etc., of certain power companies, 22 in all, for the price of $8,350,000.

The agreement is printed as a schedule to the statute 6 Geo. V. 1916 (Ont.), ch. 18, by which it is validated and confirmed. The retainer of the solicitors is not denied, and there is no dispute as to the services rendered by them. Several hundred titles of lands purchased were examined, in addition to some 500 agreements for easements. Full reports were made upon the titles so examined, and the transaction was carried through to completion.

In addition to the ordinary conveyancing, several difficult and important questions had to be considered and dealt with.

On the completion of the transaction, the solicitors made a copy of their docket entries, which shewed no money charges for services rendered, but gave full details of all disbursements, and forwarded it to the Minister of Lands Forests and Mines, in whose name the agreement had been made, and who had given the instructions, suggesting that he should submit it to some competent person to settle the fee which should be paid.

This course commended itself to the Minister, and he selected G. H. Kilmer, K.C., solicitor for the Hydro-Electric Power Commission, and on January 7, 1918, wrote him referring to this fact, and saying that he was thus "in a position to know the amount of work involved in a matter of this kind and the value of the services rendered. I will be glad if you will go carefully into this subject and advise the Department what you think is a reasonable allowance under all the circumstances."

Mr. Kilmer went into the question with great care, and was afforded all the information by the solicitors, and on October 21, 1918, made his report to the Minister as follows:—

"Pursuant to your letter of the 7th of January last I have examined the bill of Messrs. Millar, Ferguson, and Hunter, submitted therewith, and I think that the proper value of the services rendered as covered by the bill is the sum of $25,900. I have checked the vouchers for the disbursements in connection with these services, and the same are correctly set out in the bill, and amount to the sum of $5,689.33. The total fees and disbursements amount to $31,589.33, on which the solicitors have been paid the sum of $7,000, leaving a balance due to the solicitors of $24,589.33."

On November 4, 1918, an Order in Council was passed. This Order in Council recites that the Committee of Council has had under consideration the report of the Minister of Lands Forests and Mines, in which, after referring to the agreement of purchase and the Act confirming it, and the vesting of these properties in the Crown, he states: "That the legal firm of Messrs. Millar, Ferguson, and Hunter were instructed by the Government to inquire into and report upon the titles of the undertakings, properties, rights, contracts, licenses, privileges, purchases, and businesses so vested. That the said firm have inquired into and reported with respect to the said titles and have rendered their bill for services and disbursements in so doing, and counsel on behalf of the Government has examined the said bill and recommended the allowance of the same at the sum of $31,589.33, upon which there has been paid the sum of $7,000, leaving a balance due to the solicitors of $24,589.33."

The Minister's report then recites the fact that by an Order in Council of May 4, 1916, under sec. 7 of the validating Act, the Hydro-Electric Power Commission had been appointed to manage and administer the undertaking for the benefit of His Majesty and is now exercising such management and administration. The Order in Council then proceeds:—

"The Minister recommends that Your Honour do direct the Hydro-Electric Power Commission of Ontario to pay the said balance of $24,589.33 to the said firm of Millar, Ferguson, and Hunter and charge the same against funds belonging to the Central Ontario system, which is being operated by the said Commission for the Government."

Nothing has been done toward the payment of this account, and the matter was allowed to remain in abeyance for almost a year, when, on October 29, 1919, the Attorney-General, himself a member of the Hydro-Electric Power Commission, granted his fiat for the presentation of a petition of right.

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The answer of the Attorney-General in the first place admits the retainer and then sets up that no bill has been delivered, as required by sec. 34* of the Solicitors Act, R.S.O. 1914, ch. 159, and that the reference of the bill actually rendered to counsel for the Hydro-Electric Power Commission was merely for the purpose of making a recommendation to the Commission. There is a statement that the charge made is excessive.

The answer concludes with the statement "that the petitioners well know and the fact is that their bill of costs was to be submitted to, approved by, and if so approved paid by the Hydro-Electric Power Commission of Ontario, and not by the respondent."

At the trial before me the facts set forth were proved.

Ferguson, J.A., a member of the firm at the time of the retainer, who had personal supervision of the work, proved the rendering of the services charged for.

Mr. Kilmer shewed how he arrived at the amount which he recommended as fair remuneration for the services rendered.

A. W. Anglin and R. McKay, two gentlemen of very high standing in the profession, testified that having gone over the account with care the amount claimed in their opinion was reasonable.

By sec. 3 of this statute, all the property dealt with or purporting to be dealt with by the agreement is vested in His Majesty free from all liens, charges and incumbrances, save as provided in the contract of purchase; and, by sec. 8, provision is made for the recording of this statute in the registry offices against the parcels dealt with.

By the contract the property is sold as free of all incumbrances and the purchaser accepts the title of the vendors.

It is said that this made it unnecessary for the Crown to search the titles in any way. This view was not entertained by either of the parties to the transaction. It was thought most important to ascertain precisely the title to the various properties and what outstanding rights, claims, liens, and incumbrances there were. There were in fact many liens and charges, and the price was not paid until all these claims or charges were adjusted.

I do not think the statute intended to vest in the Crown any of the property in such a way as to interfere with the rights of

*34.—(1) No action shall be brought for the recovery of fees, charges or disbursements for business done by a Solicitor as such, until one month after a bill thereof, subscribed with the proper hand of such Solicitor . . . has been delivered to the person to be charged therewith . . .

third parties; and investigation was, in my view, necessary to ascertain all outstanding claims calling for investigation or adjustment.

That this was the opinion of the Hydro-Electric Commission is evident from the letter of Mr. Ferguson to the Commission, dated April 1, 1916, and the letter from the secretary of the Commission to him, dated September 15, 1916, and from the Attorney-General (evidently acting as a member of the Commission) to him of December 27, 1916.

The Attorney-General, the Honourable I. B. Lucas, K.C., and the Minister of Lands Forests and Mines, the Honourable G. H. Ferguson, K.C., are members of the legal profession, and they fully understand the nature of the instructions given and knew what was being done under their instructions.

If I am right in this view, there can be no real reason why the bill should not be paid, as, from the evidence as well as my own experience in such matters, the amount claimed is reasonable.

Other matters were argued which require to be carefully considered. It is said the bill was not duly rendered as required by the Solicitors Act, because the items were not moneyed out. I have no doubt that this is so; but I am also of opinion that, when a defective bill is rendered, it is competent for the client to accept it as a bill and waive strict compliance with the statute. This document was treated by the Government as a bill, it was found adequate to enable its legal advisor to assess the value of the services rendered. There was no rejection of the bill on this ground and no request for a further account giving the charge in detail. The transaction was one which called for a lump-charge rather than for elaborate detail; and the custom of conveyancers, as indicated by the various block tariffs of costs adopted by the Bar associations, is to charge a lump sum in conveyancing matters.

Counsel for the solicitors base their claim largely upon the contention that there was an agreement to pay the sum determined by Mr. Kilmer; this agreement being based on the letter of the solicitors with the bill as an offer and the Order in Council as an acceptance. Had the transaction been between individuals, the acceptance would have been proved at an earlier date, but a contract to bind the Crown must be made as required by the Executive Council Act, R.S.O. 1914, ch. 13. That Act, by sec. 6, provides:—"No deed or contract in respect of any matter under the control or direction of a Minister shall be binding on His Majesty or be

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deemed to be the act of such Minister unless the same is signed by him or is approved by the Lieutenant-Governor in Council."

The Order in Council is, to my mind, an approval of the adjustment of the account and an acknowledgment of a prior valid retainer, and so amounts to an agreement to pay.

It is quite true that the Order in Council designates an account to which the payment is to be charged, and points out the Commission as the agent by which the payment is to be made; but this seems to me quite apart from the thing requisite under the statute to give validity to the Minister's action. That action became binding when approved. It was approved. The subsequent direction to pay seems to have been abortive, the reason being as yet unexplained. The actions of the Minister which I refer to are the things done by him prior to his recommendation to the Council that the money be paid by the Hydro-Electric Commission.

I cannot regard the designation of the fund from which this account was to be paid as in any way qualifying the approval of the adjustment of the account.

But it is said that nothing short of actual payment is sufficient to relieve the solicitor from his statutory obligation to deliver a bill; and, in support of this, cases are cited before the amendment to the Solicitors Act dealing with bills for services connected with litigation.

For many years under the Ontario Solicitors Act full freedom of bargaining between the solicitor and client was permitted with reference to charges for conveyancing and all such work as comes within the scope of sec. 47 of the present statute.

By the Law Reform Act of 1909, 9 Edw. VII. (Ont.), ch. 28, secs. 54 and 55 of the then Solicitors Act, which gave this limited right, were repealed, and in place of them the sections found as 48 *et seq.* of the Solicitors Act, R.S.O. 1914 ch. 159, were enacted, giving the solicitor and the client the right to agree not only as to remuneration for conveyancing, but also as to remuneration for services in respect of business done in the Courts.

This right is wide and applies to past as well as future services, and by sec. 66 it is plain that an agreement renders the delivery of a bill unnecessary. The claim of a solicitor, save as I shall mention, when based upon an agreement under the statute, is not subject to "any provision of law respecting the signing and delivery of a bill of a solicitor." Manifestly the conferring of such wide right of agreement called for the imposition of safeguards and

these are found in the provisions of sec. 50 *et seq.*, where the right is given to the Court, if the agreement is not fair and reasonable, to direct costs to be taxed and paid in the ordinary way. This would involve the making out and delivery of a bill.

The agreement must be in writing to satisfy the statute. As indicated already, the offer and the Order in Council seems to me to supply sufficient writing.

There remains a difficulty occasioned by the provisions of the statute, sec. 56, which provides that no action shall be brought upon such an agreement, but that it shall be enforced upon a summary application.

A petition of right is not an action. This was determined in *Rustomjee* v. *The Queen* (1876), 1 Q.B.D. 487. There the Statute of Limitations, which provided that " no action shall be brought," etc., was invoked. Definitions of "action" are to be found in the Judicature Act and Rules, but these definitions are merely a conventional method of interpreting the statute and rules, adopted for the sake of brevity and simplicity and not for the purpose of changing the true nature of things. This algebraic method of interpretation is limited by the terms of the enactment. It is for the purpose of the Judicature Act and that Act alone, though by the Interpretation Act, R.S.O. 1914, ch. 1, sec. 30, it applies to all statutes relating to legal matters. It may be that this short answer might avail to answer the argument based on sec. 34, which makes the due delivery of a bill a condition precedent only to the bringing of an action, particularly as this section has been strictly construed: *Thomas* v. *Cross* (1864), 11 L.T.R. 430, 13 W.R. 166; *Jeffreys* v. *Evans* (1845), 14 M. & W. 210, 153 E.R. 452; *Brown* v. *Tibbits* (1862), 11 C.B. (N.S.) 855, 31 L.J.C.P. 206, 142 E.R. 1031; *In re Lamb* (1889), 23 Q.B.D. 5; *Taylor* v. *Robertson* (1901), 31 Can. S.C.R. 615; but I prefer to rest my decision on this branch of the case on wider grounds.

The Crown relies upon the decision in *Ray* v. *Newton*, [1913] 1 K.B. 249, as shewing that, notwithstanding the provision of the English Solicitors Act, 33-34 Vict. 1870 (Imp.), ch. 28, corresponding very closely with our own Act of 1909, there must be a bill. I do not think this is the true meaning of the case. Without a bill of costs, a bill of exchange had been given for a lump-sum. An action on this was allowed to proceed, but an order was made under the statute requiring the delivery of a detailed bill a *primâ facie* case calling for investigation having been made. The section which cor-

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responds to sec. 66 of our Act was not referred to, no doubt because it had no bearing on the question under consideration. Counsel there cite *In re Stuart*, [1893] 2 Q.B. 201, and *In re Baylis*, [1896] 2 Ch. 107, as authority for the proposition that a bill must be delivered notwithstanding an agreement. Neither case deals with this question. *In re Stuart* was a case in which an agreement was proved to be unfair and set aside and an ordinary taxation ordered, and *In re Baylis* was a case in which there was no written agreement, and it was sought to avoid taxation upon the ground that there was payment. The payment which precludes taxation is "payment of bill." A payment without a bill has no effect.

The real point of the decision in *Ray* v. *Newton* is that the right of the Court to inquire into the fairness of an agreement is not ousted by the taking of a bill of exchange. The action on the bill cannot be stayed, but the solicitor remains liable to the jurisdiction of the Court. See the headnote to the case in the L.T. report: *Ray* v. *Newton* (1912), 108 L.T.R. 313.

An agreement by a client to pay a specific sum to his solicitor has always been regarded as a valid promise, and an action would lie upon such promise: *Belcourt* v. *Crain* (1910), 22 O.L.R. 591; *Allan, etc.* v. *Dangerfield* (1911), 4 S.L.R. 363; and the fact that no bill had been rendered afforded no defence, for the action is not for "the fees, charges, and disbursements" of the solicitor, but for the money payable upon the contract. Such an agreement did not deprive the client of his right to demand a bill and tax it in the usual way.

The effect of the introduction of the English Solicitors Act, 1870, by the Law Reform Act, 1909, was not to take away from the solicitor and his client the power of contracting which they always had, but to give a new power, the right of agreement upon an amount in such a way as to preclude taxation, save in a case where the Court sets aside the agreement as unfair. An action will still lie upon an unwritten agreement to pay a certain sum, just as in *Belcourt* v. *Crain* and the cases there collected; but in all such cases there may be a taxation. If there is a written agreement fixing the amount under the Act of 1909, this precludes taxation unless the agreement is shewn to be unfair.

The Court has always, in any action upon a solicitor's account, the right to determine the amount due, and neither the solicitor nor client has the right to insist upon taxation as the mode by which the amount must be determined: *Ex parte Ditton* (1880), 13

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Ch. D. 318. In ordinary cases a reference to taxation may be the convenient way of determining the quantum of a bill. Here, I think, there is a valid agreement; but, if I had arrived at the conclusion that there was not, I should have myself assessed the amount payable as the same sum as that recommended by Mr. Kilmer and approved by the witnesses called. In cases such as this the opinion of other solicitors is a proper guide.

For these reasons, there should be a judgment declaring that the petitioners are entitled to be paid the amount mentioned in the Order in Council and interest from its date at 5 per cent. and for costs.

Judgment accordingly.

THE KING v. TELFORD.

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C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, McPhillips and Eberts, JJ.A. March 1, 1921.

Physicians and Surgeons (§IA—8)—Illegal Practice of Medicine—Defence under Proviso in Sec. 63—Proprietor of a Bath—Bath not Used in Connection with Treatment.

Where the evidence establishes that the defendant has been guilty of a breach of the British Columbia Medical Act, R.S.B.C. 1911, ch. 155, sec. 63, in practising medicine without being registered as required by the Act, he cannot evade liability on the ground that he is the proprietor of a bath within the proviso contained in the section, merely because there is a bath on the premises, there being no evidence that he exercised either of the ordinary callings of bath attendant or bath proprietor.

APPEAL by Crown from a judgment of a County Court Judge dismissing a prosecution for an infraction of the B. C. Medical Act. Reversed.

C. W. Craig, K.C., for Crown.

L. Maitland and *W. E. Banton*, for respondent.

MACDONALD, C.J.A.:—I agree in the result arrived at by my brother Galliher and in the reasons stated by him.

MARTIN, J.A. (dissenting), would dismiss the appeal.

GALLIHER, J.A.:—In my opinion what was done here constituted an offence under the Medical Act, R.S.B.C. 1911, ch. 155. What gives me some trouble is whether the accused comes within the exception in the proviso to sec. 63 of the Act. In looking at the

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proviso where the words "proprietor of such bath" are used, what would at once suggest itself to one's mind would be that the reference was to the proprietor of a regular bath house where a person would go for a Turkish or electric bath; and the administration of a massage in such a place was intended to be protected under the Act.

Persons often go to such places to have a bath and in addition take a massage, not necessarily to alleviate any disease or infirmity, but for the tonic (if I might use the word), such manipulation gives the system, but even if such massage is for the purpose of the treatment of some bodily infirmity or disease, the proviso protects the proprietor or attendant.

I do not think any one would contend that the conditions here fall within what is set out above, but it is contended that the words "proprietor of a bath" which may or may not be used in conjunction with a massage, include not only what would be recognised as a bath house, but also a place or room as here, where one bath was kept in a closet and at times (though not in the present instance) used in connection with giving a massage.

Strictly speaking the term "proprietor of a bath," or "bath house," for that matter, would apply to a person having only one room and one bath equally with a person having several rooms and several baths, but the primary object of such an establishment would be the bath and the treatment incidental, while here the primary object is the treatment or manipulation and the bath generally speaking, an incident, and in the case before us not even that.

We must look at the Act to gather the intention and in my opinion, a case such as the present is not within the proviso.

I would allow the appeal.

MCPHILLIPS, J.A.:—The appeal, in my opinion, should succeed. There can be no question that there was an infraction of the Medical Act, ch. 155, R.S.B.C. 1911, within the meaning of sec. 63 of the Act. The attempt, however, is to evade liability upon the ground, and as held by the Court below, that the defendant is the proprietor of a bath. With great respect to the Judge, I cannot come to the same conclusion. The proviso added to sec. 63 reads as follows:—"Provided always that this section shall not apply to the practice of dentistry, or pharmacy, or to the usual business of opticians, or to vendors of dental or surgilal instruments, apparatus, and appliances, or to the ordinary calling of nursing, or to the ordinary business of chiropodist, or bath attendant, or to the pro-

prietor of such bath, 1909, c. 6, s. 60."

It is clear that there is no evidence whatever shewing that the defendant was either a bath attendant or the proprietor of a bath nor that his ordinary calling was that of a bath attendant or the proprietor of a bath. Further even, that would not excuse if what was done constituted the practice of medicine. All that is safeguarded by the proviso in relation to the facts of the present case is the ordinary calling of a bath attendant or the proprietor of a bath. There is an entire absence of evidence that the defendant was pursuing either of such callings, *i.e.*, bath attendant or bath proprietor. The attempted evasion of the Act is too colourable. The mere fact that there was upon the premises a bath, if what was there could really be termed such, constituted a mere device profitless to accord immunity. There is not a scintilla of evidence that there was the exercise of either of the ordinary callings of bath attendant or bath proprietor, but even were it so neither of the callings could cloak the practice of medicine, and here that has been established. It would not even appear that the defendant seriously advanced the proposition that because of the fact that there was this so-called bath on the premises, that he was immune from prosecution. It would look to me that it was a very belated defence. Now is it any defence at all? The edition of the Solicitors' Journal (1917), vol. 61, at p. 743, said:—"The question of law thus raised is not easy to state in clear and simple language. Perhaps the best way of putting it is to say that one is entitled to adopt straight-forwardly any permissible legal means of *avoiding* liability to a public burden, [there it was a question of taxes] but not entitled to adopt a mere colourable trick for the purpose of *evading* the burden. But the border-line between permissible *avoidance* and forbidden *evasion* is obviously hard to draw. The best and ablest discussion of the difficulty is to be found in the leading case of *Attorney-General* v. *Duke of Richmond & Gordon*, [1909] A.C. 466."

It is clear, upon the facts of the present case, that the "bath" affords no defence nor does it lend any support to immunity. That which was proved in the present case constituted an infraction of sec. 63 of the Act, which without the proviso above set forth reads as follows:—"Any person shall be held to practice medicine within the meaning of this Act who shall: (a) By advertisement, sign, or statement, of any kind, allege ability or willingness to diagnose or treat any human diseases, ills, deformities, defects, or injuries:

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(b) Advertise or claim ability or willingness to prescribe or administer, or who shall prescribe or administer, any drug, medicine, treatment, or perform any operation, manipulation, or apply any apparatus or appliance for the cure or treatment of any human disease, defect, deformity or injury: (c) Act as agent, assistant or associate of any person, firm or corporation in the practice of medicine as hereinbefore set out."

I would refer to the judgment of Crease, J., in *Regina* v. *Barnfield (alias Sequah)* (1895), 4 B.C.R. 305, upon the point as to what constitutes the practising of medicine. The decision was based upon the then existent statute not so comprehensive, or specific in nature, as the present Act. The judgment is instructive and points out that the Medical Act was passed in the "public interest." At pp. 308, 309, 310, Crease, J., said:—"I think under the circumstances set forth in this case stated, submitted for my decision on appeal, after examining the authorities cited: Encyclopaedic Dictionary, p. 3077 "Medicine," *Apothecaries' Co.* v. *Nottingham* (1876), 34 L.T. 76; *Reg.* v. *Hall* (1885), 8 O.R. 407; *Reg.* v. *Stewart* (1888), 17 O.R. 5; *Reg.* v. *Howarth* (1894), 24 O.R. 561; *Reg.* v. *Coulson* (1893), 24 O.R. 246; *Haworth* v. *Brearley* (1887), 19 Q.B.D. 303; *College of Physicians* v. *Rose* (1704), 6 Mod. Rep. 44, 87 E.R. 806; *Re Horton* (1881), 8 Q.B.D. 434; and hearing counsel on both sides, that the defendant Barnfield (*alias* Sequah) is fully entitled to sell his patent medicines as publicly as he likes, so long as they are not shewn to be inimical to the public health, and as freely as Parr's life pills, or any other patent medicines. The mere selling without an inducement to any one is not "practising medicine;" but he is not entitled to call upon people to submit to his personal manipulation or inspection and dispensing of his medicine to them asking their symptoms, diseases, or complaints, or treating them as he did in the cases before us with his medicine. I say nothing about his producing the individuals themselves after treatment to audiences as living "advertisements" of his success in so treating them, as the information stops half-way at the charge of his practising medicine unlawfully. It is but common sense to say he did this for "gain or hope of reward," as the sole object of the whole thing and in every case was to sell as much of his drugs as possible.

"The merits and value of the "Sequah" drugs as medicines are not in the case. I find that in the cases before the Court, according to the ordinary and commonly understood meaning of the words of sec. 41 of the Medical Act, C.S.B.C., cap. 81, as required

to be applied to the construction of statutes the acts of the defendant legally amounted to "practising medicine," and have brought him within the penal provisions of the Medical Act.

"This Act, it should be observed, was passed in the public interest, after very full debate and examination by the Legislature. It is a *fac-simile* also of the Act passed by the Legislature of Ontario for a similar salutary object, and has been rendered necessary for the protection of the public from being practised upon by persons incompetent to treat diseases safely and intelligently, and, like the defendant, unskilled and untrained in the safe application of medical science and remedies to the delicate and highly organised constitution of the human frame. The decision of the magistrate, therefore, in dismissing the information was erroneous, and must be and is hereby reversed. And the defendant having so violated the provisions of the Act must be, and is hereby, fined in the sum of twenty-five dollars, the lowest sum mentioned in that behalf in the statute, together with the costs of the appeal and costs in the Court below."

It certainly would be inimical to the public interest and dangerous to life and limb that unqualified persons should be permitted to practise medicine under the guise of other lawful avocations. The Legislature has safeguarded the public and rightly from this great danger. It is not difficult to draw the line of demarcation and no injustice results. That line of demarcation has been overstepped by the defendant in the present case.

It follows, therefore, for the foregoing reasons that my opinion is, that the appeal should be allowed and the conviction restored.

EBERTS, J.A., (dissenting) would dismiss the appeal.

Appeal allowed.

McINTYRE v. TEMISKAMING MINING CO.

Ontario Supreme Court, Middleton, J. January 15, 1921.

Companies (§IVB—50)—Purchase of Shares in Other Companies—Authority Necessary—Ontario Companies Act R.S.O. 1914, Ch. 178, Sec. 94 (1).

The intention of the Legislature in passing sec. 94 (1) of the Ontario Companies Act R.S.O. 1914 ch. 178, was that no company should purchase the shares of any other company until the shareholders have expressly authorised it, but once the authority is con-

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ferred, the entering into and carrying out of any purchase of any particular shares is part of the corporate business which rests rightly with the directors and not with the shareholders; the word "expressly" as used in the statute is intended to indicate that if the power is to be validly conferred upon the directors it must be done in plain and unmistakable language—"expressly" as distinguished from "impliedly."

MOTION by the plaintiff for an interim injunction turned by consent into a motion for judgment. Dismissed.

W. R. Smyth, K.C., for plaintiff.

Strachan Johnston, K.C., for defendants.

MIDDLETON, J.:—The plaintiff, a minority shareholder of the defendant company, on behalf of herself and all other shareholders of the company, asks for a declaration that a certain by-law passed by the directors of the company, confirmed by the unanimous vote of the shareholders present or represented by proxy at a general meeting of the shareholders, is *ultra vires* and void.

The by-law in question is as follows:—

"Be it enacted as a by-law of the Temiskaming Mining Company Limited that the directors be and they are hereby expressly authorised from time to time and whenever they see fit to purchase shares in any other corporation and to use the funds of the company for such purpose."

The validity of this by-law is attacked on several nominally different grounds, but upon analysis they all resolve themselves into one question: whether, under sec. 94 of the Ontario Companies Act, R.S.O. 1914, ch. 178, a by-law in general terms, such as the by-law quoted, is permissible. The contention of the plaintiff is that a separate by-law is required approving of each individual transaction by which the company seeks to acquire any shares in any other corporation.

So far as I know, this question has never been considered, and it is manifest that the importance of the contention of the plaintiff is great, and a decision in her favour would be far-reaching in effect.

The statutory provisions dealing with the matter are, first, sec. 23, which provides that a company shall possess as incidental and ancillary to the powers set out in the letters patent, *inter alia*, the power to "*(e)* subject to section 94, take, or otherwise acquire and hold, shares in any other company having objects altogether or in part similar to those of the company or carrying on any business capable of being conducted so as directly or indirectly

to benefit the company."

Section 94 provides as follows:—

"(1) The company although authorised by the special Act, letters patent or supplementary letters patent, or by this Act to purchase shares in any other corporation shall not do so or use any of its funds for such purpose until the directors have been expressly authorised by a by-law passed by them for the purpose, and confirmed by a vote of the shareholders present or represented by proxy at a general meeting duly called for that purpose and holding not less than two-thirds of the issued capital stock represented at such meeting.

"(2) This section shall not apply to a company incorporated for the purpose of carrying on the business of buying, selling or dealing in shares."

It is common ground that this company is not a company incorporated for the purpose of carrying on the business of buying, selling, or dealing in shares as mentioned in sub-sec. 2.

Although, as I have said, there is no authority upon this precise section, I think that the reasoning of the Court in *Mackenzie* v. *Maple Mountain Mining Co.* (1910), 20 O.L.R. 615, determines the case against the plaintiff. That case dealt with the question arising under the provisions of the section corresponding to sec. 92 in the present Act, providing that any by-law for the payment of the president, or any of the directors, shall not be valid or acted upon unless passed at a general meeting, or, if passed by the directors, until the same has been confirmed at a general meeting. It was there contended that this section of the statute required that the shareholders should confirm the particular transaction, and fix the remuneration of the directors, and that a general by-law authorising the payment of the president or of a director was not a sufficient compliance with the statute. It is pointed out that the statute does not require the approval of each contract. All that is required is that there shall be a by-law, which implies a general law made by the directors or shareholders of the company for its government, which may properly, and generally must, deal with the subject in general terms.

Applying the reasoning of that case to the case in hand, I think that the intention of the Legislature was that no company should purchase the shares of any other company until the shareholders have expressly authorised it. Once the authority is conferred, the entering into and carrying out of any purchase of any

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particular shares is part of the corporate business which rests rightly with the directors and not with the shareholders.

Upon the argument stress was laid upon the use of the word "expressly" in the statute. It is said that this points to an intention on the part of the Legislature that each particular transaction should be dealt with in a by-law. I do not so understand the word. I think it is intended to indicate that, if the power is to be validly conferred upon the directors, it must be done in plain and unmistakable language—"expressly" as distinguished from "impliedly."

A point, not discussed upon the argument, at first appeared to me to be troublesome. The implied charter-power, which I have quoted above from sec. 23, is to purchase shares in any other company having objects altogether or in part similar to those of the company or carrying on a business capable of being conducted so that directly or indirectly it would benefit the company.

It appeared to me that it would not be undesirable to embody in the resolution passed under sec. 94 the same limitation found in the power quoted; but, on further consideration, it appears to me that it is better to follow the precise wording of sec. 94, which requires the passing of such a by-law before the implied power conferred by sec. 23 comes into operation, and that the wide wording of the by-law must in practice be regarded as controlled and limited by the narrower provisions to be read into the charter.

In this case it is clear from the facts disclosed that the intention is to purchase shares undoubtedly within the charter-power, when once it is set free for operation by the shareholders' resolution.

No good purpose would be served by citing from text-books, dictionaries, and cases for the purpose of shewing that the word "expressly" is elastic and capable of several meanings. Still less useful would be any attempt to shew that in other statutes the word was used in a sense similar to or different from that which it here bears.

The action fails and should be dismissed, with costs if demanded.

Action dismissed.

LEGAULT v. DESEVE.

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Supreme Court of Canada, Idington, Duff, Anglin, Brodeur and Mignault, JJ. June 21, 1920.

Mortgage (§III—47)—Transfer of Property—Personal Obligation of Transferee to Pay the Debt—Quebec C. C. Articles 1019, 1508, 2016, 2056, 2065.

The mere taking of a transfer of property subject to a hypothec does not under the civil law of Quebec per se entail any personal obligation on the part of the transferee to pay the debt for which the hypothec is security. There is no implication that the transferee undertakes to indemnify the vendor against his personal liability such as the English equity system imports in the case of one who purchases subject to a mortgage.

[Desève v. Legault (1919), 29 Que. K.B. 375, affirmed. See Annotation, Assumption of debt upon a transfer of the mortgaged premises; 25 D.L.R. 435.]

APPEAL from the judgment of the Court of King's Bench, appeal side, (1919), 29 Que. K.B. 375, reversing the judgment of the Superior Court and dismissing the appellant's action. Affirmed.

The material facts of the case are fully stated in the judgments following.

L. Boyer, K.C., and *A. Décary*, K.C., for appellant.

A. Geoffrion, K.C., and *O. Dorais*, K.C., for respondent.

IDINGTON, J.:—I agree with the judgment of my brother Mignault and hence that this appeal should be dismissed with costs.

DUFF, J.:—I concur with MIGNAULT, J.

ANGLIN, J.:—I concur in the judgment dismissing this appeal. The mere taking of a transfer of property subject to a hypothec does not under the civil law of Quebec *per se* entail any personal obligation on the part of the transferee to pay the debt for which the hypothec is security. There is no implication that the transferee undertakes to indemnify the vendor against his personal liability such as the English equity system imports in the case of a purchaser subject to a mortgage. In Quebec the assumption of personal liability by the transferee must be clear and unequivocal in order that it may be judicially enforced. Ordinarily the words "à la charge de l'hypothèque" (subject to the hypothec) do not import it, but are regarded as merely intended to preclude any claim in warranty by the transferee against the transferor should the holder of the hypothec subsequently enforce it against the property. I do not find in the fact that these words are unnecessarily repeated in the

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provision for taking over the property in satisfaction in the event of default contained in the instrument executed to evidence the loan made by Desève to Lecavalier and Chassé (which had already referred to the existing hypothec of $15,000 as a charge on the land) or in their repetition in the instrument executed by the curator of Lecavalier's estate in compliance with Desève's demand for a transfer "à titre de dation en paiement" (by way of giving in payment) sufficiently clear and explicit evidence of an intention that Desève should on taking over the property in satisfaction of his claim assume personal liability for the debt as security for which the $15,000 hypothec was held. The phrase "à la charge de l'hypothèque" (subject to the hypothec) is at best equivocal. My brother Mignault, whose opinion I have had the advantage of reading, has discussed at some length the authorities bearing on its purview and effect. For the reasons I have indicated I agree in his conclusion that assumption of personal liability by the respondent has not been satisfactorily made out and that the appeal therefore fails.

BRODEUR, J.:—I am of the opinion that this appeal should be dismissed, for the reasons given by my colleague, Mignault, J.

The parties to the giving in payment and to the original loan could certainly stipulate that the purchaser would not be personally held to pay the prior hypothec. The contracts do indeed say that the property shall be taken subject to the hypothec, that is to say, according to article 2016 of the Civil Code (Que.), subject to a real right affecting it. The purchaser under these conditions could be held to surrender the property if the creditor of the hypothecary debt wished to proceed against the land, but the holder could only be obliged to pay the debt if he had personally bound himself to do so.

In the present case, the obligation to pay that is usually found in notarial acts (Marchand, Formulaire du Notariat, vol. 2, p. 553; Lainey, Formulaire d'actes usuels, p. 552) is not expressed. The most that can be said is that a doubt exists, and in that case, the contract must be interpreted in favour of him who has contracted the obligation (art. 1019 C.C. (Que.))

The appeal should be dismissed with costs.

MIGNAULT, J.:—In this case, which gave rise to an argument lasting an entire day, the only question before us relates to the meaning to be given to a clause by which the respondent obtained the transfer to himself, by way of giving in payment, of an immovable hypothecated in his favour for a sum of $6,200, subject to a first hypothec of $15,000 in favour of the appellant. In discuss-

ing the interpretation of these four words "subject to the hypothec," the attorneys on both sides displayed a great deal of ability and quoted several old authorities, from Loiseau, Ferriere and Duplessis down to Pothier. Moreover, while in the case before us, four Judges gave their opinion in favour of the respondent and two against him, three judgments given respectively by Demers, Duclos, and Martineau, JJ., were produced, in which a clause similar or identical was discussed, each of the judgments being in favour of the appellant's contentions. The respondent is a party to the action in the cases decided by Duclos and Martineau, JJ., and we are told that he has appealed from the judgments rendered against him. Considerable sums are at stake, and our judgment will settle the fate, not only of the present action, but of the two other actions I have just referred to. For this reason, the question of interpretation is of capital importance to the parties, and I have answered it only after going to the root of the matter.

I shall first make a very brief analysis of the essential facts. By deed dated April 16, 1914, passed before Chauret, notary, appellant loaned the sum of $15,000 to Lecavalier and Chaussé on the security of a first mortgage upon the immovable known and described as part of re-subdivision 3 of sub-division 19 of lot 12 of the cadastre of the incorporated village of Cote St. Louis, now part of the city of Montreal.

On May 4, 1914, before Rivest, notary, the respondent loaned $6,200 to Lecavalier and Chaussé on second hypothec on the same immovable. The act stipulated that for greater security and in order to avoid the costs and delays of a sheriff's sale, in the event of the borrowers making default to repay the sum loaned or to pay the interest on this sum or on the first mortgage, or the taxes or insurance premiums, the respondent would be entitled to keep the mortgaged property and to become sole proprietor thereof, this being by way of giving in payment of the amount due him in capital, interest, and accessories, subject to the hypothec of $15,000 hereinafter mentioned only (the hypothec of the appellant).

Respondent, who had exacted all possible security to protect his claim, probably never suspected that this clause of giving in payment, exacted as additional security, contained the germ of a large action, or rather of several actions, as I have just said. In any event, Chaussé having transferred all his rights to Lecavalier, and the latter having made an abandonment of his property at the demand of his creditors, the respondent exacted the passing of a

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deed of giving in payment in his favour.

This deed was passed before Rivest, notary, on May 28, 1915, and Lecavalier's curator, St. Amour, judicially authorised, transferred the immovable in question to the respondent, by way of giving in payment, together with another immovable on which respondent also held a second hypothec. The deed set forth that the two immovables were ceded in consideration of the sum of $1,800, and in full payment of the hypothecary claims of the respondent, and further, "subject to the hypothec of $15,000 affecting the emplacement first described" (the appellant's mortgage) "and to the hypothec of $25,000 affecting the emplacement secondly described," (a hypothec in favour of one Dame Alice Daoust, widow of a certain Viau).

Later, on December 3, 1915, before Labreche, notary, respondent sold the immovable now in question to Hebert. The deed declared that the sale was made for the price of $12,500 paid in cash by good and valuable consideration, and also "subject to the hypothec of $15,000 affecting the immovable in favour of Legault."

In 1917, the appellant sued Hebert personally claiming payment of his hypothecary debt, and after contestation obtained a judgment against him before Demers, J. A writ of execution was then issued against Hebert, and this writ having been noted on a previous execution, the hypothecated immovable was sold by the sheriff. The price of sale not being sufficient to pay the appellant's claim, he now calls upon the respondent to pay the difference, to wit $5,711.60, alleging that the latter had personally bound himself to the payment of his claim.

In the Superior Court, Greenshields, J., gave judgment in favour of the appellant, but this judgment was reversed in appeal, Pelletier, J., dissenting. The case was then appealed to this Court.

It is elementary that the hypothecary debtor remains owner of the hypothecated immovable and may freely dispose of it. Should he sell it, the sale does not affect the rights of the hypothecary creditor, who may sue the purchaser and compel him to quit the immovable, unless he prefers to pay the plaintiff's claim. Nor does the sale engage the personal liability of the purchaser toward the creditor, unless the purchaser has obliged himself to pay the hypothecary debt. He may bind himself to do so by an agreement with the vendor, without the intervention of the hypothecary creditor. There is in that case delegation or indication of payment, a delegation which is called imperfect because it has not been accepted by

the creditor. The creditor may nevertheless accept it, as long as it has not been revoked by the vendor, and this establishes a legal connection between him and the purchaser. The jurisprudence is to the effect that the taking of an action against the purchaser in virtue of a delegation of payment is sufficient acceptance thereof.

We must now see if there has been a delegation of payment in this case, for if this delegation exists, the appellant accepted it by taking action against the respondent.

I have cited the clause on which the dispute turns, which is found first in the deed of loan dated May 4, 1914, and next in the deed of giving in payment of May 28, 1915. In the first deed, respondent stipulated that in default of payment, he would have the right of keeping the immovable of which he would become the owner by giving in payment, subject to the appellant's hypothec of $15,000 only. In the second deed, this immovable and another were transferred to him in consideration of $1,800 and subject moreover to the appellant's hypothec of $15,000 and Mrs. Viau's hypothec of $25,000.

The Judges forming a majority of the Court of Appeal held that by this clause the respondent accepted the charge of the hypothec only, and did not bind himself personally to pay the debt of which the hypothec was an accessory. Now there is no doubt that the personal obligation to pay the debt is of the essence, for without it there can be no delegation of payment susceptible of acceptance by the creditor. Let me also say that the existence of this personal obligation must not be open to doubt, for no one is ever presumed to intend to contract an obligation. In other words, he who seeks to enforce the payment of an obligation must prove it, and the proof must completely satisfy the Judge. It must be so especially in such a case as this, where the appellant and the respondent were perfect strangers to each other, and where the former, who did not require in his deed of loan that subsequent purchasers of the property should be personally bound to him, now wishes to profit by a clause inserted in a second deed of loan and in a contract of giving of payment to which he was not a party, and thus obtain a new debtor. Surely the appellant *certat de lucro captendo*, and in case of doubt, the clause which he invokes must be interpreted against him.

Did the respondent, then, contract a personal obligation to pay the appellant's hypothecary claim in buying subject to his hypothec?

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I have carefully read the opinion of Martineau, J., in the case of *Pilon* v. *Deseve*, one of the judgments, copy of which was furnished us by the appellant. Numerous authorities are there cited drawn from the old law, namely, art. 102 of the Custom of Paris, art. 102 of the Custom of Meaux, art. 409 of the Custom of Orleans; Ferriere, Grande Coutume, vol. 2, p. 67; Bacquet, Droit de Justice, ch. 21, No. 195; Henrys, Vol. 2, book 3, question 51; DeLalande on article 409 of the Custom of Orleans, pp. 243 et seq., and Duplessis, p. 607.

All these authorities deal with the case of real or constituted rents secured by hypothec on an immovable, and they deny the right of abandonment in full satisfaction to the purchaser of the immovable who has charged himself with the rent and from whom payment is claimed of the arrears accrued during his holding. To these I may add a more modern authority, though not of very recent date, in which it was held that where a deed of sale states that the immovable is sold with its rights and charges, the purchaser is personally bound to pay the rents for which the immovable is hypothecated. Liege, June 1st, 1814, Dalloz, Privileges and Hypothecs, No. 1855, 30.

All these authorities only treat of rents, and it is readily conceivable that in the case of an immovable held to the payment of certain regular charges, such as arrears of rents, taxes, or seigneurial dues, the purchaser who buys subject to the rent, will be personally bound to pay the arrears become due during his holding. But the appellant has cited no authority in which this doctrine was applied to a debt due by the vendor and secured by an hypothec on the immovable sold, and I have not found any either, save for the passage from Loiseau, which I shall quote in due course and which does not support the appellant's contentions.

According to the general rules applicable in this matter, it is not necessary, for the protection of the hypothecary creditor, to stipulate in the deed of sale of a hypothecated immovable that the sale is made subject to the hypothec, for the creditor may follow the immovable into whatever hands it passes and cause it to be sold judicially in order to be paid, according to the rank of his claim, out of the proceeds of the sale (art. 2056 C.C.). It follows that the sale always takes place subject to the hypothec.

What then is the use of the express clause that the sale is made subject to the hypothec? It can only be of use to the vendor, either in obliging the purchaser to pay the hypothecary debt, thus freeing

the vendor from any personal recourse against him for this debt, or in preventing the purchaser from suing him in warranty in the event of his eviction by the hypothecary creditor.

In the first of these two cases, the vendor imposes on the purchaser what may be called an active obligation. He binds him to the payment of the hypothecary debt. The clause which contains this stipulation must not be equivocal, and must leave no doubt as to the vendor's intention to impose and the purchaser's intention to accept this obligation.

In the second case, the purchaser's obligation is passive. He must bear the hypothec; and if he is evicted in consequence of the hypothec, he has no recourse in warranty against the vendor.

But, it will be argued, if it is sought to exclude warranty, it is sufficient to declare the incumbrance in the deed of sale (art. 1508 C.C.). Now in the deed of loan from Deseve to Lecavalier and Chaussé the existence of the appellant's hypothec is expressly declared, and in another clause it is stated that the sale is made subject to the hypothec. The object of this last clause cannot then have been the exclusion of warranty, for the declaration or denunciation of the hypothec sufficed for this purpose. The only use of such a clause is, therefore, to impose on Deseve the obligation to pay the appellant's hypothec to the acquittal of Lecavalier and Chaussé.

This argument would have a great deal of weight were it not for the fact that notarial deeds are usually filled with useless clauses and with repetitions, and the deed in question is not free from this reproach, as shown by the clause requiring payment in good current monies and in legal tender. Besides the clause in question is equivocal and may very well mean that the respondent takes the immovable subject to the first hypothec affecting it, without any right to be indemnified by Lecavalier and Chaussé. Further the deed uses the words, "subject to the hypothec of $15,000 hereinafter mentioned," and later mentions the hypothec so that the two clauses are complementary and really form only one stipulation. All doubt could have been avoided by saying "subject to the payment by him of the hypothec of $15,000 hereinafter mentioned," and then it would have clearly appeared that Lecavalier and Chaussé intended to make a delegation of payment, and not merely to protect themselves against an eventual recourse in warranty on the part of Deseve. It is a clause of this kind of which Loiseau speaks in his treatise on Degeurpissement, (edition of 1701) Book III, ch. VIII, p. 73, where he

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says:—

"Therefore the benefit of discussion cannot be claimed by the holder who has acquired the land subject to the express charge of paying the rent or the debt, for he is personally bound toward the creditor, and that without any transfer of the vendor's rights, according to the practice in France, as discussed in the following book. Nor would it be reasonable that he should have the right of asking that who has a recourse against him should be discussed before him. It would be quite otherwise where the purchaser knew of the rent at the time of the purchase, but did not oblige himself to pay it; or even where he acquired the land subject not to the rent but to the hypothec by which the rent is secured, for he is not then personally bound to pay it, neither toward the creditor nor toward the debtor. It is only a notice or certificate of the hypothec affecting the land, given in order to avoid *stellionate*, so that before calling upon the purchaser, it is necessary to discuss the debtor who has sold the land."

The Judges of the Court of Appeal interpret the word "hypothec" as meaning the accessory right which constitutes the hypothec as distinguished from the debt for which it is but security. In my opinion this argument would have more weight if the parties had not used the word "hypothec" in referring to the hypothecary claim. Thus the deed imposes on the borrowers the obligation of producing to the lender his receipts showing payment of capital and interest "of the hypothecs hereinafter mentioned," and in the event of their defaulting to pay the instalments when due "of the prior hypothecs affecting the said property," the lender may exact immediate reimbursement with interest at 10%. There are other expressions of the same kind which weaken the argument accepted by the Court of Appeal. Besides I do not think that this argument is material, for even if the clause in question means that the respondent takes the immovable, subject to the appellant's hypothec, it does not by any means follow that he is bound to pay the debt. He has consented to suffer the resulting eviction, that is all. I would be loath to give to such an equivocal clause a meaning which, I am convinced, would go beyond anything the parties had foreseen.

Article 2065 of the Civil Code (Que.) is invoked by both parties. It reads:—

"The holder against whom the hypothecary action is brought, and who is neither charged with the hypothec nor personally liable for the payment of the debt, may, besides the grounds of defence

tending to destroy the hypothec, set up any of the exceptions set forth in the five following paragraphs, if there be grounds for them."

But this text has no bearing on the responsibility of the holder who is charged with the hypothec or who is personally liable for the payment of the debt. It deals with the case of a holder against whom an hypothecary action has been taken, by which he is given the faculty of surrendering the land in order to avoid payment. All that the article takes away from this holder is the five exceptions mentioned by the Code, and the defence based on grounds tending to destroy the hypothec. He will nevertheless be condemned hypothecarily only, according to the conclusions of the action taken against him. The question of the possibility of taking a personal action against him is left open, and in order to answer it in the affirmative, I would have to find in the purchaser's deed of acquisition a personal obligation to pay the hypothecary claim. I find no such obligation in this case.

I would therefore dismiss the appeal with costs.

Appeal dismissed.

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Ontario Supreme Court, Rose, J. January 4, 1921.

Vendor and Purchaser (§IE—28)—Agreement to Purchase Land—Failure to Pay Instalments When Due—Election by Vendor to Continue Contract—Right to Terminate for Failure to Pay Subsequent Instalment—Refund of Amount Paid—Occupation Rent.

An agreement for the sale and purchase of land contained the following clause:—"and it is expressly understood that time is to be considered the essence of this agreement and unless the payments are punctually made at the time and in the manner above mentioned these presents shall be null and void and of no effect and the vendor shall be at liberty to resell the said land." After default in the payment of the third instalment the vendor wrote the purchaser a letter threatening to "close mortgage" if he did not make immediate payments. The Court held that the vendor had elected not to cancel the agreement notwithstanding the default in payments but this did not prevent him from cancelling it on failure to pay the fourth instalment. The agreement not providing for default of payments already made, the vendor was bound to return the moneys paid on account of the purchase price, but was entitled to be paid an occupation rent

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for the time the purchaser occupied the premises.

ACTION by a vendor of land for a declaration that the purchaser had lost his rights by failing to pay certain instalments of the purchase-price at the appointed times, and for possession and for occupation rent.

F. L. Smiley, for plaintiff; *H. L. Slaght*, for defendant.

ROSE, J.:—The plaintiff, who lives in Englehart, sold to the defendant, at a price payable in instalments, for which promissory notes secured by chattel mortgage were given, the stock in trade contained in a shop situated near Iroquois Falls; and, by an agreement in writing, dated February 17, 1920, agreed to sell him the shop for $2,000. Of the purchase-price of the shop, $475 was paid in cash. The balance was to be paid in equal monthly instalments of $35 each, payable on the 18th of each month, commencing with March, 1920; and interest was to be paid half-yearly on the 15th days of December and June. The agreement contained the following clause:—

"And it is expressly understood that time is to be considered the essence of this agreement and unless the payments are punctually made at the time and in the manner above mentioned these presents shall be null and void and of no effect and the vendor shall be at liberty to resell the said land."

As the payments in respect of the stock in trade fell due, the plaintiff sent drafts for the amounts, which were duly paid through the bank at Iroquois Falls; but he did not draw for or demand the instalments of the purchase-price of the shop, and the defendant did not pay such instalments, so that at the end of May there were three of them overdue.

On May 28, 1920, the plaintiff wrote the defendant a letter, of which the following seems to be a correct translation:—

"Mr. Nathan Abramson: I let you know, as you are behind with the payments, I request you to send me a marked cheque for $400 not later than Monday next. If not, I will close mortgage. Do not forget what I am writing you."

At this time there was not due any such amount as $400. What was due was a note for $100 with interest amounting to $2.25, in respect of the stock in trade, together with the three instalments of the purchase-price of the shop, $105—in all, $207.25. The plaintiff says that he had made a mistake as to the amount overdue in respect of the stock, and that he thought that with the amount due on that account and the three instalments there was something over $400

due; and he says that the mortgage to which he referred was the chattel mortgage.

The defendant says that he at once wrote the plaintiff, asking him how the $400 was made up. The plaintiff says that he did not receive the letter. There is some corroboration of the defendant's statement in the evidence of S. Gurevitch, and I am inclined to accept it. Whether the plaintiff received the letter or not, he revised his figures, and, apparently on May 31, sent forward a demand draft (erroneously dated May 3) for $183, which he says was for 4 instalments of the purchase-price (he thinking that the first instalment ought to have been paid in February) and a half-year's interest (another mistake, the interest not being payable until June). He says that attached to the draft was the memorandum which is now pinned to it (Ex. 3), which he translates as follows:—"Payments past due, Feb. 17, $35; Mar. 17, $35; Apr. 17, $35; May 17, $35; $140. Interest, $43: $183.

"That is on the house. You are slow with the payments. You have got to pay right away. I send you your note: it was due May 18."

The note referred to is the note for $100, before mentioned, which he did send forward with a draft for $103.25, which was paid.

The defendant says that no memorandum was attached to the draft for $183 when it was presented to him (and I rather think he is to be believed), and that he could not understand why any such sum as $183 should be demanded; and that he therefore instructed his son, who lives in Englehart, to see the plaintiff and find out what he meant. The son tried to see the plaintiff, but was informed that he was away from home, and seems to have neglected to try again during June.

On July 1, the son heard from a Mr. Katt that the plaintiff had some thought of cancelling the agreement. Accordingly he went to see him and asked him whether the defendant was behind with his payments. The plaintiff said "yes, there were four payments overdue;" whereupon the defendant's son said that he would attend to the matter at once. He then arranged with his employer for the payment of half of his next month's wages in advance, and on July 2, as soon as the bank opened for business, cashed his employer's cheque and went to the plaintiff and offered the money, which the plaintiff refused to accept, saying that the shop belonged to his brother, Isaac Korman, and that Isaac wanted the property. Isaac had, in fact, had a demand for possession prepared by a

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solicitor, dated June 30, and this he served on the afternoon of July 2. (This statement is the result of the evidence of the defendant and his son: the plaintiff's evidence is disregarded where it conflicts with that of any other witness.) There were other tenders later, both of the arrears and of the subsequent instalments, but the plaintiff and Isaac Korman, who seems really to own the property, although it stands in the plaintiff's name, insist that the defendant's rights are at an end.

I think the defendant always intended to complete his purchase, and that his default in making payment of the instalments as they fell due is attributable to the fact that he took it for granted that the plaintiff would draw on him for whatever payments became due, either on account of the stock or on account of the shop; and I think the conduct of the Kormans is harsh and unjust; but, after a careful consideration of the recent and much discussed cases on the point decided by the Judicial Committee of the Privy Council, I do not think that there is here any "forfeiture" against which I am at liberty to grant relief—indeed, Mr. Slaght does not contend that the case is one in which that kind of relief can be granted—and I pass on to consider the main argument, which is that the plaintiff "waived" or otherwise lost his right to declare the contract at an end.

I think that after the letter of May 28, 1920, it was not open to the plaintiff to declare the agreement to be at an end because of the non-payment of the March, April, and May instalments. Those payments had not been made at the times stipulated, and the clause which has been quoted gave the plaintiff the right to terminate the agreement. He might terminate it or not as he saw fit; he elected to keep it in force and to make the defendant pay the overdue instalments, and determined to use, if necessary, the chattel mortgage as a means of enforcing payment; and by his letter he gave the defendant notice of his election; so that, even if notice of such an election is necessary—as to which, as well as to the present discussion in general, see Ewart's book on "Waiver Distributed," pp. 88 *et seq.*—the case is complete. He made his election, and it was irrevocable. Did he thereby lose the right, which he would otherwise have had, to terminate the agreement at a future time, if there should be further defaults on the part of the defendant? Mr. Slaght argues that he did. He contends that what the plaintiff did at the end of May was, in effect, to "waive" his right to insist that time was of the essence of the contract—virtually to wipe that clause

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out of the agreement, subject to the exercise of such power as may have remained in him again to make time of the essence by giving a notice fixing a reasonable time within which all overdue payments must be made, and stating that, in the future, prompt payment would be insisted upon. I am afraid that that is not the result. As I view the matter, the plaintiff did not "waive" the benefit of the clause, in the sense contended for. It seems to me that in May, default having been made, he had the right (subject to what will be said about estoppel) to elect whether he would, because of that default, put an end to the agreement, or would keep the agreement in force and insist upon payment of the sums to which, according to its terms, he was then entitled. I cannot see that he was, at that time, put to any further election; and I cannot find that he did, at that time, in fact, make any election, other than the one which he was then called upon to make. I cannot find any evidence that he intended to effect any alteration in the respective rights and obligations of himself and the defendant as to matters *in futuro*, or that he did anything which reasonably led the defendant to think that he was not to be required to make his future payments on the appointed days, or which otherwise estopped him (the plaintiff) from asserting, when further default occurred, that such default was a breach of the agreement, and that, time still being of the essence, the result specified in the agreement followed. Whatever might have been said in support of the proposition that, by the course of dealing followed in reference to payments on account of the stock, the plaintiff had induced a belief on the part of the defendant that the March, April, and May instalments of the purchase-price of the shop would not be treated as overdue until after they had been demanded, and so had estopped himself (as the insurance companies had estopped themselves in the cases cited by Ewart on p. 221) from saying that these payments were overdue at the time when the letter of May 28 was written, I think that, after that letter, the plaintiff cannot be held responsible for any belief which the defendant may have had that prompt payment of the June instalment would not be insisted upon.

If the foregoing is correct, the plaintiff had the right to terminate the agreement when the defendant failed to make the payment which fell due in June. True, he did not—as I think—give the defendant formal notice of his election until after the defendant's son had tendered all the money due; but that fact does not seem to be of importance. There was no obligation resting upon the

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plaintiff to make or announce his election before the tender, which was not very long after the default. He had, in fact, made it before, and when the tender was made he announced it to the person making the tender. This person, the defendant's son, was not expressly authorised by the defendant to make the tender; but, assuming the tender to be a good one, it can hardly be said that notice of the election given to the son was not good notice to the defendant, if any notice was required. I think, therefore, that the defendant's rights under the agreement came to an end on July 2, 1920; and that the plaintiff is entitled to judgment.

The agreement does not provide that upon its termination for default payments already made shall be forfeited. The plaintiff, therefore, has no right to retain the $475, and that sum must be returned to the defendant: see *Brown* v. *Walsh* (1919), 45 O.L.R. 646.

The defendant will have to pay an occupation rent for the time that he has been in possession, and there will have to be a reference to the Local Master at Haileybury to fix the amount, unless the parties can agree upon it.

I do not think that a tender by the plaintiff of the $475 was a necessary part of the exercise of the option to terminate the contract: see "Waiver Distributed," pp. 241 *et seq.* In my opinion, no tender would have been necessary, even if the defendant had been entitled to the whole of the $475; and, as he was not entitled to the whole of that sum, but only to that sum less the occupation rent, the amount of which has not yet been ascertained, it was impossible for the plaintiff to know exactly how much he had to repay.

The plaintiff justifies his termination of the agreement also on the ground that the defendant failed to keep up certain fire insurance on the building. All that it is necessary to say about that branch of the case is that, upon the evidence, there does not seem to have been any breach of the defendant's contract; and that, even if there was, it was not such a breach as indicated a repudiation by the defendant of his obligations, so as to give the plaintiff the right to terminate the agreement without relying upon the clause which has been under discussion; and that the clause in question does not help the plaintiff, for it applies only to the non-payment of the purchase-price.

The defendant must pay the costs of the action down to trial. The costs of the reference will be reserved until after the report.

If the plaintiff desires immediate possession, he must pay the $475. If he prefers to wait until the sums payable by the defendant are ascertained, he may do so, and then may have possession upon paying the amount, if anything, by which the $475 exceeds the amounts ascertained to be due to him.

Judgment accordingly.

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Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon; JJ.A. April 25, 1921.

Principal and Agent (§I—2)—Revocation of Agent's Authority—Admission of Judgment as Evidence of—Notification to Third Parties—Sale of Land—Specific Performance.

By conferring authority upon his agent a principal gives third persons the right to assume that they can deal with the agent until they receive notice of the authority having been revoked, or at least until some circumstance arises which should put them upon their inquiry. Where the principal has knowledge of a transaction with the agent which was commenced while the agent had authority, and which is pending when the authority is cancelled it is not sufficient to notify the agent not to go on with the transaction he must also notify the third party of the termination of the agency.

Query as to whether a judgment in an action to which such third party was not a party can be received as evidence of the termination of the agency.

[See annotation Principal and Agent, 1 D.L.R. 149.]

APPEAL by defendant from the trial judgment in an action for specific performance of an agreement for the sale of land. Affirmed.

G. A. Cruise, for appellant; *F. F. MacDermid*, for respondent.

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

LAMONT, J.A.:—This is an action by a purchaser for specific performance of an agreement of sale of two quarter sections of land.

The defendant resists the plaintiff's claim on the ground that the agreements of sale were executed on his behalf by his former agents after their authority to do so had been revoked. The defendant had for sale a large quantity of land in the Battleford district, and on May 1, 1912, he entered into an agreement by which F. W. Hodson & Co. were appointed his exclusive agents for the

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sale thereof, and he gave to that company a power of attorney constituting them his lawful attorneys "to make and sign land contracts of sale of the said lands in said agreement, to give effectual receipts for purchase moneys of the said lands, to pay taxes thereon and transact all other business in connection with the purchase and sale of the said lands, and also to transact such other business in connection with the said lands as the said agents may consider advisable in his interests."

On January 15, 1918, the plaintiff interviewed Hodson & Co. with a view to buying the east half-19-38-8-W3rd. They told him he could have the south-east quarter at once, but that they could not let him have the north-east quarter until a Mrs. Wilson, who had the refusal of it, decided that she would not buy it. An agreement of sale in respect of the south-east quarter was drawn up that day and signed by the plaintiff, and he made the cash payment thereon. He was unable to state definitely whether the agreement was then executed by Hodson & Co. on behalf of the defendant and his copy handed to him, or whether the company retained his copy and sent it on to him by mail. He, however, did testify that he had his copy duly executed within a few days after January 15, and this testimony the trial Judge virtually accepts. In May, 1918, Mrs. Wilson decided that she could not purchase the north-east quarter. Of this the plaintiff was notified, and he forwarded to Hodson & Co. his cheque for the first payment. An agreement of sale was drawn up and executed by himself and by Hodson & Co., under their power of attorney, for the defendant. In June the defendant wrote to the plaintiff repudiating the transaction and saying that Hodson & Co. had no authority to sell to him either of the quarters covered by the two agreements, and he refused to recognise the plaintiff as purchaser of either quarter. The plaintiff tendered to the defendant the payment which, under the agreement, fell due the following autumn, and on that being refused brought this action. At the trial no evidence was put in that the defendant had determined the agency of Hodson & Co., or that their power of attorney had been revoked, other than this, that at the opening of the case for the defence the defendant's counsel put in a judgment of Brown, C.J.K.B., delivered June 19, 1920, in an action between the defendant and Hodson & Co., in which that Judge held that certain letters written by the defendant had the effect of revoking and cancelling the agreement of the plaintiff as of January 31, 1918. The reception of this judgment was objected to, but the judgment was filed as

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an exhibit. The trial Judge decreed specific performance as to both quarters. The plaintiff now appeals.

As I have already pointed out, the only evidence from which it could be inferred that the defendant had cancelled the authority of Hodson & Co. as of January 31, 1918, was the judgment of Brown, C.J.K.B., which was filed.

The question therefore is: can that judgment be regarded as evidence of the fact that the defendant had, on January 31, 1918, revoked the authority of Hodson & Co. in an action brought by one who was not a party to the action in which such judgment was rendered.

In 13 Hals., pp. 343-344, the law is laid down as follows:—"478. A judgment *inter partes* raises an estoppel only against the parties to the proceeding in which it is given, and their privies, *i.e.*, those claiming or deriving title under them. As against all other persons it is *res inter alios acta*, and with certain exceptions, though conclusive of the fact that the judgment was obtained and of its terms, is not even admissible evidence of the facts established by it. . . ."

In *Castrique* v. *Irmie* (1870), L.R. 4 H.L. 414, at p. 434, Blackburn, J., said:—"A judgment in an English Court is not conclusive as to anything but the point decided, and therefore a judgment of conviction on an indictment for forging a bill of exchange, though conclusive as to the prisoner being a convicted felon, is not only not conclusive, but is not even admissible evidence of the forgery in an action on the bill, though the conviction must have proceeded on the ground that the bill was forged."

In Phipson on Evidence, 4th ed., at p. 373, the author says:—"Every judgment is therefore conclusive evidence for or against all persons (whether parties, privies or strangers) of its own existence, date and legal effect as distinguished from the accuracy of the decision rendered."

I am therefore of opinion that the judgment put in evidence was not sufficient to establish as against the plaintiff the allegation that the authority of Hodson & Co. had been revoked on January 31, 1918, or at any time prior to June 5, 1918. Even if revocation prior to the signing of the contract for the north-east quarter has been established, the plaintiff, in my opinion, would still be entitled to his order, on the ground that the defendant, as he admits, knew in April, 1918, of negotiations between the plaintiff and Hodson & Co. in respect of the purchase of lands belonging to the

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defendant, and he knew at that time that Hodson & Co. claimed that he could not revoke the authority of the company to sell those lands. Yet, knowing this, he stood by and did not notify the plaintiff that Hodson & Co. had no longer any authority to execute agreements of sale on his behalf. Further, the evidence shews that Hodson & Co. had been the defendant's agents for the last 6 years, and that they had sold something like 30,000 acres for him. Under these circumstances, as the trial Judge points out in his judgment, "where the agent has been habitually employed and so held out by the principal as such, the latter will be bound by his acts if within the scope of his former authority until reasonable notice of its revocation. *Trueman* v. *Loder* (1840), 11 Ad. & El. 589, [113 E.R. 539]."

The appeal, in my opinion, should therefore be dismissed with costs.

TURGEON, J.A.:—In this case I am of opinion that the judgment of the trial Judge should be sustained, and I think it will not be necessary in order to justify this finding to go beyond the facts admitted by the defendant himself. He admits that on January 15, 1918, Hodson was his duly authorised agent for the sale of this half section of land in question as well as of other lands belonging to the defendant in the Battleford district. On that date Hodson negotiated with the plaintiff for the sale of these lands. The plaintiff signed the agreement covering the south-east quarter of the half section, and left with Hodson his cheque for $400 to cover the cash payment called for by the agreement. This cheque was cashed by Hodson some time in May. As to the other quarter section, it appears that Hodson had already given an option upon this quarter to a Mrs. Wilson, but he agreed to sell the quarter to the plaintiff in case Mrs. Wilson did not exercise her option. In May, Hodson notified the plaintiff that Mrs. Wilson had not purchased the land and that the plaintiff could have it. Whereupon the plaintiff, on May 18, sent $400 to Hodson to meet the first payment provided in the agreement which had been made between them tentatively on January 15. The plaintiff went into possession of both quarters in "the spring," (the exact time is not shewn in the evidence), fenced a portion of the land and harvested the hay. Some time in June he received two letters from the defendant, one dated June 5 and the other June 11, the first referring to the south-east quarter and the second to the north-east quarter; both informing the plaintiff that Hodson had no authority to sell the land and declining to recognise the plaintiff as a purchaser. These letters

were the first notice received by the plaintiff of any disagreement between the defendant and Hodson, or of any revocation of Hodson's authority to sell the lands.

Now I will assume for the moment that the contract of agency between the defendant and Hodson terminated on January 31, 1918. I do not find this as a fact, for I consider it doubtful whether the evidence tendered at the trial to establish this fact, and objected to at the time by counsel for the plaintiff, should be considered by us at all. But as it will make no difference in the result, according to my view of the case, I do not propose to deal further with the question of the admissibility of this evidence. Assuming, then, that the defendant did cancel his agency contract with Hodson on January 31, 1918, I find that on his own admission he was in Hodson's office in April, 1918, and there saw the plaintiff's cheque for $400 and a contract signed by the plaintiff covering the south-east quarter of the land. He says that he thereupon instructed Hodson to return the plaintiff's cheque to him and not to complete the sale of the land. He then went to Saskatoon and wrote Hodson from there to the same effect. He makes no reference at all in his evidence to the sale, or proposed sale, of the north-east quarter. Hodson disregarded his instructions; he cashed the plaintiff's first cheque on May 7th, and accepted his second remittance of $400 made on May 18, to meet the first payment on the north-east quarter.

Under these circumstances I think judgment must be awarded the plaintiff on both transactions. If the agreement affecting the south-east quarter was completed on January 15, both by the plaintiff and by Hodson, as the plaintiff contends, then, admittedly, it was so completed while Hodson had power to bind the defendant. If this agreement was not completed until after the defendant had notice of it in April, then I think he is still bound. As between himself and the plaintiff, the defendant had the opportunity of advising the defendant [plaintiff] in April of the cancellation of Hodson's authority to act for him. He did not do so, although he knew that negotiations had been going on between Hodson and the plaintiff and that these negotiations were begun while Hodson still possessed authority, as appears from the fact that the contract between Hodson and the plaintiff conveying the south-east quarter, and the cheque left by the defendant with Hodson, both of which documents the defendant saw, are dated January 15. Had he notified the plaintiff at once, he might at least have prevented the contract for the north-east quarter being made, even if it was too late to stop the

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sale of the south-east quarter. As it is, he took no action, and I think that, under the circumstances disclosed both by the plaintiff and by Hodson, the plaintiff was justified in continuing to deal with Hodson, as he did, not only for the south-east quarter but for the north-east quarter as well. On June 5, the defendant wrote the plaintiff stating: "He" (Hodson) "has nothing whatever to do with my lands now." This intimation, if made in April, when the defendant might have made it, would likely have brought about a different result, at least in so far as the north-east quarter was concerned.

It was urged by counsel for the defendant that, having notified Hodson in April not to sell the land and to return the plaintiff's cheque to him, the defendant did all he was called upon to do and that he did not have to anticipate that Hodson would disobey his instructions to stop the sale. If this argument can be accepted, there would never, apparently, be any duty devolving upon a principal to give notice of revocation of his agent's authority. But the law is all the other way. The rule appears to be that, by conferring authority upon his agent, the principal gives third persons the right to assume that they can deal with the agent until they receive notice of the authority having been revoked, or at least until some circumstance arises which in all reason should put them upon their inquiry. And this is particularly true of third parties who begin to deal with the agent while his authority does, in fact, exist, as did the plaintiff in this case. To reverse the rule would be to put third parties upon their enquiry not only before beginning any transaction with the agent but before each successive step in a transaction once begun.

The appeal should be dismissed with costs.

Appeal dismissed.

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RE WOODS AND ARTHUR.

Ontario Supreme Court, Orde, J. February 7, 1921.

Dower (§III—50)—Sale of Property by Husband—Wife Living Apart—Refusal to Bar Dower—Dower Act R.S.O. 1914, ch. 70, sec. 14 not Applicable—Sum Set Aside to Answer Claim if Wife Survives Husband.

Where a vendor is desirous of giving the purchaser an unincumbered title in fee to property but his wife refuses to bar her dower

and the Dower Act R.S.O. 1914, ch. 70, sec. 14, not being applicable, the wife not having been living apart from her husband "for two years under such circumstances as disentitle her to alimony", the vendor cannot be forced to accept an abatement of the purchase price to answer the wife's claim for dower, but the purchaser is entitled to have a sum set aside out of the purchase money to provide for the wife's claim to dower if she should become entitled to it by surviving her husband, the interest during their joint lives to be paid to the husband.

[Skinner v. Ainsworth (1876), 24 Gr. 148, followed. See Annotation Conveyances to defeat Dower, 55 D.L.R. 259.]

MOTION by a vendor of land, under the Vendors and Purchasers Act and under the Dower Act, for an order determining a question as to the right to dower of the vendor's wife.

E. F. Raney, for the vendor.

L. A. Richard, for the purchaser.

D. R. Leask, for the wife of the vendor.

ORDE, J.:—The vendor is here faced with the problem of giving the purchaser an unincumbered title in fee simple in spite of his wife's refusal to bar her dower. The wife left her husband on October 22 last, because of some differences with him, and has not returned. She refuses to join in the conveyance for the purpose of barring her dower. The purchaser desires a conveyance free from any inchoate right of dower, and the vendor wishes to give it.

The law governing the rights of the parties under these circumstances is not in very satisfactory shape. The case is not one to which sec. 14 of the Dower Act, R.S.O. 1914, ch. 70, applies, for the wife has not been living apart from her husband "for two years under such circumstances as disentitle her to alimony," nor is she confined in a hospital for the insane as a lunatic, nor is she of unsound mind. It was urged that sub-sec. 2 of sec. 14 gives power to the Judge, in cases which do not come within sub-sec. 1, to value the wife's dower; but while, at first blush, sub-sec. 2 might appear to give some additional power to the Judge, a true reading of it makes it merely supplementary to sub-sec. 1. It does not follow that a wife whose dower can be barred without her consent under sub-sec. 1 is disentitled to dower. So that in any case in which an order is made under sub-sec. 1 barring the wife's dower for the purpose of making title to a purchaser or mortgagee, if the wife has not disentitled herself to dower, her dower is to be valued, and the sum fixed as representing her dower is to be dealt with as sub-sec. 2 provides. To give sub-sec. 2 any wider scope than this involves reading into the section a great deal that is not there.

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Sub-section 2 is, in my judgment, merely in aid of sub-sec. 1 and has no independent operation whatever.

The vendor also relies upon the judgment of Spragge, C., in *Skinner* v. *Ainsworth* (1876), 24 Gr. 148. That was an action for specific performance brought by the purchaser against the vendor, in which it was decreed that the defendant should convey the lands to the purchaser free from incumbrances. Upon the conveyance being submitted to the wife of the vendor for execution in order to bar her dower, she refused, and an application was made to the Court for an abatement of the purchase-money by reason of the wife's inchoate right to dower. This application was opposed by the vendor on the ground that the wife might predecease the vendor. In that event it would clearly be unfair to the vendor that a sum should be deducted from the purchase-money to compensate the purchaser for a claim which in the result never materialised. The vendor suggested that the practice adopted by Lord Hatherley in *Wilson* v. *Williams* (1857), 3 Jur. (N.S.) 810, should be followed. Spragge, C., acceded to that suggestion and declared that a sufficient portion of the purchase-money should be set aside to answer the wife's claim for dower in the event of her subsequently becoming entitled thereto by surviving her husband, and that the interest thereon should be paid to the vendor during the joint lives of himself and his wife, and upon her decease that the principal should be paid to him; and that there should be a reference to fix the amount so to be set aside.

I have not found any case which either overrules or follows *Skinner* v. *Ainsworth*, though in *Loughead* v. *Stubbs* (1880), 27 Gr. 387, 390, Proudfoot, V.-C., says: "There is no doubt that had the husband alone entered into the agreement he might have been required to procure a bar of his wife's dower, or to make an abatement of the purchase-money;" and he refers to *Van Norman* v. *Beaupré* (1856), 5 Gr. 599. Although *Skinner* v. *Ainsworth* was cited upon the argument, Proudfoot, V.-C., does not refer to it in his judgment. It is to be observed, however, that the real point for determination in *Loughead* v. *Stubbs* was not what procedure was to be adopted in working out the respective rights of the vendor, his wife, and the purchaser, in a case like *Skinner* v. *Ainsworth*, but whether or not the wife should have been added as a party defendant because she was also a party to the agreement of sale. I think his reference to the purchaser being entitled to an abatement of the purchase-money cannot have been intended as a judgment to that

effect, in conflict with what Spragge, C., has laid down in *Skinner* v. *Ainsworth*.

The case of *Van Norman* v. *Beaupré*, 5 Gr. 599, to which Proudfoot, V.-C., refers, was almost upon all fours with *Skinner* v. *Ainsworth*. The purchaser asked for specific performance, and the vendor was unable to give him a conveyance free from dower, because of the refusal of the vendor's wife to join. Blake, C., held that the purchaser was entitled to a decree for specific performance with an abatement of the purchase-money to the extent of the value of the wife's inchoate right to dower. It is odd that *Van Norman* v. *Beaupré* was not referred to in *Skinner* v. *Ainsworth*, but the *Van Norman* case was decided in 1856, and the case of *Wilson* v. *Williams*, which was followed by Spragge, C., in *Skinner* v. *Ainsworth*, was decided in 1857.

Notwithstanding that these cases are to some extent contradictory, I am of the opinion that *Skinner* v. *Ainsworth* lays down the principle that should be followed, and I see no reason why it should not be applied here. There is, however, one feature of all the cases to which I have referred that is unsatisfactory. In none of them is it held that the wife's inchoate right to dower is barred. Whether the purchaser is to be safeguarded by an abatement of the purchase-money, as in *Van Norman* v. *Beaupré*, or by setting aside a sum to answer the wife's claim to dower in the event of her surviving her husband, as in *Skinner* v. *Ainsworth*, the sole protection afforded to the purchaser is by way of indemnity against the wife's future claim. The land itself still remains subject to the claim for dower, and that claim cannot be finally disposed of until the death of either the husband or the wife.

Following *Skinner* v. *Ainsworth*, I hold that the vendor cannot be forced to accept an abatement of the purchase-money to answer the wife's claim to dower, but that the purchaser is entitled, if he desires it, to a conveyance by the husband, and to have a sum set aside out of the purchase-money to provide for the wife's claim to dower if she should become entitled to dower by surviving the vendor, and that during their joint lives the interest upon the moneys so set aside shall be paid to the husband, and that it be referred to the Master in Ordinary to fix the amount so to be set aside, unless the parties can agree upon the amount. This will involve, of course, the acceptance by the purchaser of a conveyance of the land subject to the inchoate right of dower of the wife of the vendor, which, so far as I can see, I have no power to bar under

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the existing circumstances. And, for that reason, it must be optional with the purchaser whether he will accept such a conveyance or not. He is in substantially the same position as a purchaser who is entitled under an agreement for sale to take what the vendor can give him with compensation for a deficiency or indemnity for some prospective claim, but he ought not to be bound to complete the contract upon these terms. This is not a case where the vendor, notwithstanding that he is unable to give the purchaser all that he contracted for, is nevertheless entitled to specific performance against the purchaser subject to compensation or abatement because of some trifling deficiency: *Bowes* v. *Vaux* (1918), 43 O.L.R. 521, at pp. 523 *et seq.* Here the defect to which the purchaser's title would be subject by reason of the outstanding inchoate right to dower, together with the ultimate prospect of possible litigation with the dowress, would be too burdensome to inflict upon an unwilling purchaser, even with compensation or an indemnity.

The order will therefore go in the terms above stated, if the purchaser elects to take it. Otherwise the application of the vendor will be dismissed. In either case the vendor must pay the costs both of the purchaser and of the wife.

Judgment accordingly.

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Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ. April 5, 1921.

Statutes (§IIA—104)—Construction—"Any Statute" in Provincial Act, Meaning of—Act to Supplement the Revenue of the Crown in Alberta 1906 ch. 30 as Amended by 1909 ch. 5, sec. 5—Exemption of Railway from Taxes.

The Act to supplement the revenues of the Crown in the Province of Alberta, 1906, ch. 30, as amended by ch. 5, sec. 10, 1909 Stats. contains a proviso that "no tax shall be payable under this Act upon or with respect to any portion of a line of railway aided by a guarantee of bonds, debentures, debenture stock, or other securities under the provisions of any statute for a period of fifteen years....." The words "any statute" as used in this section refer to any statute passed by the Alberta Legislature and do not exempt from taxation a railway merely because its bonds have been guaranteed by the Dominion of Canada.

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Where in a provincial statute reference is made to a "statute" the reference is to a statute of the Legislature that is speaking unless there is something in the context to the contrary.

[Currie v. Harris (1917), 41 D.L.R. 227, 41 O.L.R. 475 referred to. See 58 D.L.R. 1, reversing this decision.]

APPEAL by plaintiff from the judgment of Hyndman, J., (1920), 53 D.L.R. 691, dismissing the plaintiff's action to recover certain taxes and penalties. Reversed.

H. H. Parlee, K.C., and *I. B. Howatt*, for appellant.

N. D. Maclean, for respondent.

HARVEY, C.J.:—The action was originally begun for the taxes for 1913, 1914, 1915, 1916, 1917 and 1918 and at the trial by consent a claim for taxes for 1919 was added on the understanding that as far as costs were concerned it was not to be considered as having been claimed earlier.

The statute under which it is claimed the liability arises is an Act to Supplement the Revenues of the Crown in the Province of Alberta, ch. 30, 6 Edw. VII 1906, (Alta.).

The first section provides that every person, company, etc., owning or operating a railway in the Province shall pay a tax on any part of the railway not exempt from taxation based on its actual value.

Sections 2 and 3 provide that a commission may be appointed to determine the actual value and that until such determination it shall be taken to be $20,000 per mile. Section 4 provides that every company, etc., owning or operating a railway in the Province shall without notice or demand each year before July 1 make a return to the provincial treasurer showing the mileage of the railway and specifying any portion claimed to be exempt with particularity and giving the grounds for the exemption claimed, and sec. 5 provides that any company, etc., failing to comply with the requirements of sec. 4 shall be liable to a penalty of $20 a day for each day during which the default continues and in addition to a tax of double the amount otherwise payable. Section 6 authorises the Lieutenant-Governor to extend the time for the return and sec. 7 authorises him to fix the mileage not exempt from taxation if the return is not made or is in his opinion incorrect. Sections 8 and 9 provide that the tax shall be 1% of the value and be payable on September 1 in each year. Section 10 provides for methods of recovery of the taxes and penalties and directs that in an action the Order in Council fixing the mileage shall be *primâ facie* evidence of the mileage.

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In 1908 the Act was amended, 8 Edw. VII (Alta.), ch. 20, sec. 17, by adding sec. 12 which defines "railway" as meaning "a line or part of a line of railway within the province which was constructed at a date seven years or more previous to the first day of September, 1905, or which shall have completed seven years or more of existence at any time subsequent to the said first day of September, 1905," and authorises the Lieutenant-Governor in Council by order to settle the question in case of a dispute.

In 1909 this section was amended, 9 Edw. VII (Alta.), ch. 5, sec. 10, by adding the following proviso:—"Provided however that no tax shall be payable under this Act upon or with respect to any portion of a line of railway aided by a guarantee of bonds, debentures, debenture stock, or other securities under the provisions of any statute for a period of fifteen years from the date of the commencement of the operation of the portion of the line so aided, and thereafter during the currency of the guarantee as aforesaid the amount of taxes payable hereunder upon or with respect to such portion of any line of railway so aided shall not exceed an amount equal to $30 per mile of the mileage of such portion of such line in the province."

At the same time that the last amendment was made several statutes were passed authorising the guaranteeing by the Province of securities of different railways (chs. 14, 15 and 16). Apparently this was the first legislation having this effect.

The plaintiff's claim is for $21,121.76 tax for each year from 1913 to 1918 inclusive being in respect of 176.23 miles valued at $11,985.34 per mile making a total of $126,730.56 to which they add an equal amount for double tax and $43,820 for penalty at $20 a day for 2191 days making a total for all of $297,281.12 to which is to be added $21,121.76 for taxes for 1919 by amendment at the trial, making in the aggregate $318,402.88.

The defences to the claim for taxes are, in the words of the defendant's factum, "that the lines in question had been aided 'by guarantee of bonds, debentures, debenture stock or other securities under the provisions of any statute' and also that the Orders in Council purporting to fix the mileage and purporting to fix the value of the railway for the purposes of assessment were *ultra vires*, invalid or not binding on the defendant."

It was admitted for the purpose of the trial that the defendant owned or operated the railway proposed to be taxed all of which was in existence in December, 1905, that it made no returns to the

provincial Treasurer and paid no taxes, but that it received notice of the valuation of the railway and of the amount of taxes claimed. It was also admitted that power was given to the Government of Canada to aid the railway and that proof that aid was given could be given by copy of Order in Council.

The plaintiffs proved that an Order in Council was passed on July 31, 1907, fixing the mileage of defendant's railway at 176.23 and it is not disputed that this is the correct mileage. They also proved that an Order in Council was passed on August 29, 1908, declaring the value of all railways liable to assessment to be $11,985.34 per mile.

The defendant's railway consists of two sections, one of a few miles operated by it but constructed under the name of the Edmonton, Yukon and Pacific between South Edmonton and Edmonton and the other the major portion being the part of its main line from Lloydminster to Edmonton.

The defendant proved by Order in Council of the Governor-General dated July 20, 1903, that under the authority given, the Dominion Government had authorised the guarantee of its bonds. This aid as the Act (3 Edw. VII 1903 (Can.), ch. 7) states was authorised only in respect of that portion of its lines now in question from Lloydminster to Edmonton, and the Order in Council was admitted in proof of that. No Order in Council respecting aid to the E. Y. & P. appears to have been obtained in time for the trial but the judgment seems to have been given on the supposition either that the other order included it or that there was a similar one for it. There was produced however on the appeal and introduced without objection a copy of an Order in Council dated March 3, 1904, giving aid to the E. Y. and P. but though no notice was taken of it on the argument it is to be observed that the aid is not by way of guarantee of securities but by way of cash subsidy not exceeding $6,400 per mile.

The defence as will be seen is that in the exemption provisions of the statute the expression "any statute" is to be construed as not limited to a statute of this Province but as including a statute of the Dominion of Canada. Even with this it is apparent that the portion of the railway formerly the E. Y. & P. is not within it and that therefore it was not entitled to any exemption.

Then in 8 Geo. V 1918 (Alta.), ch. 4, sec. 48, the Alberta Interpretation Act was amended by declaring that "The expression 'province' means the Province of Alberta and the expressions 'Act'

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and 'Statute' mean an Act or Statute of the province." This amendment became effective on April 13, 1918, and from that time onward the defence ceased to be available. It would appear therefore that the defence would be applicable to no taxes after 1917.

As regards the defences based on the Orders in Council it seems to me that little need be said and I do not deem it necessary to consider even the ground of their alleged invalidity. If the one respecting mileage is ineffective it would simply be necessary to enquire into and ascertain the actual mileage and that is obviated by the admission that the mileage as stated in the Order in Council is the correct mileage. If the other Order was not passed on sufficient ground and is invalid the provisions of the statute applies and the value is $20,000 a mile or nearly double what is claimed. The plaintiffs ask to amend by claiming on that valuation but as they only do so to meet the objection I do not find it necessary to consider the application seriously because it is hard to see how a defendant can seriously contend that he is liable to nothing because the plaintiff asks for less than he is entitled to.

It is a very common practice for a plaintiff to abandon part of a claim which he says he is entitled to recover, and I can see no valid objection to a claim because it is less than the amount of the whole liability. I think therefore that if both of these Orders in Council were non-existent it would be no answer to the plaintiff's claim.

The claim for penalties was dismissed not on the ground that defendant was not liable but on the ground that the Court had power to and should relieve against them.

This Court held unanimously in *McHugh* v. *Union Bank of Canada* (1910), 3 Alta. L.R. 166, at 175, that the power given to the Court to relieve against penalties did not authorise it to relieve against statutory penalties which would in effect be authorising it to repeal statutes.

The power is given to the Lieutenant-Governor in Council, 63-64 Vict. 1900 (Can.), ch. 8, even if it did not exist as a prerogative right, and the Courts are powerless. While our decision in the *McHugh* case was reversed the view expressed on this point was in no way questioned and it is in my opinion undoubtedly correct. The plaintiffs have not claimed cumulative penalties in respect of the default for each year but only for a single default for a period of exactly 6 years though the default of 1913 alone had in fact continued for 6 years and 2 months when the action was begun.

The same objection would apply to this claim as to the claim for taxes, viz., that plaintiffs claiming less than they are entitled to should receive nothing.

This leaves now only the defence to the claim for taxes resting on the interpretation of the expression "any statute."

The trial Judge concluded that on the general rule of strict construction of taxing statutes the term should be construed as against the taxing authority and he held that it included a statute passed by the Dominion. I conceive that there might be railways entering this province from a neighboring province or even from the United States which were in the receipt of aid by way of guarantee of securities under the provisions of statutes of these provinces or of a State of the United States, and if the word "statute" is not to be limited to the "statute" of the Legislature speaking I can see no reason why it should not include any such statute. The fact that Dominion statutes may be in force in this Province is not I think material. A statute authorising the guaranteeing of bonds of a railway company is not in force anywhere in the sense that the Bills of Exchange Act for instance is in force. It is simply the Legislature's authority to the Executive Government to do something which will bind the credit of the State.

Then I think the rule of construction of taxing statutes is scarcely applicable in the sense applied because what we are construing is not a provision imposing a tax but one exempting from the general imposition and the rule in that case would be rather against the one claiming the exemption. See *The King* v. *School District of Madawaska* (1919), 49 D.L.R. 371, 46 N.B.R. 506, [affirmed 56 D.L.R. 95]. No help can be got from the new interpretation given in 1918 either way, if for no other reason, because the Interpretation Act itself says that an amendment is to be no indication of the previous law.

In *Currie* v. *Harris* (1917), 41 D.L.R. 227 at 248, 249, 41 O.L.R. 475 at 497, in which the word "statute" as used in a Provincial Act had to be construed, Meredith, C.J., with whom two other Judges expressly and the other two impliedly concur, states: "The words "of a statute for the time being in force" in my opinion apply only to a statute of the Province. . . . Unless there is something in the context to the contrary, in my opinion where in a provincial statute such a reference is made to a statute as is made in sec. 3 "statute" means a statute of the Legislature which is speaking."

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It seems to me that that is the proper view and it is strengthened in this Province at least by a consideration of the provisions of the Interpretation Act itself when we look for the proper meaning to be attached to words in statutes. In sec. 2 we find in the second line the expression "every Act of the Province," though it may be noted that it does not say what Province, while near the end of the section the expression is simply "any Act." In sec. 3 it is "Acts" only, while in secs. 5 and 6 it is "Act of the Province." Again in sec. 7 which contains the general interpretations, the expression is "every Act" without more, while in the various paragraphs of that section we find the words "Act" and "statute" frequently used without more, though of course meaning Act and statute of this Province. It is true that sec. 2 declares that the Act applies to all Acts of the Legislature but it does not declare that it is limited to such application.

But the most important consideration in my opinion is the reason for the provision itself.

Now it scarcely needs argument to satisfy one that the reason why a railway is exempt is not because it has received aid and is therefore better able to pay taxes. This case furnishes an example of two forms of aid and the receipt of the one by way of a cash subsidy does not exempt the railway so aided from taxation. Then why should the other? Surely the reason is because the requiring it to pay taxes might cause it to fail to pay its other obligations in which event the guarantor would be called on to supplement the guarantee. I can see no reason for thinking that the Province would be concerned with any other guarantor than itself, but it would advantage it little to collect taxes from a railway company which it would require to pay back in satisfaction of debts. The intention of the Legislature is of course the ultimate basis of any interpretation and it seems to me that having regard to the particular condition of this Act there can be little doubt that its intention in the exemption was to safeguard its own interests. This is emphasised by the fact that though as the facts shew this defendant had a guarantee from the Dominion when the provincial Act was passed in 1906 no exemption was granted until 1909 when the Province itself entered the field of guaranteeing railway securities.

I think therefore that the words "any statute" in the Act in question mean "any statute of the Province of Alberta" and that the defence of exemption fails.

I would accordingly allow the appeal with costs and direct

judgment to be entered for the plaintiffs for the full amount claimed as above set out with costs.

In the statement of claim there is also a claim for interest but I take it that this was not intended to be pressed as nothing was said about it on the argument and in view of the double tax and other penalties I am doubtful whether any such claim if pressed should be allowed.

STUART, J., concurs with HARVEY, C.J.

BECK, J. (dissenting in part):—Chapter 30 of 1906 (Alberta) entitled "An Act to supplement the revenues of the Crown in the Province of Alberta" enacts: (sec. 1) that every company operating a line or part of a line of railway within the Province shall pay a tax in respect of the railway or part thereof so operated and *not exempt from taxation* based upon the actual value of such railway or part thereof so operated within the Province.

Chapter 20, 8 Edw. VII 1908 (Alta.) the Statute Law Amendment Act added (sec. 17), a definition of "railway" having regard to the date of the construction of the line.

Chapter 5 of 9 Edw. VII 1909 (Alta.), the Statute Law Amendment Act (part II) enacted sec. 10 that "no tax shall be payable under this Act upon or with respect to any portion of a line of railway aided by a guarantee of bonds, debentures, debenture stock, of other securities *under the provisions of any statute* for a period, etc.

At the same session of the Alberta Legislature Acts were passed authorising the guarantee of certain securities, in respect of certain specified portions of the lines of railway owned or operated by the Canadian Northern R. Co., the Grand Trunk Pacific R. Co. and the Alberta and Great Waterways Railway Co. respectively.

Chapter 7 of 1903 (Can.) authorised the Dominion Government to aid and assist the extension of the railway of the Canadian Northern R. Co. from Grand View, the point where what is known as the Gilbert Plains Branch of the said railway ends, to a point at or near the town of Edmonton, a distance of about 620 miles, etc., by guaranteeing the principal and interest of the first mortgage bonds, debentures or other securities of the said company secured by mortgage, etc.

An Order in Council (Can.) dated July 20, 1903, was produced shewing that the company's securities were guaranteed pursuant to the said Act. This covered the line from Lloydminster to Edmonton.

So far as this portion of the line is concerned then, the question is not, I think, whether it comes within the words "exempt from

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S. C.

THE KING AND THE PROVINCIAL TREASURER OF ALBERTA v. CANADIAN NORTHERN R. Co.

taxation" in sec. 1 of ch. 30 of 6 Edw. VII, 1906 (Alta.), which would doubtless cover the case of the Canadian Pacific Railway but whether it is a portion of a line of railway aided by guarantee under the provisions of any statute? In other words the question is not whether it is exempt but whether it comes within the specified subjects of taxation. I think therefore that if any technical or artificial rule of interpretation is to be applied it is that applied by Hyndman, J., (1920), 53 D.L.R. 691, when dealing with the case in the first instance rather than that applied by the Chief Justice.

Speaking generally the word "statute" may, it seems to me, include a statute of Canada as well as a statute of the Province; in fact it might include a statute of the Parliament of Great Britain having effect *proprio vigore* within the Province.

The Act of 1906, sec. 1, when using the words "exempt from taxation" was undoubtedly referring to exemption by force of a statute of the Dominion Parliament. No exemption then existed by virtue of a statute of the Province. It would have been mere surplusage to have said "exempted *by any statute* from taxation," but if it had been so expressed the reference undoubtedly in the mind of the Legislature would have been, as it undoubtedly was by the eliptical expression, used as referring to a Dominion Statute.

When the Act of 1909 was passed there were in fact no lines of railway within the Province "aided by a guarantee . . . under the provision of any statute" of the Province; but there was at least the line now in question then actually "aided by a guarantee under the provisions of a statute" of the Dominion.

In the future it was evidently intended that certain lines should be similarly aided by the Government of the Province. Undoubtedly such cases would fall within the words of the Act of 1909. The words "any statute" are general and in my opinion are not to be taken as confined to any statute of the Province. The contentions put forward as to the mind of the Legislature seems to me to be but guesses and if we are to guess we may suppose that the legislators looked upon railway lines within the Province whether constructed under the authority of Dominion or Provincial Acts or aided by one Government or the other as of equal benefit to the Province and consequently entitled to equal treatment. Also it is not to be overlooked that this particular railway and two out of the three railways which the Province contemplated aiding by guarantee are Dominion Lines.

So far as statute law is concerned the property-holders and

residents and others of the Province are subject equally to the statutes of the Dominion and the statutes of the Province when legislating within their respective fields of jurisdiction. Such statutes are operative concurrently and in proper language and even among lawyers are indifferently referred to as statutes, unless there be reason to differentiate.

To adopt the words quoted in Bouvier's Law Dictionary 3rd ed. tit. "State" vol. 3, p. 3123: "The laws of Canada are laws in the several Provinces and just as much binding on the citizens and Courts thereof as the provincial laws are. Canada is not a foreign sovereignty as regards the several Provinces, but is a *concurrent*, and within its [exclusive] jurisdiction, a paramount, sovereignty."

Assuming the proper jurisdiction a statute of the Dominion is *equally in the same sense* a statute binding the property-holders, residents and others within the territorial limits of a Province with a statute of the Provincial Legislature. The Courts must take notice judicially of statutes passed by either Legislature indifferently.

In my opinion therefore the words "any statute" in the enactment under consideration applies indifferently to any statute either of the Dominion or the Province.

As to the change in the Interpretation Act made in 1918 I think that cannot affect the rights in question here. It is a general amendment of such a character that I think it cannot be taken to have been intended to affect rights or obligations existing under statutes already passed which, as contrasted with it, are in the nature of special legislation which presumably would be substantially altered only after a special consideration directed to them.

Hence as to the portion of the line of railway between Lloydminster and Edmonton in my opinion there is no liability on the part of the company.

As to the residue of the line and as to the penalties I concur in the result reached by the Chief Justice.

Appeal allowed.

ONT.

S. C.

RE ORFORD AND DANFORTH HEIGHTS, LTD.

Ontario Supreme Court, Orde, J. January 5, 1921.

Dower (§III—50)—Wife Living Apart From Husband—Adultery—Sale of Land by Husband—Dower Barred by Power of Attorney of Wife—Conveyance Attacked on Ground of Fraud—Action for Alimony—Dower Act R.S.O. 1914, ch. 70—Evidence—Order Dispensing with Wife's Concurrence.

An order will be made under sec. 14 of the Dower Act R.S.O. 1914, ch. 70 dispensing with the concurrence of the wife for the purpose of barring dower in lands which had been conveyed by conveyance in which the dower had been barred under power of attorney which the wife attacked as fraudulent, it being proved that the wife had been living apart from the husband for two years under circumstances which disentitled her to alimony. For the purposes of the motion it was proper for the Judge to take into consideration evidence taken in an alimony action and his judgment therein.

[See Annotation, Conveyances to defeat Dower, 55 D.L.R. 259].

MOTION by Frederick Orford, under the provisions of sec. 14 of the Dower Act, R.S.O. 1914, ch. 70, for an order dispensing with the concurrence of the applicant's wife for the purpose of barring her dower in land which the applicant had conveyed to an incorporated company named "Danforth Heights Limited."

E. D. Armour, K.C., and *E. G. McMillan*, for the applicant.

J. P. White, for the company.

Grayson Smith and *S. J. Birnbaum*, for L. G. Orford, wife of the applicant.

ORDE, J.:—This was a motion made before me under the provisions of sec. 14 of the Dower Act, R.S.O. 1914, ch. 70. By that section, "Where the wife of the owner of land has been living apart from him for two years under such circumstances as disentitle her to alimony . . . and such owner is desirous of selling or mortgaging the land free from dower," a Judge of the Supreme Court may on summary application make an order dispensing with the concurrence of the wife for the purpose of barring her dower.

The application was unusual in that the deed of the lands in question, which was dated January 10, 1920, had already been executed by Orford in favour of Danforth Heights Ltd., and contained a bar of dower by his wife executed by him under a power of attorney from her. This deed had been attacked in an action brought by Mrs. Orford against her husband and the company, on the ground that its execution on her behalf under the power of attorney was fraudulent, and that action had been tried before me

and judgment has been reserved. The matter was still further out of the ordinary in that an action for alimony was then pending between Mrs. Orford and her husband.

The evidence upon which the present application was based was taken in England, by commission in the pending alimony action, and tended to prove that Mrs. Orford had been living apart from her husband for more than two years under circumstances which disentitled her to alimony. The application was vigorously opposed on her behalf, on the ground that the question as to her right to alimony was already before the Court in the alimony action, and that it would not be proper to deal with that question in a summary way until the action had been tried. It was significant that upon this application there was no affidavit of Mrs. Orford denying the positive evidence as to her adultery in England, but merely an affidavit by her solicitor going into the circumstances under which the commission had been issued and the evidence taken thereunder.

It so happened that the alimony action came on for trial before me, and in a judgment which I have delivered to-day (see *Orford* v. *Orford* (1921), 58 D.L.R. 251, 49 O.L.R. 15.) I find as a fact that Mrs. Orford was guilty of adultery in England in the month of January and again in the month of May, 1918, and that she gave birth to a child of which her husband was not the father on February 13, 1919. During the whole of the period in question she was living apart from her husband.

For the purposes of this motion I am taking into consideration the evidence taken in the alimony action and my judgment therein, and I now declare that Mrs. Orford was for a period of more than two years prior to the making of the application living apart from her husband under circumstances which disentitle her to alimony, and that Orford is therefore entitled to sell or mortgage his lands, and particularly the lands mentioned in the deed to the Danforth Heights Ltd., free from dower, and I order that her concurrence therein for the purpose of barring her dower be dispensed with.

Counsel for Mrs. Orford referred to *Re Eagles* (1877), 7 P.R. (Ont.) 241, in which it was held that the Act was intended to apply only to those cases in which it was shewn beyond all question that the wife was disentitled to alimony. Whatever difficulty there may have been in this regard has been removed, in my judgment, by the evidence adduced in the trial of the alimony action, resulting in the dismissal of the action.

Certain technical objections were raised to the making of any

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order, on the ground that Orford was no longer the "owner" of the land, having conveyed it to the company, and that there was no real "sale" in contemplation. The objection that Orford is not the owner does not come with much force from one who in another action is seeking to set aside the conveyance to the company as fraudulent.

I do not think it was intended that the power of the husband to make a good title under sec. 14 should be hampered by technical objections. Orford was the owner at the time he executed the deed in question. The conveyance to the company was in fact a sale. I am of the opinion that that ownership and that sale bring Orford sufficiently within the terms of the section to justify the making of the order. It may be that, in view of the wording of sub-sec. 3, which speaks of a conveyance being made "after the making of the order," it may be a prudent thing for Orford, for the purpose of perfecting the title of the company, to execute a further deed, "expressed to be free from his wife's dower," by way of confirmation of the earlier one. It is to be observed that sub-sec. 4 extends the operation of that section to cases where a conveyance has already been executed by the husband, and part of the purchase-money has been retained by the purchaser as an indemnity against dower. This sub-section is not applicable here, but it serves as a guide, in my judgment, to the intended scope of the section. If the section is to be extended to cases where part of the purchase-money is held back by way of indemnity, why exclude cases where the owner is under an obligation to convey free from dower but cannot do so, merely on the ground that he has already executed and delivered the deed? I think if the earlier words of the section "owner of land" are read in conjunction with the words "is desirous of selling or mortgaging the land free from dower" it becomes clear that it is not the mere sale or mortgage that is the subject-matter of the section, but the sale or mortgage "free from dower." Notwithstanding the conveyance already executed, Orford still desires to make a good title, that is, to sell the land "free from dower."

For these reasons, I do not think that the objections to the making of the order are valid ones, and the order will go as already stated.

Judgment accordingly.

HUBLEY v. KEANS.

N. S.

S. C.

Nova Scotia Supreme Court, Russell, J., Ritchie, E.J., and Mellish, J. April 2, 1921.

Parties (§IB—55)—Action Brought by Infant Without Next Friend—Application During Trial to Dismiss—Father Added as Next Friend—Case Proceeded with—Jurisdiction of Trial Judge.

Under the Nova Scotia rules if an infant sues without a next friend, his solicitor being under the impression that he is over twenty-one, the Judge at the trial has a discretion, during the trial on an application to dismiss the action, to permit a next friend to be added and to proceed with the action.

SPECIAL CASE reserved by the trial Judge in an action for damages brought by an infant.

Plaintiff brought an action against defendant claiming damages for injuries to plaintiff's motor truck alleged to have been caused by the negligent operation of defendant's motor vehicle on a public highway. The case came on for trial before Longley, J., with a jury, and it appearing that at the time the action was brought plaintiff had not attained the age of 21 years the Judge permitted plaintiff's father to be added as next friend and proceeded with the trial.

At the request of defendant's solicitor a special case was reserved for the opinion of the Court as to the power of the Judge to make the amendment referred to. The case reserved is set out in the opinion of Ritchie, E.J., delivering the judgment of the Court.

J. J. Power, K.C., for defendant; *A. Cluney*, K.C., for plaintiff.

RUSSELL, J., agrees with RITCHIE, E.J.

RITCHIE, E.J.:—This case was tried before Longley, J., with a jury. The Judge has stated a special case reserving points of law for the opinion of the Court. The case stated and points reserved are as follows:—1. The plaintiff brought an action on September 9, 1920, and filed his statement of claim on September 24, 1920, in this Court for $500 damages against the defendant for damages to the plaintiff's motor truck, caused by the negligence of the defendant in negligently operating his motor vehicle on a public highway on St. Margaret's Bay Road in the county of Halifax on September 5, A.D. 1920. 2. The defendant appeared on September 18, 1920, in the usual way and filed his defence on September 30, 1920, denying among other things the allegations in the plaintiff's statement of claim, and in his defence set up a counterclaim for $1,000 for damages to his motor vehicle by the negligent operation on the St.

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Margaret's Bay Road of the plaintiff's motor truck on September 5, 1920. 3. Issue being joined on these pleadings the action came on for trial before me with a jury at the October Civil Sittings, 1920, of this Court at Halifax, and after the plaintiff had opened his case to the jury and on being sworn he gave evidence in support of his claim and in cross examination admitted then that he was only 20 years of age. At the conclusion of his cross-examination, counsel for the defence asked the Court to stay the further trial of the action or to dismiss it on the ground that the plaintiff being an infant he was incompetent to bring or maintain the action then being tried. I gave then the plaintiff's solicitor permission, against the objection of the defendant's solicitor to file the consent of the infant plaintiff's father (who was in Court) to act as next friend, which consent is in the following terms:—

"C. No. 838. In the Supreme Court.
Gerald Hubley v. *Keans.*

I hereby consent to act as next friend for Gerald Hubley in the action against William A. Keans, and to my name being used as such.

Dated this 5th day of November, 1920.

(Sgd.) Willis Hubley."

4. The plaintiff's solicitor explained that he thought from his client's appearance that he was over 21 years of age and I think from his appearance at the trial that this was justified. No step was taken in respect to constituting anyone a guardian *ad litem* to defend the defendant's counterclaim, and its trial with the action then proceeded in the usual way and other witnesses were called by the parties and examined and cross-examined and the jury were addressed by counsel and myself and at the conclusion of which after deliberating they brought in a verdict of $150 for the plaintiff. 5. On being moved for judgment by the plaintiff I was asked by the defendant before signing an order for judgment to reserve for the opinion of the Court *en banc* the following points of law which I now do as follows:—

"(a). Was I right in giving the plaintiff during the trial leave to file the consent of his father as next friend and on such being done should the trial of the action have proceeded to a conclusion as it did?

(b). If the above question is answered by the Court in the negative what order for judgment should I make?"

The record on file herein can be referred to by the parties on the argument of this point of law.

Dated at Halifax this 4th day of December A.D. 1920."

It is quite clear that if an action is commenced on behalf of an infant without a next friend an application to dismiss the action would ordinarily meet with success. But in this case when the objection was taken, application to amend by inserting the name of a next friend was made, and this application was granted by the trial Judge.

It is contended that the Judge had no power to so amend and that if he had such power it was a wrong exercise of discretion to do so.

In my opinion neither of these contentions should prevail. Rule 10 of Order XVI disposes of the contention that the Judge had no power to make the amendment. The stated object of that rule is to prevent any cause or matter being defeated by reason of the misjoinder or non-joinder of parties, and the rule clearly recognises that a next friend may be added.

I do not think any authority is needed other than the rule, but Daniel's Chancery Practice, 8th ed., vol. 1, p. 100 and *Flight* v. *Bolland* (1828), 4 Russ. 293, 38 E.R. 817, may be referred to.

The remaining contention is that the granting of the amendment was a wrong exercise of discretion. I am wholly unable to agree. The object of having a next friend is to give the defendant security for his costs; the moment he is added he is liable for the costs past and future. Why defeat the action and force the plaintiff to bring a new action with a next friend and travel the same road again? I think if the Judge had refused the amendment it would have been an improper exercise of discretion, because it would have involved unnecessary litigation and costs to no purpose.

There is a counterclaim and it is true that an infant cannot enter an appearance except by a guardian *ad litem*, but I cannot see how that effects this case. The infant does not enter an appearance; he is before the Court for the purposes of the claim and the counterclaim, and the next friend is liable for the costs of both in the event of failure.

I answer question (a) in the affirmative.

The plaintiff will have his costs.

MELLISH, J.:—I agree in the conclusion reached.

Discretion held properly exercised.

ONT.

S. C.

RE N. BRENNER & CO., LTD.

Ontario Supreme Court in Bankruptcy, Orde, J. January 12, 1921.

Bankruptcy (§II—13)—Action Pending by Bankrupt—Assignment—Authorised Trustee Carrying on—Procedure—Rules 300 and 302, Ontario Supreme Court Rules.

A chose in action having passed to the authorised trustee by an assignment under the Bankruptcy Act, it is the trustee's duty upon getting the written permission of the inspectors to take out a praecipe order to continue proceedings under Rules 300 and 302 of the Rules of Practice and Procedure of the Supreme Court of Ontario and the proceedings should be continued in his official name.

[Jackson v. North Eastern R. Co. (1877), 5 Ch. D. 844 referred to. See Annotation, Bankruptcy Law in Canada, 53 D.L.R. 135, also Annotation on the Bankruptcy Act Amendment Act, to be published in 59 D.L.R. 1.]

MOTION on behalf of Osler Wade, an authorised trustee in bankruptcy, to whom an authorised assignment had been made by the above named company, for an order empowering him to continue the proceedings in an action in the Supreme Court of Ontario, commenced by the company, before the assignment, against H. J. Garson & Co.

H. H. Shaver, for the applicant.

ORDE, J.:—N. Brenner & Company Limited, on November 10, 1920, made an authorised assignment under the Bankruptcy Act, 9-10 Geo. V 1919 (Can.), ch. 36, to Osler Wade, an authorised trustee. At that time an action was pending in the Supreme Court of Ontario at the suit of N. Brenner & Co. Ltd. against H. J. Garson & Co. On November 29, 1920, at a meeting of creditors, instructions in writing were given to the trustee to proceed with the action. The defendants in the action did not appear or file any statement of defence, and on January 5, 1921, judgment by default was signed against the defendants for damages to be assessed.

The authorised trustee now desires to set the action down for trial in order to assess the damages, and applies for an order authorising the authorised trustee to continue the proceedings, and confirming what he has already done in that regard.

I think the authorised trustee has misconceived the course which he should have taken to proceed with the pending action.

By sec. 20 (1) of the Bankruptcy Act, "the trustee may, with the permission in writing of the inspectors, . . . *(c)* bring, institute, or defend any action or other legal proceeding relating to the property of the debtor." The powers given by this section are

conferred upon the authorised trustee, whether acting under a receiving order or under an authorised assignment. The written permission must not be a general permission, but a permission to do the particular thing for which permission is sought: sec. 20, sub-sec. 2.

If the trustee in this case had the requisite permission, no application to the Court for leave to bring or institute an action or other legal proceeding is necessary. It is suggested that para. *(c)* may not be wide enough to cover the revivor or continuance of an action already pending, but the wider power "to bring" an action would include the lesser one to "continue" one already brought. Apart from that, I think the words to "institute . . . any . . . other legal proceeding" would be sufficient to authorise the trustee to take the necessary steps in the pending action to continue it in his official name. For these reasons, I hold that no leave to proceed, so far as the insolvency proceedings are concerned, is necessary.

But it is equally clear that the trustee could not proceed with the action in the name of the insolvent. By sec. 10, the assignment vested in the trustee all the property of the assignors at the time of the assignment, except property held by them in trust and property exempt from execution or seizure under legal process. "Property" includes "things in action:" sec. 2, para. *(dd)*. So that the insolvent's right of action against the defendants in the action then pending passed to the trustee under the assignment, and the action could not thereafter be properly continued in the name of the insolvents, and the entry of judgment in their name was irregular. See *Jackson* v. *North Eastern R. Co.* (1877), 5 Ch. D. 844.

The chose in action having passed to the trustee under the assignment, it was the trustee's duty, upon getting the written permission of the inspectors, to take out a præcipe order to continue proceedings under rules 300 to 302 (Rules of Practice and Procedure of the Supreme Court of Ontario, 1913).

The proceedings will not be continued in the name of Osler Wade as authorised trustee, but in his official name, "The Trustee of the Property of N. Brenner and Company Limited, authorised assignor:" see sec. 16. It may be that a præcipe order may not be sufficient to cure the irregular judgment which has been signed, and that some other order may be required either in lieu of or in addition to the præcipe order; but I think it will be sufficient for me, without saying more on that point, to indicate the course which the trustee should now take. *Judgment accordingly.*

CAN.

S. C.

FULLER v. GARNEAU.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin and Mignault, JJ. February 1, 1921.

Mines and Minerals (§IIA—32)—Sale of Lands—Reservation of—Reservation in Crown Grant Greater than in Subsequent Agreement—Cancellation of Agreement on Ground of Misrepresentation—Right of Purchaser to Support of Surface.

A reservation in a Crown grant "reserving thereout and therefrom all mines and minerals which may be found to exist within, upon or under such lands together with full power to work same and for this purpose to enter upon and use or occupy the said lands or so much thereof or to such an extent as may be necessary for the effectual working of the said minerals or mines, pits, seams and veins containing the same," confer a wider power on the owner of the mines and minerals than those contained in a subsequent agreement of sale "reserving to his Majesty, his successors and assigns, all mines and minerals" which is subject to an implied condition that the exercise of the right shall not prejudice the surface owner's right to support of the surface and a purchaser under the agreement for sale who has purchased upon the understanding that the reservations in the original grant are the same as set out in the agreement has a right upon discovering the difference to be allowed to proceed to trial in an action for cancellation of the agreement on the ground of misrepresentation and to determine the rights arising from the reservations.

[Fuller v. Garneau (1920), 51 D.L.R. 307 reversed; Review of authorities.]

APPEAL by plaintiff from the judgment of the Alberta Supreme Court, Appellate Division, (1920) 51 D.L.R. 307, affirming the judgment of Scott, J. (1919), 50 D.L.R. 405, dismissing an action to determine the rights arising on a sale of land reserving all mines and minerals. Reversed and plaintiff allowed to proceed to trial.

J. R. Lavell, for appellant; *C. H. Grant*, for respondent.

DAVIES, C.J. (dissenting):—The single and only question which arises on this appeal for us to determine is whether the words of the reservation in the Crown grant are greater than, or different from, the words in the agreement of sale from the defendant respondent to the plaintiff appellant.

The words in this latter agreement are "reserving unto His Majesty, his successors and assigns, all mines and minerals."

The reservation in the Crown grant is as follows:—"Reserving thereout and therefrom all mines and minerals which may be found to exist within, upon or under such lands together with full power to work the same and for this purpose to enter upon and use or

occupy the said lands or so much thereof or to such an extent as may be necessary for the effectual working of the said minerals, pits, seams and veins containing the same."

After reading the authorities cited by the counsel at Bar to sustain their respective contentions, I am of the opinion that the appeal fails.

I think that Ives, J., who delivered the judgment of the Appellate Division (1920), 51 D.L.R. 307, 15 Alta. L.R. 194, correctly stated the question at issue, in his reasons for judgment, as follows, at p. 308:—"Do the words in the Crown grant enable more extensive colliery operations to be carried on to get (or win) the minerals than do the words used by the defendant vendor in the agreement, extended by legal implication?" and he answered that question, I think, correctly, when he said he thought they did not.

The full reservation merely adds to the reservation of the mines and minerals "the full power to work the same and for this purpose to enter upon and use" so much of the lands and to such an extent as may be necessary for the "effective working of the minerals" or the mines, etc.

I cannot doubt under the authorities that these express powers are impliedly and necessarily contained in the simple reservation of the mines and minerals and that they do not extend or enlarge these implied powers which are essential to give efficacy to the reservation.

See *per* Bayley in *Cardigan* v. *Armitage* (1823), 2 B. & C. 197, 107 E.R. 356, and Lord Wensleydale in *Roubotham* v. *Wilson* (1860), 8 H.L. Cas. 348, 11 E.R. 463; *Duke of Hamilton* v. *Graham etc.* (1871), L.R. 2 Sc. & Div. 166 at p. 171,

We are not called upon to decide upon the respective rights of the mine owners under these reservations as against the surface owner, and, of course, do not do so. Whether or not they carry the right as against the surface owner to cause subsidence of the soil it is not either necessary or desirable on the facts before us to determine. That question is certainly a difficult and a delicate one and should only be dealt with, where necessary to determine, on the facts as found in each case. I do not, in the present appeal and on the facts as they appear in the record, feel called upon or justified in expressing any opinion on that question.

I simply determine that, in my opinion, the two reservations mean the same and that the implied powers arising in the one are equivalent to the express powers given in the other. But whether they give the right to cause subsidence as against the surface owner

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I leave for determination when a case actually involving that question arises and all the facts necessary to decide it are before the Court.

The appeal should be dismissed with costs.

IDINGTON, J. (dissenting):—If the language used upon which it is attempted herein to rest a charge of fraudulent misrepresentation, is only applied in a common sense way, having regard to what I suspect is common knowledge on the part of everyone dealing in real estate in Alberta, it would mean, to him to whom it was addressed there, exactly what the language of the reservation in a Crown grant expresses, when the title rests upon that with the reservation therein of mines and minerals.

I must be permitted to doubt if it took seven years on the appellant's part to discover this in face of such a falling market as ensued.

The ground of delay not having been expressly taken and argued out by reason of the narrow limitations of the direction of trial as presented to us, I need not pursue that phase of the question of delay.

But the pleadings shew that the agreement of purchase which appellant accepted pursuant to such alleged misrepresentation, contained an express provision for the appellant purchaser getting a deed of conveyance pursuant thereto, subject to the conditions and reservations in the original grant of the Crown. That is all he is entitled to get and surely it embraces such a well known common reservation of mines and minerals in the form now in question.

The cases relied upon by the appellant, in his factum, to overcome this express feature of the contract in question, do not seem to touch its force and efficacy as a complete answer to the pretension of misrepresentation and fraud as specified by appellant's pleadings set up as the fundamental part of his case.

The cases so cited and relied upon are the well known cases of *The Directors etc. of The Central R. Co. of Venezuela* v. *Kisch* (1867), L.R. 2 H.L. 99; *Redgrave* v. *Hurd* (1881), 20 Ch. D. 1, and *Rawlins* v. *Wickham* (1858), 3 De G. & J. 304, 44 E.R. 1285.

And besides in their essential features of fraud or misrepresentation going far beyond anything pleaded herein, the first named shews how prompt action is required and delay may be inexcusable and destructive of such a claim.

There is in short no fraud or misrepresentation herein, if the pleadings are to be read as a whole, as the factums seem to indicate.

We have in the case no copy of the order directing what is to be disposed of, but no doubt that in the record and the recognition by each factum of what is involved, may be taken as our guide to the limitations thereof.

I may be permitted to say that it does not seem to me at all necessary to rely upon some of the decisions cited in support of the judgment appealed from, and thereby impliedly to assume that the reservation in the Crown Grant means, in every case, exactly what many of the decisions cited seem to imply in regard to subsidence of the surface, for they were, in many instances, by the consideration of a course of legal and judicial history which ultimately may not be found exactly to fit all the conditions leading to what was intended to be expressed in the reservations in the Crown grants for land in our North West Provinces; especially when coal, for example, forms part of that very surface in question which inevitably must subside when such coal is taken.

It seems better to avoid putting, impliedly, an interpretation or construction of the Crown Reservation which I hold must have been, or should have been, from the foregoing considerations, presented to the mind of appellant.

The appeal should be dismissed with costs.

DUFF, J.:—The point of law to which the Appellate Division, 51 D.L.R. 307, directed its attention is stated in the judgment of Ives, J., at p. 308:—"The plaintiff is the purchaser from defendant of certain lands, under an agreement of sale "reserving unto His Majesty, his successors and assigns, all mines and minerals."

The full reservation in the Crown grant is in the following words:—"Reserving thereout and therefrom all mines and minerals which may be found to exist within, upon or under such lands together with full power to work the same and for this purpose to enter upon and use or occupy the said lands or so much thereof or to such an extent as may be necessary for the effectual working of the said minerals or the mines, pits, seams and veins containing the same." The issue is as to whether the words used in the Crown grant confer a wider power on the owner of the mines and minerals over the surface, than the words in the agreement, which admittedly are extended by the implied right to the mineral owner to enter upon the surface and dig for, get and carry away the minerals. Or perhaps we might put the issue thus: Do the words of the Crown grant enable more extensive colliery operations to be carried on to get the minerals than do the words used by the defendant vendor in

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the agreement, extended by the legal implication?"

The precise question therefore upon which it is necessary to pass is whether an exception of "mines and minerals" gives in favour of the grantor rights as large as the rights given by such an exception associated with an express reservation of the right to work in the terms above stated. It is to be noted that the easement given by the reservation involves not only the right to take the minerals found in the lands granted but to enter and occupy the land for the working of all veins containing minerals that may be found in them. I should hesitate before holding that the powers of entry for the purpose of exploration under such a reservation are not greater than those given by a provision of the deed excepting *simpliciter* "mines and minerals."

There are many other points which might be suggested but it is unnecessary to discuss them because in one respect at all events I have come to a definite conclusion that the reservation of the right to work in the terms of the patent confers wider rights than an exception in the more limited form. It is established doctrine that the right to work in such a way as to let down the surface does not arise under an exception of "mines and minerals" unless there is something in the terms of the deed which expressly or by necessary implication gives such a right. That is settled in a series of cases: *Love and Ferens* v. *Bell and Salvin* (1884), 9 App. Cas. 286; *Butterley Co.* v. *New Huckrall Colliery Co.* [1910] A.C. 381; (see especially the judgment of Lord Macnaghten at pp. 385-6). But the rule seems to be also established that where there is an express right to work a specified kind of mineral even in terms less comprehensive than those we have now to pass upon that may, according to the circumstances involve the right to work that kind of mineral notwithstanding this consequence. Astbury, J., in *Welldon* v. *Butterley Co.* [1920] 1 Ch. 130, fully discussed the effect of a disposition where the reserved rights include by express stipulation the power to work the subjacent coal *eo nomine*, and where it is established as a fact that by no known method of working the coal can subsidence be avoided.

The reservation in the patent does not specifically mention coal or any other mineral but there is a reservation of all "mines and minerals" and a right to work all of them. It does not appear to me that a right expressed in these terms is less comprehensive as regards any particular mineral that may be found than a right derived from a stipulation on the same terms but applicable to that

particular mineral alone. I think the judgment of Astbury, J., is convincing and although in express terms it applies only to the case of a reservation of the right to work specific minerals the reasoning does, I think, involve the conclusion that the rights under such a clause as that we have to consider are of the same character; and in that reasoning I concur.

This suffices to dispose of the precise question passed upon by the Appellate Division, 51 D.L.R. 307, and decided by them in a sense adverse to appellant and the result is that the appeal from that decision should be allowed and the judgment dismissing the action set aside.

The action will of course proceed in accordance with the Alberta practice in the usual course to the trial of the other questions which remain to be determined.

I express no opinion of course upon any of these questions nor do I make any suggestion whatever as to the ultimate effect of the present decision upon the determination of the concrete questions in controversy in this litigation.

The appellant is entitled to his costs of the appeals and of the hearing in the Court of first instance.

ANGLIN, J.:—The question to be determined on this appeal is whether a reservation of mines and minerals *simpliciter* in a grant of land carries with it all the rights and privileges, actual and potential, which the reservation of mines and minerals "with full power to work the same, and for this purpose to enter upon and use or occupy the . . . lands or so much thereof and to such an extent as may be necessary for the effectual working of the said minerals or the mines, pits, seams and veins containing the same" found in the grant of the land here in question from the Crown, may confer. For the appellant it is contended that there is a substantial difference in regard to the right to destroy or cause subsidence of the surface and certain other rights.

The implication in the mere reservation of them in a grant of land of the right to win, get and take away the minerals is recognised by a long series of authorities. The powers which this implied right gives are well stated by Kekewich, J., in *Marshall* v. *Borrowdale Plumbago Mines etc* (1892), 8 T.L.R. 275. They may be formulated in terms not dissimilar to those above extracted from the Crown grant.

But that the right so implied is always subject to the condition that its exercise shall not prejudice the surface owner's natural right

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to support is conclusively established by many authorities in English Courts of which the most recent is the decision of the House of Lords in *Thomson* v. *St. Catharine's College, Cambridge etc.*, [1919] A.C. 468. The surface cannot be destroyed however necessary it may be to do so for the practical working of the mines.

The same result follows in the case of an express power to work etc., where it is possible to work the mines and extract the minerals without causing subsidence or destruction of the surface, and the right to do so is not conferred expressly or by necessary implication in the terms in which the power is couched. *Dixon* v. *White* (1883), 8 App. Cas. 833, at 843; *Davis* v. *Treharne* (1881), 6 App. Cas. 460. A modern instance of such a necessary implication is found in *Davies* v. *Powell Duffryn Steam Coal Co.*, [1917] 1 Ch. 488.

As Lord Macnaghten said in the *Butterknowle Case*, [1906] A.C. 305, at p. 313, after referring to the more recent decisions of their Lordships:—"The result seems to be that in all cases where there has been a severance in title and the upper and the lower strata are in different hands, the surface owner is entitled of common right to support for his property in its natural position and in its natural condition without interference or disturbance by or in consequence of mining operations, unless such interference or disturbance is authorised by the instrument of severance either in express terms or by necessary implication. This presumption in favour of one of the ordinary and most necessary rights of property holds good whether the instrument of severance is a lease, or a deed of grant or reservation, or an inclosure Act or award. To exclude the presumption it is not enough that mining rights have been reserved or granted in the largest terms imaginable, or that powers and privileges usually found in mining grants are conferred without stint, or that compensation is provided in measure adequate, or more than adequate, to cover any damage likely to be occasioned by the exercise of those powers and privileges."

But where it is established that the mines cannot be worked or the minerals extracted without entailing such consequences, an express power to work the mines and get the minerals necessarily implies the right to cause subsidence and destruction of the surface. This is the result of the decisions in *Butterley Co.* v. *New Hucknall Colliery Co.*, [1910] A.C. 381; *The Duke of Buccleuch* v. *Wakefield* (1869), L.R. 4 H.L. 377, and *Bell* v. *Earl of Dudley*, [1895] 1 Ch. 182. The authorities on this branch of the law are ably discussed in the recent judgment of Astbury, J., in *Welldon* v. *Butterley Co.*,

[1920] 1 Ch. 130.

In this latest case it is stated to be scientifically established that all systems of coal mining necessarily result in the subsidence of the surface. It may be that in the present case it can be established by evidence that whatever coal lies under the land in question cannot be removed without destruction of the surface. At all events the fact that the express powers reserved in the Crown grant expose the purchaser to the risk of such a result, to which he would not have been subject had the reservation been merely of "mines and minerals," in my opinion suffices to preclude an *a priori* finding that the title offered him is such as the vendor can compel him to accept.

Other differences between the scope of the expressed and implied powers urged by the appellant are probably negatived by the limitative word "necessary" in the clause of the Crown grant. But they, as well as the defences of notice by registration and waiver of the right to repudiate, and the effect of the provision in the agreement that the deed to be given shall be "subject to the conditions and reservations in the original grant from the Crown," can be dealt with more satisfactorily after a full trial of the action.

I am for these reasons, with great respect, of the opinion that the appeal should be allowed and the judgment of dismissal set aside and the action allowed to proceed to trial in the ordinary course. It may be that the plaintiff will then fail to satisfy the Court that whatever minerals may be upon, in or under the land cannot be removed without permanent injury to the surface and that the defendant will on that ground eventually succeed.

The appellant is entitled to be paid his costs of the appeals to the Appellate Division, 51 D.L.R. 307, and to this Court; and the costs of the motion before Scott, J., (1919), 50 D.L.R. 405, should be costs in the cause to the plaintiff in any event thereof.

MIGNAULT, J.:—The issue of law tried on the pleadings in this case is whether the contention expressed in paras. 10 and 11 of the respondent's statement of defence is well founded, for, if it is, the appellant's action was rightly dismissed. These two paragraphs are as follows:—"10. The defendant says that the reservations set out in para. 7 of the statement of claim are the same reservations or less reservations than those implied by reservation of the mines and minerals."

"11. The defendant says that in law, a reservation of the mines and minerals is equivalent to reservation of mines and minerals

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together with full power to work the same and, for this purpose, to enter upon and use or occupy the said lands, or so much thereof and to such an extent as may be necessary for the effective working of the said minerals or the mines, pits, seams and veins containing the same."

The appellant's action claimed rescission of an agreement of sale made with the respondent, on the ground *inter alia*, that although the respondent stated that he could not agree to sell the mines and minerals, which were reserved, he represented that this was the only reservation, whereupon the agreement of sale was signed, reserving to His Majesty, his successors and assigns, all mines and minerals. And the appellant alleges that since the agreement of sale he had discovered by a search made in the Land Titles Office that the reservation of mines and minerals in favour of the Crown was not as represented by the respondent, but was a much more complete reservation, being as follows:—"Reserving thereout and therefrom all mines and minerals which may be found to exist within, upon or under such lands together with full power to work the same, and for this purpose to enter upon and use or occupy the said lands or so much thereof and to such an extent as may be necessary for the effectual working of the said minerals or the mines, pits, seams and veins containing the same."

The appellant's case is that under a bare reservation to the Crown of mines and minerals, while the mines and minerals lying under the surface could be—to use the terms found in most reservations—won, got at and taken away, this could only be done subject to the surface owner's natural right of support of the surface by the subjacent strata, whereas, under the reservation found in the Crown's grant, the Crown could, if necessary, cause a subsidence of the surface; so that the reservation in favour of the Crown is materially different from that represented by the respondent, and much more serious in its effects than a general reservation of mines and minerals would be.

The respondent's contention, in my opinion, is clearly unfounded. I take it as being now well settled that a bare reservation of mines and minerals does not carry with it the right to cause subsidence of the surface. An express reservation, on the contrary, in terms such as those to be found in the grant from the Crown and quoted above, where the mines and minerals cannot be won, got at or taken away without causing subsidence of the surface, carries with it by necessary implication the right to work the mine and

extract the minerals even to the point of depriving the owner of the surface of his right of support by the subjacent strata.

The distinction is well expressed in the head note to the decision of the English Court of Appeal in *Butterley Co. Ltd.* v. *New Hucknall Colliery Co.*, [1909] 1 Ch. 37, as follows, at pp. 37, 38:—"In construing instruments which involve the severance of surface or of a higher seam and subjacent minerals it is presumed that the owner of the surface or of the higher seam intends to reserve his common law right of support; the onus of shewing that this was not the intention of the parties to the deed lies on the mineral owner, and this onus is not discharged by the insertion of full powers of working and carrying away all the minerals expressed in general terms, or of wide provisions for compensation. But when the mineral owner proves not only that the upper seam will not be destroyed, but only injured to such an extent as will admit of compensation, and, further, that it is impossible to get the minerals at all without letting down the upper seam, all reasons for qualifying the general words of the powers of working are gone, and if the terms of the instruments make it clear that it was the intention of the parties that subjacent seams should be worked, it is a necessary implication that they intended that there should be a subsidence of superjacent strata."

As an example of a case where there is only a bare reservation of mines and minerals, I may refer to the recent decision of the House of Lords in *St. Catharine's College, Cambridge* v. *Rosse etc.*, [1919] A.C. 468, where the right to cause subsidence of the surface was denied. And, as shewing where this right can be applied, when the terms of the reservation are sufficiently wide, and the mine cannot be worked without causing subsidence, there is the still more recent decision of Astbury, J., in *Welldon* v. *Butterley Co.*, [1920] 1 Ch. 130. This last case, while not binding on us, is very instructive in shewing where the right to cause subsidence can be considered as a necessary implication of the right to work the mine, and the Judge very exhaustively deals with all the authorities bearing on the matter.

On the issue of law raised in this case by the respondent's plea, I, with respect, think that the appellant is right in complaining of the dismissal of his action. His action should therefore go to trial, and inasmuch as the respondent alleges that he, the appellant, purchased subject to the conditions and reservations in the original grant from the Crown, it should be determined whether this (if

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proved) renders his purchase subject to the express reservation above quoted, and whether it is possible or not to win, get at and carry away the minerals without causing subsidence of the surface. The question will then be whether the appellant has made out a case for rescission of the agreement of sale.

The appeal should be allowed with costs here and in the Appellate Division, costs of motion to the plaintiff in any event.

Appeal allowed.

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Ontario Supreme Court, Appellate Division, Mulock, C.J. Ex., Riddell, Sutherland and Masten, JJ. January 14, 1921.

Arbitration (§III—17)—Construction Contract—Agreement to Submit Differences to Engineer—Decision to be Final—Submission of Question—Decision—No Disqualification Through Misconduct—Finality.

Where parties to a contract agree that should any "differences of opinion.....arise as to the meaning of the contract or of the general conditions, specifications or plans.....or as to any other questions or matters arising out of the contract, the same shall be determined by the engineer.....and his decision shall be final and binding upon all concerned and from it there shall be no appeal" and a difference of opinion arises which is submitted to the engineer who gives his decision and there is no question of his being disqualified by misconduct or incapacity to perform his duty, the parties are bound by his decision.

[Farquhar v. City of Hamilton (1892), 20 A.R. (Ont.) 86; Clarke v. Watson (1865), 18 C.B. (N.S.) 278; Scott v. Liverpool Corp. (1858), 1 Giff. 216, 65 E.R. 891; Jackson v. Barry R. Co., [1893] 1 Ch. 238, followed.]

APPEAL by the Municipal Corporation of the City of Toronto, the defendants in the action, from the judgment of Middleton, J. Reversed.

G. R. Geary, K.C., for appellants.

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

The judgment of the Court was delivered by

MULOCK, C.J.Ex.:—This is an appeal from the judgment of Middleton, J., (1920). 47 O.L.R. 251, in the plaintiff's favour, for $4,630 and costs.

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The material facts are as follows:—

By a contract under seal, bearing date April 7, 1913, made between Howard Scott and Edwin G. Law, the contractors, and the defendant corporation, the contractors agreed to construct certain works for the corporation, the latter agreeing to pay therefor to the contractors the amounts in the contract mentioned.

During the progress of the work Scott transferred his interest under the contract to the plaintiff Law, who now alone is entitled to any moneys payable by the corporation by reason of the contract.

The plaintiff claims to have fully performed the work called for by the contract, and to be entitled to payment of the balance of the contract-price. The defendant corporation contends that the contractor left undone a portion of the work contracted for in the contract, the completion of which cost the corporation the sum of $2,450, and which amount was deducted from the sum agreed to be paid to the contractors.

The trial Judge found against the corporation's contention; hence this appeal which relates to one item only of the judgment in review.

The determination of the issue between the parties depends, I think, upon the answers which should be made to the following three questions:—(a) Was the plaintiff, according to the terms of the contract, bound to perform the work in question? (b) Was the engineer of the defendant corporation entitled, under the terms of the contract, finally to determine the answer to that question? (c) Was the engineer, by reason of his bias or interest, disqualified from so determining it?

The contract is "to perform . . . all the work mentioned in the specifications hereto annexed required in the construction of piers and abutments, and of the bridge flooring, together with all the excavation work necessary in connection with the same, as set out and described in the specifications hereto annexed marked A, required in the erection and completion of the St. Clair avenue bridge in the city of Toronto . . . agreeably to the plans, drawings and specifications and general conditions hereto annexed marked A, prepared for the said works by the city engineer, and signed by the contractors, to the satisfaction, and under the direction and personal supervision of him, the said city engineer, or his assistant engineer in charge of said work, and provide at their own expense such good, proper, and sufficient materials of all kinds whatsoever, to be approved by the said engineer, as shall be proper

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and sufficient for completing and finishing, within the time aforesaid, all the work shewn on the said plans, and mentioned in the said specifications signed by the city engineer and contractors for the sum of," etc.

The contract contains, amongst others, the following provisions:—

"2. The said work shall in all things be performed according to the plans, drawings, and specifications and general conditions, and after the manner herein set forth and explained, which said plans, drawings, and specifications and general conditions are hereby expressly declared to be incorporated in and form part of this agreement as if the same were specifically set out and embodied herein."

"4. The said proprietors (the defendant corporation) covenant . . . with the said contractors that they, the said proprietors, . . . shall and will, in consideration of the covenants and agreements herein contained being strictly executed, kept and performed, by the said contractors, as specified, well and truly pay, or cause to be paid, to the said contractors . . . for all the work to be done by the said contractors . . . the sum of," etc.

The specifications marked A described the work referred to in the contract, in the following words: "Specifications for contract, substructure, and floor, St. Clair avenue bridge, Extent of Work. This contract shall include the supplying of material and labour necessary for the excavation for the piers and abutments, and of the bridge floor except the wooden block pavement which is not included in this contract." This specification also contains the following provision: "The drawings governing this work and forming part of the contract are . . . drawing No. D-9-50 concrete floor details."

Under the heading "Concrete," are the following provisions:—

"All bridge seats shall be finished level and true to elevations, and tops of wing and back walls shall be finished to slope or as shewn on drawings."

"Under the direction of the engineer, the contractor for this work shall set the cast-iron gullies in the floor. These gullies shall be provided by the contractor for the steel work."

"Drainage of bridge floor."

"The contractor for the structural steel work will carry down to a depth of two feet below the finished ground level, the four drain pipes from the floor of the bridge."

The general specifications for bridges, also made part of the contract, contain the following provisions:—

"General Specifications for Bridges: Unless otherwise specified, all bridges built for the City of Toronto shall be designed and constructed in accordance with these specifications. Special specifications will generally be issued for each proposed bridge, giving type of bridge, general dimensions, and such other information as may be necessary for the contractor to tender. Such special specifications shall govern on any point wherein they conflict with these general specifications."

"3. Any drawing that may accompany the specifications referred to in the preceding clause, shall form part of such specifications, and anything necessary for the construction of the work which may be called for in the drawing and omitted in the specification, or *vice versâ*, shall be executed and carried out as if fully called for in both."

"General Conditions. The general conditions referred to in the contract contain, amongst them, the following provisions:—

"Z.1. The work required to be done by the contractor under this contract comprises . . . the formation, construction, completion, and maintenance of the several works referred to in the plans and specifications relating thereto, and in these general conditions. The several parts of the plans, specifications, and these general conditions of the contract shall be taken together to explain each other, and to make the whole consistent, and if it be found that anything has been omitted or misstated which is necessary for the proper performance and completion of any part of the work contemplated, the contractor will, at his own expense, and without making any extra claim therefor, execute the same, as if it had been properly described, and the decision of the engineer in regard thereto shall be final, and the correction of any such omission or misstatement shall not be deemed an addition to or deviation from the works hereby contracted for; nor shall such decision or correction entitle the contractor to an extension of time for the completion of the contract."

"Z.15. Anything whatever which may be imperfectly specified or imperfectly shewn on the plans, or shewn on the plans and not specified, or which may be specified and not shewn, must be taken, considered, and done as if it were both shewn and specified."

"Z.19. Should any discrepancies appear, or differences of opinion, or misunderstanding arise as to the meaning of the contract

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or of the general conditions, specifications, or plans, or as to any omissions therefrom or misstatements therein, in any respect, or as to the quality or dimensions or sufficiency of the materials, plans, or work, or any part thereof, or as to the due and proper execution of the works, or as to the measurement of quantity or valuation of any works executed or to be executed under the contract, or as to extras thereupon, or deductions therefrom, or as to any other questions arising out of the contract, the same shall be determined by the engineer, who shall have the right at all reasonable times to visit . . . and his decision shall be final and binding upon all parties concerned, and from it there shall be no appeal; and the contractor shall immediately, when ordered by the engineer, proceed with and execute the works, or any part thereof, forthwith, according to such decision, and with such additions to or deductions from the contract-price as provided under the terms of the specifications, contract, and general conditions, without making any claim for any extension of time in completing the contract, unless arranged in writing with the engineer as herein provided."

"Z.21. . . . In case of the contractor's failure to finish the work or works, properly and fully as required, or in case of the work, or any part thereof, being taken out of his hands, as provided in these conditions, the engineer may proceed to finish the work for him as his agent in this respect, and at his expense, or proceed as provided in section Z.34."

"Z.40. . . . The word 'plans' means all plans, profiles, drawings, sketches, or copies thereof, exhibited, used, or prepared for or in connection with the work embraced under the contract."

The question between the parties is, whether the contract whereby the plaintiff agreed to supply the material and labour necessary for the "bridge floor except the wooden block pavement" included "one-half inch mortar and the asphalt mastic," as shewn in the plan "D.9-50," and also referred to in the marginal explanatory notes opposite the detailed drawing of the bridge.

Mr. Kilmer contended that certain steel work formed a portion of the "bridge floor," and that a literal construction of the contract would require the contractor to supply this steel work; but, inasmuch as the defendant corporation admitted that the steel work formed no part of the work covered by the contract, it might also be fairly contended that the plaintiff was not bound to perform all the other work the details of which appear on plan "D.9-50." Irrespective of the details which appear on that plan and the marginal

notes, and which are, I think, a complete answer to Mr. Kilmer's argument, inasmuch as the contract implies that the structural steel work is to be the subject of another contract, there is, I think, no force in such an argument. If the Court had jurisdiction to determine what work was covered by the contract, my opinion would be that it included the debatable work.

The plan and marginal explanations shew, resting on certain supporting material, a structure which represents, I think, the "bridge floor" mentioned in the contract. This "bridge floor" is thus described in the marginal notes: a seven-inch concrete slab, above that a covering of three ply, 8 oz. burlap asphalt, above that asphalt mastic, above that one half inch of mortar, and above that four-inch wood block pavement. It appears to me quite clear that the work thus described constitutes the "bridge floor" mentioned in the contract, the whole of which work, excepting the wood block pavement, the contractors were bound to perform. These details do not suggest that the structural steel is part of the "bridge floor" expressed in the contract. If it was intended that this steel work was to be deemed part of the "bridge floor," one would have expected the contract, plans, and specifications to have so provided.

By the contract the parties agreed (condition Z.19) that should any "difference of opinion . . . arise as to the meaning of the contract or of the general conditions, specifications, or plans . . . or as to any other questions or matters arising out of the contract, the same shall be determined by the engineer . . . and his decision shall be final and binding upon all concerned, and from it there shall be no appeal." If the difference in question is one of the matters thus referred to the engineer for his final determination, then the Court has no jurisdiction to deal with it. The language of the submission is comprehensive. Every difference of opinion as to the meaning of the contract, specifications, or plans, or as to any other thing or matter arising out of the contract, is submitted to the final decision of the engineer, to the exclusion of the jurisdiction of the Court; and I am of opinion that the difference in question is one of the matters covered by the submission. This difference is an honest one, the plaintiff interpreting the meaning of the plans and specifications one way, the defendant corporation another. The engineer has rendered a decision in favour of the defendant corporation; and, unless he is disqualified by misconduct or incapacity to perform his duty, the parties are bound by such decision.

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The plaintiff's counsel did not argue before us that the engineer had been guilty of misconduct or was incapable of performing his duty; in fact the only reference to such disqualification was by Mr. Geary, who contended that there was no evidence of misconduct on the part of the engineer, a view which, I think, is fully established by the evidence. When the parties agreed to submit any difference to his final decision, he was, to the knowledge of the contractors, a paid employé of the defendant corporation; and, without in the slightest degree questioning his sense of fairness, it may be presumed that he entertained a bias in favour of the defendant corporation. Nevertheless such relationship and bias do not warrant the inference that he was incapable of honestly deciding any difference between the parties: *Farquhar* v. *City of Hamilton* (1892), 20 A.R. (Ont.) 86. He was bound to act in good faith towards both parties, and if he did so act his decision is not reviewable by the Court: *Ormes* v. *Beadel* (1860), 2 DeG.F.&J. 333, 45 E.R. 649, 30 L.J. (Ch.) 1. Where the parties agree to accept as final the engineer's decision, and he reaches an honest one, they are bound by it: *Clarke* v. *Watson* (1865), 18 C.B. (N.S.) 278, 144 E.R. 450; *Scott* v. *Liverpool Corporation* (1858), 1 Giff. 216, 65 E.R. 891, [affirmed 3 DeG.&J. 334, 44 E.R. 1297]; *Jackson* v. *Barry R.W. Co.*, [1893] 1 Ch. 238, at pp. 246 and 247.

I have carefully studied the contract, and the evidence, including the plans and specifications, and I am satisfied that the engineer acted in good faith, and that he was fully capable of rendering a fair decision. Such a decision, even if erroneous, is binding, but I do not think it was erroneous. So far as I am competent to form an opinion, his decision was, I think, fully justified by the contract and what appears on plan D-9-50 and the marginal notes.

For these reasons, I am of opinion that this appeal should be allowed with costs, and that the judgment entered for the plaintiff should be reduced by the said sum of $2,450.

Appeal allowed.

REX v. DELF; REX v. FAWCETT; REX. v. KING.

ALTA.

S. C.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ. March 10, 1921.

Elections (§IV—90)—Medicine Hat Charter—Construction—Time for Taking Proceedings against Municipal Officer.

Under sec. 6, Title IX. of the Medicine Hat charter and amendments the summing up and declaration of the result by the returning officer is a material part of the election, which does not end with the close of the polls but continues until this has been done, and the first formal and official announcement of the result is made by the returning officer. In computing the six weeks mentioned in the section, the day on which the election ends is to be excluded and the application may be made at any time within the six weeks commencing on the following day.

Where an alderman's election is not legal because the provisions of sec. 2, Title IX of the Act have not been complied with, no order for the election having been made by the council, the election must be taken to be the date of nomination which was also the date of the declaration of election and the six weeks as provided in sec. 6, Title IX will run from that date.

APPEAL from the trial judgment in *quo warranto* proceedings against the defendants, aldermen of the city of Medicine Hat. Varied.

S. G. Bannan, for appellants.

G. M. Blackstock, for respondent Fawcett.

C. S. Blanchard, for respondents King and Delf.

HARVEY, C.J.:—I agree with my brother Beck as respects King's case but I am unable to agree with him that the election was not completed till the day after polling.

I can find nothing in the Medicine Hat charter, 1906 (Alta.), ch. 63, to lead me to the conclusion that in the case of these respondents there was anything done or required to be done after the day of polling that was essential to their election. If there had been a tie and a casting vote necessary, of course, the election would not have been completed until that vote had been given but to hold that the election is not complete until the declaration is made by the returning officer seems to me to involve the holding that it is not complete until the completion of all proceedings, which are taken under the authority of the charter, are completed, which would mean in the case of a recount, until the recount is completed.

The fact that the result may not be finally and definitely known cannot alter the fact that the result cannot be changed after the day

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of the poll, though there may be a difference of opinion as to what the result is.

If the validity of the election or the right of the candidate to be deemed elected depended on the declaration of the returning officer, I would see reason for considering it part of the election but I find nothing in the Medicine Hat charter to support that view and I feel little doubt that if for any reason the returning officer failed to declare the result it would not prevent the candidate receiving the requisite vote from acting as an elected alderman.

This view is supported also by some of the provisions of the charter. The notice of the poll in sec. 6, Title V, to be given by the returning officer ends with the notice that he will on the date named "sum up the votes and declare the result of the election." Then sec. 33, Title VI, shews that all he does is to add up the votes as given in the statements made by the deputy returning officers on the day of the polling and "declare to be elected the candidate having the highest number of votes for each office to be filled by the election." Section 34 provides that if there is an equality of vote he shall give a casting vote to decide the election. Quite clearly the election in this last case is not decided, or, in other words, is not completed until the casting vote is given, but I see no reason to infer that the election in the other cases is not decided until he makes his declaration of the result. If there is any inference to be drawn it seems to me it should be the converse.

If the election was over, as I think it was in these cases in view of the terms of the charter, on the polling day, the application for a fiat was not made in time and was properly set aside.

I would, therefore, dismiss all of the appeals with costs.

STUART, J.:—In these cases I agree with the result arrived at by the other members of the Court in the King case.

In regard to the Delf and Fawcett cases I confess that the view adopted by Harvey, C.J., has appealed to me very strongly but on final consideration I have come to the opposite conclusion.

It is well settled that the captions of an Act can be looked at for purposes of interpretation. Section 33, which enacts that the returning officer shall cast up from the statements received from the deputies the number of votes for each candidate is part of Title VI of the Act which bears the caption "Elections, Procedure." This seems to indicate that the casting up of the total result is part of the procedure of the election. It is true that the provisions for a recount before a Judge are under the same caption but it is un-

questionable that the declaration of the returning officer is the first official announcement of the result. The recount by the Judge seems to be rather analogous to an appeal. Just as the trial of an action technically continues until the judgment is entered, so I think the election continues until the first formal and official announcement of the result is made.

Upon consideration I feel unable to assent to the view that the election is over as soon as the polling is closed. It seems to me that there can be no real decisive choice, that is effective choice, until the individual votes are finally counted and the majority ascertained. If immediately after the close of the polling a physical catastrophe intervened, such as earthquake or fire, so that the ballots were destroyed and there was no possibility of the result being ascertained, it could surely not be said that there had been an election or that any one could properly sit as alderman as the result of it. Then the deputies under sec. 25 do count up the votes at their respective polls and make written statements of the result. But no one officially has any right to these statements except the returning officer. Except from pure hearsay, no one can say what the total result is. That can only be legally ascertained by the returning officer's act under sec. 33 in adding up the figures received in the various statements. The act of the returning officer in adding up these results is, to my mind, just as essential as the acts of the deputies in counting the ballots at their respective polls, and the absence of this act of the returning officer, for whatever reason, would be just as fatal to the real conclusion or ending of the election as the failure of the respective acts of the deputies would have been. In other words, I think official knowledge and ascertainment of the result is as much an essential part of the election as the secret and unascertained acts of the voters in making and depositing their ballots. A choice by the electors which is unknowable seems to me not to be a complete election. The revelation of what they have done is surely an essential part of the process.

Furthermore when the statute gives a person a certain time within which he may take proceedings against the election of a candidate surely it does not intend that that time should begin to run until it is officially known that the person to be attacked has been elected.

I therefore agree with Beck, J., in these two cases and adopt his view also with respect to the question of the affidavits.

I agree also with the disposition of costs proposed by Beck, J.

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BECK, J.:—The three defendants were elected aldermen of the city of Medicine Hat. The Medicine Hat charter is chap. 63 of the Statutes of Alberta 1906, amended in 1910, 1911-12, 1913 (1st sess.), 1913 (2nd sess.), 1914, 1915, 1916, 1919.

Proceedings in the nature of *quo warranto* were taken against each of the defendants. The section of the charter calling for interpretation is sec. 6 of Title IX which reads as follows:—"If within six weeks after the election a relator shews by affidavit to a Judge reasonable ground for supposing that the election was not legal or was not conducted according to law, or that the person declared elected thereat was not duly elected, or for contesting the validity of the election of the Mayor or of any Alderman or in case at any time a relator shows by affidavit to a Judge reasonable ground for supposing that a member of the Council has forfeited his seat or has become disqualified since his election and has not resigned his seat, the Judge may grant his *fiat* authorising the relator upon entering into a sufficient recognisance, as hereinafter provided, to serve a notice of motion in the nature of a *quo warranto* to determine the matter."

Nominations were made on Monday, December 6; the polling took place on Monday the 13th, and the Returning Officer made his declaration of the result on Tuesday, December 14. The public notice of a public meeting of the electors for the purpose of receiving nominations called for nominations of "candidates for the offices of mayor for the year 1921, and four aldermen from the city at large for the years 1921-1922 and one alderman for the year 1921." King was the only person nominated for the office of alderman for 1921 and was declared elected presumably forthwith in accordance with sec. 3 of Title V. This election of an alderman for the year 1921 was intended to fill a vacancy caused by the resignation of one Huckvale. The provisions relating to elections in such cases are contained in sec. 2 of Title IX. I shall have to refer to these and the facts relating to Huckvale's resignation later on.

The other two defendants, Delf and Fawcett, were elected at the polling held on December 13, and were declared elected on December 14. Application was made to Hyndman, J., for a fiat in each of these three cases on Tuesday, January 25, and were granted on that day. On February 7 applications came before McCarthy, J., to set aside the fiats granted in each case by Hyndman, J., on the grounds: (1) That the fiat was not granted within six weeks after the election. (2) That the affidavit of the relator was not duly sworn.

McCarthy, J., set aside the fiats. This is an appeal from his decision.

I deal with the first objection as applicable to the two defendants Delf and Fawcett.

As I have stated the polling took place on Monday, December 13; the declaration was made on Tuesday the 14th; the fiats of Hyndman, J., were given on Tuesday, January 25; and the question is whether the fiats were given "within six weeks after the election."

It seems clearly settled that in calculating the time "after" an event, the day of the event, with some extraordinary exceptions not applicable here, is to be excluded. Hals., vol. 27 *tit* "Time," p. 449, secs. 888 et seq.

If therefore the "election" was on the date of polling—Monday the 13th—the six weeks expired on Monday, January 24. If, however, the "election" was on the date of declaration—Tuesday the 14th—the six weeks did not expire until Tuesday the 25th, and the fiats were granted within the time limited.

The Ontario Municipal Act, R.S.O. 1914, ch. 192, sec. 162, corresponds with the section of the Medicine Hat charter which I have quoted. The words with which it opens are the same: "If within six weeks after an election." In Robson & Hugg's Municipal Manual (1920) at p. 214 in a note upon these words it is said:—"The question under 162 is when does an election end? It would seem that the summing up and declaration of the result by the returning officer on the day following the polling day as provided in sec. 126, [Charter tit VI, sec. 33] was a material part of the election; and it certainly is the date when the summing up discloses that two or more candidates have an equal number of votes, for then the clerk (returning officer) under sec. 127, [Charter tit VI, sec. 34] must give a casting vote. In computing the six weeks the day on which the election ends must be excluded and the application can be made at any time within the six weeks commencing on the following day. A part of a day will not be considered."

I approve of the opinion which I have quoted and therefore hold that the applications in the cases of Delf and Fawcett were commenced in time.

I think it has not been established that the affidavits upon which the fiats were obtained, which are regular on their face, were not properly sworn.

McCarthy, J., however appears to have set aside the fiats on a ground which was not taken in the notice of motion before him and

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as a foundation for which nothing appears in the material before us which we understand comprises all the material before him; but which seems to have been matter within his own knowledge, namely, that an application for these fiats was first made to himself; that he had refused it on the ground that the affidavits were defective and insufficient. He held that such defects could not be cured and a new application made upon new material, which is what was done in the present case, and it was on the ground that he set aside the order of Hyndman, J. I think that this view cannot be sustained but that it is permissible to make application for a fiat, after the refusal on the ground of insufficiency of the material only on a former application, provided of course that the last application is made within the six weeks. The question is discussed at some length in the cases cited in the new work already quoted, Robson & Hugg's Municipal Manual, at pp. 216 and 217.

In the cases therefore of Delf and Fawcett, I would allow the appeal with costs.

The case of King requires separate consideration.

In his case I think the "election" must be taken to be the date of nomination—December 6—which was also the date of the declaration of his election. In his case therefore the fiat was clearly not granted within the limited time.

The election of King was clearly "not legal" in view of the provisions of Title IX, sec. 2, which provides that in case of resignation, etc., the council at its next meeting shall order an election and the member so elected shall hold office for the unexpired period of the member whose place he was elected to fill; provided, etc.

Huckvale's letter of resignation is dated November 25 and states that his resignation is to take effect at the end of the year. The municipal year would appear to end on December 31, or if not, on the 1st Monday in January, or if that day happened to be a public holiday, on the next subsequent day not being a public holiday. (Title X, sec. 1).

The council purported to accept the resignation at a meeting held at 8 p.m. on December 6, the time of nomination fixed by the public notice—which was dated November 26—being 11 a.m. of December 6. There was, so far as appears, no order by the council for an election to fill the vacancy caused by Huckvale's resignation; and if there had been it probably would have been ineffective if passed before the resignation took effect.

King's election is not attacked, as are those of Delf and Fawcett,

on the ground of want of qualification or disqualification, but only on the ground that his election was "not legal." It would seem then that the quoted section applies to it and that it was necessary that the proceedings be commenced within six weeks.

It seems to be the policy of the Legislature and of the Courts to disregard irregularity where it does not appear that any harm has resulted. It would seem that the Judge upon an application for a fiat has a discretion—judicial of course—to refuse a fiat (Hals., vol. X, tit Crown Practice, sec. 5 Quo Warranto, p. 134, para. 272), and I am not sure that in the case of King had the application been made within the limited time the fiat might not properly have been refused. (Hals. ib and Robson & Hugg, pp. 215 et seq.)

I think therefore, the fiat in King's case was properly set aside but I would do so only on the ground that the fiat was not granted within the proper time. In his case I would therefore dismiss the appeal with costs.

Judgment varied.

CHEESEWORTH v. CITY OF TORONTO.

Ontario Supreme Court, Orde, J. January 12, 1921.

Injunction—(§II—75)—Application for Permit for Dry-cleaning Works—Approval of Property Committee—Adoption by City Council—Report of Board of Control Recommending Rescission—Action to Restrain Municipal Corporation from Adopting.

A report of the Board of Control of the City of Toronto recommending to the Council that a resolution of the Property Committee which the Council had adopted granting a permit for a dry-cleaning plant be rescinded, is sufficient on which to found an action for an injunction to restrain the City of Toronto from adopting the report of the Board of Control.

MOTION by the plaintiff to continue an interim injunction, turned by consent into a motion for judgment.

W. D. McPherson, K.C., for plaintiff.

C. M. Colquhoun, for defendants.

ORDE, J.:—It was agreed that this motion to continue the interim injunction be turned into a motion for judgment.

The plaintiff, desiring to establish a dry-cleaning plant on

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certain premises in rear of Pendrith St., entered into negotiations with the owners for the purchase thereof, and it was arranged that the owners should apply to the defendant corporation for the usual permit. This application was considered and approved by the Property Committee of the City Council, and the Committee's recommendation was adopted by the City Council on May 25, 1920. The plaintiff thereupon completed the purchase of the property, and took steps to erect her buildings. To this certain persons residing in the neighbourhood took strong objection; and, in addition to commencing an action for an injunction to restrain the plaintiff from erecting the building, made application to the Property Committee to rescind the recommendation which it had previously made. After a motion for an interim injunction in that action had been dismissed, the action was discontinued, but the effort to have the recommendation of the Property Committee and the Council's resolution of May 25, 1920, rescinded was continued, with the result that the Board of Control, by its report No. 27, dated December 17, 1920, recommended to the Council that the resolution of the Property Committee which the Council had adopted on May 25, 1920, be rescinded.

This action was thereupon brought for an injunction to restrain the defendant corporation from adopting the report of the Board of Control.

Counsel for the defendant opposed the motion on the ground that the action is premature; that the report of the Board of Control is a mere report having no legal effect until its adoption by the City Council; that it does not follow that it will be adopted by the Council; and that until the Council has adopted it the plaintiff had no cause for complaint. There is, of course, much force in the argument that a report or recommendation from the Board of Control is ineffective until it has been adopted by the Council, and the argument would have much greater force if the Council had not already, by its resolution of May 25 last, come to a final and definite decision in the matter, upon which the plaintiff had acted. It may well be urged in answer to the plaintiff's action that, if the resolution of May 25 binds the defendants, so as to render futile any further interference with the plaintiff's building operations and to be a complete defence to any action which the defendants might take to restrain the plaintiff, then the plaintiff ought to await such action and not seek to forestall it by an injunction. But the City Corporation is a powerful body with power not of an administrative but of a legislative character, and the threat or suggestion of pro-

ceedings to prevent the plaintiff from building may seriously hamper the plaintiff in borrowing money to complete her building or in otherwise dealing with her property, and may cast a cloud upon her title.

Counsel for the defendants does not suggest that if the Council should see fit to rescind its previous resolution, the Council could in any way make its rescinding resolution effective. I must assume, therefore, that the recommendation of the Board of Control, if adopted, can have no other effect than to embarrass the plaintiff. The rescission of its earlier resolution will contain a veiled threat of some action or proceeding against the plaintiff, and may well make the impression in the minds of persons dealing with her property that her right to erect and maintain the cleaning plant is without legal foundation.

Under the wider jurisdiction granted to the Court to grant an injunction "in all cases in which it appears to the Court to be just or convenient" to do so (Judicature Act, R.S.O. 1914, ch. 56, sec. 17), the Court, while it must be governed by legal and equitable principles, is not restricted to cases where there is no other remedy: *Aslatt* v. *Corporation of Southampton* (1880), 16 Ch. D. 143. Nor must it wait until the other party has entered upon the doing of the injurious act. If there is reasonable ground to believe that the threat may be carried into operation, an injunction may be granted.

Admitting that the rescission of the resolution of May 25 last may so injure the plaintiff as to cast a doubt upon her title to her property, and therefore justify an injunction to restrain the defendants from acting upon it, does the recommendation of the Board of Control constitute a sufficiently authoritative threat of the impending course of action on the part of the Municipal Corporation as to justify interference at that stage? I am of the opinion that it does. If, instead of a Municipal Corporation, the defendants were a joint stock company, whose directors had passed a resolution which, if carried into effect, would injure the plaintiff, but which required the approval of the shareholders before the company could act upon it, the mere passage of the directors' resolution would be sufficient ground upon which to apply for an injunction to restrain the company from committing the threatened injury. There is no substantial difference between such a case and the present one.

There will, therefore, be judgment for the plaintiff permanently restraining the defendants and the Council thereof from rescinding

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the resolution of the Council of May 25, 1920, in question herein, or the recommendation of the Property Committee approving of the application to erect a dry-cleaning plant upon the property in question. The defendants will also pay the plaintiff's costs.

Judgment for plaintiff.

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GWIN v. BACKUS AND DRAPER.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon, JJ.A. March 30, 1921.

Garnishment (§IC—17)—Mortgage Debt—Agreement Between Mortgagor and Mortgagee—Payment by Mortgagor of Encumbrances—Credit Allowed on Mortgage—Evidence—Admissibility—Garnishable Debt.

Service of a garnishee summons binds only a debt which the judgment debtor could himself enforce against the garnishee for his own benefit and so where a purchaser has given a mortgage back for part of the purchase price of the land purchased, and it is verbally agreed between such purchaser and the vendor that the purchaser will assume and pay off encumbrances against the property the amount of which is to be credited on the mortgage, evidence of the agreement is admissible and the only garnishable debt is the balance of the money secured by the mortgage after deducting the encumbrances.

[Webster v. Webster (1862), 31 Beav. 393, 54 E.R. 1191; General Horticultural Co.; Ex parte Whitehouse (1886), 32 Ch. D. 512; Davis v. Freethy (1890), 24 Q.B.D. 519, referred to.]

APPEAL by plaintiff from a District Court judgment in a garnishee action. Affirmed with a variation as to costs.

P. H. Gordon, for appellant; *C. M. Johnston*, for respondent.

The judgment of the Court was delivered by

LAMONT, J.A.:—On November 6, 1919, the plaintiff sued the defendant in the District Court, and immediately thereafter took out a garnishee summons directed to one L. S. Draper, garnishee, which was served on Draper November 17, 1919. In February, 1920, the plaintiff obtained judgment against the defendant for $377.88. In answer to the garnishee summons, Draper filed the following statement:—"I made a mortgage for $500.00 against the S.W. 35-16-18-W3rd in favour of Henry Backus which falls due July 23/20 with interest at 8% per annum. At the time the said mortgage was made it was agreed between Henry Backus and myself that the following

encumbrances against the title to the land should be paid by me and set off against the aforesaid mortgage."

Then followed a statement of the taxes, seed grain liens and mechanics' liens registered against the mortgaged premises. On April 26, 1920, before any money was payable on the mortgage, the plaintiff applied for and obtained an order directing an issue as to the liability of the garnishee. The matter came on for hearing before the Judge of the District Court on June 7. Affidavits made by the defendant and Draper were read. These affidavits established that on July 25, 1919, the defendant sold to Draper the S.W. 1/4-35-16-18-W3rd; that Draper paid all the purchase price excepting $500, which was retained for the purpose of paying off certain encumbrances registered against the property, the exact amount of which was not then known to either; that it was agreed between the parties that Draper should give the defendant a mortgage for $500, balance of the purchase money; but that Draper should ascertain the total amount of the registered encumbrances, pay off or assume the same, and the amount thereof was to be credited on the mortgage, and the balance only was to be payable to the defendant. The District Court Judge issued a fiat directing a reference to the Clerk of the Court to inquire into the state of account between the defendant and Draper. The certificate of the Clerk, dated September 18, 1920, shews that the registered encumbrances unpaid amount to $296.60, leaving a balance of $249.92 due to the defendant in respect of the mortgage; which amount the Judge, on September 27, directed the garnishee to pay into Court, subject to the payment of certain costs. From that order the plaintiff now appeals.

The chief grounds of appeal are: (1) that, in as much as the mortgage was an instrument under seal, the affidavits of Draper and the defendant setting out the agreement between them in respect of the payment of the encumbrances by Draper, should not have been received, as they tended to vary the terms of the mortgage; (2) that the garnishee should have been ordered to pay the full amount of the mortgage moneys and interest without deducting therefrom the encumbrances; (3) that the plaintiff should have been given costs against the garnishee.

The plaintiff, in my opinion, has misconceived the rights of a garnishor. The Rules of Court provide that the service of a garnishee summons shall bind any debt due or accruing due from the garnishee to the defendant or judgment debtor. The debt, however, must be a garnishable debt, and must be one which the judgment

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debtor could himself enforce for his own benefit, for a creditor acquires no larger rights than those of his debtor. *Webster* v. *Webster* (1862), 31 Beav. 393, 54 E.R. 1191.

Not only must the debt be enforceable by the judgment debtor, but if there are rights or equities affecting a garnished debt as between the judgment debtor and the garnishee, the garnisher can attach the debt only subject to such rights or equities.

In re *General Horticultural Co., Ex parte Whitehouse* (1886), 32 Ch. D. 512, the Court held that:—"A garnishee order under Rules of Supreme Court, 1883, Order XLV, binds only so much of the debt owing to the debtor from a third party as the debtor can honestly deal with at the time the garnishee order *nisi* was obtained and served; consequently it is postponed to a prior equitable assignment of the debt, even in the absence of notice."

This statement of the law was approved by the Court of Appeal in *Davis* v. *Freethy* (1890), 24 Q.B.D. 519, where, at p. 524, Fry, L.J., said:—"Such a garnishee order would bind so much as and no more than the judgment debtor could honestly deal with without interfering with the interests of third persons." See also *Norton* v. *Yates*, [1906] 1 K.B. 112.

As the plaintiff could not enforce the mortgage in question to any greater extent than his judgment debtor, the question to be determined is, could the defendant himself have enforced payment of the mortgage by Draper without crediting thereon the encumbrances which Draper paid or assumed in pursuance of the agreement between them. I am very clearly of opinion he could not. The defendant, by agreeing to have the encumbrances which he was under obligation to pay settled by Draper and credited on the mortgage, obtained a mortgage for the entire balance of the purchase money, which he would not have obtained, without having the title first cleared, but for such agreement. To permit him afterwards to collect the full purchase money with the encumbrances still registered against the property, would be to permit him to perpetrate a gross fraud on Draper.

It seems to me clear that the plaintiff, under his garnishee summons, can acquire no higher right in respect of the mortgage than he would have had if the defendant had assigned the mortgage to him.

In *Dixon* v. *Winch* (1899), 81 L.T. 111, Cozens-Hardy, J., at p. 113, says:—"It is well settled that, where a mortgage is transferred without the privity of the mortgagor, the transferee takes

subject to the state of account between the mortgagor and mortgagee at the date of the transfer."

Counsel for the plaintiff contended that, as the mortgage in question had been sealed and delivered, parol evidence was not receivable to shew that it had been agreed that the encumbrances registered against the property were to be paid or assumed by Draper and the total amount thereof credited on the mortgage, or that any agreement had been made by which the defendant was not to receive the full $500 and interest, and he cited as authority therefor *Morrison* v. *Cybulak*, [1919] 1 W.W.R. 330, where it was held that parol evidence was inadmissible to establish a verbal agreement between a mortgagor and her husband, the mortgagee, made at the time the mortgage was given, by which the parties agreed that the mortgage was not to become payable until the wife made a sale of the land. That decision was based on the rule that parol evidence is inadmissible to contradict or vary the terms of a written agreement.

In answer to this contention, it seems to me only necessary to point out that if the defendant himself had brought an action to enforce payment of the mortgage, evidence of payments made by Draper on account of the mortgage would have been clearly admissible, and it would make no difference whether those payments had been made to the defendant or to some other person at his request or with his concurrence.

In *McQuarrie* v. *Brand* (1896), 28 O.R. 69, the head note is as follows:—"It is a good defence to an action by the personal representatives of the payee against the maker of a promissory note for value received, that at the time of the making of the note an oral agreement was entered into between the payee and the maker which has been fully performed, that if the latter would pay interest on the note, and, although not liable to do so, would support for life a relative of the former, the note should be considered paid; and evidence to the above effect was held admissible in an action on the note brought after the complete performance of the agreement by the defendant."

In the present case, Draper, by paying off or assuming the encumbrances registered against his property has carried out the oral agreement made between himself and the defendant, and the mortgage is, to the extent of those encumbrances, discharged.

As to the case of *Morrison* v. *Cybulak*, *supra*, while it is no doubt established law that where a document purports to be the

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final record of the agreement of the parties, parol evidence is generally inadmissible to contradict or vary its terms, yet it is equally established law that parol evidence is admissible to shew that a written document which purports to be unconditional was in fact executed with the intention that it should only take effect as a contract upon the performance of a condition precedent, or was not intended to operate from the time of its execution, but from some future uncertain time. If the defence in the above case was that the mortgagor and mortgagee at the time the mortgage was made agreed that it was to become operative only in case the wife sold the land, evidence of such agreement was, in my opinion, admissible.

Pym v. *Campbell* (1856), 6 El. & Bl. 370, 119 E.R. 903; *Davis* v. *Jones* (1856), 17 C.B. 625, 139 E.R. 1222; *Pattle* v. *Hornibrook*, [1897] 1 Ch. 25; *Ontario Ladies' College* v. *Kendry* (1905), 10 O.L.R. 321; *Standard Bank of Canada* v. *Wettlaufer* (1915), 23 D.L.R. 507, 33 O.L.R. 441; *Molsons Bank* v. *Cranston* (1918), 45 D.L.R. 316, 44 O.L.R. 58.

I am, therefore, of opinion that the District Court Judge was right in holding that the only debt garnishable in the case was the balance of the money secured by the mortgage after deducting the encumbrances.

In his order the Judge directed that the garnishee's costs be deducted from the amount ordered to be paid into Court, and that all the costs both of plaintiff and garnishee be costs against the defendant Backus. This latter direction cannot stand.

If the plaintiff and garnishee desire to indulge in costly litigation they must do so at their own expense, and not at the expense of the defendant who was not a party to the issue.

In allowing the garnishee his costs as against the plaintiff, the Judge, in my opinion, was right. On June 5, when a reference was directed as to the amount of the encumbrances, there was nothing payable under the mortgage. There was at that time no obligation on the part of the garnishee to ascertain the exact amount which was to be credited on the mortgage as a result of his assumption of the encumbrances. He had informed the Court as to his liability and was not in default in respect of any duty devolving upon him. The issue was rendered necessary by the refusal of the plaintiff to recognise the garnishee's right to set off the encumbrances against the mortgage, which was the only right the garnishee claimed and in which he has entirely succeeded. The plaintiff, therefore, should pay the garnishee's costs, which costs may be retained out of the

moneys to be paid into Court as directed by the trial Judge.

The defendant, however, is entitled to have credited on his judgment the full $249.92, less the costs of issuing and serving the garnishee summons.

The appeal therefore should be dismissed with costs, but the judgment below as to costs should be varied as I have indicated.

Appeal dismissed.

SANDLOS v. TOWNSHIP OF BRANT.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Latchford, Middleton and Lennox, JJ.
January 28, 1921.

Highways (§IVA—155)—Continuous Neglect to Repair—Accident—Damages—Liability to Township Municipality—Ontario Municipal Act R.S.O. 1914, ch. 192—Notice.

A township municipality which puts in a tile drain under a highway and then for many years makes no proper inspection or repairs, until the tiles become broken and insecure and unable to support the traffic on the road, is guilty of negligence and liable in damages under the Ontario Municipal Act to an automobile owner whose car breaks through the culvert. No question of notice or knowledge arises in such a case as the accident does not arise from some sudden injury or damage to the highway.

[City of Vancouver v. Cummings (1912), 2 D.L.R. 253, 46 Can. S.C.R. 457; Jamieson v. City of Edmonton (1916), 36 D.L.R. 465, 54 Can. S.C.R. 443, applied; See Annotation 46 D.L.R. 133.]

APPEAL by the Municipal Corporation of the Township of Brant, the defendants, from the judgment of Rose, J., in favour of the plaintiff, in an action tried without a jury at Brantford.

The action was brought to recover damages for the breach of the defendants' statutory duty to keep in repair a highway in the township, by reason of which, as the plaintiff alleged, he was injured and his motor vehicle damaged.

The trial Judge found that the highway was out of repair and that the plaintiff's injury and damage were caused thereby, and he assessed the damages at $500, for which sum, with costs, he directed that judgment should be entered for the plaintiff.

G. H. Kilmer, K.C., for appellants; *O. E. Klein*, for respondent.

MEREDITH, C.J.C.P.:—It is to be regretted that this case was not determined, as nearly all such cases can and should be, upon a

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positive finding, upon the whole evidence, whether the defendants were, or were not, blamable and answerable in damages, in law, for the injuries which the plaintiff sustained.

But the case was not so determined at the trial. It may be difficult to understand the principles which the trial Judge thought supported all that he said regarding the nature of a defendant's liability in such a case as this; but the result of it seems to be that, in his opinion, the defendants are liable unless they prove that the injuries sustained were not caused by any failure on their part to observe and perform the duty of keeping in repair the highway in question—among others—imposed upon them by statute.

This, it need hardly be said, is a startling proposition to those who have long been concerned in the administration of justice in this Province; but the trial Judge is not altogether answerable for it: much the same thing has been said somewhat recently by Judges in the Supreme Court of Canada, though not directly in regard to the law of this Province; and so the trial Judge is to have the credit, or the blame, only of making it applicable to this Province, in this and in another case referred to by him. But I must wait until it is bindingly done—if ever it can be—before giving effect to anything that would upset the law of this Province, given effect in all of its cases without exception always, a law upon or in view of which, all the legislation now existing in the Province upon the subject has been passed.

It is, however, not necessary for the purposes of this case that that question should be considered, even though the plaintiff relies upon the ruling in that respect to support the judgment appealed against; it is not necessary because, as I find, the judgment can be supported on firmer ground, and quite irrespective of any onus of proof.

Negligence on the part of the defendants—a neglect of the duty imposed on them by statute in these words, "Every highway . . . shall be kept in repair . . . ," was, as I find, amply proved by the plaintiff and plainly appears upon the whole evidence: neglect, as alleged in the plaintiff's pleadings and particulars, in the construction as well as in the maintenance of the culvert in question and of that part of the roadbed of the highway above and about it.

The culvert was put in by a person up to that time without experience or teaching in large tile drain construction. The tiles, 2½ feet in diameter, were put in by him with the assistance of one

man only, and a man at least equally inexperienced and unlearned in the work. No foundation was put under them, and they were *not even cemented together*. No reasonable means were taken to prevent still water remaining and freezing in them. The gravel in the road was not firmly packed, under and around them so as to make the structure best able to withstand the jar and the weight of the traffic over it, and so as to prevent the water from penetrating behind the tile and weakening the whole structure: and, according to the only testimony on the subject, the tile were probably composed of only 1 part cement to 6 of sand, though common knowledge is that the best should be "1 in 4;" they were never examined, or even looked at, in the performance of the defendant's duty to keep them, as part of the highway, in repair; though, having regard to the sizes of the tile, that might easily have been done thoroughly; and they were so neglected although the defendants were well aware of the fact that in later years motor cars carrying great weights had come into use over this and other highways, causing injury to their bridges and wooden culverts; and they were placed so near the surface of the roadbed that, when covered with 12 or 14 inches of gravel, an elevation in the road over them was created which wore down until only 8 inches, and that with a depression on each side, was over them; and this covering was renewed only once a year after the construction of the culvert; the result being that for a long time before the accident in question there had been a small depression across the road on each side of the culvert, caused by the road settling down on each side of the tiles, whether by reason of insufficient filling in and banking or by water working its way along the tile on the outside is not very important in this particular case. This disrepair naturally and necessarily caused vehicles passing over the culvert to "thump" upon it, those carrying great weights with great force; and the shallowness of the roadbed over the tile left them with altogether too little protection against the sledge hammer blows of the iron-shod heavy as well as light horses passing over them. Then months before the accident that which was probable, if not inevitable, happened; a horse's hoof went down, leaving a hole in the road, or in some other manner the hole came into existence; and that was filled in with *sod*. A proper degree of care should have caused an examination of the culvert and the removal of fractured tile—which indeed according to the evidence must have been all or nearly all of them—and the placing of new, and not too cheap, tiles firmly cemented together upon a solid

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foundation, tiers firmly embedded under the road with a proper outlet for the water coming into them.

I see no occasion for a new trial nor any reason for any failure to deal with the action finally here; the case was heard with great patience by the trial Judge, through the hearing of all the witnesses —unnecessary as well as necessary—and through all the questions asked—material as well as immaterial, and largely the latter; witnesses and questions not in the least curtailed by the trial Judge's views upon any question of onus of proof; and, if the case were not fully argued at the trial upon that branch of it which I consider decisive of it, it was so argued here, all the members of the Court leaning strongly towards, during the argument, the view that upon that branch only could the judgment be sustained; our duty therefore appears clearly to me to be: to give the "judgment which ought to have been pronounced" at the trial: The Judicature Act, sec. 27, R.S.O. 1914, ch. 56, that is, to affirm the judgment appealed against, but on different grounds.

Though not needful for the determination of this case to express or form any opinion on the question whether the action is or is not one for negligence, or upon the subject of onus of proof, it may be advisable to do so, as I cannot but consider the views expressed by the trial Judge in these respects erroneous.

That the action is one for negligence seems to me to be self-evident. It is for neglect of duty; and it cannot make any difference that the duty is imposed by statute.

So, too, as to the onus of proof; non-performance of the duty—non-performance, neglect, or omission, call it what you may—causing the injury complained of, must be proved if not admitted. That proof of the nature or cause of the accident is sometimes, perhaps often, proof of negligence—*res ipsa loquitur*, as it is generally but crudely said—does not affect the question and must not be confused with any notion that the onus is not upon the plaintiff or that it has not been satisfied by him.

In the case of *City of Vancouver* v. *Cummings* (1912), 2 D.L.R. 253, 46 Can. S.C.R. 457, a case depending on the provincial laws of British Columbia, Idington, J., did say, at p. 256, in one part of his opinion: "Is it not clear that on such a statute . . . , when the facts demonstrate an actual want of repair, causing damage, an action is *primâ facie* of necessity shewn to be well-founded, because the statute has not been duly observed or complied with, and hence the party in default called upon to offer some excuse?"

If by "an actual want of repair" is meant an actual neglect of the statute-imposed duty to repair, all the rest may be agreed to, although at the moment I find it impossible to suggest any excuse. A road, or any structure, may be put out of repair without any kind of fault on the part of him whose duty is to keep it in repair. The very obligation implies that. One is not obliged to repair that which cannot, or is never permitted to become, out of repair. Roads to be kept in repair must necessarily be remade, until the corduroy way becomes the cement pavement; not because the law says that cement pavements shall be laid, but because the duty to repair makes it pay, and be best for those under the obligation to put down such pavements; and whilst such "repairs" are being made it cannot be said that the statute-imposed duty is not being performed, that the road is out of repair within the meaning of the enactment, when indeed those upon whom the obligation rests are doing their duty in the best and most costly way; and so throughout the whole growth and life of a highway it may from time to time be even impossible, from many causes, without any failure to perform the duty to keep it in repair.

But I am content to take that Judge's own practical answer to his own question at p. 260: he was in favour of the plaintiff in that action, not on any such ground, but because "there had arisen a presumption on the evidence and inferences fairly deducible therefrom, which entitled the respondent to recover on the statute if the jury chose to draw such inferences;" a conclusion in which any one could agree if satisfied, as that Judge, the Chief Justice of the Court, and apparently Brodeur, J., were, that there was evidence of misfeasance—and so a right of action irrespective of the statute—and of nonfeasance, because of the character of the highway and the length of time the obstruction had existed to go to the jury, and the jury had found for the plaintiff.

Then in the later case of *Jamieson* v. *City of Edmonton* (1916), 36 D.L.R. 465, 54 Can. S.C.R. 443, although the Chief Justice adhered to his approval of that dictum—if it may be called as much as that—of Idington, J., on the subject, that Judge himself seems to have lost faith in it; though not expressly recanting, he said nothing about it; but other Judges made it plain that it is not yet, at all events, to be deemed in any way binding.

Many road case difficulties have arisen from a failure to keep in mind the character of the duty in question. It is no new thing, nor is it a different thing under one enactment from another.

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Though that which is enacted in one place may be different from that in another, the "repair of a highway" is and always has been the same thing; at common law as well as under enactments, howsoever the obligation may arise; and it may generally be described as a duty to do all things that may be reasonably necessary in the way of repair of the way to keep it fit for the lawful traffic over it; and no private right of action for nonrepair lies unless conferred by enactment or contract.

Much was said in the cases to which I have referred, and in this case, on the subject of notice of need of repair; indeed the whole defence of this action is based upon the want of notice of the hole in the road which caused the accident in question, and the want of reasonable time to repair it. Notice is not an ingredient of the duty to repair; but it may be a controlling factor in the question whether that duty has been performed. Notice, however, of a defendant's own wrong—of omission or commission—is out of the question; but when a highway is put out of repair, as in many ways it may be, without any fault of those whose duty it is to repair, that duty is reasonably performed if the repair be made within a reasonable time after they are informed, know, or should have acquired knowledge, of the need of repair; much misunderstanding may arise from a failure to keep in mind just what "repair" is.

If the hole in the way over the culvert in question here were, as I find it to have been, a natural consequence of—that which reasonable persons should have known was likely to follow from—the negligence of the defendants, in the construction and maintenance of the culvert, which I have set out, no question of notice or knowledge arises; the plaintiff's injury was caused, not of a sudden, but by the negligence of the defendants extending over 7 years.

Examples may perhaps better explain my views: a plaintiff proving injury caused by a dangerous and old hole in the road, which is within the defendants' territorial limits, proves duty and breach of it; the long continued disrepair proves the breach. A plaintiff proving injury caused by a tree blown down upon the road shortly before the accident fails to prove negligence unless he proves that the falling of it upon the highway was the natural result of some negligence of the defendants or that they had notice or knowledge or ought to have known of the fallen obstruction, and had reasonable opportunity for removing it or of giving reasonable

warning of the danger caused by it.

A plaintiff proving that defendants under an obligation to repair a road left an obstruction on it—a waggon, a heap of stones, or anything else—into which he drove in the night and was injured without negligence on his part, establishes a double cause of action; for misfeasance apart from any statutory duty; and for non-feasance under the statute because of failure to remove or give warning of the danger of which they knew.

On the question of contributory negligence little if anything was said upon this appeal; and a careful perusal of the evidence, for the purpose of dealing with that question, has convinced me that nothing could be said that should lead to the conclusion that the findings of the trial Judge in this respect were wrong; and the damages awarded were unquestionably not too large.

I am in favour of dismissing the appeal.

RIDDELL, J.:—The plaintiff, travelling in his automobile, himself driving, from Hanover to Chesley, passed along the 13th side-road of the township of Brant, a fairly well travelled road. At one of the culverts on this road, made of cement tile, he met with an accident—his wheel ran into a hole on the culvert with disastrous results.

At the trial before Rose, J., he obtained judgment for $500, and the township corporation, the defendants, now appeal.

The culvert consists of 6 cement tiles, each 2 feet, 6 inches, in length and 2½ inches thick. The tile at the extreme west (the plaintiff's left) was cracked through and had a piece broken out at its eastern end—the second was apparently a new tile, whose eastern end came to the left wheel-track—it was not close to the third tile, whose western end was under the left wheel-track and which ran to the middle of the *via trita;* this was broken in 8 or 10 pieces—the fourth tile was also cracked. It is quite clear that the highway was out of repair, and the trial Judge has negatived contributory negligence. He also finds that "the manifestation on the surface of the road that there was a break in the pipe came only a very few hours before the accident;" but that it had not been shewn that the break in the tile came at the same time as the appearance upon the surface. Had that been the case, my brother says:—

"I should have thought there was a good deal in the defendants' contention—I should have thought it not unreasonable to hold that no system of inspection would have enabled the defendants

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to discover and repair the break before the plaintiff came along in his motor car."

Then he goes on to say:—

"But the culvert could easily have been inspected. The defendants knew, or thought they knew, that harm was being done to portions of their roadways, but they made no attempt to inspect this particular culvert, or any other cement culvert. The defendants proceeded upon the assumption that cement culverts once put in were permanent. I do not know whether on that it ought to be found, if it were necessary to find it in order to determine the case, that the defendants were negligent in not making greater inspection."

The findings of fact are wholly warranted by the evidence, and the result is that it is established that the accident was due to want of repair not manifest until a few hours before the accident —the want of repair was caused by a break in a hidden tile which may or may not have occurred at the time of the outward manifestation of nonrepair. Such a break could have been discovered on inspection of a certain character, but there is no finding of negligence in the system of inspection actually in use.

From almost the beginning of municipal control of and responsibility for highways, it has in this Province been considered that an action of this kind is based upon negligence—there must be proved some original defect or some negligence in inspection or want of inspection or some knowledge of the defect or the lapse of such length of time that knowledge will be implied. The authorities in this Province, at least until Rose, J.'s, decision in *Richardson* v. *Township of Warwick* (1920), 18 O.W.N. 106, have been uniform: and they need not be quoted. My brother, however, interprets the Supreme Court decisions as laying upon the municipality an onus not recognised by the Ontario cases; and, finding that such onus has not been met, he gives judgment for the plaintiff.

The cases upon which *Richardson* v. *Township of Warwick* is founded are: *City of Vancouver* v. *Cummings*, 2 D.L.R. 253, 46 Can. S.C.R. 457, and *Jamieson* v. *City of Edmonton*, 36 D.L.R. 465, 54 Can. S.C.R. 443.

In the *Jamieson* case, at p. 467, Fitzpatrick, C.J., said:—

"In *City of Vancouver* v. *Cummings*, 2 D.L.R. 253, 46 Can. S.C.R. 457, Idington, J., speaking for the majority of this Court, said (p. 466, [2 D.L.R. 258]): 'I am, despite dicta to the contrary,

prepared to hold that, unless in some such case as I have suggested, the question of notice or knowledge does not arise, and that in all cases where the accident has arisen from the mere wearing out or apparent wearing out, or imperfect repair of the road, there arises upon evidence of accident caused thereby, a presumption without evidence of notice that the duty relative to repair has been neglected.' "

The exceptional cases referred to by Idington, J., are indicated by his words almost immediately preceding those quoted by the Chief Justice: the Judge says at p. 258:—

"No one would think of saying that, when the forces of nature have suddenly destroyed or put out of repair a road, or some one has maliciously or negligently wrought the same result, and an accident has taken place as a result thereof, the municipality must be held as insurers, and so, regardless of all opportunity to have repaired the road so destroyed, be cast in damages."

We therefore have it authoritatively stated by the head of our ultimate court of appeal in Canada that the statement of the law by Idington, J., is that of the Supreme Court.

The result is that "in all cases where the accident has arisen from the . . . apparent wearing out or imperfect repair of the road, there arises upon evidence of accident caused thereby a presumption without evidence of notice, that the duty relative to repair has been neglected." The present is such a case; and we must, I think, in loyal obedience to the Supreme Court, hold that a presumption has arisen that the duty of the defendants relative to repair has been neglected.

The presumption is of course not *juris et de jure*, but it is rebuttable. The defendants did not meet the presumption by evidence shewing that they did all that could reasonably be done to prevent the want of repair occasioning the accident.

I am therefore of opinion that the appeal should be dismissed with costs.

Distinctions can be drawn between the cases in the Supreme Court and the present; but, in my view, we should not make too subtle distinctions in such matters—if we err in applying what seems to be the fair meaning of binding decisions, it is for the Court, whose judgments we have tried to follow, itself to make the distinctions and set us right if we have misunderstood the judgments.

This is eminently a case for the final appellate tribunal.

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LATCHFORD, J.:—The trial Judge has decided this case in favour of the plaintiff, on the ground, mainly, that it was incumbent upon the defendants to adduce evidence rendering it possible and proper to find, in their favour, that they had discharged the statutory duty of keeping the highway in repair, and that they had not satisfied that onus.

Such, indeed, seems to be the effect of the judgments of the Supreme Court of Canada in *City of Vancouver* v. *Cummings* and in *Jamieson* v. *City of Edmonton*, although Duff, J., in the latter case declined to express an opinion upon the question whether the effect of the statute is that where a nuisance is shewn to have existed in fact the onus is thereby cast upon the municipality to establish that the nuisance was not due to any cause for which it is responsible: in other words, whether or not there is a presumption in law arising from the existence of a nuisance—in the condition of the highway—that the municipality is responsible for: a presumption that the municipality can meet only by establishing the negative of the issue (36 D.L.R. at p. 474).

The judgment in appeal may, however, be supported on the grounds stated by Anglin, J., in the *Jamieson* case at p. 476. In imposing an obligation (in that case to keep the highway in reasonable repair) the Legislature, he says, has intended to hold that such obligation involves the duty of preventing, as far as reasonably possible, the continuance of known conditions which will bring about a state of disrepair.

In the present case the continuance of the conditions resulting in the highway being in a state of disrepair was known to the officers of the municipality. They took no precautions, to use the words of Anglin, J., (p. 476), "in the nature of extra inspection commensurate with the likelihood of a dangerous state of disrepair arising." Nor did the township prevent the conditions which it was known resulted from the use to which the road on which the plaintiff was injured was subjected. There was no proper inspection of the highway which was known to be sustaining damage. Had such inspection taken place, the defective condition of the culvert would have been disclosed.

I think the appeal should be dismissed with costs.

MIDDLETON, J.:—The question which has arisen upon the Municipal Acts of other Provinces as to the liability of the municipality for damages for nonrepair does not arise upon our statute, because it provides not only that every highway "shall be kept in

repair" by the corporation, but also that "in case of default the corporation shall be liable for all damages sustained by any person by reason of such default" (Municipal Act, R.S.O. 1914, ch. 192, sec. 460 (1).

Where the cause of action arises by reason of some act of a third person, such as the making of an unauthorised excavation in the road or the placing of an obstruction upon the highway, I agree that there has been no "default" upon the part of the municipality unless it appears that its responsible officers knew or ought to have known of the state of affairs complained of. Knowledge and inaction will prove the "default." The absence of due system by which knowledge of such defects would be acquired would equally shew default.

In cases of nonrepair, liability is established *primâ facie* as soon as the defect is proved, and the onus is cast upon the municipality to shew such circumstances as will exonerate it from the *primâ facie* liability. As put by Duff, J., in *Jamieson* v. *City of Edmonton*, 36 D.L.R. at p. 473, the statute is "capable of being read as creating an absolute duty to prevent the highways of the city falling into a state of disrepair. There is, however, much to be said, and there is a long line of authorities beginning with *Hammond* v. *Vestry of St. Pancras* (1874), L.R. 9 C.P. 316, in support of the view that where duties of maintenance are, by enactments similar to sec. 507 (of the Edmonton charter (1904), O.N.W.T., ch. 19) cast upon a municipal body, the responsibility is not an absolute responsibility making the municipality in all circumstances answerable in damages for the existence of a state of things which the statute aims to prevent . . . but that the public authority charged with such responsibility is not answerable if the state of things out of which the complaint arises is one which could not have been prevented or made innocuous by the observance on its part and on the part of such agencies as it employed, or ought to have employed, of proper care and diligence. A highway may become a dangerous nuisance through a sudden operation of nature not reasonably forseeable, or from the mischievous act of some person for whom the authority charged with the care of the highway is not responsible and which it could not reasonably be held to be negligent or incompetent in not anticipating. In such cases and generally speaking in cases in which the state of things complained of can be shewn to have been something which the public authority could not reasonably have been expected to know or to provide against,

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it has been held that there is a good answer to any claim for reparation." After discussing the question of onus, he adds: "There seems to be sufficient ground for holding that proof of the existence of a nuisance does in itself constitute a *primâ facie* case throwing upon the municipality the burden at least of going forward with evidence."

In *City of Vancouver* v. *Cummings*, 2 D.L.R. 253, Idington, J., in an opinion which in the last case cited is said to be that of the majority of the Court, says at p. 256: "When the facts demonstrate an actual want of repair, causing damage, an action is *primâ facie* of necessity shewn to be well founded, because the statute has not been duly observed or complied with, and hence the party in default called upon to offer some excuse. *Primâ facie* the duty is imperatively obligatory, and its consequences can only be got rid of by some valid excuse for a failure to discharge the duty so imposed."

Turning from this important aspect of the law to the merits of this particular case, the liability of the defendants seems to be very clear. The culvert was constructed 10 years ago, and there seems to have been no adequate inspection. When put in, it was sufficient to carry the traffic as it then was for many years; but, to the knowledge of the municipality, there has in the last few years come to be a very heavy motor traffic on the road, some of the vehicles having a weight not deemed possible when the culvert was built. One vehicle when loaded weighs 10 tons. After the accident, this culvert was repaired, one new tile being put in, but even then it only lasted a few months before it was completely destroyed.

What was said by Anglin, J., in the *Edmonton* case, 36 D.L.R. at p. 476, seems in point: "I think it is not imposing upon the municipality an obligation greater than the Legislature intended to hold that the duty to keep in a reasonable state of repair involves the duty to prevent, as far as reasonably possible, the continuance of known conditions which will bring about a state of disrepair, and, if the continued existence of such conditions is not prevented, to take precautions in the nature of extra inspection commensurate with the likelihood of a dangerous state of disrepair arising."

Where there is an increased volume of traffic, and the traffic has become of such a nature as to render a condition of disrepair most probable, the municipality is, in my view, clearly liable when it fails to take any steps to prevent the inevitable condition of disrepair from arising: *Davis* v. *Township of Usborne* (1916), 28 D.L.R. 397, 36 O.L.R. 148, as explained in *Township of Southwold*

v. *Walker* (1919), 50 D.L.R. 176, 46 O.L.R. 265.

The obligation of the municipality under the Ontario statute is in very wide terms; it is not qualified as in the Supreme Court cases, where the obligation was to keep "in reasonable repair." Here the obligation is "to keep in repair." The cases go to shew that this means not perfect condition but reasonable repair. There is no justification for the idea that the municipality is entitled to allow its roads to fall into disrepair and then escape liability on the ground that it had no notice or knowledge of the situation.

As already pointed out, and as stated in the *Vancouver* case, 2 D.L. R. at p. 258, notice is only of importance when what is complained of arises "out of the clear wrongdoing of some one who had no official relation with the municipality or colour of right to do what he had done."

Notice in other cases may well be relied on to emphasize the breach of duty by the municipality.

I think the appeal should be dismissed with costs.

LENNOX, J.:—This appeal is disposed of in a way quite satisfactory to me in dismissing it with costs, and I would not add a word to what has been so well said by more experienced members of the Court, were it not that there appeared to be some doubt entertained, during the argument, as to whether—whatever might be the ultimate decision upon the evidence—the reasons in the judgment appealed from were well assigned. The most important of these was as to when the onus of proof shifts from the plaintiff, in an action of this character, to the defendant, a municipal corporation. Subject to the exception that I am not yet quite convinced that "this action is not an action for negligence," I find nothing to criticise in either the reasoning or conclusions of the trial Judge. It is, of course, as he says immediately afterwards, "an action for breach of a statutory duty to keep the road in repair;" but the corporation is only liable for damages "in case of default;" and, with respect, I am of opinion that disregard of a statutory duty imposed upon a municipal corporation, as distinguished from unavoidable failure to perform it, is negligence. The Legislature apparently so regarded it. An action "for a personal injury caused by snow or ice upon a sidewalk" is necessarily an action for "gross negligence," which is said to be "only ordinary negligence with a superlative epithet." I prefer, and entirely agree with what the same Judge said in the very similar case of *Richardson* v. *Township of Warwick* (1920), 18 O.W.N. 106, at p. 107, namely: "Upon

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proof of such facts as have been established in this case, the municipality must be held liable, as for a breach of a statutory duty, unless they are able to shew that they took all reasonable means of preventing the continued existence of such a dangerous state of non-repair as had been described."

Where statutory rights or obligations are in question, it is often worth while to read, and read again, and carefully study the relevant provisions of the statute—postponing consideration of supposedly applicable decisions until the statute has been allowed to speak for itself as to its meaning and effect. This appeal, I think, presents a fitting occasion for thoughtfully reading again what the Legislature has said as to the duties and obligations of a municipal corporation in reference to its highways.

Section 460 of the Municipal Act declares that: "(1) Every highway and every bridge shall be kept in repair by the corporation the council of which has jurisdiction over it, or upon which the duty of repairing it is imposed by the Act, and in case of default, the corporation shall be liable for all damages sustained by any person by reason of such default." The word "default," twice occurring is, I am inclined to think, a peculiarly apt word to express and define the intention of the Legislature. One of its meanings is "failure," and failure is often unavoidable, do what you can to prevent it. If, after enacting without any qualifying words that "every highway shall be kept in repair," the Legislature had substituted the word "failure" for "default," and said, "and in case of *failure* the corporation shall be liable for all damages by reason of such *failure*," the whole legislative scheme would be unworkable, and financially intolerable. The Legislature, by imposing a duty and providing for a penalty, aimed at securing for the public reasonably easy and convenient avenues of communication, and, as far as might be by the exercise of corporate diligence, the safety of persons carefully using the highways, but stopped short of providing accident policies, or immunity from loss, without regard to the effort of the corporation to comply with the statute. This is the principle established by *Hammond* v. *Vestry of St. Pancras*, L.R. 9 C.P. 316, and I think uniformly recognised in our own Courts. I dwell upon this because of the confusion I see liable to arise as to the onus of proof, and the point at which it shifts from the plaintiff to the municipal corporation, by discarding the well-established doctrine of negligence as the basis of the action. The cases on which the Judge relied in *Richardson* v. *Township of War-*

wick and in this action do not question or disturb the theory of negligence as a condition of liability: indeed, to quote only one sentence from one of them, in *Jamieson* v. *City of Edmonton*, 36 D.L.R. 465, at p. 473, Duff, J., puts it in this way: "Under an enactment in the Ontario Municipal Act, to much the same effect as section 507" (of the Edmonton city charter), "municipalities have uniformly been held to be exonerated in the absence of negligence." Wharton, of course speaking of the legal sense, defines "default" as "omission of that which a man ought to do; neglect." It is obviously, I think, in this latter sense that the word is used in the statute. In addition to specific exceptions provided for (subsecs. (3), (6), (7), and (8)), the Legislature, by the use of this term as the foundation or condition of liability, pointed to municipal misconduct—whether by nonfeasance or misfeasance—and enabled the Courts, as they have done in almost innumerable cases, to protect the public interest where it appears upon the evidence, that, notwithstanding the want of repair, the corporation acted carefully and vigilantly in the discharge of its statutory duties. All this is the antithesis of negligence. "Keep in repair" involves original construction and putting in repair in the first instance, and reconstruction when necessary. It includes misfeasance and nonfeasance (sub-sec. (2)).

The facts are not in dispute. The highway and culverts in question were constructed many years ago and at a time when, whatever the volume of traffic may have been, it was of a comparatively light class—no vehicles weighted to impose a heavy strain upon the road-bed, bridges or culverts. I do not know whether this road should be called a leading highway, but it is a road upon which there has been a lot of traffic of all kinds in recent years. It may be that the culvert, at the time of construction, was sufficient for the ordinary traffic of that date; I am inclined to think, on the evidence, that the original construction was decidedly faulty by reason of the character of the tiles used, the way they were placed, and the lack of covering, but I prefer to rest my conclusions definitely upon other grounds, and therefore refrain from expressing any definite conclusion upon this matter of fact. "For a considerable time," as the Judge expresses it, before the accident occasioning the plaintiff's injuries, and for far more than a sufficient time to enable the corporation to put the highway in a condition of safety and reasonable repair—having regard to existing conditions—a heavy motor-truck, loaded with saw-logs and a

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gross weight of about 10 tons, was being driven over this culvert, and was injuring the road-bed and liable to cause the collapse of the culvert, at any moment, as the defendant corporation well knew. The municipal council talked about it, but did nothing to avert the danger, or to keep track of the condition of the culvert or of the road-bed over, or adjacent to it. The break in the road-bed occasioning the personal injuries and damage to property complained of was immediately above the concrete-tiled culvert—many of the tiles being cracked, some of them broken, and a few of them not being in close juxtaposition or properly aligned—and the break in the surface only manifested itself a few hours before the happening of the accident in question. It is not contended, and could not be upon the evidence, that the plaintiff, at the time, was not properly and carefully using the highway, or that the automobile he was driving was not in good running condition and properly equipped, or that the plaintiff was not a competent driver; in short the hole in the road was the immediate and sole cause of the accident. It is true that the corporation did not know that the culvert had partly collapsed or that the road-bed had actually fallen in before the happening of the damage complained of, but actual notice in such case is not necessary. Where a municipal corporation is liable for damages sustained by reason of negligent nonfeasance of the statutory duty imposed upon it to maintain its highways in repair, the question of actual notice does not arise: majority judgment of the Supreme Court of Canada in *City of Vancouver* v. *Cummings*, 2 D.L.R. 253, an action arising out of a hole in a sidewalk.

It is unnecessary to generalise: it is not often prudent to do so. Applying what I regard as the very clear provisions of our statute, and the interpretation of similar enactments here and in Great Britain, to the facts of this case, I have no doubt as to the plaintiff's right to maintain his judgment upon the evidence before the Court. Where, as here, to put it very briefly, a plaintiff exercising his right to use the highway, and without negligence on his part, sustains personal injury or pecuniary damage owing to a break in the highway, through the highway being out of repair, he has made a *primâ facie* case entitling him to recover: *City of Vancouver* v. *Cummings, supra; McClelland* v. *Manchester Corp.*, [1912] 1 K.B. 118; *City of Vancouver* v. *McPhalen* (1911), 45 Can. S.C.R. 194. He has then done all he was called upon to do. By this the door to the relief of the municipal corporation is not necessarily sealed: they may, if they can, still shew that they acted

reasonably and with care and vigilance, that what happened and occasioned the plaintiff's disaster could not have been forseen or prevented, or that it was something that could not be anticipated or provided against, and that they ought, under the circumstances, to be excused; but, if the plaintiff has succeeded in closing his case without disclosing ground for exoneration, it is for the corporation to open the door and light the way: *Whitehouse* v. *Birmingham Canal Co.* (1857), 27 L.J. (Ex.) 25; *Blyth* v. *Company of Proprietors of the Birmingham Waterworks* (1856), 11 Exch. 781, 156 E.R. 1047; *Bateman* v. *Poplar District Board of Works* (1887), 37 Ch. D. 272; *Brown* v. *Sargent* (1858), 1 F. & F. 112. And this is the point at which the onus of proof shifts to the defence: *City of Vancouver* v. *Cummings, supra; Blamires* v. *Lancashire and Yorkshire R.W. Co.* (1873), L.R. 8 Ex. 283. The defendants called witnesses, but the testimony did not go to shew that the defendants did all they could to keep this highway in repair; on the contrary, the evidence of their chief witness, the county engineer, to my mind made matters look a good deal worse. The motor-truck loaded with saw-logs was perhaps not within the ordinary traffic upon the roads of this municipality, and it may be—I do not say it is so—that *quoad* the owner of the truck the municipality were not bound to provide for it safe and easy passage over their highway. But the use being made of the highway by the plaintiff was within the ordinary traffic upon the defendants' highways, and as to the plaintiff and others using the highway in the ordinary way of traffic the statute imposed the duty of keeping the highway reasonably safe for travel, and to provide for safety under new conditions as they arise from time to time: *Davis* v. *Township of Usborne*, 28 D.L.R. 397, at p. 400.

In *Sharpness New Docks and Gloucester and Birmingham Navigation Co.* v. *Attorney-General*, [1915] A.C. 654, at p. 665, Lord Atkinson, speaking of the duty of persons charged with the maintenance of ways, said: "As the ordinary traffic expands or changes in character, so must the nature of the maintenance and repair of the highway alter to suit the change." See also *Township of Southwold* v. *Walker*, 50 D.L.R. 176, *per* Middleton, J., at p. 183, and Ferguson, J.A., at p. 185.

One of the defaults of the defendant corporation was in not putting and keeping their highway in repair, having regard to conditions arising subsequent to the date of original construction. Their negligent disregard of their statutory duty was more flagrant

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than in *Cullen* v. *Brant*, although the consequences are less serious, for on this occasion they had both warning and opportunity. Greene sums up the situation very concisely:—

"But if in due prevention you default,

"How blind are you that were forwarned before."

Where, as here, a municipal corporation is aware of conditions liable to cause the highway to become dilapidated or dangerous, and it takes chances and does nothing, it is not only *primâ facie* liable for resultant injuries, but, as it seems to me, it shuts out, in advance, all lines of defence, except perhaps a plea of contributory negligence: *Jamieson* v. *City of Edmonton*, above, a case not distinguishable in principle from the one at Bar. I cannot concur in the opinion that this is a case calling for further litigation.

I think the appeal fails.

Appeal dismissed.

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