EASTERN

LAW REPORTER

CANADA

CONTAINING JUDGMENTS OF THE COURTS

—OF—

NOVA SCOTIA, NEW BRUNSWICK

AND

PRINCE EDWARD ISLAND

And of the Exchequer Court and Judicial Committee of the Privy Council in cases arising in such Provinces

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VOLUME VII.

EDITOR:

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THE CARSWELL COMPANY, LIMITED

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NOVA SCOTIA.

SUPREME COURT.

DRYSDALE, J. MAY 1ST, 1909.

FULLER v. WEBBER AND MUSGRAVE'S AGENT.

Debtor and Creditor—Agent—Declaration by Latter of Principal's Indebtedness — Judgment — Application to Amend Declaration—Refusal.

J. B. Kenny, for plaintiff.

T. R. Robertson, for agent.

By a declaration of 10th August, 1908, the agent admitted an indebtedness of at least $140 to the absent debtor, for the price of staves sold and delivered to her, the agent not being able to state the exact amount until the staves were surveyed at Halifax. Judgment has been entered and execution is now applied for under Order 46, Rule 20. On this application the agent now seeks to change her declaration and substitute a new one denying any indebtedness to the absent debtor, and in support of such application produces the affidavit of George Musgrave, which simply shows that she sold the staves in England and annexes an account sales showing a deduction on the sale on account of size, and that, he is informed, the staves were badly sawn and not full thickness. She does not make a prima facie case as to any change in her liability to the absent debtor as formerly admitted, and on this material I must refuse her application to amend her declaration of 10th August, 1908.

Application refused.

NOVA SCOTIA.

LAURENCE, J. MARCH 15TH, 1909.

NEPTUNE METER COMPANY v. THE CITY OF HALIFAX.

Contract—Vendor and Purchaser—Sale of Water Meters to Municipal Corporation—Foreign Company—Authority of City to Purchase—Approval of City Engineer—Refusal of City to Accept—Waiver of Engineer's Approval—Rescission of Contract—Transfer of Possession—Liability.

R. E. Harris, K.C., and W. A. Henry, K.C., for plaintiff.
W. B. A. Ritchie, K.C., and F. H. Bell, for defendant.

The contract between the parties was as follows:—

This memorandum of agreement, made this seventh day of March, A.D. 1908, between the City of Halifax, a municipal corporation, of the one part; and the Neptune Meter Company, a body corporate, having its head office in the city of New York, U. S. A., hereinafter called "The Contractor," of the other part.

Witnesseth, that the said city agrees to buy, and the said contractor agrees to sell, two thousand (2,000) Trident water meters, size of inlet five-eighths of an inch, for the price of eight dollars and forty cents ($8.40) each; and one hundred (100) Trident water meters, size of inlet three-fourths of an inch, for the price of twelve dollars and sixty cents ($12.60) each. The above prices shall be for the goods delivered in Halifax f. o. b., but exclusive of duty, and shall include all couplings, strainers, and other fittings requisite to the satisfaction of the city engineer of the said city. The meters shall be adapted to register in Imperial gallons, and shall be subject in all respects to approval by the said engineer before being accepted by the city.

Terms of payment shall be cash on delivery in Halifax after inspection and approval by the city engineer.

In witness whereof, the city of Halifax has caused its seal to be hereto affixed and these presents to be signed by its mayor and city clerk, and the said contractor has hereto

affixed his hand and seal on the day and year first above written.

Signed, sealed and delivered
in the presence of

Robert T. MacIlreith,
Mayor.
L. Fred. Monaghan,
City Clerk.
[Seal of City.]

F. W. W. Doane,
Witness to signature of mayor and clerk.
Warren L. Jacobens,
Witness to signature of president of company.

Neptune Meter Company,
M. G. Perrins, President.
J. Beard Kirkpatrick,
Secretary.
[Seal of Neptune Meter Co.]

The following telegram was sent by the plaintiff to the defendant:—

"New York, May 4th, 1908.
"His Worship the Mayor, Halifax, N.S.:

"We will furnish f. o. b. Halifax half or five-eighth inch Trident meters with couplings fitted with cast iron bottoms $8.40, three-quarter in. $12.60, plus duties, fitted with resilient frost bottom one half or five-eighth inch $9.40, three-quarter inch $13.60, plus duties.

"Neptune Meter Co.,
"J. H. Ballantine,
"Vice-President."

The contract sued on is dated March 7th, 1908. It bears the seal of defendant corporation, and is signed by the mayor and city clerk. It is suggested that this document, when prepared, was not presented to and adopted by the city council as expressing the terms of agreement decided upon. The material particulars of the agreement, however, had been before the council in reports from the committee on works, and by the tenders or offers to supply the goods mentioned in the contract, and these were approved before the contract was executed.

The plaintiff company is a foreign corporation, and it is contended is subject to the provisions of ch. 127 of Revised Statutes and amendments in respect to registration, etc., and therefore cannot recover in this action. It is admitted this corporation has not registered. I think the Act does not apply, and the defence will not avail: American Hotel Supply Co. v. Fairbanks, 41 N. S. R. 444.

The principal defence to this action arises under two sections of the city charter, 305 and 330.

Section 305 (2): "No committee or board, nor any member of either, shall make any expenditure for such civic year in excess of the amount to the credit of such committee or board, or such appropriation respectively"—(4) "And such contract shall not be binding on the city."

Section 330 (2): "If any debt is incurred or any money is expended by the council, or under its authority, beyond the amount provided by law, such debt or expenditure shall not be recovered from the city, but the members of the council voting for the resolution for the incurring of such debt, or for the making of such expenditure, shall be jointly and severally liable therefor."

Section 305, I think applies to the expenditure of the ordinary annual revenues of the city, and 330 to the expenditure of monies borrowed for specified purposes, and the contract would not be authorized or "intra vires" the defendant corporation if at the time it was entered into funds to meet the obligation had not then been in the words of the section last quoted "provided by law."

Much evidence was given to show that there was at the date of the contract to the credit of the "water service" (to which service or department this contract relates) a sum sufficient or largely so, to meet the expenditure contracted for, apart from money borrowed specially for the purpose. It is necessary here to state that two contracts for the purchase of water meters were entered into at the same time, involving an expenditure of $31,855.50, the one sued on in this action calling for $18,335 of that sum. It would be necessary, therefore, to show a sum to the credit of this service equal to the larger amount. I do not deal with this evidence, as I do not think it established the fact of this amount being in hand; besides it was practically admitted that this evidence does not prove that this sum was in hand from sources other than the loan hereinafter mentioned at the time the contracts were entered into. The plaintiff,

therefore, relies on the fact that money to meet these contracts had been provided by law by means of a loan for the special purposes covered by these contracts, under an Act of the legislature, ch. 71 of 1907. This Act authorized a loan for several purposes, which included in terms $135,000 for "the further extension and improvement of the water system." On the 22nd July, 1907, the city council resolved to borrow $50,000 for the installation of water meters. Before the date of the contracts a large proportion of the loan authorized by the said Act had been actually received by the city. In this way, it is argued, the city was in funds sufficient for the specific purpose of the installation of the water meters contracted for. On the other hand, however, it is contended that the money borrowed under the Act referred to, cannot be regarded as money "provided by law" within the meaning of sec. 330 for this reason. The brokers through whom the loan was negotiated took exception to that Act as not furnishing satisfactory security, and only advanced or paid over the money upon an undertaking by the city to obtain confirmatory legislation or refund the money. This confirmatory legislation was procured by ch. 72, 1908, but after the date of the contracts. The two sections of the city charter referred to are, no doubt, for the security of the citizens by controlling expenditures by the city council, and my interpretation of sec. 330 is that if the legislature has authorized the making of loans for specific purposes, that is a providing by law of money for those purposes—certainly so after the money is borrowed. The contract is for the purchase of water meters, and the resolution of July 22nd is for the installation of meters. I think the latter includes or implies the former. It should be noted that the language of ch. 71 of 1907 is "for the further extension and improvement of the water system," and it is contended that the resolution of July 22nd, 1907, being for the installation of water meters, it should be shown that the latter is an extension and improvement. I think this is an unreasonable refinement upon the language used; meters are an extension or improvement, and probably both.

The contract sued on provides that the meters and attachments to be supplied shall be delivered in Halifax to the satisfaction of the city engineer, and shall be subject in all respects to approval by the said engineer before being accepted by the city, and payment shall be cash on delivery

in Halifax after inspection and approval by the city engineer. 700 of these meters were delivered, inspected and approved by the city engineer and accepted by defendants, and should be paid for. The other 1,400 are in a warehouse of the Canada Atlantic and Plant Steamship Co. at Halifax ready for inspection and acceptance by defendants. The 1,400 meters have not been inspected and approved by the city engineer, and for the reason, it is stated, that on the 6th August, 1908, the city council came to the following resolution:—"That the city decline to take delivery of the meters or to pay the bill of the Neptune Meter Co. until directed to do so by a decision of the Court." This repudiation of the contract and refusal to carry it out was communicated to the plaintiff, and has, it is contended, waived and excused the necessity of inspection and approval by the city engineer, and that the plaintiff company is entitled to recover the price of the 1,400, as well as the 700.

"An absolute refusal to perform an agreement or an absolue repudiation of it, communicated to the opposite party, is a waiver and excuse of the performance by him of future conditions precedent:" Bullen & Leake, pp. 158, 756, and cases there cited.

A renunciation of the contract, or a total refusal to perform it before the time of performance has arrived, may be acted upon by the other party, and so adopted by him as a rescission of the contract: Leake on Contracts, 620; Cort v. Abergate Ry. Co., 17 Q. B. 127.

The contract is for the sale of goods specified and described to be delivered at Halifax, and I think the property in these "meters" in the warehouse has passed to defendants so as to entitle the plaintiffs to recover the agreed price: Benjamin on Sales, 322, 355; McKay v. Dick, 6 App. Cas. 251; Badische Anilin und Soda-Fabrik v. Basle Chem. Works (1898), A. C. 200 at p. 207.

I am of opinion the plaintiffs should have judgment for $18,355, or the contract price of the goods delivered and costs of suit.

The evidence taken in New York under commission as to quality of the goods was unnecessary and irrelevant, and the costs of that should not, I think, be allowed.

DOMINION OF CANADA.

EXCHEQUER COURT.

NOVA SCOTIA ADMIRALTY DISTRICT.

APRIL 30TH, 1909.

WATT ET AL. v. THE SCHOONER "JOHN IRWIN."

Admiralty Law—Collision—Steamer and Sailing Ship—Art. 21 of Rules for Preventing Collisions—Breach.

Morrison, K.C., for plaintiff.
Mellish, K.C., for defendant.

The facts are fully stated in the judgment.

DRYSDALE, DEPUTY LOCAL JUDGE:—This action is brought by the owner, master, and crew of the "Regina B.," a schooner of 79 tons, which was sunk in a collision had with defendant steamer in Halifax harbour on the night of 19th October, 1908.

The "Regina B.," in charge of Captain Aucoin, was on said night, between nine and ten o'clock, coal laden, beating into Halifax harbour. The wind was north, or, according to the captain of the "Regina B.," a little east of north, baffling to the east, as he puts it. The contention of those on board the "Regina B." is that after coming inside of Meagher's Beach light at or near the point marked G/X on the chart used, the vessel commenced to starboard tack towards Middle ground buoy, and according to plaintiff's preliminary act, on a west north-west course; that this tack was continued until they passed the Middle ground buoy about 200 yards and passing to the south of it; that the schooner then tacked and stood to the north-east on the port tack; that before, at the time of and after the tacking, they had observed the red light of the steamer "Irwin" only as she was coming down the harbour; that after they had proceeded about 200 yards on the port tack, and when about abreast of Middle ground buoy, the "Irwin" suddenly opened her green light, altered her course, and bore down on them, striking the "Regina B." on the port side aft of the main rigging

with the stem and starboard bow of the "Irwin." The master of the "Regina B." has drawn a diagram marked G/1 to illustrate his contention as to the manner of collision.

The contention of the "Irwin" is that they were coming out of the harbour on the fairway, heading south with the Middle ground buoy always on their starboard bow; that they saw the "Regina B." standing to the west on the starboard tack and shewing her green light; that she was then about three-quarters of a mile distant and bearing a point and a half on the "Irwin's" port bow; that they then starboarded their helm so as to bring green to green and pass astern of the schooner; that whilst they were so proceeding with the intention of passing astern and having brought green to green, the "Regina B." suddenly came up in the wind and tacked close ahead; that although they then at once ported their helm and reversed their engines, the "Regina B." was struck aft of the main rigging, but by the stem and port bow of the "Irwin." Under the evidence I have to consider which of these contentions is supported. There is no dispute as to where the collision occurred, it was in the main ship-channel very near the fairway. The "Irwin" was admittedly going out of the harbour and it is fair to assume on the usual course in the fairway. Her officers so state and she would, as they state, naturally be keeping Middle ground buoy on her starboard bow. And if this were so I cannot understand the statements of those on the "Regina B." when they say they were west of the buoy mentioned, some 200 yards, when they tacked, and still saw only the red light of the "Irwin." If they were as far west as the buoy, the "Irwin" keeping the fairway, as I have no doubt she did, would be shewing her green light, and I think when the "Regina B." undertook to tack she could not have been as far west as her captain alleges.

A steamer, it is true, must keep out of the way of a sailing vessel when such vessels are proceeding in such directions as to involve risk of collision, but it is also true that where, by the rules, one of two vessels is to keep out of the way, the other shall keep her course and speed. And under this rule I take it to be stated that a sailing ship must not, outside of narrow channels or other places where she is compelled to, go about close ahead of a steamer so as to embarrass the steamer and make it difficult for her to keep out of the way, and that where risk of collision exists, a sailing ship is not entitled to go about until compelled to. The

real point in dispute here is whether the "Regina B." improperly tacked right or close in front of the steamer, and thus violated rule 21. Captain Aucoin's statements as to the bearing of the "Irwin" when he first saw her are most unsatisfactory. In his examination he first states that he first saw the "Irwin" when he was on a west north-west course on the starboard tack, about half way between Meagher's Beach buoy and Middle ground buoy; that the "Irwin" was then about three-quarters of a mile or a mile distant coming out of the harbour, and bearing about a point or a point and a half on his (the "Regina's") starboard bow and that the "Irwin's" red light got broader on his bow as he continued his western tack. This statement cannot be accepted as to the bearing, as it is a very material contradiction of plaintiff's preliminary act. In such act the bearing of the "Irwin" when first seen is given as five or six points on the starboard bow of the "Regina B." when the "Irwin" was first seen at a distance of about one mile. The captain then further states that after continuing his starboard tack to the west of Middle ground buoy, the "Irwin" was at the point where he decided to tack, about one-half mile distant and bearing about two and one-half points on his starboard bow with his red light only shewing. Such a statement puts the "Irwin" in an altogether improbable place and position, considering her course out of the harbour and her bearing when first seen, and captain Aucoin's statements as to this position and his own reasons for tacking were most unsatisfactory. Another striking feature of Captain Aucoin's testimony was as to his course at the time of and the manner in which the ships came together. He states he was sailing on a north-east course on the port tack for about 200 yards after tacking west of Middle ground buoy, when the collision occurred, and that some time after he was on that course the "Irwin" opened her green light and came in contact with him aft of the main rigging with her stem and starboard bow. It is apparent this would require an extraordinary change of course on the part of the "Irwin" at short range, and it is difficult to accept such a statement, and the "Regina B." could not with the wind as stated, sail a north-east course. The best she could do would be probably a point north of east. Again this method of collision is inconsistent with the admission that the "Irwin's" port anchor in the collision fouled the main rigging of the "Regina B." Looking at the whole evidence I am satisfied that

the vessels came together in the manner indicated by the officers of the "Irwin," that is to say, that the "Regina B." had just come up in the wind and was in the act of tacking; that the "Irwin" in the effort to clear her under a port helm, struck with her stem and port bow. As to the manner of collision, I accept the statement of the officers of the "Irwin." I am satisfied that when the two vessels were so close that risk of collision existed, the "Regina B." improperly undertook to go about without being compelled to, and without any good reason for so doing; that her conduct in this respect embarrassed the "Irwin," which would otherwise have cleared her; that she was guilty of a violation of Article 21, and such violation was the cause of the collision.

It was contended that the "Irwin" was in fault in not slackening her speed or stopping and reversing earlier. As to the speed the "Irwin" was making, I find it was about 7 miles an hour, which under the circumstances seems reasonable. I accept the statements of the officers of the "Irwin" as to her course out of the harbour, and as to the positions of the vessels just before the collision. When the captain speaks of minutes during which he was under a starboard helm, I think allowance must be made always as to time; the substance of the statement is in the fact that he went to port enough to bring green to green, and after the "Regina B." tacked so close as to make a collision almost inevitable. No fault or delay can be attributed to the "Irwin's" captain in his effort to stop and reverse or in any of his emergency orders. It is true it is the duty of a steamer, where there is risk of collision, whatever may be the conduct of the sailing vessel, to do everything in her power that can be done to avoid collision. At the same time, as stated in the leading case on the subject, if a steamer is to be condemned for having omitted to do something which she ought to have done, it seems right to require proof of three things; first, that the thing omitted was clearly in the power of the steamer to do; second, that if done it would in all probability have prevented collision, and thirdly, that it was an act which would have occurred to any officer of competent skill and experience in command of the steamer. When the captain of the "Irwin" brought green to green, as I find he did, the original risk of collision was determined, and going at a moderate rate I do not see he was then under any obligation to slacken or stop. And after the "Regina B." tacked in front, I do not think, under the evidence, there is any-

thing that I can reasonably say he omitted that he ought to have done. In fact, as to the conduct of the "Irwin's" officers throughout, I do not find any act or omission on their part that in my opinion should decree them in fault.

The action will be dismissed.

NOVA SCOTIA.

SUPREME COURT. APRIL 21ST, 1909.

GOULD v. GILLIES.

Promissory Note — Action on—Counterclaim for Damages—Misrepresentation — Interest on Note and Counterclaim.

W. F. O'Connor, for defendant, counterclaiming.

T. R. Robertson, contra.

RUSSELL, J.:—In this case the plaintiff has recovered judgment against the defendant on a note of hand given for stock. The defendant counterclaims for damages for misrepresentation in the sale of the stock, and his right to so counterclaim is sustained. It is conceded that the defendant is entitled to recover on his counterclaim, as damages, the amount he paid for the stock. The only question raised is whether the defendant is entitled to interest from February, 1904, the time the note given for the stock matured, and September 4th, 1906, as of which date the judgment will be entered on the counterclaim. The defendant has had to pay, or will have had to pay interest on the note from the date mentioned, and is, therefore, out of pocket to that extent in consequence of the misrepresentation, but it is contended that his counterclaim for deceit or misrepresentation is only a common law action for damages, and that in no such case would interest be given as part of the damages, interest being purely a statutory matter, except in connection with certain kinds of commercial obligations.

The defendant, however, contends that he is not asking for interest as interest, but solely because he has been obliged to pay interest on this very transaction in consequence of the misrepresentation, and in connection with the note on which the plaintiff has recovered; that, in other words, he is out of

pocket to the extent of the interest in the same manner as in respect to the principal amount paid for the stock.

It seems equitable that if the plaintiff is allowed to recover interest on the note given for the stock, and the defendant is allowed to counterclaim for damages for the amount of the note because of the misrepresentation, the interest should run on the counterclaim as it does on the claim. In Weeks v. Propert, L. R. 8 C. P. 427, the plaintiff recovered interest as damages in an action for breach of implied warranty of authority to issue a debenture. There is not a very great difference between an implied representation of authority to issue, from which a warranty of such authority is also implied, and a representation as to the character of the stock. The former it is true gives an action ex contractu, and the latter ex delicto, but I see no reason why that should make the measure of damages different. There was no contract to pay interest in the case of the implied warranty of authority if the authority should be found to be defective, any more than there was in this case. No case has been cited that is expressly in point, but I think the analogy of the case last mentioned warrants me in including interest for the period referred to in the damages assessed.

NOVA SCOTIA.

SUPREME COURT. APRIL 21ST, 1909.

IN RE MILLER.

Contempt of Court—Improper Withdrawal of Money from Court—Attachment—Appeal to Privy Council—Special Leave—Practice.

J. J. Power, K.C., for applicant.

H. Mellish, K.C., contra.

Application for leave to appeal to Privy Council.

DRYSDALE,, J., in Chambers.

The question is whether an appeal lies here, from an attachment for contempt of Court, duly issued against the

applicant, to the Privy Council, and this involves an interpretation of the Imperial Order in Council appearing at page 384 of Safford & Wheeler's P. C. Prac.

There must be a decree order or sentence of the Court, and it must be given or pronounced in respect of a matter at issue above £300, or involve directly or indirectly a claim, demand or question to or respecting property or a civil right amounting to or of the value of £300. In such case the person aggrieved by the decree may appeal, and upon appealing the appellant shall give to the respondent security by bond, etc., for the prosecution of the appeal. Does this cover a case where an attorney, a party to a suit, has been adjudged guilty of contempt of Court in not obeying an order in the action requiring him to pay into Court a sum of $734,22 improperly withdrawn by him from the Court? The Court's attention was called to the contempt of its order by one of the parties to the suit, and at his instance the Court required the applicant to account for his disobedience of its orders. After a hearing the Court directed the attachment for the applicant's wilful disobedience. This is a case it seems to me where the Court is punishing a man for contempt of the Court, and is not a case where an appellant can give security to a respondent, and is not such a case as is contemplated by the Imperial Order in Council. It is not in the nature of a payment or determination between parties, and I think clearly does not fall within the order. If the applicant desires to question the act of the Court before His Majesty's Privy Council, he can do so by special application. Now I find that the practice in such cases is indicated in Safford & Wheeler, as one of special leave, see page 789 of that work, where it is stated that where special leave to appeal is sought by practitioners who have been struck off the rolls or been convicted of contempt of Court, a settled practice exists.

It is a matter about which I entertain no doubt under the material presented in this case, and I have to refuse the application.

Application refused.

PRINCE EDWARD ISLAND.

SUPREME COURT OF JUDICATURE.

SULLIVAN, C.J. MAY 4TH, 1909.

LYNCH BROTHERS DOLAN COMPANY LIMITED v. ELLIS.

Infancy—Plea of—Ratification after Full Age — Knowledge of Non-liability at Time of Ratification — Conditional Ratification.

W. E. Bentley, for plaintiffs.

A. C. Saunders and J. J. Johnston, K.C., for defendant.

SULLIVAN, C.J.:—This is an action on a bill of exchange for $46.69, at two months, dated 20th March, 1908. The bill was given for goods supplied to the defendant in his business as a trader. The defendant has pleaded infancy to which the plaintiffs have replied a written ratification by the defendant after attaining his full age. According to the evidence given in his behalf, the defendant came of age on the 14th April, 1908. The ratification consists of a letter written by the defendant to the plaintiff's solicitors in response to an application by them for payment of the bill of exchange. The letter reads as follows:

"Conway, P. E. Island,
July 15th, 1908.

McLeod & Bentley,
Charlottetown,

Gentlemen,—

Enclosed herewith you will find cheque for $25, and note at 3 months for $22.75, to settle claim of Lynch Brothers, Dolan Co., Sydney, N.S. Kindly send me receipt for same and oblige.

Yours truly,
Fulton Ellis."

The plaintiffs' solicitors returned to the defendant by letter dated 17th July, 1908, the cheque and promissory note enclosed in his letter saying that they could "not accept anything but payment at once of the amount of the claim;" and

their request not having been complied with, they shortly afterwards commenced this action.

The question is whether the defendant's letter above set forth amounts to a ratification within the meaning of the Provincial Statute, 36th Vict. c. 20, s. 5, which is a copy of the Imperial Act, 9 Geo. 4, c. 14, s. 5, commonly called Lord Tenterden's Act. To its sufficiency two exceptions are taken on behalf of the defendant, first, that it is not an absolute promise to pay the debt, and, secondly, that at the time it was written and despatched, the defendant did not know that he was not legally liable to pay the debt.

In Harris v. Wall (1 Exch. 122), what is sufficient to constitute ratification of an infant's contract is defined by the Court in these words: "There is some difficulty in cases like the present, in understanding clearly what is meant by a ratification . . . But whatever difficulty may exist the law clearly recognizes ratification as something distinct from a new promise. Indeed Lord Tenderden's Act, 9 Geo. 4, c. 14, s. 5, which was cited in the argument before us, expressly makes the distinction between a new promise and the ratification, after majority of the old promise made during infancy, in both cases requiring a written instrument signed by the party. . . . We are of opinion (apart from Lord Tenderden's Act), that any act or declaration which recognizes the existence of the promise as binding is a ratification of it, as in the case of agency; anything which recognizes as binding an act done by an agent or by a party who has acted as agent, is an adoption of it. Any written instrument signed by the party, which in the case of adults would have amounted to the adoption of the act of a party acting as agent, will in the case of an infant who has obtained his majority amount to a ratification."

In Mawson v. Blane (10 Exch. 206) Parke, B., says: "The term 'ratification' has already received an interpretation in the case of Harris v. Wall, where it was held to mean such a ratification as would make a person liable as principal for an act done by another in his name. It seems to me that the meaning of 'ratification' is something different from 'promise.' It is an admission that the party is *liable and bound* to pay the debt arising from a contract which he made when an infant."

In the same case Martin, B., adopting the judgment of the Court in Harris v. Wall, says: "I apprehend a ratification to be a consent by a person after he becomes of full age

to be liable for a debt contracted during infancy, expressing to the effect that he is willing to affirm it, and that it is valid."

Applying in this case the test of agency, or assumed agency adopted in Harris v. Wall, if the bill in suit, instead of having been accepted by an infant, had been accepted by some other person being an adult, on behalf of the defendant, the letter in question would clearly have amounted to an adoption of the agency of that other person, and the defendant would have been liable. On the same grounds, it would seem, that he is liable in the present case. Nor can the defendant's letter be regarded as merely a conditional ratification on the ground that he offered as payment of his bill a cheque and a promissory note at three months which were not accepted by the plaintiffs' solicitors. On the contrary, it is in my opinion, an absolute ratification as such ratification is defined by the Court in the citations I have given from the cases of Harris v. Wall and Mawson v. Blane.

The exception of the defendant's counsel that when the defendant despatched the letter in question he did not know that he was not legally liable to pay the debt, and is, therefore, absolved from payment, is answered by the cases which I have cited, and which give the requisites of a valid ratification.

In those requisites it is not stated that the party should know when he makes the ratification that he is not legally liable on his original promise. The defendant's counsel based the foundation of his argument on this point upon the case of Harmer v. Killing (5 Esp. 102); but in that case the opinion seems to have been a mere obiter dictum. The only adjudged point in Harmer v. Killing was that the defendant's promise was made under duress per minas—threats of unlawful imprisonment, and that the defendant might avoid it for that reason. The same question was raised in Morse v. Wheeler (86 Mass. 570), in which the decision in Harmer v. Killing was discussed and considered, and in which the Court decided that such knowledge was not necessary either on principle or authority." In the course of the judgment reference is made to Harmer v. Killing in these words: "The notion of such an exception had its origin in the opinion of Lord Alvanley as reported in the case of Harmer v. Killing (5 Esp. 102). . . . That case was first published in 1807, and the obiter dictum, as well as the adjudicated point in the case, has been transferred into most of the books of a later date, English and American, which treat of the ratifica-

tion of an infant's contract. Yet we have found no case in the English reports in which the question has been raised, whether it is necessary to the ratification of such contract that the new promise should be made with knowledge that the party was not legally liable on his original contract. . . . Even if it had been adjudged in Harmer v. Killing that knowledge of an infant's non-liability was necessary to the ratification of his contracts after he comes of age, such judgment would have been virtually overruled by the numerous cases decided since in which the requisites of a ratification have been judicially stated, without mention of such knowledge. And if such knowledge be necessary to the ratification of an infant's contract, by a new promise after coming of age, why is it not necessary in those cases of ratification, not by promise, but by acts done or omitted? We see no difference in principle between the cases."

It is a long established legal principle that he who makes a contract freely and fairly cannot be excused from performing it by reason of his ignorance of the law when he made it. This principle is well illustrated in the case of Stevens v. Lynch (12 East 38), in which the drawer of a bill of exchange endeavoured to avoid a promise made by him to pay the bill, on which he was not then liable, because the promise was made under a mistaken belief that he was liable. But the Court held that he could not defend himself upon the ground of his ignorance of the law when he made the promise.

In this case I have come to the conclusion that the plaintiffs have established their replication, and the result is that I find a verdict in their favour for forty-eight dollars and seventy-six cents ($48.76), with costs.

NOVA SCOTIA.

SUPREME COURT.

MEAGHER, J. AUGUST 21ST, 1901.

RUFFEE v. SHAW.

Principal and Surety — Contract between Principal and Surety whereby Principal Agrees to Discharge Surety's Liability and Surety gives Principal Demand Note to Recoup him—Action by Surety on Note before Discharging Principal's Liability.

The facts are set out in the judgment, and most of the cases cited are there referred to.

O. S. Miller, for plaintiff.

F. L. Milner, for defendant.

MEAGHER, J.:—The plaintiff, being a joint and several maker with the defendant, for the latter's accommodation, of two notes amounting to $1,500 which were outstanding in the hands of third parties, took from the defendant a note for $1,500, being the note sued on.

It was given upon the plaintiff's promise to him that he would retire the other notes forthwith. The agreement covered two aspects. First that the plaintiff would pay the outstanding notes in acquittance and discharge of the defendant's liability thereon, and secondly, that the defendant would give the plaintiff a demand note for $1,500 to recoup him to that extent for his outlay in discharging these notes.

It was done apparently at the defendant's instance. He was then about to abscond from the province, and he may have feared that the holders of these notes, or one of them, would arrest him therefor and thus defeat his project of getting away, and that his uncle, the plaintiff, would not be at all likely to take such a step against him.

The plaintiff paid both notes on the 27th of October, 1900, but began his action a few days before then. He, no doubt, paid the holders all arrears of interest. That fact was not directly proven, but interest was due on them, and the holders, no doubt, insisted on getting it. The plaintiff's promise contemplated the payment of all that was due on them. To the extent, therefore, of the excess of interest beyond the $1,500 for which the note sued on was given, the plaintiff was prejudiced and the defendant correspondingly benefited by the arrangement between them. The $1,500 note carried interest from its date, but if the sum paid by plaintiff to retire the notes was $1,550 (and whatever it was he was bound by his arrangement with defendant to pay) he can never recover back that $50 from the defendant, because by agreement they made this note the measure of the plaintiff's protection, and because, having undertaken with the defendant absolutely to pay the notes, the relations were so changed thereby that he could not thereafter invoke the relationship of principal and surety and sue the defendant for money paid, upon the implied promise which springs from that relation when the surety pays money in discharge of his liability. See Toussaint v. Martinnant, 2 T. R. 105, Rowlatt on Principal and Surety, p. 176. These notes

were overdue when the arrangement spoken of was made, and no time having been agreed upon at which they were to be paid, the intention, I presume, was that they should be paid forthwith: Churchill v. Hunt, 3 Denio (N. Y.) 321.

The plaintiff having, as I find, undertaken to pay the notes in acquittance and discharge of the defendant in consideration of receiving the defendant's demand note for a fixed sum, if he did not perform his engagement in that behalf, was liable to be sued thereon by the defendant, who, in that event, would be enabled to recover from the plaintiff the amount due upon the notes with all overdue interest, that being the amount which the plaintiff engaged to pay in exoneration and discharge of the defendant.

The rule of law is too clear to be disputed. It was acted on in this Court in Barrowman v. Fader, 31 N. S. Rep. 20, where many of the cases are cited.

In Ashdown v. Ingamells, 5 Ex. Div. 286, where the same principle was applied, Bramwell, L.J., said: "If the liquidating debtors had not become insolvent they clearly would have been entitled to recover by way of damages the sum which the defendant ought to have paid, but did not pay."

The action there was not for the balance due upon the price of the things sold, but for not paying to third parties a sum which the defendant undertook to pay in discharge of the vendor's liability to them.

The case of Wicker v. Hoppock, 6 Wallace (U. S.) 94, deals with the same principle and holds that "On a breach of contract to pay, as distinguished from a contract to indemnify, the amount which would have been recovered if the contract had been kept is the measure of damages if the contract is broken." See also Spark v. Heslop, 1 E. & E. 563, and Hodgson v. Wood, 2 H. & C. 649.

Most of the cases, it is true, were founded upon a bond or covenant to pay, under seal, and which imported a consideration, but a seal was not necessary to make the contract valid, and its presence did not affect the measure of damages.

The defendant's promise to recoup the plaintiff's outlay, if expressed in a letter or undertaking, would be good, and it cannot be any less effective because it assumes the shape of a note on demand.

Sparks v. Heslop, and Ashdown v. Ingamells, cited above, were not cases of bond or covenant. The former was

founded on a letter and the latter upon an agreement which does not appear to have been under seal.

The only difference between the transaction in Loosemore v. Radford, 9 M. & W. 657, and this one, is that here the surety undertook to discharge the sum for which he and his principal were liable, and as a means of protection against his liability thus assumed he took the note in suit, while in that case the principal covenanted to pay the sum for which he and the surety were liable on a day certain, but did not do so.

If anything the surety's position is stronger here. He made a contract with the defendant, his principal, and thereby for the first time as between them promised and became liable to discharge the outstanding liability, while in the case just mentioned, the surety's liability so far as his principal was concerned, remained just what it was before, so that here, to the surety's already existing liability to the creditor, there was by the contract between them superadded the liability, as between the plaintiff and the defendant, to pay the notes in exoneration of the defendant, and to protect the plaintiff against, that the defendant gave him the note in controversy.

Laying aside this branch of the case it is necessary to consider the position of the parties towards each other apart from the new contract which was made. Prior to that and during the interval which had elapsed from the making of the notes the defendant was the principal and the plaintiff his surety. There was, however, no privity of contract between them—the surety's contract was with the creditor alone. The defendant, as principal, had no means available to him of compelling the plaintiff to fulfil the contract with the payees or holders of the notes. The consideration for the promise moved, not from the debtor, the principal, but from the creditor. That is certainly true in the case of a guarantee, and I cannot conceive in this particular, any distinction here. No promise was made in this instance, and none could be implied from the principal to the surety to indemnify him against these notes—at least none that could be enforced, because such promise does not arise until the surety pays, and then the law implies it from their relation to each other in the transaction. I am speaking from the standpoint of the ordinary general rule.

There is, as it has been said, "No reason for the law to create a promise until the surety has actually lost property

for which the principal should in equity compensate him."

The form of action in such cases is "assumpsit for money paid," and money or its equivalent must, therefore, have been paid before there can be a recovery. But the situation is otherwise "where the plaintiff holds an express promise to indemnify and save him harmless; there he can maintain an action without having paid the debt." Sedgewick on Damages, vol. 2, ss. 785 and 786, and the question then is the measure of damages.

It was open to the plaintiff to take from his principal at the time an express contract to repay his outlay, or to hold him harmless against the liability assumed for him. Such a contract would be good and founded on ample consideration. The mere fact that the contract was not made until some time after, cannot, it appears to me, affect the result nor the rights or liabilities of the parties dependent upon it.

If this note had been given at the time the notes were made, being payable in advance of the others, the intention would have been obvious. The inference then would have been either that the plaintiff, by taking the note on demand, desired to put himself in a position where he could compel the defendant through its payment to him to provide himself with funds for the payment of the other notes at maturity, or the contract embraced in the notes themselves supplemented by the demand note to the plaintiff meant that the defendant should retire them at maturity, and failing that, whether paid or not by the plaintiff, the latter would be in a position to invoke the rule of law to which I have referred, and claim that the demand note was at least the equivalent of a contract to enonerate and discharge him from their payment, and fixed the measure of damages as well.

The observations of Ashurst and Buller, JJ., in Toussaint v. Martinnant, 2 T. R. 100, are pertinent. The former said: "There is no doubt but that wherever a person gives a security, by way of indemnity for another, and pays the money, the law raises an assumpsit. But where he will not rely on the promise which the law will raise, but takes a bond as a security, there he has chosen his own remedy, and he cannot resort to an action of assumpsit. Therefore, in this case his only security is in the bond. . . . But still the bond was their remedy, and they shall not be permitted to change their security upon a subsequent event and

resort to that indemnity which the law would have raised," p. 104. The latter said: "Now, why does the law raise such a promise? Because there is no security given by the party. But if the party choose to take a security there is no occasion for the law to raise a promise. Promises in law only exist where there is no express stipulation between the parties; in the present case the plaintiffs have taken a bond, and, therefore, they must have recourse to that security. It has been objected by the plaintiffs' counsel that this bond could not be proved under the commission of bankrupt, but there would have been no difficulty in that. First, it is said that there is no consideration for it, but clearly as a question of law there is a sufficient consideration, for the surety binds himself to pay the debt of another, who afterwards becomes a bankrupt. The consideration is, therefore, good in law. And it is not unreasonable, for the surety may say he will only lend his credit for three months, and if the money be not paid at that time he will call on the principal for his indemnity," p. 105.

The liability of the principal upon the bond in that case was terminated by his discharge in bankruptcy, but the surety having paid the money in discharge of his liability after the bankruptcy proceedings, it was sought to raise an implied promise to repay it by operation of law from the relation of principal and surety. The case is decisive of the question that that could not be done because of the express contract of indemnity. The principle of that case, so far as it deals with the question of proof in bankruptcy, has been departed from or modified, but on the point which I regard as applicable here it is good law to-day.

The plaintiff, as I have already pointed out, was under no liability as between him and the defendant to retire these notes, but was liable to the holders of course. The defendant could not do anything by reason of any right he possessed to enforce or accelerate their payment by the plaintiff, at all events prior to the giving of the note sued on.

By the arrangement then made the plaintiff, the surety, in consideration of what I regard as the equivalent of an express contract to save himself harmless against the payment he undertook, contracted with the defendant to pay the notes and to relieve the defendant from that obligation. The express contract in that behalf—the note—then made for the first time between them, was the consideration for the plaintiff's promise. The relation of principal and

surety thereupon ceased to exist, it disappeared forever, and the p aintiff's remedy was confined thereafter to the express contract: Sedgewick on Damages, vol. 2, s. 784. The date of that note would govern so far as the statute of limitations might be involved, no matter when the plaintiff paid the notes. The change in the plaintiff's position was, therefore, a material one.

One of the remedies which the plaintiff had up to the time of the making of the new bargain which resulted in the demand note, was the right to compel the creditors, the holders of the notes, to sue for and collect them from the defendant. By that arrangement, and by taking an express contract of indemnity and by expressly assuming their payment, and relieving the defendant therefrom, he lost the right first mentioned.

There was nothing to provent the parties to this action from changing their relations with each other at any time, and such change would in itself be a sufficient consideration for any promise founded upon or springing from such change. The debt guaranteed was overdue, and the plaintiff had a right to say to the defendant: "you must put me in a position where I can as against you compel you to put me in funds to pay it." I have already adverted to the fact that there was no privity of contract between the plaintiff and the defendant in the original transaction, and that the contract of the former was with the payees of the notes, the defendant's creditors, alone. The mere fact that they were parties to the same instrument could not in this case affect this because that fact did not and could not, as between themselves, alter or affect the relation of principal and surety which alone at that time subsisted between them. This is all the more apparent when it is remembered that the plaintiff could not sue the defendant upon the notes, but would be forced to rely upon payment and the implied promise arising therefrom to recover.

Even at the risk of repeating myself I may say that I regard the situation as reduced to this—if the new contract had not been made then payment by the plaintiff would have given rise to an implied promise by the defendant to repay him. But once the plaintiff himself contracted with the defendant that he would himself pay the notes and would absolve the defendant from the obligation to pay the holders, the whole situation became changed. Payment after that by the plaintiff could only, so far as the defendant was con-

cerned, be made in pursuance of the new contract and not on the faith of the old relations at all, and consequently it would not give rise to the implied promise which otherwise would have been thereby created. In effect it is much the same as an exchange of accommodation notes and produces the same results—the one being the consideration for the other.

The element of suretyship was not present in any of the cases to which I have had access which were cited by the defendant.

I am much pleased to be able to decide this case as I have, because the defence is a dishonest one, The defend ant has received the benefit of the plaintiff's payment, and now seeks to prevent his recovery. The defendant was not prejudiced by any delay which took place in the payment of the notes by the plaintiff. The defendant absconded immediately after he gave the plaintiff the note sued on. Several actions, including this one, were soon after commenced against him as an absconding debtor, and if the defence succeeds it will enure to the benefit of other attaching creditors alone.

The plaintiff will have judgment with interest and costs. If an appeal is asserted security must be given before I shall grant stay of execution.

NOVA SCOTIA.

REA v. LOCKETT.

COUNTY COURT, DISTRICT NO. 4. JANUARY 28TH, 1908.

Jurisdiction of the County Court—Cause of Action Arising, and Defendant Residing, without the District of the Court—Affidavit of Merits—Order 34, Rule 1 (2).

This was an action brought by A. E. Rea and Company, Ltd., of Toronto, in the County Court for district No. 4, against John Lockett & Son of Bridgetown (a place not within district No. 4), to recover the price of goods sold and delivered. The goods were ordered either from an agent at Bridgetown or by letter sent from Bridgetown to the plaintiff direct. The defendant pleaded that the cause of action

arose, and that he resided, without the jurisdiction of the Court and that the Court had no jurisdiction over the cause of action, and he moved to change the place of trial from district No. 4 to district No. 3 within which he resided. The rule provides that the venue may be changed upon satisfying the Court that defendant has a good defence to the action on the merits.

F. L. Milner, for defendant.

Rufus A. Tremaine, for plaintiff.

CHIPMAN, Co. C.J.:—In this motion the defendant after appearance is moving for a change of venue to district No. 3. The facts briefly stated are:—

(a) Writ issued at Truro in the County of Colchester. Specially indorsed. Amount claimed $58.72.

(b) Place of trial—Truro.

(c) Plaintiff company's residence and chief place of business—Toronto.

(d) Defendant's residence at Bridgetown in the county of Annapolis within district No. 3.

(e) Cause of action arose either at Bridgetown or in Toronto.

(f) The application is made under Order 34, Rule 1 (2). This rule is as follows: "In any action in which the plaintiff does not reside within the province, the defendant after appearance shall be entitled to an order changing the place of trial to the county in which the defendant resides, or in which, in case of a corporation, the defendant corporation has its chief place of business, or in which the cause of action arose, on satisfying the Court or a Judge that he has a good defence to such action on the merits."

(g) The defence is a plea to the jurisdiction of the Court.

Is this a good defence to the action on the merits? It has been decided that a plea of the Statute of Limitations, of bankruptcy, and of infancy, should be considered a plea to the merits (Chitty, 267 and cases cited), and an affidavit of merits is defined to be "An affidavit stating facts shewing a substantial ground of defence" (Annual Practice, notes to Order 27, Rule 15).

I think I am justified under these authorities in holding that a plea to the jurisdiction is "a good defence to the action on the merits."

So holding, I think, under the law and the facts, that the application should be granted and the place of trial changed to the county of Annapolis, district No. 3.

Costs to be costs in the cause.

The plaintiff subsequently discontinued the action.

NOVA SCOTIA.

SUPREME COURT.

MEAGHER, J. SEPTEMBER 9TH, 1908.

MACKENZIE, CROWE & CO. v. C. P. R.

The Railway Act, 1903—Validity of By-law Made under the Railway Act of 1888—Conditions Limiting Liability of Railway Company not Approved by the Board—Notice of Loss of Goods within Thirty-six Hours—Privity of Contract between Shipper and Second Carrier.

In June, 1904, plaintiffs shipped 11 cases of larrigans to Winnipeg. The goods were delivered to the D. A. R., which reaches St. John, N.B. The receipt for the goods issued by the D. A. R. was as follows:—

Received from MacKenzie, Crowe & Co., the undermentioned property in apparent good order, addressed to H. G. Middleton & Co., Winnipeg, Manitoba, to be sent by the said company, subject to the terms and conditions stated above and on the other side, and agreed to by the shipping note delivered to the company at the time of giving this receipt therefor.

At the foot of this receipt were written the words: "Ship C. P. R." The 10th condition on the back of the receipt was in the following form:—

10. That all goods addressed to consignees at points beyond the places at which the Company have stations, and respecting which no direction to the contrary shall have been received at these stations, will be forwarded to their destination by public carrier or otherwise as opportunity may offer, without any claim for delay against the Company for want

of opportunity to forward them; or they may, at the discretion of the Company, be suffered to remain on the Company's premises, or be placed in shed or warehouse (if there be such convenience for receiving the same) pending communication with the consignees, at the risk of the owners, as to damage thereto from any cause whatsoever. But the delivery of the goods by the Company will be considered complete, and all responsibility of the said Company shall cease, when such other carriers shall have received notice that said Company is prepared to deliver to them the said goods for further conveyance; and it is expressly declared and agreed that the said Dominion Atlantic Railway Company shall not be held responsible for any loss, damage or detention that may happen to goods so sent by them, if such loss, damage or detention occur after the said goods arrive at said stations, or places on their line nearest to the points of places which they are consigned to or beyond their said limits.

The D. A. R. carried the goods safely to St. John, N. B., and there delivered them to the C. P. R. and took the following receipt therefor:—

Received from the undermentioned property in apparent good order addressed to H. G. Middleton & Co., to be forwarded by the said Company to Winnipeg, Manitoba, station, subject to the terms and conditions of the current tariff and classification, and to those stated above and to those upon the other side of this shipping bill which is delivered by the Company and accepted by the consignor or his agent as the basis upon which this receipt is given for the said property, and it is agreed to by the consignor as a special contract in respect thereof.

The 12th condition on the back of the receipt was as follows:—

12. There shall be no claim for damage for loss of, or detention of, or injury or damage to any goods for which the Company is accountable, unless and until notice in writing, and the particulars of the claim of said loss, damage or detention, are given to the station freight agent at or nearest to the place of delivery, within thirty-six hours after the goods, in respect of which said claim is made, or such portions of them as are not lost, are delivered.

Part of the shipment was lost in transit and this action was brought to recover the value of the goods so lost.

The following by-law of the D. A. R. was put in evidence to shew that that company limited its liability as a carrier to its own line.

"17. It is expressly agreed that the Company does not contract for the safety, carriage or delivery of any goods except on the Company's lines, and where a through rate is named to a point reached by other carriers, either by land or by water, it is on the agreement that this Company is to act only as agent of the owner of the goods as to that portion of the said rate required to meet the charges of other carriers; and if any goods be consigned to a point beyond the Company's lines, that the goods may be handed over by the Company for further conveyances to such carrier as the Company may select, and the Company in so handing over the goods shall be merely the agent of the owner, and the responsibility of the Company in respect of any loss, misdelivery, detention, damage or injury by any means whatsoever to any goods, shall cease so soon as the Company shall either deliver them to the connecting carrier for further conveyance or notify such carrier that it is ready to do so."

The action was tried at Bridgetown in June, 1908, by MEAGHER, J., without a jury.

W. B. Roscoe, K.C., O. S. Miller and F. L. Milner, for the plaintiffs.

W. A. Henry, K.C., for the defendant.

MEAGHER, J.:—I shall for brevity call the Dominion Atlantic Railway Company "The Company," the Canadian Pacific Railway Company "the defendants," and the Railway Commissioners "the Board."

The action is to recover damages for the loss of three cases of larrigans out of a shipment of eleven cases consigned by the plaintiffs to Middleton & Co., Winnipeg.

The action is founded upon contract only and was not presented in any other form or aspect by the pleadings or upon the trial.

The third paragraph of the statement of claim alleged a contract with "the Company" for the entire journey, while the fourth averred that the cases were safely delivered at St. John to the defendants to be carried thence by them for reward and delivered to the consignees at Winnipeg, and that eight only were delivered.

The defence denied, or declined to admit, all material allegations; and as to the third paragraph pleaded that it related to dealings between the plaintiffs and the Company to which the defendants were not privy, and by which they were not bound. It was also averred that the Company were the consignors and that the cases were received and to be carried subject to the terms of a shipping bill, one of which was that they should not be liable for any loss, etc., unless notice in writing, with particulars, was given 36 hours after such portion of the goods as were not lost were delivered, and that such notice and particulars were not given within that time or at all.

The reply joined issue and pleaded that the defendants received the goods as common carriers from the Company, who were the plaintiffs' agents in that behalf, to be carried for the plaintiffs to Winnipeg and there delivered to the consignees, and that the defence of want of notice was a contract or condition within section 275 of the Railway Act, that such contract or condition so pleaded had not been approved of or authorised by the Railway Board and was void.

Mr. Henry, K.C., for the defendants, at the close of the evidence pointed out that the third paragraph of the statement of claim alleged a through contract with the Company, and that it was not alleged at all that there was a contract with the defendants. Mr. Roscoe, K.C., as to this relied on paragraph two of the reply and asked, in case that should be held insufficient, for an amendment to meet the suggested difficulty, which I accordingly allow.

Mr. Henry also cited some cases to shew that the case rested on contract only. No answer was made by the plaintiffs on that branch.

The Company on 7th of June, 1904, received the eleven cases at Bridgetown, consigned to Middleton & Co. at Winnipeg, to whom they had been sold by the plaintiffs by sample, and issued to the plaintiffs a way bill for their conveyance thither, which contained a great many stringent conditions, and was in substance the same as that issued by the defendants at St. John. The freight was payable at Winnipeg and was paid there by the consignees, who have been repaid by the plaintiffs.

The Company's system ended at St. John and the defendants' began there. The cases were safely delivered by the Company to the defendants to be carried thence to their destination over the latter's sysem. Eight cases only reached

Winnipeg and were delivered, the others were lost on the defendants' line and before reaching Winnipeg.

The consignees refused to accept those delivered on the ground that they were not according to sample and they were reshipped to Ottawa and sold there for the plaintiffs.

The defendants, on the 10th of June, 1904, at St. John, issued a way bill acknowledging the receipt of the goods to be forwarded to Winnipeg, which was handed to the St. John agent of the Company, who held it until produced by him upon the trial. I do not think it ever came to the plaintiffs' possession. It did not shew from whom the defendants received the goods, nor on whose account, nor with whom they contracted to carry them.

The words "ship C. P. R." were written obliquely across the blank space on the face of the Company's way bill in the handwriting of the plaintiffs' clerk, who filed up the blank spaces in it. They were upon it when the Company issued it to the plaintiffs.

It was proved that the Company's local tariff to St. John is higher than to points beyond that, but it was not pointed out what bearing, if any, that fact had upon the case, nor upon what basis the freight to St. John was charged in this instance.

The eight cases reached Winnipeg about the first week of September, but no written notice or claim for loss was given to the defendants other than by a letter from the plaintiff's solicitor of the 9th of December demanding payment for those which were lost.

A by-law of the Company, No. 17, was put in. It was approved by an order-in-council of July 24th, 1900, and is expressed in the form of an agreement. It expressly limits the Company's liability to its own lines and declares that the Company does not contract for the safety, carriage, or delivery of goods beyond them, and that when a through rate is named to a point reached by other carriers it is upon the agreement that the Company is to act only as agent of the owner of the goods as to that part of the rate required to meet the charges of other carriers. In a word, it may be said that it limits their liability entirely to their own system and declares that the Company in handing over goods to the next carrier does so merely as agent of the owner and upon such delivery the Company's responsibility terminates.

The defence put in an interim order of the Railway Board, dated Oct. 17th, 1904, which, after reciting that ap-

plications for approval of their forms of bills of lading, etc., had been made by four named companies, including the defendants', and that they were the only companies up to that time which had complied with the requirements of section 275 of the Railway Act, ordered that such four companies should have power to use the forms submitted until the Board should otherwise order.

The section just named enacts that "No contract, condition, by-law, regulation, declaration or notice made or given by the Company impairing, restricting, or limiting its liability in respect to the carriage of traffic, shall relieve the Company from such liability, except as hereinafter provided, unless such class of contract, by-law, etc., shall have been first authorised or approved by order of the Board."

The by-law referred to was made under the authority of Chapter 29 of the Acts of 1888, which was repealed by the present Railway Act, chapter 58, of the Acts of 1903. Section 33 of the latter continued in force until repealed; all regulations and orders made under statutory authority by the Railway Committee of the Privy Council which were in force when chapter 58 was passed. There does not appear to be any similar provision as to by-laws of Companies then in force. Whether any of these are in operation depends upon section 20 of chapter 1 (the Interpretation Act) which continues those that are not inconsistent with the Railway Act, until they are annulled or others made in their stead.

As soon as the trial began the defendants' counsel said he intended to raise two questions only: 1st—that there was no privity of contract; 2nd—want of notice within 36 hours under section 12 of the defendants' way bill; and as to damages the proof was upon the plaintiffs.

At the close he contended that the contract at St. John was a sub-contract with the Company and not with the plaintiffs, and cited a number of cases to shew there was no privity where, as here, the first contract was a through one; that the defendants' form of contract was sanctioned by the Railway Board by the order in evidence. That its recitals proved that only the four companies named in it, and the "Company" was not one of them, had applied to have their forms of contract legalised, and therefore the Company had no conditions limiting its liability; that if the Company was liable or had made a contract to carry to Winnipeg, as it really had, then the defendants were not; and at any rate were merely the forwarding agents of the Company. Condition No. 12

as to notice was urged, and it was pointed out that the Company's by-laws were not, nor was any of them, referred to in the contract. They therefore did not enter into it, and finally that the defendants only knew the Company in the matter and only professed to deal with it.

The opposing contention was that the contract at St. John was with the plaintiffs through their agents, the Company; that the conditions limiting the defendants' liability were void under the statute; that the order of the Railway Board was made after the goods reached Winnipeg and after the loss had occurred and after a cause of action therefor had arisen; it was not retroactive and could not affect vested rights under earlier contracts; that its recitals could not be regarded because the Board had no power to bind or affect any Company not before it, and not a party to the proceeding, by any statement of fact. There was therefore no proof that the Company's way bill had not been approved of, while the proper presumption was that it had been. The Company's liability, therefore, ended at St. John, and that of the defendants began there; and finally, that section 20 of chapter 1 continued by-law 17, which was not inconsistent with the Railway Act, and that under the facts the principle of Bristol, etc., Railway Co. v. Collins (1858), 7 H. L. C. 194, and other cases cited was displaced.

The defendants' answer to the foregoing was that the by-law was permissive and merely gave power to the Company to incorporate it into their shipping contracts; it had not done so in this instance and therefore the contract alone could be looked at. It was not contended that the by-law was not in force nor that it was inconsistent with chapter 58. I regret very much that this branch was not discussed. At one stage I made up my mind to direct a re-argument so that it might be and laid the case aside for some weeks to await Mr. Henry's recovery from his recent illness; but on taking it up again decided to dispose of it and let the matter be threshed out in the Appeal Court.

If the by-law is in operation there cannot, I think, be any doubt the defendants are liable for the reason, if for no other, that the Company's contract did not extend beyond St. John, and the contract of the defendants there must, in that light, be regarded as made with the plainiffs.

Assuming for the moment that the by-law is in force, it must be regarded the same as if it was contained in the way bill. Its own terms necessarily made it a part of every con-

tract of carriage the Company made, and the statute made it binding upon and to be observed by all persons, and therefore it was not a mere agreement, "but a law binding on all persons to whom it applied, whether they agreed to be bound by it or not." Per Lindley, L.J., in London Assn., etc., v. London, etc., Docks, 1892, 3 Chy. 252.

I have in the foregoing enumerated every point and argument made by both parties. I accept without hesitation the plaintiffs' answer to the argument founded on the order of the Railway Board subject, however, to the inference to be drawn as to whether the by-law has or has not been approved; and if it has not, whether it is still in force.

I am unable to see any sufficient reason for concluding that the by-law has been approved, even after giving the maximum omnia rite esse acta its widest application.

The statute in the interests of the public provides against exemption from liability in respect of the carriage of traffic by means, amongst others, of any by-law unless it has received the sanction of the Board. It is to that extent a disabling statute, and being general, that is, subject only to the exceptions which appear in it subsequent to the provisions just mentioned, and which are probably those enumerated in sub-section 3 of section 275, and perhaps others of a similar class, it seems to me that the approval of the by-law by the Board should in the face of so general a provision, be proved affirmatively by those who seek its aid. In other words, it was incumbent upon them to shew it had received the necessary official sanction, and therefore the case was taken out of the general terms of the statute.

I have not in this connection lost sight of section 20 of the Interpretation Act, nor of the fact that if the by-law is consistent with the Railway Act it is in force and its approval need not be shown.

The statute, except through the operation of the methods it prescribes, renders invalid all contracts, by-laws, etc., limiting the Company's liability in respect to the carriage of traffic, except in the specified cases, and this is not one of those; this by-law is quite general and relieves the Company from liability in all cases covered by its terms; in a word, if operative, it limits the Company's liability very materially in respect to the carriage of the goods in question, and that is something the statute says shall not be done, unless the conditions prescribed by section 275 have been complied with.

There is, therefore, an inconsistency between them, and consequently the statutory provision must prevail in the absence of proof that the by-law has been duly sanctioned.

The statute was assented to in October, 1903, and was brought into operation by proclamation on February 1st, 1904; consequently there was ample time given to enable companies affected by its provisions to prepare their tariffs, forms of contract and by-laws, and have them approved as soon as the Board began its labours after the Act came into force. The period, therefore, during which the Companies, subject to the Railway Act, would be exposed to all the liability of common carriers must necessarily at the most have been very short. I mention this merely to show that the statute did not operate harshly against them.

I am of opinion that the directions by the plaintiffs to the Company to ship by the C. P. R. from St. John constituted the Company their agent to enter into a new contract with the defendants for them, that the contract there made was in reality with the plaintiffs, who are, by reason of the directions given, and by force of the circumstances, as well as by what was done and agreed to at St. John, entitled to sue upon it for the loss.

The conditions limiting liability in that contract cannot avail the defendants, as their class of contract had not been approved of when it was made. Its subsequent validation cannot be permitted to defeat the plaintiffs' prior right of action.

The contract with the Company, it is true, was upon its face one for the entire journey, and the provision in it that the Company's responsibility ceased upon the delivery of the goods to the defendants at St. John, did not make it any the less a through contract; see per Lord Chelmsford at page 231 of 7 H. L. C. 1858, in Bristol, etc., v. Collins. Nevertheless, I infer from the directions given by the shippers to ship by the C. P. R. that the intention was that there should, notwithstanding any contract at Bridgetown with the Company, be a new contract there with the defendants on behalf of the plaintiffs for the rest of the voyage. If this were not so the plaintiffs would probably not have given any instructions with regard to the reshipment at St. John, and would not have named the next carrier, but would have left the Company to select whomsoever they pleased.

It may be, too, that in the circumstances of this case the liability may turn to some extent upon the principle of the

cases mentioned at page 432 of McMurchy & Denison's work under the sub-heading, "Who may sue." I have not examined them, however, and they may not have been decided upon any obligation or duty arising out of contract.

The validity of condition No. 12 remains to be considered. It should, I submit, receive a strict construction; or, as Lord Russell said in Kruse v. Johnson (1898), 2 Q. B. 99, it should be "benevolently" interpreted in favour of the plaintiffs.

The English Railway and Canal Traffic Act, 1854, provided that every company should be liable for loss occasioned by its neglect or default or that of its servants, notwithstanding any notice, condition or declaration made and given by such company contrary thereto or in anywise limiting their liability, and every such notice, condition or declaration was declared to be null and void. It was, however, held in Zunz v. South Eastern Railway Co., L. R. 4 Q. B. 539, that that Act applied only to the traffic on a company's own line, that is a line belonging to it worked by it; and in McMillan v. The Grand Trunk Railway (1889), 16 S. C. R. 543, the Court held that section 246, sub-section 3, of the Railway Act of 1888 did not prevent that Company from restricting its liability for negligence as carriers or otherwise in respect to goods to be carried after they left its own line; see McMurchy & Denison's Ed. of 1905, page 394. The sub-section there considered is the same as sub-section 3 of section 214 of the present Railway Act.

The main question, therefore, to be determined in this connection is whether section 275 is more comprehensive than that just adverted to, and whether any contract or by-law which in any sense affects to impair, limit or restrict the Company's liability is valid, unless it has been sanctioned by the Railway Board.

I need not repeat what I have already said upon the statute and by-law in their relation to each other, and the scope of each, and need only add that my conclusion is that the defendant Company of itself, and without the Board's approval, could not make any contract or by-law or give any notice, etc., which in any aspect, whether in respect to liability for occurrences, or neglect upon, or beyond, their own lines, would impair, limit or restrict its liability in respect to the carriage of traffic; and this no matter whether it related to negligence, or breach of duty, or was merely a condition precedent protecting them from liability until such condition was performed by the other party.

The plaintiffs will have judgment for a sum to be fixed when the order for judgment is moved and with costs. Nothing was said as to the measure of damages upon the hearing, and therefore I abstain from disposing of them until the time mentioned.

NEW BRUNSWICK.

FULL COURT. NOVEMBER 13TH, 1908.

CHUTE ET AL. v. ADNEY.

Land—Trespass—Verdict for Plaintiffs—Motion for New Trial — Title by Deed — Construction — Boundaries — Mortgage—Adverse Possession.

Action of trespass to land tried before Mr. Justice McLEOD without a jury at the Carleton Circuit. Verdict for plaintiffs.

Motion to set aside this verdict and enter a verdict for the defendant, or failing that, for a new trial, was made to this Court in Trinity Term last.

An action of ejectment between the parties in this suit was tried before LANDRY, J., and a judgment rendered for plaintiffs.

On appeal to the Supreme Court of New Brunswick, a motion for a new trial was refused, and judgment confirmed. (See 6 E. L. R 244.)

A. B. Connell, K.C., for plaintiffs.

C. N. Skinner, K.C., and H. A. Powell, K.C., for defendant.

The judgment of the Court (BARKER, C.J., LANDRY, McLEOD, GREGORY and WHITE, JJ.), was now delivered by

WHITE, J.:—This is an action of trespass to land tried without a jury at the Carleton Circuit in April last before Mr. Justice McLeod, who found for the plaintiff and assessed the damages at $10. The defendant pleaded (1), not guilty, and (2), that the land was not the plaintiffs'. But the only question in real dispute between the parties was whether the

plaintiffs at the date of the alleged trespass—August, 1906—had a title to the locus in quo sufficient to sustain their action. The material facts touching this question are as follows:—

By deed dated 14th September, 1882, one George T. Hartley and wife conveyed to Thomas Harrison a lot of land described in the deed as—

"All that certain piece or parcel of land situate in said Woodstock described as follows: Commencing at south-east corner of land conveyed by Commercial Bank to Timothy Lenihan; thence running north five degrees east, ten chains and fifty links along the easterly line of said land conveyed to Lenihan to a post; thence south eighty-five degrees east, thirty chains or to the main highway road, passing through said Woodstock; thence southerly along said main highway road to land owned or occupied by James Dougherty; thence north eighty-five degrees west, twenty-five chains and thirty links to the place of beginning, containing twenty-seven acres and three-quarters of an acre more or less, being part of land conveyed by Eliza A. English to said Commercial Bank and by said bank to said George T. Hartley by deed registered in Book J., No. 2, of said Carleton County Records, pages 391 to 393, the twenty-eighth of June, 1871."

From the evidence it appears that this 27¾ acre lot is abutted throughout the whole length of its northern side by land now known as the Jordan lot, but which had formerly been part of a farm owned and occupied by Hugh Harrison; and that Thomas Harrison, who is a son of Hugh Harrison, had lived for some years on this farm with his father.

Upon the execution of the deed mentioned, Thomas Harrison entered into possession of the 27¾ acre lot described and continued to occupy it down to the sixteenth day of June, 1886, when he gave a deed, bearing that date, to Franklin Sharp. In this last named deed the land conveyed is described as follows:—

"All that piece or parcel of land situate in the Parish of Woodstock, aforesaid, and more particularly described as follows: Beginning at a stake standing on the west side of the highway road being six chains and eighty-six links at right angles from Thomas Harrison's south line; thence north eighty-four degrees and forty-five minutes west, twenty-five chains and ninety links to a cedar post squared and hacked standing on Lenihan's east line; thence north five degrees and forty-five minutes east along said line six

chains and eighty-six links to Thomas Harrison's south line; thence south eighty-four degrees and forty-five minutes east along said line to the west side of said highway road; thence southerly along west side of said road to the place of beginning, containing twenty acres more or less."

From the evidence of Thomas Harrison, it appears that about the time he gave this deed, he and Sharp went together upon the land with a surveyor and ran out the boundaries of the land intended to be conveyed. They started on the north side line of the 27¾ acre lot, which, as stated, also forms the south line of the Jordan lot, or old Hugh Harrison farm; and thence they measured southward some distance, the exact length of which the witness states he does not remember, although he says they went "far enough to make twenty acres." At the point thus obtained they drove an iron stake on the highway road which forms the eastern boundary of the 27¾ acre lot. From this iron stake they ran westward to the Lenihan farm, and there put in a wooden stake; thence they ran northerly along Lenihan's east line to the Jordan south line; and thence along such south line easterly back to the starting point.

It is clear that this survey was made about the time the deed was executed for the purpose of defining the bounds of the land intended to be conveyed by Harrison to Sharp, but whether the survey took place just before or just after the delivery of the deed is, perhaps, not quite so clear. In the cross-examination of Thomas Harrison (page 40 of the Transcript) will be found the following evidence upon this point:

Q. In this deed that you gave, where was it that you struck the iron rod, where you drove that down? A. At the corner of the Nevers, along the main road there.

Q. That is the only mark that you put there? A. Yes, I am sure of that.

Q. (Reads description.) "Beginning at a stake standing at the west side of the highway." Is that what you mean? A. Where the iron stake was.

Q. Was it not driven down to the ground? A. Driven right down to the ground.

Q. That is what you mean by "at a stake standing on the west side of the highway"?

Mr. Connell. This is argument.

Q. Didn't you give bounds for this deed to the solicitor or to the man who drew the deed? A. I think I must have.

This testimony, coupled with the fact that the description in the deed, refers to a stake standing on the west side of the highway road, as the starting point, and to a "cedar post squared and hacked standing on Lenihan's east line," as marking the western end of the first course and southern boundary of the lot conveyed, leads me to infer that the description given in the deed is based upon the survey, rather than that the survey was made subsequently to the execution of the deed. In this conclusion I am confirmed by this further consideration. The evidence shews that by a survey made by Abraham G. Stone, a land surveyor, two years before the trial, the boundaries of the lot run out when Harrison gave the deed to Sharp contain exactly twenty acres. The description in the deed to Sharp states the area of the land conveyed to be twenty acres more or less, and gives the courses and distances of the boundaries. As the highway road, which forms the eastern boundary, runs at a considerable angle to the side lines, and is not straight, it would be impracticable to frame a description, such as is given in the deed, without a previous survey. Without a previous survey, it would not have been possible to have fixed the length of the boundary, running from the stake at the starting point on the highway road, a course 84 degrees and 45 minutes west, to a cedar post hacked and squared standing on Lenihan's east line at 25 chains and 90 links, as is done in the deed. In this connection, this further testimony of Thomas Harrison should be pointed out. (Page 35 of the Transcript.)

Q. Did you and Franklin Sharp, after he went into possession under this deed, go on to this land and do anything? A. We went on and put on a piece of fence.

Q. Did you take any person with you, a surveyor or anybody? A. Yes, we had a surveyor.

Q. Can you tell me the name? A. I think it was Mr. Stone; I would not be positive. It was a long while ago.

Q. You and the surveyor and Franklin Sharp went on, and, I presume, he did the surveying? A. Yes.

While it is, perhaps, the most natural inference from this last quoted piece of testimony that the survey was made after the execution of the deed, it is also quite consistent with it, that the survey was made prior to the deed, and that it was so made, I think, appears for the reasons I have mentioned.

Thomas Harrison states that after he had placed Franklin Sharp in possession, which he did about the time the deed was given, they, the grantor and grantee, together erected a fence from the front of the lot back westwardly for some distance, or, to quote his words, "to a little above the orchard on the Nevers place." This Nevers place, it may be well to explain, appears by the evidence to be that portion of the 27¾ acre lot which lies south of the south boundary of the 20 acre lot run out by Harrison and Sharp. Harrison further states that he examined the locality on the day before he gave evidence, and that he then found a fence which looked to him to be in the same place where he and Sharp had originally constructed it, and on pages 43-44 of the Transcript appears the following testimony by him:

Q. You put one stake down, this iron stake you have spoken of? Yes.

Q. And that iron stake you placed on the highway road at the end of the fence where that present old fence is now on the north line of Nevers lot? A. Yes.

Q. That is some distance below the turn in the road? A. A little distance south of the turn in the road.

Q. Did you place any stake whatever along the highway other than this iron stake?

Mr. Powell. This is new matter.

Q. You placed an iron stake there on the north line of the Nevers lot where the old fence is now? A. Yes.

Q. Did you place any iron stake anywhere else? A. No

Q. Did you place any wooden stake anywhere else as a starting place on the highway road? A. Up here at the corner of the Harrison corner line there was a little stake put in there.

Q. I am now speaking of putting any other stakes on the highway road other than that iron stake? A. No, I did not.

Q. You did not put any stake above the turn in the road? A. No.

Thomas Harrison, after making the deed to Franklin Sharp, continued in possession of the Nevers lot down to April 16, 1887, when, by deed bearing that date, he conveyed to Angelina Birmingham a lot of land which, in the deed, is bounded and described precisely as is the 27¾ acre lot above mentioned conveyed to Harrison by Hartley. It would seem that the intention of the parties to this deed was to convey to Birmingham only that portion of the 27¾ acre lot which lay to the south of the land conveyed to Sharp,

and that the inclusion of the whole 27¾ acres in the description was a mistake. At all events, under this deed Angelina Birmingham went into occupation of the Nevers place only, and neither she, nor any person claiming title through her, appears to have laid claim to any land north of the Nevers lot, down to the 13th of June, 1904, on which date Frederick W. Nevers received a deed from Bessie A. Thomas, to whom the land had come, through several mesne conveyances, from Angelina Birmingham, of a lot of land described in such deed, as it is in all the preceding chain of deeds, from Angelina Birmingham down, precisely as in the deed from George T. Hartley to Thomas Harrison.

Frederick W. Nevers by deed dated and registered April 10th, 1905, conveyed to Solomon Perley, Ellis W. Smith and Frederick B. Smith, their heirs and assigns, land in said deed described as—

"All that piece or parcel of land and premises situate, lying and being in the Parish of Woodstock and County of Carleton and described as follows: Beginning at the main highway road at a point three chains and sixty-six links from the north line of land formerly owned by James Doherty now deceased, said line being the north line of the Town of Woodstock; thence westerly in a parallel course with said Doherty line until it strikes land formerly owned by Timothy Linehan; thence north three chains and twenty links along said Linehan line; thence easterly to and parallel with the said south line to the main highway road; thence south along the said highway three chains and twenty links to the place f beginning, containing ten acres more or less."

Franklin Sharp continued in possession of the twenty acre lot down to the time of his death in September, 1892. By his last will and subsequent mesne conveyances all the real property of which he died possessed, became vesed in his sister, A. Lizzie Sharp. The lands to which she thus became entitled included not only the 20 acre lot mentioned, but a large block of adjoining lands, the whole being known as the Sharp orchard. These Sharp orchard lands, A. Lizzie Sharp mortgaged to The Canada Permanent and Western Canada Mortgage Corporation, by deed dated the 16th of January, 1901. In this mortgage deed, the 20 acre lot is bounded and described precisely as in the deed from Thomas Harrison to Franklin Sharp, with these words added at the end of the description, "and being same lands

conveyed to the late Franklin Sharp by Thomas Harrison and wife by deed dated the sixteenth day of June, A.D. 1886, and duly recorded in said Records in Book 'F,' No. 3, on pages 475, etc." This mortgage contained the usual power of sale in case of default in payment, to be exercised on one month's notice, either by public auction or by private contract, and provides that it shall not be incumbent upon the purchaser, upon any such sale, to ascertain or inquire whether, previous to such sale, such notice had been given. The power of sale is given to the "corporation," and by a prior clause in the mortgage deed "corporation" is defined to mean and include "the corporation, their successors and assigns."

It is admitted that the corporate name of the Canada Permanent and Western Canada Mortgage Corporation was changed to Canada Permanent Mortgage Corporation.

The Canada Permanent Mortgage Corporation assigned this mortgage to George A. White by deed dated the first day of February, A.D. 1905, and registered the 17th day of February, A.D. 1905, and, in view of the question raised by the defendant as to White's power to sell under this assignment, because the Canada Permanent Mortgage Corporation does not, expressly and in terms, convey such power to White, I will quote from the deed the description of what is therein stated to be conveyed, namely:—

"All and singular the said Indenture of Mortgage hereinbefore in part recited, and the respective land, and sums of money both principal and interest due or accruing due (and as yet unpaid by the said A. Lizzie Sharp), and secured and made payable in and by the said Indenture of Mortgage, subject, however, to all covenants, provisoes and agreements therein respectively contained. To have and to hold, etc."

White purchased this mortgage, and had it assigned to him, at the instance of, and acting on behalf of, Ellis W. Smith, Solomon Perley and Frederick B. Smith, the purchase money coming to him through them, or one of them. There being default in the payment of the purchase money secured by the mortgage, White advertised and sold the property to Perley and the two Smiths, and, in pursuance of this sale, executed to the purchasers a deed bearing date the twenty-first day of March, A.D. 1905, registered the twenty-seventh day of March, A.D. 1905. This deed, after recitals describing the mortgage deed, and the lands thereby mortgaged, the proviso for payment and the power of sale therein

contained, the assignment, the death of A. Lizzie Sharp, default in payment under the mortgage, the giving of a month's notice pursuant to the power of sale, and the manner in which such notice was given, and the fact that the lands were put up at public auction and were bid in by the grantees, contained the following words of conveyance:—

"Now this indenture witnesseth, that the said George A. White, in pursuance of the power of sale contained in the said indenture of mortgage, and of the said sale, and of all other powers in him vested, and in consideration of the said sum of five thousand two hundred dollars to him paid, the receipt whereof is hereby acknowledged, hath and by these presents does grant, bargain, sell and convey to the said Ellis W. Smith, Solomon Perley and Frederick B. Smith, their heirs and assigns, all the hereinbefore mentioned and described lands and premises, together with the buildings and improvements thereon and the appurtenances thereto belonging, to have and to hold the same unto and to the use of the said Ellis W. Smith, Solomon Perley and Frederick B. Smith by deed dated the 22nd day of April, A.D. 1905,

It is claimed by the defendant that, inasmuch as White, in having the mortgage assigned to him, was acting for Perley and the two Smiths, who had furnished him with the purchase money, they, Perley and the Smiths, were the real holders of the mortgage, or at least had such an interest therein, that a valid sale under foreclosure could not be made to them by White, but, subject to this objection, it is admitted that the notice of sale was given, and all forms were complied with, requisite to have made the sale valid if the grantees had been strangers to the mortgage.

Solomon Perley and wife, Ellis W. Smith and Frederick B. Smith by deed dated the 22nd day of April, A.D. 1905, and registered the 3rd day of May, the same year, conveyed to the plaintiffs lands which, although bounded and described in such deed as one block, and not, as in the case of the Sharp mortgage, by separate parcels, comprise all that portion of the 27¾ acre lot which was covered by the A. Lizzie Sharp mortgage. The consideration stated in the deed is five thousand two hundred dollars, and is the purchase price actually paid by the plaintiff. Whether or not the plaintiffs had actually notice that Perley and the Smiths were interested in the mortgage does not appear, but the defendant does not allege or claim that there was any such notice.

The plaintiffs claim title from Thomas Harrison, first, by the chain of conveyances passing through Franklin Sharp and A. Lizzie Sharp, and if that fails, then, secondly, by the line of conveyances through Angelina Birmingham.

There is in evidence a plan of the locus in quo and surrounding lands, prepared by Mr. Stone, a land surveyor, from a survey made by him about two years prior to the trial. On this plan a dotted line is drawn to indicate a line six chains and eighty-six links north of, and parallel to, the south side line of the 27¾ acre lot, and extending from the highway road westward to the Lenihan line.

The defendant claims that this dotted line indicates the south boundary of the land conveyed to Sharp by the deed from Harrison, and that, although Harrison put Sharp in possession of all that portion of the 27¾ acre lot which lies north of the Nevers piece, that part of such portion which lies between the dotted line and the Nevers lot, a strip three chains and twenty-two links wide, did not pass under the deed, but that Sharp, nevertheless, acquired a possessory title to this strip in consequence of Harrison putting him into possession; and that, by upwards of twenty years continuous, open and adverse possession by Sharp and those claiming under him, this strip has become absolutely vested in the defendant.

Franklin Sharp died in September, 1892, leaving him surviving three sisters, namely, A. Lizzie Sharp, H. Jennie Rankine and the defendant, and also one brother, Humbolt Sharp. A. Lizzie Sharp died the 31st day of May, 1904, leaving as her heirs at law the defendant, who took out administration upon her estate, her brother Humbolt, and her sister Mrs. Rankine.

The first question to be determined is, what land passed to Sharp under the Harrison deed; because, whatever land did so pass, was covered by a mortgage made by A. Lizzie Sharp. Now there is no ambiguity, error, or uncertainty, patent on the face of the document. It is apparent, from the deed, that the land intended to be conveyed is bounded, on the north, by a line designated in the conveyance as, "Thomas Harrison's south line," on the south, by a line running parallel to such north line, and at a distance from it of six chains and eighty-six links; on the east, by the highway road, and on the west by Linehan's east line. It is only when we come to apply this description to the ground that difficulty arises. If we assume, that by using the words "Thomas Harrison's south line" in the deed, the parties

intended to indicate the south line of the 27¾ acre lot, conveyed to Harrison by Hartley, and to make such south line the northern boundary of the land conveyed, we find that not only did Harrison not own any land south of such line, but that any lot laid off to the south of it would not, and could not have for its western boundary any part of Lenihan's east line, as called for by the deed.

The defendant, however, claims that the south boundary of the land conveyed begins at a point on the highway road six chains and eighty-six links north of the south line of the 27¾ acre lot and runs along a course indicated by the dotted line to the Lenihan line; and thence along the Lenihan line to the north line of the 27¾ acre lot along which it runs back to the highway road and down that road to the place of beginning. A lot so laid off would have for its western boundary the Lenihan east line for the distance only of three chains and sixty-four links, instead of six chains and eighty-six links as called for by the deed, and would include an area less than eleven acres instead of the twenty acres stated by the deed to be the area conveyed. This difficulty might possibly be gotten over by the rule that where a fixed and ascertainable monument, such as an old established line, is given as a boundary, distance and areas called for in the description are to yield to such monument in determining the true bounds of the lot. But a lot so laid out would have as its third course, and northern boundary, the north side of the 27¾ acre lot, while the deed describes this northern boundary as "Thomas Harrison's south line." If these words, "Thomas Harrison's south line," when used in the deed for the purpose of indicating the north line of the land conveyed, are to be construed as designating the north line of the 27¾ acre lot, how can we construe the same words, when used in the deed as a basis to fix the starting point, to mean the south line of such 27¾ acre lot. But if, from all the evidence intrinsic and extrinsic, we conclude that the parties meant by these words, "Thomas Harrison's south line," as twice used in the deed, to designate the north line of the 27¾ acre lot, then there will remain no latent ambiguity, and all parts of the description will exactly fit into, and harmonize with, the bounds of the lot which the plaintiffs claim was conveyed to Sharp. Now, inasmuch as there is no ambiguity or uncertainty apparent on the face of the deed, it is not only proper, but, in this, as in almost every case where it is sought to ascertain the land conveyed

by deed, it is necessary to resort to extrinsic evidence to ascertain what the parties intended to indicate by any expression or words in the deed purporting to describe any monument, such as an old line, marked stake or other object used to designate and define the bounds of the lot conveyed. In doing this, we must place ourselves as nearly as possible in the position of the parties when the deed was given, and ascertain as far as we can, the true location of all things specified in the description contained in the deed, as objects by which the land intended to be conveyed is to be ascertained and located. If, having done this, we discover that there is not to be found upon the ground sufficient of the means of identification called for by the deed to enable us to determine with certainty what the parties intended to convey, then the deed is void for uncertainty; but a mere error or inaccuracy in the description will not vitiate the deed, provided there is in the document sufficient accurate description to enable us to determine, with certainty, the land intended by the parties to be conveyed.

Now, it is quite apparent that the line designated in the deed by the words, "Thomas Harrison's south line," as the basis from which we are to find the starting point on the highway road, is the same line which is to form the third and north boundary of the lot. The first course and south boundary is to be a line parallel with this north boundary line and to be six chains and eighty links distant from it, and is to start at a stake on the highway road and run "thence 84 degrees and 45 minutes west 25 chains and 90 links to a cedar post squared and hacked standing on Lenihan's east line." The second course, and western boundary, is to run from this marked post "north five degrees and forty-five minutes east along the Lenihan line six chains and eighty-six links," to the line given as the basis for locating the starting point, and which, as stated, is to form the third course and north boundary of the lot conveyed. The highway road is to constitute the east boundary. All this appears on the face of the deed. Then what extrinsic evidence have we? About the time the deed was executed, Harrison and Sharp had a surveyor to run out the bounds of the lot which they intended to convey, and on this survey an iron stake was driven, as the starting point. This stake is shewn by the evidence to have been driven at the north-east corner of the Nevers lot, which forms the south-east corner of the land claimed by the plaintiffs. A wooden

stake was placed at the west end of the south line of the lot surveyed. For the reasons already stated, I concluded that this survey was made prior to the execution of the deed, and, if so, these stakes, being artificial monuments placed by the parties to define the south boundary of the lot, coupled with the fact that the deed specifies a stake, as the starting point on the highway road, and mentions a marked post as standing on the Lenihan line, at the west end of the south boundary line, six chains and eighty-six links south of the north side line of the lot conveyed, afford one of the best possible means of locating the true bounds of the land intended to be conveyed. Artificial monuments thus placed are regarded by the law as evidence of the intention of the parties, second only in controlling force to that of natural monuments; for, while it is true that reference in a deed to a stake must often be taken to indicate merely a point, and does not necessarily mean that a stake had been actually placed at such point, yet when, from extrinsic evidence it appears, as it does in this case, that an iron stake was actually driven to fix the starting point, and another stake was actually placed to mark the end of the first course, these stakes so placed became important factors in fixing the bounds of the land, and are in fact artificial monuments. And, even if I am wrong in concluding that the survey was made prior to the execution of the deed, there can be no doubt that it was made about the time the deed was given, and was intended by the parties to accord with the deed, and indicates what the parties themselves then understood was the land conveyed or intended to be conveyed. It may be that the reference in the deed to "Thomas Harrison's south line," is an error in description, and should have read "Hugh Harrison's south line," or merely "Harrison's south line," but in any case there is, I think, sufficient in the description taken as a whole, coupled with the extrinsic evidence admissible, to make it clear that the land which passed to Sharp under the deed from Harrison was all that portion of the 27¾ acre lot which lies north of the Nevers land.

Next in order for consideration. is the defendant's claim, that White could not sell under the power of sale contained in the mortgage, because, first, such power was not assignable by the terms of the mortgage; and, secondly, if it were asignable, it was not in fact assigned to White. By the mortgage deed it provided, as I have already set forth in the foregoing statement of facts, that the power of sale may be

exercised by the "corporation," which, by an interpretation clause in the deed, is defined to mean, when used in this connection, the mortgagee, its successors and assigns. The defendant, however, claims that White is not an assignee of this power of sale, because the assignment to him of the mortgage deed, the land mortgaged, and the debt secured, does not carry with it the power of sale, in the absence of words, which are wanting, expressly specifying such power as one of the things assigned.

If it were necessary to the determination of this case to decide this point, I would decide it adversely to the defendant's contention, because, in my view, the power of sale is a power coupled with an interest, and when the mortgage deed authorises this power to be exercised by the "assigns" of the mortgagee, I think it must be taken to include under that term, "assigns," the assignee to whom the mortgagee has transferred, without reservation, the mortgage debt, together with the lands mortgaged and the mortgage deed: Osborne v. Rowlett, 13 Ch. D. 774, is an authority in support of this view; and in Coote's Law of Mortgage, 7th ed., p. 845, it is said: "The power of sale in the mortgage should also be referred to in the transfer; but it would seem that all powers and remedies, although not mentioned, would pass," citing Boyd v. Petrie, L. R. 7 Ch. 385.

On the other hand, I agree with the defendant's contention that Perley and the two Smiths were so interested in the mortgage security that the sale made by White to them, in professed exercise of the power of sale, would not foreclose the equity of redemption. In other words, that while White, by his deed following the foreclosure sale, transferred the legal title to Perley and the Smiths, they would, in equity, be regarded as mortgagees under the Sharp mortgage, and would be subject to a bill to redeem. But, upon the records in the Registry office, Perley and the Smiths, at the time the plaintiffs bought from them, appeared to be the absolute owners, and the plaintiffs, who bought in good faith, and with no notice of the defendant's equitable rights, acquired, I think, a good absolute title to the land, as well in equity as at law. This, of course, is on the assumption that the power of sale under the mortgage was vested in White. But assume, for the sake of argument, that neither had White power to sell, nor Perley and the Smiths the right to buy so as to foreclose the mortgage, it still remains beyond question that White, having the legal title, could convey that

legal title, though it might continue subject to the defendant's equitable right to redeem.

Now this is an action at law, and at law, all that the plaintiffs have to establish in this suit, so far as concerns title, is that they have the legal title and right to possession and have acquired an actual, or constructive possession, of the locus in quo by entry under such title. A mortgagee, after default by the mortgagor, and indeed before default where there is nothing to shew a contrary intention between the parties, has the right to enter and take possession of the lands mortgaged. Perley and the Smiths, after White's conveyance to them, took possession of the mortgaged lands, and although the defendant swears they never attempted to interfere with her occupancy of the strip lying south of the dotted line, their entry upon part of the mortgaged premises would give them constructive possession of the whole sufficient to have enabled them to maintain trespass, unless it were shewn that by such entry it was not intended to acquire possession of the disputed strip. Moreover, it appears from the defendant's own evidence that the plaintiffs in July, 1906, and therefore after they had received their deed from Perley and the Smiths, entered upon the very strip now claimed by the defendant and cut hay there, and furthermore it appears that at the time the trespass complained of was committed, in August, 1906, the defendant was picking apples on this lot, that the plaintiff, John N. Chute, entered upon the land and ordered her to quit the premises, that she refused to leave, and that he had to use force to remove her. Therefore, even if there had been no entry by Perley and the Smiths, and even if the hay cutting by the plaintiffs did not constitute such an entry by them as would enable the plaintiffs to maintain trespass for subsequent acts done by the defendant upon the land, it would still be true that from the time the plaintiffs entered in August and ordered the defendant to leave, her act in refusing to go until ejected by force, would constitute a trespass to the land for which the plaintiffs could recover.

For these reasons, I think, the verdict rendered by the learned Judge should stand.

A number of objections were taken to the admission of evidence. Without going into them in detail, I may say I think there is nothing in any of them requiring a new trial.

I have not dealt with the plaintiffs' claim to title to the locus in quo through Angelina Birmingham, because the

learned Judge who tried the case made no finding as to whether or not there was such twenty years' adverse possession by Franklin Sharp, and those claiming under him, as would, according to the defendant's claim, destroy any title the plaintiffs might otherwise have derived from Angelina Birmingham. Unless the plaintiffs have succeeded, as I think they have, in establishing their title under the A. Lizzie Sharp mortgage, the case would have to go to a new trial, so that it could be decided by verdict whether or not the documentary title under which the plaintiffs claim, from Angelina Birmingham, has been lost by adverse possession on the part of the defendant and those through whom she claims.

Rule for new trial refused.

NOVA SCOTIA.

SUPREME COURT.

LONGLEY, J., AT SYDNEY. APRIL 26TH, 1909.

REX v. McINTYRE.

Liquor License Act—Sale of Liquor—Conviction—Stated Case—Evidence of Defendant—Protection against Incriminating Questions—Practice.

Carroll, for plaintiff.

Harrington and Chisholm, for defendant.

The facts are stated in the reasons for judgment.

LONLEY, J.:—The Stipendiary Magistrate of Glace Bay has stated a case for the opinion of the Court in this matter which was submitted to my consideration at the recent sittings at Sydney. No provision for any such cases stated is found in the Nova Scotia Liquor License Act and is, I presume, based upon the provisions of s. 73, c. 161 R. S., "Of Summary Convictions." I am not without doubt as to this power being available under the Liquor License Act, but as the parties have agreed upon the case I am going to undertake to deal with the matter under c. 161 R. S.

The facts are as follows. The defendant was charged with selling liquor contrary to the Act on or about the 29th day of March, 1909, and one witness deposed that he had bought some whiskey from the accused some time between the 15th and 29th of March, which the Stipendiary regarded as constituting a prima facie case. The defendant then went upon the stand and categorically denied any transaction with the witness between the 15th and 29th of March, and this evidence, the Stipendiary declares, he is inclined to believe. Then came cross-examination, and the defendant was asked as to his transactions with witness on March 29th. His counsel objected that he could not be compelled to answer the question since it might criminate him. The Stipendiary decided he must answer, whereupon he admitted that he had sold whiskey to witness on the 29th and the Magistrate convicted him.

Upon these facts the Stipendiary has stated a case, asking the opinion of the Court upon the four following points:—

1. Is the accused a competent witness in a liquor case?

2. If not, when I recived his direct testimony, without objection, was I entitled to disregard it?

3. Should I have struck it out on motion of counsel for prosecution?

4. Was I right in compelling the accused to answer the above question against the objection of his counsel.

The important question is the fourth, as I conceive the others are easily disposed of.

Chapter 100, s. 164 (Liquor License Act) enacts:

"On the trial of any information or complaint under the provisions of this chapter, the person charged, or the husband of such party, shall be competent and compellable to give evidence as a witness, but nothing in this chapter shall compel a defendant to answer any question which may tend to criminate himself."

I conceive this provision entirely governs the position of an accused party as a witness. I am disposed to think that the Canada Evidence Act does not apply to the trial of a suit for penalties under a Provincial Act, but I cannot help thinking that this section has been drafted without full consideration of its effects. While apparently making an accused person under the Act a competent and compellable witness, it at once hedges him about with such protection as to make him practically worthless as a witness except by way of contradiction. He can defeat a prosecution by unlimited

powers of denial of acts and things charged, but his mouth seems to be closed the moment he is subjected to cross-examination as to acts and things he has done. I would venture to express an opinion that it would be more rational to apply to this section the principle adopted in the Canada Evidence Act.

But I have to give the best interpretation in my power, and I see no alternative but simply to give the words of section 164 the meaning which they naturally bear. Under this section I think it would be obviously impossible for the prosecutor to call the accused as a witness to prove the offence, because he could claim his protection. Is the case changed when the accused goes on the stand to deny the statements of witnesses for the prosecution? Is he any the less entitled to claim precisely the same protection against making incriminatory statements? I rather regret that I am unable to see any distinction.

Dealing with the four questions submitted, I have to say that my answer to the first is "yes," and this disposes of the second and third.

In regard to the fourth I would be compelled to answer it in the negative if the stipendiary had put it in this form: "Was I right in compelling the accused to answer the above questions against the specific claim of the accused that the answer would tend to criminate him?" He has not put it in that form. The accused, I am clear, cannot escape by the objection of counsel. The claim is a personal one and must be made by the party himself, and under oath: Boyle v. Wiseman, 1855. (See note 7, Taylor on Ev., 9th ed., sec. 1457.) In Vaillant v. Dodemead, 2 Atk. 524, Lord Hardwick said, "These objections to answering should be held to very strict rules." The Court ought at least to have the sanction of an oath as to the foundation of the objection that the answer will criminate. Taylor on Evidence, s. 1458, 9th ed.

As the question now stands I have to answer the question in the affirmative. But I do not wish the matter to go off upon a mere technicality, and if either of the parties desires it, I will refer the case stated back to the justice in order that he may, if he can, report as to whether the claim for protection was made by accused under the sanction of his oath or whether it was merely a formal objection made by his counsel. If no such application is made within ten days from the filing of this memo. an order will pass affirming the conviction.